
**In The
Supreme Court of the United States**

THE MATTAPONI INDIAN TRIBE and
CARL T. LONE EAGLE CUSTALOW,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA, VIRGINIA DEPARTMENT
OF ENVIRONMENTAL QUALITY, acting on behalf of the
STATE WATER CONTROL BOARD, DAVID K. PAYLOR in his
official capacity as Director of the Department of Environmental
Quality and Executive Director of the State Water Control Board,
and the CITY OF NEWPORT NEWS, VIRGINIA,

Respondents.

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

**BRIEF OF THE STATE RESPONDENTS IN OPPOSITION
TO THE PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Is a pre-Independence agreement between the British Crown and a group of Native Americans that has never been ratified by the United States considered a treaty between the United States and an Indian Tribe?

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BRIEF IN OPPOSITION

The Attorney General of the Commonwealth of Virginia, Robert F. McDonnell, on behalf of the Commonwealth of Virginia, the Virginia Department of Environmental Quality, acting on behalf of the State Water Control Board, and David K. Paylor,¹ in his official capacity as Director of the Department of Environmental Quality and Executive Director of the State Water Control Board (collectively “Virginia”),² responds to the Petition for a Writ of Certiorari.³



INTRODUCTION

On May 29, 1677, representatives of the British Crown and Native Americans living in the eastern portion of the British Colony of Virginia entered into the *1677 Treaty at Middle Plantation with Tributary Indians After Bacon’s Rebellion* (“1677 Agreement”).⁴ *Early American Indian Documents: Treaties and Laws, 1607-1789* 83 (Alden T. Vaughan & W. Stitt Robinson, eds. 1983). Although many pre-Independence agreements between the British Crown and Native Americans were explicitly ratified by the United States under the Articles of Confederation and/or the Constitution, the 1677 Agreement was never ratified by the United States. Thus, the 1677

¹ During the proceedings in the Supreme Court of Virginia, Robert G. Burnley was the Director. Mr. Paylor succeeded Mr. Burnley in January 2006.

² The remaining respondent, the City of Newport News, Virginia, is not a party to this Brief in Opposition. The City either will waive its Response or will file its own Response to the Petition.

³ On March 13, 2006, this Court extended the time for such filing to and including May 10, 2006.

Agreement is *not* a treaty between the United States and an Indian Tribe. See *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (“the adoption of the treaty provision in Article VI, [§ 2] make[s] 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 . . . would remain in effect.”) At most, the 1677 Agreement is a contract between Virginia and a group of people living in Virginia.

Nevertheless, the Petitioners, the Mattaponi Indian Tribe and its Assistant Chief (collectively “the Mattaponi”), claim that they are descendents of those Native Americans who entered into the 1677 Agreement over 300 years ago and claim that the 1677 Agreement should be treated as a treaty having the force and effect of federal law.⁴ Although

⁴ Because the determination of whether the Mattaponi are, in fact, the descendents of the Native Americans who entered into the 1677 Agreement is an issue for the National Government, Virginia takes no position on the issue. However, Virginia does recognize the Mattaponi as an Indian Tribe for purposes of State law. See *Virginia Code* § 2.2-2629(C) (recognition by Virginia Council on Indians). By virtue of State recognition, Virginia confers certain benefits upon the Mattaponi by statute. See, e.g., *Virginia Code* § 2.2-2629 (representation in State advisory council to Governor); *Virginia Code* § 29.1-301(I) (exemption from license requirement to hunt, trap or fish); *Virginia Code* § 29.1-521(B) (exemption from permit requirement/restrictions on hunting, trapping, possessing, selling wild birds and animals); *Virginia Code* § 58.1-2403(4) (exemption from motor vehicle sales and use tax). Virginia also observes a guardian-ward relationship with the Mattaponi, pursuant to which it established a State reservation (the “State Reservation”), title to which Virginia holds in trust for the beneficial use and occupancy of the Mattaponi. See *1976-77 Op. Virginia Att’y Gen.* 107, 107-09; *1917-18 Op. Virginia Att’y Gen.* 160. The State Reservation comprises approximately 150 acres situated along the Mattaponi River (the “River”) in King William County, the use of which the Governor and Grand Assembly first authorized as early as 1894. See *1893-94 Virginia Acts* at 973-74. At present, of the 450 members of

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the National Government has *never* declared that the Mattaponi are a federally recognized Indian Tribe,⁵ the Mattaponi wish for this Court effectively to give them that status.⁶ More significantly, although the 1677 Agreement has *never* been ratified by the United States, the Mattaponi ask this Court to determine that, as a matter of constitutional law, the 1677 Agreement is no different than a treaty that has been negotiated by the President and ratified by the Senate. While this Court may see a need to *interpret* a pre-Independence agreement that has been ratified by the Senate, between the British Crown and a *federally recognized* Indian Tribe, *see Seneca Tribe v. New York*, 382 F.3d 245 (2nd Cir. 2004), *petition for cert. filed*, No. 05-905 (Feb. 3, 2006), there is no need for this Court to consider the *status* of a pre-Independence agreement involving a group of Native Americans that *has never been recognized* by the National Government. Moreover, even if this Court were inclined to determine the status of an agreement, which has never been ratified by the Senate, involving a non-federally recognized Indian Tribe, the issue of the status of the 1677 Agreement is of no

the Mattaponi, 65 (approximately 14%) currently reside on the Reservation. Documents that inform the nature of the interest that the Mattaponi enjoy in the State Reservation date back to the 1600's.

⁵ Accordingly, the Mattaponi do not receive the protection, services, benefits, immunities and privileges accorded federally-acknowledged tribes pursuant to federal law. *See* 25 C.F.R. § 83.2 (Federal acknowledgement "is a prerequisite to the protection, services and benefits . . . available to Indian tribes by virtue of their status as tribes.").

⁶ The National Government has never recognized *any* Virginia Indian tribe. Moreover, Congress has declined to enact measures to extend recognition by legislation. *See* H.R. 5073, 107th Cong., 2nd Sess. (2001).

consequence to the underlying case. Accordingly, certiorari should be denied.



STATEMENT OF THE CASE

Despite the Petition's focus on interesting points of history, international law, and Virginia's surrender of sovereign authority over Indian affairs to the National Government, the reality of this case is far more mundane. Quite simply, the Mattaponi – like numerous other environmental groups – object to Virginia authorizing the construction of a reservoir. Unlike the environmental groups, who must confine their challenge to state and federal environmental laws, the Mattaponi have asserted an additional ground for challenging the project – the 1677 Agreement.

1. Background of the Litigation

This litigation concerns Virginia's decision to issue a Water Protection Permit (the "Permit") authorizing construction of a reservoir (the "King William Reservoir") to provide for the present and future water supply needs of residents of the Virginia Peninsula.⁷ *App.* at 142-51,

⁷ Studies have concluded that an impoundment of freshwater is central to an effective plan to satisfy the Virginia Peninsula's water needs. Water generally is abundant in Southeastern Virginia, but availability of freshwater resources fluctuates substantially both seasonally and in times of drought. Accordingly, the Regional Study Group proposed creating the King William Reservoir – a 1526 acre freshwater impoundment – by constructing a dam across Cohoke Creek, a tributary of the Pamunkey River located between the Pamunkey and Mattaponi Rivers in King William County. The Reservoir will affect 437 acres of wetlands and open waters at the site of the impoundment. It

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169-71. Construction of the King William Reservoir follows nearly twenty years of study by a Regional Raw Water Study Group (the “Regional Study Group”) created by local governments⁸ on the Virginia Peninsula.⁹

a. Virginia Law

Under *Virginia Code* §§ 62.1-44.2 through 44.34:28 (the “State Water Control Law”), the State Water Control Board (the “Board”)¹⁰ is required to issue a Water Protection

will also require construction of a pump station (the “Pump Station”) located on the River at Scotland Landing. The Pump Station skims from the River during times of high rainfall will constitute the primary water supply for the Reservoir. When high flows allow, the Project will withdraw a *maximum* of 75 million gallons per day (“mgd”) from the River. Because of restrictions imposed by the State, however, the *average* rate of withdrawal will total less than 20 mgd. The Pump Station will withdraw the required water 24 miles upstream from West Point, Virginia and pump it to the Reservoir through a 1.5 mile pipeline. Newport News will then pump water out of the Reservoir as needed and transmit it through an 11.7-mile pipeline to the Diascund Creek Reservoir in New Kent County for distribution.

⁸ Regional Study Group member-jurisdictions currently serve more than 400,000 people, a number expected to exceed 600,000 by the year 2040.

⁹ Numerous studies project that, by 2040, Virginia Peninsula communities would experience a total water supply deficit of nearly 39.8 mgd. In response, the Regional Study Group identified a combination of measures through which to satisfy projected area water needs. These include development of fresh groundwater resources, desalinization of brackish groundwater and imposition of conservation and use restrictions. *App.* at 3. The proposed King William Reservoir would supply the remaining 23.2 mgd of the 39.8 mgd total deficit. *Id.* After considering a number of other options, the Regional Study Group selected the King William Reservoir site both for practical and environmental reasons. *App.* at 3.

¹⁰ The Board is a citizen board that administers the State Water Control Law and implements policies and promulgates regulations

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Permit for activities involving dredging or filling of wetlands, requiring withdrawals of water from surface watercourses, causing permanent flooding or impounding, or that cause significant alteration or degradation of existing wetlands acreage or function. *Virginia Code* § 62.1-44.15:5(D). In deciding whether to issue a permit, Virginia's State Policy as to Waters binds the Board. Chapter 2 of Title 62.1 of the State Water Control Law enumerates Virginia's general policy regarding the "regulation, control, development and use of waters" in Virginia. *Virginia Code* § 62.1-11(B).¹¹ Moreover, the Board *shall*

pursuant thereto. See *Virginia Code* §§ 62.1-44.4 through 62.1-44.15. The Department of Environmental Quality ("DEQ") serves as technical staff to the Board and its Director serves as Executive Director of the Board. See *Virginia Code* §§ 10.1-1185, 10.1-1186.

¹¹ Specifically, the Virginia's State Policy as to Waters recognizes that "the waste or unreasonable use . . . of water should be prevented; and the conservation of such water is to be exercised." It also states that "[t]he changing wants and needs of the people of the Commonwealth . . . require the water resources of the Commonwealth to be put to uses beneficial to the public to the extent of which they are reasonably capable." *Virginia Code* § 62.1-11(C). Likewise, "it is the intent of the Commonwealth, to the extent practicable, to maintain flow conditions to protect instream beneficial uses *and* public water supplies for human consumption." *Virginia Code* § 62.1-11(F) (emphasis added). To that end, the State Water Control Law defines the beneficial uses of State waters:

"Beneficial use" means both instream and off stream uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. Off stream beneficial uses include, but are not limited to, domestic (including public water supply), agricultural, electric power generation, commercial and industrial uses.

Virginia Code § 62.1-10(b). The statute also specifies the priority assigned competing uses, stating expressly that "[p]ublic water supply uses for human consumption shall be considered the highest priority." *Virginia Code* § 62.1-10(b) (emphasis added); see also *Virginia Code*

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issue a Virginia Water Protection Permit “if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses.” *Virginia Code* § 62.1-44.15:5. The Board may also issue a permit containing conditions to protect instream uses. *Id.* In determining whether a permit should be issued and what conditions may be necessary, the Board must consult with other State agencies and “such consultations *shall* include the need for *balancing* instream uses with off-stream uses.” *Id.* subsection (F) (emphasis added).

b. Issuance of the Permit

In July 1993, the City of Newport News submitted a joint permit application to the United States Army Corps of Engineers and the Board for permits to construct the Reservoir pursuant to 33 U.S.C. §§ 1251 through 3104 (the “Clean Water Act”) and the State Water Control Law.¹² In

§ 62.1-44.15:5(C). In formulating guidance for the development of Virginia’s water resources for public water supply and other purposes, furthermore, the Board shall, among other things, take into consideration that:

[a]dequate and safe supplies should be preserved and protected for human consumption, while conserving maximum supplies for other beneficial uses. *When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses.*

Virginia Code § 62.1-44.36 (emphasis added).

¹² Processing Newport News’s application for a Virginia Water Protection permit also involved preparation of a draft Environmental Impact Statement, *see* 42 U.S.C. §§ 4332 through 4370 (the National Environmental Policy Act), a supplement draft Environmental Impact Statement and a Final Environmental Impact Statement.

February 1997, the Board issued a draft Virginia Water Protection Permit for the Reservoir after receiving the Corps' Final Environmental Impact Statement.¹³ At its December 16, 1997 meeting, the Board issued a Final Permit, but imposed additional restrictions upon the construction/operation of the King William Reservoir.¹⁴

2. Administrative Appeal to the Trial Court

Pursuant to *Virginia Code* §§ 2.2-4000 through 2.2-4029 and § 62.1-44.29, the Mattaponi and others appealed the Board's decision to issue the Permit to the trial court – the Circuit Court for the City of Newport News. In their petitions for appeal, the Mattaponi and others argued that the Board failed to consider evidence concerning the Reservoir's impact on cultural and aesthetic instream beneficial uses, the reasonableness of the Permit's withdrawal limits, the impact of wetlands losses and salinity

¹³ By regulation, issuance of a Draft Permit ordinarily signifies that the Board has tentatively decided to issue a permit. 9 *Virginia Administrative Code* § 25-210-120A. Nevertheless, the Board twice delayed a final decision on the proposed Reservoir to await further studies.

¹⁴ Among these was a minimum instream flow ("MIF") condition that prohibits withdrawals from a river when its rate of flow is below specified levels. The Board also imposed more stringent minimum Reservoir release conditions than those included in the earlier draft permit. The initial draft permit required that a minimum 2 mgd be released from the Reservoir back to Cohoke Creek (approximately one-third of the Creek's estimated average daily stream flow). This was reduced to 1 mgd during severe reservoir draw downs. (Condition B4). Moreover, the Board demanded an increase in the minimum releases from the Reservoir to a level equal to the median monthly flow of Cohoke Creek at the dam site. That limit would apply, furthermore, even when severe drought causes water supply emergency conditions. Subject to these additional restrictions, the Board approved the final Permit. *App.* at 4.

intrusions on River water quality, and the effect of the Reservoir on other instream beneficial uses. *App.* at 6. More significantly, the Mattaponi asserted that issuance of the Permit violated the 1677 Agreement.¹⁵ *Id.*

Virginia and Newport News demurred (moved to dismiss) the Mattaponi's administrative appeal for lack of standing. The Circuit Court agreed and dismissed all petitions. *App.* at 131-34.

3. Court of Appeals of Virginia

The Mattaponi and others then appealed to Virginia's intermediate appellate court – the Court of Appeals of Virginia – which affirmed the trial court's dismissal for lack of standing. *App.* at 123-30.

4. Supreme Court of Virginia

The Mattaponi and others then appealed that decision to the Supreme Court of Virginia, which reversed and held that the Mattaponi and others did have standing. *App.* at 106-20. Accordingly, the matter was remanded to the trial court for further proceedings.

5. Proceedings on Remand to the Trial Court

On remand, the Mattaponi amended their petition to argue that issuance of the Permit violated Articles IV and

¹⁵ Specifically, the Mattaponi argued that, “[t]he Commonwealth [of Virginia] stands as a successor-in-interest to the Crown” under the 1677 Agreement. The Mattaponi have long espoused the view, both before and in earlier stages of this litigation, that the 1677 Agreement is Virginia law.

VII of the 1677 Agreement.¹⁶ More significantly, the Mattaponi argued for the first time that the United States stood as successor-in-interest to the British Crown and, therefore, that the 1677 Agreement was a treaty between the United States and an Indian Tribe.

While holding that the Board's decision to issue the Permit was based on substantial support in the evidence and complied with applicable state and federal law, the trial court also rejected the Mattaponi's novel argument. *App.* at 9. Specifically, it held that the 1677 Agreement claims were governed by Virginia State law and that it lacked jurisdiction to determine those claims under the terms of the 1677 Agreement. *App.* at 82-98.

6. Court of Appeals of Virginia

On appeal, the Court of Appeals of Virginia affirmed the trial court's rulings regarding the propriety of the

¹⁶ Article IV of the 1677 Agreement provides that:

For prevention of . . . Injuries and evil consequences . . . for time to come; It is hereby Concluded and Established, That no *English* shall Seat or Plant nearer then [sic] Three miles of any *Indian* Town; and whosoever hath made, or shall make any In croachment upon their Lands shall be removed from thence. . . .

4 *Early American Indian Documents, supra*, at 83. Article VII of the 1677 Agreement provides:

That the said *Indians* have and enjoy their wonted conveniences of Oystering, Fishing, and gathering Tuchahoe, Curtenemons, Wild Oats, Rushes, Puckoone, or any thing else (for their natural support) not useful to the *English*, . . . Always provided they first repair to some Publick Magistrate . . . who shall not refuse them a Certificate. . . .

Id. at 84.

Board's action. *App.* at 65-81. However, the intermediate appellate court also found that it lacked jurisdiction to decide the Mattaponi's claims based on the 1677 Agreement. *App.* at 9. Accordingly, pursuant to *Virginia Code* § 8.01-677.1, the intermediate appellate court transferred the claims based on the 1677 Agreement to the Supreme Court of Virginia. *App.* at 61-65.

7. The Virginia Supreme Court Decision

Like the Court of Appeals, the Virginia Supreme Court ruled that the Board's decision to issue the Permit complied with state law.¹⁷ *App.* at 10-28.

¹⁷ Contrary to the Mattaponi's contention that the Board erred by failing to consider the 1677 Agreement in deciding whether to issue the Permit, the Virginia Supreme Court noted that a Virginia Water Protection Permit, like other regulatory permits, does not affect private property rights or otherwise adjudicate the merits of opposing claims of right. *App.* at 23. Such a permit can only determine the rights of the applicant *vis-à-vis* the State and the public. *Id.* A Virginia Water Protection Permit constitutes only a certification that the applicant's proposed activity "is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses" as such beneficial uses are statutorily defined. *App.* at 23. Likewise, the State Water Control Law does not otherwise authorize the Board to determine any other private rights of citizens. Rather, in hearing the appeal of a Virginia Water Protection Permit, the Board's function is to evaluate the evidence, make factual determinations, and ascertain solely whether the Permit complies with the State Water Control Law's enumerated requirements. *App.* at 24. Thus, the Supreme Court of Virginia ruled:

[a]ccordingly, because the [State] Water Control Law does not and could not authorize the Board to adjudicate any private rights, we hold that the Court of Appeals did not err in concluding that the Board lacked authority to consider the [Mattaponi's] 1677 Treaty claims.

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More significantly for purposes of this Petition, Virginia's highest court held that Virginia law – not federal law – governed the 1677 Agreement. *App.* at 29-33. First, the lower court concluded that the 1677 Agreement was not a treaty between the United States and an Indian Tribe. *App.* at 29-30. As *Reid* makes clear, an agreement executed prior to the adoption of the Articles of Confederation is not a treaty of the United States. *App.* at 30. Second, the Supreme Court of Virginia found that the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, did not give the 1677 Agreement the force and effect of federal law. *App.* at 30-31. Unlike other groups of Native Americans, the Mattaponi have never been the subject of specific legislation enacted by Congress in the furtherance of its “guardian-ward” relationship with Indian Tribes. *App.* at 31. Third, the Supreme Court of Virginia concluded that this Court's decisions do not mandate the 1677 Agreement to be considered federal law. *App.* at 32-33. Although there is language in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), suggesting that the National Government succeeded to all treaty claims of the British Crown, the lower court found that these pronouncements were mere *dicta*.

App. at 24. Insofar as the Mattaponi argued that the Board failed to consider the cultural and aesthetic value of certain archeological sites which would be flooded by the Reservoir, see *Virginia Code* § 62.1-44.15:5(C), Virginia's highest court found that such sites were not beneficial uses of State waters within the contemplation of the statute (although governed otherwise by State historic preservation laws). *App.* at 24-25. Moreover, the court found that the Board had considered the archeological sites in weighing the protection of the sites against preservation of instream flows and satisfaction of area water needs. *App.* at 25. Given the competing interests involved, the court ruled that the Board was within its discretion to elect to protect instream flows, which decision was based on substantial evidence in the agency record. *App.* at 25.

App. at 32. Moreover, succeeding to the *claims* of the Crown does not necessarily mean succeeding to all of its *obligations*.

Having concluded that the 1677 Agreement did not have the force and effect of federal law, Virginia's highest court turned to the issue of whether the Mattaponi's claims based on the 1677 Agreement were barred by sovereign immunity. Engaging in a straightforward application of settled principles of Virginia law, the lower court concluded that sovereign immunity barred the claims against Virginia, but that the claims could be pursued against the City of Newport News. *App.* at 33-36. As to the claims against the City of Newport News, the Supreme Court of Virginia concluded that the trial court did have jurisdiction to consider those claims and, thus, remanded the matter to the trial court. *App.* at 39.

This Petition for a Writ of Certiorari, which is limited to the sole issue of whether the 1677 Agreement has the force and effect of federal law, followed.



REASONS FOR DENYING THE WRIT

The Court should deny certiorari for two reasons. First, this Petition is a poor vehicle for resolving the question presented. Initially, if the 1677 Agreement is a treaty with the United States, it is uncertain that the Mattaponi can enforce it. Additionally, resolution of the status of the 1677 Agreement does not affect the underlying litigation.

Second, the Mattaponi's position – that all pre-Independence agreements between Native Americans and

the British Crown automatically became treaties between the United States and Indian Tribes – is contrary to both federal law and history. Federal law provides that unless an agreement with an Indian Tribe was explicitly ratified by the Senate prior to March 3, 1871, it cannot be a treaty between the United States and an Indian Tribe. Moreover, the Mattaponi’s notion that obligations of the British Crown were transferred to the United States upon independence from the British Crown ignores the historical reality that Virginia and the other former Colonies existed as independent sovereign nations from 1776 to 1788.

I. THIS PETITION IS A POOR VEHICLE FOR RESOLVING THE QUESTION.

Since the lands that became the United States were once colonies of Great Britain, France, Spain, the Netherlands, and Russia, there may be a number of agreements between Native Americans and European nations that have never been ratified by the United States. *See Pet.* at 19 & 19 n.12. If a *federally recognized* Indian Tribe were to assert a claim based on these *unratified* agreements, then there might be a need for this Court to clarify that *unratified* agreements are not treaties. However, this particular Petition, which involves a group of Native Americans that has never been recognized by the National Government, is a poor vehicle for resolving the question. This is so for two reasons. First, if the 1677 Agreement is a treaty with the United States, it is uncertain that the Mattaponi can enforce it. Second, resolution of the status of the 1677 Agreement will have no impact on the underlying litigation.

A. If the 1677 Agreement Is a Treaty With the United States, It Is Uncertain That the Mattaponi Can Enforce It.

Even if the 1677 Agreement constitutes a treaty between the United States and Indian Tribes, it is uncertain that the Mattaponi can enforce it. In order to enforce it, the Mattaponi must establish that they are the successors to the Native Americans who entered into the 1677 Agreement.¹⁸ See *United States v. Washington*, 641 F.2d 1368, 1371 (1981). Moreover, the Mattaponi must show that the National Government recognizes them as an Indian Tribe. That is, it must demonstrate that the National Government regards them as a sovereign capable of entering into a treaty with the United States.

It is uncertain that the Mattaponi can meet these dual burdens of succession and recognition. While Virginia has recognized the Mattaponi as an Indian Tribe for purposes of Virginia law and while Virginia regards the Mattaponi as the successor to the Native Americans who executed the 1677 Agreement, the National Government has *never recognized* the Mattaponi for any purposes. Although the issue of succession is a factual one, *Washington*, 641 F.3d at 1371, the issue of recognition by the National Government is a political question not subject to judicial review.¹⁹

¹⁸ In order to prove that they are the successors to the Native Americans that signed the 1677 Agreement, the current Mattaponi must demonstrate that: (1) they are descended from the Native Americans who entered into the 1677 Agreement; and (2) they have maintained an organizational tribal structure from the time of execution until the present. See *Washington*, 641 F.3d at 1371.

¹⁹ Of course, this Court has recognized that judicial review of congressional and executive actions regarding *federally recognized*
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See Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”). If this Court is to resolve the status of pre-Independence agreements between Native Americans and the British Crown, it should do so in a case where there is no doubt that the Indian Tribe is both federally recognized and the successor to the Indian Tribe that executed the treaty.

B. Resolution of the Status of the 1677 Agreement Will Have No Impact on the Underlying Litigation.

Quite simply, the resolution of the status of the 1677 Agreement will have no impact on the underlying litigation. This is so for three reasons.

First, regardless of whether the 1677 Agreement has the force and effect of federal law, the Mattaponi’s claims against Virginia based on the 1677 Agreement are barred

Indian Tribes is appropriate in some circumstances. *See United States v. Sioux Nation*, 448 U.S. 371, 413 n.28 (1980); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84-85 (1977). However, this Court has never ruled that the National Government’s decisions regarding whether to extend federal recognition to an Indian Tribe is subject to judicial review. Judicial review of a determination as to which group is and is not an Indian Tribe is analogous to judicial review of the President’s decision as to which government is the legitimate government of a foreign state or to judicial review as to who is the legitimate governor of a State. *See Luther v. Borden*, 48 U.S. (7 How.) 1, 42-43 (1849) (declining to determine which faction was the legitimate government of Rhode Island).

by sovereign immunity.²⁰ See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991) (The sovereign immunity confirmed by the Eleventh Amendment, U.S. Const. amend. XI, bars suits by Indian Tribes against the States.). See also *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287-88 (1997) (Sovereign immunity bars injunctive relief suit by Indian Tribe against a State.); *Seminole Tribe v. Florida*, 517 U.S. 44, 54-72 (1996) (Sovereign immunity bars suit by Indian Tribe against a State based on the Indian Gaming Act.). Thus, the portion of the Supreme Court of Virginia's opinion holding that the claims against Virginia were barred by sovereign immunity will survive any decision by this Court.

Second, even if the 1677 Agreement has the force and effect of federal law, it has no impact on the decision of the State Water Control Board to issue the Permit. The State Water Control Board may not consider let alone interpret federal treaties. The Board is simply the wrong forum to address such issues. The Board "derives its authority solely from the [State] Water Control Law that creates and defines the Board's duties."²¹ *App.* at 23. In deciding

²⁰ Although all of the Mattaponi's claims against Virginia are barred by sovereign immunity, this Court has jurisdiction to review the judgment below. See *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 165-66 (1999).

²¹ By statute, the Virginia General Assembly has empowered the Board to: (1) study and investigate all problems concerned with the quality of state waters and to make reports and recommendations; (2) study and investigate methods, procedures, devices, appliances, and technologies that could assist in water conservation or water consumption reduction; (3) coordinate its efforts toward water conservation with other persons or groups, within or without the Commonwealth; (4) make reports concerning, and formulate recommendations based upon, any such water conservation studies to ensure that present and future water needs of the citizens of the Commonwealth are met; and

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whether to issue a permit, the Board determines only the rights of an applicant *vis-à-vis* the Commonwealth and the public. *Zapulla v. Crown*, 391 S.E. 2d 65, 68 (Va. 1990). The Board does not affect private property rights or adjudicate the merits of competing private claims of right. The State Water Control Law also does not authorize the Board to determine any other private rights of citizens. *See Virginia Code* § 62.1-44.22. Thus, the Board may not consider federal treaty obligations in determining whether to issue or deny a Virginia Water Protection Permit. Accordingly, even if the 1677 Agreement constituted federal law, the Board's determination that the Permit should be issued would be unaffected.

(5) establish such standards of quality and policies for any state waters consistent with the general policy set forth in this chapter, and to modify, amend or cancel any such standards or policies established and to take all appropriate steps to prevent quality alteration contrary to the public interest or to standards or policies thus established. *Virginia Code* § 62.1-44.15(2)-(4). In fulfilling these responsibilities, the Board has the duty to issue or deny a Virginia Water Protection Permit for any activities that will significantly alter or degrade existing wetlands acreage or function or that will cause permanent flooding or impoundment of State waters. *App.* at 23.

The State Water Control Law also specifies the factors the Board shall consider in deciding whether to issue a Virginia Water Protection Permit. These include: (1) preservation of instream flows for purposes of the protection of navigation; (2) maintenance of the receiving body's waste assimilation capacity; (3) protection of fish and wildlife resources and habitat; (4) protection of recreational uses; and (5) preservation of cultural, and aesthetic values. *Virginia Code* § 62.1-44.15:5(C). Issuance of a Virginia Water Protection Permit shall constitute the certification required by § 401 of the federal Clean Water Act. *Virginia Code* § 62.1-44.15:5(A). Additionally, a Virginia Water Protection Permit is certification that an applicant's proposed activity "is consistent with the provisions of the . . . State Water Control Law and will protect instream beneficial uses" of State waters. *Virginia Code* § 62.1-44.15:5(B).

Third, even if the 1677 Agreement could be considered federal law, the Mattaponi have waived the claim they now seek to assert. Principles of contract interpretation apply to treaties with Indian Tribes. See *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd sub nom.*, *Wyoming v. United States*, 492 U.S. 406 (1989). Furthermore, the course of dealings by the parties to a treaty is a key to the meaning of a treaty. See *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259-60 (1984); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). Moreover, laches apply to claims asserted under treaties with Indian Tribes. *City of Sherill v. Oneida Indian Nation*, 544 U.S. 197, 214-15 (2005); *Schrimpscher v. Stockton*, 183 U.S. 290, 296-98 (1902). If these principles are applied to the Mattaponi's claims, it is clear that they waived their interests under the 1677 Agreement. Although the Mattaponi now allege rights to use of areas in the "buffer zone" outside the property described by the 1677 Agreement,²² they neglected to assert such interests over more than 300 years since the signing of the agreement attended by settlement and development of such areas. Similarly, though they now contend that the 1677 Agreement constitutes an obligation of the United States, the Mattaponi have a long history of looking to Virginia – not the United States – as the successor to protections originally afforded them by the British Crown. Indeed, it was only after this litigation was well underway

²² Moreover, such claims are, in and of themselves, internally inconsistent. The 1677 Agreement established the "buffer zone" as an area free of the presence of either the Mattaponi or English Settlers. Certainly, the Mattaponi's failure to object to hundreds of years of settlement of that area precludes them from raising such challenge now.

that Mattaponi argued that the 1677 Agreement constituted a federal treaty.

If this Court is to resolve the status of pre-Independence agreements between Native Americans and the British Crown, it should do so in a case where the resolution of that question actually has an impact on the underlying litigation. Certiorari should be denied.

II. THE MATTAPONI'S POSITION CONTRADICTS FEDERAL LAW AND HISTORY.

The Mattaponi's position is simple – all pre-Independence agreements between Native Americans and European nations automatically became treaties between the United States and Indian Tribes. *See Pet.* at 14-15 (asserting that “the United States acquired all treaty rights and obligations of the Great Britain relating to the United States’ territory” and that these obligations “ought to be enforced as matters of federal law under the Supremacy Clause”). In effect, the Mattaponi invite this Court to embrace the doctrine of “universal succession.” However, despite the Mattaponi's claims to the contrary, this doctrine is far from being a settled norm. *See* Claude Emanuelli, *State Succession, Then and Now, With Special Reference to the Louisiana Purchase*, 63 La. L. Rev. 1277 (2003) (discussing divergence in theory and practice with respect to successor state treaty obligations). Moreover, because Great Britain, France, Spain, the Netherlands, and Russia undoubtedly reached agreements with Native Americans who inhabited various parts of what is now the United States, issuing a blanket approval of the doctrine of universal succession risks opening a Pandora's box of claims against the National Government and the States.

Just as significantly, a broad endorsement of the doctrine could hamper the National Government's relations with foreign nations, many of which have governments established through revolutionary means. Aside from creating constitutional chaos due to the uncertainties regarding the existence of previously undiscovered agreements with possibly contradictory terms, the Mattaponi's position is contrary to federal law and history.

First, the Mattaponi's position is contrary to federal law. Because of the Indian Commerce Clause, the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, the Property Clause, U.S. Const. art. IV, § 3, cl. 2, and the Restrictions on the States Clause, U.S. Const. art. I, § 10, the National Government has exclusive power to regulate affairs with Indian Tribes. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973); *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959); *Perrin v. United States*, 232 U.S. 478, 482 (1914).²³ Prior to 1871, the National Government allowed Indian Tribes to enter into treaties with the United States government, albeit in limited fashion. *See United States v. Forty-Three Gallons of Whisky, Minn.*, 93 U.S. 188, 193-96 (1876) (Indian tribes constitute dependent "nations" or "states," but still capable of making treaties). In 1871, Congress abolished the right of Indian Tribes to make treaties with the United States and instead declared that:

²³ As a legal matter, not every group with Native American ancestry qualifies as an Indian Tribe. An Indian Tribe is a *political* entity. As part of its power to regulate affairs with Indian Tribes, Congress obviously has authority to decide whether it will recognize, *as a Tribe*, a group with such ancestry. Because Congress has never recognized the Mattaponi as a Tribe, Virginia need not depend upon a congressional delegation of power in order to regulate affairs with respect to the Mattaponi.

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any *treaty lawfully made and ratified with any such Indian nation or tribe* prior to March 3, 1871, shall be hereby invalidated or impaired.

25 U.S.C. § 71 (emphasis added). *Cf. Antoine v. Washington*, 420 U.S. 194, 204 (1975) (Despite the existence of 25 U.S.C. § 71, Congress retains the power to enact agreements with Indian Tribes by means of ordinary legislation.). In other words, federal law provides that the United States recognizes only those agreements with Indian Tribes that *were ratified by the Senate* prior to March 3, 1871. If the agreement was not explicitly ratified by the Senate prior to March 3, 1871, then the agreement cannot be considered a treaty of the United States. Yet, the Mattaponi insist that an agreement, which has never been ratified by the Senate, is in fact a treaty between the United States and an Indian Tribe.

Second, the Mattaponi's position is contrary to history. When the thirteen British Colonies declared their independence in 1776, they did not create a single sovereign nation. Rather, the thirteen States created *thirteen independent sovereign nations*. See *Declaration of Independence* ("these United colonies are and of right ought to be free and independent states"). After independence, individual States retained the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Id.* Although the Articles of Confederation, which became effective in 1781, created a "Perpetual Union" among the States, *Articles of Confederation*, preamble, it also recognized that each State "retains its

sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled.” *Articles of Confederation*, art. II.²⁴ Thus, when the States ratified the Constitution in 1788, “the States entered the federal system with their sovereignty intact.”²⁵ *Blatchford*, 501 U.S. at 779. Given

²⁴ With respect to relations with Indian Tribes, the Articles of Confederation were ambiguous. See David A. Forte, *Commerce with Indian Tribes* in *The Heritage Guide to the Constitution* 107, 108 (Edwin Meese III, Matthew Spalding, & David A. Forte, eds. 2005) (“A troubling precedent was the ambiguous relationship between the [Confederation] Congress, the states, and Indians in the Articles of Confederation.”).

²⁵ Of course, the Constitution “split the atom of sovereignty” by “establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.” *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). By dividing sovereignty between the National Government and the States, the Constitution insured that “a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.” *The Federalist No. 51* at 291 (James Madison). See also *The Federalist No. 28* at 149 (Alexander Hamilton) (“Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.”). Thus, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869). This division of sovereignty between the States and the National Government “is a defining feature of our Nation’s constitutional blueprint.” *Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). It “protects us from our own best intentions” by preventing the concentration of “power in one location as an expedient solution to the crisis of the day.” *New York v. United States*, 505 U.S. 144, 187 (1992). The division of power between *dual sovereigns*, the States and the National Government, is reflected

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that there were thirteen separate sovereign nations between 1776 and 1788, there is no reason to believe that the *obligations* of the British Crown toward Native Americans were uniformly assumed by the newly independent nations. Indeed, the status of the British Crown's obligations likely varied from State to State or even from agreement to agreement. In any event, unless those obligations passed to the newly independent States, the obligations could not pass to the United States once the Constitution was adopted. In short, the Mattaponi's position – that the obligations of the British Crown automatically became the obligations of the United States – ignores the historical and constitutional reality of early days of American independence.

During the nineteenth century, this Court suggested the United States succeeded to all territorial and political "claims" of the British Crown. *See Holden v. Joy*, 84 U.S. 211, 244 (1872) ("Colonies were planted by Great Britain, and the United States, by virtue of the revolution and the treaty of peace, succeeded to the extent therein provided to all the claims of that government, both political and territorial."); *Worcester*, 31 U.S. (6 Pet.) at 544 ("The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them."). However, to say

throughout the Constitution's text, *see Printz v. United States*, 521 U.S. 898, 919 (1997), as well as its structure. *See Alden v. Maine*, 527 U.S. 706, 714-15 (1999). *See also* U.S. Const. amend X (If a sovereign power is not explicitly given to the National Government, it is reserved to the States to the People). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

that the United States took from Great Britain all of the British Crown's political and territorial claims simply reaffirms that Great Britain has no claims. It does not mean that the United States became bound by all the *obligations* of the British Crown, or that Indian tribes were intended to be third-party beneficiaries of the Treaty of Paris, which ended the Revolutionary War. Moreover, both *Holden* and *Worcester* involved treaties that had been created after the United States was formed. *See Holden*, 84 U.S. at 237; *Worcester*, 31 U.S. (6 Pet.) at 538-39. Neither case involved a pre-Independence agreement that had never been ratified by the United States. Thus, even if those cases are read to suggest that the obligations of the British Crown automatically became obligations of the United States, such suggestions must be regarded as *dicta*. This Court is “not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.” *Central Virginia Cmty. Coll. v. Katz*, 126 S. Ct. 990, 996 (2006). *See also Cohens v. Virginia*, 19 U.S. (6 Wheat.), 264, 399-400 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”).

Although the issue of the status of pre-Independence agreements between Native Americans and the British Crown may seem intriguing, there is no reason for this Court to consider a position that is directly contrary to both a federal statute and our Nation's history. Certiorari should be denied.



CONCLUSION

The Petition for a Writ of Certiorari should be **DENIED.**

Respectfully submitted,

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