No. 05-1141

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

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE PETITION . . . 2

I. THIS COURT SHOULD RESOLVE THE STATUS OF PRE-REVOLUTIONARY INDIAN TREATIES 5

A. There Is A Need For This Court's Guidance On The Status Of Pre-Revolutionary Indian Treaties 5

B. This Issue Has Continuing Implications For Indian Treaty Rights 8

II. THIS COURT'S PRECEDENT REQUIRES RECOGNITION OF PRE-REVOLUTIONARY INDIAN TREATIES AS TREATIES OF THE UNITED STATES 9

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES:

Catawba Indian Tribe of South Carolina v. State of South Carolina, 718 F.2d 1291 (4th Cir. 1983) 6

Catawba Indian Tribe of South Carolina v. State of South Carolina, 865 F.2d 1444 (4th Cir. 1989) 6, 7

County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) 9

Delaware Nation v. Commonwealth of Pennsylvania, __ F.3d __, 2006 WL 1171859 (3d Cir. May 4, 2006) 6

Golden Hill Paugussett Tribe of Indians v. Weicker, 839 F. Supp. 130 (D. Conn. 1993) 7

Greene v. State of Rhode Island, 398 F.3d 45 (1st Cir. 2005) 6

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) 5

Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974) 4, 12, 15

Oneida Indian Nation of New York v. State of New York, 860 F.2d 1145 (2d Cir. 1988) 10, 13

Cited Authorities

Page

Seneca Nation of Indians v. State of New York, 382 F.3d 245 (2d Cir. 2004) 5, 7

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986) 6

State of New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) 5

State of New Jersey v. Wright, 117 U.S. 648 (1886) 5

Talton v. Mayes, 163 U.S. 376 (1896) 12

Tulee v. State of Washington, 315 U.S. 681 (1942) . . . 9

United States v. Arrieta, 436 F.3d 1246 (10th Cir. 2006) 6

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 12, 13

United States v. Kagama, 118 U.S. 375 (1886) . . 12, 13, 14

United States v. Lara, 541 U.S. 193 (2004) 12

United States v. Sandoval, 231 U.S. 28 (1913) 6

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941) 15

Cited Authorities

Page

United States v. Wheeler, 435 U.S. 313 (1978) 12

United States v. Winans, 198 U.S. 371 (1905) 9

Western Mohegan Tribe and Nation v. Orange County, 395 F.3d 18 (2d Cir. 2004) 6

Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515 (1832) 9, 10, 11, 13

STATE CASES:

Alliance to Save the Mattaponi v. Commonwealth of Virginia, 621 S.E.2d 78 (Va. 2005) 12

Commonwealth of Massachusetts v. Maxim, 695 N.E.2d 212 (Mass. App. Ct. 1998) 5

Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. State of New Jersey, 867 A.2d 1222 (N.J. Sup. 2005) 5, 6, 7

OTHER AUTHORITIES:

1976-77 Op. Va. Att'y Gen. 107 (1977), 1977 WL 27313 4

2001 Op. Va. Att'y Gen. No. 00-076 (Sep. 28, 2001), 2001 WL 1265220 4

Cited Authorities

Page

Brief for Appellee Commonwealth of Virginia, *Alliance to Save the Mattaponi v. Commonwealth*, 621 S.E.2d 78 (Va. 2005) (Rec. No. 042826), 2005 WL 3949510 4

The Federalist No. 3 (John Jay) (Benjamin F. Wright ed., 2004) 11, 14

James A. Henretta et al., *America's History, Volume 1*: *To 1877* (3d ed. 1997) 3

Petition for Writ of Certiorari, *Mattaponi Indian Tribe v. Virginia*, No. 05-1141 (U.S. March 6, 2006) 2

Petition for Writ of Certiorari, *Seneca Nation of Indians v. New York*, No. 05-905 (U.S. Jan. 17, 2006) 7

Treaty of Middle Plantation, May 29, 1677, *reprinted in* Samuel Wiseman, *Samuel Wiseman's Book of Record*: *The Official Account of Bacon's Rebellion in Virginia* (Michael Leroy Oberg ed., 2005) 3

The National Congress of American Indians, as *amicus curiae,* submits this brief in support of the petition of the Mattaponi Indian Tribe for a writ of certiorari.[1]

INTEREST OF THE *AMICUS CURIAE*

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. NCAI is dedicated to protecting the rights and improving the welfare of American Indians. NCAI represents Indian tribes across the country. The tribes vary greatly in their land use, populations and histories. A primary purpose of NCAI is to preserve the integrity and enforceability of Indian treaties.

The Virginia Supreme Court's ruling that federal law does not govern the enforceability and interpretation of pre-Revolutionary Indian treaties, if allowed to stand, would undermine the rights of many Indian tribes. A rule that permits state law to govern pre-Revolutionary treaty enforcement and construction would subject the treaties to the vagaries of state law and potentially render numerous treaties unenforceable under rulings similar to the decision below. As Petitioners correctly point out, a state supreme court conclusion that pre-Revolutionary treaties are not enforceable has far-reaching

1. All parties have consented to the filing of this *amicus curiae* brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States and such consent is reflected in the letters filed with this Court. Pursuant to Rule 37.6, counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

implications, including undermining this Court's precedents requiring solicitude for Indian sovereignty and protection of Indian treaty rights.

SUMMARY OF ARGUMENT

The issue presented to this Court is whether the obligations imposed by a treaty entered into before the American Revolution by a prior sovereign and an Indian nation are enforceable as a matter of federal law under the Supremacy Clause. Although disputes involving pre-Revolutionary treaties continue to arise in a variety of contexts, this Court has never directly addressed the issue. The lack of definitive guidance permitted the Virginia Supreme Court to reach a conclusion that is at odds with well-established principles of federal Indian law. The implications of the ruling below threaten to impair or abrogate treaty rights of many Indian tribes. This Court should grant the Mattaponi's petition in order to clarify the status of pre-Revolutionary treaties that define, to this day, the rights of various Indian tribes.

REASONS FOR GRANTING THE PETITION

Well before the first Europeans arrived in what is now Virginia, the Mattaponi inhabited the land along the Mattaponi River. To assist the original British colonists in Virginia, King Charles II of England achieved the Mattaponi Tribe's alliance and friendship through two treaties—the 1646 Treaty of Peace with Necotowance[2] and the Articles of

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2. *See* Petition for Writ of Certiorari at 4 n.2, *Mattaponi Indian Tribe v. Virginia*, No. 05-1141 (U.S. March 6, 2006) (describing 1646 Treaty of Peace with Necotowance).

Peace of 1677.[3] The treaties guarantee the rights of certain Indian Tribes, including the Mattaponi, to protection and exclusive possession and use of their land. The Articles of Peace of 1677 (the "Peace Treaty") responded specifically to the violence against Indian tribes that resulted from Bacon's Rebellion.[4] The parties to the Peace Treaty intended to resolve the violence between the colonists and the Indian tribes, and to reestablish a mutual and respectful relationship between them.[5]

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3. "Articles of Peace between the most Mighty Prince, and our Dread Soveraigne Lord Charles the Second by the Grace of God King of Great Britaine, France and Ireland, Defender of the Faith, &c. And the several Indian Kings and Queens &c. Assenters and Subscribers hereunto . . . ," commonly known as the Treaty of Middle Plantation, *reprinted in* Samuel Wiseman, *Samuel Wiseman's Book of Record: The Official Account of Bacon's Rebellion in Virginia*, at 135-39 (Michael Leroy Oberg ed., 2005) (hereinafter "*Wiseman's Book of Record*").

4. Bacon's Rebellion has been attributed to the frustrations of poor Virginia farmers who were convinced by Nathaniel Bacon that their economic difficulties could be overcome by taking lands inhabited by the Indian tribes. James A. Henretta et al., *America's History, Volume 1: To 1877, at* 50-51 (3d. ed 1997).

5. Whereas by the mutuall discontents, Complaints, Jealousyes, and fears of English and Indians occasioned by the violent Intrusions of divers English into their Lands, forcing the Indians by way of Revenge to kill the Cattle & Hogs of the English, whereby offence & Injurys being given and done on both sides, the peace of this his Majesties Colony hath been much disturbed & the late unhappy Rebellion by this means (in a great measure) begun & fomented which hath involved this Country into soe much Ruine & Misery; For prevention of which Injuryes and Consequences (as much as possible wee may) for tyme to come; It is hereby Concluded and established that noe English, shall seate or plant nearer than three miles of any Indian Town . . . .

Wiseman's Book of Record, at 135 (Art. 4).

The Commonwealth of Virginia has, without interruption, recognized the existence of and obligations arising from the Peace Treaty for more than 300 years. *See, e.g.*, 1976-77 Op. Va. Att'y Gen. 107, 108 (1977), 1977 WL 27313, at *1-2; 2001 Op. Va. Att'y Gen. No. 00-076 (Sep. 28, 2001), 2001 WL 1265220, at *2-3; *see also* Brief for Appellee Commonwealth of Virginia at 20-21, *Alliance to Save the Mattaponi v. Commonwealth*, 621 S.E.2d 78 (Va. 2005) (Rec. No. 042826), 2005 WL 3949510, at *20-22 (detailing history of Peace Treaty and associated obligations). The Virginia Supreme Court's decision that the Peace Treaty is not enforceable as a matter of federal law under the Supremacy Clause allows the Commonwealth to turn its back on the obligations that it has repeatedly acknowledged for more than three centuries.

In *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 678 (1974), this Court recognized that "[t]here has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians." The Virginia Supreme Court's decision reflects this continuing tension and raises a fundamental issue regarding the enforceability of pre-Revolutionary treaties with Indian nations that continues to have relevance today. The decision below conflicts with well-established principles of federal Indian law articulated by this Court over the last 200 years. This Court should grant the Mattaponi's petition in order to assure the primacy of federal law in determining the treaty rights of Indian nations.[6]

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6. Because the issue raised by the Mattaponi's petition is a matter of significant federal concern, we believe it would be appropriate for the Court to invite the Solicitor General to express the views of the United States on the petition.

I. THIS COURT SHOULD RESOLVE THE STATUS OF PRE-REVOLUTIONARY INDIAN TREATIES

The rights and obligations of numerous Indian tribes on the East Coast are defined in whole or in part by pre-Revolutionary treaties, patents and Parliamentary acts. Despite the continuing relevance of these treaties, the question presented here—whether a pre-Revolutionary Indian treaty is enforceable as a matter of federal law—has never been squarely addressed by this Court.

A. There Is A Need For This Court's Guidance On The Status Of Pre-Revolutionary Indian Treaties

Disputes involving pre-Revolutionary treaties have arisen on many occasions in a variety of contexts in the past, and such disputes continue to arise. The cases addressing these disputes extend from Chief Justice Marshall's day to the present. *See, e.g.*, *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 165 (1812) (discussing 1758 treaty between King Charles and the Delaware Indians); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 593-98 (1823) (discussing pre-Revolutionary treaties); *New Jersey v. Wright*, 117 U.S. 648, 648-51 (1886) (1758 treaty with Delaware Indians); *Seneca Nation of Indians v. New York*, 382 F.3d 245, 259-65 (2d Cir. 2004) (pre-Revolutionary treaties with Seneca Nation), *pet. for cert. filed*, No. 05-905 (U.S. Jan. 17, 2006); *Commonwealth v. Maxim*, 695 N.E.2d 212, 214 (Mass. App. Ct. 1998) (interpreting fishing rights guaranteed by 1727 and 1749 Indian treaties); *Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. State*, 867 A.2d 1222, 1229-30 (N.J. Sup. 2005) (1758 treaty with ancestors of Unalachtigo Band of

the Nanticoke-Lenni Lenape Nation).[7] While these and other cases do not directly address the precise issue here, they reflect the fact that the federal and state courts have long wrestled with disputes involving pre-Revolutionary Indian treaties.[8]

Contrary to the decision of the Virginia Supreme Court below, several of these decisions reflect an assumption that pre-Revolutionary treaties are matters of federal law. In *Unalachtigo*, for example, an Indian tribe sought specific performance under a 1758 treaty that guaranteed the tribe certain reservation lands, under the theory that a subsequent sale of the land was void under the federal Indian Nonintercourse Act. The Appellate Division of the New Jersey Superior Court concluded that the New Jersey state courts lacked subject matter jurisdiction over the claim because Congress was vested with the sole authority to regulate commerce with Indians. 867 A.2d at 1227. While

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7. *See also Delaware Nation v. Pennsylvania*, __ F.3d __, 2006 WL 1171859, at *5 (3d Cir. May 4, 2006) (addressing 1738 and 1741 land patents concerning Delaware Nation Indian tribe); *Greene v. Rhode Island*, 398 F.3d 45, 47 (1st Cir. 2005) (status of 1661 deed to Indian tribe); *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18, 20 (2d Cir. 2004) (claims brought under 1621 peace treaty between tribe and Great Britain); *Catawba Indian Tribe of S.C. v. South Carolina*, 718 F.2d 1291, 1298 (4th Cir. 1983) (claims under 1760 and 1763 treaties), *rev'd*, 476 U.S. 498 (1986), *remanded to* 865 F.2d 1444 (4th Cir. 1989).

8. The courts and Congress also struggled for decades to confirm and clarify the rights of Indians under treaties with the King of Spain in territories acquired from Spain and Mexico. *See, e.g.*, *United States v. Arrieta*, 436 F.3d 1246, 1249-50 (10th Cir. 2006) (discussing history of Pueblo land cases); *see also United States v. Sandoval*, 231 U.S. 28, 38-39, 44-49 (1913) (holding that the Pueblo Indians, who were formally granted title to land by the King of Spain in 1689, possess rights that are entitled to the protections of federal law).

the issue in *Unalachtigo* differs from the issue here, the New Jersey court's recognition of the federal nature of Indian rights under pre-Revolutionary treaties is at odds with the Virginia Supreme Court's view that such rights are entirely a matter of state law.[9]

More recently, in *Seneca Nation*, 382 F.3d at 259-60, the Second Circuit considered the status of a 1764 treaty between the British Crown and the Seneca Nation. The Seneca Nation petitioned this Court for review of the Second Circuit decision, identifying a question closely related to the one presented here:

> Whether treaties made between Indian tribes and the British Crown before the Constitution should be interpreted according to the same rules applicable to treaties between Indian tribes and the United States after the Constitution, such that title to Indian land may not be extinguished without plain and unambiguous expression of intent by the sovereign.

Petition for Writ of Certiorari, at i, *Seneca Nation of Indians v. New York*, No. 05-905 (U.S. Jan. 17, 2006). Implicit in this issue is whether the 1764 Seneca treaty is enforceable as a matter of federal law.

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9. *Compare, e.g., Catawba Indian Tribe of S.C. v. South Carolina*, 865 F.2d 1444, 1456 (4th Cir. 1989) (concluding action arose "under Constitution, laws, or treaties of the United States" where tribe alleged right of occupancy under treaties with the British Crown), *with Golden Hill Paugussett Tribe of Indians v. Weicker*, 839 F. Supp. 130, 136 (D. Conn. 1993) (claims under 1763 British Proclamation prohibiting non-sovereign purchases of Indian lands did not arise "under the Constitution, laws, or treaties of the United States" for purposes of assessing subject matter jurisdiction).

That this issue continues to arise in 2006—over three centuries after these treaties were signed and over two centuries after the Constitution's ratification—is testament to the need for this Court's intervention. State and lower federal courts have struggled and continue to struggle with questions related to the enforceability and interpretation of pre-Revolutionary treaties and agreements. Without definitive guidance from this Court regarding the status of these treaties, lower courts will continue to address these issues on an *ad hoc* basis, creating a risk of conflicting decisions and outcomes inconsistent with well-established principles of federal Indian law.

B. This Issue Has Continuing Implications For Indian Treaty Rights

The Virginia Supreme Court's decision in this case illustrates the need for application of federal Indian law. The Virginia court's conclusion that pre-Revolutionary Indian treaties with the British Crown are matters of state law allows Virginia to effectively nullify terms of the Peace Treaty by invoking its sovereign immunity. If allowed to stand, the decision threatens to support the development of a body of law that abrogates the rights of Indians under treaties that have been observed for centuries.

Even if the states do not decide to abrogate such treaty rights completely, the application of state law could well provide lower levels of protection to Indian rights than would be required under federal law. For example, if an Indian treaty with a prior sovereign were considered to arise under state law, a state may choose not to apply the protective canons of construction that this Court has adopted for construing Indian treaty rights.

See, e.g., *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985) (Indian treaties "should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit") (citations omitted); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Winans*, 198 U.S. 371, 380-81 (1905). Under the Virginia Supreme Court's reasoning, states would be free to adopt different approaches to the application and enforcement of pre-Revolutionary treaties, leading to a potentially conflicting patchwork of rules governing Indian treaty rights.

II. THIS COURT'S PRECEDENT REQUIRES RECOGNITION OF PRE-REVOLUTIONARY INDIAN TREATIES AS TREATIES OF THE UNITED STATES

The decision below is at odds with important principles of federal Indian jurisprudence developed by this Court over the past 200 years.

This Court's early opinions addressing Indian treaty rights make clear that during the infancy of the United States, the federal government was as concerned with maintaining existing peaceable relationships with Indian tribes that had been established by prior sovereigns as it was with creating its own new peaceful relationships. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832) ("congress resolved 'that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies'"). When assessed against this backdrop, this Court's rulings allow only the conclusion that pre-Revolutionary treaties must be matters of federal law binding on the states under the Supremacy Clause.

Chief Justice Marshall proclaimed in 1832 that treaties of prior sovereigns with Indian tribes are matters of federal law. In *Worcester*, the State of Georgia attempted to punish a non-Indian for violating a state law that prohibited non-Indians from residing on Indian land, even with the Indian tribe's permission. *Id.* at 537. In holding that such a state law was repugnant to treaties with the Cherokees and thus to the federal Constitution, the Court reviewed the history of the relationship between Great Britain and the Indian nations, as well as the succession of the United States to the claims of Great Britain. Chief Justice Marshall explained that when the states were colonies, "all intercourse" with Indian tribes resided in the Crown. *Id.* at 557-58. During the Revolutionary War, although the states were "not perfectly organized," Congress nevertheless "assumed the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States." *Id*. at 558. Although the Articles of Confederation resulted in some confusion regarding the extent of the states' powers over relations with the Indian nations,[10] the Constitution clearly vested that power exclusively in the federal government. Chief Justice Marshall concluded that "[t]he 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." *Id*. at 559. The clear implication of the Court's opinion,

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10. Even during the confederal period, however, there was no dispute that only the federal government had power to treat with the Indian nations over matters of war and peace. *See Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1153-54 (2d Cir. 1988). The Mattaponi Peace Treaty, of course, addresses issues of war and peace.

therefore, was that pre-Revolutionary treaties between Great Britain and Indian nations became treaties of the United States for purposes of the Supremacy Clause.[11]

In reaching the contrary conclusion, the Virginia Supreme Court simply discounted as *dicta* this Court's discussion in *Worcester* of the status of pre-Revolutionary treaties, without addressing the important federal principles at the heart of that

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11. See also *The Federalist No. 3* (John Jay), at 98-99 (Benjamin F. Wright ed., 2004):

> It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies. . . . [U]nder the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner, — whereas adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent; and that, as well from the variety of independent courts and judges appointed by different and independent governments, as from the different local laws and interests which may affect and influence them. The wisdom of the convention, in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government, cannot be too much commended.

foundational case. *See Alliance to Save the Mattaponi v. Commonwealth*, 621 S.E.2d 78, 95 (Va. 2005).[12]

In fact, the principles espoused by Chief Justice Marshall have been reiterated by this Court on more than one occasion. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-17 (1936); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (power over Indian tribes must exist in the federal government, "because it never has existed anywhere else"); *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 678 (1974) ("federal law and federal courts must be deemed the controlling considerations in dealing with the Indians").

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12. The Virginia court also concluded that "[b]ecause the Tribe has not been granted federal recognition, and has not shown that it otherwise has obtained protective legislation from the federal government based on an acknowledged guardian-ward relationship, we discern no basis for concluding that the Treaty is federal law based on such a relationship." *Alliance to Save the Mattaponi*, 621 S.E.2d at 95. This conclusion, however, is based on faulty logic. The Mattaponi's lack of formal recognition by the federal government is an issue separate and apart from whether its pre-Revolutionary treaty must be enforced as a matter of federal law under the Supremacy Clause. The federal recognition process does not *create* distinct Indian tribal communities; rather, a tribe that has federal recognition has simply had its status as a separate political body confirmed, and is entitled to various federal benefits as a result. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (governmental powers of Indian Tribes derive from "inherent tribal sovereignty" not delegation from federal government); *United States v. Lara*, 541 U.S. 193, 199 (2004) (same); *Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("[P]owers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution." They are not "federal powers arising from and created by the Constitution of the United States.").

In *Curtiss-Wright*, for example, this Court held that certain "powers of external sovereignty," such as the "powers to declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties" were vested only in the federal government. 299 U.S. at 318. The Court explained that "[a]s a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." *Id.* at 316. The Court went so far as to state that such powers would reside in the federal government as "necessary concomitants of nationality" even "if they had never been mentioned in the Constitution." *Id.* at 318.

To be sure, *Curtiss-Wright* did not specifically address Indian treaties. The teaching of *Curtiss-Wright*, however, should be read in conjunction with the historical context of pre-Revolutionary Indian treaties. During the Colonial period, and at the time of the Revolution, treaties with Indian nations were considered of equal status with treaties with other nations—*i.e.*, were very much matters of "external sovereignty." *See, e.g.*, *Worcester*, 31 U.S. at 592-93; *Kagama*, 118 U.S. at 384; *see also Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1153-54 (2d Cir. 1988) (power over war and peace treaties must reside with the federal government).

Seen in this context—*i.e.*, that treaties with Indian nations were considered to be treaties with separate sovereigns—it is clear that the power over relations with Indian nations under treaties entered into both before and after the Revolution must reside with the federal government. A necessary corollary of this conclusion is that the

interpretation, effect and enforceability of such treaties are a matter of federal law.

This conclusion is consistent with the view of the drafters of the Constitution that because the federal government was less likely to engage in hostilities with the Indian tribes, the federal government was better suited than the individual states to handle relations with Indians:

> Not a single Indian war has yet been occasioned by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants. . . . But not only fewer just causes of war will be given by the national government, but it will also be more in their power to accommodate and settle them amicably. They will be more temperate and cool, and in that respect, as well as in others, will be more in capacity to act advisedly than the offending State.

The Federalist No. 3 (John Jay), at 99-100 (Benjamin F. Wright ed., 2004); *see Kagama*, 118 U.S. at 384 ("[Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

Indeed, even in cases where the thirteen former colonies had so-called "pre-emptive" rights to Indian land within their chartered limits, many cases addressing Indian claims under

treaties have made clear that any rights the states had are nonetheless subject to the central federal power for dealings with Indian nations. *See, e.g.*, *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 667 (1974) (recognizing doctrine that "federal law, treaties, and statutes protecting Indian occupancy and . . . its termination was exclusively the province of the federal law"); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) ("The power of Congress in that regard is supreme.").

These principles, developed in the context of Indian land acquisition and land grant cases, hold true no matter what the nature of the Indian right at issue. Accordingly, although this is neither a land grant nor land acquisition case, the principles set forth in such cases are equally applicable here, where the Mattaponi are suing for enforcement of express treaty rights protecting them from encroachment on the use and enjoyment of their land and from impairment of their fishing rights. It surely would be anomalous if, as the court below held, protection of such Indian rights under pre-Revolutionary treaties were held to be matters of state law, free from the pervasive and critical role of federal law envisioned by the Founders.

The implications of the decision below—and the threat it creates to the treaty rights of those Indian nations whose rights still flow from pre-Revolutionary treaties—call for this Court to resolve, even at this late date, this important question.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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