No. 06-

IN THE
Supreme Court of the United States

THE DELAWARE NATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, the Delaware Nation (the "Delawares" or "Petitioner"), has asserted the following alternative theories to recover tribal land: (1) Unextinguished fee-based land title subject to the protection of the Indian Non-Intercourse Act of 1799; (2) Unextinguished aboriginal land rights because there was no extinquishment of rights by a sovereign.

The Delawares' fee title/Non-Intercourse Act argument raises an unsettled and very significant legal issue which the Third Circuit Court of Appeals wrongly declined to decide. Further, the Court of Appeals' disposition of the Delawares' aboriginal rights/sovereignty argument was based on an improper finding of waiver, which was made in contravention of federal law and the policy of protecting Indian tribes from being unfairly dispossessed of their land.

The questions presented are:

(1) Whether the Indian Non-Intercourse Act of 1799 applies to land held in fee by a federally recognized Indian tribe.

(2) Whether the Court of Appeals' finding of waiver as to Petitioner's aboriginal rights claim was improper and in contravention of important rules of pleading and of federal law and policy which protect federally recognized Indian tribes asserting claims to tribal land.

PARTIES TO THE PROCEEDINGS

Petitioner, The Delaware Nation, is a federally recognized Indian tribe which sues in its own capacity and as the sole legitimate heir of, and successor in interest to, Chief "Moses" Tunda Tatamy[1]

Respondents are Honorable Edward G. Rendell, Governor of the Commonwealth of Pennsylvania; County of Northampton, Pennsylvania; Northampton County Commissioners J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth, and Nick R. Sabatine; Township of Forks, Pennsylvania; Forks Township Supervisors John Ackerman, David Kolb, Donald H. Miller, David W. Hoff, and Henning Holmgaard; Binney & Smith, Inc.; Follett Corporation; Robert Aerni; Mary Ann Aerni; Audrey Bauman; Daniel O. Lichtenwalner; Joan B. Lichtenwalner; Carol A. Migliaccio; Joseph M. Padula; Mary L. Padula; Jack Reese; Jean Reese; Elmore H. Reiss; Dorothy Reiss; Gail N. Roberts; Carl W. Roberts; Warren F. Werkheiser; Ada A. Werkheiser; Warren Neill Werkheiser; Nick Zawarski and Sons Developers, Inc.; Mark Sampson; Cathy Sampson; all either current occupants of the land at issue or government entities that have sanctioned the tenants' possession.[2]

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1. Chief Tatamy's name is also sometimes spelled "Tetamy."

2. The Delawares' Complaint also named the Commonwealth of Pennsylvania, the County of Bucks, Pennsylvania and its officers Michael G. Fitzpatrick, Charles H. Martin and Sandra A. Miller as defendants. The parties subsequently stipulated to the dismissal of those parties.

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PETITION FOR WRIT OF CERTIORARI

The Delaware Nation, a federally recognized Indian tribe, acting on its own behalf and as the legitimate sole heir of, and successor in interest to Chief "Moses" Tunda Tatamy, respectfully petitions for a writ of certiorari to review the judgment rendered in this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The May 4, 2006 opinion of the United States Court of Appeals for the Third Circuit (App. 1a-17a) is reported at 446 F.3d 410 (2nd Cir. 2006). That published version of the opinion incorporates the terms of the Court of Appeals' subsequent June 14, 2006 Order, whereby the court amended its May 4, 2006, opinion to correct a statutory reference. (App. 18a-20a). The November 30, 2004 opinion of the district court, which granted respondents' motions for dismissal filed pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure (App. 21a-50a), is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 2006. A timely petition for rehearing *en banc*, or alternatively for panel rehearing, was denied on June 15, 2006 (App. 51a-53a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Non-Intercourse Act, 25 U.S.C. § 177 (1799), provides:

> [N]o purchase, grant, lease or other conveyance of lands or title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or in equity, unless the same be made by treaty or convention, entered into, pursuant to the constitution.

The Protection of Indians Act, 25 U.S.C. § 194, (2003), provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself from the fact of previous ownership or possession.

RULE INVOLVED

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following

> defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted,. . . .

STATEMENT OF THE CASE

This case involves the Delawares' efforts, undertaken pursuant to federal statutory and common law, to regain possession of approximately 315 acres of tribal land. The Delawares' right to the land at issue arises from two sources: (1) Unextinguished fee title based on two land patents from the Proprietaries of colonial Pennsylvania to one of their chiefs (as to whom Delaware Nation is the sole legitimate heir and successor in interest); (2) Unextinguished aboriginal title, having occupied the land from time immemorial.

The Court of Appeals' decision affirming the dismissal of the Delawares' Complaint contravened federal statutory, procedural and common law and was in derogation of various important policy considerations. That court explained that the question of whether the Indian Non-Intercourse Act protects tribal or Indian land acquired in fee "appears to be unsettled." (App. 13a-14a). However, it declined to consider and address this issue, thereby leaving unresolved an important part of the Delawares' claims, which claim is of great importance to all Native Americans.

The Court of Appeals also departed from federal law and policy in finding that the Delawares waived their right to contest a key factual conclusion reached by the district court in connection with its Rule 12(b)(6) dismissal. That conclusion, to the effect that Thomas Penn was the sovereign, contradicted both the Complaint's allegations and the plain

language of one of its attachments. Contrary to the Court of Appeals' conclusion, the record establishes that the Delawares repeatedly objected to defendants' insertion of various extraneous facts, such as the purported "fact" upon which the district court ultimately relied. The Delawares did not waive their claim that their aboriginal title was never properly extinguished by a sovereign. That claim of non-extinguishment was entitled to substantive review.

A. Factual and Procedural Background[3]

1. Facts Alleged In Complaint

The Delawares are a federally recognized Indian tribe and the political continuation of the Lenni Lenape tribe of Indians. 67 Fed. Reg. 46328 (2002). They commenced this action on their own behalf and as the sole legitimate heir of and successor in interest to "Moses" Tunda Tatamy, a deceased Lenni Lenape chief. Approximately 315 acres of land in eastern Pennsylvania, now known as Tatamy's Place, is at issue. Their claim of entitlement to that land was thwarted at the district court level by its dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

From time immemorial and prior to the arrival of European settlers, the Delawares inhabited large portions of the eastern seaboard of the North American continent. The homeland of the Delawares extended throughout the Delaware River Valley from what is now Cape Henlopen, Delaware (to the south), to include the west side of the lower Hudson Valley in what is now Southern New York State (to

3. Except as otherwise noted, the factual background is based upon the allegations in the Complaint.

the North). It included Tatamy's Place, the approximately 315 acres located at the "Forks of the Delaware," Forks Township, Northampton County, Pennsylvania, which are now at issue. By virtue of their continual occupancy and possession of that land, the Delawares maintain aboriginal rights to the property.

When the European settlers came to North America, they brought with them the concept of fee ownership of land.[4] In 1681 King Charles II of England signed a charter in favor of William Penn for lands encompassing what is today the Commonwealth of Pennsylvania. Although William Penn owned fee title and was the proprietary of colonial Pennsylvania by virtue of the Charter, he was nonetheless "accountable directly to the King of England." The Charter, which conveyed Pennsylvania to William Penn (and was attached to the Complaint), stated that the Crown is "Saving also, unto Us, Our heires and Successors, the Sovereignty of the aforesaid Countrey."

After the death of William Penn and his wife, Penn's sons and grandsons became the "Proprietaries" of colonial Pennsylvania. They did not exhibit the same friendly attitude toward the Indians as did their father. William Penn's son, Thomas Penn, employed particularly deceitful tactics in dealing with the Indians. Through his infamous act of chicanery, known as the Walking Purchase of 1737, Thomas

4. Fee title is also referred to in the case law as the right of preemption. *The Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 504 (W.D.N.Y.) (citing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (cites omitted), *aff'd*, 382 F.3d 245 (2d Cir. 2004), *cert. denied*, __ U.S. __, 126 S. Ct. 2351, 165 L. Ed. 2d 278 (2006). The right of preemption gives the holder the exclusive right to acquire Indian land once aboriginal title is extinguished. *Id.*

Penn dispossessed the petitioner Delawares of 1,200 square miles of land.[5]

Although the Walking Purchase had the effect of dispossessing the Delawares from 1,200 square miles of land, neither Thomas Penn nor the other Proprietaries of colonial Pennsylvania had the intent to dispossess Petitioner from Tatamy's Place. Rather, the Delawares' possessory rights were reaffirmed through the fee title conveyance of Tatamy's Place from the Proprietaries to Chief "Moses" Tunda Tatamy, a leader of the Delawares who lived on the land with his band of Delaware Indians.

The first official documents evidencing the Proprietaries' intent to convey Tatamy's Place to the Chief predates the 1737 Walking Purchase. On December 13, 1736, a Warrant — *i.e.*, an official application to the colonial government for land — submitted by the Lenni Lenape and issued by the Proprietaries was duly recorded in the Warrant Application Books of Bucks County at T-14 (the "Warrant"). On April 28, 1738, the Proprietaries granted Chief Tatamy a land patent to the 315 acres now known as Tatamy's Place (the "First Patent"). The Proprietaries' grant of Tatamy's Place to Chief Tatamy was again confirmed after the Walking Purchase through the issuance of a second land Patent on January 22,

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5. Thomas Penn misrepresented to tribal leaders that their ancestors agreed to relinquish their rights to as much land as could be walked in a day. Thomas Penn's representations are now universally recognized as having been fraudulent. At the time, however, tribal leaders believed Thomas Penn's statements to be true and felt duty bound to honor the alleged agreement. Thomas Penn exacerbated his fraud by pre-cutting a way through the forest and employing trained runners (instead of walkers) to take as much tribal land as possible.

1741 (the "Second Patent"), duly recorded in Patent Book A-9, Page 530.

The Delawares attached true and correct copies of the First and Second Patents to their Complaint. They also averred that Chief Tatamy received fee title to Tatamy's Place in his capacity as a tribal representative by virtue of the fact that the Delawares did not recognize individual land ownership. Like many other Indian tribes, they believed in the communal ownership of property. Further, they alleged in their Complaint that they are, in any event, the sole legitimate heirs of, and successors in interest to, Chief Tatamy.

Neither Chief Tatamy nor the Delawares ever subsequently conveyed fee title to Tatamy's Place to anyone. Specific averments to this effect are found in ¶¶ 45, 47, 48 and 55 of their Complaint. After the Second Patent, the next record conveyance pertaining to Tatamy's Place is a deed recorded on March 12, 1803. In that deed, Edward Shipper, as the Executor of the Estate of William Allen, purported to convey Tatamy's Place to Henry and Mathias Strecher (the "Strecher Deed"). The Strecher Deed is recorded in the Office of the Recorder of Deeds in Deed Book 2, page 242. There exists no prior deed from Chief Tatamy or any of his heirs to William Allen or to any other person.

2. The Delawares' Claims Asserted In Complaint

The Delawares, on their own behalf and as the heir of Chief Tatamy, commenced suit in the United States District court for the Eastern District of Pennsylvania to regain their

315 acres of tribal land.[6] Their Complaint asserted both fee-based and aboriginal rights to this land. The fee-based claim was brought under the Indian Non-Intercourse Act of 1799, 25 U.S.C. § 177 (1799). Their aboriginal land rights claim relied on the Non-Intercourse Act of 1799 and on federal common law. *E.g.*, *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234-35 (1985) (recognizing common law cause of action of Indians to sue for aboriginal land rights).

3. Defendants' Motions To Dismiss

The defendants each moved to dismiss, arguing, among other things, that the Delawares failed to state legally recognized claims. In pertinent part, they challenged the applicability of the Non-Intercourse Act to the Delawares' fee title claim and maintained that the Delawares' aboriginal title was long ago extinguished. They also raised factual issues by interjecting extraneous allegations of historical facts into their arguments, and refused to accept the Complaint's allegations as true, as required by Rule 12(b)(6).

A key extraneous factual contention which defendants interjected into the case was that William Penn and his heirs (including Thomas Penn), not the King of England, were the sovereigns of colonial Pennsylvania at important times referred to in the Complaint. *See, e.g.,* Governor Rendell's Memorandum of Law in support of his Motion to Dismiss

6. The Delawares' suit was against the individuals and businesses currently occupying Tatamy's Place, together with the local, county and state governments which approved and ratified the possession of the land. It sought declaratory and injunctive relief to restore their possession of Tatamy's Place, and damages for the unlawful occupancy of that land.

at 3, 13-14. The issue of sovereignty had great potential significance because only the sovereign is vested with the right to extinguish aboriginal title (*i.e.*, holds the "right of extinguishment"). Contrary to the complaint's allegations, the defendants argued that the Delawares' aboriginal rights were extinguished by the Proprietaries as sovereign.

The Delawares' written response objected to defendants' improper attempts to inject facts outside the record. Specifically, the Delawares stated:

> Defendants disregard the allegations contained in the Complaint and the fair inferences drawn from those allegations and instead improperly interject inconsistent *facts* to urge the Court to draw contrary conclusions. In addition to having no bearing on a motion to dismiss, those facts simply are inaccurate and unverified.

See Consolidated Memorandum of Law in Opposition and Response to All Defendants' Motions to Dismiss at 13 (emphasis on original). Later, in responding to written questions provided to the parties by the district court at oral argument, the Delawares repeatedly stated their objection to the district court's consideration of any facts that were contrary to the Complaint's allegations.

B. The District Court's Decision

Unlike subsequent statutory versions, the 1799 and 1802 versions of the Non-Intercourse Act of 1799 governed the divestiture "of lands, or of any title or claim thereto, *from any Indian*, or nation or tribe of Indians . . .," (emphasis

added).[7] Thus, it specifically spoke to individual Indian land possession.

The district court ruled that the 1802 version of the statute, extending protection to lands owned by individual Indians as well as Indian nations and Indian tribes, applied to the Delawares' claims. App. 42a.[8] However, it rejected the applicability of that statute to their fee-based claims under the theory that "whatever title Plaintiff [petitioner] asserts to have, the title must have aboriginal rights attached in order to survive dismissal under the [Non-Intercourse] Act and federal common law." App. 43a. Thus, the District court rejected the Delawares' argument that a Non-Intercourse Act claim could be based on fee title to tribal land. App. 42a-43a.

The district court also wrongly construed the Delawares as arguing that once extinguished, aboriginal title could be revived by the tribe's receipt of fee title. App. 43a [p.27 of D.Ct.'s opinion) The District court concluded, based on New York district court authority, that "aboriginal title, once extinguished, is forever lost." App. 44a, citing *Tuscarora Nation of Indians v. Power Authority of New York*,

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7. Later statutory language, including the language initially relied upon by the Third Circuit Court of Appeals before correcting its opinion, spoke to "lands, or of any title or claim thereto, *from any Indian nation or tribe of Indians*" (emphasis added). *See also* the June 14, 2006 Third Circuit Court of Appeals Order at App. 19a.

8. The district court applied the 1802 version of the statute because the first recorded deed transfer, after the second land Patent was issued in 1741, occurred in March, 1803. App. 42a. With respect to the issues presented in that case, there are no material differences between the 1799 and 1802 versions of the statute.

164 F. Supp. 107 (W.D. N.Y. 1958). It also rejected the Delawares' argument that the Tenth Circuit's decision in *Alonzo v. United States,* 249 F.2d 189, 197 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958), supported the conclusion that the Non-Intercourse Act protected fee title as well as aboriginal title. App. 44a, n.6.

Because the district court ruled that the Non-Intercourse Act did not protect fee title, it did not analyze whether the Delawares obtained fee title to Tatamy's place either because the conveyance was to Chief Tatamy as an tribal representative, or because of the Delawares' asserted position as the sole legitimate heir of, and successor in interest to, Chief Tatamy.

Besides rejecting the Delawares' fee-based title argument, the district court also rejected their aboriginal title claim. App. 39a-40a. The Court premised that portion of its decision on a factual conclusion, at variance with the pleadings, that Thomas Penn was the sovereign of colonial Pennsylvania and was thus empowered to extinguish Indian rights. As previously noted, this factual contention not only contravened the Complaint's allegations, but also was objected to by the Delawares during the course of the district court litigation of the Rule 12(b)(6) motions.

C. The Court of Appeals' Decision

On appeal, the Third Circuit Court of Appeals affirmed the district court dismissal, finding (1) that any aboriginal rights were extinguished by the Walking Purchase, and (2) that the tribe does not hold fee title to the land. In so doing, the Court of Appeals recognized the unsettled nature of the

question of whether the Non-Intercourse Act applies to Indian land held in fee. App. 11a-14a. However, it refused to consider and resolve that potentially significant Indian affairs issue.[9] Its justification therefore, according to the panel, was that the conveyances in the First and Second Patents were to Chief Tatamy as an individual, and not as a tribal representative. App. 13a-14a.[10]

The Court of Appeals' analysis and stated justification resolved only one prong of the Delawares' two prong fee-based land claim. Besides alleging that Chief Tatamy received title to Tatamy's Place as a tribal representative (which the Third Circuit rejected), the Delawares also alleged entitlement to the land by virtue of their position as sole and legitimate heir of, and successor in interest to, Chief Tatamy.[11]

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9. The Court of Appeals also did not cite the correct version of this statute in rendering its opinion on May 4, 2006. It corrected its error on June 14, 2006. App. 19a-20a.

10. At n.15 of its Opinion the Court of Appeals further noted:

> In addition, Judge Roth would hold that the Nonintercourse Act claim would fail even had the land in question been tribal because the Delaware Nation failed to identify a specific land conveyance that violated the Act or to allege that the gap in the chain of title post-dates the Nonintercourse Act's enactment.

App. 17a.

11. The Delawares' alternative theories were concisely stated in the Complaint and set forth in the response to the district court's written questions. They reminded the Court of Appeals of this point in their principal appellate brief at p.32 (arguing that the Nation "is

(Cont'd)

The Court of Appeals clearly should have determined whether the Delawares stated a viable Non-Intercourse Act claim by reason of the assertion of their position as the Chief's sole legitimate heir and successor in interest. The Court of Appeals decision, as amended on June 14, 2006, recognized the applicability of the version of the Non-Intercourse Act that protected land rights of individual Indians. However, that court never at any point reached the considerably important and unsettled question of whether the Non-Intercourse Act protected Indian lands held in fee.

The Court of Appeals also refused to review the district court's factual finding that Thomas Penn was the sovereign of colonial Pennsylvania — sovereignty being the predicate for a right of extinguishment. Instead, it ruled that the Delawares waived their right to contest Thomas Penn's alleged sovereign status and thus refused to consider the merits of the Delawares' alternative argument for aboriginal land rights. The Court of Appeals imposed the severe sanction of waiver against the Delawares despite its recognition that "The history of Tatamy's Place is yet another sad example of our forefathers' interactions with the Indian nations." App. 3a. In fact, the Court of Appeals' imposition of such a sanction was perhaps yet another "sad example" of Indian treatment. Remarkably, it was imposed although the Delawares had contested defendants' interjection of facts from outside of the Complaint and its attachments —

(Cont'd)

the legitimate heir of Chief Tatamy and the political continuation of the Lenni Lenape tribe" and "alternatively took the fee title as the heir of Chief Tatamy"), and reiterated this argument in their reply brief at § II.C.3 ("The Delaware Nation is the Rightful Heir of Chief Tatamy").

including defendants' factual contention that the Proprietaries (and not the King of England) were sovereigns and therefore entitled to extinguish aboriginal rights.

The consequence of the Court of Appeals' waiver ruling was to allow the district court's clearly erroneous factual conclusion, based on unverified facts contrary to the Complaint's allegations, to remain unchallenged. This, in turn, deprived the Delawares of both protections to which it is absolutely entitled and of access to the courts to litigate its aboriginal rights claim.

REASONS FOR GRANTING THE PETITION

The Delaware Nation petitions this Court pursuant to Sup. Ct. R. 10 for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Review is first warranted because the Court of Appeals failed to address and resolve what it recognized to be an unsettled question of federal law: Whether the Non-Intercourse Act applies to land held or acquired by Indian tribes in fee. *See* App. 13a-14a. The lower court's failure to review that key issue, and to then resolve the Delawares' related fee-title claim based on its status as Chief Tatamy's successor in interest and only legitimate heir, is more than disappointing. Resolution of these issues is so important for the proper conduct of Indian affairs that it warrants the exercise of this Court's supervisory powers. Sup. Ct. R. 10(a).

Review is also warranted because the Court of Appeals' ruling, that the Delawares waived their right to contest a critical district court factual conclusion, was contrary to their Complaint's allegations, contravenes federal Indian law and

policy, as well as settled federal procedural law, and was not supported by the record. Such a severe departure from federal Indian law and policy, and from the Federal Rules of Civil Procedure, likewise calls for the exercise of this Court's supervisory powers. Sup. Ct. R. 10(a). Significantly, where Indian affairs are at issue this Court has found it appropriate to exercise its jurisdiction although the determination at issue might not otherwise be subjected to review. *See Williams v. Lee,* 358 U.S. 217, 218 (1958) ("Because this *was a doubtful determination*, of the important question of state power over Indian affairs, we granted certiorari." (emphasis added)).

I. This Court Should Review And Resolve The Unsettled Issue Of Whether The Non-Intercourse Act Protects Indian Land Held In Fee

In affirming the district court's dismissal of the Delawares' Complaint, the Court of Appeals recognized the existence of an unsettled question of federal law: Whether the Non-Intercourse Act applies to tribal land reacquired or held in fee title. It is desirable that this significant issue be resolved. Such resolution depends on an analysis and review of federal Indian law and policy.

Federally recognized Indian tribes such as the Delawares are "wards of the nation, and dependent wholly upon its protection and good faith." *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941) (*citing Minnesota v. Hitchcock*, 185 U.S. 373, 395, 396 (1902). Accordingly, federal courts and Congress have been particularly protective of the land rights of Indians.

Federal policy must be the starting point to determine whether the Non-Intercourse Act extends to Indian land held

in fee. It is well recognized that "[f]ederal law has generally protected beneficial use by tribes of their lands, regardless of how acquired." F. Cohen, *Cohen's Handbook of Federal Indian Law*, § 9.A (1982) (Tribal Interests in Real Property). The Non-Intercourse Act does not alter federal policy.

The express statutory language of the instantly relevant Non-Intercourse Act applies to "purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or, tribe of Indians . . ." 25 U.S.C. § 177 (1799). *See also* App. 20a (June 14, 2005 Court of Appeals Order correcting this statutory reference). Such broad language does not limit the statute's application solely to aboriginal title to tribal land. Rather, the broad reference to "any title or claim" to land owned by Indians supports the conclusion that valid claims under the Non-Intercourse Act include those based on fee title to tribal land. Indeed, federal courts have not required that a plaintiff to plead aboriginal title to state a Non-Intercourse Act claim. Rather, a plaintiff need only plead that: (1) it is an Indian or an Indian tribe; (2) the land in question is tribal land; (3) the United States never consented to or approved of the alienation of the land in question; and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) (*citations omitted).*

This case presents this Court with the opportunity to definitively review and define this area of the law, and to make clear that the Non-Intercourse Act's alienation restrictions are not limited to aboriginal title. The Court can resolve this important "unsettled" area of the law.

Such an articulation by this Court would be appropriate. Consistent with federal policy, the plain language of the statute, and the Delawares' asserted position, circuits other than the Third Circuit have interpreted the Non-Intercourse Act's alienation restrictions to be broader than just aboriginal title. In *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958), the Tenth Circuit specifically stated:

> The reason for the imposition of restrictions [set forth in 28 U.S.C. § 177] *is in nowise related to the manner in which Indians acquired their lands.* The purpose of the restrictions is to protect the Indians . . . against the loss of their lands by improvident disposition or through overreaching by members of other races.

Alonzo, 249 F.2d at 196 (emphasis added). This holding recognizes the strong federal policy of federally recognized Indian tribes who are considered wards of the federal government.

The Fourth Circuit decision in *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938), is consistent with the *Alonzo* holding. There, the Commissioner of Indian Affairs acquired land for the benefit of the Eastern Band of Cherokees via a grant from the State of North Carolina. *7,405.3 Acres of Land*, 97 F.2d at 418-19. The Fourth Circuit specifically held that the Non-Intercourse Act's restrictions on alienation apply, stating that "*it makes no difference that title to the land in controversy was originally obtained by grant from the state of North Carolina.*" *Id*. at 422 (emphasis

added). The "determinative factor" in the Fourth Circuit's holding is

> that the federal government has assumed toward [the Eastern Band of Cherokees] the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise without its consent.

Id. (citations omitted).[12]

Logic, public policy and existing case law establish that the version of the Non-Intercourse Act, which the Court of Appeals ultimately found to apply to this case, protects land owned in fee by individual Indians. *See* 25 U.S.C. § 177 (1799). The plain language of the Non-Intercourse Act does not require plaintiff Indians or tribes to have aboriginal title to tribal land. Thus, the Court of Appeals' ruling that Chief

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12. The United States District Court for the Northern District of New York also extended federal land protections to Indian land held in fee title in interpreting the term "Indian Country" (which term refers to the geographic area in which tribal and federal laws normally apply and state law does not. 18 U.S.C. § 1151(a)). Specifically, in *Cayuga Indian Nation v. Village of Union Springs*, the court held that the property at issue "falls within the definition of Indian Country, and such status is not precluded when a tribe holds fee title to the land." 317 F. Supp. 2d 128, 137 (N.D.N.Y. 2004). Only Congress could terminate the reservation status of the land. *Id*. Because the land was "Indian Country," local zoning laws did not apply.

Tatamy took fee title to Tatamy's Place as an individual and not as a tribal representative did not resolve all aspects of the Delawares' claims. Correction is required to protect Indian rights.

The Delawares alternatively alleged in their Complaint, and argued throughout each stage of this litigation, that they have fee-based rights because they are Chief Tatamy's heirs and successor in interest. Courts have the obligation to consider alternative arguments, and the Third Circuit should have done so here. *See, e.g.*, *Edwards v. Wyatt*, 335 F.3d 261, 263 (2nd Cir. 2003) (finding district court improperly failed to consider or resolve plaintiff's alternative claim and remanding for consideration).

Regardless, and in any event, for purposes of defendants' motions to dismiss made pursuant to Rule 12(b)(6), the pleadings must be accepted as true. *E.g.*, *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (2nd Cir. 1993). This is particularly so here since the right of inheritance of Indians is controlled by the laws, usage and custom of the tribe. *Jones v. Meehan*, 175 U.S. 1, 30-32 (1899). Finally, the Delawares' status as Chief Tatamy's heirs is a factual matter, which should not have been resolved in a dismissal motion.

In sum, when the Non-Intercourse Act applies, the only way that tribal land can be defeased is through a federal treaty approved by the Congress of the United States. 25 U.S.C. § 177 (1799). The Delawares' Complaint avers that no such defeasance occurred with respect to its fee title in Tatamy's Place. Hence, their claim should have been allowed to proceed and the Court of Appeals should therefore have reversed the district court's dismissal.

II. The Court Of Appeals Contravened Federal Indian Law And Policy When It Found Waiver and Failed To Review The District Court's Erroneous Factual Conclusion, Which Was Contrary To The Complaint's Allegations

This Court should also exercise its supervisory powers to review the Court of Appeals' conclusion that the Delawares waived their right to contest the district court's factual conclusion that Thomas Penn was sovereign, and therefore vested with the right to extinguish the Delawares' aboriginal land rights. That conclusion violated the Indian Protection Act, 25 U.S.C. § 194 (2003), and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Its force and effect was to deny the Delawares their coveted access to the courts to pursue their non-extinguishment claim.

As a preliminary matter, the Court of Appeals' waiver conclusion is factually incorrect. As previously detailed, *defendants raised Thomas Penn's alleged sovereign status as a factual issue, not a legal issue*. Governor Rendell (and other defendants) inserted that and numerous other extraneous facts into the brief in support of his dismissal motion and then predicated his legal argument on those facts. In response to their brief, the Delawares specifically objected to defendants' interjection of extraneous facts and otherwise sufficiently preserved this issue for later review. *See* discussion *supra* (Statement of Case, Section A.3.).

In nevertheless finding waiver, the Court of Appeals disregarded federal policy and law. In Indian land claim litigation, the federal policy is unambiguous: "[O]nce a tribe makes out a *prima facie* case of prior possession *or title* to the property in dispute, the burden rests upon the non-Indians

to demonstrate otherwise." *Cayuga Indian Nation of New York v. Village of Union Springs*, *supra* (cites omitted) (emphasis added). This federal common-law policy has been adopted by Congress and codified in the Protection of Indians Act:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, *the burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself* from the fact of previous ownership or possession.

25 U.S.C. § 194 (2003) (emphasis added).

The Delawares' Complaint established unextinguished aboriginal title to Tatamy's Place sufficient to proceed.[13] They unambiguously pled that they inhabited Tatamy's Place from time immemorial. Thus, they stated a prima facie case for aboriginal title. Their Complaint also stated a prima facie claim that their aboriginal title was not validly extinguished by the King of England as the sovereign.

The Delawares alleged that King Charles II of England conveyed fee title to colonial Pennsylvania to William Penn,

13. To establish such title, an Indian tribe must show that it actually, exclusively, and continuously occupied and used property for an extended period of time. *Yankton Sioux Tribe of Indians v. South Dakota*, 796 F.2d 241, 243 (8th Cir. 1986), *cert. denied,* 483 U.S. 1005 (1987); *see also Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F.Supp. 2d 313, 343 (N.D. N.Y. 2003) (Indian tribe obtains aboriginal title when it uses and occupies property to the exclusion of other Indian tribes and persons); *Seneca Nation*, 206 F.Supp. 2d at 503.

but that Penn remained accountable to the King. Moreover, the Charter of 1681, which they attached to the Complaint, unambiguously stated that the King retained all sovereignty over colonial Pennsylvania even though he granted fee title to Penn. Fee title — *i.e.*, the "right of preemption" — and the right to extinguish aboriginal title — *i.e.*, the "right of extinguishment" — are separate powers. The right of extinguishment does not automatically pass upon acquiring fee title from the sovereign. *Seneca Nation*, 206 F. Supp. 2d at 504 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-43, 3 L. Ed. 162 (1810) (other cites omitted). The Delawares pled that William Penn received fee title (the right of preemption), but not the right of extinguishment.

Because they pled that aboriginal title that was not extinguished, the Delawares established a prima facie case for aboriginal title. 25 U.S.C. § 194. Accordingly, the burden then shifted to the non-Indian defendants to show otherwise. For purposes of defendants' motions to dismiss, their burden under the Indian Protection Act must be evaluated in accordance with the well established standards of Rule 12(b)(6). The district court and the Court of Appeals, however, declined to so proceed.

In ruling on defendants' dismissal motions, the district court was required by Rule 12(b)(6) to accept as true the Complaint's well pled allegations and to review those allegations in the light most favorable to the plaintiff. *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.,* 140 F.3d 478, 483 (2nd Cir. 1998); *Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (2nd Cir. 1997). It also was required

to accept as true all reasonable inferences that can be fairly drawn from the complaint, *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (2nd Cir. 1993), and to consider exhibits attached to the complaint, such as the Charter of 1681. *See City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (2nd Cir. 1998); *Steinhardt Group, Inc. v. Citicorp,* 126 F.3d 144, 145 (2nd Cir. 1997). Under the Indian Protection Act and the Federal Rules of Civil Procedure, defendants could not defeat the Delawares' prima facie case by alleging facts outside of the Complaint.[14]

Moreover, even if the Delawares did not preserve their challenge to the "Thomas Penn sovereignty" factual dispute

14. To the extent that the district court desired to consider facts beyond the four-corners of the complaint, it should have provided the Delawares with notice and the opportunity to present evidence in accordance with the Federal Rules of Civil Procedure. But the district court did not treat the dismissal motions as summary-judgment motions. Nor did it convert defendants' dismissal motions to summary-judgment motions as allowed in appropriate circumstances by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(b). Thus, the district court erred. It is reversible error for a district court to convert a Rule 12(b)(6) motion to a Rule 56 motion without providing notice of its intent to convert and allowing the opportunity to submit evidence. *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) (citing *Castle v.Cohen*, 840 F.2d 173, 179-80 (3d Cir. 1988) (vacating summary judgment when district court converted the Rule 12(b)(6) motion without notice to the parties); *Davis Elliott Int'l. v. Pan American Container Corp.*, 705 F.2d 705, 706-08 (3d Cir. 1983) (reversing summary judgment when the district court acted without notice to the parties and without an opportunity for hearing); *Crown Central Petroleum Corp. v. Waldman*, 634 F.2d 127, 129 (3d Cir. 1980) (reversing summary judgment when the district court acted without notice to the parties and without allowing an opportunity to submit affidavits); *Bryson v. Brand Insulations, Inc*., 621 F.2d 556, 559 (3d Cir. 1980) (same).

(which they did), the Court of Appeals waiver finding was inappropriate under the circumstances since significant Indian interests were involved and the district court's factual conclusion was historically unsupportable.

Courts of appeals have been empowered by this Court's precedent to review district court factual determinations such as the determination the district court made here.

> [T]here are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond doubt, *see Turner v. City of Memphis*, 369 U.S. 350 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Singleton v. Wulff, 428 U.S. 106, 121 (1976). "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also T I Federal Credit Union v. Delbonis*, 72 F.3d 921, 929-30 (1st Cir. 1995) (appellate courts can consider issues not adequately raised with the district court if issues implicate important constitutional or governmental issues). Plainly such issues are raised here since Indian land rights are at issue.

Since it is beyond doubt that Rule 12(b)(6) prohibits a court's consideration of extraneous facts, the Third Circuit's finding of waiver represents a "doubtful determination" in the Indian affairs context which well warrants this Court's review. *See Williams v. Lee, supra.* This is particularly so

since an injustice clearly resulted: The Court of Appeals deprived the Delawares of the opportunity to contest the district court's clearly erroneous factual determination that Thomas Penn was "the sovereign" and thereby entitled to extinguish aboriginal title. Otherwise stated, the Court of Appeals wrongly employed a rigid and improper analytical process.

In sum, the Court of Appeals reversal of the district court's pivotal and fatal factual determination was important and necessary in light of the strong federal law and policy, which impose significant burdens on non-Indians once an Indian tribe makes out a prima facie case involving title to real estate. *See Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d at 138; 25 U.S.C. § 194 (2003). The Delawares' Complaint pled a plain and unambiguous intent by the actual sovereign not to extinguish aboriginal title and that claim should have been allowed to proceed. *E.g., United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346, 354 (1941).[15] Both courts below wrongly deprived the Delaware Nation of access to the courts and to the benefit of well-developed law intended to protect Indian land rights. Intervention and correction by this Court is well warranted.

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15. The Complaint's factual allegations also demonstrate that neither Thomas Penn nor the Proprietaries intended to extinguish The Delaware Nation's aboriginal rights to Tatamy's Place. The question of intent almost always involves questions of fact that are within the exclusive province of the jury to resolve. *See, e.g.*, *Martin Marietta Corp. v. New Jersey Nat'l Bank*, 653 F.2d 779, 782 (3d Cir. 1981) (stating that the question of intent is a question of fact to be settled by the jury).

CONCLUSION

WHEREFORE, for the foregoing reasons, the Delaware Nation's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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