No. 05A668

In The
Supreme Court of the United States

THE MATTAPONI INDIAN TRIBE, *et al.*

Petitioners,

v.

COMMONWEALTH OF VIRGINIA, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1677, representatives of colonial Virginia, acting on behalf of the British Crown, signed a peace treaty with Indian tribes. The Mattaponi Indian Tribe, which is descended from the signatory tribes, asserted in the state litigation below that the Commonwealth of Virginia violated the terms of this treaty by authorizing the construction of a reservoir that would encroach on the Tribe's land and interfere with its fishing rights. The Virginia Supreme Court held that the treaty arises under state law because it was signed before the American Revolution and, therefore, was not created "under the authority of the United States." U.S. Const. art. VI, cl. 2, App. 136. When the Court applied Virginia common law to this pre-Revolutionary treaty, it held that the Commonwealth was immune from suit. The question presented is:

Whether the obligations imposed by an Indian treaty with a prior sovereign should be enforceable as a matter of federal law under the Supremacy Clause.

PARTIES TO THE PROCEEDINGS

Petitioners are: The Mattaponi Indian Tribe and Carl T. Lone Eagle Custalow, Assistant Chief.

Respondents are: The Commonwealth of Virginia, Department of Environmental Quality, on behalf of the State Water Control Board, Robert G. Burnley, Director & Executive Secretary, and the City of Newport News.

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OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 621 S.E.2d 78, 93-96 (Va. 2005) and is set forth in the Petition Appendix ("App.") at 1. The remainder of the relevant opinions below are also included in the Petition Appendix.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Virginia was entered on November 4, 2005. Chief Justice Roberts extended the time for filing this petition to and including March 6, 2006. Order of The Chief Justice of the Supreme Court of the United States granting a motion to extend the time to file a petition for certiorari in Application No. 05A668 (January 25, 2006), App. 213. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, App. 136.

The Treaty at Middle Plantation with Tributary Indians After Bacon's Rebellion, May 29, 1677, App. 142.

STATEMENT OF THE CASE

For the first time in the history of the United States, a state supreme court has held that an Indian treaty is governed

by state law. The decision that an Indian treaty signed before the American Revolution is not enforceable as federal law under the Supremacy Clause is a departure from our constitutional structure of government, which prohibits states from being party to treaties. The decision ignores the settled principle that property rights secured by a prior sovereign are not to be transgressed by a successor sovereign. The decision also disregards two centuries of this Court's jurisprudence establishing that Indian affairs are matters of federal law subject to uniform interpretive principles. The Virginia Supreme Court's holding that pre-Revolutionary treaties are not the supreme law of the land exposes those tribes to the vagaries of state law, something this Court has shielded them from since the early days of the Republic and creates two distinct categories of Indian treaties based on the historical accident of when they were signed. Absent this Court's review, the Virginia Supreme Court's decision calls into question the legal status of all treaties signed by a prior sovereign. It also undermines the legal tradition of interpreting Indian treaties according to a uniform body of federal law that takes into account the special status of Indian tribes.

In order to put in context the Virginia Supreme Court's radical departure from the time-honored practice of enforcing Indian treaties as matters of federal law, historical background on this particular treaty is necessary.

A. Historical and Factual Background

The Mattaponi Indian Tribe ("Mattaponi" or "Tribe") is one of eight American Indian tribes that live in Virginia.[1] These tribes were once a prosperous network of tribes ruled by the Great Chief Powhatan, father of Pocahontas, and controlled most of tidewater Virginia. Helen C. Rountree, *Pocahontas's People: The Powhatan Indians of Virginia Through Four Centuries* 3-4 (1996). Directly at issue in this case is the Treaty at Middle Plantation, a peace treaty between the Powhatan Indians and colonial representatives of King Charles of England, executed almost one-hundred years before the American Revolution and the formation of the United States. The Treaty at Middle Plantation with Tributary Indians After Bacon's Rebellion, May 29, 1677, *reprinted in Early American Indian Documents, 1607-1789, Virginia Treaties, 1607-1722*, at 82-87 (Alden T. Vaughan & W. Stitt Robinson eds., 1983), App. 142 (hereinafter *Treaty at Middle Plantation*).

Beginning in the early days of European settlement, disputes over land and resources between colonists and Indians escalated into acts of war. In response, the British government entered into a series of treaties to quell these disputes and ensure that each of the tribes would have enough land and resources to maintain their way of life.[2]

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[1] The Indian tribes that live in Virginia are the Chickahominy, the Eastern Chickahominy, the Mattaponi, the Monacan Indian Nation, the Nansemond, the Pamunkey, the Rappahannock, and the Upper Mattaponi.

[2] In the Treaty of Peace with Necatowance, signed in 1646, the Indians of Virginia first acknowledged acquiescence to the British Crown and, in return, the colonial governors promised the Indians protection. "That Necotowance do acknowledge to hold his kingdome from the King's Ma'tie of England, and that his successors be appointed or confirmed by the King's Governours from time to time, And on the other side, This

The Treaty at Middle Plantation of 1677 ("Treaty"), at issue here, enumerated the rights and obligations between the tribes and colonists. It is one of the oldest Indian treaties in the United States, and the Commonwealth of Virginia, and its signatory tribes continue to rely on it. 2001 WL 12652200 (Va. Att'y Gen. Op.) (2001), App. 188. In signing the Treaty, the tribes pledged allegiance to the British Crown and, among other things, promised to protect the colonists from acts of war by foreign Indian tribes. *Treaty at Middle Plantation* at 82-84 (Arts. I, VIII, IX), App. 143-46. Notwithstanding the tribes' avowed allegiance to the Crown, the Treaty promised that each Indian King and Queen would retain the power to govern their own people. *Id.* at 85 (Art. XII), App. 147.

The Treaty gave the tribes patents to their lands[3] and guaranteed their freedom from encroachment within three miles of their towns[4] as well as their members' hunting, fishing, and gathering rights.[5] *Id.* at 83-84 (Arts. II, IV, VII,

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Assembly on the behalfe of the colony, doth undertake to protect him or them against any rebels or other enemies whatsoever." Treaty with the Necotowance, Oct. 5, 1646, *reprinted in* William Waller Henning, The Statutes at Large; Being a Collection of all the Laws of Virginia, from the First session of the Legislature, in the year 1619, Vol. I, at 322-326 (1823) [herinafter *Treaty at Necotowance*], App. 152.

[3] "[T]he said *Indian* Kings and Queens and their subjects, shall hold their lands . . . in as free and firm manner as others His Majesties Subjects have and enjoy their Lands." *Treaty at Middle Plantation* at 83 (Art. II), App. 144.

[4] Article IV of the Treaty granted the Tribe freedom from encroachment of its land, providing "[t]hat no *English* shall Seat or Plant nearer than three miles of any *Indian* Town." *Id.* at 83 (Art. IV), App. 144-45.

[5] The Treaty also preserved the tribes' right to fish and gather in their accustomed places, guaranteeing "[t]hat the said *Indians* have and enjoy their wonted conveniences of Oystering, Fishing, and gathering Tuchahoe, Curtenemons, Wild Oats, Rushes, Puckoone, or any thing else

respectively), App. 144-46. The Treaty additionally assured that the colonists would protect the tribes from military incursion, *id.* at 84 (Art. X), App. 147, and prohibited treating Indians as an inferior people,[6] *id.* at 84-85 (Arts. VI, XII, XIV, XV), App. 145-48. The Treaty ensured that "upon any breach or violation," the Indians were entitled to the same legal recourse "as if such hurt or injury had been done to any Englishman." *Id.* at 83-84 (Art. V), App. 145. Additionally, the Treaty prescribed that the tribes would offer an annual tribute of twenty beaver skins to the Governor. *Id.* at *85* (Art. XVI), App. 148.

Throughout the years, the descendants of the original signatory tribes and Virginians have lived in peace, and the sanctity of the Treaty has endured. The Treaty is of great significance to the Virginia tribes, and the Commonwealth has acknowledged its obligations under the Treaty. 1976-77 Op. Va. Att'y Gen. 107 (1977), App. 198. Each Thanksgiving, the tribes make their annual tribute to the Governor of Virginia, which the Governor has always accepted, symbolizing the peaceful relations with the Commonwealth.[7] Indeed, just weeks following the issuance of the decision below, holding that Virginia did not have to abide by the terms of the Treaty, the tribes, including the Mattaponi, made this annual presentation to then-Governor Mark Warner.

(for their natural support) not useful to the *English*." *Id.* at 84 (Art. VII), App. 147.

[6] Specifically, the Treaty ensured that Indians would not be imprisoned absent a warrant upon sufficient cause, that no person may keep an Indian as a servant absent license from the governor, and that no Indians shall be sold as slaves. *Id.* at 84-85. (Arts. VI, XIII, XV), App. 145-48.

[7] The annual tribute of beaver pelts was first established in the Treaty at Necotowance in 1646. *Treaty at Necotowance* at 323 (Act I, Imp.), App. 155-56. Due to a decline in beaver stocks, the tribes now offer the Governor a tribute of game.

The Mattaponi Indian Tribe and its ancestors have lived near the Mattaponi River since the beginning of recorded history. Under the protection of the Treaty, the Tribe has enjoyed a quiet existence in its historic Indian town along the river's banks in southeastern Virginia. A proud, distinct culture, the Mattaponi continue their traditional hunting, fishing, and gathering practices, which form a vital part of the Tribe's cultural identity. Tribal members subsist mainly on fish from the river, primarily the American Shad. A Tribe-operated shad hatchery on reservation land along the banks of the Mattaponi River is the single largest source of income, employment, and job training for tribal members on the reservation and is also a source of great pride for the Tribe.

B. Procedural History

In December 1997, the Virginia State Water Control Board ("Board") granted a Virginia Water Protection Permit ("VWPP") to the City of Newport News authorizing the construction and operation of the King William Reservoir, a large project located within three-miles of the modern Mattaponi Reservation.[8] The project will withdraw enough water from the Mattaponi River to threaten the survival of the river's population of American Shad, and hence the survival of the Tribe's hatchery and its traditional fishing practices. The proposed reservoir project will also flood nearby Cohoke Mill Valley, destroying Indian tribal archaeological and cultural resources.

[8] The other major permits required for this reservoir project, including a Virginia Marine Resources Permit, Va. Code § 28.2-1204, and a federal Clean Water Act section 404 permit, 33 U.S.C. § 1344, have been issued.

On February 13, 1998, the Tribe appealed the Board's issuance of the permit to the Circuit Court of Newport News and asserted, among other claims, that the issuance of the permit violated Articles IV and VII of the Treaty, which guarantee the Tribe's freedom from encroachment and its fishing and gathering rights, respectively. Petition for Appeal of the Mattaponi Indian Tribe, et al., Chancery No. 30001-RW at ¶ 32-40 (February 13, 1998), App. 166-67; First Amended Petition for Appeal, Chancery No. 30001-RW/RC at ¶ 34-49 (June 19, 2002), App. 169-171. The Tribe also asserted that, under the Supremacy Clause, the Commonwealth was bound by the terms of the Treaty. First Amended Petition for Appeal of the Mattaponi Indian Tribe, et al., Chancery No. 30001-RW/RC ¶ 29 (June 19, 2002), App. 169. This challenge has been heard by the Virginia Supreme Court twice. In the first hearing, the court below reversed the trial court's judgment that the Tribe lacked standing to assert that the permit violated the Treaty and held that the Tribe was a sovereign with justiciable interests that could be injured by the proposed reservoir project. *Mattaponi Indian Tribe v. Virginia*, 541 S.E.2d 920, 926 (Va. 2001) (reversing judgment of trial court and remanding to the Court of Appeals with instructions for a trial upon the merits).

Upon remand from the Tribe's first appeal to the Virginia Supreme Court, the Circuit Court of Newport News dismissed the majority of the Tribe's case and found, *inter alia*, that claims arising from the 1677 Treaty arise under Virginia law. Final Order of the Honorable Robert W. Curran in Chancery No. 30001-RW/RC (Aug. 28, 2003), App. 82. The Tribe appealed to the Virginia Court of Appeals, which held that it lacked jurisdiction under Virginia Code Section 17.1-405(1) to hear the Tribe's appeal concerning its Treaty claims and transferred those claims to

the Virginia Supreme Court pursuant to Virginia Code Section 8.01-677.1.[9] *Mattaponi Indian Tribe v. Virginia*, 601 S.E.2d 667, 677 (Va. Ct. App. 2004), App. 64.

In each brief filed during this second round of litigation, the Tribe asserted that its Treaty claims arose under, and were enforceable as a matter of, federal law under the Supremacy Clause. First Amended Petition for Appeal of the Mattaponi Indian Tribe, et al., Chancery No. 30001-RW/RC ¶ 29 (June 19, 2002), App. 169 ("The Commonwealth is bound by the provisions of the 1677 Treaty at Middle Plantation through the Supremacy Clause of the United States Constitution."); Opening Brief of Appellants, Mattaponi Indian Tribe, et al., in the Court of Appeals of Virginia in Record No. 2338-03-1, at 2 (Dec. 30, 2003), App. 173 ("Must the courts of the Commonwealth apply federal law and the Indian canons of construction in adjudicating claims arising under the 1677 Treaty at Middle Plantation?"); Opening Brief of Appellants, Mattaponi Indian Tribe, et al., in the Supreme Court of Virginia in Record No.042826 at 10-11 (April 26, 2005), App. 176 ("The Trial court's conclusion that claims arising from the 1677 Treaty at Middle Plantation arise under Virginia law . . . ignores the U.S. Constitution's mandate that Indian treaties be upheld as the supreme law of the land . . . .").

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[9] When the Court of Appeals transferred the Treaty claims to the Virginia Supreme Court, it also ruled on the Tribe's challenge to the Board's permit under the Virginia Administrative Procedure Act (VAPA), Va. Code § 2.2-4026, and held that the issuance of the VWPP did not violate the State Water Control Law. The Virginia Supreme Court granted the Tribe's petition for appeal of its claim challenging the issuance of the permit under VAPA on March 11, 2005, and consolidated it with the transferred Treaty case. Orders of the Supreme Court of Virginia Granting Petitions for Appeal in Record Nos. 042198, and 042826 (March 11, 2005), App. 40.

C. The Virginia Supreme Court's Decision

In the second appeal to the Supreme Court of Virginia, the Tribe asserted that the circuit court erred by holding that the obligations of the Treaty at Middle Plantation were not enforceable as a matter of federal law under the Supremacy Clause. Opening Brief of Appellants, Mattaponi Indian Tribe, et al., in the Supreme Court of Virginia in Record No. 042826 at 7-8, 10, 16-18 (April 26, 2005). In its opinion issued on November 4, 2005, the Virginia Supreme Court rejected the Tribe's argument that the Treaty is enforceable as a matter of federal law.

> The Supremacy Clause refers only to treaties made under the authority of the United States. The Treaty before us was entered into in 1677, over 100 years before the Constitution was adopted in 1789. Because the United States did not exist in 1677, manifestly, the Treaty could not have been made under the authority of the United States. Further, the United States Congress has not ratified the Treaty pursuant to its authority under Article I, Section 10 of the Constitution . . . . The circuit court, by its holding that Virginia law governs claims asserted under the Treaty, implicitly held that the Treaty is valid and enforceable as Virginia law . . . . Thus, given our holding that the Treaty is not federal law, the circuit court's holding that the Tribe's Treaty claims arise under Virginia law has become the law of the case.

Alliance to Save the Mattaponi v. Virginia, 621 S.E.2d 78, 93-96 (Va. 2005), App. 30-33.[10] In addition, the court below concluded that the Commonwealth of Virginia, its agencies, and officials enjoy sovereign immunity protection from suit under the Treaty as Virginia common law requires an express waiver of immunity, and one did not exist as to the Treaty.

> As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action. Only the General Assembly, acting in its capacity of making social policy, can abrogate the Commonwealth's sovereign immunity. . . . Applying these principles, we conclude that the Commonwealth is immune from suit on the Tribe's separate Treaty claims. The General Assembly has not waived the Commonwealth's immunity from suits of this nature and, in the absence of such an express waiver, the Commonwealth cannot be held liable on those claims.

Id. at 96 (internal citations omitted), App. 34-35. The Virginia Supreme Court affirmed the dismissal of the claims against the Commonwealth and remanded the case for a trial on the merits of the Tribe's treaty claims against the permit applicant, the City of Newport News. *Id.* at 97-98, App. 35-39. Although the Tribe's challenge to the reservoir project will continue against the City, the Virginia Supreme Court's

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[10] When issuing the opinion, the court below consolidated the case brought by the Mattaponi Indian Tribe with the case brought by the environmental group Alliance to Save the Mattaponi. In this opinion, the Virginia Supreme Court also affirmed the Court of Appeals' holding that the Board's permit did not violate VAPA. *Alliance to Save the Mattaponi*, 621 S.E.2d at 89, 91-93, App. 23-28.

decision that the Treaty arises under, and is governed by, Virginia law and its holding on sovereign immunity are final as to Petitioners in all respects. *Id.*

REASONS TO GRANT PETITION

In an unprecedented ruling, a state court has called a treaty a matter of state law, directly contradicting the Constitution, which makes clear there is no place for treaties with states in our system of government. The conversion of a fundamentally federal issue into a matter of state law by the court below is flatly inconsistent with the powers of a national sovereign and the principles of universal succession. The Virginia Supreme Court's decision thwarts the special role that these tribes occupy in our federal system and undermines the uniform body of law this Court has created for interpreting Indian treaties. The decision below opens the door for other state courts to hold that all Indian treaties with prior sovereigns are unenforceable as matters of federal law and to interpret those treaties according to the idiosyncrasies of their own laws.

Here, the application of state law to the Treaty at Middle Plantation triggered Virginia's doctrine of sovereign immunity, rendering the Treaty unenforceable against the Commonwealth and depriving the tribal signatories to one of the oldest treaties in the country of the benevolent protection of two hundred years of a carefully developed, uniform body of federal Indian jurisprudence. The full extent and implications of the Virginia Supreme Court's holding that the Treaty arises under state law, moreover, remain uncertain. Because local governments in Virginia also enjoy a form of sovereign immunity, this holding potentially lets Virginia local governments and their agencies violate the Treaty without fear of liability. In addition, the Virginia General

Assembly may now be able to amend the Treaty unilaterally. If other state courts elect to follow the decision below, other pre-Revolutionary treaties may also be subject to these, and other, uncertainties.

In justifying its departure, the Virginia Supreme Court held that the obligations in the Treaty at Middle Plantation are not enforceable as a matter of federal law simply because it was signed by representatives of the British Crown prior to the American Revolution. As a treaty's interpretation should not hinge on when and where it was signed, this Court should grant certiorari and correct the Virginia Supreme Court's unwarranted departure from the structure of the Constitution and the jurisprudence of this Court with regard to Indian treaties and Indian matters.[11]

A. The Decision Below Contradicts the Constitution's Structure of Government and the Doctrine of Universal Succession

It is settled law that all Indian treaties created *after* ratification of the Constitution are enforceable as federal law under the Supremacy Clause. U.S. Const. art. VI, cl. 2, App. 136; *In re New York Indians*, 72 U.S. 761, 768 (1866) ("[T]he rights of the Indians [in this case] . . . depend . . . upon treaties, which are the supreme law of the land."); *see*

[11] Should this Court grant the recently presented petition for certiorari in *Seneca Nation of Indians v. New York*, 382 F.3d 245, 261 n.17 (2d Cir. 2004), *petition for cert. filed*, 6 U.S.L.W. 22 (U.S. Feb 3, 2006) (No. 05-905), the Court should also grant the instant petition because the question of whether pre-Revolutionary Indian treaties are the supreme law of the land envelopes the question in *Seneca*—whether federal rules of interpretation apply to land claims under a pre-Revolutionary treaty. However, if the Court decides not to grant the *Seneca* petition it can independently grant the petition in this case because the question presented here is not limited to land claims.

also Antoine v. Washington, 420 U.S. 194, 204 (1975) (holding that once specific agreements with an Indian tribe have been ratified by Congress, they become laws "like treaties [and are] the supreme law of the land"). This Court has also determined that all Indian treaties created under the authority of the Articles of Confederation are enforceable as matters of federal law under the Supremacy Clause. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) ("[T]he debates [during the drafting and ratification of the Constitution] as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect."); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties.").

This case presents the question of whether the structure and language of the Constitution tolerates an anomalous category of Indian treaties that are governed solely by state law. The question arises here because the plain language of the Supremacy Clause—"all Treaties made . . . under the authority of the United States shall be the supreme Law of the Land"—does not address treaties made with a prior sovereign. U.S. Const. art. VI, cl. 2, App. 136. However, the Virginia Supreme Court's decision to interpret this clause to exclude pre-Revolutionary treaties and, therefore, to classify the Treaty at Middle Plantation as a "state treaty," directly conflicts with other provisions in the

Constitution regarding treaties. The United States Constitution clearly vests in the federal executive the "Power . . . to make Treaties," U.S. Const. art. II, § 2, cl. 2, App. 135-136, and clearly declares that "[n]o state shall enter into any Treaty, Alliance, or Confederation." U.S. Const. art. I, § 10, cl. 1, App. 135. There is simply no place for a state treaty in this structure of government. *Cf. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (holding that the President's constitutional treaty power "belies any suggestion that Congress [in drafting an act regarding international policy with Burma] intended the President's effective voice to be obscured by state or local action").

Furthermore, the Virginia Supreme Court's decision that pre-Revolutionary treaties must arise under state law is inconsistent with the doctrine of "universal succession." "Universal succession" holds that the United States acquired all treaty rights and obligations of Great Britain relating to the United States' territory. The Framers of the Constitution acknowledged this doctrine. *See e.g.*, The Federalist No. 84 (Alexander Hamilton), App. 187 (citing Grotius' theory that "states neither lose any of their rights, nor are discharged from any of their obligations, by a change in the form of their civil government"). This Court has embraced the doctrine of "universal succession" as well. *See*, *e.g.*, *Worcester*, 31 U.S. (6 Pet.) at 544 (indicating its understanding that when the United States was formed, it acquired all the claims of Great Britain, "both territorial and political"); *accord Holden v. Joy*, 84 U.S. 211, 244 (1872) ("[T]he United States, by virtue of the revolution and the treaty of peace, succeeded to the extent therein provided to all the claims of [Great Britain], both political and territorial."). Thus, although the references to treaties in the Constitution do not specify what became of treaties made prior to the creation of the United States, both the structure of the constitution and the doctrine of "universal

succession" strongly suggest that the United States inherited these treaty obligations, and that they ought to be enforced as matters of federal law under the Supremacy Clause.

B. The Decision Below Departs from Long-Standing Jurisprudence of This Court

Interpreting an Indian treaty as arising under state law, as the court did below, undermines this Court's settled precedent that, under the Supremacy Clause, all treaties—including Indian treaties—are superior to any state constitution, statute, or common law that conflicts with a treaty's provision. *Antoine*, 420 U.S.at 205 (holding that the Supremacy Clause precluded the enforcement of a state law that conflicted with the rights secured by an Indian treaty); *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement."). Here, Virginia's common law was inconsistent with the terms of the Treaty at Middle Plantation because the court's application of the state's common law doctrine of sovereign immunity, far from yielding to the Treaty, had the effect of nullifying its enforcement provision. *See Alliance*, 621 S.E.2d at 96, App. 34-35.

By invoking common law sovereign immunity and thereby releasing the Commonwealth from liability under the Treaty, the Virginia Supreme Court left the Treaty with less force than a common contract. *See* Restatement (Second) of Contracts § 344 ("Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract."). This result directly conflicts with the jurisprudence of this Court, which holds that construing a "treaty as giving the Indians 'no rights but

such as they would have without the treaty' would be 'an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more.'" *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 397 (1968) (internal citations omitted).

Obligations imposed by Indian treaties should be enforced as matters of federal law to ensure their uniform, consistent, and predictable interpretation. By holding that the Treaty arises under state law, the Virginia Supreme Court's decision grants discretion to the Commonwealth's lower courts to ignore the guidance of federal Indian law jurisprudence. An important part of this jurisprudence is the body of law known as the Indian canons of construction. These tools for interpreting treaties and other laws affecting Indians derive from the special place that tribes hold in our federal system; namely, that they are domestic dependent nations and are owed the protections of a ward by its guardian. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The canons prescribe, among other things, that courts construe Indian treaties liberally, resolve ambiguities in favor of tribes, and interpret treaty terms as the Indians would have understood them. *E.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 195-96 (1999); *see also Choctaw Nation v. United States,* 318 U.S. 423, 431-32 (1943) (noting that Indian treaties "are to be construed . . . in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.'") (internal citations omitted).

The decision below absolving the Commonwealth from abiding by the terms of the Treaty is irreconcilable with the protective Indian law principles articulated by this Court. Further, now that the Virginia Supreme Court has declared that the Treaty at Middle Plantation is not enforceable as a

matter of federal law, its lower courts, when interpreting the Treaty's terms, may choose to ignore federal Indian jurisprudence, apply it, or merely create a "similar" standard. *Cf. Seneca Nation of Indians v. New York*, 382 F.3d 245, 261 n.17 (2d Cir. 2004), *petition for cert. filed*, 6 U.S.L.W. 22 (U.S. Feb 3, 2006) (No. 05-905) (noting that "[a]lthough [the federal Indian canons of construction] were articulated specifically with reference to treaties and other legislative enactments by the United States government . . . we see no reason not to apply a *similar* standard to Indian treaties negotiated by Great Britain, a prior sovereign"). This doctrinal ambiguity stands in stark contrast to the uniform and predictable body of federal jurisprudence that would apply, if the Treaty at Middle Plantation, like all other federal Indian treaties, was considered enforceable as the supreme law of the land.

C. The Decision Below Is at Odds with a Long Tradition That Indian Affairs Are Matters of Federal Law

The holding that an Indian treaty is not enforceable as a matter of federal law under the Supremacy Clause additionally contradicts the long tradition of federal primacy in Indian affairs. The origins of central authority over treaty-making and other matters involving Indians began in the mid-eighteenth century. The British Crown sought to end chaotic relations and frequent wars between colonial governments and Indian tribes by asserting exclusive Crown authority over Indian affairs. *See, e.g.*, Royal Proclamation, Oct. 7, 1763, *reprinted in Colonies to Nation 1763-1786: A Documentary History of the American Revolution* 16-18 (Greene ed., 1975), App. 205 (recalling all settlers from Indian lands and forbidding emigration there until further notice, and only

allowing licensed government agents to trade with the Indians); *see also* David Wilkins, *Quit-claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 Okla. City U. L. Rev. 277, 293 (1998) ("With chaos reigning supreme, the British government decided it was time to impose more structure on Indian affairs by centralizing Indian policy in the hands of the Crown.") (hereinafter *Wilkins*). The Crown also retained for itself the exclusive authority to treat with the Indian tribes. *See Wilkins* at 291-92. ("[T]reaties negotiated between Britain and the British colonies with Indian tribes . . . generally centered on the establishment of peace and friendship, alliance, trade, return of captives or exchange of hostages, boundary establishment or revision, or land cessions.").

Following the Revolutionary War, the drafters of the Articles of Confederation also sought to prevent conflict with Indians by vesting Congress with the exclusive power to "enter[] into treaties and alliances" and to "regulat[e] the trade and manag[e] all affairs with the Indians." Articles of Confederation art. IX, App. 137; *Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1154 (2d Cir. 1988) ("We conclude that [the Articles of Confederation] did not give the states any power to make treaties of war and peace with the Indians . . . ."); *see also Wilkins*, at 296 (discussing American policymakers' "fear of war with tribes" in post-Revolutionary America). When drafting the Constitution, the Framers reaffirmed the plenary federal authority in making Treaties with Indians, s*ee* Speech of James Madison at the Federal Convention on Tuesday, June 19 1787, *in 5 Debates on the Adoption of the Federal Constitution, in the Convention Held at Philadelphia in 1787*, at 207-209 (Jonathan Elliot ed., 2d ed. 1968), App. 180 (disapproving of the states' practice of making treaties with Indian tribes during the confederal period and expressing concern over the

states' violations of treaties, "which, if not prevented, must involve us in the calamities of foreign wars"), and vested the exclusive treaty-making power in the federal government, U.S. Const. art. II, § 2, cl. 2, App. 135-136.

The Virginia Supreme Court's holding that the Treaty is governed by state law is a clear departure from this history and legal tradition, which create a special role in Indian affairs for the federal government and limit the states' involvement with the Indian tribes. *See Worcester*, 31 U.S. (6 Pet.) at 560 (holding that tribes "possessed rights [established by treaties] with which no state could interfere," and that "the whole power of regulating the intercourse with [Indians] was vested in the United States"); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes."). A uniform body of federal Indian law is of vital importance to all Indian tribes because this Court has articulated and refined this jurisprudence with an eye towards the history surrounding the federal government's special role in dealing with these "domestic dependent nations." *See, e.g., Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

D. The Court Should Grant This Petition to Resolve the Unsettled Status of Pre-Revolutionary Treaties

The issues surrounding pre-Revolutionary treaties are not unique to the tribes of Virginia and can be expected to recur.[12] Several other courts have addressed treaties and agreements with prior sovereigns. *See, e.g.*, *Seneca Nation of*

[12] Scholars estimate that 175 Crown treaties were negotiated between Britain and the British Colonies and Indian tribes as well as treaties between Indians and other European countries. *See Wilkins*, at 292.

Indians, 382 F.3d at 261 n.17 (2d Cir. 2004) (interpreting the terms of a 1764 Indian treaty with the British Crown) (internal citations omitted); *Delaware Nation v. Pennsylvania*, 2004 WL 2755545 9 (E.D. Pa. 2004) (addressing a 1682 Indian Treaty and a 1737 land purchase act by British colonists). *Cf. Vermont v. Elliot*, 616 A.2d 210 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993) (addressing the status of land grants by the British Crown). These cases involved issues closely related to whether a pre-Revolutionary Indian treaty is enforceable as a matter of federal law, but none has squarely addressed the exact nature of an agreement with a prior sovereign. As each Indian treaty holds particular significance to its signatory tribes, there is nothing to be gained from prolonging review of this issue and allowing pre-Revolutionary treaties to be interpreted absent the uniform principles of federal law.

For the reasons stated above, the Virginia Supreme Court's decision is a significant anomaly in the context of a Constitution that grants exclusive treaty power in the federal government and is at odds with this Court's jurisprudence that honors the obligations incurred by prior sovereigns. The holding below opens the door for other state courts to disregard the tradition of federal primacy in Indian affairs, to ignore this Court's federal Indian law jurisprudence and its protective interpretative canons, and to interpret pre-Revolutionary treaties according to the idiosyncrasies of their own laws, including door-closing devices such as sovereign immunity, as occurred here. Because the question presented in this case is of vital importance to many Indian tribes this Court should grant certiorari and resolve whether pre-Revolutionary Indian treaties are enforceable as federal law under the Supremacy Clause. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (granting certiorari because of the "importance of the . . . decision not

only for the Oneidas, but potentially for many Eastern Indian land claims"); *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128, 141 (1972) (granting certiorari because of "the importance of the issues for [certain] Indians."); *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (granting certiorari "in view of the [lower court] decision's significant impact on relations between the Indian tribes and the government").

CONCLUSION

For the foregoing reasons, the Mattaponi Indian Tribe respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

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