No. 24-1240

IN THE

Supreme Court of the United States

UNKECHAUG INDIAN NATION, HARRY B. WALLACE,
Petitioners,

v.

AMANDA LEFTON, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition fails to address the Petition's central claims. Rather than engage with the record and arguments, Respondents rely on conclusory assertions that unresolved *Daubert* and privilege motions were irrelevant, the Indian canons of construction do not apply, and that historical recognition of the Unkechaug and their treaty rights is immaterial. Their defenses based on laches and res judicata are equally misplaced, as both the district court and the Second Circuit correctly rejected them.

Respondents' Brief in Opposition fails to address core due process and evidentiary issues raised in the Petition. It asserts that unresolved *Daubert* and privilege motions were irrelevant because the district court did not rely on experts or privileged documents. Yet the record shows that the district court cited the Respondents' expert (Kerns), but those motions remained pending. The Opposition also avoids the merits of the Indian canons of construction, dismisses historical recognition as 'state law,' fails to engage with relevant precedent, and overstates laches and res judicata defenses already rejected by the lower courts. These omissions and flaws underscore why this Court's review is warranted.

Respondents contend that the *Pennhurst* doctrine bars Petitioners' claims because the Andros Treaty is merely an agreement between New York State and the Unkechaug, not enforceable as federal law, and that—even while acknowledging its existence under New York law—the State may simply choose not to honor it. This argument not only misapplies

Pennhurst but also underscores the very constitutional infirmity at issue: a State cannot concede the validity of a treaty and then refuse to honor its obligations on the theory that federal law provides no recourse. As demonstrated below, the Andros Treaty is properly understood as federal law, enforceable under the Supremacy Clause, Debts and Engagements Clause, and cannot be nullified by a State's unilateral refusal to honor it.

Misstatements of Facts by Respondents

Respondents make numerous factual misstatements. They falsely imply that the Unkechaug were only encouraged to fish for juvenile eels by Maine tribes and that the Unkechaug had never done so prior to 2014. (Opp. 4)

The historical record flatly contradicts this claim. The Unkechaug are Algonquin Indians who have lived between saltwater and freshwater systems and have fished for various sea creatures since time immemorial. See photo of Unkechaug member Thomas Hill with eel spear, taken by Francis Harper in 1910, published in *300 Years of Trials*, Russell Drumm, *East Hampton Star* (Jan. 15, 2013), https://www.easthamptonstar.com/archive/300-years-trials; image courtesy of the Smithsonian Institution.

Respondents also advance further inaccuracies on page three of their Opposition by citing an alleged decline in juvenile eels reported by the Atlantic States Marine Fisheries Commission, referencing the Declaration of Kerns and the District Court.

Petitioners consistently disputed these claims in briefing and Daubert motions—motions the District Court never considered or ruled upon before deciding summary judgment.

Moreover, Respondents ignore the NYSDEC's obligations under its own Commissioner's Policy-42. The Unkechaug submitted a Fishing Management Plan incorporating traditional ecological knowledge recognized by the NYSDEC and acknowledged by the Respondents' expert, Kerns. This was addressed in the Petitioners' Daubert motion, which the court failed to adjudicate. Further, the Respondents' opposition failed to acknowledge that the Unkechaug had repeatedly reached out in the spirit of good faith as equal sovereigns to establish a relationship and for the Unkechaug to share their fishing management plan. (App. L. 309a)

Additionally, Respondents' Opposition fails to disclose that the Unkechaug Nation filed the instant action only after New York State Assistant Attorney General Hugh Lambert McLean threatened Unkechaug Nation Chief Harry B. Wallace, Esq., with criminal charges for alleged fishing-related felonies unless the Unkechaug Nation brought suit in federal court asserting a tribal treaty right. (App. G. 178a, 179a, 181a, 182a, 223a, 225a). Attorney General McLean admitted in his declaration opposing Petitioners' subpoena at the district court level that he was conducting an ongoing criminal investigation of Chief Wallace, and invoked investigatory and privilege protections. (App. G. 178a). To this day, no charges have ever been filed against Chief Wallace. Furthermore, Chief Wallace and counsel for the

Petitioners each submitted affidavits in the Reply on cross-motions for summary judgment, stating that Attorney General McLean had personally called them both and made these threats—communications which directly compelled the Nation and Chief Wallace to initiate the district court action. (App. G. 223a, 225a, Dist. Ct. Dkt. 117 Par. 24, Dist Ct. Dkt. 119 Par. 10-13)

Respondents attempt to dramatize the supposed decline of juvenile eels in New York State waters, yet omit a critical fact: the U.S. Fish and Wildlife Service denied petitions to list the American eel as endangered in both 2007 and 2015. See https://www.savingseafood.org/fishing-industry-alerts/u-s-fish-wildlife-service-aesa-agree-american-eel-population-stable-not-threatened/. The Service concluded that "the eel's single population is overall stable and not in danger of extinction (endangered) or likely to become endangered within the foreseeable future (threatened)." This determination followed extensive scientific review by multiple federal agencies, including NOAA and the Atlantic States Marine Fisheries Commission (ASMFC).

The Service further cited "harvest quotas and mechanisms restoring eel passage around dams and other obstructions" as proactive conservation measures. It noted the species' "flexibility and adaptability" in both lifecycle and habitat as additional bases for finding no listing was warranted. See https://www.savingseafood.org/fishing-industry-alerts/u-s-fish-wildlife-service-aesa-agree-american-eel-population-stable-not-threatened/.

Respondents also misled the Court on page four of their Opposition by noting that the NYSDEC seized a shipment of eels in 2014, but omitting that the same shipment had been approved for export by the United States Fish and Wildlife Service.

Finally, Respondents falsely assert on page 12 that Dr. John Strong.[1] "never reached a conclusion" as to whether the Andros Order constituted a treaty or federal law. This is demonstrably incorrect. The District Court granted the Petitioners' motion to preserve Dr. Strong's testimony due to his age and health (App.G. 190a–191a). During his testimony on April 12, 2021, Dr. Strong explicitly stated—on page 26 of the transcript—that his assignment was to determine whether the Andros Order rose to the level of a treaty, and that he found that it did. (App. G. 215a).

This transcript was submitted in support of the Petitioners' summary judgment motions. In fact, Respondents themselves filed a Daubert motion seeking to exclude Dr. Strong's testimony on the grounds that he drew legal conclusions about the Andros Order being a treaty under federal law. (App. G. 202a). Petitioners opposed that motion and attached Dr. Strong's deposition transcript in support. (App. G. 206a).

Respondents' current claim—that Dr. Strong never opined on the Andros Order's status—is not only

[1] Dr. John Strong was the only historical expert produced in this case, the Respondents failed to produce any historical expert witness.

false, it highlights the prejudicial effect of the District Court's failure to rule on the Daubert motions prior to summary judgment. The issue of whether the Andros Order constitutes federal law is a contested material fact.

ARGUMENT

I. *Daubert* Motions, Expert Reliance, and Privilege Review

Respondents argue that the district court did not rely on expert or privileged materials in granting summary judgment (*Opp.* 2, 11–12). The record directly contradicts this claim. The Kerns affidavit and expert submissions were cited in the district court's summary judgment opinion (*App. B.* 34a,35a,36a), despite Petitioners' pending *Daubert* challenges. Even reliance on "background facts" from a contested expert without a gatekeeping ruling is a due process violation under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Similarly, the district court ordered in camera review of nearly 4,800 documents but never ruled on their status (*App.* G. 172a., App. E. 101a.). The Opposition dismisses this as irrelevant and asserts Petitioners "forfeited" a Rule 56(d) claim (*Opp.* 13–14). It does not respond to the core argument: that withholding a ruling left the record incomplete, deprived Petitioners of transparency, and prejudiced appellate review.

II. Indian Canons of Construction and Treaty Interpretation

Respondents argue that the canons of construction do not apply because the Andros Order was not federal law (*Opp.* 15–16). This is circular: whether the Order constitutes federal law requires interpretation informed by historical context and the Indian canons. Petitioners presented expert evidence showing ambiguities that must be read as the Unkechaug understood them. (See *Washington v. Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055)

The Opposition fails to confront this evidence, instead treating the matter as a purely constitutional text question. This approach contradicts the longstanding precedent that courts must resolve treaty ambiguities in favor of tribes. See *Herrera v. Wyoming*, 587 U.S. 329, 343–44 (2019).

III. Historical Recognition and Practice Evidence

Respondents dismiss historical recognition of the Unkechaug and the Andros Order as state-level acknowledgment only (*Opp.* 17–18). This ignores the constitutional principle of federal succession to colonial treaties and overlooks federal conduct treating the Tribe and its agreements as binding. See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1812); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). Governor Andros issued the Andros Order under Crown authority. It reflected mutual obligations concerning tribal resource use that fall within the historical category of colonial

compacts carried forward by the United States. State correspondence and Federal recognition through common law further confirm continuous treatment of the Unkechaug as a recognized tribal community under treaty-like protocols. (See *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 42 (E.D.N.Y. 2009) and App. M. 335a)

By reducing recognition to "state law," Respondents avoid the federal question at the heart of this case. They also rely on the absence of BIA administrative recognition, ignoring Petitioners' argument that recognition can arise through federal common law. (*Gristede's Foods, Inc.)*

IV. Precedential Support for Federal Incorporation of Colonial Treaties: The Andros Treaty Is a Unique Rights-Bearing Instrument That Was Misread Below, and *Mattaponi* Is Distinguishable

Respondents rely heavily on the Virginia Supreme Court's *Mattaponi* decision and claim that Petitioners' cited precedents are inapposite (*Opp.* 19–20). They do not explain why Supreme Court cases such as *Herrera v. Wyoming*, 587 U.S. at 343–44; *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1812); or *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), do not apply, nor do they confront Petitioners' reliance on congressional practice.

Respondents rely heavily on *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 451–52

(2005), to argue that colonial-era agreements lack enforceability under federal law. But their reliance is misplaced, and they overlook the critical distinctions between the Mattaponi treaty and the Andros Treaty with the Unkechaug.

The treaty at issue in *Mattaponi* was a 1677 submission treaty, one of several signed after Bacon's Rebellion, essentially documenting Native acquiescence to English colonial rule. The Virginia Supreme Court declined to enforce it as federal law on narrow state constitutional and procedural grounds, holding that the treaty had not been federally adopted or ratified. Notably, the court did not question that colonial treaties could be enforceable under federal law, but found no basis for enforcement in that particular instance.

By contrast, the May 1676 Andros Treaty with the Unkechaug is not a surrender or submission agreement, but an affirmative recognition of sovereign rights. It was entered into before the submission treaties of 1677 and contains language unparalleled in colonial diplomacy:

> 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.

(App. H. 230a)

This provision affirms *equal rights* to natural resources and the freedom to act "as they thinke good"—an extraordinary declaration of non-

subordination during a period when most Native peoples were explicitly placed beneath Christian colonists in law and social status. It is not merely a peace pact but a charter of co-sovereignty.

A. Distinction From the Other Colonial Agreements

The comparable colonial Treaty of Hartford (1638)—a well-known colonial-era compact—illustrates why the Andros Treaty with the Unkechaug is uniquely rights-bearing and distinguishable. The Treaty of Hartford, entered after the Pequot War, was a punitive agreement dividing Pequot survivors as captives and tribute payers among the colonies of Massachusetts, Connecticut, and the Narragansett. It is widely understood as a colonial governance instrument, not a mutual treaty between sovereigns. It contains no affirmative recognition of tribal rights and has never been enforced as federal law.

In contrast, the May 1676 Andros Treaty explicitly affirms the Unkechaugs' autonomy. This is not a clause of submission or tribute but of non-exclusive resource rights and equal access, memorialized in the colonial record. It contains language rarely seen in colonial diplomacy—placing the Unkechaug and Christians on the same legal footing for purposes of fishing and whaling—during an era where Indigenous peoples were otherwise subordinated. No such recognition appears in the Treaty of Hartford or comparable colonial documents. This underscores the distinctive legal character of the Andros Treaty and why it triggers the Indian canons of construction and qualifies for federal succession under *Dartmouth*

College, *Fairfax's Devisee*, and *United States v. Winans*, 198 U.S. 371 (1905).

At the time of the 1676 Andros Treaty, King Philip's War was still actively being waged in New England, posing an existential threat to colonial governments. As expert historian Dr. John Strong explains, Governor Andros convened the treaty council out of fear that the Unkechaug and other Long Island tribes would join the rebellion. (App. J. 268a-284a). This was not a mere recordation of existing goodwill but a preemptive diplomatic accord, crafted during wartime, and intended to secure strategic neutrality and mutual benefit. That the treaty grants the Unkechaug liberty to fish "with Christians or by themselves" in this broader military threat further supports its interpretation as a binding intergovernmental agreement rather than a local ordinance. Such circumstances invoke the Indian canons of construction, which mandate interpreting ambiguity in favor of the tribe, especially when the document reflects asymmetric bargaining during armed conflict. See *Herrera v. Wyoming*, 587 U.S. 329, 343–44 (2019).

Indeed, in structure and substance, the Andros Treaty better reflects the mutual diplomatic exchange required for treaty formation under federal common law. See *United States v. Winans*, 198 U.S. 371, 380–81 (1905) (treaties are not grants of rights to Indians but reservations of rights not granted away).

B. The Andros Treaty Language Is Unique Among Colonial Agreements

Petitioners are unaware of any other colonial-era treaty or order that explicitly grants a tribe liberty to engage in commerce, resource use, and joint action "with Christians or by themselves." This phrasing rejects the hierarchical caste assumptions that dominated the colonial era and reflects an intent to treat the Unkechaug as autonomous equals, not subordinates.

The Opposition does not meaningfully confront this uniqueness or cite any counterexample. That silence confirms the distinctive legal and historical value of the Andros Treaty, further underscoring the lower courts' dismissal error.

C. The Indian Canons Require That This Language Be Construed Broadly

Under the Indian canons of construction, the Treaty must be interpreted as the Unkechaug would have understood it, and all ambiguities resolved in their favor. *Herrera v. Wyoming*, 587 U.S. 329, 343–44 (2019). The phrase "as they thinke good" is expansive, not restrictive. The right to "freely whale or fish … by themselves or with Christians" is a non-exclusive right, precisely the kind upheld in *Winans*, *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 189–91, 204 (1999)), and *Herrera*.

Contrary to the Respondents' argument, the absence of BIA recognition does not defeat this claim. Recognition may arise via federal common law. See *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir. 1995). The federal government's repeated engagement with the Unkechaug over centuries—such as in census enumeration, military service, and Indian Health Service—confirms de facto recognition along with common law recognition after an extensive hearing where the District Court found that the Unkechaug satisfied the *Montoya* Criteria[2] in *Gristede's Foods v. Unkechaug Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009).

Respondents fail to grapple with the text, history, and legal consequences of the Andros Treaty. Their Opposition mischaracterizes *Mattaponi*, ignores the canons of construction, and discounts the extraordinary rights-bearing language of the Treaty—language that renders the Unkechaug case fundamentally distinct.

By simply repeating lower-court holdings, the Opposition avoids engagement with Petitioners' substantive constitutional argument that colonial-era agreements can acquire federal law status through succession and recognition.

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[2] "The Unkechaug met the Montoya Criteria which required to prove that the Unkechaug were the as a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular through sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261, 266 (1901)

V. Due Process and Procedural Fairness

Respondents minimize Petitioners' due process arguments by labeling disputed evidence "irrelevant" (*Opp.* 11–12). Yet the record shows that contested expert testimony was cited, and nearly 4,800 documents were submitted for in camera review with no ruling (*App.* B. 34a, 35a, 36a,; App. G.172a; App. E. 101a).

Unresolved motions and reliance on contested materials left the record incomplete, undermining appellate review and violating Petitioners' right to a full and fair hearing. The Opposition's conclusory denials cannot erase these deficiencies.

VI. Laches, Res Judicata, and State-Law Defenses

Respondents argue that the claims are barred by laches and res judicata, invoking *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), and *Western Mohegan Tribe v. Orange County*, 395 F.3d 18 (2d Cir. 2004) (*Opp.* 21–22). These cases are inapposite. The Unkechaug do not seek possession of land or exclusion of others, but only recognition of a non-exclusive treaty right to fish alongside others. The district court correctly rejected laches (*App.* B. 49a-58a), and the Second Circuit affirmed, citing *Silva v. Farrish*, 47 F.4th 78, 87 (2d Cir. 2022) (*App. A.14a-16a*).

Res judicata likewise fails. The state case did not reach the merits, and both the district court and the

Second Circuit held it could not bar the present claims (*App. B. 58a*).

CONCLUSION

The Petition should be granted.

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