UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DAVID T. SILVA,
GERROD T. SMITH, and
JONATHAN K. SMITH,
Members of the Shinnecock Indian Nation,

Plaintiffs,

- against -

BRIAN FARRISH,
JAMIE GREENWOOD,
EVAN LACZI,
BASIL SEGGOS,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
and SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendants.

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Case No.: 18-cv-3648 (SJF) (SIL)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

Plaintiffs, David T. Silva, Gerrod T. Smith, and Jonathan K. Smith, all on-Reservation Shinnecock Indians, have filed a two count complaint. Count I seeks a declaratory judgment under the Supremacy Clause, U.S. Const., Art. VI, Cl.2, that Plaintiffs enjoy un-relinquished aboriginal usufructuary fishing rights retained in ceded territory and a request pursuant to Fed. R. Civ. P. 65 enjoining the Defendants from enforcing the laws of the State of New York against Plaintiff Silva in Southampton Town Justice Court in Case No. 17-7008, and from otherwise interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters. (Doc. 1) (Compl., Count I, ¶¶ 21-23).[1] Count II is a claim for money damages for the continuing prosecutions and interference with their property and civil rights under 42 U.S.C. §§ 1981 and 1982 of the 1866 Civil Rights Act, as amended. (Compl., Count II, ¶¶ 24-25)

Defendants, Brian Farrish, ("Defendant Farrish" or "Farrish"), Evan Laczi, ("Defendant Laczi" or "Laczi"), Basil Seggos, ("Defendant Seggos" or "Seggos"), and New York State Department of Environmental Conservation, ("Defendant DEC" or "DEC"), (collectively, "the State Defendants"), have served a motion to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and (6). The State Defendants erroneously contend that Plaintiffs' claims are barred by sovereign immunity, lack of standing, and abstention under the Younger Doctrine, and Plaintiffs failed to state a claim upon which relief may be granted.[2]

[1] Plaintiffs' complaint will be referred to as "Compl., ¶ __".
[2] The State Defendants' motion to dismiss resembles the County Defendants' motion in key respects, except the County Defendants raise prosecutorial immunity and the State Defendants raise qualified immunity, and the State Defendants move under Rule 12(b)(1) and (6) and the County Defendants only move under Rule 12(b)(6). As such, Plaintiffs' opposition papers are similar, and should be read together.

II. STATEMENT OF ISSUES

A. WHETHER THE COURT SHOULD DENY THE STATE DEFENDANTS' RULE 12(B)(1) MOTION TO DISMISS THE COMPLAINT?

PLAINTIFFS ANSWER: "YES"

DEFENDANTS ANSWER: "NO"

B. WHETHER THE COURT SHOULD DENY THE COUNTY DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS THE COMPLAINT?

PLAINTIFFS ANSWER: "YES"

DEFENDANTS ANSWER: "NO"

III. STATEMENT OF FACTS

A. The Plaintiffs are on-Reservation Shinnecock Indians and have been ticketed prosecuted, and had their fish and equipment seized over the last decade for fishing in the waters adjacent to the lands of the Shinnecock Indian Reservation, Shinnecock Bay and its estuary waters.

As alleged in their complaint filed in this Court on June 22, 2018, (Doc. 1), Plaintiffs, David T. Silva, ("Silva"), Gerrod T. Smith, ("Gerrod Smith"), and Jonathan K. Smith, ("Jonathan Smith"), are all on-Reservation members of the Shinnecock Indian Nation, a federally recognized Indian Tribe. (Compl., ¶¶ 2-4) "The Shinnecock and other seafaring native peoples of eastern Long Island have fished in the waters surrounding Long Island and other areas since time immemorial." . (Compl., ¶ 13) **"**At all relevant times, Plaintiffs were and are enrolled members of the Shinnecock Indian Nation, a federally recognized Indian Tribe, ("the Shinnecock Nation"), reside on the Shinnecock Indian Reservation, have fished in the adjacent waters of Shinnecock Bay and its estuary, have been ticketed and prosecuted in New York State courts by the Defendants, and are deterred and chilled from exercising their rights to fish by the acts of the Defendants." (Compl., ¶ 14) Plaintiffs allege that "Colonial Deeds and related documents clearly

support the right of the Shinnecock and other native peoples of eastern Long Island to fish in the waters adjacent to their communities without interference" and cite specific historical documents. [3] (Compl., ¶ 15 (a-e) The opinion and detailed analysis in the report of Dr. John S. Strong, Exhibit 10 filed in support of Plaintiffs' Motion for Preliminary Injunction clearly supports Plaintiffs' contention. (Doc. 3-10)

Plaintiffs allege "Over the last decade, the Defendants have ticketed, seized fish and fishing equipment, and prosecuted the Plaintiffs for alleged criminal offenses in alleged violation of New York State law involving fishing and raising shellfish in Shinnecock Bay and its estuary waters, which are adjacent to the lands of the Shinnecock Indian Reservation. Each of the prosecutions failed. Yet, the Defendants persist and continue to ticket and threaten prosecution. The Plaintiffs are in fear of exercising those same usual and customary aboriginal fishing rights secured and retained for them by their ancestors when Shinnecock territory was ceded to the English. Ironically Plaintiff Silva is presently scheduled to stand trial on August 30, 2018, in the Town of Southampton Justice Court, located in Hampton Bays, New York, the building itself sitting on ceded Shinnecock territory." (Compl., ¶ 16) Plaintiffs give detailed examples of three failed prosecutions of fishing in Shinnecock Bay against Salvatore Ruggiero, a non-Indian fishing with Gerrod Smith, (Compl., ¶ 17), against Gerrod Smith, (Compl., ¶ 18), against Jonathan Smith, (Compl., ¶ 19), and now against Silva, (Compl., ¶ 20). The place of Indian fishing in each case was Shinnecock Bay which waters touch the land base of the Shinnecock Indian Reservation. The types of fish involved were many and included oysters.

"Most recently on April 20, 2017, Silva was stopped by two DEC Officers, Laczi and Farrish, while Silva was fishing for elver eels in Shinnecock Bay. Silva's eels, net, and other

[3] Note Plaintiffs are not seeking a determination of Reservation boundaries.

fishing equipment were seized, and Silva was issued a criminal appearance ticket alleging possession of undersized eels in violation of New York State law, 6 NYCRR 40-1(b)(ii). Silva was later charged with two additional criminal offenses, ECL 13-0355 (no fish license), and 6 NYCRR 40-1(b)(iii) (possession of eels over limit). This case is presently lodged and pending in the Southampton Town Justice Court as Case No. 17-7008 and is being prosecuted by Greenwood. Silva's attempt to obtain a voluntary dismissal by Greenwood was unsuccessful, and Silva's motion to dismiss for lack of jurisdiction was denied by that court. Over Silva's objection, that case is presently scheduled for trial on August 30, 2018 at 9:00 am." (Compl., ¶ 20)

B. Shinnecock Bay and its estuary waters are clearly in an area of un-relinquished aboriginal fishing since time immemorial and retained fishing rights in ceded territory.

Plaintiffs' allege in paragraph 15 of the complaint, with specificity, pointing to particular deeds and other historical documents, that they enjoy an aboriginal right to fish in the waters adjacent to the Shinnecock Indian Nation without interference.[4]

> Colonial Deeds and related documents clearly support the right of the Shinnecock and other native peoples of eastern Long Island to fish in the waters adjacent to their communities without interference, to Wit:
>
> a) Department of State Book of Deeds, Unpublished documents, Office of the Secretary of State, Albany, New York, 2: 85-86. (New York State Archives. Series 453, vols. 1-9)
>
> b) Gardiner, David Lion, 1873 [1840] *Chronicles of East Hampton*, Sag Harbor, N.Y.: Isabel Gardiner Mairs, 3.
>
> c) *Documents Relative to the Colonial History of the State of New York*, ed. Edmund Bailey O'Callaghan and Berthold Fernow, 15 vols. Albany, N.Y.: Weed, Parsons, 1856-87, 14: 686, 692, 695, 718, 720.
>
> d) *Records of the Town of East Hampton*, ed. Joseph Osborne, 5 vols. Sag Harbor, N.Y. 1887, 1: 2-3, 1: 170-171.
>
> e) *Records of the Town of Southampton*, ed. William Pelletreau. 8 vols. Sag Harbor, N.Y. 1874-77, 1: 162, 167-68; 2: 354-55."

[4] See Exhibit 10, opinion and report by Plaintiffs' expert witness, Dr. John A. Strong, in support of Plaintiffs' motion for preliminary injunction. (Doc. 3-10)

Plaintiffs filed the present lawsuit on June 22, 2018, alleging in Count I "continuing supremacy clause violations of un-relinquished aboriginal usufructuary fishing rights retained in ceded territory. The Plaintiffs exercised their lawful rights to use waters, fish, take fish, and hold their fish clearly within an area of aboriginal usufructuary fishing rights un-relinquished and retained by Plaintiffs' ancestors in the aforementioned Colonial Deeds and related documents ceding Shinnecock territory, all protected under the Supremacy Clause, U.S. Const., Article VI, clause 2." (Compl., ¶ 22) The relief requested under Count I is "Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and Fed.R.Civ.P. 65, the Plaintiffs request the Court to issue a declaratory judgment, and preliminary and permanent injunctive relief in favor of Plaintiffs and against the Defendants, enjoining the Defendants from enforcing the laws of the State of New York against Plaintiff Silva in Southampton Town Justice Court in Case No. 17-7008, and from otherwise interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters." (Compl., Relief ¶ 1)

Count II alleges a "continuing pattern of illegal racial discrimination in violation of 42 U.S.C. §§ 1981 and 1982 of the 1866 Civil Rights Act, as amended. The Defendants' aforesaid acts against the Plaintiffs constitute a continuing pattern and practice of purposeful acts of discrimination based on their race as Native Americans in violation of Plaintiffs' civil rights to equal security of the laws and to exercise their lawful federally protected rights to use waters, fish, take fish, and hold their fish without interference, without seizure of person and property, and without prosecution by the Defendants." (Compl., ¶ 25) The relief sought under Count II is "The Plaintiffs demand a jury trial and a monetary award for actual and punitive damages in favor of Plaintiffs and against the Defendants, jointly and severally, in an amount to be

determined at trial, including an amount of $102 million punitive damages to deter and punish the Defendants for blocking Plaintiffs' participation in the elver eel market during the 2017 and 2018 seasons, plus any future seasons during the pendency action, plus attorney fees and costs." (Compl., Relief ¶ 2)

IV. STANDARD OF REVIEW

On a motion to dismiss the Court must assume that all of the facts alleged in the Complaint are true, construe those facts in the light most favorable to the Plaintiffs, and draw all reasonable inferences in favor of the Plaintiffs. *Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 169 (2d Cir. 2009); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 115 (2d Cir.2008); *U.S. Bank Nat. Ass'n v. Ables & Hall Builders*, 582 F. Supp. 2d 605, 606 (S.D.N.Y. 2008).

Under *Bell Atlantic Corp. v, Twombly,* 550 U.S. 544 (2007), a plaintiff must include enough facts in their complaint to make it plausible—not merely possible or conceivable—that they will be able to prove facts to support their claims. As the Second Circuit stated:

> Generally, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted) (alteration in original) (citations omitted). Instead, "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (citations omitted). What is required are "enough facts to state a claim to relief that is plausible on its face." Id. at 570. In the words of the Supreme Court's most recent iteration of this standard, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ---U.S. ----, 129 S.Ct. 1937, 1949 (2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," however, dismissal is appropriate. *Id*. at 1950. *Star, et al v. Sony BMG Music Entertainment, et al,* ___ F.3d ___ Docket No. 08-5637-cv (2d Cir. *January 13, 2010)* [Slip Op., at 8-9]

V. ARGUMENT

A. Applicable Law

The wording in the colonial documents relating to reserved fishing rights must not be construed to the detriment of the Plaintiffs. "The language used in treaties with the Indians should never be construed to their prejudice." *Squire v. Capoeman*, 351 U.S. 1, 7 (1956)

The Supreme Court has long ago held that an individual governmental officer cannot hide behind the immunity and sovereignty of their office when acting outside the scope of their duties, such as the repeated, fruitless, and race-based Shinnecock prosecutions in excess of jurisdiction by the County Defendants as in this case. *Ex parte Young*, 209 U.S. 123 (1908). Here, Greenwood is treated as acting in her personal capacity and is not protected by the immunity and sovereignty of her office. "The attempt of a State officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U.S., at 124.

Quoting from the Federal Judicial Center in explaining the importance of *Young* in the country's jurisprudence (www.fjc.gov):

> **Ex parte Young**
> March 23, 1908
>
> In response to a lawsuit from shareholders of railroad companies challenging the constitutionality of a Minnesota law lowering railroad rates, a federal court issued an injunction against the law's enforcement. Minnesota's attorney general, Edward Young, ignored the injunction and attempted to enforce the law in a state court proceeding. Jailed for contempt of court, he sought a writ of habeas corpus from the Supreme Court. In *ex parte Young*, the Court denied the writ, holding

> that when a state official attempted to enforce an unconstitutional statute, that official was deemed to be acting in their personal, rather than official, capacity, and was therefore not protected by the Eleventh Amendment's grant to the states of sovereign immunity. The decision was highly controversial; many viewed it as an unwarranted intrusion upon the concept of sovereign immunity, while others felt it was a necessary aspect of the federal judiciary's ability to declare state laws unconstitutional.

B. The State Defendants are not entitled to sovereign immunity

The State Defendants contend they are entitled to sovereign immunity under the Eleventh Amendment,[5] and the Court should not apply *Ex parte Young*. (State Defs. Mem., pp. 4-5) The State Defendants argue Plaintiffs have failed to show an ongoing violation of federal law and opine "[t]emporally remote single prosecutions do not constitute an ongoing violation for purposes of *Ex parte Young*," citing *KM Enters. v. McDonald*, 2012 U.S. Dist. LEXIS 138599 (E.D.N.Y. 2012) (State Defs. Mem., p. 4) The State Defendants also contend also that the relief requested by Plaintiffs does not fall within the *Ex parte Young* exception, arguing that the relief sought here extends beyond prospective relief, and enters into the equivalent realm of a "quiet title" action which was barred in *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261 (1997). The State Defendants insist that the relief sought here is of the nature of a quiet title action, citing *W. Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004) This argument by the State Defendants defies a plain reading of the complaint, and reliance on these cases is misplaced.

KM Enterprises was a case against the commissioner of the New York State Department of Transportation involving a public procurement contract solicited by the Town of Brookhaven for a project to install traffic equipment, won by a competitor, only one allegation of violation of

[5] U.S. CONST. amend. XI, provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

federal law and contained "no factual allegations" - hardly analogous to the repeated and detailed factual prosecutions of plaintiffs for exercising their fishing rights in Shinnecock Bay. *KM Enterprises,* at 13. Further, the complaint in this case is detailed and specific with the continuing prosecutions of the Plaintiffs, showing a continuing violation of the Supremacy Clause, and a pattern of bad faith and harassment which chill their exercise of their fishing rights. The pleadings in *KM Enterprises* were "difficult to discern the Plaintiff's allegations." *Id.*

In the State Defendants' misplaced reliance on *Idaho v. Coeur D'Alene Tribe* and *W. Mohegan Tribe & Nation,* the State Defendants fail to cite any language from the complaint that the relief sought is not limited to prospective relief, and completely mischaracterize the relief sought by Plaintiffs in conclusory fashion as analogous to a quiet title suit. Plaintiffs seek no such relief defining ownership or its equivalent. Plaintiffs' relief is limited to prospective relief to protect Plaintiffs' rights:

> Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and Fed.R.Civ.P. 65, the Plaintiffs request the Court to issue a declaratory judgment, and preliminary and permanent injunctive relief in favor of Plaintiffs and against the Defendants, enjoining the Defendants from enforcing the laws of the State of New York against Plaintiff Silva in Southampton Town Justice Court in Case No. 17-7008, and from otherwise interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters (Compl., Relief, ¶1)

Under *Ex parte Young*, a suit against a state official is not barred if prospective relief is sought, as in this case. *Ex parte Young*, 209 U.S., at 123. The precedent of declaratory judgments and injunctions against states in Indian fishing rights cases is well established. "Under the Supremacy Clause of the United States Constitution, state regulation of Indian fishing rights secured by the treaties here in question, and implemented by Federal and tribal regulations, has been held preempted. Any regulation must be by Congress or Congressional authorization." *U.S.*

v. State of Michigan, 471 F. Supp. 192, 274 (W.D. Mich. 1979)(Fox, CJ), *aff'd as modified*, 653 F. 2d 277 (6th Cir. 1981) "The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government, and no principle of federalism requires the federal government to defer to the states in connection with the protection of those rights. The responsibility of the federal government to protect Indian treaty rights from encroachment by state and local governments is an ancient and well-established responsibility of the national government." *U.S. v. State of Michigan*, 653 F. 2d, at 279. The right to fish is one of the aboriginal usufructuary rights included within the totality of use and occupancy rights which Indian tribes might possess. *Menominee Tribe v. United States*, 391 U.S. 404 (1968) "If any person shows identification, as provided in the Decision of the Court, that he is exercising the fishing rights of a Treaty Tribe and if he is fishing in a usual and accustomed place, he is protected under federal law against any State action which affects the time, place, manner, purpose or volume of his harvest of anadromous fish, unless the State has previously established that such action is an appropriate exercise of its power." *U.S. v. Washington*, 384 F. Supp. 312, 408 (W.D. Wash. 1974)(Boldt, J.) "Treaty-recognized rights cannot, however, be abrogated by implication. The LCO's rights to use the ceded lands remain in force." *Lac Courte Oreilles Band v. Voigt*, 700 F. 2d 341, 365 (7th Cir. 1983); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1205 (10th Cir. 2002) (holding *Ex Parte Young* applicable and action not barred by Eleventh Amendment); *Menominee Tribe; U.S. v. Winans*, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of right from them -- a reservation of those not granted."). Treaties and laws must be construed in favor of Indians, and the Supremacy Clause

precludes application of state game laws to a tribe on ceded territory. *Antoine v. Washington*, 420 U.S. 194, 199 (1975)("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice."). Indians' historical hunting and fishing rights are kept absent an express abrogation of such rights by Congress. *Menominee Tribe,* 391 U.S. at 412 ("We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians.")

The well-known Judge Boldt decision in *U.S. v. Washington* is proof that permanent injunctive relief can work prospectively to protect rights to fish in a realistic and workable fashion.

C. The Court is not required to abstain under the Younger Doctrine under the bad faith and harassment exceptions

The State Defendants contend abstention by the Court is mandatory under the Younger Doctrine without reference to the Native American backdrop. "To the extent not addressed in the Memorandum and Order dated July 31, 2018, ECF No 48, the Court should dismiss remaining claims seeking injunctive or declaratory relief as to Plaintiff Silva under the Younger abstention doctrine." (State Defs. Mem., pp. 6-7)[6] *Younger* is a limitation of the *Ex parte Young* exception to sovereign immunity and is properly part and parcel of the immunity section above. *See, Younger v. Harris,* 401 U.S. 37, 43-46 (1971)

By the time of the Revolutionary War,"[i]t was accepted that Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233-34 (1985) As stated by the Supreme Court in

[6] Plaintiffs did not have an opportunity to argue the *Younger* bad faith and harassment exceptions in response to the Defendants' opposition papers to Plaintiffs' motion for preliminary injunction, because the Court's docket entry show cause order did not provide for reply papers and stated no oral argument would be held.

Oneida II, "Indians have a federal common-law right to sue to enforce their aboriginal land rights." *Oneida* 470 U.S., at 235. "It is rudimentary that 'Indian title is a matter of federal law and can be extinguished only with federal consent' and that the termination of the protection that federal law, treaties, and statutes extend to Indian occupancy is 'exclusively the province of federal law.'" *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670-71 (1979) (quoting *Oneida I*, 414 U.S., at 670)

In applying *Ex parte Young* in the Native American context, there is a 4-part framework. See, *Elephant Butte Irrigation Dist. V. Dep't of the Interior*, 160 F.3d 602, 607-608 ((10th Cir. 1998) The 4th prong is whether the suit rises to the level implicating "special sovereign interests." *Id*. Here, the State Defendants have no "special sovereign interest" over enforcement of fishing regulations against Shinnecock Indians exercising use rights under retained fishing rights within sight of their reservation land base. This lack of implicating a special sovereign interest is distinguished from an action equivalent to determining ownership under a quiet title action over navigable waters in *Idaho v. Coeur d'Alene Tribe*, relied upon by the State Defendants above.

In addition, nowhere does the State Defendants address the "bad faith," "harassment," and "unusual circumstances" exceptions, distinguishing *Dombrowski v. Pfister*, 380 U.S. 479 (1965) as a limited exception in *Younger v. Harris*, 401 U.S., at 54. Justice Brennen's concurring opinion in *Younger* (joined by White and Marshall), pointed out that "He [the plaintiff] has not alleged that the prosecution was brought in bad faith to harass him." *Younger*, 401 U.S., at 56. A chilling effect upon rights might result from such prosecution regardless of its prospects of success or failure. *Dombrowski*, 380 U.S., at 487-489. The abstention doctrine is inappropriate where a statute is justifiably attacked on its face, or as applied for the purpose of discouraging

protected activities. *Dombrowski*, 380 U.S., at 489-491. The state court's ultimate interpretation of a statute would be irrelevant to meet the claim that it was being applied to discourage civil rights activities. *Dombrowski*, 380 U.S., at 490.

The Plaintiffs have plainly plead facts showing bad faith, harassment, and special circumstances of failed prosecutions, seized property, and a continuing pattern of interference with their aboriginal and retained Shinnecock fishing rights:

> Over the last decade, the Defendants have ticketed, seized fish and fishing equipment, and prosecuted the Plaintiffs for alleged criminal offenses in alleged violation of New York State law involving fishing and raising shellfish in Shinnecock Bay and its estuary waters, which are adjacent to the lands of the Shinnecock Indian Reservation. Each of the prosecutions failed. Yet, the Defendants persist and continue to ticket and threaten prosecution. The Plaintiffs are in fear of exercising those same usual and customary aboriginal fishing rights secured and retained for them by their ancestors when Shinnecock territory was ceded to the English. Ironically Plaintiff Silva is presently scheduled to stand trial on August 30, 2018, in the Town of Southampton Justice Court, located in Hampton Bays, New York, the building itself sitting on ceded Shinnecock territory. (Compl., ¶16)
>
> On January 28, 2009, in *People of the State of New York v. Salvatore J. Ruggiero*, Case No. 08-101350, Southampton Justice Court, Southampton, New York, after a bench trial and prosecution testimony by Farrish, that court found the Defendant, a non-Indian who was fishing with Gerrod Smith, not guilty of possession of undersized flounder, undersized blackfish, and undersized porgy, for the Defendants' failure to prove jurisdiction. (Compl., ¶17)
>
> On October 14, 2009, in *People v Gerrod T. Smith*, Case No. 08-101351, Southampton Justice Court, Southampton, New York, after removal to this federal court, three criminal counts of possession by Gerrod Smith of undersized flounder, blackfish, and porgy in Shinnecock Bay, were dismissed in the Justice Court. (Compl., ¶18)
>
> On June 17, 2010, in *People v. Jonathan K. Smith*, Case No. 09-031419, Southampton Justice Court, Southampton, New York, after removal to this federal court and known as Case No. 09-0571 in the United States District Court for the Eastern District of New York, (Wexler, J.), a judgment of dismissal of criminal possession by Jonathan Smith of a shellfish farm in Shinnecock Bay without a license was entered for failure of the Defendants to prosecute. (Compl., ¶19)

> Most recently on April 20, 2017, Silva was stopped by two DEC Officers, Laczi and Farrish, while Silva was fishing for elver eels in Shinnecock Bay. Silva's eels, net, and other fishing equipment were seized, and Silva was issued a criminal appearance ticket alleging possession of undersized eels in violation of New York State law, 6 NYCRR 40-1(b)(ii). Silva was later charged with two additional criminal offenses, ECL 13-0355 (no fish license), and 6 NYCRR 40-1(b)(iii) (possession of eels over limit). This case is presently lodged and pending in the Southampton Town Justice Court as Case No. 17-7008 and is being prosecuted by Greenwood. Silva's attempt to obtain a voluntary dismissal by Greenwood was unsuccessful, and Silva's motion to dismiss for lack of jurisdiction was denied by that court. Over Silva's objection, that case is presently scheduled for trial on August 30, 2018 at 9:00 am. (Compl., ¶20)
>
> The Plaintiffs exercised their lawful rights to use waters, fish, take fish, and hold their fish clearly within an area of aboriginal usufructuary fishing rights un-relinquished and retained by Plaintiffs' ancestors in the aforementioned Colonial Deeds and related documents ceding Shinnecock territory, all protected under the Supremacy Clause, U.S. Const., Article VI, clause 2. (Compl., ¶22)
>
> The Defendants' repeated interference, seizures, and prosecution of the Plaintiffs by application of New York State fishing regulations violates Plaintiffs' fishing rights protected under the Supremacy Clause, was and is void, and was and is in excess of New York State jurisdiction. (Compl., ¶23)

Bad faith and harassment are also shown by these continued prosecutions on one hand, and the Defendants' complete failure to consult with the Shinnecock Indian Nation on matters involving Plaintiffs' fishing rights in accordance with obligations under Executive Order No. 13175. *See, e.g.,* no mention of Executive Order No. 13175 in the Affidavit of James Gilmore, dated July 23, 2018, even though Mr. Gilmore states he serves "as the New York Commissioner on the Atlantic States Marine Fisheries Commission (ASMFC or Commission)…." (Gilmore Aff., Doc. 47). There is no mention of required consultation in any filing by any of the Defendants.[7]

[7] More instances of bad faith and harassment: Mr. Gilmore testified in his affidavit that "American eel (*Anguilla rostrate*) are an important and protected resource. Their population is *depleted* and at historically low levels for several reasons, including *overfishing*…." Gilmore Aff, ¶4 (emphasis added). But Mr. Gilmore is impeached by the ASMFC's own website, "No overfishing determination can be made based on the analyses performed."

For these reasons, the Court is not mandated to decline injunctive relief under the Younger Doctrine due to the injunctive relief sought does not rise to implicate any special sovereignty interest of the Defendants, and because the facts alleged show bad faith, harassment, and special circumstances.

D. Plaintiffs have standing

The State Defendants contend Plaintiffs "lack standing to seek injunctive or declaratory relief" under Count I, without mentioning the unique facts and backdrop of this Indian case. (State Defs. Mem., pp. 7-9) In conclusory fashion and without reference to the facts alleged in the complaint, the State Defendants argue "Plaintiffs Gerrod Smith and Jonathan Smith have not alleged that they are currently being prosecuted or facing criminal charges" and "their request for injunctive relief is entirely speculative and remote." (State Defs. Mem., p. 8) With respect to Silva, the State Defendants opine that "Past injury does not supply a predicate for prospective relief 'since the fact that such practices had been used in the past did not translate into a real and immediate threat of future injury.'" (State Defs. Mem., p. 9)

The Plaintiffs have set forth in detail three failed prosecutions and seizure of their fishing property, and a pending one, by the County Defendants for Shinnecock fishing under their aboriginal rights in Shinnecock Bay within a stone's throw of the land base of the Shinnecock Indian Reservation. The detailed pleading of the pattern of actual seizures of fishing property, and actual criminal charges against the Plaintiffs, and the chilling effect such prosecutions have upon their enjoyment of their rights, constitutes facts establishing the Article III requirement of

(www.asmfc.org/species/american-eel) Mr. Gilmore also is impeached by studies of the U.S. Fish & Wildlife Service, which has on two occasions, 2007 and 2015, made findings that the American eel stock is "stable" and should not be placed in a protected status. See, press release, October 7, 2015 (fws.gov/external-affairs) The DA Defendant as well as Suffolk County has also failed to respond to Plaintiff Silva's service discrimination complaint filed on Suffolk County's website on or about November 28, 2017, even though a prompt review and response to online discrimination complaints are promised on the website, which notes the County accepts federal funding.

standing: 1) an "injury in fact" by a showing of a "concrete and particularized" injury to the Plaintiffs, as well as the requirements that 2) said acts are fairly traceable to the conduct of the State Defendants, and 3) the conduct is likely to be redressed by a favorable judicial decision. *Robins v. Spokeo*, No. 13-1339, Slip Op. at 6, 578 U.S. __ (2016) Further, the fact that all prior prosecutions failed with dismissals and an acquittal, and the Defendants continue to prosecute Shinnecock Indians for fishing, shows bad faith and harassment on the part of the Defendants. It stands to reason with little effort that a declaratory judgment in favor of Plaintiffs will result in Plaintiffs being able to enjoy their aboriginal fishing rights without interference by the Defendants in Shinnecock Bay and other usual and customary Shinnecock fishing areas.

Plaintiffs have met the standing requirements under *Spokeo*. 1) the injury in fact is established by a concrete and particularized injury to each Plaintiff. Each Plaintiff has had criminal charges brought against him and property seized for fishing in Shinnecock Bay. 2) the acts are fairly traceable to the conduct of the State Defendants. Each arrest and criminal charge was conducted by the appropriate named officer of the DEC. With respect to Seggos, the arrest and criminal charges of Shinnecock Indians was approved as a matter of policy at the top, by Seggos, Commissioner of the DEC. And 3) the conduct is likely to be redressed by a favorable judicial decision. The well-established precedent of Indian fishing cases discussed above shows that a declaratory judgment and injunctive relief is practical and workable. See, e.g., the *Boldt* decision.

E. Plaintiffs have stated a claim upon which relief may be granted

The State Defendants move to dismiss Counts I and II pursuant to Fed. R. Civ. P. 12(b)(6), for various reasons as contended below. (State Defs. Mem., pp. 9-24)

1. As to un-relinquished aboriginal and retained fishing rights in

ceded territory

In Count I, Plaintiffs plead:

> The Plaintiffs exercised their lawful rights to use waters, fish, take fish, and hold their fish clearly within an area of aboriginal usufructuary fishing rights un-relinquished and retained by Plaintiffs' ancestors in the aforementioned Colonial Deeds and related documents ceding Shinnecock territory, all protected under the Supremacy Clause, U.S. Const., Article VI, clause 2. (Compl., ¶ 22)
>
> The Defendants' repeated interference, seizures, and prosecution of the Plaintiffs by application of New York State fishing regulations violates Plaintiffs' fishing rights protected under the Supremacy Clause, was and is void, and was and is in excess of New York State jurisdiction. (Compl., ¶ 23)

The State Defendants contend Count I should be dismissed because "the Supremacy Clause does not provide a private right of action. Furthermore, the documents Plaintiffs rely on do not stand for the proposition that Plaintiffs want them to." (State Defs. Mem., p. 9) The State Defendants spend most of their brief attacking the colonial documents and their interpretation referred to in the complaint relating to retained aboriginal fishing rights:

> The Shinnecock and other seafaring native peoples of eastern Long Island have fished in the waters surrounding Long Island and other areas since time immemorial. (Compl., ¶13)
> …
>
> Colonial Deeds and related documents clearly support the right of the Shinnecock and other native peoples of eastern Long Island to fish in the waters adjacent to their communities without interference, to Wit:
>
> a) Department of State Book of Deeds, Unpublished documents, Office of the Secretary of State, Albany, New York, 2: 85-86. (New York State Archives. Series 453, vols. 1-9)
> b) Gardiner, David Lion, 1873 [1840] *Chronicles of East Hampton*, Sag Harbor, N.Y.: Isabel Gardiner Mairs, 3.
> c) *Documents Relative to the Colonial History of the State of New York*, ed. Edmund Bailey O'Callaghan and Berthold Fernow, 15 vols. Albany, N.Y.: Weed, Parsons, 1856-87, 14: 686, 692, 695, 718, 720.
> d) *Records of the Town of East Hampton*, ed. Joseph Osborne, 5 vols. Sag Harbor, N.Y. 1887, 1: 2-3, 1: 170-171.

e) *Records of the Town of Southampton*, ed. William Pelletreau. 8 vols. Sag Harbor, N.Y. 1874-77, 1: 162, 167-68; 2: 354-55.

(Compl., ¶15(a)-(e)) In support of their motion for a preliminary injunction, Plaintiffs submitted the report of their expert witness, Dr. John A. Strong, who is of the opinion that "The above documents clearly support the rights of the Shinnecock and the other native peoples of eastern Long Island to fish in the waters adjacent to their communities "without let or hindrance" and to dispose of their catches, "as they think good". (Doc. 3-10) The Defendants filed no expert witness report to the contrary.

The State Defendants misconstrue the plain meaning of the cause of action in Count I and err in contending that the cause of action is brought under the Supremacy Clause. The cause of action is plainly brought under Plaintiffs' "aboriginal usufructuary fishing rights." (Compl., ¶22) "Indians have a federal common-law right to sue to enforce their aboriginal land rights." *Oneida* 470 U.S., at 235. "It is rudimentary that 'Indian title is a matter of federal law and can be extinguished only with federal consent' and that the termination of the protection that federal law, treaties, and statutes extend to Indian occupancy is 'exclusively the province of federal law.'" *Wilson v. Omaha Indian Tribe*, 442 U.S., at 71. As such, application of state fishing laws to the Plaintiffs here is trumped by federal law under the Supremacy Clause, "all protected under the Supremacy Clause, U.S. Const., Article VI, clause 2." (Compl., ¶22) A plain reading of the complaint shows the Supremacy Clause is not plead as a cause of action.

The State Defendants spend a significant part of their brief arguing against Plaintiffs' interpretation of the colonial documents referred to in the complaint. (State Defs. Mem., pp. 10-24) The rule of interpretation is well established and ignored in their brief. "The language used in treaties with the Indians should never be construed to their prejudice." *Squire v. Capoeman*, 351 U.S., at 7.

Plaintiffs object to the attempt by the State Defendants to introduce other documents before the Court on a motion to dismiss. On a motion to dismiss the Court must assume that all of the facts alleged in the Complaint are true, construe those facts in the light most favorable to the Plaintiffs, and draw all reasonable inferences in favor of the Plaintiffs. *Abdullahi v. Pfizer, Inc.*; *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.; U.S. Bank Nat. Ass'n v. Ables & Hall Builders.* The rule of interpretation in favor of Plaintiffs must be applied.

On a Rule 12 motion, the Court should disregard the State Defendants' documents outside the four corners of the complaint. *Faulkner v. Beer*, 463 F. 3d 130, 134 (2d Cir. 2006). Further, the statements by opposing counsel in the State Defendants' brief are not evidence. *Kulhawik v. Holder*, No. 08-4582-ag (2nd Cir. 2009), citing *INS v. Phinpathya*, 464 U.S. 183, 188-89 n. 6 (1984)

The interpretation of Plaintiffs' colonial documents is a matter of fact to be decided at trial.

2. As to 42 U.S.C. §§ 1981, 1982

The State Defendants contend that Plaintiffs have failed to state a cause of action under 42 U.S.C. §§ 1981, 1982. (State Defs. Mem., pp. 20-23) The State Defendants argue "Plaintiffs have alleged no facts showing discriminatory intent." (State Defs. Mem., p. 21) "Plaintiffs claims also conflict with the plain language of the statutes." (State Defs. Mem., p. 22) And finally, "[w]ith respect to Section 1981, Plaintiffs have identified no contractual right that has been impaired or prevented, as required to state a claim." (State Defs. Mem., p. 22)

In Count II, Plaintiffs have plead:

> The Defendants' aforesaid acts against the Plaintiffs constitute a continuing pattern and practice of purposeful acts of discrimination based on their race as Native Americans in violation of Plaintiffs' civil rights to equal security of the laws and to exercise their lawful federally protected rights to use waters, fish, take fish, and hold their fish without interference, without seizure of person and property, and without prosecution by the Defendants.

(Compl., ¶ 25)

The Civil Rights Act of 1866 (42 U.S.C. §§ 1981 and 1982) is extremely broad in its coverage. Section 1981 protects the right of all persons to make and enforce contracts free from racial discrimination. Section 1982 protects the rights of citizens to inherit, purchase, lease, sell, hold, and convey real and personal property. The Act covers commercial as well as residential real estate transactions. The Act also covers both public and private discrimination. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The Civil Rights Act of 1866 is limited, however, to cases of racial discrimination (although some forms of ethnic or national origin discrimination may count as "racial" discrimination under the Act), and Section 1982 on its face protects United States citizens. The Supreme Court has broadly construed what is meant by racial discrimination under the 1866 Civil Rights Act and held that discrimination against Arabs in *St. Francis College v. Al Khazraji*, 481 U.S. 604 (1987), and against Jews in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), constituted racial discrimination under the 1866 Civil Rights Act.

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court restricted the application of Section 1981 to claims arising out of the formation of the contract. But the Civil Rights Act of 1991 legislatively overruled the Supreme Court's decision in *Patterson*, providing that the clause "to make and enforce contracts" in Section 1981 "includes the making, performance, modification and termination of contracts, *and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*" 42 U.S.C. § 1981(b). [emphasis added]

Under the 1866 Act, the plaintiff must establish that the defendant's acts were "purposeful." *General Building Contractor's Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982).

Plaintiff need only show discrimination by a preponderance of either direct or circumstantial evidence. *Desert Palace, Inc. v. Costa,* 123 S.Ct. 2148 (2003).

Under the 1866 Civil Rights Act, a court may "use any available remedy to make good the wrong done." *Sullivan v. Little Hunting Park,* 396 U.S. 229 (1969).

1. Section 1981

Plaintiffs' suit arises under the "contracts clause" (not the "equal benefits clause") of Section 1981, which provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to *make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. [emphasis added]

(b) "Make and enforce contracts" defined

For purposes of this section, *the term "make and enforce contracts" includes* the making, performance, modification, and termination of contracts, and *the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship*. [emphasis added]

a. Elements of a contracts clause 1981 claim

1) Persons of a protected racial class. *St. Francis College v. Al Khazraji*, 481 U.S., at 613; *Shaare Tefila Congregation v. Cobb*, 481 U.S., at 617-618.

In the instant case, Plaintiffs are members of a protected racial class. "At all relevant times, Plaintiffs were and are enrolled members of the Shinnecock Indian Nation, a federally recognized Indian Tribe, ("the Shinnecock Nation"), reside on the Shinnecock Indian Reservation" (Compl., ¶ 14)

2) A "contractual relationship." *Section 1981(a).* And "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Section 1981(b).*

Plaintiffs have plead the right to enjoy all the benefits, privileges, terms and conditions of the reserved fishing rights secured by their ancestors in colonial deeds which, by contract, ceded Shinnecock territory and reserved fishing rights. "Colonial Deeds and related documents clearly support the right of the Shinnecock and other native peoples of eastern Long Island to fish in the waters adjacent to their communities without interference, to Wit: …." (Compl., ¶15) "The Plaintiffs are in fear of exercising those same usual and customary aboriginal fishing rights secured and retained for them by their ancestors when Shinnecock territory was ceded to the English." (Compl., ¶16)

3) "Purposeful discrimination," *General Building Contractor's Ass'n., Inc. v. Pennsylvania,* 458 U.S., at 391, by a preponderance of either direct or circumstantial evidence. *Desert Palace, Inc. v. Costa*. Intentional discrimination occurs when the recipient acted, at least in part, because of the actual or perceived race of the alleged victims of discriminatory treatment. *Doe ex rel. Doe v. Lower Merion Sch. Dist*., 665 F.3d 524, 548 (3d Cir. 2011). While discriminatory intent need not be the only motive, a violation occurs when the evidence shows that the entity adopted a policy at issue "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Any intentional use of race, whether for malicious or benign motives, is subject to the most careful judicial scrutiny. *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 493 (1989); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 226 (1995). The record need not contain evidence of "bad faith, ill will or any evil motive on the part of the [recipient]." *Williams v. City of Dothan,* 745 F.2d 1406, 1414 (11th Cir. 1984). The Court looks to the "totality of the relevant facts" will determine whether the recipient has engaged in intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (discussing analysis of intentional discrimination generally). Circumstantial evidence requires the fact finder to make an inference or presumption. *Hamilton v. Southland Christian Sch., Inc.,* 680 F.3d 1316, 1320 (11th Cir. 2012). "Circumstantial evidence can include suspicious timing, inappropriate remarks, and comparative evidence of systematically more favorable treatment toward similarly situated [individuals] not sharing the protected characteristic…." *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994); accord *Troupe v. May Dep't Stores Co*., 20 F.3d 734, 736 (7th Cir. 1994). A "direct evidence" case is rare. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) ("[D]irect evidence of intentional discrimination is hard to come by.") *Id.*, at 271.

> The pattern and practice of the targeted (and failed) prosecutions, seizure of property, and removal from the waters, against each of the Plaintiffs supports an inference of intentional discrimination. (Compl., ¶¶ 16-20)

4) Interference with the "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.*

5) Damages. Under the 1866 Civil Rights Act, a court may "use any available remedy to make good the wrong done." *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

2. <u>Section 1982</u>

Section 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

a. Elements of a 1982 claim

1) Persons of a protected racial class. See Section 1981 elements, *supra*.

2) US citizen, *Section 1982*

3) "purchase, lease, sell, hold, and convey real and personal property" *Section 1982* See Section 1981 elements, *supra.* In the instant case, the Plaintiffs' personal property was seized and never returned. Plaintiffs "rights to use waters, fish, take fish, and hold their fish without interference, without seizure of person and property, and without prosecution by the Defendants."

4) "Purposeful discrimination" See Section 1981 elements, *supra*.

5) Interference. *Section 1982*. See Section 1981 elements, *supra.*

6) Damages. See Section 1981 elements, *supra.*

For the above reasons, Plaintiffs have sufficiently plead causes of action under Sections 1981 and 1982.

3. As to Defendant Seggos

Defendant, Seggos, contends Count II should be dismissed as to him in his personal capacity, because "he had no personal involvement or direct connection to the alleged events." (State Defs. Mem., p. 23) "The attempt of a State officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U.S., at 124. As Commissioner of the DEC, Seggos sets policy and sees to it that it is executed, and that against the Shinnecock Indian Plaintiffs, Plaintiffs allege, constitutes illegal discrimination under Sections 1981 and 1982. The State Defendants are raising a question of fact as to Seggos' personal involvement and direct connection to the events, which is subject to discovery, and trial. On a motion to dismiss the Court must assume that all of the facts alleged in the Complaint are true, construe those facts in the light most favorable to the Plaintiffs, and draw all reasonable inferences in favor of the Plaintiffs. *Abdullahi v. Pfizer, Inc.; Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*; *U.S. Bank Nat. Ass'n v. Ables & Hall Builders*.

4. The State Defendants are not cloaked with qualified immunity

Lastly, the State Defendants contend they are cloaked with qualified immunity in their personal capacities and make contrary factual assertions. (State Defs. Mem., pp. 23-24) On a motion to dismiss the Court must assume that all of the facts alleged in the Complaint are true, construe those facts in the light most favorable to the Plaintiffs, and draw all reasonable inferences in favor of the Plaintiffs. *Abdullahi v. Pfizer, Inc.; Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*; *U.S. Bank Nat. Ass'n v. Ables & Hall Builders*. Under *Ex parte*

Young, the State Defendants have no immunity as they are deemed acting in their personal, rather than official capacity, by their alleged participation in the continuing prosecution of the Plaintiffs in excess of state jurisdiction and in violation of the supremacy clause protections of their aboriginal fishing rights under Count I, and in violation of the civil rights laws, Sections 1981 and 1982 under Count II. Further, 42 U.S. § 1981(c) expressly strips the State Defendants of immunity. "The rights protected by this section are protected against impairment … under color of State law."

VI. CONCLUSION

For the foregoing reasons, the State Defendants. Rule 12(b)(1) and (6) motion to dismiss Plaintiffs' complaint is without merit and should be denied in its entirety.

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New York, New York

Respectfully submitted,

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