No. 24-1240

IN THE

Supreme Court of the United States

UNKECHAUG INDIAN NATION, et al.,
Petitioners,

v.

AMANDA LEFTON, Commissioner, New York State Department of Environmental Conservation, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Unkechaug Indian Nation and their leader, Chief Harry Wallace, claim that an order issued in 1676 by the British governor of the colony of New York constitutes federal law and therefore preempts New York State's regulatory prohibition on harvesting juvenile eels from state waters. Both courts below rejected that claim, concluding that the 1676 order was not federal law under either the Debts and Engagements Clause or the Supremacy Clause of the U.S. Constitution. Both courts below also agreed that the district court had discretion to resolve the case without deciding pending motions that would have been irrelevant to the case's disposition.

The questions presented are:

1. Whether the district court properly declined to resolve motions about expert testimony and privileged documents, when resolution of those motions would have been irrelevant to the dispositive ruling that the 1676 order is not federal law.

2. Whether the district court properly declined to apply the Indian canon of construction to interpret the meaning of the 1676 order, when the order's meaning is irrelevant to the dispositive ruling that the 1676 order is not federal law.

3. Whether the 1676 order is not federal law under either the Debts and Engagements Clause or the Supremacy Clause because the 1676 order was issued by a British colonial governor nearly one hundred years before the founding of the United States and was never ratified by Congress.

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INTRODUCTION

Respondent the New York State Department of Environmental Conservation (DEC) manages the population of American eel in New York pursuant to a multi-state fishery management plan, the enforcement of which is required by federal law. The plan prohibits the harvesting of juvenile eels in state waters. DEC does not enforce the plan on Native American reservations, including the reservation of petitioner the Unkechaug Indian Nation.

In 2014, DEC ticketed two members of the Unkechaug Indian Nation and six other individuals for mass-harvesting juvenile eels in New York waters that are not on the Unkechaug reservation. The Unkechaug Nation and its leader, Chief Harry Wallace, sued DEC in federal court, alleging that an order issued in 1676 by the British colonial governor of the colony of New York was federal law that preempted application of DEC's state fishing regulations to the Unkechaug Nation.

The U.S. District Court for the Eastern District of New York granted summary judgment to DEC, and the U.S. Court of Appeals for the Second Circuit unanimously affirmed. As relevant here, the court of appeals ruled that 1676 colonial order was not federal law under the Debts and Engagements Clause or the Supremacy Clause of the U.S. Constitution because the order had been issued nearly a century before the United States existed and had never been ratified by Congress. The court of appeals also determined that, under the circumstances, the district court had discretion to grant summary judgment to DEC without resolving the parties' cross-motions to exclude expert testimony or petitioners' motion to compel production of all documents on respondents' privilege log. The court of appeals explained that

resolution of those motions would have been irrelevant to the dispositive ruling that the 1676 order was not federal law, and that the district court had not relied on any expert testimony or privileged documents in making its decision.

The petition for certiorari should be denied. Petitioners primarily focus on the district court having granted summary judgment to DEC without resolving motions to exclude expert testimony or to compel production of all documents on respondents' privilege log. But the Second Circuit applied settled law to the circumstances presented, concluding that the district court did not exceed its discretion in declining to rule on motions that were irrelevant to the dispositive determination that the 1676 order is not federal law. Certiorari is not warranted to review this case-specific ruling, which was correct in any event and, in the case of the privilege issue, forfeited below.

For similar reasons, certiorari is not warranted to address whether the Indian canon of construction should apply to interpreting the meaning of the 1676 order. The Second Circuit declined to address the order's substantive meaning because it would not have altered the conclusion that the order is not federal law. This Court should not grant certiorari to review an issue that the court of appeals declined to address and that would not change the case's outcome.

Certiorari is also unwarranted to review the Second Circuit's conclusion that the 1676 order is not federal law. That conclusion is plainly correct because the order predates the Articles of Confederation by nearly a hundred years and was never ratified by Congress. Petitioners offer no authority to the contrary, much less any

conflicting decision of this Court, a circuit court of appeals, or a State's highest court.

Finally, this case suffers from several additional defects that make it a poor vehicle for reviewing any of petitioners' questions presented.

STATEMENT

A. Legal Background

New York is a member of the Atlantic States Marine Fisheries Commission (ASMFC), a body established under federal law to manage aquatic species in the fifteen member States that border the Atlantic Ocean. *See* 16 U.S.C. § 5101 et seq. One of these species is the American eel, which member States manage through a fishery management plan.

In 1999, after scientists reported that the American eel population was declining, ASMFC member States agreed to prohibit the harvesting of juvenile eels, defined as eels shorter than six inches in length. But the decline persisted, due in part to the emergence of a lucrative overseas trade for very young "glass" eels.[1] (CA2 J.A. 1472-1473, 1503, 1515, 1704, 2329-2332.) To address this continued decline, member States strengthened the plan's restrictions in 2013, prohibiting the harvesting of eels shorter than nine inches in length and instituting quotas on the harvest of adult eels. New York has implemented the fishery management plan's provisions, including the provisions regarding the Amer-

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[1] "Glass eels" which are two to three inches long and have transparent skin, migrate en masse from ocean waters to coastal tributaries. (CA2 J.A. 2329.)

ican eel, through state regulations, as federal law requires all ASMFC member States to do.

New York's regulations implementing the ASMFC fishery management plan are promulgated and enforced by DEC. *See, e.g.*, 6 N.Y.C.R.R. § 40.1(e) (size restriction). However, DEC does not enforce these regulations on Native American reservations, including the reservation of the Unkechaug Nation in Long Island, New York. DEC does not dispute that, under state law, fishing within the Unkechaug reservation is subject to regulation only by the Unkechaug Nation. (*See* Pet. App. 7a (citing N.Y. Env't Conserv. Law § 11-0707(8)).)

B. Factual Background

In early 2014, members of a Native American tribe in Maine began to encourage other tribes along the East Coast to harvest glass eels. (*See* CA2 J.A. 1779-1780) Among the tribes approached were the Unkechaug Indian Nation. It is undisputed that, prior to 2010, the Unkechaug Nation had never fished for glass eels. (*See* CA2. J.A. 1779-1780, 2964.)

In March 2014, DEC officers on night patrol encountered members of the Unkechaug Nation, as well as other individuals who were not members of the Unkechaug Nation, harvesting glass eels in New York state waters that are not the Unkechaug reservation. (Pet. App. 8a.) DEC seized approximately seven-and-a-half pounds of live glass eels—or approximately 21,750 eels—and ticketed the individuals. (*See* Pet. App. 8a; CA2 J.A. 2817-2818 (estimating 2,900 eels per pound of glass eels).)

During the next two years, the Unkechaug Nation shipped or attempted to export several shipments of glass eels overseas. New York intercepted some of these

shipments, and the Unkechaug Nation sued DEC in state court for injunctive relief and damages. (Pet. App. 8a.) The complaint alleged that DEC had violated the Unkechaug Nation's sovereign fishing rights; it did not mention any purported federal treaty. (Pet. App. 55a-56a.) DEC moved to dismiss the complaint because the Unkechaug Nation did not have any right to take or possess glass eels in contravention of state law. The state court granted DEC's motion to dismiss because the complaint failed to state a cause of action. (Pet. App. 56a-57a). The Unkechaug Nation did not appeal.

C. Procedural Background

One-and-a-half years after the dismissal of the state court lawsuit, petitioners filed this lawsuit in the U.S. District Court for the Eastern District of New York against DEC and its commissioner in his official capacity. The complaint alleged, inter alia, that DEC's regulatory prohibition on glass eel fishing was preempted by an order issued in 1676 by the British colonial governor of New York, Sir Edmund Andros (the "Andros Order").[2] Although the Andros Order was issued by a British colonial governor nearly a century before the

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[2] Petitioners also pleaded three other claims that are not mentioned in their petition for certiorari and that are no longer part of this litigation: (i) a claim that DEC's regulations are preempted by 25 U.S.C. § 232, concerning New York's criminal enforcement jurisdiction on reservation lands; (ii) a claim that DEC's fishing regulations interfere with the Nation's inherent right to tribal sovereignty and self-government; and (iii) a claim that unspecified state prohibitions on dumping construction debris and other fill in tidal wetlands violate the Nation's First Amendment right to religious expression. The district court dismissed these claims at summary judgment (Pet. App. 58a-83a), and the court of appeals deemed them forfeited for failure to brief them on appeal (Pet. App. 9a; 79a-83a).

Articles of Confederation, and has never been ratified by Congress, the complaint contended that article VI of the Constitution—specifically, the Debts and Engagements Clause, U.S. Const. art. VI, cl. 1, and the Supremacy Clause, *id.*, art. VI, cl. 2—transformed the Andros Order into federal law that preempts DEC's state-law fishing regulations.[3] (*See* Pet. App. 9a-10a, 21a.)

The district court denied DEC's motion to dismiss the complaint, and the case proceeded to discovery. During discovery, petitioners moved to compel production of all documents listed on DEC's privilege log or, in the alternative, for an in-camera review of all such documents. (*See* Pet. App. 94a.) The district court ordered DEC to submit copies of these documents to chambers, and DEC complied. (Pet. App. 101a.) The district court did not thereafter order DEC to produce any privileged materials to petitioners.

After discovery was complete, the parties submitted cross-motions to exclude the testimony of each other's expert witnesses, pursuant to *Daubert v. Merrell Dow*

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[3] The Andros Order is not available in any federal code of which DEC is aware. The document has been reprinted in two historical compilations of New York colonial papers and reads in full:

> Upon the request of the Ind[ ]s of Unchechauge upon Long Island
>
> Resolved and ordered that they are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good according to law and Custome of the Government of which all Magistrates officers or others whom these may concerne are to take notice and suffer the said Indyans so to doe without any manner of lett hindrance or molestacion they comporting themselves civilly and as they ought.

(Pet. App. 234a-235a.)

Pharmaceuticals, Inc., 509 U.S. 579 (1993). (*See* Pet. App. 10a.) As relevant here, DEC moved to exclude the testimony of petitioners' expert Dr. John Strong, a historian who testified about the meaning of the Andros Order. Petitioners moved to exclude the testimony of DEC's expert Toni Kerns, a director at the ASMFC, who testified about the life cycle of the American eel and the need to conserve this species. (*See* Pet. App. 19a & n.12.)

While these motions to exclude expert testimony were pending, the parties each cross-moved for summary judgment. (*See* Pet. App. 10a-11a.) The district court granted DEC's motion and denied plaintiffs' motion. (Pet. App. 33a.) As relevant here, the district court rejected petitioners' theory that the Debts and Engagements Clause transformed the Andros Order into federal law that could preempt New York's regulations under the Supremacy Clause. The court explained that the Debts and Engagements Clause applied only to agreements entered into by the United States after the Articles of Confederation, and that the Andros Order was not such an agreement because it was entered into by a colonial government nearly one hundred years before the existence of the United States. (Pet. App. 66a-68a.) The district court's order also terminated the parties' *Daubert* motions and petitioners' motion to compel. (Pet. App. 83a.)

The U.S. Court of Appeals for the Second Circuit unanimously affirmed, concluding that the Andros Order was not federal law that could preempt DEC's state-law regulations. (Pet. App. 21a.) First, the court concluded that the Debts and Engagements Clause did not apply to the Andros Order. As the court explained, the Debts and Engagements Clause applies only to agreements entered into by the United States during the confederal period, i.e., the period of the Articles of

Confederation. The Andros Order plainly was not such a confederal-period agreement, the court further explained, because it was entered into by a British governor nearly a century before the Articles of Confederation. (Pet. App. 21a-23a.)

Second, the court concluded that the Supremacy Clause itself also did not apply to the Andros Order because that clause covers only agreements "made . . . under the Authority of the United States." The court explained that the Andros Order was not made under the United States' authority because it preceded the United States' existence by nearly a century and because there was no evidence that it had ever been ratified by Congress. (Pet. App. 23a-26a.) Having concluded that petitioners' federal preemption claim failed as a matter of law, the court of appeals declined to address, among other things, the Andros Order's substantive meaning, including how members of the Unkechaug Nation would have interpreted the order when it was issued in 1676. (*See* Pet. App. 28a.)

Third, the court of appeals concluded that, under the particular circumstances presented, the district court had not abused its discretion in declining to rule on the *Daubert* and privilege motions. (Pet. App. 17a-20a.) The court of appeals explained that the district court had not relied on any expert testimony, which in any event would have been irrelevant to its dispositive legal ruling that the Andros Order is not federal law. (Pet. App. 18a-19a.) The court of appeals also explained that the district court had not relied on any privileged material. The court of appeals further explained that petitioners had forfeited their speculative argument that privileged materials were necessary for their summary-judgment motion because they had failed to raise this argument to the district court. (Pet. App. 20a.) And, in any event,

the court of appeals explained that, based on the privilege log, the documents appeared to have no bearing on whether the Andros Order was federal law. (Pet. App. 19a-20a.)

The court of appeals denied rehearing en banc (Pet. App. 87a-88a), and petitioners then filed this petition for certiorari.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because it primarily seeks review of the lower courts' discretionary and case-specific decisions to decline to rule on issues that would not have affected the outcome of this case. The Second Circuit's ruling affirming summary judgment for DEC turned on a single, dispositive legal issue: that the Andros Order was not federal law and, therefore, could not serve as the basis for petitioners' preemption claim.[4] But the petition mainly focuses on the district court having issued summary judgment without first ruling on pending evidentiary motions. The court of appeals determined that the district court did not abuse its discretion under the circumstances because resolving the motions would not have altered the dispositive conclusion that the Andros Order is not federal law. There is no split in authority requiring courts to decide issues that are not germane to the results they reach. Certiorari is not warranted to review this case-specific determination, which was correct in any event.

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[4] As discussed *supra* (at 5 n.2), the Second Circuit deemed petitioners' remaining claims forfeited for failing to brief them on appeal, and those forfeited claims are not at issue here.

For similar reasons, certiorari is not warranted to review the proper application of the Indian canon of construction—which instructs courts to construe ambiguous treaty terms as the signatory Indian tribe would likely have understood them at the time of signing. *See Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, *modified sub nom.*, *Washington v. United States*, 444 U.S. 816 (1979). The Second Circuit declined to interpret the meaning of the Andros Order, and therefore did not opine on the application of the Indian canon of construction, because the order's meaning would have no bearing on the court's dispositive conclusion that the order is not federal law. The Court should not grant certiorari to review an issue that the Second Circuit declined to reach based on the circumstances presented, including that resolution of the issue would not alter the outcome here.

Nor is certiorari warranted to address the Second Circuit's conclusion that the Andros Order is not federal law. This conclusion is plainly correct and does not conflict with any decision from this Court, another circuit court of appeals, or a State's highest court. Indeed, the Second Circuit's decision accords with a decision by Virginia's highest court concluding that a preconfederal agreement was not federal law.

A. Certiorari Is Not Warranted to Address Case-Specific Decisions Declining to Resolve Evidentiary Motions That Were Irrelevant to the Case's Outcome.

The petition focuses on the district court's decision to grant summary judgment to DEC without resolving (i) the parties' cross-motions to exclude the testimony of each other's expert witnesses and (ii) petitioners' motion to compel production of every document on respondents'

privilege log. (Pet. i, 14-19.) The Second Circuit determined that the district court acted within its discretion under the circumstances. As the Second Circuit explained, resolving these motions would not have affected the sole dispositive ruling that the Andros Order was not federal law, and the district court did not rely on any of the materials that were the subject of the motions. This Court should not grant certiorari to review this case-specific exercise of discretion.

1. The decision below is simply an application of the well-settled principle that courts "are not required to make findings on issues the decision of which is unnecessary to the results they reach." *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976)). This established principle, like the principle of constitutional avoidance, conserves judicial resources and prevents article III courts from issuing essentially advisory opinions on matters that do not affect the outcome of the parties' dispute. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 734 (1978) (noting settled practice of avoiding unnecessary decision of constitutional issues). No contrary authority requires courts to decide nonjurisdictional issues that are not germane to the results they reach. Accordingly, the Second Circuit's application of this settled principle to the circumstances here does not merit this Court's review. *See generally* Stephen M. Shapiro et al., *Supreme Court Practice* 4-18 (11th ed. 2019) (certiorari typically not granted where questions presented would not change outcome).

Petitioners incorrectly contend that the Second Circuit's decision upsets settled law by broadly authorizing district courts to abandon their gatekeeping function under *Daubert* to determine whether expert testimony may properly be admitted into evidence. (*See* Pet. 16.) The Second Circuit's decision does not reflect any

such broad ruling and is instead expressly limited to the specific circumstances here, where resolving the *Daubert* motions would have been irrelevant to the case's outcome. (Pet. App. 19a.) Indeed, the Second Circuit made clear that in most cases, the district court will need to resolve *Daubert* or other discovery motions before resolving motions for summary judgment because, unlike here, the resolution of such motions might matter to the case's outcome. (*See* Pet. App. 18a.)

2. Moreover, the Second Circuit's application of that principle to this case is correct and does not warrant review, as the Second Circuit properly determined that resolving the pending motions would not have changed the outcome here.

First, resolving the motions to exclude expert testimony would have been irrelevant to the dispositive ruling that the Andros Order was not federal law. Neither of the experts provided any testimony relevant to that determination. Petitioners' expert, Dr. Strong, testified about the likely substantive meaning of the Andros Order's language, but he did not testify about whether the order constituted federal law. (Pet. App. 19a n.12.) Indeed, he stated that he was not asked to and did not opine on any events occurring after 1676—let alone events occurring during the confederal period or after the U.S. Constitution's ratification. (*See* CA2 J.A. 2013-2014.) And respondents' expert, Ms. Kerns, testified about subjects wholly unrelated to the Andros Order, specifically, the life cycle of the American eel and the need for species conservation. (*See* Pet. App. 19a n.12.)

There is no merit to petitioners' contention that the district court credited and relied on Ms. Kerns's expert opinions. (*See* Pet. 18-19.) The district court did not do so. The court cited Ms. Kerns's deposition testimony only

in setting forth uncontroverted background facts. For instance, the district court cited Ms. Kerns's testimony in describing the history and composition of the ASMFC and New York's regulations prohibiting juvenile eel harvesting (*see* Pet. App. 34a & n.1, 36a)—background facts that petitioners did not dispute. And the court also cited public documents appended to Ms. Kerns's report (*see, e.g.*, Pet. App. 34a & n.1, 35a-36a). Petitioners never challenged the authenticity or reliability of those documents (*see* CA2 J.A. 1175-1196 (petitioners' *Daubert* motion)) and indeed relied on the same documents to support their motion for summary judgment (*compare* CA2 J.A. 3106, 4648, *with id.* 4111-4114). Moreover, any such reliance would have been harmless in any event because Ms. Kerns's testimony about the American eel would not have any conceivable bearing on the dispositive question whether the Andros Order is federal law.

Second, resolving petitioners' motion to compel production of documents listed on respondents' privilege log also would have been irrelevant to the outcome of this case. The district court did not rely on privileged documents in any part of its decision, as the Second Circuit correctly observed. (*See* Pet. App. 19a.) And there is no basis for petitioners' speculative contention that they were prejudiced because unidentified documents listed on the privilege log might have been relevant to the court's dispositive determination that the Andros Order is not federal law. As an initial matter, petitioners forfeited this argument by failing to argue to the district court that they lacked any facts or documents essential to opposing respondents' summary judgment motion. (Pet. App. 20a (citing Fed. R. Civ. P. 56(d)).) In any event, respondents' privilege log includes no reference to the Andros Order, and petitioners failed to make any

argument as to how disclosure of any document listed on the privilege log might have resulted in a different outcome. (*See* Pet. App. 20a.)

3. Petitioners are mistaken in suggesting (Pet. 14-15) that the Second Circuit's decision here creates a split in authority about courts' discretion to decline to resolve motions that are unnecessary to a case's disposition. Neither this Court's decision in *Daubert* nor its companion decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), requires district courts to decide evidentiary motions that are ultimately irrelevant to the dispositive legal issue in a case. Instead, *Daubert* and *Kumho Tire* concerned the substantive legal standard for the admissibility of expert testimony. *Daubert*, 509 U.S. at 588-89, 597-98, overturned the "general acceptance" standard for admissibility of expert testimony, and *Kumho Tire Co.*, 526 U.S. at 141, extended *Daubert*'s reliability standard beyond "scientific" expert testimony. There was no dispute in either case about the relevance of the disputed expert testimony to the outcome of the case, and thus no plausible argument that the court could have exercised its discretion to decline to decide the testimony's admissibility. *Daubert*, 509 U.S. at 583 (expert opinions that defendant's drug caused birth defects); *Kumho Tire*, 526 U.S. at 142-44 (expert opinion that defendant's tires were defectively designed and manufactured).

The two Tenth Circuit decisions on which petitioners rely (*see* Pet. 16-17) are likewise inapposite, and do not create any circuit split. In those decisions, the Tenth Circuit emphasized that the district court must make findings sufficient to enable appellate review when it admits or excludes expert testimony over a party's objection. *See Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000); *Adamscheck v.*

American Fam. Mut. Ins. Co., 818 F.3d 576, 578 (10th Cir. 2016). Neither decision says anything about district courts' long-standing discretion to decline to rule on evidentiary motions that have no bearing on the case's outcome.

B. Petitioners' Question About the Indian Construction Canon Is Not Squarely Presented Here.

Certiorari is also not warranted to review whether the Indian construction canon should be used to interpret the Andros Order. (*Contra* Pet. 19-20.) That question is not squarely presented here because the Second Circuit did not reach it and because resolution of that question would not affect the outcome of this case.

The Second Circuit declined to address whether the Indian construction canon should be applied to the Andros Order because that question was ultimately irrelevant. (*See* Pet. App. 28a.) The Second Circuit's ruling that the Andros Order is not federal law was based entirely on the fact that the Andros Order was issued nearly a century before the United States existed and was never ratified by Congress. (*See* Pet. App. 20a-25a.) The Second Circuit's ruling did not involve any interpretation of the Andros Order's terms, and therefore did not address the application of the Indian construction canon. (*See* Pet. App. 28a.) This Court should not grant certiorari to address a question that the court of appeals properly declined to reach and that is irrelevant to the case's outcome.

Petitioners misplace their reliance (Pet. 21-22) on *Washington State Commercial Passenger Fishing Vessel Association*, in which the Court applied the Indian construction canon in interpreting the meaning of a fed-

eral treaty. *See* 443 U.S. at 676. There, the meaning of the treaty was centrally relevant to the outcome of the case. *See id.* at 662 ("principal question presented" concerned character of treaty right to take fish). No such circumstances exist here.

C. Certiorari Is Not Warranted to Review Whether the Andros Order Is Federal Law.

Certiorari is unwarranted to review the Second Circuit's conclusion that the Andros Order is not federal law because it predates the existence of the United States by nearly a century. (*Contra* Pet. 23-27.) The Second Circuit's decision is plainly correct and does not create any split in legal authority.

1. The Second Circuit correctly determined that neither the Debts and Engagements Clause nor the Supremacy Clause transformed the Andros Order, a seventeenth-century order issued by an individual British colonial governor, into federal law that preempts DEC's state-law prohibition against glass eel fishing. (Pet. App. 21a-25a.)

The Debts and Engagements Clause provides that "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." U.S. Const. art. VI, cl. 1. This clause has nothing to do with colonial-era treaties with Native American tribes. Instead, as the Second Circuit correctly explained, the Debts and Engagements Clause concerns financial or contractual commitments undertaken in support of the Revolutionary War during the confederal period. (Pet. App. 22a.) Specifically, the limited purpose of the clause was to assure creditors "that the adoption of the Constitution would not erase

existing obligations recognized under the Articles of Confederation." *Lunaas v. United States*, 936 F.2d 1277, 1278 (Fed. Cir. 1991); *see The Federalist* No. 43 (James Madison) (clause was included, among other reasons, "for the satisfaction of the foreign creditors of the United States"). Petitioners offered no basis to conclude that the Andros Order, an order issued by a representative of the British Crown a century before the Revolutionary War, was a financial or contractual commitment recognized under the Articles of Confederation.

The Second Circuit also correctly rejected petitioners' Supremacy Clause argument. The Supremacy Clause applies to "all Treaties made, or which shall be made, under the Authority of the United States." U.S. Const. art. VI, cl. 2. As the Second Circuit explained, the clause's plain language makes two types of treaties federal law: (i) treaties entered "under the authority of the United States before the ratification of the Constitution, i.e., those entered during the Confederal period," and (ii) "future treaties made by the United States after the ratification of the Constitution." (Pet. App. 23a (emphasis omitted).) *See Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (observing that first type intended to cover agreements made by United States under the Articles of Confederation). The Andros Order does not fit within either category. Indeed, as an order issued by a colonial governor approximately one hundred years before the Articles of Confederation, the Andros Order was plainly not "made . . . under the Authority of the United States," U.S. Const. art. VI, cl. 2. *See Restatement of the Law–The Law of American Indians* § 5 cmt. h (Westlaw 2024)

(tribal treaties with American colonies "are not treaties entitled to status under the Supremacy Clause").[5]

2. The Second Circuit's decision on this point does not conflict with any decision from this Court, another circuit court of appeals, or a State's highest court. To the contrary, it accords with a decision from Virginia's highest court concluding that a preconfederal period treaty was not federal law.

In *Alliance to Save the Mattaponi v. Commonwealth*, Virginia's highest court ruled that a 1677 treaty between the British colony of Virginia and a tribe was not federal law under the Supremacy Clause. *See* 270 Va. 423, 451-52 (2005), *cert. denied*, 547 U.S. 1192 (2006). The court concluded that the Supremacy Clause refers only to treaties "made under the authority of the United States" and that the 1677 treaty "manifestly" did not qualify as such because it was entered into over 100 years before the Constitution was adopted. *Id.* at 452. Nor had the treaty been ratified by Congress. *Id.* That reasoning is identical to the Second Circuit's reasoning here.

Petitioners have failed to identify any authority finding that a preconfederal period treaty constituted federal law under either the Supremacy or Debts and Engagements Clauses. Two of the cases on which petitioners rely (Pet. 23-24) concerned treaties that were entered into *after* the ratification of the Constitution and to which the United States was a party. Specifi-

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[5] *See also* U.S. Department of the Interior, *Bureau of Indian Affairs, Frequently Asked Questions* (n.d.) (noting that state Indian reservations "stem from treaties or other agreements between a tribal group and the state government or the colonial government(s) that preceded it"), https://www.bia.gov/frequently-asked-questions.

cally, in *Herrera v. Wyoming*, this Court held that an 1868 treaty between the Crow Tribe and the United States survived Wyoming's conversion from a federal territory into a State. 587 U.S. 329, 334, 341-42 (2019). And in *Fairfax's Devisee v. Hunter's Lessee*, this Court held that a 1794 treaty between the United States and Great Britain protected the land ownership rights of a British subject and his descendants, notwithstanding state legislation that arguably stripped the subject of title to the property. 11 U.S. 603, 627-28 (1812). Neither of these cases addressed an order issued by an individual British governor nearly a hundred years before the United States existed, let alone ruled that such an order has the force of federal law.

Petitioners also err in relying on *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). (*Contra* Pet. 24.) That case did not concern treaties, nor did it concern the Supremacy or Debts and Engagements Clauses. Instead, in *Trustees of Dartmouth College*, this Court held that the Contract Clause of the U.S. Constitution applied to a private charter that the British Crown had granted to Dartmouth College. 17 U.S. at 650. Although petitioners now argue that the Andros Order should be deemed a contract protected under the Contract Clause, (Pet. 24), that argument is completely unpreserved for this Court's review because petitioners did not plead a Contract Clause claim in their complaint. Indeed, they failed to present any argument based on the Contract Clause until their reply brief in the Second Circuit. (*See* Pet. App. 27a.) *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (declining to consider case that related only to theory that tribe did "not even attempt to pursue in the case before us"); *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas,

J., respecting denial of certiorari) (noting that Court will not review arguments not presented by parties).

Petitioners misplace their reliance on an unrelated floor statement by a congressional representative from New York in 1892, in support of a bill appropriating funds for education and other purposes to the Indian Department (the predecessor to the Bureau of Indian Affairs). (*See* Pet. at 25-26 (presumably quoting 23 Cong. Rec. 1254 (1892)).) The floor statement concerns the origins of the protective ("trust") responsibility that the United States owes to certain Native American tribes as a result of the United States' exclusive right to alienate certain tribal reservation lands. *See* 1 *Cohen's Handbook of Federal Indian Law* § 18.02(1)(a)(ii) (Nell Jessup Newton & Kevin K. Washburn eds., Lexis 2024). This trust responsibility has no relevance to the question of whether the Supremacy or Debts and Engagements Clauses apply to colonial agreements with Native American tribes, and the floor debate concerned a law that related only to postindependence treaties. *See* Ch. 164, 27 Stat. 120, 123-34 (1892).

Petitioners likewise misplace their reliance on the fact that New York has honored "deeds, patents, and treaties granted by its colonial predecessor" to Native American tribes. (*See* Pet. at 26-27.) New York and the United States are separate sovereigns, *Denezpi v. United States*, 596 U.S. 591, 598 (2022), and they have different relationships with various tribes, including the Unkechaug Nation in particular. (*See* Pet. App. 349a (report of state legislature observing that the Unkechaug Nation is "recognized by New York State through treaties negotiated with our colonial predecessors, but they are not recognized by the United States Bureau of Indian Affairs").) New York has maintained a diplomatic relationship with the Unkechaug Nation since the 1600s.

See N.Y. Indian Law § 2 (recognizing the "Poospatuck or Unkechauge Nation" as an Indian nation under state law). But that *state-law* relationship provides no support for petitioners' claim that the Andros Order is *federal* law with preemptive effect. And as explained below, Eleventh Amendment immunity would preclude the federal courts from addressing claims seeking to compel state officials to follow state law.

D. This Case Is a Poor Vehicle to Address Any of Petitioners' Questions Presented.

Finally, several additional defects make this case a poor vehicle to review any of the questions that the petition purports to present.

1. First, under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Eleventh Amendment bars petitioners' claims based on the Andros Order. Colonial-era agreements with tribes, such as the Andros Order, may at most "be recognized as a matter of state law." *Restatement of the Law–The Law of American Indians*, *supra*, § 5 cmt. h. But it is well settled that the *Ex parte Young*, 209 U.S. 123 (1908), exception to state sovereign immunity does not authorize suits to compel state officials' adherence to state law. *Pennhurst*, 465 U.S. at 100, 106. Thus, the Eleventh Amendment bars the federal courts from addressing claims for injunctive relief against New York officials based on a document that is, at most, state law. *See, e.g.*, *Santee Sioux Tribe of Neb. v. Nebraska*, 121 F.3d 427, 432 (8th Cir. 1997) (*Pennhurst* barred tribe's suit against state official for violation of state law); *see also Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 256 (8th Cir. 1995) (sovereign immunity would bar tribe's suit against state officials "seeking to enjoin violations of state law").

2. Second, res judicata precludes petitioners' claims here because they arise from the same nucleus of operative facts as petitioners' prior state-court lawsuit. The state court dismissed petitioners' complaint for injunctive relief after concluding that petitioners had failed to identify a legal right to take or possess glass eels in contravention of state law.[6] (*See* Pet. App. 56a-57a.) Rather than appeal that decision in state court, petitioners filed this federal lawsuit. *Cf. Slater v. American Min. Spirits Co.*, 33 N.Y.2d 443, 446 (1974) (granting preclusive effect to orders dismissing third-party claims where third-party plaintiff did not appeal).

3. Last, considerations of laches and acquiescence bar petitioners' attempt to judicially enforce the 350-year-old Andros Order. *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). In *Sherrill*, this Court rejected, based on "the extraordinary passage of time," the Oneida Nation's attempts to reestablish sovereign authority over parcels of reservation lands sold to private owners between 1795 and 1805. *Id.* at 202-05, 214, 219. The *Sherrill* doctrine bars petitioners' claims here. Like the Oneida Nation, which did not assert sovereignty over the parcels for 200 years, *see id.* at 216, the Unkechaug Nation did not assert immunity from state fishing laws for 350 years. (*See, e.g.*, CA2 J.A. 2923-2925 (Chief Wallace's testimony that members of the Unkechaug Nation long acquiesced to state requirements to obtain fishing licenses).) And accepting petitioners' claims now would be highly disruptive to New York's regulation and management of its state waters

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[6] The district court incorrectly found that the state court's dismissal was not on the merits and thus declined to apply res judicata. (Pet. App. 54a-57a.) The court of appeals did not reach this issue.

because petitioners interpret their immunity as authorizing them to issue and require their own licenses, even for non-Native individuals, without regard to New York law or New York's obligations under the ASMFC (*see* Pet. App. 8a; CA2 J.A. 2966, 3002, 4542).

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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