UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNKECHAUG INDIAN NATION and CHIEF HARRY B. WALLACE, in his capacity as chief and individually,

Plaintiffs,

-against-

Case No. 18 Civ. 1132 (WFK)(AYS)

BASIL SEGGOS, in his official capacity as the Commissioner of the New York State Department of Environmental Conservation, and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Defendants.
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STATE DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Other Authorities

Federal Rules

Constitutional Provisions

New York Statutes and Rules

Defendants Basil Seggos and the New York State Department of Environmental Conservation[1] respectfully submit this reply memorandum of law in further support of their motion for summary judgment. For the reasons stated below, in the State Defendants' moving papers, and in the State Defendants' opposition to the Plaintiffs' cross-motion for summary judgment, there is no genuine dispute as to any material fact and the State Defendants should be awarded judgment as a matter of law.[2]

PRELIMINARY STATEMENT

After hundreds of pages of sound and fury, the outcome of this case must resolve decisively in favor of the State Defendants based on a set of discrete and dispositive issues of law. The Plaintiffs had ample opportunity to explore their allegations in discovery and to articulate valid legal claims through their briefing. But, despite every such opportunity, they have failed to come forward with either admissible evidence or legal authority that could overcome summary judgment on a myriad of grounds. Their claims are barred by the Eleventh Amendment, precluded based on their prior lawsuit, foreclosed by binding Supreme Court precedent, predicated on conduct occurring outside the limitations period, or simply unsupported by admissible evidence sufficient to satisfy the required elements of their claims. And even if this host of substantive and procedural objections, any one of which requires granting summary judgement to Defendants, were to be ignored, the Plaintiffs' core claim regarding the Andros

[1] For ease of reading, this reply brief uses the same defined terms as the State Defendants' moving brief (the "State Br.") and brief in opposition to the Plaintiffs' motion for summary judgment (the "State Opp.").

[2] In this reply, the State Defendants rely on declarations and exhibits submitted in support of their motion for summary judgment, dated August 20, 2021. These include the Declaration of Toni M. Kerns, dated August 18, 2021 ("Kerns Dec."), and the exhibits thereto; the Declaration of Monica Kreshik ("Kreshik Dec."), dated August 19, 2021, and the exhibits thereto; and the Declaration of James M. Thompson, dated August 20, 2021 ("Thompson Dec"), and the exhibits thereto. The State Defendants also rely on the Declaration of James M. Thompson, dated October 1, 2021 submitted in reply ("Thompson Reply Dec."), and attached the portions of the deposition transcripts cited herein to the Declaration of Benjamin Liebowitz in opposition to summary judgment, dated September 17, 2021 ("Liebowitz Dec.").

Order would fail as a matter of law in any event: the Order simply does not say what the Plaintiffs say it says; instead, its plain text declares that any fishing rights conferred are subject to "the law and Custome of the Government," which necessarily includes the environmental protection laws the Plaintiffs seek to violate. The Plaintiffs have attempted to confuse the matter with a profusion of dramatic statements, conclusory assertions, and personal attacks on all involved.[3] Now, the evidence and well-established legal authority before the Court clear away their attempted obfuscation and demonstrate that their claims necessarily fail as a matter of law.

ARGUMENT

I. THE PLAINTIFFS HAVE FAILED TO RAISE ANY GENUINE DISPUTE OF MATERIAL FACT

The Plaintiffs seek to evade summary judgment for the State Defendants via a flawed Local Rule 56.1 counterstatement (the "Pl. Cs.") that seeks to manufacture alleged disputes of fact where none can exist, and the content of which violates both the letter and spirit of the Local Rules and the Federal Rules of Civil Procedure. Where a non-moving party seeks to "controvert[] any statement of material fact" in a movant's 56.1 statement, that party must "cit[e] to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c)." Local Civil Rule 56.1(d). Further, "where, as here, the record does not support the assertions in a Local Rule 56.1 [counter]statement, those assertions should be disregarded and the record reviewed

[3] Throughout the litigation, and on an accelerating basis during the briefing of the instant cross-motions for summary judgment, the Plaintiffs have engaged in a series of hyperbolic *ad hominem* attacks on the State Defendants, the DEC staff, their counsel, their witnesses, and their expert. See, e.g., Plaintiffs' Memorandum of Law In Support of Its Opposition to Defendants' Motion For Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure, (the "Pl. Opp. ") at 1 (accusing the State Defendants of "racist and divisive undertones"); id. at 31 (accusing the State Defendants' "witnesses and expert" of "prejudice against the Unkechaug"); id. at 47 (accusing DEC Deputy Commissioner and General Counsel of "animus against the Unkechaug"); see also Declaration of Chief Harry B. Wallace, Pl. Opp. Ex. 8 (the "Wallace Op. Dec.") ¶ 15 (baselessly accusing one of the AAGs representing the State Defendants of "racist views of white superiority"); Dkt. No. 73 at 3 (claiming that the State Defendants' expert witness "perjured herself"). The State Defendants will not respond to this invective, other than to say that it is untrue and ought to be beneath the dignity of this proceeding. The State Defendants simply ask the Plaintiffs to cease these untoward attacks, and trust the Court will disregard them.

independently." Holtz v. Rockefeller & Co., 258 F.3d 62, 73-74 (2d Cir. 2001) (also holding that "where there are no[] citations or where the cited materials do not support the factual assertions in the Statements, the Court is free to disregard the assertion.") (quotation omitted). The Plaintiffs have not met that standard, and instead repeatedly and impermissibly confront straightforward factual statements in the State Defendants' 56.1 Statement of Material Facts ("State 56.1")—such as the plain meaning of documents, and their own unambiguous, sworn deposition testimony—with a series of conclusory and misleading assertions relying on inadmissible evidence, no evidence, or evidence that flatly fails to support the "facts" they allege. See Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008) ("A party opposing summary judgment does not show the existence of a genuine issue of fact to be tried merely by making assertions that are conclusory. . . or based on speculation.") (internal citations omitted, collecting cases).

By way of example, the Plaintiffs purport to "dispute" nearly every material fact concerning the American eel and the work of the ASMFC set forth in the State Defendants' 56.1 Statement with a single multiple-page assortment of block-quotes from the deposition testimony from Toni Kerns, the ASMFC 2017 Stock Update, and their own eel management plan, in an apparent attempt to manufacture the misimpression that the ASMFC Stock assessment was "outdated," "biased," or "unreliable." Pl. Cs. at ¶ 7. However, the cited materials do no such thing, as discussed at greater depth in Section VI(A), *infra*. The Plaintiffs incorporate by reference this same jumble of sources as their sole basis for disputing paragraphs 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, and 22 of the State 56.1, instead of addressing each allegation directly and specifically, as required by Local Rule 56.1.

Throughout their counterstatement, the Plaintiffs also seek to dispute facts established based on their own sworn deposition testimony, again without citation to evidence—admissible or otherwise—that actually controverts the facts at issue. See Risco v. McHugh, 868 F. Supp. 2d 75, 88 (S.D.N.Y. 2012) (a 56.1 counterstatement is "deficient" where "it frivolously purports to deny certain factual assertions that a review of the record establishes have previously been admitted by Plaintiff in sworn testimony, or otherwise relied on by Plaintiff."). For example, the Plaintiffs dispute the fact that the Unkechaug had never fished for glass eels prior to 2010, despite Plaintiff Wallace testifying to this as the Rule 30(b)(6) witness for the Unkechaug. Cs. 56.1 ¶ 27; Wallace 30(b)(6) Tr. 59:2-16.[4] In support of their contention that "the Unkechaug have always fished for glass eels since time immemorial," the Plaintiffs cite, without explanation, a letter from Thomas Berkman (Pl. Ex. 28), their own eel management plan (Pl. Ex. 36), the Wallace Opp. Dec. (Pl. Ex. 8), and a photograph that purports to be an Unkechaug man fishing for eels with a spear in 1910. Pl. Cs. ¶ 27. None of these documents reference the Unkechaug fishing for glass eels (as opposed to adult eels) prior to 2010. On the same basis, the Plaintiffs dispute Plaintiff Wallace's 30(b)(6) testimony that the Unkechaug never sold glass eels prior to 2010, with the confusing addition of a citation to DEC internal policy CP-42. Pl. Cs. ¶ 28; see also Wallace 30(b)(6) Tr. 60:21-23.

Likewise, the Plaintiffs frivolously dispute that in their 2016 action in New York State Supreme Court, Unkechaug Indian Nation v. N.Y. State Dept. of Env'tl Conservation, Index No. 4254/2016, they asserted that DEC had violated their sovereign fishing rights and interfered with their religious practice. Pl. Cs. ¶ 41. To dispute this fact, Plaintiffs propound nearly a page of

[4] Excerpts from the transcript of the deposition of Plaintiff Harry Wallace as Fed. R. Civ. P. 30(b)(6) witness for the Unkechaug Indian Nation ("Wallace 30(b)(6) Tr."), taken in this action on February 27, 2020, are annexed as Exhibit B to the Liebowitz Dec.

non-responsive argument and cite to the complaint in that action, which clearly alleges, *inter alia*, that the DEC "deprived the plaintiff of its rights and sovereignty as an Indian Nation and interfered with the cultural and religious practices of the Unkechaug as Care-takers of their land and natural resources," Kreshik Ex. D ¶ 29; see also Pl. Cs. ¶ 41. The Plaintiffs further attempt to dispute obvious and unassailable procedural facts concerning their earlier lawsuit on the same baseless grounds, including that the DEC moved to dismiss that case (Pl. Cs. ¶ 42), that the complaint in that action was dismissed, in part, for failure to state a cause of action (Pl. Cs. ¶ 43), that they filed an order to show cause seeking to withdraw from that case (Pl. Cs. ¶ 44), that their motion to withdraw was not granted (Pl. Cs. ¶ 45), or even that they failed to appeal the decision (Pl. Cs. ¶ 46). The Court should disregard the Plaintiffs' meritless and unsupported disputations, and deem the applicable assertions by the State Defendants, each of which was supported by citations to specific, admissible evidence, to be admitted.

II. THE ELEVENTH AMENDMENT BARS THE PLAINTIFFS' CLAIMS

A. There Has Been No Waiver of Eleventh Amendment Immunity

At the eleventh hour, the Plaintiffs have finally attempted to adduce the "additional evidence of Defendants invoking federal jurisdiction" that the Court called for in its April 2019 opinion, the absence of which would likely lead to DEC's dismissal on Eleventh Amendment Grounds. See Unkechaug Indian Nation v. DEC, No. 18 Civ. 1132, 2019 WL 1872952 at *4 (E.D.N.Y. Apr. 23, 2019). In his declaration, Plaintiffs' counsel reveals for the first time in this litigation that it was actually *he* who purportedly heard the alleged "threat" from AAG McLean that serves as the basis of the Plaintiffs' attenuated waiver argument. Declaration of James F. Simermeyer (the "Simermeyer Dec.") ¶ 41. This new allegation by Plaintiffs' counsel—which

was never disclosed in discovery—is the only first-hand account of the alleged "threat,"[5] which even if credited by the Court cannot satisfy the "stringent" test required for a federal court to find waiver of Eleventh Amendment immunity, as a matter of law. Boddie v. N.Y. State Div. of Parole, No. 08 Civ. 911, 2009 WL 1033786, at *4 (E.D.N.Y. Apr. 17, 2009) (quoting Close v. N.Y., 125 F.3d 31, 39 (2d Cir. 1997)); see also Santiago v. N.Y. State Dep't of Corr. Servs., 945 F.2d 25, 30 (2d Cir. 1991) (waiver "will only be found [] 'where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.").

i. As A Matter of State Law, An Independent Prosecutor Like AAG McLean Could Not Waive DEC's Eleventh Amendment Immunity

The Plaintiffs' waiver argument fails as a matter of law because, under the settled statutory and decisional law of New York State, a prosecutor working for the Attorney General is not the attorney for or representative of a regulatory agency such as DEC. As the State Defendants pointed out in their moving brief, State Br. at 22-23, and in their opposition brief, State Opp. at 20-22, AAG McLean was not an employee, officer, or agent of DEC, nor did he represent DEC as an attorney. See Kreshik Dec. ¶ 24. Although criminal investigations such as the one conducted by AAG McLean are initiated by a request from an executive agency such as the DEC, the Attorney General and her staff conduct any such investigations (and bring any associated prosecutions) on behalf of the People of the State of New York, and not as an agent or attorney for the requesting entity. See People v. Gilmour, 98 N.Y.2d 126, 131-32 & n.6 (2002) (discussing the legal effect of a criminal referral, and explaining that in such a situation "the

[5] Plaintiffs' counsel also avers that AAG McLean had a separate telephone call with another lawyer representing Plaintiff Wallace, and that the other lawyer then told him what AAG McLean said in that telephone call, which Plaintiffs' counsel did not participate in. See Simermeyer Dec. ¶ 43. Plaintiffs' counsel's recollection of what the other lawyer told him about what AAG McLean said in the other phone call is hearsay within hearsay, and must be disregarded. See Fed. R. Evid. 802, 805; U.S. v. Cummings, 858 F.3d 763, 773 (2d Cir. 2017).

Attorney General has the prosecutorial powers otherwise held by the District Attorney"); see also N.Y. C.P.L. § 1.20(32) (defining "district attorney" to mean, "where appropriate, the attorney general, an assistant attorney general [such as AAG McLean], a deputy attorney general, [or] a special deputy attorney general"). Once the Attorney General is authorized to conduct a criminal inquiry, she is not subject to agency oversight or control, and is empowered to follow the facts and prosecute the case as she sees fit. See People v. Mktg. & Advertising Servs. Center Corp., 272 A.D.2d 982, 982 (N.Y. App. Div. 4th Dep't 2000) (Attorney General was empowered to prosecute defendant corporation even though referring agency had not authorized it as a target); see also Gilmour, 98 N.Y.2d at 134 (agency heads were not to identify offenses to be prosecuted because "the very point of the request is to allow the Attorney General, as prosecutor, to make that determination.").

The Plaintiffs have never had a response to this black-letter New York law establishing the Attorney General's prosecutorial independence. Instead, they simply assert – repeatedly, conclusorily, and without citing to any legal authority – that AAG McLean's actions must be imputed to DEC because they say he is DEC's representative.[6] See, e.g., Pl. Opp. at 54 ("Seggos

[6] The Plaintiffs point to the State Defendants' privilege log in asking the Court to infer that the existence of communication between DEC and AAG McLean indicates that the prosecutor acted as an agent of DEC, but federal courts routinely reject the admission of privilege logs by adverse parties attempting to speculate as to the contents of the protected documents. See, e.g., Utica Mut. Ins. Co. v. Munich Reins. Am., Inc., No. 12 Civ. 196, 2018 WL 3135847, at *13 (N.D.N.Y. June 27, 2018) (rejecting admission of privilege log as evidence where plaintiff "has not identified any relevant, nonspeculative inferences that could be drawn from it."). Here, the Plaintiffs are not attempting to introduce the privilege log to show the existence of communications between the prosecutor and the regulatory agency – which has never been in dispute – but rather as an invitation to speculate as to the communications' contents. See Pl. Opp. at 57 (alleging without citation that "[t]hese communications illustrate that McLean [was] acting in support of the scheme orchestrated by NYSDEC . . . to pressure Wallace with criminal prosecution unless the nation brought a lawsuit").

Even if the privilege log were admissible evidence, it would do nothing to establish that AAG McLean represented DEC as an attorney, let alone that he had the authority to waive DEC's Eleventh Amendment immunity in a prospective civil case entirely separate from his investigation or prosecution (or that he did so). The privilege log demonstrates that DEC and AAG McLean were in communication during and after the Plaintiffs' 2016 state court case against DEC, and during McLean's own investigation of Plaintiff Wallace on behalf of the Office of the

and NYSDEC directed its legal representative, NYS Assistant Attorney General Lambert to cunningly coerce Chief Wallace and the nation into bringing this action."); id. at 57 ("McLean [was] acting in support of the scheme orchestrated by NYSDEC through Seggos and Berkman to pressure Wallace with criminal prosecution unless the nation brought a lawsuit."). These conclusory allegations cannot contradict the well-settled New York State law that the Attorney General's prosecutors, such as AAG McLean, are not attorneys for a state agency that issues a criminal referral, and therefore could not waive the agency's immunity even if they purported to do so.

ii. The New Recollection by Plaintiffs' Counsel Is Inadmissible Hearsay

The purported "threat" recounted in the Plaintiffs' counsel's new declaration is also inadmissible under the hearsay rule. The Plaintiffs are offering the alleged out-of-court statement by McLean into evidence "to prove the truth of the matter asserted," Fed. R. Evid. 801(c)(2), in this case, for the proposition that "if Chief Wallace and the Nation did not file a federal lawsuit asserting its rights against the NYSDEC [McLean] would commence felony criminal prosecution against Chief Wallace." Simermeyer Dec. ¶ 41.[7] The statement therefore

Attorney General, but the State Defendants have never denied the existence of such communication, see, e.g., Dkt. Nos. 45 & 46, which is both normal where prosecutors and regulatory agencies have overlapping areas of jurisdiction and desirable on a policy basis. See U.S. v. Acquest Transit LLC, 319 F.R.D. 83, 97 (W.D.N.Y. 2017) (holding that work product protection applies to "communications between [] prosecutors and [] administrative agencies involved in parallel investigations and litigations regarding the same parties"); id. at 97 (emphasizing "the need for [agency] counsel to be appraised of developments in the related criminal case and for the prosecutor to be aware of developments in this civil action.").

[7] The Plaintiffs cite a handful of other sources in addition to the Declaration from Plaintiffs' counsel. See Pl. Opp. at 58 (citing Plaintiffs' Exhibits 8, 22, and, 23). However, none of the other exhibits cited contain direct evidence of the purported "threat." The declaration of Plaintiff Wallace makes clear that Wallace himself did not hear the purported threat. See Pl. Opp. Ex. 8 ¶ 4; see also Wallace 30(b)(6) Tr. 40:9-12 (admitting that Plaintiff Wallace never spoke to AAG McLean directly). Exhibit 22 is a previous declaration by AAG McLean, but that declaration says nothing about any "threat" or any intention to waive sovereign immunity, only that McLean "has voluntarily deferred any indictment due to the pendency of this civil action . . . as its outcome may affect the scope of any liability." Pl. Opp. Ex. 22 ¶ 4. And Exhibit 23 consists of excerpts of the State Defendants' privilege log, which are inadmissible and in any event make no mention of the alleged "threat." None of these sources contains a first-hand account of the alleged "threat," which appears only in the newly-made declaration of Plaintiffs' counsel.

cannot be admitted on its own terms. See Fed. R. Evid. 802. Nor is there any exception to the hearsay rule that could apply to the purported statement by AAG McLean. In particular, any statement by AAG McLean would not qualify as a statement by a party-opponent under Fed. R. Evid. 801(d)(2). AAG McLean is not a party to this action, nor is his employer, and neither DEC nor Commissioner Seggos has "adopted" the purported statement; in fact, DEC has resolutely asserted its Eleventh Amendment immunity and emphasized that AAG McLean was not someone "whom [DEC] authorized to make a statement on the subject." Fed. R. Evid. 801(d)(2)(A-C); see Kreshik Dec. ¶¶ 24-25.

iii. The New Testimony by Plaintiffs' Counsel Is Inappropriate and Was Never Disclosed in Discovery

The newly-asserted recollection by Plaintiffs' counsel about the purported "threat" by AAG McLean must also be excluded based on the Plaintiffs' repeated failure to disclose it in discovery. See Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial"). Plaintiffs' counsel's declaration is the first time he has ever claimed that he directly heard the alleged "threat" – something that was presumably always within his personal knowledge, but which he is revealing for the first time three-and-a-half years into the litigation.

The State Defendants requested exactly this information in their 19th interrogatory, which asked the Plaintiffs to "[i]dentify any incident in which you claim Defendants waived sovereign or Eleventh Amendment immunity and any evidence which you claim reflects such a waiver." Interrogatories, Thompson Reply Dec. Ex. A at 7. The Plaintiffs' response refused to identify any such incident:

> Plaintiffs refer Defendants to Plaintiffs Complaint, Plaintiffs Responses and production to Defendants Document requests bates stamp 1-3964, Initial Discovery

> disclosure, Plaintiffs Opposition to Defendants motion to dismiss including exhibits and the Nations and Chief Wallace's depositions.

Plaintiffs' Interrogatory Responses, Thompson Reply Dec. Ex. B at 9; cf. Thompson v. Jamaica Hosp. Med. Ctr., No. 13 Civ. 1896, 2015 WL 3824254, at *3 (S.D.N.Y. June 19, 2015) (sanctioning party who told opponent to "see generally the entire 57-page production" because "merely gesturing at a large set of documents is not sufficient"). It was certainly within the Plaintiffs' knowledge at the time, as it was Plaintiffs' counsel – the declarant today regarding the alleged "threat" – who signed the interrogatory responses that made no mention of it. See Interrogatory Responses, Thompson Reply Dec. Ex. B at 10.

The Plaintiffs were required to give a straightforward answer to the straightforward question of what incidents they claim amounted to an Eleventh Amendment waiver, and their failure to do so should preclude them from introducing new or withheld contentions now, since "[c]ontention interrogatories are treated as judicial admissions which usually estop the responding party from later asserting positions not included in its answers, 'unless the failure was substantially justified or is harmless.'" In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 117 F. Supp. 3d 276, 294 (S.D.N.Y. 2015) (quoting Fed. R. Civ. P. 37(c)(1). "Where there is substantial prejudice to the [opposing party]—namely, not being advised of the contours of this claim until long after the termination of discovery and the filing of dispositive motions—the [Plaintiffs'] failure to [disclose or] amend their contentions results in this claim being deemed waived." Unigene Labs., Inc. v. Apotex, Inc., No. 06 Civ. 5571, 2010 WL 2730471, at *6 (S.D.N.Y. July 7, 2010).

Similarly, the Plaintiffs refused to reveal that their counsel had any firsthand evidence in their initial disclosures, which Plaintiffs' counsel himself signed. See Plaintiffs' Initial Disclosures § A, Thompson Reply Dec. Ex. C at 2-4. Having refused to identify himself as

someone with discoverable information, Plaintiffs' counsel cannot put himself forward as a witness now, at the close of summary judgment briefing, when he never disclosed his knowledge over the previous three-and-a-half years of litigation.[8] See BF Advance, LLC v. Sentinel Ins. Co., Ltd., No. 16 Civ. 5931, 2018 WL 4210209, at *6-8 (E.D.N.Y. Mar. 20, 2018) (striking testimony by witness where offering party "failed timely to disclose [him] as a witness in their Rule 26 disclosures, or at any time prior to submitting their opposition to defendant's summary judgment motion").

iv. The New Testimony by Plaintiffs' Counsel, Even if Credited, Fails to Amount to a Waiver on Behalf of DEC

Even if the Court were to admit the testimony of Plaintiffs' counsel, and to credit it, its content would still not amount to a waiver of sovereign or Eleventh Amendment immunity on the part of DEC or Commissioner Seggos. As discussed in the State Defendants' moving brief, State Br. at 21-22, and opposition brief, State Opp. at 20-21, "'[t]he test for determining whether a State [entity] has waived its immunity from federal-court jurisdiction is a stringent one,' and 'waiver of a State's Eleventh Amendment immunity will not be found unless such consent is unequivocally expressed.'" Boddie, 2009 WL 1033786, at *4 (quoting Close, 125 F.3d at 39). Accordingly, "[w]aiver may not be implied," Sossamon v. Texas, 563 U.S. 277, 284 (2011), and "will only be found [] 'where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.'"

[8] If this matter were to proceed beyond summary judgment, Plaintiffs' counsel's attempt to introduce his own testimony to rebut a key affirmative defense should necessitate his disqualification under the advocate-witness rule. See Rizzuto v. De Blasio, No. 17 Civ. 7381, 2019 WL 1433067, at *4 (E.D.N.Y. Mar. 29, 2019) ("The test . . . is whether the attorney's testimony could be *significantly useful* to his client. If so, he should be disqualified regardless of whether he will actually be called.") (emphasis in the original) (quoting Lamborn v. Dittmer, 873 F.2d 522, 531 (2d Cir. 1989)).

Santiago, 945 F.2d at 30 (brackets omitted) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

The substance of the purported statement made by AAG McLean to Plaintiffs' counsel simply does not meet this standard. As Plaintiffs' counsel recollects it:

> On or about the spring of 2017, NYS AG Hugh Lambert McLean called my office and advised me that if Chief Wallace and the Nation did not file a federal lawsuit asserting its rights against the NYSDEC he would commence felony criminal prosecution against Chief Wallace.

Simermeyer Dec. ¶ 41. Notably missing from that statement is 1) any assertion that AAG McLean was an attorney for or otherwise authorized to act as DEC's representative, or 2) any statement that DEC would waive Eleventh Amendment or sovereign immunity. Instead, AAG McLean purportedly speaks only about what *he* will do in his own role as a prosecutor, consistent with his statement in his declaration in support of his motion to quash that "OAG ha[d] voluntarily deferred any indictment due to the pendency of this civil action challenging the applicability of New York's environmental laws to the Plaintiffs, as its outcome may affect the scope of liability." Dkt. No. 48 ¶ 4. The "reasonable construction" of AAG McLean's purported statement is that he was speaking regarding his own independent prosecutorial role, and not on behalf of DEC, for which he has never purported to act and by which he has never been authorized to act. Santiago, 945 F.2d at 30; see Kreshik Dec. ¶ 24. The alleged statement to Plaintiffs' counsel, even if it were to be admitted and credited, does nothing to say otherwise.[9]

[9] In their opposition, the Plaintiffs collect several cases concerning waiver of Eleventh Amendment Immunity. Pl. Opp. 53-54. These cases stand for the general proposition that states *can* waive their immunity, but none of them found waiver under the circumstances at issue here. Rather, where Plaintiffs' cited cases found waiver (which some did not), they involved unequivocal acts consenting to federal jurisdiction by states, such as removal, intervention, or filing a claim in a bankruptcy proceeding. See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999) (Florida could not waive its sovereign immunity by engaging in activity in alleged violation of the Lanham Act); Gardner v. State of N.J., 329 U.S. 565, 574 (1947) (filing proof of claim in bankruptcy proceeding may waive sovereign immunity); Clark v. Barnard, 108 U.S. 436, 447 (1883) (State's "voluntary appearance" in federal court as an intervenor avoids Eleventh Amendment inquiry).

Cf. Melrose v. N.Y. State Dept of Health, No. 05 Civ. 8778, 2009 WL 211029, at *6 (S.D.N.Y. Jan. 26, 2009) (statement "does not contain any 'express language' or 'overwhelming implications' that would lead to the conclusion that New York has waived its Eleventh Amendment immunity."); Sossamon, 563 U.S. at 284 ("Waiver may not be implied.").

v. The Plaintiffs' Assertion of Waiver Is Meritless

The Plaintiffs' waiver argument also fails as a matter of common sense. The argument amounts to an assertion "that McLean[] act[ed] in support of the scheme orchestrated by NYSDEC through Seggos and Berkman to pressure Wallace with criminal prosecution unless the nation brought a lawsuit." Pl. Opp. at 57; see also id. at 58 (alleging that "NYSDEC was scheming to force the Unkechaug to commence this action"). Certainly, it would be illogical for DEC to want to be sued by the Plaintiffs, especially for a second time.

"On or about the spring of 2017," when the Plaintiffs claim AAG McLean made his alleged threat, Simermeyer Dec. ¶ 41, DEC had already defeated the Plaintiffs in court. The Plaintiffs had brought their state court lawsuit in April 2016, seeking a "permanent injunction against the defendant NYSDEC for violation of the constitutional and sovereign rights of the Unkechaug Indian nation." State Court Complaint, Kreshik Dec. Ex. D at 7. DEC had moved to dismiss, but the Plaintiffs chose not to oppose the motion, instead attempting to "withdraw the matter without prejudice," in order to bring a new case in federal court, which DEC successfully opposed. See Simermeyer Aff., Kreshik Dec. Ex. G ¶ 6 (noting that DEC had "directed its attorney not to consent" and that the "application was opposed by the defendant."). DEC prevailed, obtaining a dismissal "upon the grounds that the complaint fails to state a cause of action," Unkechaug Indian Nation v. DEC, Index No. 4254-2016, Slip Op. at 1 (Sup Ct. Queens Cty. Oct. 12, 2016), Kreshik Dec. Ex. I, and the Plaintiffs' motion to discontinue was itself withdrawn. Docket, Kreshik Dec. Ex. H. In contrast, it was the Plaintiffs who wanted a federal

court lawsuit, long before the Spring of 2017. Their counsel told the state court as much on October 12, 2016, averring under penalty of perjury that the Plaintiffs "ha[ve] a legitimate reason to commence an action in the federal court." 2016 Simermeyer Aff., Kreshik Dec. Ex. G ¶ 7(b). Plaintiffs' counsel asserted that that "the full extent of the Unkechaug rights can better be litigated in federal court rather than state court," and that "the Unkechaug have a right to seek a forum that will . . . allow much greater latitude for damages under both state and federal laws."[10] Id.

At the time of the alleged threat, "[o]n or about the spring of 2017," DEC had litigated the merits and won, while the Plaintiffs had attempted to start a new federal suit, but failed. The Plaintiffs' waiver theory is not coherent: they receive all the benefit from the putative "threat," while DEC "did not gain any unfair advantage that would support a finding of voluntary waiver." Gulino v. Bd. of Educ., No. 96 Civ. 8414, 2016 WL 7320775, at *8 (S.D.N.Y. July 18, 2016), R&R adopted, 2016 WL 7243544 (S.D.N.Y. Dec. 14, 2016).

B. Because Plaintiffs Seek a Declaration That New York's Exercise of Fee Title Remains Subject to the Tribe's Rights, the Eleventh Amendment Applies

i. Under Coeur d'Alene, Western Mohegan, and Silva, The Plaintiffs Cannot Obtain Injunctive Relief Against DEC or Commissioner Seggos

As the State Defendants showed in their moving brief, State Br. at 23-27, and their opposition brief, State Opp. at 24-28, the Ex Parte Young exception to the Eleventh Amendment does not apply under binding Supreme Court precedent. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 282 (1997). The Second Circuit has made clear that the same logic applies to a claim of "only 'Indian title,'" meaning "the right to camp, to hunt, to fish and to use the

[10] Plaintiffs' counsel made a similar last-minute personal averment regarding "threats" in the 2016 state court action, declaring that "[i]n a telephone conversation that I was a part of to set up meeting and communicate to the NYSDEC, threats were made by representatives of NYSDEC to bring criminal action against the Unkechaug and it representatives. [sic]" 2016 Simermeyer Aff., Kreshik Dec. Ex. G ¶ 7(b). Notably, this earlier nonspecific "threat" included no mention of the unnamed threatening person's desire for DEC to face a federal court lawsuit.

waters and timbers in the contested lands and waterways." Western Mohegan Tribe and Nation v. Orange County, 395 F.3d 18, 22 (2d Cir. 2004).

The Plaintiffs argue that this settled law does not apply to them because they characterize their relief as "[a] declaration of rights, in contrast to a quiet title action." Pl. Opp. at 59; see also id. at 58 (describing the relief sought as "a non-exclusive treaty reserved fishing right").[11] An identical argument was rejected in this action's companion case, Silva v. Farrish, which concerned a claimed right to take glass eels based on "Colonial Deeds and related documents," including the Andros Order that is central to the Plaintiffs' case. See Silva v. Farrish, No. 18 Civ. 3648, 2020 WL 3451344 (E.D.N.Y. May 27, 2020), R&R adopted, 2021 WL 613092 (E.D.N.Y. Feb. 17, 2021). The Silva plaintiffs similarly claimed that they sought "an even more limited right to use the waters, fish, take fish, and hold fish and shellfish in Shinnecock Bay and its estuary and other usual and customary fishing waters." Silva, 2020 WL 3451344 at *7 (cleaned up). And like the Plaintiffs here, they attempted to distinguish Western Mohegan by "assert[ing] that the Tribe does not intend to exclude its non-Indian neighbors." Id.

[11] As they did in their moving brief, the Plaintiffs also ask the Court to ignore the binding precedent of Western Mohegan in favor of the Sixth Circuit standard, as articulated in Ottawa Tribe of Okla. v. Speck, 447 F. Supp. 2d 835 (N.D. Ohio 2006). See Pl. Opp. at 60 (devoting almost the entire page to a block quote from Speck). Speck and the cases it cites are readily distinguishable for the three reasons explained on pages 26-28 of the State Defendants' opposition brief. First, the relief sought in this case involves a complete immunity from State regulation, see Wallace Tr. 135:18-21 ("Q: So could the state pass any law or regulation that would apply to the Unkechaug's fishing? A: No."), while the Speck plaintiffs merely sought "a declaration of their right to fish and hunt *with limited regulations*." Speck, 447 F. Supp. 2d at 839-40. Second, the Speck plaintiffs specifically acknowledged that "the Tribe's exercise of hunting and fishing rights would be subject to . . . conservation measures," Plaintiffs' Opposition Brief, Ottawa Tribe of Okla. v. Speck, No. 05 Civ. 7272, 2006 WL 816481, § 2 (N.D. Ohio Feb. 15, 2006), while the Plaintiffs in this case deny the applicability of any State conservation measures. See Compl. at 12 ¶ 1 (demanding "[a] declaration that the [Plaintiffs] are *immune* from NYSDEC and Commissioner Basil Seggos [sic] fishing regulations and that the NYSDEC and Commissioner Basil Seggos *lack authority to enforce fishing regulations* under New York State Environmental Laws against the Nation . . . ." (emphasis added)). And lastly, Speck was decided under the Sixth Circuit's standard, which conflicts with the Second Circuit's holding in Western Mohegan. Compare Speck, 447 F. Supp. 2d at 839 ("The Sixth Circuit has held that anything short of a quiet title action is not barred under Coeur d'Alene.") with Western Mohegan, 395 F.3d at 23 (Coeur d'Alene applies whenever a plaintiff's claim "is fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas" or "seeks a declaration from this court that New York's exercise of fee title remains 'subject to' the Tribe's rights.").

To be sure, the Plaintiffs here do not "seek[] to divest the State of *all* regulatory power over submerged lands," Coeur d'Alene, 521 U.S. at 296 (O'Connor, J., concurring) (emphasis added), but they are seeking to prevent the State from enforcing State environmental law in State waters, at least as regards the Plaintiffs and those to whom the Plaintiffs choose to issue permits. See Wallace Op. Dec. ¶ 20 (asserting that the Plaintiffs "should be allowed . . . to fish without regulation by the defendants in its traditional waters and shall in turn set qualifications and conditions," but that "[t]his does not mean that the NYSDEC cannot regulate non Unkechaug using the resources."). But such a state of affairs would be "fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas." Western Mohegan, 395 F.3d at 23. The Silva court held as much "find[ing] that, despite Plaintiffs' insistence that they are seeking only 'protection of a use right of the waters,' they are, in reality, seeking the equivalent of ownership rights." Id. This was the case because the plaintiffs were "really seeking a declaration that New York's exercise of fee title remain[s] 'subject to' the tribe's rights. Id. (quoting Western Mohegan, 395 F.3d at 23). The fact that the Plaintiffs seek fishing rights merely changes the property right they are seeking from the equivalent of joint ownership to the equivalent of an easement on New York's waters – it does not change the fact "that the Tribe's claim is fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas." Western Mohegan, 395 F.3d at 23; cf. U.S. v. Winans, 198 U.S. 371, 384 (1905) (where treaty provision allowed "taking fish at all usual and accustomed places," the language "fixes in the land such easements as enable the right to be exercised.").

Rephrasing the nature of the right the Plaintiffs claim does not change the fundamental fact "that Plaintiffs in reality seek a declaration from this Court that New York's exercise of fee title remains subject to Plaintiffs' and their tribes' right of use." Silva v. Farrish, No. 18 Civ.

3648, 2021 WL 613092, at *3 (E.D.N.Y. Feb. 17, 2021) (adopting R&R because it "correctly and thoroughly articulated . . . the flaws with Plaintiffs' position"). Nor can it be denied that "[t]he requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." Coeur d'Alene, 521 U.S. at 282; cf. Wallace Tr. 129:13-16[12] ("There's no limitation on the Unkechaug's fishing right except by what the Unkechaug place. The New York State doesn't have the right to do that."). Because the relief the Plaintiffs seek is fundamentally inconsistent with New York's ownership of its navigable waters, "the Ex Parte Young exception to [] Eleventh Amendment sovereign immunity does not apply to Plaintiffs' claims against the NYSDEC . . . and Seggos." Silva, 2021 WL 613092 at *3.

ii. The Plaintiffs' New Formulation of Their Relief Sought Does Not Change the Analysis

The Plaintiffs' opposition papers appear to scale back their claims for relief, but the eleventh-hour change in tactics does not alter the Eleventh Amendment analysis. In their court filings, and at Plaintiff Wallace's depositions on behalf of himself and the tribe, the Plaintiffs took a maximalist position regarding the fishing rights they claim, asserting the right to take fish "anywhere fish go," Wallace Tr. 137:18-23, to take an unlimited amount of fish even if doing so could result in extinction, see id. at 136:17-137:14, to take federally endangered species, id. 135:12-17; see also Wallace 30(b)(6) Tr. 123:13-14 ("I don't see any species limitation"), to resume whaling, see id. at 124:16-19, to extend their claimed fishing authority to any other Native American tribe, Wallace Tr. 140:17-141:4, to issue fishing permits to nonmembers, Wallace 30(b)(6) Tr. 121:23, and even to non-Natives, id. at 121:25-122:4, to apply their rights

[12] Excerpts from the transcript of the deposition of Plaintiff Harry Wallace ("Wallace Tr."), taken in this action on January 28 and 31, 2020, are annexed as Exhibit A to the Liebowitz Dec.

against the federal government, Wallace Tr. 135:8-11, to fish in federal waters on an unlimited basis, id. at 136:12-15, and to apply their claimed fishing right in the waters of any other American state. See id. 135:22-136:11. These assertions were entirely consistent with the Plaintiffs' previous litigation positions, see Plaintiffs' First Interrogatory Responses, Thompson Dec. Ex. K at 4-5 (identifying the Unkechaug's "customary waters" as including "waters within its territories and throughout the State of New York" and "all the waters of Long Island"), and the actions taken on behalf of the tribe. See, e.g., Signed 2014 Unkechaug Fishing Permit, Thompson Dec. Ex. H; cf. Wallace Tr. 270:12-25 (admitting that three of the four men listed on the permit were not members of the tribe).

In their opposition papers, the Plaintiffs redefine the "customary waters" in which they seek an unlimited fishing right as the space "between the Namkee Creek and Apoucock Creek." Pl. Opp. at 62; see Wallace Opp. Dec. ¶ 21. They also attempt to walk back their earlier positions, claiming that the State Defendants' citations to their deposition testimony is "meant to be inflammatory to make the Unkechaug seem unreasonable," and that Plaintiff Wallace's deposition testimony "was taken out of context because I responded to the questions in general terms of native rights to fish." Wallace Dec., Pl. Opp. Ex. 8 ¶¶ 21-24. This is simply false: Plaintiff Wallace does not deny that he made the statements reflected in the deposition transcript, and both the questions and the answers made clear that Plaintiff Wallace was speaking on behalf of the Unkechaug in specific, not "in general terms of native rights to fish." See, e.g. Wallace Tr. 129:11-21 (explaining that "[t]here's no limitation on the Unkechaug's fishing rights" and that New York law was not valid "anywhere in the common areas of the Unkechaug."); see also, e.g., id. at 135:12-17 ("Q: Okay. And your answer to the question could the Unkechaug take endangered species if they wanted to is also, yes? A: I would say the limitations on the Nation

are not restricted by any laws that I have seen."). "It is well established that 'a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." O'Leary v. City of N.Y., 983 F. Supp. 2d 410, 413 n.1 (E.D.N.Y. 2013) (Kuntz, J.) (quoting Hayes v. N.Y. City Dep't of Corr., 84 F.3d 614, 619 (2d Cir. 1996)).

Moreover, the Plaintiffs' new position is less limited than it appears. The area from Apoucock Creek to Namkee creek is approximately 25 miles in length, covering all of Moriches Bay and much of the Great South Bay. Assuming that the Plaintiffs extend their claim to the limits of New York State's waters, which include both bays and the waters extending three miles beyond the barrier islands on the south side of them, see 43 U.S.C. § 1312, the Plaintiffs are claiming an easement over more than 100 square miles of State waters. The Plaintiffs still claim the right "to fish without regulation by the defendants," with New York only able to "regulate non Unkechaug using the resources." Wallace Op. Dec. ¶ 20. They claim the right "to dispose of their catch in any matter [they] see[] fit," presumably meaning selling eels commercially, in violation of N.Y. ECL § 71-0924. Id. Although Plaintiff Wallace denies that he would "authorize countless person to fish," he notably does not say that fishing would be limited to Nation members, and in fact promises to use the fishing right "in providing economic benefit to . . . other natives related to Unkechaug." Id. ¶ 22. And despite the new, more limited definition of "customary waters," Plaintiff Wallace asserts once again that "the waters where natives fish can include all waters within the United States and New York." Id. ¶ 24.

Redefining the claimed area does not change the legal impact of Coeur d'Alene and Western Mohegan, which focus not on the size of the lands or waters in dispute, but on whether the tribal claim "seeks a declaration . . . that New York State's exercise of fee title remains

'subject to' the Tribe's rights." Western Mohegan, 395 F.3d at 23. Notably, Coeur d'Alene itself dealt with a claim smaller in area than the State waters between Namkee Creek and Apoucock Creek. See 521 U.S. at 264 (describing Lake Coeur d'Alene, which "is some 24 miles long and 1 to 3 miles wide."). Because "[t]he Tribe's claim is fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas," the Eleventh Amendment applies, regardless of whether the Plaintiffs claim all of New York's waters or just a part of them. Western Mohegan, 395 F.3d at 23.

C. The Pennhurst Doctrine Separately Bars the Plaintiffs' State-Law Claims, Including the Claim Based on the Andros Order

The Pennhurst doctrine serves as a separate Eleventh Amendment bar to the Plaintiffs' state law claims based on inherent sovereignty and the Andros Order, because "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984). As the State Defendants demonstrated in their moving brief, State Br. at 27, and opposition brief, State Opp. at 28-29, these two causes of action sound only in state law, and therefore do not fall into the Ex Parte Young exception. See Pennhurst, 465 U.S. at 106 (such a lawsuit "conflicts directly with the principles of federalism that underlie the Eleventh Amendment."). The Plaintiffs have not articulated a federal basis for either claim. Although they point to the Engagements Clause and Supremacy Clause in Article VI of the U.S. Constitution, neither provision applies to the Andros Order. See Sections IV(C) and VI(D)(i), *infra*.

The Plaintiffs make a halfhearted effort to distinguish Pennhurst, but do not even attempt to grapple with its core holding that Ex Parte Young does not permit injunctive relief against a state official for violation of state law. Instead, they include a single, lengthy block-quote from

an out-of-Circuit authority, Nelson v. Miller, 170 F.3d 641 (6th Cir. 1999), which concerns the difference between prospective and retrospective relief, not the difference between state-law and federal-law claims. See id. at 647 ("because the claims at issue here 'only seek compliance in the future' they are claims for prospective relief."). Nelson does not address (let alone refute) the Supreme Court's straightforward holding that the prospective-relief exception to Eleventh Amendment immunity is "inapplicable in a suit against state officials on the basis of state law." Pennhurst, 465 U.S. at 106. Accordingly, "to the extent Plaintiffs seek prospective relief against [Commissioner Seggos] in [his] official capacity for violations of the [state] constitution and state law," as they do in their claims based on inherent sovereignty and the Andros Order, "those claims are indeed barred by the Eleventh Amendment under the Pennhurst doctrine." Vega v. Semple, 963 F.3d 259, 284 (2d Cir. 2020).

III. THE PLAINTIFFS' CLAIMS ARE BARRED BY *RES JUDICATA* AND COLLATERAL ESTOPPEL

A. *Res Judicata* Bars the Plaintiffs' Claims

The Plaintiffs' opposition does not address the applicability of *res judicata*, instead spending a single sentence on an assertion that the State Defendants' arguments "are unpersuasive as the matter was based on a specific unlawful taking and seizure of Unkechaug Indian nation fish on April of 2016." Pl. Opp. at 68. That sentence is unsupported by any citation to evidence or legal authority, and the Plaintiffs follow it by pivoting directly to the issue of collateral estoppel. See id. In fact, *res judicata* bars their claims in their entirety.

As the State Defendants explained in their moving brief, State Br. at 28-29, "[u]nder both New York law and federal law, the doctrine of *res judicata*, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties or their privies from relitigating

issues that were or could have been raised in that action."[13] Malcolm v. Bd. of Educ. of Honeoye Falls-Lima Cent. Sch. Dist., 506 F. App'x 65, 68 (2d Cir. 2012) (summary order) (quotations and brackets omitted) (quoting Maharaj v. Bankamerica Corp., 128 F.3d 94, 97 (2d Cir. 1997)). A matter could have been raised in a prior action if it emerges from the same 'nucleus of operative facts' as any claim actually asserted in the prior action." Id. (quoting Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 90 (2d Cir. 1997)).

The Plaintiffs fail to address these legal standards, but they manifestly apply to bar this second lawsuit. Justice Nahman's order dismissing the 2016 state action was an adjudication on the merits, as the dismissal was "upon the grounds that the complaint fails to state a cause of action." Unkechaug Indian Nation v. DEC, Index No. 4254-2016, Slip Op. at 1 (Sup Ct. Queens Cty. Oct. 12, 2016), Kreshik Dec. Ex. I. It is black-letter law in the Second Circuit that "[a]s the sufficiency of a complaint to state a claim on which relief may be granted is a question of law, the dismissal for failure to state a claim is a final judgment on the merits and thus has *res judicata* effects." Williams v. Fay Servicing LLC, No. 19 Civ. 5405, 2020 WL 70953, at *2 (E.D.N.Y. Jan. 7, 2020) (quoting Berrios v. NYCHA, 564 F.3d 130, 134 (2d Cir. 2009)). The 2016 seizure of the Plaintiffs' glass eels at JFK airport is one of their core allegations in this subsequent federal action, see Compl. ¶¶ 23-24; Pl. Opp. 15-17, 33, 51-53, 97, and the Plaintiffs expressed the same fundamental argument in 2016 that they possess a sovereign right to take

[13] The Plaintiffs argue in passing that the 2016 dismissal should not be preclusive because "it is easy to see that there are different parties to the action." This argument ignores black-letter law, cited by the State Defendants in their moving brief, State Br. at 29 n.24, holding that *res judicata* and collateral estoppel bar any parties in privity with the original litigants. See Overview Books, LLC v. U.S., 755 F. Supp. 2d 409, 417-18 (E.D.N.Y. 2010) (collecting cases and noting that "[*r*]*es judicata* operates to preclude claims, rather than particular configurations of parties"). Chief Wallace was clearly in privity with the Tribe in the 2016 state court action – after all, he verified the 2016 complaint. Kreshik Dec. Ex. D at 8; see also id. ¶ 3 (alleging that Wallace was Chief "[a]t the commencement of this action and at all times herein mentioned"). Nor can the Plaintiffs evade preclusion by suing Commissioner Seggos, as "government officials sued in their official capacities are generally considered to be in privity with the governmental entity that they serve." Overview Books, 755 F. Supp. 2d at 417.

glass eels in violation of New York law. See, e.g., 2016 State Court Complaint, Kreshik Dec Ex. D at 1 ¶¶ 14, 18-20, 24, 26, 29-30, 33 (making sovereignty-based arguments in each of the Plaintiffs' six causes of action). The Plaintiffs even raised a Free Exercise argument, asserting that DEC "interfered with the cultural and religious practices of the Unkechaug as Care-takers of their land and natural resources." Id. ¶ 29. The dismissal for failure to state a claim, which the Plaintiffs never appealed, serves as a bar to all claims that "were or could have been raised in that action," including each of the claims raised here. Malcolm, 506 F. App'x at 68.

B. Collateral Estoppel Bars the Plaintiffs' Claims

The Plaintiffs' claims are also subject to collateral estoppel, which "bars a party from relitigating an issue decided against the party in a prior proceeding." Overview Books, 755 F. Supp. 2d at 420 (citing Roe v. City of Waterbury, 542 F.3d 31, 41 (2d Cir. 2008)). "Once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Id. (quoting Montana v. U.S., 440 U.S. 147, 153 (1979)).

Here, the Plaintiffs' 2016 State Court Complaint certainly raised the same issues present in this subsequent federal case. In particular, the Plaintiffs contended that they enjoyed a sovereign right to take glass eels in violation of New York law, see Kreshik Dec. Ex. D ¶¶ 14, 18-20, 24, 26, 29-30, 33, that federal law pre-empted DEC's regulation of their taking glass eels, see id. ¶¶ 17, 32 (alleging that DEC "depriv[ed] the Unkechaug Indian nation of its rights under the laws of the United States" and asserting DEC's "interference with the Unkechaug ability to transact commerce in violation of . . . the United State Constitution"), and that DEC had infringed on their free exercise of religion. Id. ¶ 29 (alleging that DEC "interfered with the cultural and religious practices of the Unkechaug as Care-takers of their land and natural resources."). DEC actually litigated the issue of whether a right to take glass eels existed,

moving to dismiss and arguing *inter alia* that there was "no legal basis" for an "injunction preventing DEC from prospectively enforcing . . . the statutory prohibitions regarding the taking and possession of glass eels," and that the Plaintiffs had no "legal right to possess glass eels in contravention of New York State law." 2016 Motion to Dismiss Brief, Kreshik Dec. Ex. F at 1, 7. Although the Plaintiffs' 2016 state court complaint did not specifically raise the issue of treaty rights or the Andros Order, DEC's response did, pointing out that the Tribe "failed to cite to any cases or treaties showing that it has any legal right to circumvent the American Eel Fishery Management Plan or New York State law." Kreshik Dec. Ex. F. at 7.

Rather than credibly contest the proposition that the substantive claims at issue in the 2016 State Court action mirrored the ones at issue now, the Plaintiffs attempt to distinguish the case based on the relief sought, noting that the eels seized in 2016 were released into the wild (after others had leaked into a local pond due to spillage from a DEC tank) and contending that this somehow "resulted in the nations inability to litigate its rights" because it "could only seek money damages which would not resolve the outstanding issues." Pl. Opp. at 69. But the Plaintiffs misrepresent the substance of their 2016 claims, which did not merely seek return of the seized eels or money damages for them, but rather a permanent injunction in Plaintiffs' favor preventing New York from applying its ban on glass eel poaching and trafficking – the same relief the Plaintiffs seek in this subsequent federal case. Compare 2016 State Court Complaint, Kreshik Dec. Ex. D at 5 ("Relief sought is permanent injunction against the defendant NYSDEC for violation of the constitutional and sovereign rights of the Unkechaug Indian nation") with Compl., Dkt. No. 1 at 12 (seeking "[a] permanent injunction against . . . any attempts by NYSDEC . . . to enforce the civil or criminal laws against the Nation").

The Plaintiffs sought this relief in state court, but then abandoned their claims, choosing

not to oppose DEC's motion to dismiss.[14] Accordingly, "the branch of the defendant's motion to dismiss the plaintiff's complaint upon the grounds that the complaint fails to state a cause of action" was "granted without opposition to the extent that the branches of plaintiff's complaint *which seek injunctive relief* [we]re dismissed." Unkechaug Indian Nation v. DEC, Index No. 4254-2016, Slip Op. at 1 (Sup Ct. Queens Cty. Oct. 12, 2016), Kreshik Dec. Ex. I (emphasis added). Because their claims for injunctive relief were litigated and decided in state court, collateral estoppel precludes the Plaintiffs from re-litigating them here.

IV. THERE IS NO FEDERAL PREEMPTION

A. Plaintiffs Argue the Wrong Standard

As discussed at greater length in the State Defendants' moving brief, State Br. at 32-35 and opposition brief, State Opp. at 62-68, the judicial analysis of a claim of pre-emption "rests on two fundamental principles." N.Y. Pet Welfare Ass'n, Inc. v. City of N.Y., 850 F.3d 79, 86 (2d Cir. 2017). "First, every preemption case starts with the presumption that Congress did not intend to displace state law," a presumption that is "especially strong in areas where states traditionally wield police powers." Second, the ultimate question before the court is to discern the intent of Congress, "by examining the federal scheme as a whole and identifying its purpose and intended effects." Id. at 87 (quotation and brackets omitted).

The Plaintiffs' opposition attempts to evade this "especially strong" presumption by relying on a preemption standard which only applies when states attempt to regulate activity *on*

[14] The Plaintiffs' failure to oppose the motion to dismiss their claims for injunctive relief does not rob Justice Nahman's dismissal of its preclusive effect. Although judgments by default are generally not given collateral estoppel effect, this is not the case "where the party against whom preclusion is sought appears in the prior action, yet willfully and deliberately refuses to participate in those litigation proceedings, or abandons them, despite a full and fair opportunity to do so." In re Abady, 22 A.D.3d 71, 85 (N.Y. App. Div. 1st Dep't 2005); accord Hassan v. Marks, No. 16 Civ. 1653, 2017 WL 9485672, at *10 (E.D.N.Y. Aug. 15, 2017) (collateral estoppel applied where "Plaintiff had a full and fair opportunity to contest these issues in [State] Supreme Court and abandoned his claims").

Native American reservations. However, it is black-letter New York statutory law that the challenged regulations do not apply within the bounds of the Poospatuck Reservation. See N.Y. ECL § 11-0707(8). The Plaintiffs cite to Yakima Indian Nation v. Whiteside, an Eastern District of Washington case applying the test from White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), to zoning laws concerning reservation land. Yakima, 617 F. Supp. 735, 746 (E.D. Wash. 1985); cf. Bracker, 448 U.S. 136, 143 (1980) (applying a more lenient standard for preemption where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation[,]" because the "unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law."). However, it is well-settled that the Bracker test only applies to attempts to regulate *on-reservation* conduct. See Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 112 (2005) (The application of Bracker's interest-balancing test to off-reservation regulation is "inconsistent with the special geographic sovereignty concerns that gave rise to that test.").[15] For this reason, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973).

The holdings of these cases flow from the well-settled "assumption that the States have no power to regulate the affairs of Indians on a reservation." Williams, 358 U.S. at 271. But

[15] Plaintiffs also rely on E. Band of Cherokee Indians v. N. Carolina Wildlife Res. Comm'n, 588 F.2d 75, 78 (4th Cir. 1978), another case concerning regulation of *on-reservation* activity, for the proposition that "state regulatory laws may apply to tribal regulations unless their application would frustrate tribal self-government or impair a right granted or reserved by federal law." Id. (citing Williams v. Lee, 358 U.S. 217, 220 (1959)). Eastern Band, however, applied Williams to determine when a state "may regulate reservation Indians and non-Indians in certain situations" on the reservation. Id. at 77. Williams, likewise, concerned the exercise of state jurisdiction over civil suits by Non-Native Americans against Native Americans for actions arising on Native American reservations. See Williams, 358 U.S. at 223.

what the Plaintiffs seek in this litigation is not to be free from state regulation on their reservation—which they already are—but to be free from New York State regulation in New York State waters. See Compl. ¶ 38 (claiming preemption of State regulation both "on the Poospatuck Indian Reservation and in customary Unkechaug fishing waters"); Wallace Tr. 92:17-93:5 (contending that the Plaintiffs are free from State regulation "both on and off the reservation").

B. 25 U.S.C. § 232 Does Not Pre-Empt Any State Regulation

The Plaintiffs concede that the sole statute they have argued preempts New York's glass eel regulations, 25 U.S.C. § 232, actually "extends concurrent jurisdiction" to states and the federal government over "crimes . . . commit[ted] on reservations within [the] state." Pl. Opp. at 73. As discussed at greater length in State Defendants' moving brief (State Br. 32-35) and opposition brief (State Opp. 65-66), 25 U.S.C. § 232 provides for concurrent federal and state jurisdiction for crimes committed on-reservation, but has no relevance to New York's laws concerning fishing outside reservation boundaries. See id. ("The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York"). The statute's limiting clause, which provides that "nothing contained in this section shall be construed to deprive any Indian tribe . . . []of hunting and fishing rights as guaranteed them by . . . treaty," id., merely states that the statute is not abrogating any previously-existing treaty, and cannot plausibly be read to implicitly circumscribe state environmental regulation. Cf. Shinnecock Indian Nation v. Kempthorne, No. 06 Civ. 5013, 2008 WL 4455599, at *11 (E.D.N.Y. Sept. 30, 2008) (rejecting argument that § 232 implicitly amounted to federal tribal recognition, declaring that the statute relates only "to New York State's jurisdiction over crimes committed on Indian reservations," and refusing "to strain these statutes beyond their plain and unambiguous meaning.").

Moreover, the Plaintiffs' opposition fails to address the fact that the ban on taking eels under nine inches was promulgated pursuant to New York State's obligations as a member state of the ASMFC, a federal interstate compact acting specifically pursuant to federal law. See N.Y. v. ASMFC, 609 F.3d 524, 528–29 (2d Cir. 2010); 16 U.S.C. § 5104.[16] Given that New York was obligated *by federal law* to adopt these measures, it makes little sense that Congress would then implicitly preempt them. See 16 U.S.C. § 5104; State Br. at 35. Federal law does not preempt New York's regulation of American eel fishing – instead, it specifically authorizes and empowers it.

C. The Supremacy Clause Does Not Apply

The Plaintiffs' final pre-emption argument points to the Supremacy Clause, under which "all treaties made . . . under the authority of the United States[] shall be the supreme law of the land." See Pl. Opp. 71 (quoting U.S. Const. art. VI). But as argued in the State Defendants' moving brief, State Br. at 34, n. 27, and opposition brief, State Opp. at 66-67, the Andros Order could not fall under the purview of the Supremacy Clause because it manifestly was not made "under the Authority of the United States." See Restatement (Third) of the Law of American Indians § 4(h) (draft Apr. 16, 2014) ("Indian treaties with American colonies may be recognized as a matter of state law, but are not treaties entitled to status under the Supremacy Clause."). In Alliance to Save the Mattaponi v. Commonwealth Department of Environmental Quality, Virginia's highest court confronted this same issue and held:

> The treaty before us was entered into in 1677, over 100 years before the Constitution was adopted in 1789. Because the United States did not exist in 1677, manifestly, the Treaty could not have been made under the authority of the United

[16] Nor do the Plaintiffs respond to the fact that the Lacey Act provides federal criminal liability for transporting fish in violation of state law, and has been repeatedly used to sustain conviction for unlawful transport of American eel in violation of New York's ban. See, e.g., U.S. v. McDougall, 216 F.3d 1074 (2d Cir. 2000) (affirming conviction for conspiracy to transport American eel taken from Lake Ontario in violation of DEC regulations).

> States. Further, the United States Congress has not ratified the Treaty pursuant to its authority under Article I, Section 10 of the Constitution.").

270 Va. 423, 452 (2005). The Plaintiffs attempt to dismiss Alliance, a directly on-point decision, on the sole basis that it is not binding on this Court, Pl. Opp. 71, but they offer no argument against its holding, and have never adduced evidence or provided colorable legal argument as to why any order issued by a British colonial government and not subsequently ratified by Congress should or could be construed as a treaty "made . . . under the authority of the United States."

This same principle was the basis of the court's holding in Golden Hill Paugussett Tribe of Indians v. Weicker, which rejected King George's Proclamation of 1763 as a basis for federal jurisdiction because it did not "aris[e] under the Constitution, laws, or treaties of the United States." 839 F. Supp. 130, 137-38 (D. Conn. 1993), remanded in part on other grounds, 39 F.3d 51 (2d Cir. 1994). The Plaintiffs seek to distinguish the holding of Golden Hill on the bases that the relief sought was different than here and that a royal proclamation is somehow of a different character than the Andros Order (Pl. Opp at 71), but both were ultimately acts of the British Crown, not the United States, and manifestly did not arise under U.S. federal law. Cf. Seneca Nation of Indians v. N.Y., 382 F.3d 245, 268 (2d Cir. 2004) (rejecting argument that the ratification of the Supremacy Clause "implicitly validated" pre-existing federal treaty with an Indian tribe and made it the supreme law of the land). The Plaintiffs have not provided any legal or factual basis to support their contention that the Andros Order implicates the Supremacy Clause, other than their own conclusory statements. Accordingly, even if the Andros Order were to restrict the authority of the State to protect species in its waters – which it does not – it would do so under its own terms as a matter of state law, not as a matter of federal pre-emption.

V. THE PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER THE FREE EXERCISE CLAUSE

A. The Plaintiffs' Free Exercise Claims Concerning Wampum Cannot Withstand Summary Judgment

i. The Plaintiffs Concede that Their Free Exercise Claims Concerning Wampum Are Time-Barred

In their Opposition, the Plaintiffs fail to confront the undisputed fact that their Free Exercise claims are time-barred – in fact, their Counterstatement effectively concedes the point. In their Complaint, the Plaintiffs premise their Free Exercise claim entirely on purported interference by the DEC with their religious practices concerning the fishing and disposal of shells used to create "ceremonial wampum." Compl. at ¶¶ 46-53. During Plaintiff Wallace's depositions, both as an individual and as 30(b)(6) witness, it became apparent that this claim is premised entirely on purported citations from the DEC against the Unkechaug in "1994 or 1995" and "2008," for "dumping illegally when [the Unkechaug] were putting shell into the water." Wallace Tr. 30:12-15, 193:5-9, 194:1-9; Wallace 30(b)(6) Tr. 23:1-13; Kreshik Decl. Ex. J. [17] Other than these alleged incidents concerning disposal of shells, Plaintiff Wallace testified that he was aware of no other "specific instances" in "which the DEC interfered with" disposing of the shells used for making wampum. Wallace 30(b)(6) Tr. at 28:3-20. Each of these purported incidents are well outside the three-year § 1983 limitations period for a constitutional cause of action.[18]

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[17] Plaintiff Wallace contended in his 30(b)(6) deposition that there was another citation concerning dumping from 2014, which is also outside the statute of limitations, which he "believ[ed]" was issued by the DEC, Wallace 30(b)(6) Tr. 23:1-13, but that the "charges were dropped." Id. at 25:17-20. Plaintiffs have produced no evidence of this 2014 citation, and DEC has no record of it. Kreshik Decl. ¶ 28.

[18] "Constitutional claims, such as Plaintiff's Free -Exercise Clause claim, must be brought under 42 U.S.C. § 1983." Monroe v. Rockland Cty. Dist. Attorney's Ofc., No. 20-CV-5445 (LLS), 2020 WL 5518510, at *2 (S.D.N.Y. Sept. 14, 2020) (quoting West v. Atkins, 487 U.S. 42, 48-49 (1988)).

In their Counterstatement, Plaintiffs dispute the fact that "DEC has no record of having ever cited a member of the Unkechaug Nation for placing shells in the water," (State 56.1 ¶ 49) on the basis that "Defendants issued citations against Unkechaug Nation in 2007 and 2008 for illegal dumping or placing of objects without a DEC permit on water abutting the Poospatuck Reservation." Pl. Cs. ¶ 49 (citing Pl. Ex. 35). Plaintiffs' Exhibit 35 is the sole evidence Plaintiffs offer of purported citations related to placing shell in the water, and it contains three unauthenticated, inadmissible citations from 2007 and 2008, related to placing fill in navigable waters and conducting regulated activity in tidal wetlands without a permit. Id. These three citations are the only evidence Plaintiffs have offered concerning any purported interference with their ability to practice their religion as it relates to wampum. Even if the three citations were competent evidence that the DEC had cited Plaintiffs in connection with their religious practices related to wampum—which they are not—they confirm that the latest alleged instance occurred in 2008, which is well outside the statute of limitations for a § 1983 action. See Muhammadali v. City of N.Y., No. 18 Civ. 1521, 2018 WL 10808575, at *1 (E.D.N.Y. Apr. 5, 2018) (Kuntz, J.) (because alleged constitutional violation occurred "more than three years prior to the filing of this Complaint, these claims are time-barred by the statute of limitations and must be dismissed.")

ii. The Plaintiffs' Free-Exercise Claims Regarding Wampum Lack Factual Support

Even if the Plaintiffs' claims were not time-barred, they have failed to adduce *any* admissible evidence that DEC has ever actually infringed their religious practices related to wampum. In their Counterstatement, the Plaintiffs take care to not actually characterize the citations included in Plaintiffs' Exhibit 35 as related to disposal of shells used to create wampum, stating vaguely that they were for "for illegal dumping or placing of objects without a DEC

permit on water abutting the Poospatuck Reservation." Pl. Cs. ¶ 49 (citing Pl. Ex. 35). Even if these citations were properly before the Court on this motion, they contain no reference to shells or wampum, and the Plaintiffs do not even specifically allege they were related to wampum. Moreover, DEC has no record of ever citing the Unkechaug for this practice, and DEC does not actually prohibit the Plaintiffs' practice of returning shell to the water, nor does the text of N.Y. ECL § 25-0401.[19] Kreshik Dec. ¶¶28-30; State 56.1 ¶ 49. Simply put, the Plaintiffs have never adduced evidence "such that a reasonable jury could return a verdict" in their favor regarding their claim that DEC interfered with its creation and disposal of wampum.[20] Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

iii. The Plaintiffs Lack Standing as to Possible Future Enforcement of the Challenged Environmental Laws

The Plaintiffs likewise fail to address the State Defendants' arguments concerning standing, but those arguments provide an independent basis on which their Free Exercise claims regarding wampum should be dismissed. A plaintiff may not establish standing by relying on the mere existence of a statute that allegedly "threatens" him or her, as the Supreme Court's "cases have consistently spoken of the need to assert an injury that is the result of a statute's actual or threatened enforcement, whether today or in the future," and further, that "[i]n the absence of contemporary enforcement, we have said that a plaintiff claiming standing must show that the likelihood of future enforcement is 'substantial.'" California v. Texas, 141 S. Ct. 2104, 2114

[19] N.Y. ECL § 25-0401(3) provides in relevant part that the "depositing or removal of the natural products of the tidal wetlands by recreational or commercial fishing, shellfishing, aquaculture, hunting or trapping, shall be excluded from regulation hereunder, where otherwise legally permitted."

[20] In fact, the undisputed evidence demonstrates that the Plaintiffs regularly engage in religious practices concerning wampum without any State interference. See Wallace 30(b)(6) Tr. 129:4-17 (declaring that Plaintiff Wallace's shop alone uses "thousands" and "tens of thousands" of shells to make wampum every year).

(2021). Just as the Plaintiffs have failed to adduce evidence of actual interference with their religious practice, they have failed to present evidence of or even argument concerning any threat of future enforcement concerning their religious practice related to wampum. See State Br. at 37-38; State Opp. at 72-73. Accordingly, the Plaintiffs lack standing to assert these claims.[21]

B. The Plaintiffs' Unpled Free Exercise Claims Concerning Glass Eels Cannot Withstand Summary Judgment

i. The Plaintiffs Have Not Pled Any Free Exercise Claim Concerning Glass Eels

In their Opposition, the Plaintiffs assert that New York's prohibition on fishing for glass eels also interferes with their religious liberty, without acknowledging or addressing State Defendants' argument that any such claim must be dismissed because it was unpled, or otherwise attempting to account for its total absence from their Complaint. See Compl. ¶¶ 46-53. Though the Plaintiffs now argue that the glass eel ban burdens their religious practice—without introducing any evidence to support the proposition—it is well-established that the assertion of such an unpled claim cannot defeat summary judgment. See, e.g., Gianascio v. Giordano, 2003 WL 22999454, at *5 (S.D.N.Y. Dec. 19, 2003) ("Plaintiff may not allege an unpled [claim] in an attempt to survive a summary judgment motion.").

ii. The Plaintiffs Have Not Adduced Any Evidence That New York's Ban on Glass Eel Fishing Burdens Their Religious Practice

Even if the Plaintiffs had properly pled a Free Exercise claim concerning eels, they have not adduced any evidence that New York's prohibition on *glass* eel fishing – as opposed to

[21] Moreover, because the Plaintiffs cannot demonstrate any ongoing or future threat of interference with their religious practices related to wampum, their claims are further barred by the Eleventh Amendment, and Ex parte Young does not apply. See In re Dairy Mart Convenience Stores, Inc., 411 F.3d 367, 372 (2d Cir. 2005) ("[T]he Ex parte Young exception" applies only where the "'complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'") (quotation omitted).

fishing for adult eels, which is undisputedly legal – actually burdens their religious exercise. A government action can only violate the First Amendment if it "substantially burden[s] the exercise" of a plaintiff's religious belief. Bloomingburg Jewish Educ. Ctr. v. Village of Bloomingburg, 111 F. Supp. 3d 459, 484 (S.D.N.Y. 2015). But the Plaintiffs have failed to provide any evidence that the Unkechaug religion specifically includes fishing for juvenile or glass eels, as opposed to adult eels. This is unsurprising, given that the Nation acknowledged that it never fished for glass eels prior to 2010. Wallace 30(b)(6) Tr. 59:2-16 ("As a representative of the tribe I'm not aware of that prior to 2010.").[22] In fact, the Plaintiffs' Eel Plan specifies that an eel used for a religious ceremony "shall not exceed one yellow eel, no less than 18 inches in total body length . . . regardless of the nature of the ceremony." Plaintiffs' Eel Plan § 1.3(A)(2); see also Moore Tr. 141:23-142:7[23] (confirming that eel used at a religious ceremony would be "yellow eels and no less than 18 inches"). Frederick Moore, who the Plaintiffs contend is an expert in their religion, see ECF No. 91, stated that he was not aware of any religious "ceremony that would use glass eels." Moore Tr. 142:8-15.

It is undisputed that New York permits the taking of adult eels of the kind the Plaintiffs would use in their religious ceremonies. See Plaintiffs' 56.1 Statement ¶ 30. Accordingly, there is no evidence before the Court that a ban on taking eels under nine inches "place[s] a substantial burden on the observation of a central religious belief." Skoros v. City of N.Y., 437 F.3d 1, 39 (2d Cir. 2006).

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[22] The Plaintiffs dispute their own sworn testimony in their Rule 56.1 Counterstatement, stating that "the Unkechaug have always fished for glass eels since time immemorial." Pl. Cs. ¶ 27. In support of this about-face, the Plaintiffs cite, without explanation, a March 2016 letter from Thomas Berkman (Pl. Opp. Ex. 28), their own undated Eel Plan (Pl. Opp. Ex. 36), the Wallace Opp. Dec., and a photograph that purports to be an Unkechaug man fishing for eels with a spear (which would presumably only be useful for taking an adult eel, and ineffective in piercing the tiny body of a glass eel) in 1910. Pl. Cs. 56.1 ¶ 27. Not a single one of these documents references the Unkechaug fishing for glass eels prior to 2010.

[23] Excerpts from the transcript of the deposition of Plaintiffs' proposed expert Frederick Moore ("Moore Tr."), taken in this action on April 9, 2021, are annexed as Exhibit C to the Liebowitz Dec.

C. In Any Event, Either Free Exercise Claim Would Fail Because the Challenged Measures Are Valid, Neutral, and Generally Applicable

i. The Smith Standard Governs, and New York's Environmental Regulations Pass Rational Basis Scrutiny

The Plaintiffs seek summary judgment on their Free Exercise claims under the wrong standard, citing to Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), to argue that their religious practice has been substantially burdened without a compelling government interest. Pl. Opp. at 75. However, in Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990), "the Supreme Court rejected this compelling state interest test for facially neutral laws of general applicability that only incidentally burden the free exercise of religion." Francis v. Keane, 888 F. Supp. 568, 573 (S.D.N.Y. 1995). It is accordingly well-established that "'[t]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Commack Self-Service Kosher Meats, Inc. v. Hooker, 680 F.3d 194, 210 (2d Cir. 2012) (quoting Smith, 494 U.S. at 879).

Though the Plaintiffs do not cite to the specific laws they are challenging, N.Y. ECL § 25-0401 makes it illegal to, *inter alia,* "dump either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind" into a "tidal wetland area" without a permit, and 6 NYCRR §§ 10.1 (a) and (b), 40.1(f) and (i), which make it illegal to take or possess American eels less than nine inches in New York State. Id. As discussed at length in State Defendants' moving brief, State Br. at 41-43, and opposition, State Opp. at 76-78, Plaintiffs' claims fail as a matter of law because the challenged environmental laws are valid and neutral laws of general applicability, and plainly pass muster under rational basis scrutiny.

ii. The Free Exercise Claims Would Fail Even Under Strict Scrutiny

Even if the Court were to apply the incorrect standard Plaintiffs cite, their Free Exercise claims would still fail as a matter of law. Where strict scrutiny applies, the Free Exercise inquiry "asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." Jimmy Swaggart Ministries v. Bd. of Equalization of CA, 493 U.S. 378, 384–85 (1990). The challenged laws must also be "narrowly tailored in pursuit of those interests." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

Here, Plaintiffs have failed to adduce any evidence that their religious beliefs, either concerning wampum or eel fishing have been burdened, as discussed at length in sections V(A)(ii) and V(B)(ii), *supra*. Further, even if the Plaintiffs had established that New York's laws posed a substantial burden to their religious practice, N.Y. ECL § 25-0401 and 6 NYCRR §§ 10.1 (a) and (b), 40.1(f) and (i) serve compelling governmental interests. As discussed in pages 78-81 of the State Defendants' opposition brief, these laws protect vital New York State resources: its wetlands and its threatened marine species. These are governmental concerns of the first order, enshrined in the New York State Constitution. See N.Y. Const. Art. XIV § 3 ("Forest and wild life conservation are hereby declared to be policies of the state."); N.Y. Const. Art. XIV § 4 (stating that "[t]he policy of the state shall be to conserve and protect its natural resources and scenic beauty" and mandating that "[t]he legislature, in implementing this policy, shall include adequate provision for . . . the protection of . . , wetlands and shorelines, and the development and regulation of water resources.").[24]

New York's prohibition on glass eel fishing is narrowly tailored. As discussed in the

[24] New York has an additional compelling interest in avoiding sanctions provided for under federal law. See 16 U.S.C. § 5106(c)(1)). If New York were to ignore the ASMFC's Fisheries Management Plan, *all* eel fishing in New York State could be prohibited by the Secretary of Commerce. Id.

State Defendants' moving brief, State Br. at 44-47 and opposition, State Opp. at 81, the ban on taking American eels under nine inches was the result of a scientific determination by the ASMFC that the species was depleted, and in such poor health that removals of the species were too high to maintain the population. Kerns Dec. ¶¶ 26-31, 36, Exs. F and I. The ASMFC imposed the current ban on taking eels under nine inches only after finding that lesser measures had failed. See id. ¶¶ 32-34. And the ban on taking eels under nine inches is minimally restrictive, allowing the taking of adult eels, including the ones used in the Plaintiffs' religious ceremonies. See Moore Tr. 141:23-142:7. Concerning ECL § 25-0401, its prohibition on dumping in tidal wetlands can hardly be said to sweep too broadly, as it does not even apply to the acts the Plaintiffs claim it infringes.

VI. THE BAN ON GLASS EELS APPLIES TO PLAINTIFFS' OFF-RESERVATION FISHING REGARDLESS OF WHETHER THE ANDROS ORDER IS A TREATY

A. New York's Ban on Taking Juvenile Eels Applies Under the Conservation Necessity Doctrine

New York's ban on taking juvenile eels applies to the Plaintiffs' fishing activities because it is a reasonable, necessary, and nondiscriminatory conservation measure. The Parties do not dispute the validity of the doctrine or the governing standard: as the State Defendants argued in their moving brief, State Br. at 44, and as the Plaintiffs acknowledge in their opposition, Pl. Opp. at 17, "Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999). Instead, all parties acknowledge that the Supreme Court has "repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation," in what has come to be known as the conservation necessity doctrine. Id.

The American eel is in decline and needs protection. The history of the threat to the species, the scientific processes used to assess its health, and the joint state-federal regulation of the American Eel by the ASMFC (and therefore by New York and other member states) is laid out in pages 4-10 of the State Defendants moving brief, in the accompanying declaration of Toni M. Kerns, and in the cited ASMFC documents underlying it. Briefly summarized, ASMFC fisheries scientists recognized a decline in the eel population in the late 1990s, exacerbated by factors including the species' unique life cycle and its vulnerability to concentrated fishing, leading the Commission to enact its first fisheries management plan, which included a six-inch minimum limit. See Kerns Dec. ¶¶ 20-24. Although these measures prevented a complete collapse, the species' population continued to decline, with the ASMFC's peer-reviewed 2012 study of the species' health concluding that the American eel was "depleted" in United States waters, with its population "at or near historically low levels." See id. ¶¶ 28-32 & n.1. In response, the ASMFC required (and New York adopted) regulations that *inter alia* limit the catch of eels to 25 yellow eels per person per day and increase the minimum size to nine inches. Id. ¶¶ 33-35. The 2017 stock assessment concluded that the species remained depleted and in need of protection. Id. ¶¶ 36-37.

To counter the straightforward import of the species' depleted state (and the ASMFC scientific studies that establish it) the Plaintiffs' opposition offers a hash of conclusory and unsupported assertions. Briefly summarized, they argue: 1) that there is no genuine threat to the American eel, see Pl. Opp. at 18-23, 50-51; 2) that because any eel mortality is pre-spawn mortality, the ban on taking eels under nine inches is unjustified, see id. at 23-24; 3) that State regulation is improper because the Unkechaug's own Eel Plan is better on a policy level, see id. at 25-27; that the conservation necessity doctrine cannot apply because DEC did not sufficiently

consult with the Plaintiffs, see id. at 30-31, 34, 37, 39; and 5) that DEC's ban on taking eels under nine inches is discriminatory, see id. at 27-50. Each of these arguments was made in substantially identical form in the Plaintiffs' moving brief ("Pl. Br.") – in fact, virtually all the text was cut-and-pasted, cf. Pl. Br. at 31-68 – and refuted in detail in the State Defendants' opposition brief. See State Opp. at 32-48. Nonetheless, in the interest of clarity, the State Defendants briefly respond to each of these arguments here.

i. The American Eel Is Under Threat, as Evidenced by the Best Scientific Analysis Available, and the Ban on Taking Eels Under Nine Inches Is a Reasonable and Necessary Response

The Plaintiffs' first response to the applicability of the conservation necessity doctrine is simply to deny there is a problem. See Pl. Opp. at 18 ("The Unkechaug also challenge the status of the American Eel and believe them to be in abundance contrary to NYSDEC's unsubstantiated position of depletion."). In support of this proposition, the Plaintiffs copy-and-paste two large sections of the ASMFC's 2017 American Eel Stock Assessment Update, which touch on "natural mortality of American eels" and "[i]ncidental mortality," defined as eel death "caused by anthropogenic activities other than harvest." Pl. Opp. at 19-20; cf. 2017 Stock Assessment Update, Kerns Dec. Ex. I at 8-9 (original location of the copied text).[25] The Plaintiffs then assert, without any citation to evidence or authority, that "[t]he overfishing argument is a disingenuous theory that lacks validity because any effect from fishing is *de minimis* on the population."[26] Pl. Opp. at 20.

[25] The Plaintiffs also include in their counterstatement, without explanation or discussion in their brief, block quotations from the 2017 Stock Update concerning potential "biases" and sources of error in data from commercial and recreational fisheries. See Pl. Cs. ¶ 7 (citing 2017 Stock Update at 15-16). The Plaintiffs offer no explanation as to why the ASMFC's acknowledgement of potential sources of error in two sources would undermine the conclusion of the 2017 Stock Update, which considered and weighted data from a myriad of other fishery independent surveys in addition to commercial and recreational fishing data.

[26] The Plaintiffs also point to the fact that the U.S. Fish and Wildlife Service declined to list the American eel as an endangered species under the Endangered Species Act. See Pl. Br. at 39. However, endangered status under federal

But of course the threat from fishing will not be reflected in passages that focus on natural mortality or human impacts "other than harvest," and the Plaintiffs notably omit the conclusions about fishing impacts found elsewhere in the 2017 Stock Assessment Update, including that harvest of glass eels "has increased as the average market price has risen to over $1,000 per pound with peaks exceeding $2,000 per pound," that "all life stages are subject to fishing pressure," that trend analyses indicated "neutral or declining abundance," and that all three analysis methodologies "detected significant declining trends." Kerns Dec. Ex. I at iv, 10, 33. The ASMFC accordingly concluded "that the American eel population in the assessment range is similar to five years ago and remains depleted." Id. at iv.

To be clear, fishing is not the only factor negatively impacting the health of the American eel, and other stressors such as climate change, habitat loss, and hydroelectric dams do lead to eel mortality. See Kerns Dec. ¶ 37, State Opp. at 35-36. But it does not follow that the presence of other factors means that fishing regulation is unnecessary or unreasonable, particularly where those other factors, such as warming oceans, cannot be readily controlled. Id. And the Plaintiffs have adduced no evidence for their unilateral, conclusory assertion that "any effect from fishing is *de minimis*." Pl. Opp. at 20. Instead, the best and most current scientific analysis available, based on the widest possible array of data sources,[27] concluded that the species was in decline

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law is an entirely different and more stringent designation, which applies when a species is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Moreover, federal courts "have rejected the idea that species preservation must be an issue for the conservation necessity principle to apply." Anderson v. Evans, 371 F.3d 475, 499 (9th Cir. 2004) (finding that the applicability of the conservation necessity doctrine instead "depends on the conservation purpose of the statute."); see, e.g., U.S. v. Turtle, 365 F. Supp. 3d 1242, 1249-50 (M.D. Fla. 2019) (federal law barring sale of alligator eggs was a reasonable and necessary measure, and conservation necessity doctrine applied even though the American alligator had been removed from the list of endangered species). Instead, "[w]hether the Tribe's [fishing] will damage the delicate balance of the [American eels] in the marine ecosystem is a question that must be asked long before we reach the desperate point where we face a reactive scramble for species preservation." Anderson, 371 F.3d at 499.

[27] The Plaintiffs also mischaracterize a section of Ms. Kerns' deposition testimony, which discusses reaching out to all known email list-servs, universities, scientists, government agencies, and the general public in order to collect data for use in the ASMFC's stock assessments, deriding the ASMFC's analysis as "based on random information

and that policy intervention was warranted. Kerns Dec. Ex. I at iii-iv, 33. The ban on taking eels under nine inches, which was enacted by ASMFC and adopted by New York "[i]n order to minimize the chance of excessive recreational harvest, as well as circumvention of commercial eel regulations" – in other words, illegal poaching of glass eels – is a reasonable and necessary measure to address a significant threat to the species. Kerns Dec. Ex. G at 11; see Kerns Dec. ¶ 38 (without the ASMFC's interventions, including the nine-inch minimum limit, "an unregulated American eel fishery and loss of habitat would likely have resulted in a population collapse").

ii. All Eel Mortality Is Pre-Spawn Mortality, but Juvenile Eels Are Uniquely Vulnerable to Mass Harvest

Next, the Plaintiffs seize on a statement by Ms. Kerns that all "[m]ortality on a pre-spawn eel is mortality, so any eel that doesn't survive is an eel that will be not be able to spawn," and use it to justify the unfounded conclusion that New York's ban on taking eels under nine inches "is meaningless and an arbitrary and capricious rule." Pl. Opp. at 23. Ms. Kerns' testimony was correct – because eel spawn at the end of their long life cycle, any eel that is harvested does not survive to reproduce, see Kerns Dec. ¶ 22; id. Ex. I at 6-7 – but the Plaintiffs' conclusion is not, and only follows if one ignores the very facts that make their illegal harvest so lucrative.

The reason that juvenile or glass eels need specific protection is because they are uniquely vulnerable to being harvested in bulk. See Kerns Dec. ¶ 22 (noting that "[g]lass eel aggregate seasonally to migrate, making harvest on glass eels and elvers more easily available thus enabling concentrated eel fishing"). The Plaintiffs' proposed expert acknowledged as much at his deposition: when asked how many glass eels a single fisherman could catch in a night, he

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reported to everyone they know." Pl. Opp. at 22-23, 50. This is a gross mischaracterization of the ASMFC's methodology, which involves assembling the greatest possible set of data sources – fifty-two in all – from commercial landings data to federal recreational fishing statistics, to repeated samplings from locations up and down the East Coast, to monitoring of related species. See Kerns Dec. Ex. F at 31 *et seq*.

said "[y]ou can catch a lot. By a lot, I mean hundreds to thousands of eels during the course of one tide cycle." Moore Tr. 92:21-93:5. This unique vulnerability to mass harvest makes glass eels particularly susceptible to mortality – and particularly key to protecting the species.

iii. The Plaintiffs' Eel Plan is Legally Irrelevant and Insufficient as a Policy, and the Plaintiffs do Not Even Follow It

The Plaintiffs repeatedly argue that the conservation necessity doctrine should not apply because they have their own, unilateral American Eel Management Plan, Pl. Opp. Ex. 36 (the "Plaintiffs' Eel Plan"), which they contend "is superior to that of the NYSDEC's regulations to preserve the American Eel."[28] Pl. Opp. at 25. But the fact that the Plaintiffs have their own plan is legally irrelevant: the conservation necessity doctrine is an analysis of the appropriateness of the State's regulation protecting a threatened species, and the existence or non-existence of the Tribe's own regulation does not play a role in that legal determination. See Confed. Tribes of Colville Reservation v. Anderson, 903 F. Supp. 2d 1187, 1198-99 (E.D. Wash. 2011) (refusing to adopt "ineffective tribal self-regulation" as a factor in the necessity analysis, since the Supreme Court's "determination of 'appropriate standards' did not include, either explicitly or inferentially, effective tribal self-regulation").

Moreover, the purported core mechanism of the Plaintiffs' Eel Plan does not actually have the benefits they claim. The Plaintiffs point to their "wild caught stocking effort," which they claim "addresses the major causes of destruction of the eels by transporting eel catches

[28] The fact that the Plaintiffs thought it necessary to have a "restoration and management" plan contradicts their subsequent assertion in this lawsuit that they "believe [American eel] to be in abundance." Pl. Opp. at 18. In fact, one federal Circuit Court has held that where a tribe such as the Unkechaug enacts a conservation measure such as the Plaintiffs' Eel Plan, it creates a presumption that the State's conservation regulation is valid. See U.S. v. Williams, 898 F.2d 727, 729-30 (9th Cir. 1990) ("We therefore find that if an Indian tribe has enacted wildlife laws similar to the state or federal laws that are being enforced against tribe members, the tribal laws create a presumption of validity."). The Plaintiffs' Eel Plan itself specifically acknowledges a "significant threat to American eel populations" – though it refuses to acknowledge that fishing might play any role – and recognizes a need for "fisheries management and restoration of eel populations." Plaintiffs' Eel Plan at 1.

beyond the dangers of NYS streams, rivers, and other waterways." Pl. Opp. at 26. But this project fails to address the main threat to the eel from artificial barriers, which occurs when eel travel *downstream, not upstream*. See 2017 ASMFC Stock Assessment Update, Kerns Dec. Ex. I at 6 (noting that "downstream mortality may be caused by hydroelectric facilities by impingement or turbine passage."). The Plaintiffs' purported expert acknowledged as much. Moore Tr. 178:16-179:15 (testifying that downstream mortality was a greater issue than upstream, and that the Unkechaug Plan did not address it). The central focus of the Plaintiffs' Eel Plan thus provides little or no benefit, and the Plan contains no other substantive measures geared toward protecting the species, while placing no limit on the amount of eels that could be taken either by a single individual or by the Tribe as a whole. Moore Tr. 150:4-19.

Moreover, the available evidence shows that the Plaintiffs are not even following their own plan. As discussed on pages 46-47 of the State Defendants' opposition brief, the last time the Plaintiffs took glass eels, in early 2016, a "landing report" identified by Plaintiff Wallace at his deposition showed that the Plaintiffs caught 15.5 kilograms of glass eels, but instead of "stocking" the 30% of the catch called for under their Eel Plan, they attempted to sell the entire amount to Crown Success Limited in Kowloon, Hong Kong, for a "value of approximately $100,000." Compare Landing Report, Pl. Ex. 7 at 7 (showing 15.5 kilograms of eels caught between March 25 and April 5, 2016) with 2016 State Court Complaint, Kreshik Dec. Ex. D ¶¶ 5-7 (alleging that "Plaintiff Unkechaug Indian nation was in legal possession of 15.50 Kilograms of live glass eels on or about April 6, 2016"); cf. Plaintiffs' Eel Plan § 2.2(A-B). The Plaintiffs' Eel Plain is not legally relevant to the conservation necessity analysis, but even if it were, there is no reason that the Court should give weight to the plan when the Plaintiffs' expert acknowledges its inadequacy and the Plaintiffs themselves do not appear to follow it.

iv. DEC Attempted to Consult With the Plaintiffs, but the Plaintiffs Rejected the Overture

The Plaintiffs repeatedly attack DEC for an alleged failure to follow an internal policy known as CP-42, which concerns "consult[ing] with appropriate representatives of Indian Nations on a government-to-government basis on environmental and cultural resource issues of mutual concern." CP-42 policy, Pl. Opp. Ex. 13. As a threshold matter, the policy document is not relevant to the conservation necessity analysis, and is not even legally binding: by its own terms it does not "create any right, benefit, obligation, or cause of action, whether direct or indirect." Id. at 4. Accordingly, CP-42 is not material to any claim or defense.

Moreover, the Plaintiffs' invocation of CP-42 in their opposition brief is based on a misleading and inaccurate version of the facts: DEC attempted to work amicably with the Plaintiffs under the CP-42 policy, but the Plaintiffs refused to stop taking and trafficking glass eels. On March 3, 2016, DEC Deputy Commissioner Tom Berkman sent Chief Wallace a letter, seeking "to open a dialogue between the people of the Unkechaug Indian Nation and [DEC] concerning conservation and management of the American Eel species." Berkman Letter, Pl. Opp. Ex. 25 at 1. Noting that "DEC has reason to believe that the Unkechaug Indian Nation is harvesting American eel less than nine inches long from the waters of New York State," Deputy Commissioner Berkman *asked the Plaintiffs to consult*, writing that "DEC invites the Unkechaug Indian Nation to join New York State in protecting the American eel species," requesting any relevant information regarding the Unkechaug's claimed right to take juvenile eels, giving his direct phone number, and offering to set up a meeting. Id. at 1-2.

This was the consultation called for by the CP-42 policy, and the Plaintiffs rejected it. Plaintiff Wallace's reply letter asserted that the Unkechaug have an "aboriginal right to fish that can never be restricted nor otherwise regulated by the State of New York," that "there has never

been any law nor regulation that has ever been imposed to restrict our ability to engage in subsistence fishing as set forth above," and that "we neither request nor accept permission to engage in historic subsistence activity." Pl. Opp. Ex. 28. The Plaintiffs then decided to cease communications and resume illegally fishing for glass eels. According to a landing report signed by Plaintiff Wallace, the Unkechaug fished for glass eels on March 26, 2016 – just a week after he sent his letter – and on each of the eleven nights through April 5, 2016. See Landings Report, Pl. Ex. 7 at 7. The Plaintiffs tried to ship all of those newly-caught glass eels to Hong Kong on the following evening, only to be interdicted by DEC law enforcement officers. 2016 State Court Complaint, Kreshik Dec. Ex. D ¶¶ 5-7; see also Kreshik Dec. ¶ 16, Ex. C. After that, it was the Plaintiffs who chose to sue, see 2016 Verified Complaint, Kreshik Dec. Ex. D, and after the Plaintiffs lost that lawsuit, it was they who chose to sue again in federal court. See Complaint, Dkt. No. 1. DEC has repeatedly sought dialogue with the Plaintiffs in order to find a negotiated solution, both before and during the litigation, but the Plaintiffs have never been willing to accept the applicability of New York conservation law to their off-reservation fishing.

v. The Ban on Taking Eels Under Nine Inches Applies to All Fishers Equally, and Does Not Discriminate

The Plaintiffs argue next that New York's blanket ban on taking eels under nine inches in length should not apply to them because it is discriminatory. But as discussed more fully in the State Defendants' Moving Brief, (46-47) and Opposition Brief (38-41), under the applicable precedent a measure is discriminatory only if it treats Native hunting or fishing activity differently than non-Native hunting or fishing, which New York's glass eel ban does not. See U.S. v. Washington, 143 F. Supp. 2d 1218, 1224 (W.D. Wash. 2001) (statute was discriminatory where "Oregon's proposed territorial fishing restriction for Indian fishers would not apply to non-Indians."); cf. Dep't of Game of Wash. v. Pullyallup Tribe, 414 U.S. 44, 48 (1973) ("There

is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely pre-empted by non-Indians, is allowed."). In contrast, where a statute or regulation applies to Natives and non-Natives equally – like New York's ban on taking eels under nine inches in length – it is not discriminatory. See Anderson, 371 F.3d at 498 (challenged statute "cannot be said to discriminate . . . because members of the Tribe are not being singled out."). Even Plaintiff Wallace has acknowledged that the regulations apply to non-Native fishermen on the same basis that they apply to the Unkechaug. See Wallace Tr. 98:9-14 ("It doesn't matter whether or not they are targeting Native Americans or not. I believe it is an attempt to control all activity including our activity, whether it's designed to target us or not."); cf. Pl. Opp. at 18 (acknowledging that the challenged regulations "prohibit anyone from catching eels under 9-inches.").

The bulk of the Plaintiffs' discrimination argument amounts to a tautology, where the law cannot apply to them because it is discriminatory, and the law must be discriminatory because it applies to them. Plaintiff Wallace explained the formulation at his deposition, asserting that "if this regulation does not specifically make an exception in acknowledging the rights of the nations that are in New York to be able to fish, then on its face it is discriminatory and it is a violation of treaty rights." Wallace Tr. 100:6-10. The Plaintiffs' opposition brief places the same assertion in a slightly different frame, where DEC must be discriminating if it takes the position that the ban on taking juvenile eels applies to the Plaintiffs' activity, rather than exempting the Plaintiffs from its requirements or adopting the Plaintiffs' Eel Plan in place of DEC's generally-applicable regulations. See Pl. Opp. at 28 ("Failure to cooperate or even acknowledge the Unkechaug management plan shows animus and disparate treatment by NYSDEC toward the Unkechaug.").

It cannot be discriminatory for a state environmental regulator to apply evenhanded regulations to a tribe's off-reservation fishing, particularly when the entire point of the conservation necessity doctrine is that "treaty rights are reconcilable with state sovereignty over natural resources." Mille Lacs, 526 U.S. at 205. And although the Plaintiffs repeatedly copy-and-paste lengthy deposition excerpts and follow them with conclusory assertions regarding prejudice or animus, none of the passages quoted supports any inference of discriminatory intent. New York's ban on taking eels under nine inches is facially neutral, generally applicable, reasonable, and necessary for conservation purposes. It "cannot be said to discriminate between treaty and non-treaty persons because members of the Tribe are not being singled out." Anderson, 371 F.3d at 498.

B. The Sherrill Doctrine Bars This Novel Claim Based on a 342-year-old Document

In their opposition, Plaintiffs mischaracterize the extraordinarily disruptive nature of the relief they seek and cite to inapposite case law in an attempt to avoid the bar to their claims imposed by City of Sherrill v. Oneida Indian Nation of N.Y., 544 US. 197 (2005), and its progeny. See Pl. Opp. 10-15. The inquiry under Sherrill centers "on the length of time at issue between a historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectation of individuals and entities far removed from the events giving rise to the plaintiffs' injury." Oneida Indian Nation of N.Y. v. County of Oneida, 617 F.3d 114 (2d Cir. 2010).

As a preliminary matter, Plaintiffs seek to shift the burden, arguing that because "Plaintiffs never needed to assert its rights until the recent interreference from NYSDEC beginning in 2014," somehow their completely new assertion of rights under a 342-year-old

order of the Colonial government falls outside Sherrill's scope.[29] Pl. Opp. 10-11. The Plaintiffs thus acknowledge that they failed to raise any right they may have pursuant to the Andros Order until 2014 at the earliest. Id. Moreover, the Tribe has testified under oath that it never fished for glass eels prior to 2010. See Wallace 30(b)(6) Tr. 59:2-16. And prior to their 2016 state court litigation, the Unkechaug had never challenged the applicability or validity of New York's laws concerning off-reservation regulation of eel fishing and fishing licenses. See Kreshik Dec. ¶ 14.

There was no reason for the State to impose any sanction on the Unkechaug's fishing practices prior to 2014 because the Tribe was in compliance with New York law. In fact, Plaintiff Wallace testified that the Unkechaug Tribal Council previously worked with DEC to help tribe members obtain New York State fishing licenses. Wallace Tr. 117:15-118:3; see id. at 117:16-17 (stating that such licenses "were issued routinely"). And the record shows that Plaintiff Wallace himself obtained such licenses for off-reservation fishing every year for over a decade. Id. 116:8-117:4; see also Kreshik Dec. Ex. A. !

The Plaintiffs also attempt to distinguish Sherill on the basis of the relief they seek, relying on precedent from a Michigan District Court. Pl. Opp. at 13 (citing Saginaw Chippewa Indian Tribe of Michigan v. Granholm, No. 05-10296-BC, 2009 WL 3125612, at *3 (E.D. Mich. Sept. 28, 2009) (distinguishing Sherill on the basis that the relief sought was "simply a request for a declaration that the Saginaw Chippewa have retained jurisdiction over historic tribal land.")); but see Onondaga Nation, 500 F. App'x at 89 (summary order) (explaining that under

[29] Under Second Circuit precedent, the applicability of Sherrill depends on the length of time that has passed and the disruptive nature of the Plaintiffs' claims, not whether a tribe accepted or defied State jurisdiction. See Onondaga Nation v. New York, 500 F. App'x 87, 90 (2d Cir. 2012) (summary order) (discussing prior Circuit cases and concluding that even if plaintiffs "showed after discovery that they had strongly and persistently protested, the standards of federal Indian law and federal equity practice stemming from Sherrill an its progeny would nonetheless bar their claim.").

reported Second Circuit precedent, "it is irrelevant that [Plaintiffs] merely seek a declaratory judgment" because "a declaratory judgment alone—even without a contemporaneous request for an ejectment—would be disruptive.").[30] However, even if the Court were to "follow the logic and application" of this case, it would not change the outcome. Id. As demonstrated in section II(B)(ii), *supra*, the relief Plaintiffs seek is not a modest grant of "nonexclusive fishing in well-defined traditional waters" as Plaintiffs now seek to characterize it. Pl. Opp. at 15. Given that Plaintiffs, in essence, seek to prevent the State from enforcing State environmental law in State waters, undermining centuries of conservation regulation, "[t]he disruptive nature of the claims is indisputable as a matter of law." Onondaga Nation, 500 F. App'x at 89. This disruption, combined with "justifiable expectations, grounded in [three-and-a-half] centuries of New York's regulatory jurisdiction, until recently uncontested," bars the Plaintiffs from now claiming exemption from State regulation. Sherrill, 544 U.S. at 215-16.[31]

C. Kennedy Is Supreme Court Precedent on Point

The Plaintiffs do not dispute that People ex. rel. Kennedy v. Becker, 241 U.S. 556 (1916), remains good law. Nor do they dispute the reasoning that underpins the Kennedy opinion: that although at the time of the treaty in that case none of the parties would have foreseen "the necessary exercise of inherent power under modern conditions for the preservation of wildlife. . .

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[30] Plaintiffs also rely on Cayuga Indian Nation of N.Y. v. Seneca Cty., N.Y., but the holding of that case, which clarifies that Sherill does not abrogate a tribe's sovereign immunity from tax enforcement lawsuits, does not bear on the issue at bar. 978 F.3d 829, 832 (2d Cir. 2020); cert. denied, No. 20-1210, 2021 WL 2301979 (U.S. June 7, 2021) ("[W]e therefore finally put to rest the misguided claim that Sherrill abrogated a tribe's sovereign immunity from suit."); cert. denied, No. 20-1210, 2021 WL 2301979 (U.S. June 7, 2021); see also id. at 840 (holding that "Sherrill does not strip tribes of their immunity from suit in tax foreclosure proceedings."). However, the Cayuga court expressly acknowledged that Sherrill "narrowed the scope of tribal immunity from certain forms of state regulation" – like the environmental regulations at issue here. Id. at 832.

[31] As discussed in State Defendants' moving brief, State Br. 49-50, New York State has consistently exercised regulatory oversight of its waters for centuries. See, e.g., People of the State of New York ex. rel. Kennedy v. Becker, 215 N.Y. 42, 46 (1915) (holding 106 years ago in fishing rights case that "[t]he right of the state to enact police legislation for the preservation of game and fish is so well recognized and has been so widely exercised that here is no need to spend any time in demonstrating or justifying its existence")

. the existence of the sovereignty of the state was well understood." Id. at 563. Accordingly, the fishing rights at issue were "subject, nonetheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised." Id. at 564. The Supreme Court ruled that the undisputed existence of the fishing rights at issue did not change the fact that fishing activities conducted under the treaty were subject to New York State conservation regulation. Id. at 563-64.

The Plaintiffs attempt to distinguish Kennedy via two lengthy block-quotes from U.S. v. State of Wash., 384 F. Supp. 312 (W.D. Wash. 1974), arguing that it stands for the proposition that the Andros Order provides "a right for the Unkechaug not a mere privilege rendering Kennedy not applicable to the Unkechaug." Pl. Opp. at 16. Washington is not binding precedent in this New York District Court, while Kennedy indisputably is. Moreover, the "privilege/right" distinction the Plaintiffs would have the Court adopt from Washington has no basis in the text or minutes of the Andros Order, which refers to the grant to the Unkechaug as a "priviledge," "leave," and "liberty," but not a "right."[32] See, e.g., Andros Order, Thompson Dec. Ex. J at 1 (Unkechaug request "that they may have leave to have a whale boate . . . to fish and dispose of what they shall take."); id. at 2 ("They are to have an order to shew for their priviledge."). The Plaintiffs' argument against the straightforward applicability of Kennedy fails both on the law and on the text of the Andros Order.

D. The Andros Order is Not Binding on New York State

The Plaintiffs advance several legal theories as to why the Andros Order is binding on New York State, all of which were previously addressed in State Defendants' opposition. See

[32] The version of the Andros Order utilized by the Plaintiffs, taken from a compilation of New York historical manuscripts, uses the term "right" only in two bracketed header sections, which were presumably added by the volume's two editors. See Andros Order, Thompson Dec. Ex. J.

State Opp. at 53-58. For the reasons already set forth in that brief and summarized below, the Andros Order, issued by an English governor in 1676, is not binding on New York State 345 years later.

i. The Federal Constitution Does Not Incorporate the Andros Order

The Plaintiffs argue that the Engagements Clause of Article VI of the Constitution, "incorporated and ratified" the Andros Order, Pl. Br. 9, but the Plaintiffs have misconstrued and misrepresented this Constitutional provision. It provides recognition by the United States of "Debts contracted and Engagements entered into. . . under the Confederation," U.S. Const. Art. VI, but the provision has no bearing on the Andros Order, which was issued in 1676, over a hundred years prior to the Confederation's existence. Likewise, as discussed at length in Section IV(C), *supra*, the Supremacy Clause does not bear on the Andros Order because it manifestly was not made "under the authority of the United States," which did not exist in 1676 and would not for a hundred years after. U.S. Const. Art. VI (emphasis added); see also Alliance to Save the Mattaponi, 270 Va. at 452; Seneca Nation, 382 F.3d at 268; Restatement (Third) of the Law of American Indians § 4(h) (draft Apr. 16, 2014). The Plaintiffs have not cited any example of a British treaty, let alone a unilateral order, that is currently enforceable against the United States or a State. Instead, they rely on a series of inapposite cases concerning new statehood not automatically abrogating an existing federal treaty, and two cases from the early days of the United States concerning Virginia's land confiscation laws (Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603 (1812)) and the Constitution's contract clause (Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819)). None of these cases have any bearing on the matter at bar.[33]

[33] None of these cases stands for the proposition that executive orders—or treaties entered into—by English colonial governors survived or were incorporated into law at the time of the formation of the United States. Herrera v. Wyoming addressed the issue of whether the Wyoming Statehood Act abrogated an existing 1886 treaty between the

ii. The Andros Order Has No Force Under State Law

The Plaintiffs also argue that the Andros Order is supposedly binding on New York State because of the New York State Constitution, as well as two letters and an excerpted report. However, their constitutional argument is incorrect and the letters and report are unauthenticated, hearsay, and inadmissible for the purpose of summary judgment. Pl. Br. 5-8. These arguments are without merit and were addressed fully in State Defendants' opposition brief, State Opp. at 55-57, the content of which is summarized briefly below.

The New York State Constitution provides that "[s]uch parts of the common law, and of the acts of the legislature of New York, as together did form the law of said colony. . . which have not expired been repealed or altered. . . shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same." N.Y. Const. Art. I § 14. However, to the extent the Andros Order would be considered an "act of the legislature of New York," it has been subsequently repealed. The State legislature later explicitly abrogated any remaining "acts of the legislature" of the colony of New York in the nineteenth century, through the enactment of General Construction Law § 71, which provides that "[a]cts of the legislature of the colony of New York shall not be deemed to have had any force or effect in this state since December twenty-ninth, eighteen hundred and twenty-eight." General Construction Law § 72 similarly states that the "resolutions of the congress of the colony of New York and of the

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United States and the Crow Tribe. 139 S. Ct. 1686, 1700 (2019). Fairfax's Divisee concerned whether confiscation of an estate in Virginia, which had originated as a grant from the British Crown, violated the 1783 treaty between the United States and Great Britain ceasing hostilities. See Id., 11 U.S. at 607-609. Dartmouth College concerned the question of whether acts by the New Hampshire legislature altering the charter of Dartmouth College—a private charitable institution founded upon donation by a private benefactor and subsequent charter granted by the British Crown-- violated the Constitution's contract clause. The decision establishes that the United States Constitution does not bar the state from regulating its own public institutions but does protect private corporations as against the state. See id. at 630-31, 638. It does not stand for the proposition that all acts of colonial governments somehow remained binding on the United States after its formation.

convention of the state of New York, shall not be deemed to be the laws of this state hereafter.").[34]

iii. The Andros Order Has Been Abrogated

Further, even if Plaintiffs had met their burden of showing that the Andros Order was at some point binding on New York State, it has since been abrogated by subsequent legislation. See State Br. at 53-56. "[T]he question of abrogation does not turn on whether [a treaty] has been expressly identified for abrogation. [The Legislature] is not required to investigate the array of international agreements that provide some protection that it wishes to annul and then assemble a check-list reciting each one. What is required is a clear expression by [the Legislature] of a purpose to override protection that a treaty would otherwise provide." Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116, 124 (2d Cir. 2000). As discussed above, and in the State Defendants' moving brief, State Br. at 53-56, New York State made such a "clear expression" of purpose to "override" the Andros Order through the passage of the General Construction Law §§ 71 and 72, which establish that acts of the colonial government "shall not be deemed to have had any force or effect" and "shall not be deemed to be the laws of this state hereafter."

But this was not New York's only act evincing clear expression of intent to abrogate the Andros Order. As discussed in the State Defendants' Moving Brief, the New York State Legislature has also made clear its intent to abrogate in in other ways, including by asserting sole "jurisdiction over navigation on the navigable waters of the state," N.Y. Navigation Law §

[34] The Plaintiffs also cite to two unauthenticated letters, purporting to be from New York State Officials, and an excerpt of a report Plaintiffs claim was produced at the behest of Governor Mario Cuomo in 1988. See Pl. Opp. 6-7 (citing Pl. Exs. 4, 5, and 6). None of these three documents is properly before the Court on this motion because they are unauthenticated and their contents are hearsay. However, even if the Court were to consider them for the truth of the matter asserted, none of them reference the Andros Order, and none of them stand for the proposition that it is binding on New York State.

30, and declaring that New York State "owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership." ECL § 11-0105; see also id. ("Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition."). And New York has declared that no one may fish in its waters absent a license issued by DEC. See ECL §§ 11-0701(4); 13-0355(1); see also Kreshik Dec. ¶¶ 7-10.

VII. THE PLAINTIFFS' INHERENT SOVEREIGNTY CAUSE OF ACTION IS MERITLESS AND ABANDONED

As the State Defendants argued in their moving brief, State Br. at 68-69, the Plaintiffs' second cause of action, which alleges that New York's regulation of glass eels "violates the Unkechaug inherit right of self-governing," Compl. ¶ 45, is meritless because such sovereignty only applies within the boundaries of their reservation, and DEC does not purport to regulate on-reservation conduct. See ECL § 11-0707(8). The Plaintiffs have not responded to this argument from the State Defendants' moving papers, and so their claim should be deemed abandoned. See Esperanza v. City of N.Y., 325 F. Supp. 3d 288, 298 (E.D.N.Y. 2018) (Kuntz, J.)

VIII. THE ANDROS ORDER DOES NOT PROVIDE THE UNLIMITED RIGHT TO OFF-RESERVATION FISHING THE PLAINTIFFS CLAIM

A. The Andros Order Is Not a Treaty

As illustrated in State Defendants' moving brief, State Br. at 57-59, the Andros Order is not a treaty, but rather an executive order of the colonial governor of New York. The Plaintiffs offer an inadmissible expert report as well as a purported declaration from John Strong in support of the proposition that the Andros Order was supported by valid consideration because "King Philip's war was raging in New England" and "Andros feared that the Unkechaug would join forces with the New England Tribes." Pl. Opp. at 4. But as discussed in Section VIII(B),

infra, neither this expert report nor this declaration present evidence admissible for summary judgment purposes. Moreover, nothing on the face of the Andros Order or the accompanying minutes of Governor Andros's Council mention any agreement to avoid or cease hostilities, or any other form of mutual consideration. See Andros Order, Thompson Dec. Ex. J.

This stands in stark contrast to contemporary treaties at the time between English colonies and Native Americans, which include clear consideration from all parties. See State Br. at 58 and n. 38 (collecting treaty examples). The Plaintiffs point to a handful of alleged contemporary documents in an unsworn attachment to Dr. Strong's declaration, co-signed by Plaintiffs' counsel, but none of them are attached as evidence for the State Defendants or the Court to evaluate. See Pl. Opp. Ex. 3 at 3. Moreover, the only identifying language quoted refers to the document as an "article of agreement," all but one of the referenced documents appear to involve agreements with the Dutch, not the English; and not one of the documents the Plaintiffs point to as a treaty is delineated as an Order. Although the referenced documents were not provided, they appear to be consistent with the contemporary treaties annexed by the State Defendants, all of which refer to themselves as some variety of "articles of peace," see Thompson Dec. Exs. L-P, and entirely inconsistent with the Andros Order, which refers to itself as "an Order to shew for the[] priviledge" of fishing. Thompson Dec. Ex. J.

B. The Andros Order Permits Regulation of Unkechaug Fishing

Even if the Andros Order were considered a valid and enforceable treaty between the Unkechaug and New York State, which would not exist for another century, its text manifestly allows for the regulation Plaintiffs seek to avoid. Although courts "interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them[,]" Mille Lacs, 526 U.S. at 196 (citations omitted), "even Indian treaties cannot be re-written or expanded beyond their clear terms." Choctaw Nation of Indians v. U.S., 318 U.S. 423, 432 (1943). The

Andros Order is unambiguous. It explicitly limits the Unkechaug's ability to fish and dispose of their effects "according to law and Custome of the Government," and only so long as the Unkechaug were "comporting themselves civilly and as they ought." Andros Order, Thompson Dec. Ex. J.

Although the Plaintiffs do not address these direct and unambiguous limitations in the Andros Order in their brief, they claim, without citation to evidence or law, that "it is highly unlikely that the Colony of New York would have been concerned with the Unkechaug fishing and management of glass eels." Pl. Opp. at 5. On this point, the Plaintiffs also cite to an exhibit they characterize as a declaration of their proposed expert Dr. John Strong, in support of their contention that the "Unkechaug would not have understood the treaty to provide for fishing regulation by the Colony of New York." Pl. Opp. at 5, citing Pl. Ex. 3. But that document is confusing and improper: on the first page of that document, Dr. Strong states only that he submits the declaration on behalf of Plaintiffs, that he is a professor emeritus at Long Island University, that he has expertise *inter alia* in historical matters related to the Unkechaug Indian Nation, and that "the foregoing is true and correct." Pl. Ex. 3. These relatively limited statements are followed by what appears to be an electronic signature, and the declaration does not mention or attach any documents. Id. However, following the declaration is a document titled "Plaintiffs' Response to the Defendants' Memorandum of Law in Support of Their Motion For Summary Judgment," dated August 20, 2021. Id. This five-page document is rife with legal argument, up to and including case citations, and purports to address specific portions of State Defendants' Moving Brief. Id. It once again bears the electronic signature of Dr. Strong, but also includes "James F. Simermeyer, Attorney for the Plaintiffs" in the signature block. Id. It is not sworn or made under penalty of perjury, as would be required by 28 U.S.C. § 1746. Id.

The Plaintiffs' supplemental memorandum of law attached to Exhibit 3 is not admissible evidence for purposes of their opposition to summary judgment for several reasons. To the extent it is intended to act as some kind of expert report, even though it also bears Plaintiffs' counsel's name in the signature block, it is unsworn, and "courts in this Circuit have uniformly held that unsworn expert reports do not satisfy the admissibility requirements of Fed. R. Civ. P. 56(e), and cannot be used [on] a motion for summary judgment without additional affidavit support.'" Reza v. Khatun, No. 09 Civ. 233, 2017 WL 3172816, at *2 (E.D.N.Y. July 25, 2017) (internal quotation marks and brackets omitted). Moreover, even if it were properly before the Court, it cannot be characterized as proper subject matter for expert testimony. "It is a well-established rule in this Circuit that experts are not permitted to present testimony in the form of legal conclusions." U.S. v. Articles of Banned Hazardous Substances, 34 F.3d 91, 96 (2d Cir. 1994). Yet, of relevance here, Dr. Strong and Mr. Simermeyer press legal arguments concerning the interpretation of the Andros Order, complete with multiple citations to caselaw. Id.; see also Georges v. United Nations, 834 F.3d 88, 93 (2d Cir. 2016) ("[T]he interpretation of a treaty is a question of law for the courts.").

Even if the Court were to consider Plaintiffs' Exhibit 3 on summary judgment, it provides nothing that contradicts the plain meaning of the Andros Order. As Dr. Strong testified at his deposition, the Unkechaug understood the Andros Order to mean they would be subject to the same laws applicable to English or Dutch fishermen.[35] See Strong Tr. at 104:5-105:22 (testifying that the Andros Order "grants the Unkechaug the right to participate in the whaling industry on the same legal basis as an English or a Dutch citizen[,]" and "that's what they

[35] Excerpts from the transcript of the deposition of Plaintiffs' proposed expert John Strong, Ph.D. ("Strong Tr."), taken in this action on April 13, 2020, are annexed as Exhibit D to the Liebowitz Dec.

wanted. . . that was their goal"); id. at 95:8-22; 97:19-98:2 (acknowledging that the "laws and customs" referred to in the Andros Order were English laws that could be enforced in an English court).[36] While the New York State ECL was not enacted at the time the Andros Order was signed, it falls plainly within the scope of a "law and Custome of the Government," and applies evenly to all people fishing in New York waters. And as to the second limiting clause of the Andros Order, that it only remained effective so long as the Unkechaug were "comporting themselves civilly and as they ought[,]" Dr. Strong testified that the Unkechaug understood it to mean that "breaking the laws and customs of the government would result" in the Andros Order being revoked. Strong Tr. 109:5-15.

In Plaintiffs' Exhibit 3, Plaintiffs' counsel and Dr. Strong argue, without citation to any evidence, that the "law and Custome" in 1676 did not contemplate "the application of regulations on the size or nature of the catch." Pl. Ex. 3 at 4. But this was not the state of the law at the time, as Dr. Strong acknowledged at his deposition. See Strong Tr. 112:18:25. Though the Plaintiffs do not address it in their Opposition, or in their Exhibit 3, British law had established since the 14th Century that "whales and great sturgeons taken in the Sea or elsewhere within the Realm" were the exclusive property of the King. See Statute Prerogativa Regis, 17 Edward II cap. 1 (1322).[37] Accordingly, whales and other royal fish could only be taken by "such of his subjects to whom he has granted the same royal privilege." 2 William Blackstone, Commentaries on the Laws of England ch. 27 p. 409 (12th ed. 1794), *available at* https://bit.ly/3AMic5z; cf. Andros Order, Thompson Dec. Ex. J at 1 (noting that the Unkechaug in 1676 requested "leave . . . to fish and dispose of what they shall take."). Dr. Strong testified that laws relating to the King's

[36] Defendants have moved to partially preclude the expert testimony of John Strong, Ph.D, to the extent that it asserts legal conclusions, (ECF Nos. 85-87, 92), and do not concede the admissibility of the challenged testimony.
[37] *Available at:* https://www.legislation.gov.uk/aep/Edw2cc1317/15/13/section/xiij#commentary-c918984

ownership of royal fish would be part of the meaning of the term "law and Custome of the government" in that document, establishing that the government in 1676 had the authority to restrict taking certain species, or allow it on specific terms. See Strong Tr. 112:18:25 ("Q: And would the term royal fish, would that mean the same as King's fish? A: Yeah, I would assume so, yes. Q: And would these be part of the laws and customs that we discussed? A: Well, the law – yes, of course.").[38]

Based on the plain text of the Andros Order, and the record concerning the Unkechaug's understanding of the Andros Order at the time it was issued, any right the Order conferred is circumscribed by the very laws they seek to invalidate in this proceeding.

CONCLUSION

For the reasons set forth above, in the accompanying declarations and exhibits, in their summary judgment moving papers, and in their opposition to the Plaintiffs' motion for summary judgment, Defendants Basil Seggos and the New York State Department of Environmental Conservation respectfully request that the Court grant summary judgment in their favor, deny the Plaintiffs' motion for summary judgment, dismiss the Complaint with prejudice, and grant such other and further relief as the Court deems just and proper.

[38] Moreover, the fact that the specific fishing laws at issue in this litigation were not enacted at the time the Andros Order was issued is irrelevant. This precise issue was before the Supreme Court in Kennedy, where the Court held that while "it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. . . the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not." Id. at 241 U.S. 563. The face of the Andros Order likewise demonstrates that the concept of state sovereignty was understood by the Unkechaug in 1676. The Order notes that the Tribe's request was "that they may have leave . . . to fish and dispose of what they shall take, as and to whom they like best." Andros Order, Thompson Dec. Ex. J at 1. Similarly, the Governor asked if the Unkechaug made relevant complaints "to the Magistrates in the Townes," and the Unkechaug replied that they "will doe it." Id.

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