No. ____

IN THE

Supreme Court of the United States

UNKECHAUG INDIAN NATION, HARRY B. WALLACE,
Petitioners,

v.

BASIL SEGGOS, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

James F. Simermeyer
Counsel of Record
James F. Simermeyer II
Law Offices of James F. Simermeyer P.C.
1129 Northern Blvd.
Suite 404
Manhasset, NY 11030
347-225-2228
James@Simermeyer.com

Counsel for Petitioners

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

Whether the District Court violated Petitioners' due process rights by granting summary judgment without first fulfilling its gatekeeping obligation under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to rule on the parties' pending motions to exclude or limit expert testimony?

Whether the District Court erred by relying on the Respondents' expert witness in its summary judgment decision without first addressing the Petitioners' motion to exclude or limit Respondents' expert's testimony under *Daubert*?

Whether the District Court violated Petitioners' due process rights by failing to conduct an *in camera* review of 4,780 documents withheld by Respondents under claims of privilege, despite having ordered such a review and having possession of the documents since May 2019?

Whether the Court improperly analyzed the Andros Treaty by not finding the Treaty ambiguous and conducting the Indian Canons analysis?

Whether the Court misapprehended the law in finding the Andros Treaty not valid under Federal law?

PARTIES TO THE PROCEEDINGS

Petitioner Unkechaug Indian Nation, an American Indian Tribe recognized by the State of New York and the Federal government through common law, was a plaintiff in the U.S. District Court for the Eastern District of New York and appellant in the U.S. Court of Appeals for the Second Circuit.

Petitioner Harry B. Wallace was a Plaintiff individually and as Chief of the Unkechaug Indian Nation and was an appellant in the U.S. Court of Appeals for the Second Circuit.

Respondent Basil Seggos, in his official capacity as Commissioner of the New York State Department of Environmental Conservation, was a defendant in the U.S. District Court for the Eastern District of New York and an appellee in the U.S. Court of Appeals for the Second Circuit.

Respondent New York State Department of Environmental Conservation, a department of the State of New York, was a defendant in the U.S. District Court for the Eastern District of New York and an appellee in the U.S. Court of Appeals for the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Unkechaug Indian Nation is a sovereign Indian nation that does not have any parent entities and does not issue stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Unkechaug Indian Nation, Harry B. Wallace v. Basil Seggos, in his official capacity as the Commissioner of the New York State Department of Environmental Conservation, New York State Department of Environmental Conservation*, No. 23-1013-cv, U.S. Court of Appeals for the Second Circuit. *En Banc* denied March 3, 2025.

- *Unkechaug Indian Nation, Harry B. Wallace v. Basil Seggos, in his official capacity as the Commissioner of the New York State Department of Environmental Conservation, New York State Department of Environmental Conservation*, No. 23-1013-cv, U.S. Court of Appeals for the Second Circuit. Judgment entered January 28, 2025.

- *Unkechaug Indian Nation and Harry B. Wallace v. New York State Department of Environmental Conservation and Basil Seggos in his official capacity as the Commissioner of the New York State Department of Environmental Conservation,* No. 18-CV-1132 (WFK) (AYS), U.S. District Court for the Eastern District of New York. Judgment entered June 16, 2023.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

RELATED PROCEEDINGS iv

TABLE OF AUTHORITIES vii

PETITION FOR CERTIORARI 1

OPINIONS BELOW 6

JURISDICTION 6

TREATIES INVOLVED 6

STATEMENT OF THE CASE 7

I. Factual Background 7

II. Procedural Background 9

REASONS FOR GRANTING THE PETITION

I. The Decision Below Undermines Fundamental Civil Procedure and Contravenes This Court's Precedents and Other Circuits' Mandates Requiring District Courts to Fulfill Their Gatekeeping Function 14

II. Numerous Circuit Courts Have Elaborated on *Daubert* and *Kumho*, Emphasizing the District Court's Duty to Create a Full Record and Not Shift Fact-Finding to the Circuit Courts.....16

III. The Second Circuit's Justifications for the District Court's Avoidance of Its Gatekeeping Function Are Invalid, and the District Court Abused Its Discretion.....18

IV. The District Court failed to Apply the Indian Canons of Construction, Which Require Consideration of the Historical Context and the Understanding of the Treaty by Native Participants.....19

V. The Second Circuit misapprehended the Law by not ruling that the Andros Treaty is valid under Federal Law. 23

CONCLUSION.....27

TABLE OF AUTHORITIES

Page(s)

Cases

Adamscheck v. Am. Family Mut. Ins. Co.,
818 F.3d 576 (10th Cir. 2016) 4, 16

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 2, 3, 5, 6, 12-16, 18, 19, 23

Fairfax's Devisee v. Hunter's Lessee,
7 Cranch 603 (1813) 24

Goebel v. Denver & Rio Grande W.R.R. Co.,
215 F.3d 1083 (10th Cir. 2000) 4, 16

Gristede's Foods, Inc. v. Unkechauge Nation,
660 F. Supp. 2d 42 (E.D.N.Y. 2009) 1, 7

Herrera v. Wyoming,
139 S. Ct. 1686 (2019) 22, 23

Johnson v. M'Intosh,
21 U.S. 543 (1823) 23

Kumho Tire Co. v Carmichael,
526 US 137 (1999) 3, 4, 14, 15, 16

Raskin v. Wyatt Co.,
125 F.3d 55 (2d Cir. 1997) 2

The Trustees of Dartmouth College v. Woodward,
17 U.S. 518 (1819) 24

Washington v. Fishing Vessel Assn.,
443 U.S. 658 (1979) 21, 22

Constitutional Provisions

U.S. Constitution Article VI 23, 25

N.Y.S Constitution Article 1 Section 14.....23

Other Authorities

The Andros Papers 1674-1676, Files of the
Provincial Secretary of New York during
the Administration of Governor Sir Edmund
Andros 1674-1680 .....6, 19-21, 23, 24, 25, 27

Rep. Hosea Rockwell,
Speech before the House Appropriations Committee,
February 17, 1892 25-26

John A. Strong PhD,
America's Early Whalemen: Indian Shore Whalers
on Long Island, 1650-1750 (Native Peoples of
the Americas) (2018) 8

John A. Strong PhD,
The Unkechaug Indians of Eastern Long Island:
A History (2001) 7

Unquachog Indians Vocabulary Image,
Lewis & Clark Trail Heritage Foundation,
https://lewis-clark.org/media/vocab-unquachog-
indians.jpg (last visited May 28, 2025) 7

PETITION FOR CERTIORARI

The Unkechaug Indian Nation, an Algonquian-speaking people, has inhabited Long Island since time immemorial, engaging in fishing and whaling activities long before European colonization. In May 1676, following the re-establishment of British control over Long Island, Governor Edmund Andros entered into a treaty with the Unkechaug Nation, affirming their sovereign rights to fish and hunt: "they are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good." (App. H. 230a).

New York State has historically recognized Indian Nations with whom it has maintained relationships since colonial times, honoring treaties and customs from that era (App. M. 335a–351a). The federal government has similarly acknowledged the Unkechaug Nation through federal common law. *Gristede's Foods, Inc. v. Unkechuage Nation,* 660 F. Supp. 2d 442, 445 (E.D.N.Y. 2009)

Despite this longstanding recognition, the New York State Department of Environmental Conservation (NYSDEC) began arresting and ticketing Unkechaug tribal members and seizing their catch, actions contrary to the NYSDEC's own Commissioner's Policy 42 (App. I. 237a).

In 2018, under threat of arrest by New York State Assistant Attorney General Hugh Lambert McLean, the Nation and its Chief, Harry B. Wallace, filed suit in the Eastern District of New York to assert the Nation's treaty fishing rights. The District Court

permitted extensive discovery, including expert testimony. The Nation presented the only historical expert witness and a fishing and Native religious expert, while the Respondents provided an environmental expert. The District Court granted the Nation's motion for an *in camera* inspection of 4,780 documents claimed as privileged by the Respondents, stating on the record its intention to conduct the review (App. E. 89a).

The Court issued a briefing schedule that set a date for Daubert motions, followed by summary judgment motions. The Nation filed a Daubert motion to exclude or limit the Respondents' only expert witness, and the Respondents filed motions to limit the Petitioners' historical expert and to exclude or limit the fishing and Native religion expert. However, the District Court did not rule on any Daubert motions before granting the Respondents' summary judgment motion, relying on the Respondents' expert witness in its decision. The Court also failed to review the 4,780 documents withheld by the Respondents.

The Nation timely appealed to the Second Circuit. The appellate panel acknowledged the District Court's procedural shortcomings, noting, "It is generally the better practice for a district court to resolve any pending Daubert motions or discovery disputes before adjudicating dispositive motions to define the summary judgment record conclusively. *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997)." Nevertheless, the panel affirmed the District Court's ruling. The Nation's petition for rehearing en banc was denied on March 3, 2025.

The circuit court incorrectly held that the District Court did not abuse its discretion in failing to resolve the Daubert motions or plaintiffs discovery objections because "(1) the District Court did not rely on the expert opinions, which are not relevant to the question of whether the Andros Order is valid federal law, and (2) the District Court did not rely on or, from what we can discern from the record, otherwise consider the privileged material in reaching its decision."

The Circuit Court improperly held that the District Court did not abuse its discretion; however, the District Court "abandoned its gatekeeping function" by not ruling on the *Daubert* motions before ruling on the motions for summary judgment. In fact, the District Court even cited the Respondents' expert Kerns affidavit and exhibits without first ruling on the Petitioner's *Daubert* motions, which challenged the expert and the material relied on by the District Court. (See App. B. 34a, 35a, 36a) Therefore, the District Court did rely on the record to make its decision on Summary Judgment without properly evaluating the entire record, including both parties' *Daubert* motions and in camera review of the Respondents' alleged 4780 privileged documents.

The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) established that District Court Judges must serve as gatekeepers to ensure that all scientific testimony or evidence admitted is relevant and reliable. This gatekeeping function was extended to all expert testimony in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). This panel's ruling, however, essentially

allows District Court Judges to abdicate the gatekeeping responsibilities. Thereby permitting unreliable expert testimony to reach the jury without proper judicial scrutiny. (1993) "I join the opinion of the Court, which makes clear that the discretion it endorses — trial-court discretion in choosing the manner of testing expert reliability — is not discretion to abandon the gatekeeping function." *Kumho Tire Co. v Carmichael*, 526 US 137, 158-59 [1999]

The Circuit Court affirmed the District Court abandoning its gatekeeping function contrary to the Supreme Court's precedence and several Circuit Courts' interpretation of the performance of the District Court's gatekeeping function. The Tenth Circuit in *Goebel v. Denver & Rio Grande W.R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000) and *Adamscheck v Am. Family Mut. Ins. Co.*, 818 F3d 576, 586 [10th Cir 2016] emphasizes the necessity of the trial court's active role in evaluating expert testimony and creating a sufficiently developed record so that the Circuit Court can properly determine whether the District Court properly applied the relevant law.
The Circuit Court failed to address the District Court's departure from its own prior orders, which raises significant concerns about procedural fairness and judicial consistency.

First, the District Court maintained possession of the Respondents' alleged 4,780 privileged documents from May 2019 until it issued its summary judgment in June 2023. The court had previously stated its intent to review these documents to determine their relevance to the litigation:

"I will review the documents that are being withheld to determine whether or not they ought to be produced in the litigation." (See App. E. 101a–103a).

Despite this assertion, the District Court proceeded to grant summary judgment without ruling on the *in camera* inspection or disclosing whether the withheld documents influenced its decision. This omission undermines the transparency of the judicial process and leaves the parties and reviewing courts unable to ascertain the extent to which these documents impacted the outcome.

Second, the District Court disregarded its order establishing a briefing schedule for the parties' Daubert motion, which is critical for determining the admissibility of expert testimony. (See App. C. 84a). By neglecting to address this motion, the court failed to provide a reasonable basis for its evidentiary decisions, further compromising the integrity of the proceedings.

These deviations from established procedural norms warrant this Court's review to ensure adherence to due process and the consistent application of judicial standards.

If this decision is upheld, it would set a precedent to allow district courts to abdicate their essential gatekeeping role under *Daubert* v. Merrell Dow Pharmaceuticals, Inc., thereby circumventing their duty to ensure the reliability and relevance of expert testimony. While such an approach might expedite docket management, it compromises the parties' due

process rights and fosters inconsistencies across circuits. Comprehensive research into case law suggests that district courts' rulings on Daubert motions and decisions regarding in-camera inspections are infrequently documented, as courts generally recognize the critical importance of adhering to consistent judicial standards.

OPINIONS BELOW

The Second Circuit's en banc denial (App. D. 87a) is not published. The Second Circuit's opinion (App. A. 1a.) is published at 126 F.4th 822 (2d Cir. 2025). The District Court's Order (App. B. 32a) is published at 677 F.Supp.3d 137.

JURISDICTION

The Second Circuit entered judgment on January 28, 2025. (App. A. 1a.) The Second Circuit denied the Petitioner's request for a rehearing en banc on March 3, 2025. (App. D. 87a) This Court has jurisdiction under 28 U.S.C. 1254(1).

TREATIES INVOLVED

The pertinent text of the treaty involved is Excerpt from "The Andros Papers 1674-1676, Files of the Provincial Secretary of New York during the Administration of Governor Sir Edmund Andros 1674-1680", is reproduced at App. H 230a.

STATEMENT OF THE CASE

I. Factual Background

1. The Unkechaug (Unkechaug inskitompak—the People Beyond the Hill) Indian Nation has existed since time immemorial. It is recognized as an Indian Nation by the State of New York pursuant to New York State Indian Law §§ 150–153 and is acknowledged as a federally recognized Indian Nation under federal common law. See *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009). The Unkechaug are an Algonquin people who adhere to customs and beliefs consistent with those of other Algonquin natives residing along the Eastern Seaboard of the United States. They established their communities where fresh and salt waters converge and have fished these customary waters since time immemorial. European newcomers consistently maintained government-to-government relationships with the Unkechaug Indian Nation, including the Dutch, the English, the Colony of New York, and the United States.[1] [2]

2. The Unkechaug lands are known as the Poospatuck (meaning "where the water meets") Indian Reservation, located within the State of New York near present-day Mastic, New York. The

---

[1] See generally John A. Strong PhD, The Unkechaug Indians of Eastern Long Island: A History (2001)

[2] In 1791 Thomas Jefferson visited the Unkechaug reservation to transcribe its language, see "Unquachog Indians Vocabulary Image," Lewis & Clark Trail Heritage Foundation, https://lewis-clark.org/media/vocab-unquachog-indians.jpg (last visited May 28, 2025).

ancestral lands of the Unkechaug encompassed vast areas of present-day Long Island, providing them with resources for fishing (Kupiyamaqchmun—Unkechaug fishing) and whaling (Putuap—whaling). Together with other Indian Nations of Long Island, the Unkechaug enjoyed unrestricted access to bays, streams, rivers, and the ocean. Living near water access points, they perfected methods of fishing, harvesting, and preserving fish, crustaceans, whales, and other sea creatures. The Unkechaugs' excellence in fishing and whaling techniques has been passed down through generations, preserving their traditional ecological knowledge.[3]

3. In the spring of 1676, the Unkechaug exercised their sovereignty by entering into negotiations with Governor Andros of the Colony of New York. These negotiations aimed to prevent English fishermen from seizing their catch and interfering with their fishing activities. (App. J. 250a–302a) The Unkechaug recognized Governor Andros's eagerness to appease them, given the numerous challenges facing the English colony of New York at the time. The tensions of spring 1676 were rooted in a tumultuous history involving three international confrontations resulting in regime changes; a plot by adventurer John Scott to declare himself president of Long Island; King Philip's War, which nearly decimated New England settlements and threatened to spread to Long Island; an armed standoff between Connecticut and New York militias over colonial borders; efforts by Native American whalers to

[3] See John A. Strong PhD, America's Early Whalemen: Indian Shore Whalers on Long Island, 1650-1750 (Native Peoples of the Americas) (2018)

establish their own whaling companies to compete with English-owned enterprises; and a scheme by eastern Long Island towns to secede from New York's jurisdiction and join Connecticut. (See App. J. 255a)

On May 24, 1676, Governor Edmund Andros entered into a treaty with the Unkechaug Indian Nation, affirming their sovereign rights to fish and hunt. The treaty stated: "[they] are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good." (App. H. 230a) This treaty was issued by the colonial Governor of New York and endorsed by the Unkechaug Nation. It reaffirmed the Unkechaugs' liberty to fish and whale freely, either independently or in cooperation with Christians, and to manage their goods as they saw fit.

4. New York State has repeatedly reaffirmed the blanket acknowledgement of all deeds, patents, and treaties granted by its colonial predecessor to New York State Indian Nations. This understanding and acceptance by New York State have been documented in numerous reports submitted to the Governor, in correspondence between governments by the Attorney General, and in other communications from New York State agencies. (App. M 342a-351a)

II. Procedural Background

1. The Unkechaug exercised their fishing rights undisturbed until approximately 2013. Starting in 2013, the New York State Department of Environmental Conservation ("NYSDEC") arrested and ticketed Unkechaug fishermen on several

occasions. On or around 2015, the NYSDEC seized a shipment of eels. (App. G. 167a)

2. The Unkechaug attempted on multiple occasions to cooperate with New York State and provided the State and NYSDEC with a Management Plan for fishing and harvesting eels that is compliant with other Indian Nation Management Plans that have been accepted by both Federal Fish and Wildlife, states, the Atlantic States Marine Fishing compact. (See App. L. 309a) NYSDEC failed to cooperate and adhere to their own Commissioners Policy-42 ("CP-42"). (See App. I. 237a)

3. On or about 2017, NYSDEC, through their Counsel, New York State Attorney General's office assistant attorney general Hugh Lambert McLean, threatened the Unkechaug Chief, Harry B. Wallace, and the Nation to initiate a federal action asserting Unkechaug hunting and fishing treaty rights in Federal court or Chief Wallace would face criminal prosecution. (App. G. 179a)

4. The Unkechaug Nation and Chief Harry B. Wallace filed an action for declaratory and injunctive relief Basil Seggos, in his official capacity as Commissioner of the New York State Department of Environmental Conservation and the New York State Department of Environmental Conservation, on February 21, 2018. (App. G. 146a)

5. The Complaint alleged four causes of actions (See App. G. 146a)

a. NYSDEC laws and regulations are federally preempted 25 U.S.C §232.

b. NYSDEC interference with Unkechaug sovereignty and self-government.

c. The NYSDEC restriction on fishing and gathering infringes on Unkechaug's religious practice and expression.

d. The NYSDEC restriction of fishing violates the Unkechaug treaty rights based on the May 24, 1676 treaty entered into by Governor Andros with the Unkechaug stating: "That they (Unkechaug) are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good according to the Custome…" allowed the Unkechaug to whale and fish without "molestation" and to sell their fish as they see fit. (App. H. 230a)

6. The complaint requested declarative relief that the Petitioners and their Reservation waters and customary Unkechaug fishing waters are immune from NYSDEC and Commissioner Basil Seggos fishing regulations and that the NYSDEC and Commissioner Seggos lack authority to enforce fishing regulations under NYSDEC laws against the Petitioners. (See App. G. 146a)

7. A permanent injunction against NYSDEC and Commissioner Seggos from imposing fishing restrictions on eels and crustaceans on reservation lands and customary Unkechaug Fishing waters, and

any attempts by NYSDEC or Commissioner Seggos to enforce the civil or criminal laws against the Petitioners. (See App. G. 146a)

8. NYSDEC filed a motion to dismiss the Nations' complaint. The motions were fully briefed, and the court denied NYSDEC's motion to dismiss. (See App. G. 174a)

9. NYSDEC filed its Answer on May 29, 2019. (App. G. 174a)

10. The Petitioners sought an *in-camera* inspection of the 4,780 documents withheld by the NYSDEC based on numerous grounds of privilege. (App. G. 172a)

11. On April 15, 2019, the District Court ordered Respondents to produce the alleged privileged documents to the District Court by 5:00 p.m. on May 10, 2019. (App. G172a and App. E. 101a)

12. The District Court never ruled on the 4,780 documents despite granting the in-camera inspection of those documents. There is no way to know whether the District Court judge may have reviewed and relied on those documents in the court's summary judgment ruling, yet the panel ruled to affirm despite an incomplete record.

13. Both parties conducted extensive discovery, including expert witness depositions and *Daubert* motions. (App. C. 84a) The Daubert motions were fully submitted on July 23, 2021.

14. For a second time, the District Court failed to make a ruling on any of the Daubert motions, yet in its Summary Judgment Decision, the Court cited the Respondents' Expert, Toni Kerns, Affidavit. (App. B. 34a-36a) Both parties submitted fully briefed summary judgment motions on October 1, 2021.

15. The District Court filed its Decision Granting Respondents' summary judgment motion and denied the Petitioners' motion on June 16, 2023. (App. B. 32a)

16. The Petitioners filed their Notice of Appeal on July 12, 2023. (App. F. 118a)

17. On October 25, 2023, the Petitioners filed their Appendix and Brief. (App. F. 123a-130a)

18. The Respondents filed their opposition brief on March 25, 2024. (App. F. 134a)

19. The Petitioners filed their reply brief on April 15, 2024. (App. F. 135a)

20. Both parties appeared at oral arguments and argued before the three-judge panel on September 18, 2024. (App. F. 137a)

21. The panel issued their opinion, and the clerk entered judgment on January 28, 2025. (App. A. 1a)

22. The Petitioners filed a Petition for Rehearing en banc on February 11, 2025. (App. F. 138a)

23. The Second Circuit issued a decision denying Petitioner's request for a rehearing en banc on March 3, 2025. (App. F. 140a and App. D. 87a)

REASONS FOR GRANTING THE PETITION

I. The Decision Below Undermines Fundamental Civil Procedure and Contravenes This Court's Precedents and Other Circuits' Mandates Requiring District Courts to Fulfill Their Gatekeeping Function

The Second Circuit's decision contradicts Supreme Court precedent and the principles established therein. A district court cannot abdicate its duty to rule on motions it has scheduled, nor can it render decisions based on an incomplete record—a practice that the Second Circuit should not have affirmed. This Court's intervention is necessary to address the misapprehension of the gatekeeping duty, which threatens to disrupt civil procedure and squander the resources and time of both the parties and the courts. By neglecting its responsibility to review all evidence presented in motions and *in camera* inspections, the court prejudices the parties involved.

The Circuit's ruling allows a District Court Judge to abandon its "Gatekeeping Function" mandated in Kumho Tire and Daubert, requiring the District Court Judge to perform the Gatekeeping duty of determining Daubert Motions prior to ruling on Summary Judgment Motions. *Kumho Tire Co. v Carmichael*, 526 US 137, 158-59 [1999] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* is 509 U.S. 579.

The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) established that District Court Judges must serve as gatekeepers to ensure that all scientific testimony or evidence admitted is relevant and reliable. This gatekeeping function was extended to all expert testimony in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The Second Circuit's ruling, however, essentially allows District Court Judges to abdicate the gatekeeping responsibilities. Thereby permitting unreliable expert testimony to reach the jury without proper judicial scrutiny. (1993) "I join the opinion of the Court, which makes clear that the discretion it endorses — trial-court discretion in choosing the manner of testing expert reliability — is not discretion to abandon the gatekeeping function**."** *Kumho Tire Co. v Carmichael*, 526 US 137, 158-59 [1999]

The District Court disregarded its order and abandoned its gatekeeping function by failing to rule on the Daubert motions before addressing the summary judgment motions. This oversight prejudiced the Petitioners, as the court cited the Respondents' expert, Toni Kerns, without first resolving the issues raised in the Petitioners' Daubert motion to exclude or limit Ms. Kerns' testimony and the information upon which she and the District Court relied. (App. B. 34a–36a)

II. Numerous Circuit Courts Have Elaborated on *Daubert* and *Kumho*, Emphasizing the District Court's Duty to Create a Full Record and Not Shift Fact-Finding to the Circuit Courts

The Second Circuit's ruling permits the District Court to neglect its obligation to examine all evidence and to develop a comprehensive record. Requiring the Circuit Court to assume the role of fact-finder, effectively replacing the District Court Judge's responsibilities, contradicts Supreme Court precedents and the rulings of other circuits.

In *Goebel v. Denver & Rio Grande W.R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000), the Tenth Circuit emphasized that the gatekeeping function is not discretionary and must be performed by the trial court. The court stated, "It is not an empty exercise; appellate courts are not well-suited to exercising the discretion reserved to district courts."

Furthermore, in *Adamscheck v. American Family Mut. Ins. Co.*, 818 F.3d 576, 586 (10th Cir. 2016), the Tenth Circuit reaffirmed the necessity for the trial court to actively evaluate expert testimony, highlighting that a sufficiently developed record is essential for appellate review.

By allowing the District Court to neglect its gatekeeping duties, the panel's decision improperly shifts the burden of fact-finding to the Appellate Court. This shift disrupts the established judicial process, wherein the Appellate Court's role is to

review the lower court's application of the law, not to engage in fact-finding.

The Second Circuit's decision is inconsistent with prior rulings from other circuits, such as those in the Tenth Circuit, which underscore the importance of the trial court's gatekeeping function. This inconsistency creates a lack of uniformity across circuits, leading to potential confusion and unpredictability in future cases.

A grant of this Petition is crucial to address these inconsistencies and restore coherence within the judiciary's approach to expert testimony. It is imperative to ensure that decisions align with Supreme Court precedents and maintain uniformity across circuits. This Petition provides an opportunity to reaffirm the essential gatekeeping role of District Court Judges, thereby preserving the integrity of the judicial process and ensuring that only reliable expert testimony is presented to the jury.

In light of the significant departure from established legal principles and the potential for widespread judicial inconsistency, a grant of this Petition is warranted. This review will ensure that decisions are consistent with Supreme Court mandates and uphold the integrity of the judicial process by reinforcing the critical gatekeeping role of District Court Judges.

III. The Second Circuit's Justifications for the District Court's Avoidance of Its Gatekeeping Function Are Invalid, and the District Court Abused Its Discretion

The Second Circuit acknowledged that "it is generally the better practice for a district court to resolve any pending Daubert motions or discovery disputes before adjudicating dispositive motions to define the summary judgment record conclusively." (App. A. 18a) Despite this acknowledgment, the Circuit Court attempted to justify the District Court's failure to rule on the Daubert motions by asserting that the motions were irrelevant and by expressing uncertainty about whether the District Court relied upon the 4,780 allegedly privileged documents from the Respondents, which had been in its possession since May 2019.

Allowing the Second Circuit's decision to stand would enable District Courts to circumvent years of discovery and avoid making necessary evidentiary rulings, leading to expedient decisions without a properly developed record for review. This practice would prejudice the judicial process and violate the due process rights of the parties involved.

The District Court abused its discretion in two significant ways. First, it potentially relied upon 4,780 documents from the Respondents that were never ruled upon regarding their admissibility. Second, it failed to rule on the parties' Daubert motions, yet cited exclusively the Respondents' expert, Toni Kerns, despite the Petitioners' objections to Ms. Kerns' testimony and the sources she cited,

which the District Court also referenced in its decision. (App. B. 34a–36a) This prejudiced the Petitioners and violated their due process rights.

This abdication of the gatekeeping role contravenes the Supreme Court's mandate in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which requires trial judges to ensure that expert testimony is both relevant and reliable before it is admitted as evidence. The failure to perform this critical function undermines the integrity of the judicial process and necessitates this Court's intervention to uphold established legal standards.

IV. The District Court failed to Apply the Indian Canons of Construction, Which Require Consideration of the Historical Context and the Understanding of the Treaty by Native Participants.

The District Court failed to apply the Indian Canons of interpretation of treaties between Indians and non-Indians, which direct that any interpretation under the Indian Canons should favor the Indians, reflecting how the Native participants would have understood the treaty.

The only historical expert presented was Petitioners' expert, Dr. John Strong, Ph.D., who examined and offered expert opinions concerning the complexities of interpreting an ancient, ambiguous document, including the historical setting at the time the treaty was entered into between the Unkechaug and Colonial Governor Andros. (See App. J. 249a–302a.)

Dr. Strong's expert report and testimony provided the court with the appropriate methodology to interpret the Andros Treaty, including a detailed historical perspective at the time the treaty was entered into between Governor Andros and the Unkechaug. Despite the Petitioners' arguments in favor of applying the Indian Canons and the expert testimony from Dr. Strong, the court failed to apply the Indian Canons as required, resulting in an erroneous decision regarding the Andros Treaty. The court relied solely on the plain language of a treaty drafted in colonial times in Old English, which was ambiguous and unclear. Without the application of the Indian Canons, the lower court was incapable of rendering a valid decision. It lacked the experience or knowledge to make an informed decision on the treaty. The court's application of plain language may have been expedient, but it was clearly inappropriate and denied the Petitioners due process regarding the complex treaty issues in this case.

The language of the Andros Treaty, an ancient document, was ambiguous and required a detailed and academic methodology to comprehend its significance fully. This involved understanding the historical setting, previous agreements between the colony and the Unkechaug, and how the Unkechaug, as participants, would have understood the treaty. The court's plain language approach was essentially based on expedience and served as a pretext to ignore the detailed application of the proper methodology set out in case law. The selective language relied on by the court raises issues regarding the laws and customs in colonial times upon which the court relied.

The District Court's reliance on the words "law and custom" and its conclusion that they restricted the Unkechaug, requiring adherence to English law, is false and disingenuous. Similarly, in a treaty drafted in the 1850s—approximately two hundred years after the Andros Treaty—between the United States and the Indian Nations of the Pacific Northwest, the treaty text contained a clause stating, "in common with all citizens of the Territory." *Washington v. Fishing Vessel Assn.*, 443 U.S. 658 (1979).

The Supreme Court correctly applied the Indian Canons. It looked to the historical context and the Indian understanding at the time the treaties were entered into: "There is no evidence of the precise understanding the Indians had of any of the specific English terms and phrases in the treaty." *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 666–67 (1979). Additionally, the Supreme Court correctly analyzed how both parties understood the language and intent of the treaty regarding the taking of fish. The Indians understood that non-Indians would also have the right to fish at their off-reservation fishing sites, but this was not understood as a significant limitation on their right to catch fish. Because of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights. The parties accordingly did not see the need and did not intend to regulate the taking of fish by either Indians or non-Indians, nor was future regulation foreseen. *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 668 (1979).

The Andros Treaty provides similar language and guarantees the Unkechaug the right to fish. That clause is not to be interpreted as a limitation on the Unkechaug but as a guarantee to fish without molestation by the colony/state, following the same interpretation held by the Supreme Court *in Washington v. Fishing Vessel Assn.*, 443 U.S. 658 (1979). Additionally, the District Court erred by not considering how the Indians would have understood the treaty and the negotiation. Courts have held that because Indians did not understand the English language, the Court is required to interpret the treaty as the Indians would have at the time of the treaty. Indeed, the Unkechaug in 1676 were negotiating at a profound disadvantage by trying to negotiate in an unknown language and relied on the Andros regime to write the treaty in vocabulary and terminology they chose. This required the Court to apply the Indian Canons of construction to understand what the Unkechaug would have understood those terms to mean, as well as the historical context of the treaty negotiation, including previous agreements. "Treaty analysis begins with the text, and treaty terms are construed as 'the Indians would naturally understand them.'" *Washington v. Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055; *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019).

The District Court and the Second Circuit failed to examine the language "they are at liberty and may freely whale or fish for or with Christians or by themselves" (A5526–A5530). The impact of the statement "may freely" and "for or with Christians or by themselves" is significant and illustrates that Andros wanted to appease the Unkechaug, most

likely because of the impending King Philip's War in Connecticut, which could certainly have entered Long Island with the assistance of the Unkechaug. The English used Christianity as justification to take the inhabitants' land in exchange for bringing Christianity to the continent, a doctrine of discovery. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

The failure of the District Court to determine that a document more than three hundred years old is ambiguous and required an interpretation by the Indian Canons, and the District Court's failure to review the only historical expert produced in this case who could provide some understanding of the history and relations between the Anglo and Unkechaug, underscores that the District Court should have determined the Daubert motions prior to ruling on the Summary Judgment motions. The Second Circuit should have reversed and remanded the District Court's determination.

V. The Second Circuit misapprehended the Law by not ruling that the Andros Treaty is valid under Federal Law.

The New York State Constitution, Article I, Section 14, provides that colonial transactions survive statehood and shall continue to take effect. Statehood cannot abrogate a treaty. See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696–97 (2019).

Article VI of the U.S. Constitution includes treaties as the supreme law of the land, encompassing the Andros Treaty. Courts have routinely upheld

transactions that occurred prior to the formation of the United States as valid.

Colonial documents are legally enforceable today under federal law. For example, Virginia's property confiscation laws enacted prior to the present federal constitution, as a commonwealth during and after the Revolution, were ruled unconstitutional. See *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (1813).

Dartmouth College's Crown Charter was ruled not affected by the War of Independence. *The Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 644–650 (1819). The Andros Treaty should also be deemed a contract protected under the Contract Clause of the U.S. Constitution. The Contract Clause provides that no state shall pass any law impairing the obligations of contracts. U.S. Const. art. I, § 10. In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), the Supreme Court determined that the Contract Clause prevents a state from altering or amending terms in a private corporation's charter, unless the state's power to amend was reserved in the charter itself or in a law to which it was originally subject.

In that case, King George III granted Dartmouth College a charter in 1769, which established the College's governing structure, including a board of trustees. In 1816, the New Hampshire legislature attempted to alter the Dartmouth College charter to reinstate Dartmouth's deposed president and give the New Hampshire Governor authority to appoint members of the Dartmouth College board of trustees.

The Supreme Court invalidated the New Hampshire law, holding that the Dartmouth College charter qualified as a contract in which the New Hampshire legislature could not interfere pursuant to the U.S. Constitution's Contract Clause. The same reasoning in Dartmouth College applies in this case, and the Andros Treaty should be treated as a contract under the U.S. Constitution.

The United States of America acknowledges and accepts colonial treaties between the English colonies and Indian Nations. The United States incorporated and ratified preexisting agreements by reference into the Constitution of the United States when it indicated in Article VI, Section 1.

The Andros Treaty is recognized by the federal government as well:

> All…Engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This doctrine was articulated by the Honorable Hosea Hunt Rockwell, Representative from New York and a member of the House Appropriations Committee in 1892. In a well-known speech before the Committee on February 17, 1892, Rep. Rockwell described the relationship between the Indian people in the English colonies and the subsequent American government:

> The people of all the English colonies, especially those of New England, settled

> their towns upon the basis of title procured by the equitable purchase from the Indians…
>
> The English Government never attempted to interfere with the internal affairs of the Indian Tribes further than to keep out the agents of foreign powers…
>
> …They were considered as nations competent to maintain the relations of peace and war and to govern themselves under the Protection of the Government of Great Britain. After the war of the Revolution, or upon the attainment of independence, the United States succeeded to the rights of Great Britain, and continued the policy instituted by that Government. The protection given was understood by all parties as only binding the Indians to the Government of the United States as dependent allies.

Rep. Rockwell concluded:

> We found that it was a condition and not a theory that confronted us.

Additionally, New York State has honored deeds, patents, and treaties granted by its colonial predecessor to the Indian Nations of New York State. (App. M. 342a–351a)

The unique relationship between the Unkechaug and New York State's blanket acknowledgments of colonial acts proves that the Andros Treaty is in effect today.

CONCLUSION

The court should grant the petition.

Respectfully submitted,

James F. Simermeyer
Counsel of Record
James F. Simermeyer II
Law Offices of James F. Simermeyer P.C.
1129 Northern Boulevard
Suite 404
Manhasset, New York 11030
Tel: 347-225-2228
Email: James@Simermeyer.com

ATTORNEY FOR PETITIONERS

MAY 30, 2025