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.
----------X

STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Defendants Basil Seggos ("Seggos"), in his official capacity, and the New York State Department of Environmental Conservation ("DEC" and collectively with Seggos, the "State Defendants") respectfully submit this memorandum of law in support of their motion for summary judgment against all claims brought by Plaintiffs Unkechaug Indian Nation (the "Unkechaug") and Harry B. Wallace, formerly the Chief of the Unkechaug ("Wallace" and collectively with the Unkechaug, the "Plaintiffs"). For the reasons stated below, there is no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law.[1]

PRELIMINARY STATEMENT

On its surface, this case is about the "glass eel," the juvenile form of the American Eel, and whether New York can protect the species from being further depleted by illegal fishing. But on its most fundamental level, this case is about who has sovereignty over the waters of New York State. The Plaintiffs here claim a perpetual, unlimited right to take fish in all the waters of New York, from the Atlantic Ocean to Long Island Sound, from the Hudson River to Lake Ontario. This asserted right has no limit geographically, but also no limit in terms of the amount of fish the Plaintiffs can take – they do not deny that they claim the right to fish any species to extinction, but only promise not to do so. And the Plaintiffs even claim the ability to delegate their fishing rights to others, including nonmembers of the tribe, and indeed have already issued permits purporting to do so.

[1] In further support of their motion for summary judgment State Defendants also respectfully submit the Declaration of James M. Thompson, dated August 20, 2021 ("Thompson Dec"), and the exhibits thereto; 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 State Defendants' Statement of Undisputed Material Facts Pursuant to Local Rule 56.1.

The Plaintiffs base this asserted authority on the flimsiest possible pretext – a 1676 Order issued by Edmund Andros, then the English colonial Governor of New York. The Andros Order – which was issued 342 years before the Plaintiffs ever asserted it as the basis of their purported fishing rights – simply does not say what the Plaintiffs say it says. The minutes of the discussions between the Unkechaug and Governor Andros show that the tribe did not ask for or receive a perpetual exemption from government regulation of fishing, but rather "leave . . . to fish and dispose of what they shall take," on the same basis as any English or Dutch fisherman. Far from perpetually forswearing any government oversight over the Plaintiffs' fishing, the Andros Order explicitly provides for it, stating that the fishing (and whaling) must be conducted "according to law and custome of the Government," and that the leave applied so long as the Unkechaug were "comporting themselves civilly and as they ought." Even the Plaintiffs' expert acknowledges that the term "law and custome" in the Andros Order refers to the English law governing whaling, and that those laws were enforceable in an English or colonial court.

For a host of reasons, there is no dispute of material fact that would provide an issue for trial, and the Plaintiffs' claims must fail as a matter of law. First, the lawsuit is barred by Eleventh Amendment immunity, which has not been abrogated or waived. Under the Supreme Court's holding in Coeur D'Alene Tribe of Idaho, 521 U.S. 261 (1997), and the Second Circuit's holding in Western Mohegan Tribe & Nation v. Orange County, 395 F.3d 18 (2d Cir. 2004), the Eleventh Amendment bars cases such as this one that would interfere with a state's sovereignty over navigable waters. Such a case can only be brought in state court, but here the Plaintiffs have already brought a state court case on this subject, and lost. Accordingly, *res judicata* and collateral estoppel bar their attempt to relitigate the same case twice.

The Plaintiffs' claim of federal pre-emption fails because they have not identified any federal authority that would forestall state regulation, and because New York's ban on taking eels under nine inches in length is actually required by the Atlantic Coastal Fisheries Cooperative Management Act, a federal interstate compact formally adopted by Congress and codified in the United States Code. The Plaintiffs' Free Exercise claims similarly fail – not only has DEC never interfered with the Plaintiffs' creation of wampum – the only asserted violation of their religious freedom – but all alleged incidents are time-barred, there is no credible threat of future enforcement, and any applicable laws are valid, neutral, and generally applicable, comfortably passing rational-basis scrutiny.

As to the Plaintiffs' claims based on sovereignty or the Andros Order, they are barred by the doctrine of conservation necessity; by the doctrine of laches, waiver and acquiescence under City of Sherrill v. Oneida Indian Nation of N.Y., 544 US. 197 (2005), and its progeny; by the controlling precedent of People ex rel. Kennedy v. Becker, 241 U.S. 556 (1916), which decided the precise question at bar; and by the fact that the New York Legislature has long since abrogated any rights established by this 1676 act of the colonial Governor. All of these threshold issues bar the Plaintiffs' claims as a matter of law, but even if the Court were to reach the Andros Order itself, it simply is not a treaty, and its language simply does not support the perpetual, unlimited fishing right the Plaintiffs assert, nor does it preclude State conservation regulation. Rather, it establishes, at most, that the Plaintiffs' off-reservation fishing must be conducted "according to law and custome of the Government," including those laws protecting threatened species.

STATEMENT OF FACTS

This case concerns the fate of the American Eel (*anguilla rostrata*), a vitally important species to the Atlantic marine ecosystem, but one whose population has been depleted by factors including excessive fishing. See Kerns Dec. ¶¶ 15, 30-31, 35-37. New York, through the DEC, protects the species by banning the taking of juvenile eels under nine inches in length, as required under the Atlantic Coastal Fisheries Cooperative Management Act, an interstate compact formally adopted by Congress in 1942. See Kerns Dec. ¶¶ 10-11; 16 U.S.C. § 5101 *et seq.*; 6 N.Y.C.R.R. § 40.1. The Plaintiffs seek to be free of State regulation proscribing the harvest of glass eels, and have already been caught trafficking eels to Hong Kong via JFK Airport at a price of over $1,100 per pound. See Wallace Tr. 129:11-16; Export Declarations, Thompson Dec. Exs. E & F; Commercial Invoice, Thompson Dec. Ex. G. They claim that their trafficking is legal, asserting that they enjoy an unlimited and perpetual right to off-reservation fishing in New York waters, a complete immunity from State conservation regulation, and a unilateral ability to issue permits to others. See Wallace Tr. 129:11-138:1;[2] Thompson Dec. Exs. H & I.

The American Eel and Its Decline

American eel serve as an important prey species for many fish, aquatic mammals, and fish-eating birds, and also support valuable commercial, recreational, and subsistence fisheries. Kerns Dec ¶ 15, Ex. E at 2. American eel are supported throughout their range by a single spawning population in the Sargasso Sea, where the eel begin and end their life. Id. ¶ 16. Within a year of hatching, American eel metamorphose into their next stage of life, called "glass eels," which are about two to three inches long and have transparent skin. Id. ¶ 17, Ex. E at xi.

[2] 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 Thompson Dec.

In their next stage of life, glass eels become "elvers," which are typically less than 4 inches in length, and then "yellow eels," which are sexually immature adult eels. Id. ¶ 18, Ex. E at xi. It takes American eel between three and twenty years to reach sexual maturity, at which point they metamorphose into "silver eels" and return to the Sargasso Sea to spawn. Id. ¶ 19.

Historically, American eel were abundant in streams along the East Coast, comprising more than 25% of fish biomass. Id. ¶ 20. However, in the 1990s, fisheries scientists working with the Atlantic States Marine Fisheries Commission ("ASMFC") recognized a decline in American eel population. Id. ¶ 21. The scientists determined that this decline was attributable to: (1) American eels' slow progress to reproductive age, requiring up to thirty years or more to attain sexual maturity; (2) the fact that glass eel aggregate seasonally to migrate, making them easier to harvest and enabling concentrated eel fishing that could decrease availability and exacerbate stresses on the species; (3) the fact that yellow eel harvest is a cumulative stress, over multiple years, on the same year class; (4) the fact that all eel mortality is pre-spawning mortality, meaning the eel does not have the opportunity to reproduce before being harvested; and (5) changes in year-class abundance are not readily recognizable because harvest abundance data include fish of similar sizes but from a number of year classes. Id. ¶ 22; Ex. E at 2, 7-10.

Despite regulatory measures implemented to preserve the American eel, its population has continued to drop, to the point that a 2012 peer-reviewed study conducted by the ASMFC (the "2012 Stock Assessment") found that the American eel's population was considered "depleted"[3] in United States waters, and was at or near historically low levels. Id. ¶¶ 26-31, Ex. F at 15.[4] The decline in American eel population was again observed in the 2017 ASMFC Stock

[3] A determination that a stock is "depleted" indicates the population is likely overexploited, that a stock is in poor health, and that removals from all sources are too high to maintain the population. Kerns Dec. ¶ 31.

[4] The decline in American eel population is particularly concerning, given that the European eel, which has a very

Assessment Update (the "2017 Stock Update"), which employed methodology approved by the peer-review panel and similarly concluded that the American eel stock was in a depleted state. Id. ¶ 36, Ex. I at 14-33. Further, the International Union for the Conservation of Nature ("IUCN") has classified the American eel as endangered. See Jacoby, D., Casselman, J., DeLucia, M. & Gollock, M., *Anguilla Rostrata* (2017) (amended version of 2014 assessment). The IUCN Red List of Threatened Species 2017: e.T191108A121739077.[5]

The decline in American eel population has been exacerbated by the emergence of a lucrative trade for glass eels and elvers in overseas markets, particularly a surge in demand beginning in 2011, which increased the value of glass eels in some instances to over $2,000 per pound. Kerns Dec. ¶ 35, Ex. I at 10; Annie Sneed, Glass Eel Gold Rush Casts Maine Fishermen Against Scientists, Scientific Am. Aug. 5, 2014.[6] The high value of glass eels and elvers has caused a dramatic increase in illegal eel poaching and trafficking. From 2011 to 2014, the United States Fish and Wildlife Service conducted an undercover investigation into wide-scale eel poaching along the Eastern seaboard, which resulted in prosecutions for over $7 million dollars in illegal sales. U.S. Fish and Wildlife Service, Office of Law Enforcement, "Operation Broken Glass" April 11, 2019;[7] see also Rene Ebersole, Inside the Multimillion-Dollar World of Eel Trafficking, National Geographic, June 7, 2017.[8]

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similar life history to American eel's in that it also has a single spawning population in the Sargasso Sea, is critically endangered in part due to overfishing. See id. ¶ 16. It is listed in Appendix II of CITES (Convention on International Trade in Endangered Species) which requires considerations to ensure that trade is not harmful to the species survival, and trade is prohibited for European eel due to its poor population status. Id.

[5] Available at: https://www.iucnredlist.org/species/191108/121739077.

[6] Available at: https://www.scientificamerican.com/article/glass-eel-gold-rush-casts-maine-fishermen-against-scientists/.

[7] Available at: https://www.fws.gov/le/pdf/Operation-Broken-Glass.pdf#:~:text=Operation%20Broken%20Glass%20was%20a%20criminal%20investigation%20led,for%20over%20%247%20million%20in%20illegal%20elver%20sales.

[8] Available at: https://www.nationalgeographic.com/animals/article/glass-eel-elver-trafficking-fishing-unagi.

Because of the amount of money to be made in glass eel trafficking, litigants in federal courts all over the country have put forward novel legal theories in order to create loopholes in state and federal laws protecting the species. Federal courts have rejected each and every one of these attempts, including those brought by Native Americans. See, e.g., Silva v. Farrish, No. 18 Civ. 3648, 2021 WL 613092, at *3 (E.D.N.Y. Feb. 17, 2021) (dismissing claim brought by another Long Island tribe arguing that DEC prohibition on glass eel poaching violated "their aboriginal usufructuary fishing rights"); Fregia v. Bright, 750 F.App'x 296 (5th Cir. 2018) (rejecting argument that Texas Parks and Wildlife Department regulations protecting glass eels violated Due Process Clause); U.S. v. McDougall, 25 F.Supp.2d 85 (N.D.N.Y. 1998) (holding that defendant could be criminally prosecuted for trafficking in American eels and that DEC regulation was not federally preempted and did not violate Commerce Clause or treaty with Canada); see also U.S. v. McDougall, 216 F.2d 1074 (2d Cir. 2000) (affirming federal conviction for taking American eel in violation of DEC regulation); S.D. Warren Co. v. F.E.R.C., 164 F.App'x 1 (D.C. Cir. 2005) (upholding regulatory prescriptions limiting operation of hydroelectric dams to protect American eels); Del. Valley Fish Co. v. Fish and Wildlife Svc., No. 09-CV-142-B-W, 2009 WL 1706574 (D. Me. 2009) (finding no likelihood of success on substantive challenge to U.S. Fish and Wildlife Service regulations preventing export of live glass eels).

The State-Federal Regulatory Framework Protecting the American Eel

The American eel, like other threatened species making their habitats in the waters of the East Coast states, is protected by the work of the ASMFC, an umbrella group of scientists and marine policy experts created by an act of Congress and overseen by representatives of the fifteen states bordering the Atlantic Ocean. See Kerns Dec. ¶¶ 10-11. The ASMFC was created

in 1942 by a "congressionally approved interstate compact [the ASMFC Compact']." New York v. Atl. States Marine Fisheries Comm'n, 609 F.3d 524, 528–29 (2d Cir. 2010) (citing Pub.L. No. 77–539, 56 Stat. 267 (1942), as amended by Pub.L. No. 81–721, 64 Stat. 467 (1950)), the purpose of which "'is to promote the better utilization of the fisheries . . . of the Atlantic seaboard' through a 'joint program for the promotion and protection of such fisheries.'" Id. at 528 (quoting ASMFC Compact, art. I.). In enacting the ASMFC Compact, Congress and the member states recognized that protecting threatened species required a single, consistent set of rules governing the entire length of the Atlantic coast, finding that patchwork regulation among the various states "ha[d] been detrimental to the conservation and sustainable use of [marine] resources" and that the failure of one or more states to follow the overall fishery management plan could both negatively impact protected species and create a race to the bottom, where other states would also be discouraged from fully protecting their marine resources. See 16 U.S.C. § 5101(a).

The ASMFC carries out its work by generating Fishery Management Plans for the species under its purview, including the American Eel. 16 U.S.C. § 5104(a); Kerns Dec. ¶¶ 12-14. Each plan is designed "to rebuild, restore, and maintain stocks in order to 'assure the continued availability in fishable abundance on a long-term basis.'" Kerns Dec. ¶ 12 (quoting Interstate Fishery Management Program Charter § 6(a)(1), Ex. D). In formulating a Fishery Management Plan, the ASMFC and the scientists it works with attempt to set standards that will (1) "where stocks have become depleted" by "overfishing and/or other causes . . . rebuild, restore, and subsequently maintain" populations of species like the American Eel, (2) utilize "the best scientific information available," (3) achieve results throughout the entirety of a species, (4) "minimize waste of fishery resources," (5) "protect fish habitats," (6) "provide for public

participation and comment,"[9] and (7) ensure "[f]airness and equity." Id. ¶ 13, Ex. D at 13-14. Because of the need for uniform rules along the entire East Coast, once the ASMFC adopts a fisheries management plan, member states like New York are required to implement it; if the State fails to do so, it is subject to sanctions imposed by the Secretary of Commerce. See 16 U.S.C. §§ 5104(b)(1), 5105, 5106.

The ASMFC began developing a Fisheries Management Plan for the American Eel in the late 1990s, after fisheries scientists working with the commission recognized a decline in the species' population. Kerns Dec. ¶ 21. The ASMFC published the plan in 1999, establishing rules to minimize the opportunity for excessive recreational harvest, as well as circumvention of commercial eel regulations. Id. ¶¶ 14, 23. Member states were required to impose uniform limits on eel fishing, including a six-inch minimum size and a "bag" limit of 50 eels per person. Id. Without these measures, an unregulated American Eel fishery would likely have resulted in population collapse. See Kerns Dec. ¶ 38.

But it still wasn't enough. As part of its mission, the ASMFC conducts regular stock assessments of the species under its purview, issuing addenda to the Fisheries Management Plan to reflect changing circumstances. Kerns Dec. ¶¶ 14, 25; Exs. E at 3,4, 9, 11-12; G; H. The ASMFC's 2012 Stock Assessment of the American eel, which was peer reviewed by an independent panel of scientists, including three university professors and one scientist from the private sector, found that the "American eel population is *depleted* in U.S. waters. The stock is at or near historically low levels." (emphasis in original). Id. ¶¶ 26-30, Ex. F at title page and 15.

[9] To the State Defendants' knowledge, the Plaintiffs have never provided comments during the adoption of ASMFC fisheries management plans for the American eel or any other species, despite procedures allowing them to do so. Kerns Dec. ¶¶ 39, 40, Ex. D at 16.

Likewise, the 2017 ASMFC Stock Assessment Update (the "2017 Stock Update"), employed methodology approved by the peer-review panel and similarly concluded that the American eel stock had declined. Id. ¶ 36, Ex. I at 14-33. In response to the findings of the 2012 Stock Assessment, the ASMFC promulgated Addenda III and IV to the FMP, which established measures to reduce mortality on all life stages of American eel. Id. ¶ 33, Exs. G and H. In order to address the precipitous decline in population, the new addenda increased the size limit, banning the taking of juvenile eel under nine inches and imposing a catch limit on adult (or "yellow") eel for the first time. See Id. ¶ 34. New York implemented these measures, as required by federal law. See Kreshik Dec. ¶ 5; 6 NYCRR §§ 10.1 (a) and (b), 40.1(f) and (i). These measures imposing higher minimum size limits were important to effective management and preservation of the American eel, especially in light of the lucrative market trade that had developed for glass eels and elvers beginning in 2011. Kerns Dec. ¶ 35.

Although the ban on taking juvenile eel and the strict catch limits on adult eel have helped prevent the collapse of the American eel's population, the species is still under threat. The ASMFC's 2017 Stock Assessment Update – the most current estimate of the American eel's health – concluded that the species remains depleted and that its population was in decline. See Kerns Dec. ¶ 36. The Commission is in the process of studying the species for a 2021 stock assessment update and, if necessary, a new addendum laying out any appropriate management changes. Kerns Dec. ¶ 39. The Plaintiffs, like all interested parties, will have the opportunity to make public comments on that regulatory process. Kerns Dec. ¶¶ 39, 40, Ex. D at 16.

The Plaintiffs' Illegal Taking and Trafficking of Glass Eels

It is black-letter law that within the boundaries of a Native American reservation, hunting and fishing are subject only to regulation by the tribe. Kreshik Dec. ¶ 8; New York

Environmental Conservation Law ("ECL") § 11-0707(8). However, this exemption applies only "upon such reservation," and outside of the reservation boundaries, the ECL establishes that "all fish, game, wildlife, shellfish, crustacea and protected insects" are under the ownership and control of the State, and subject to State regulation. ECL § 11-0105; Kreshik Dec. ¶ 9. New York requires any fisherman, Native or non-Native, to possess a license issued by DEC. See ECL §§ 11-0701(4); 13-0355(1); see also Kreshik Dec. ¶ 10. This requirement has been in place since 1938. 1938 N.Y. Laws 481 et seq. (requiring that "[n]o person shall . . . engage in hunting, trapping or taking fish . . . without first having procured a license" and laying out specific procedures for Native Americans to obtain such licenses.). Native Americans from recognized New York nations, including the Unkechaug, may obtain licenses free of charge if they reside on a tribe's reservation, see ECL § 11-0715(2), or in practice, the DEC has employed enforcement discretion to allow use of Nation Enrollment cards in lieu of a fishing license when all other regulatory requirements concerning hunting and fishing are complied with, including seasons, bag limits and size limits. See Kreshik Dec. ¶ 10, fn.1.[10]

For years the Plaintiffs worked in collaboration with the DEC to ensure members of the tribe could obtain licenses quickly and easily. See Kreshik Dec. ¶12; Wallace Tr. 117:16-20. In fact, the Unkechaug Tribal Council arranged with DEC for fishing licenses to be issued to tribal members at the council office, and Plaintiff Wallace described it as "a place where licenses were issued routinely." Wallace Tr. 117:16-20. Wallace himself obtained DEC hunting and fishing permits every year from 2002 to 2012, and testified that other members of the Unkechaug Nation did the same. See Kreshik Dec. Ex. A; Wallace Tr. 116:11-117:4.

[10] Whether licensed or not, all people fishing in New York waters are prohibited from taking American eel under nine inches in length. See 6 NYCRR §§ 10.1 (a) and (b), 40.1(f) and (i).

Chief Wallace admitted at a Rule 30(b)(6) deposition that the Unkechaug had never fished for glass eels prior to 2010. See Wallace 30(b)(6) Tr. 59:2-16;[11] see also id. 60:21-23 (admitting that the tribe had never sold glass eels prior to 2010). But in 2011, the price of glass eels increased dramatically. See Kerns Dec. ¶ 35. And then in 2012, Wallace decided to stop participating in the DEC license system, having spoken with other Native American leaders and concluded "that the mere fact of [DEC] issuing a license was a violation." Wallace Tr. 118:4-14.

On March 28, 2014, DEC law enforcement officers apprehended several men fishing for glass eels in Seatuck Creek, a body of water branching off of Moriches Bay, on the South Shore of Long Island. Kreshik Dec ¶ 15, Ex. B. The creek is not part of or adjacent to the Unkechaug reservation. See Wallace Tr. 271:9-272:11 (acknowledging that the creek is not part of the Unkechaug's "current territory"). These fishermen included members of the Unkechaug Nation, but also non-members, including the Plaintiffs' proposed expert in this case, Frederick Moore. Moore Tr. at 184:2-6, 186:10-191:13.[12] The men carried a permit on the letterhead of the Unkechaug Tribal Council, signed by Plaintiff Wallace, at the time the Chief of the tribe, and stating that they were "authorized to engage in traditional glass eel fishing pursuant to the Tribal Customs and practices of the Unkechaug Indian Nation." Kreshik Dec. ¶ 15; Thompson Dec Ex. H. Plaintiff Wallace admitted that one of the four men listed on the permit, Wallace Wilson, was a member of the tribe, but that the other three men, Ginew Benton, Michael Cardoze, and Gordell White, were not. Wallace Tr. 270:12-25. Plaintiff Wallace took part in the operation,

[11] 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 Thompson Dec.

[12] Excerpts from the transcript of the deposition of Frederick Moore ("Moore Tr."), taken in this action on April 9, 2021, are annexed as Exhibit C to the Thompson Decl.

arriving at the scene and informing officers that the fishermen were taking eels on behalf of the Tribe and that the fishing supplies were tribal property, then declaring that "you have no jurisdiction over our waters." See Kreshik Dec. Ex. B. When asked what waters he was referring to, he told officers "all waters except the ocean."[13] See Id.

The Unkechaug's illegal glass eel fishing continued after the 2014 incident. On May 6, 2015, the tribe (via an export declaration filed by "UNKECHAUG INDIAN NATION/ WALLACE") shipped 19.84 pounds of glass eels via JFK Airport to a buyer in Hong Kong, with a declared value of $27,000. See Export Declaration, Thompson Dec. Ex. E; Wallace Tr. 296:11-297:11 (acknowledging that the document was drafted on behalf of the Plaintiffs and that the shipment was sent to Hong Kong). On May 23, 2015, just over two weeks later, another shipment of 31.13 pounds of glass eels was shipped to Hong Kong again on behalf of "UNKECHAUG INDIAN NATION/WALLACE," with a declared value of $42,360. See Export Declaration, Thompson Dec. Ex. F; see also Wallace Tr. 299:19-302:7 (acknowledging that the document was "a record of a shipment on behalf of the Nation," but repeatedly invoking the Fifth Amendment to avoid giving any further details).

On April 6, 2016, DEC law enforcement officers interdicted a shipment and seized 15.50 kilograms of glass eels from the customs area at JFK Airport pursuant to their authority under ECL § 71-09079(4)(4). Kreshik Decl. ¶ 16, Ex. C. Although he repeatedly refused to answer questions in this litigation on Fifth Amendment grounds, see Wallace Tr. 318:18-320:11,

[13] Plaintiff Wallace's personal involvement in glass eel fishing largely went unexamined during discovery, as he invoked his Fifth Amendment right against self-incrimination to avoid answering any questions about his personal activities during the fifty-year period between 1970 and 2020. See Wallace Tr. 82:16-84:24; see also id. 273:4-275:22 (repeatedly invoking Fifth Amendment to avoid answering questions about 2014 incident). The Court can and should draw an adverse inference regarding Plaintiff Wallace's personal involvement in the glass eel fishing and trafficking, based both on this invocation of the Fifth Amendment in a civil case and on the substantial independent evidence corroborating the inference. See Mirlis v. Greer, 952 F.3d 36, 47 (2d Cir. 2020); see also, e.g., Thompson Dec. Exs. E, F, G, H, and I; Wallace Tr 280:7-23.

Plaintiff Wallace averred in the subsequent civil case in New York Supreme Court that "[t]he nation entered into a sales agreement to sell [those] 15.50 kilograms of glass eels," and attached an invoice showing that they would be shipped to a company called Crown Success Limited in Kowloon, Hong Kong, for a declared value of $ 41,500. See Kreshik Dec. Exs. C & E. DEC law enforcement officers seized the glass eels before they could be put on the airplane. Kreshik Dec. ¶ 16. The Plaintiffs responded by filing a state court lawsuit, which would ultimately be dismissed with prejudice.

The Plaintiffs File a Civil Case Regarding an Alleged Right to Fish for Glass Eels, and Lose

On April 8, 2016, the Unkechaug filed an action in New York State Supreme Court, Queens County, seeking return of the seized eels, entitled Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation, Index No. 4254/2016. See 2016 Verified Complaint, Kreshik Dec. Ex. D.[14] In that action, the Unkechaug repeatedly asserted that DEC had violated their alleged sovereign fishing rights and interfered with their religious practice. Id. On July 14, 2016, DEC moved to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (a)(7), arguing *inter alia* that the Unkechaug failed to state a claim for which relief could be granted, as there

[14] Their 2016 action was not the Unkechaug's first lawsuit challenging state regulation of their commercial endeavors asserting dubious theories of sovereignty. For example, in 2002, the Unkechaug developed a plan to purchase a strip mall and an industrial park in Sullivan County, declare the land to be their sovereign territory, and then use their "newly-discovered ancestral land" to open a high-stakes bingo operation. See generally Carruthers v. Flaum, 450 F.Supp.2d 288, 294-303 (S.D.N.Y. 2006) (finding facts regarding the gambling operation). The plan was unsuccessful, with the court ruling that the contracts at issue were "unquestionably illegal, unenforceable and void" because the Unkechaug were "neither sovereign nor [could] they claim preemption from state laws." Carruthers v. Flaum, 365 F. Supp.2d 448, 463, 465-66 (S.D.N.Y. 2005); see also id. at 470 (plaintiffs could not "rely[] on the Unkechaugs' non-existent sovereignty to get them around both state and federal regulation"). More recently, although it had been settled law for years that cigarette sales by Native American businesses were exempt from taxation, but sales to non-members are taxable, the Plaintiffs nonetheless challenged New York's taxation system governing sales of unstamped cigarettes to non-members as unconstitutional and violative of their "Sovereign Right of Self-Government." See Unkechauge Indian Nation v. Paterson, No. 10 Civ. 711, 2020 WL 553576, at *3 (W.D.N.Y. Feb. 4, 2020); see also, Cty. of Suffolk v. Golden Feather Smoke Shop, Inc., No. 09 Civ. 162, 2016 WL 1245001 (E.D.N.Y. Mar. 23, 2016) ("The long-standing practice of selling unstamped cigarettes on the [Unkechaug] Reservation has been the subject of numerous litigations in this Court.").

was "no legal authority showing that it has any legal right to take or possess glass eels in contravention of New York State Law." 2016 Motion to Dismiss brief, Kreshik Decl. Ex. F at 7. The Unkechaug did not file opposition papers. On October 12, 2016, Justice Robert L. Nahman issued an order declaring "that the branch of [DEC]'s motion to dismiss the plaintiff's complaint upon the grounds that the complaint fails to state a cause of action is granted without opposition." See Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation, Index No. 4254/2016 (N.Y. Sup. Ct. Queens Cty. Oct. 12, 2016), Kreshik Dec. Ex. I. [15]

On October 12, 2016, the same day that Justice Nahman dismissed the Plaintiffs' claims "upon the grounds that the complaint fails to state a cause of action," the Plaintiffs filed an Order to Show Cause asking Justice Nahman to allow them to discontinue the case without prejudice so that the Unkechaug could "commence an action in federal court." Kreshik Decl. Ex. G at 2, 8. The Court did not grant the relief requested, and the case's docket shows that their discontinuance motion was withdrawn. See Kreshik Dec. Ex. H. The Plaintiffs did not appeal Justice Nahman's dismissal or any other aspect of the lawsuit, but instead waited until February 2018, and filed the instant federal case anyway. Kreshik Dec. ¶ 23.

Plaintiffs File the Instant Lawsuit Seeking to Be Free of Regulation, In Part Pursuant to An Order of the British Governor of New York Colony

The Plaintiffs' central argument[16] in this case is that they are entitled to fish without any regulation by New York State due to an order purportedly issued on May 24, 1676 by the British

[15] Although the Plaintiffs' claims for injunctive relief, which mirror this action, were dismissed with prejudice "upon the grounds that the complaint fails to state a cause of action," a separate branch of the lawsuit that sought money damages for the value of the seized eels was dismissed without prejudice for lack of subject matter jurisdiction, since such a suit could only be brought in the New York Court of Claims. See Kreshik Dec. Ex. I. Justice Nahman specified that the monetary claims were dismissed "without prejudice," while the claims for injunctive relief were simply "dismissed," based on "the grounds that the complaint fails to state a cause of action." Id.

[16] Plaintiffs also claim that DEC regulation concerning dumping in tidal wetlands interferes with their religious beliefs concerning returning shells used to create Wampum to the water. Compl. ¶¶ 46-53. The last time Plaintiffs allege they were cited for this practice was in 2014. Wallace 30(b)(6) Tr. 23:1-13; 25:17-20. However, the DEC

colonial Governor of New York, Edmund Andros (Ex. J, the "Andros Order"), which they contend operates as a treaty. See Complaint ¶¶ 7, 55-56. This claim, based on a document that was 342 years old at the time the Complaint was filed, is entirely novel; prior to the 2016 State Court case, the Unkechaug had never challenged the applicability or validity of New York's laws concerning regulation of eel fishing and fishing licenses. See Kreshik Dec. ¶ 14.

Although the Plaintiffs' expert, John A. Strong, testified that an original version of the Andros Order exists, it has not been entered into evidence. See Strong Tr. 78:14-79:16;[17] Instead, the language at issue is a passage from a collection of colonial papers (the "Andros Papers"). According to the Andros Papers on May 24, 1676, the following order (the "Andros Order") was issued:

> At a Councell held in N.Y. the 24th day off May 1676.
>
> Upon the request of the Ind[ ]s of Unchechauge upon Long Island
>
> Resolved and ordered that they are at liberty and may freely whale or fish for or with Christians or by themselves and dispose of their effects as they thinke good according to law and Custome of the Government of which all Magistrates officers or others whom these may concerne are to take notice of and suffer the said Indyans so to doe without any manner of lett hindrance or molestacion they comporting themselves civilly and as they ought.
>
> By Order of the Go: in Councell
>
> [ENDORSED:] Order of Councell may 24. 1676.
> Unchechaug Indians.

Thompson Dec. Ex. J; see Wallace Tr. 120:21-121:10.

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has no record of ever citing or otherwise charging the Unkechaug for returning shells to the water and the DEC and the laws of the State of New York do not prohibit this practice. Kreshik Dec. ¶¶ 29-30. See Section IV, *infra*.

[17] Excerpts from the transcript of the deposition of John Strong, Ph.D. ("Strong Tr."), taken in this action on April 12 and 13, 2021, are attached as Exhibit D to the Thompson Dec.

The Extraordinary Scope Of The Plaintiffs' Claimed Dominion Over All Navigable Waters

During the course of motion practice and discovery, the Plaintiffs have made clear that the right they claim in this litigation amounts to complete sovereignty over New York's waters – in Plaintiff Wallace's words, that "[t]here'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." Wallace Tr. 129:11-16; see also id. 135:10:21 ("Q: So could the state pass any law or regulation that would apply to the Unkechaug's fishing? A: No.").

The Plaintiffs acknowledge no geographic limitations on their purported right to take protected species. Although the Complaint discusses an ill-defined right to fish in "customary fishing waters," Compl. ¶ 1, and refers to "[t]he customary Unkechaug fishing waters in Poospatuck Bay, off the reservation land," id. ¶ 32, Plaintiff Wallace made clear that the term "customary fishing waters" as used in the Complaint refers to all the navigable waters of New York State, and beyond. When asked for "the extent of the traditional waters that you claim the Unkechaug have the unlimited right to fish," Wallace said that the waters included "anywhere fish go." Wallace Tr. 137:18-23; see also id. 129:20-21 ("Q: And what are those areas? A: Wherever the fish go."). Wallace was asked whether the claim applied to the Forge River, the "whole shore of Long Island," the Hudson River, the Atlantic Ocean, and even Lake Ontario (which is approximately 360 miles from the Unkechaug reservation) and answered yes to each one. Wallace Tr. 137:24-138:10.

There are similarly no limits to the amount of fish that the Plaintiffs claim; when asked "[a]re there any limits to the amount of fish that the Unkechaug can take," Wallace responded, "I don't think so." Id. 136:17-19. When asked whether the Plaintiffs could fish the American Eel to extinction, Wallace did not deny that the Plaintiffs claimed the right to, but merely promised,

"well, I would not do it, so that's the best answer I can give you." Wallace Tr. 136:20-137:14. Wallace also did not deny that the Unkechaug's claimed right allowed them to take other species, including endangered ones. See id. 135:12-17; see also Wallace 30(b)(6) Tr. 123:13-14 ("I don't see any species limitation."). Plaintiff Wallace similarly would not deny that victory in the lawsuit would allow the Unkechaug to resume whaling, stating only that it's "unlikely." Wallace 30(b)(6) Tr. 124:16-19.

The Plaintiffs do not merely claim these rights for themselves. They claim that every Native American tribe in New York has the same unlimited fishing rights, and the same exemption from all State regulation. See Wallace Tr. 140:17-141:4 ("I don't believe that there's any limitation for any recognized Nation in New York."). The Plaintiffs also claim the right to issue fishing permits to nonmembers, see Wallace 30(b)(6) Tr. 121:23 ("[the Tribe] could if it wanted to"), even if the people fishing under the Tribe's permit are non-native. See id. at 121:25-122:4. In fact, the Plaintiffs have issued permits to fish for glass eels to non-members of the Unkechaug Tribe at least once before, in 2014. See 2014 Fishing Permit, Thompson Dec. Ex. H; Wallace Tr. 270:12-25.

Nor do the Plaintiffs merely intend to apply their asserted fishing rights against New York State. At his deposition, Plaintiff Wallace asserted that the Unkechaug "are not restricted by any laws that I have seen." Id. 135:15-17. He made clear that the Plaintiffs' claim of immunity from any regulation of their off-reservation fishing based on the Andros Order also operates against the United States.[18] Id. 135:8-11 ("Q: So your answer as to the question: [d]oes this document apply to the federal government is, yes? A: I think it does, yes."). And similarly, Wallace asserted that the Andros Order would prevent any other American state from halting the

[18] Plaintiff Wallace asserted that the Unkechaug have the right to fish in federal waters on the same basis as the waters of New York State. Wallace Tr. 136:12-15.

Plaintiffs' fishing activities. See id. 135:22-136-11 (asserting that the Unkechaug's fishing could not be regulated by Connecticut, New Jersey, Maine, Massachusetts, Rhode Island, or any other state).

Taken in total, the relief Plaintiffs seek in this case is perpetual in time, boundless in geography, unlimited in extent, freely delegable to whomever the Plaintiffs choose, and operable against not just New York, but every other state government and the United States as well. The instant cross-motions for summary judgment will determine whether, as the Plaintiffs would have it, "[t]here's no limitation on the Unkechaug's fishing right except by what the Unkechaug place." Wallace Tr. 129:11-16.

STANDARD OF REVIEW

Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Savino v. City of N.Y., 331 F.3d 63, 71 (2d Cir. 2003). Summary judgment is not a "disfavored procedural shortcut," but is an integral part of the Federal Rules' goal of securing the "just, speedy and inexpensive determination of every action." See Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). In order to avoid summary judgment, the nonmoving party must do more than show "some metaphysical doubt" as to the material facts. Rather, the party must come forward with admissible evidence sufficient to raise a genuine issue of fact and may not rely upon speculation or conjecture. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Savino, 331 F.3d at 71.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS THIS PROPERTY-RIGHTS LAWSUIT AGAINST THE STATE

A. The State Defendants Are Protected by Eleventh Amendment Immunity, Which Has Not Been Abrogated or Waived.

This suit is barred entirely by the State of New York's sovereign immunity under the Eleventh Amendment. "[A]s a general rule, state governments may not be sued in federal court unless they have waived their Eleventh Amendment immunity, or unless Congress has abrogated the states' Eleventh Amendment immunity when acting pursuant to its authority under section 5 of the Fourteenth Amendment." Gollomp v. Spitzer, 568 F.3d 355, 366 (2d Cir. 2009) (internal quotation marks omitted). "[T]he immunity recognized by the Eleventh Amendment extends beyond the states themselves to state agents and state instrumentalities that are, effectively, arms of a state." Id. This immunity unquestionably extends to both DEC and Seggos, barring any claims against them from being adjudicated in federal court.[19] Salvador v. Adirondack Park Agency of State of N.Y., 35 F. App'x 7, 10-11 (2d Cir. 2002) (affirming Eleventh Amendment dismissal of claims against DEC and its Commissioner, while noting that "[a]s a threshold matter, New York's Department of Environmental Conservation has been determined to be a state entity.").

"There are only three exceptions to this rule. First, a State may waive its Eleventh Amendment defense. Second, Congress may abrogate the sovereign immunity of the States by acting pursuant to a grant of constitutional authority. Third, under the Ex Parte Young doctrine, the Eleventh Amendment does not bar a suit against a state official when that suit seeks

[19] The Eleventh Amendment analysis is identical with regards to claims against Seggos, since he is sued here in his official capacity and "such immunity extends to officers acting on behalf of the state." Deadwiley v. N.Y. State Ofc. of Children & Fam. Servs., 97 F. Supp. 3d 110, 115 (E.D.N.Y. 2015) (Kuntz, J.) (quotation omitted).

prospective injunctive relief." Deadwiley, 97 F. Supp. 3d at 115 (quotations and citations omitted). None of these exceptions apply here.

As a preliminary matter, the State's Eleventh Amendment Immunity to this suit has not been abrogated by any act of the Federal government.

Likewise, neither the DEC nor Commissioner Seggos have waived sovereign immunity. Kreshik Dec. ¶ 25. Although the Plaintiffs alleged in their Complaint that Assistant Attorney General Hugh McLean "threatened to criminally prosecute . . . unless the Nation would file an action in Federal Court asserting its rights" (Compl. ¶ 25), and the Court, accepting the assertion as true for the purposes of a motion to dismiss, found that the allegation would suffice "at this stage in the litigation," it also noted that the waiver argument would likely fail "[s]hould Plaintiffs be unable to identify additional evidence of Defendants invoking federal jurisdiction." Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation, No. 18-CV-1132 (WFK), 2019 WL 1872952, at *4 (E.D.N.Y. Apr. 23, 2019).

Not only have the Plaintiffs not adduced any such additional evidence, their factual assertions about such a purported waiver have fallen apart under scrutiny. See Wallace Tr. 30 (b)(6) Tr. 40:9-12 (Plaintiff Wallace admitting that he never spoke to AAG McLean directly). "'The 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 v. N.Y. State Div. of Parole, No. 08 Civ. 911, 2009 WL 1033786, at *4 (E.D.N.Y. 2009) (quoting Close v. New York, 125 F.3d 31, 39 (2d Cir. 1997)). Accordingly, "[w]aiver 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.'" Santiago v. N.Y. State Dep't of Corr. Servs., 945 F.2d

25, 30 (2d Cir. 1991) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974) (brackets omitted)); see Sossamon v. Texas, 563 U.S. 277, 284 (2011) ("Waiver may not be implied.").

Here, there is no evidence that AAG McLean ever purported to waive sovereign immunity on behalf of DEC, and even if there were such evidence the waiver would not be effective. Moreover, Plaintiffs' claims that "on or about" an unspecified date in 2017, AAG McLean threatened prosecution unless Plaintiffs' brought the instant suit, see Declaration of Chief Harry Wallace ECF No. 31-1 at 3, make little sense given that Plaintiffs had already brought a substantially identical state court action in 2016, and DEC had already successfully opposed it. Kreshik Decl. Exs. D, I. Further, in the state court litigation, Plaintiffs' counsel filed a sworn affirmation dated October 12, 2016, seeking to withdraw the state court action to "commence an action in federal court" because *inter alia* "the full extent of the Unkechaug rights can better be litigated in federal court rather than state court," and "the Unkechaug have a right to seek a forum that will address all of the state and federal issues and allow much greater latitude for damages. . ." Kreshik Dec. Ex. G at 4 (Affirmation of James Simermeyer, Esq.).

Nor could AAG McLean waive DEC's Eleventh Amendment immunity even if he wished to. At the time of the alleged waiver, AAG McLean was not an employee, officer or agent of DEC, nor did he represent DEC as an attorney. Kreshik Dec. ¶ 24. Although a criminal prosecution by the Attorney General pursuant to N.Y. Executive Law § 63(3) may be initiated by a request from the Governor or the head of an executive agency such as DEC, the Attorney General and her staff (such as AAG McLean) bring any such case 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 referral for prosecution and explaining that "when those powers are activated, the Attorney General has the

prosecutorial powers otherwise held by the District Attorney"); see also Kreshik Decl. ¶ 24. Moreover, AAG McLean is not, and has never been, authorized to waive the DEC's Eleventh Amendment Immunity. Kreshik Dec. ¶ 24; cf. Moche v. City Univ. of N.Y., 781 F. Supp. 160, 164 n.4 (E.D.N.Y. 1992) (Corporation Counsel could not waive State's Eleventh Amendment immunity even by entering voluntary general appearance where "no New York State statute expressly authorize[d] the [Counsel] to consent to suit in a federal court on behalf of New York State under these circumstances."). Accordingly, in conducting a criminal investigation or prosecution, AAG McLean was not acting as the lawyer for the agency and had no power or authority to waive its immunity in a separate, not-yet-commenced civil action.

B. The Relief Sought by the Plaintiffs Is Unavailable in Federal Court, as Established by the Supreme Court in Coeur d'Alene and the Second Circuit in Western Mohegan

Although the Plaintiffs seek prospective injunctive relief against Commissioner Seggos, a state official, the Ex Parte Young exception to Eleventh Amendment immunity does not apply to a land use or property claim against the State.

As a threshold matter, the Ex Parte Young exception to Eleventh Amendment immunity applies to individual officials, not to state agencies such as DEC. See e.g., Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 74 (1996). Nor is it applicable to Commissioner Seggos, pursuant to the holdings of Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) and Western Mohegan Tribe & Nation v. Orange County, 395 F.3d 18 (2d Cir. 2004). In Coeur d'Alene, the Supreme Court held that the Eleventh Amendment barred a Native American tribe seeking prospective injunctive relief against state officials, where the suit sought declaratory relief concerning the tribe's exclusive use, occupancy and right to quiet enjoyment of "the submerged lands and bed of Lake Coeur d'Alene and of the various navigable rivers and streams that form part of its water

system." Coeur d'Alene, 521 U.S. at 264. The Court determined that the relief requested "was close to the functional equivalent of quiet title" and:

> [I]n effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id. at 282. In reaching its holding, the Court emphasized that States possess the "'absolute right to all navigable waters . . . subject only to the rights surrendered by the Constitution.'" Id. at 283 (quoting Martin v. Lessee of Waddell, 16 Pet. 367, 410 (1842)), and that suits involving navigable waters "uniquely implicate sovereign interests." Id. at 284. The relief Plaintiffs seek in this case would have the same effect as the relief sought in Coeur d'Alene, curtailing a State's authority over its navigable waters.

Nor does that conclusion change based on the fact that the Plaintiffs do not seek fee simple title to New York's waters or because the property right they claim is non-exclusive. In Western Mohegan Tribe & Nation v. Orange County, 395 F.3d 18, 23 (2d Cir. 2004), the Second Circuit applied the holding of Coeur d'Alene to another suit similar to the case at bar. There, the plaintiff argued that "its claims [were] of a more limited nature than those considered by the Coeur d'Alene Court" insofar that it sought "only 'Indian title,' which it describe[d] as the right 'to camp, to hunt, to fish, [and] to use the waters and timbers' in the contested lands and waterways." Id. at 22. The Second Circuit nonetheless held that under Coeur d'Alene, Eleventh Amendment immunity barred the suit because the Tribe's claims were "fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas" and that

it effectively sought a "'determination that the lands in question are not even within the regulatory jurisdiction of the State.'" [20] Id. at 23 (quoting Coeur d'Alene, 521 U.S. at 282).

The Plaintiffs' claims in this case are governed by Western Mohegan and Couer d'Alene because they implicate the same issues of state sovereignty and would prevent New York from exercising "the regulatory jurisdiction of the State" over its navigable waters. Western Mohegan, 395 F.3d at 23 (quoting Coeur d'Alene, 521 U.S. at 282). The Plaintiffs seek declaratory judgment from this Court that the:

> Nation, Harry B. Wallace as Chief and individually, its officials, and its Reservation waters and customary Unkechaug fishing waters are immune from NYSDEC and Commissioner Basil Seggos fishing regulations and that the NYSDEC and Commissioner Basil Segos lack authority to enforce fishing regulations under New York State Environmental laws against the Nation, Harry B. Wallace as Chief and individually, its officials and employees.

Compl. at 12; cf. Coeur d'Alene, 521 U.S. at 282 (Eleventh Amendment barred suit that "would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters."). The Plaintiffs define "customary Unkechaug fishing waters" as "anywhere a fish can go." Wallace 30(b)(6) Tr. at 102:12-15; see also Wallace Tr. 129:13-21 (explaining that "[t]here's no limitation on the Unkechaug's fishing right except by what the Unkechaug place" and that the right applies "[w]herever the fish go."). Further, Plaintiffs argue that attendant to their right to fish in all New York waters free from any State regulation, they also have the power to grant licenses to others to fish off reservation, subject only to their own regulatory authority. Wallace 30(b)(6) Tr. at 72:6-73:22. Indeed they have already granted such

[20] The Supreme Court has repeatedly ruled that Native American hunting and fishing rights, including those contained in a treaty, constitute an easement on the land or water in question. See People of the State of New York ex rel. Kennedy v. Becker, 241 U.S. 556, 562 (1916) (where Native American tribe had a treaty right to hunt and fish, "[w]e assume that they retained an easement, or profit *á prendre*, to the extent defined; that is not questioned."); 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.").

licenses. See Signed Unkechaug Glass Eel Fishing Permits, Thompson Dec. Exs. H & I. Plaintiffs in this action are thus seeking breathtakingly broad relief to be free from *any* regulation of their fishing activities in *all* New York waters, and the power to shield others of their choosing from those regulations as well.

This was the ground on which Magistrate Judge Locke and the late Judge Sandra Feuerstein dismissed Silva v. Farrish, this action's companion case. In Silva, members of the Shinnecock Indian Nation, another tribe based on Long Island, sued DEC and Commissioner Seggos, among other parties, asserting a right to take glass eels because "several 'Colonial Deeds and related documents' support their aboriginal right to fish in such waters 'without interference.'" Silva v. Farrish, No. 18 Civ. 3648, 2020 WL 3451344, at *1 (E.D.N.Y. May 27, 2020), R&R adopted, 2021 WL 613092 (E.D.N.Y. Feb. 17, 2021). The "Colonial Deeds and related documents" that formed the basis of the Silva case included that 1676 Andros Order that is central to the Plaintiffs' claims in this action, as stated in a report submitted by Dr. John A. Strong, the same expert the Plaintiffs have retained in this matter.[21] See Memorandum of John A. Strong, Silva v. Farrish, No. 18 Civ. 3648 (E.D.N.Y.), Dkt. No. 73-1 at 2-3 (discussing the Andros Order regarding the Unkechaug and contending that it "clearly support[s] the rights of the Shinnecock . . . to fish in the waters adjacent to their communities 'without let or hindrance.'").

The Silva Court held that these claims were barred by Coeur d'Alene and Western Mohegan, and granted summary judgment for the State. Magistrate Judge Locke found that

[21] The Plaintiffs in this case also appear to have collaborated with the Silva plaintiffs, sharing documents produced in discovery in this action for use in the Silva matter. See Silva v. Farrish, No. 18 Civ. 3648 (E.D.N.Y.), Dkt. No. 84-12 at 182-85, 193-94, 212, 214-15, 224-30 (documents bearing DEC Bates stamps from this action filed as exhibits to the Silva plaintiffs' unsuccessful opposition to summary judgment); see also Wallace Tr. 266:5-267:19 (acknowledging conversations with David Silva during the pendency of the two lawsuits).

"while Plaintiffs[] insist[] that they are seeking only 'protection of a use right of the waters[,]' . . . they are, in reality, seeking the equivalent of ownership rights." Silva, 2020 WL 3451344 at *6-7. 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 late Judge Feuerstein reached the same conclusion, finding that Magistrate Judge Locke had "correctly and thoroughly articulated" the issue and that the Eleventh Amendment barred the suit because "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."[22] Silva v. Farrish, No. 18 Civ. 3648, 2021 WL 613092, at *3 (E.D.N.Y. Feb. 17, 2021). That is exactly the relief sought in this action: in Plaintiff Wallace's words, a declaration that "[t]here'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." Wallace Tr. 129:13-16. Under the binding precedent of Coeur d'Alene and Western Mohegan, and the persuasive precedent of the two opinions in Silva, such a claim against a State cannot go forward in federal court.

C. The Plaintiffs' Sovereignty and Treaty Claims Sound in State Law, And Are Barred by the Pennhurst Doctrine

The Eleventh Amendment also bars the Plaintiffs' inherent sovereignty and treaty-based claims because these causes of action sound in state law, while the Ex Parte Young exception "applies only to ongoing violations of *federal* law."[23] Brantley v. Municipal Credit Union, No. 19 Civ. 10994, 2021 WL 981334, at *8 (S.D.N.Y. Mar. 16, 2021) (emphasis in the original). The Andros Order was not an act of the federal government – nor could it have been, since the United States would not exist for another century after it was issued and Congress has never

[22] This decision is currently on appeal to the Second Circuit, see 2d Cir. Case No. 21-616.

[23] The Plaintiffs' first and third claims, asserting federal pre-emption and violation of the Free Exercise Clause, are federal in nature.

adopted it. If the Andros Order has any force at all, it is under the law of New York State, but the Eleventh Amendment bars any federal action against a state officer for an alleged violation of state law. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (superseded by statute on other grounds) (such a lawsuit "conflicts directly with the principles of federalism that underlie the Eleventh Amendment."). The Pennhurst doctrine therefore represents a separate and independent Eleventh Amendment bar to consideration of the Plaintiffs' non-federal claims. Vega v. Semple, 963 F.3d 259, 284 (2d Cir. 2020) ("To the extent Plaintiffs seek prospective relief . . . for violations of the '[state] Constitution' and 'state law,' those claims are indeed barred by the Eleventh Amendment under the Pennhurst doctrine.").

II. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL APPLY BECAUSE PLAINTIFFS' CLAIMS HAVE ALREADY BEEN LITIGATED AND DISMISSED WITH PREJUDICE

While the Eleventh Amendment bars adjudication of Plaintiffs' claims in federal court, Plaintiffs are not jurisdictionally blocked from pursuing them in New York State Court. However, prior to the instant suit, Plaintiffs already litigated the subject matter of this case in state court, only to have their claims dismissed with prejudice. As such, their claims are barred by the doctrines of *res judicata* and collateral estoppel.

"Under 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." Malcolm v. Bd. of Educ. of Honeoye Falls-Lima Central Sch. Dist., 506 F. App'x 65, 68 (2d Cir. 2012) (internal brackets and quotation marks omitted). "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. (citing Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 90 (2d Cir. 1997)). Collateral estoppel, meanwhile, "prevents parties or their privies from relitigating in a

subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding," and applies when "1) the identical issue was raised in a previous proceeding, 2) the issue was actually litigated and decided, 3) the party had a full and fair opportunity to litigate the issue, and 4) the resolution of the issue was necessary to support a valid and final judgment on the merits." Burton v. Undercover Officer, 671 F. App'x 4, 4-5 (2d Cir. 2016) (quoting Marvel Characters, Inc. v. Simon, 310 F.3d 280, 288-89 (2d Cir. 2002)). These principles apply even when a party does not contest the issue, so long as jurisdiction was proper. See Norex Petroleum Ltd. v. Access Indus. Inc., 416 F.3d 146, 160 (2d Cir. 2005) ("The law is well established that a default judgment is deemed as conclusive an adjudication of the merits of an action as a contested judgment.").

In April 2016, after state and federal law enforcement officers seized roughly $40,000 of glass eels that the Unkechaug were planning to export to Hong Kong, the Unkechaug filed an action in the New York State Supreme Court, Queens County, entitled Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation, Index No. 4254/2016. See Kreshik Dec. Ex. D. In that action, the Unkechaug repeatedly asserted that DEC had violated their sovereign fishing rights and interfered with their religious practice.[24] See, e.g., id. ¶ 24 (alleging that DEC "caused the [Unkechaug] irreparable harm as to its property and sovereign rights as an Indian nation."); id. ¶ 29 (alleging that DEC "has deprived the [Unkechaug] 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"); cf. Evans v. Ottimo, 469 F.3d 278, 282 (2d Cir.

[24] Although Chief Wallace and Commissioner Seggos were not parties to the 2016 litigation, any claims involving them are nonetheless precluded because they are in privity with the Unkechaug and DEC, respectively. See Malcolm, 506 F. App'x at 67 (*res judicata* "precludes the parties or their privies from relitigating issues that were or could have been raised in that [prior] action") (quotation marks omitted); Beras v. Colvin, 313 F. App'x 353, 354-55 (2d Cir. 2008) (discussing privity in the context of *res judicata* and affirming dismissal of action against parties that were in privity with defendant in prior case).

2006) (under New York law of collateral estoppel, issue is "actually litigated" if it is "properly raised by the pleadings" and determined by the Court). The Unkechaug brought the 2016 case in order to seek a permanent injunction that would permit them to fish for glass eels and protect its members from prosecution for illegal trafficking – the very same relief they are demanding in this action. Compare 2016 Verified 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 lost. DEC moved to dismiss, arguing *inter alia* that there was "no legal authority showing that [the Unkechaug] ha[ve] any legal right to take or possess glass eels in contravention of New York State Law." Kreshik Dec., Ex. F at 7. Months after the DEC moved to dismiss, on the day the Court issued its ruling, the Unkechaug sought to discontinue their suit without prejudice, but were unsuccessful. Kreshik Decl. ¶¶ 20, 21, Exs. G, H. In his ruling on the motion to dismiss, Justice Robert L. Nahman dismissed the claims for monetary damages without prejudice for lack of subject matter jurisdiction, but dismissed the claims for injunctive relief with prejudice "upon the grounds that the complaint fails to state a cause of action."[25] See Unkechaug Indian Nation, slip op. at 1, Kreshik Dec. Ex. I. The Plaintiffs' motion to voluntarily discontinue was withdrawn, and the Plaintiffs did not appeal Justice Nahman's ruling. See Kreshik Dec. ¶¶ 21, 23, Ex. H.

[25] Justice Nahman was not required to explicitly state that his dismissal was "with prejudice" in order for it to have preclusive effect. To the contrary, under New York law, "[e]ven where an order does not explicitly so state, a dismissal is on the merits for *res judicata* purposes if the order addressed the merits and was not issued purely on account of technical pleading deficiencies." Plaza PH2001 LLC v. Plaza Residential Owner LP, 98 A.D.3d 89, 98 (N.Y. App. Div. 1st Dep't 2012).

The issues raised in this action – whether the Unkechaug are entitled to fish for glass eels outside their reservation, and whether their members could be subject to prosecution for attempting to ship eels to Hong Kong in April 2016 – are the same as the ones dismissed with prejudice in the state court action.[26] The Complaint in that case asserted immediately, in capital letters, that New York's actions in interdicting the eels were "INTERFERENCE IN THE SOVEREIGN RIGHTS OF THE UNKECHAUG INDIAN NATION," and claimed "THAT THE UNKECHAUG ARE IMMUNE FROM ANY JURISDICTION OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION." 2016 State Court Complaint, Kreshik Dec. Ex. D at 1 (emphasis in the original); compare Complaint, Dkt. No. 1 ¶ 1 ("The Nation seeks a declaration that the Unkechaug Nation . . . are not subject to the New York State Department of Environmental Conservation's authority . . . based upon inherent native sovereignty."). The Plaintiffs' 2016 State Court Complaint even raised the same Free Exercise claim the Plaintiffs have pressed in this case, asserting in its fifth cause of action that DEC illegally "interfered with the cultural and religious practices of the Unkechaug as Care-takers of their land and natural resources." 2016 State Court Complaint ¶ 29. These issues were necessarily decided by Justice Nahman when he granted DEC's motion to dismiss "upon the grounds that the complaint fails to state a cause of action." State Court Order, Kreshik Dec. Ex. I.

Plaintiffs cannot avoid the preclusive effect of Justice Nahman's ruling by artful pleading or by advancing new legal theories based on the same situation, since *res judicata* bars litigation

[26] There are no new facts or incidents that would render the instant claim different from the ones litigated in the 2016 action. The only fact alleged in the Complaint that post-dates Justice Nahman's ruling is a February 2018 *New York Times* article in which a DEC law enforcement officer stated that Native Americans are subject to DEC regulations when fishing in off-reservation waters. Compl. ¶¶ 20, 35; cf. Pricaspian Dev. Corp. (Tex.) v. Royal Dutch Shell, PLC, 382 F. App'x 100, 104 (2d Cir. 2010) (affirming *res judicata* dismissal based on 2003 action where plaintiff's "new claim is not based upon post-2003 facts in any meaningful way").

of any matter that "emerges from the same nucleus of operative facts" as any claim in the prior action. Malcolm, 506 F. App'x at 67; see Waldman v. Vill. of Kiryas Joel, 207 F.3d 105, 110 (2d Cir. 2000) (discussing the "well-established rule that a plaintiff cannot avoid the effects of *res judicata* by 'splitting' his claim into various suits, based on different legal theories (with different evidence 'necessary' to each suit)."). Accordingly, *res judicata* bars any new theories that "'could have been[] raised in the prior action.'" Soules v. Conn. Dep't of Emergency Servs., 882 F.3d 52, 55 (2d Cir. 2018) (quoting Monahan v. N.Y.C. Dep't of Corr., 214 F.3d 275, 285 (2d Cir. 2000)), including the Plaintiffs' new theory based on the Andros Order. Similarly, the Plaintiffs are collaterally estopped from raising the issue of their putative fishing rights a second time because it was raised in their claims for injunctive relief in the 2016 action, see Kreshik Decl. Ex. D, and necessarily decided by Justice Nahman when he dismissed the injunctive claims in their entirety. See Legal Aid Soc'y v. City of N.Y., No. 96 Civ. 9141, 1997 WL 394609, at *6 (S.D.N.Y. July 11, 1997) (imposing collateral estoppel "based on the state court's judgment, which dismisses the plaintiff's complaint in its entirety, thus implying that the state court must have necessarily decided the issue"). Because the Plaintiffs had a full and fair opportunity to litigate these issues in the 2016 action – and lost – summary judgment must be granted against their attempt to litigate them again.

III. THE CHALLENGED ENVIRONMENTAL LAWS ARE NOT PREEMPTED

The Plaintiffs contend, in summary fashion, that the State cannot regulate their off-reservation fishing because "federal law pre-empts the application of state and local laws and regulations to all Indian Tribes within the borders of the any state [sic] and the United States." Compl. ¶ 36. This claim is unsupported and meritless. The Plaintiffs misunderstand the nature of pre-emption and fail to identify any specific legal authority that shows a Congressional intent to supersede state law. Cf. Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019)

("Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law.") (quotation marks omitted).

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) (citing Wyeth v. Levine, 55 U.S. 555, 565 (2009)). "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." Id. Fisheries management is just such an area. See State of N.Y. v. Locke, No. 08 Civ. 2503, 2009 WL 1194085, at *2 (E.D.N.Y. 2009) ("The management of fisheries within state waters, including inland waters and coastal waters extending three miles seaward from shore, is subject to regulation by the states under their police powers."); see also Aqua Harvesters, Inc. v. DEC, No. 17 Civ. 1198, 2019 WL 3037866, at *25 (E.D.N.Y. July 11, 2019) (rejecting plaintiff's pre-emption argument and stating that "[s]uch a rule – which would handcuff the ability of states, under their police power, to [] manage their fisheries – cannot possibly be correct."). "The heavy burden of overcoming this presumption falls on the party alleging preemption" – here, the Plaintiffs – "who must show that the conflict between the federal and state laws 'is so direct and positive that the two cannot be reconciled or consistently stand together.'" Pet Welfare, 850 F.3d at 86-87 (quoting In re MTBE Prods. Liab. Litig., 725 F.3d 65, 96 (2d Cir. 2013)) (ellipsis omitted). 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).

Here, the Plaintiffs have identified only one statute that they claim supports federal pre-emption, 25 U.S.C. § 232, Compl. ¶ 38, but that statute explicitly empowers New York's police power, rather than restricting it.[27] 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"); see also U.S. v. Cook, 922 F.2d 1026, 1033 (2d Cir. 1991) ("The plain language of the statute leads us to conclude that section 232 extended concurrent jurisdiction to the State of New York."). To the extent that the Plaintiffs rely on 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., the language 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.").

[27] The Complaint also cites 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 Compl. ¶ 37 (citing U.S. Const. art. VI). But even if the Andros Order were a treaty, the Supremacy Clause would not apply to it, since 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."); see, e.g., Alliance to Save the Mattaponi v. Comm. Dep't of Env. Quality, 270 Va. 423, 452 (2005) ("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 States. Further, the United States Congress has not ratified the Treaty pursuant to its authority under Article I, Section 10 of the Constitution."); see also Golden Hill Paugussett Tribe of Indians v. Weicker, 839 F. Supp. 130, 136 (D. Conn. 1993) (tribal claim based on 1763 proclamation of King George III did not "aris[e] under the Constitution, laws, or treaties of the United States," as necessary for federal subject matter jurisdiction), remanded on other grounds pending agency determination, 39 F.3d 51 (2d Cir. 1994); 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). Thus, 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, not as a matter of *federal* pre-emption.

Moreover, the challenged laws at issue, restricting fishing of American eels under nine inches, [28] were 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.[29] See ASMFC, 609 F.3d at 528–29; 16 U.S.C. § 5104. Rather than federal law pre-empting New York's laws concerning American eel fishing, New York was *required by federal law* to adopt and implement the directives of the FMP and its addenda promulgated by the ASMFC. See 16 U.S.C. § 5104 ("Each State identified under subsection (a) with respect to a coastal fishery management plan shall implement and enforce the measures of such plan within the timeframe established in the plan."); Kerns Dec. ¶¶ 33-34, Ex. G at 10-11 (imposing a commercial and recreational minimum size limit of 9 inches).

The Plaintiffs have not identified any statute or legal authority that would even arguably show a Congressional intent to pre-empt New York's ability to regulate off-reservation fishing of American eel, let alone one strong enough to overcome the "heavy burden" of the presumption against displacing state law. Pet Welfare, 850 F.3d at 86. Accordingly, summary judgment should be granted against the Plaintiffs' pre-emption claim.

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

The Plaintiffs' Free Exercise claims, however construed, fail as a matter of law because they are either untimely or Plaintiffs lack standing to assert them, and, in any event, they are meritless because the challenged environmental laws are valid, neutral and generally applicable.

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[28] See NYCRR §§ 10.1 (a) and (b), 40.1(f) and (i).

[29] Moreover, federal law specifically incorporates and empowers state fish and wildlife laws such as New York's ban on taking eels under nine inches in length. The Lacey Act, 16 U.S.C. § 3372 *et seq.*, provides federal criminal liability for transporting fish taken in violation of state law, and "serves as a federal tool to aid states in enforcing their own fish and wildlife laws." McDougall, 25 F. Supp. 2d at 89-90 (finding transporting American eel to be a "predicate state offense" that supports a conviction under the Lacey Act; see also McDougall, 216 F.2d 1074 (affirming conviction for conspiracy to transport American eel taken in violation of DEC regulations).

A. Plaintiffs' Free Exercise Claim Is Non-Specific and Lacks Factual Support

As a threshold matter, there is a great deal of ambiguity as to what the Plaintiffs' Free Exercise Claim is actually about. 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" which has "special religious and cultural significance to the Unkechaug." Compl. at ¶¶ 46-53. Specifically, Plaintiffs claim that "[t]he state, through its Environmental Laws, has threatened the continuation of criminal prosecution of the fishing by the Unkechaug members and officials to obtain the shells necessary to create ceremonial wampum." Id. ¶ 51. However, the Plaintiffs do not identify any particular incidents, laws, or regulations that they argue burden their religious practice in this regard. See generally id. at ¶¶ 46-53.

The course of discovery has not shed any more light on the substance of this claim. Apparently, the sole basis for this claim is Plaintiff Wallace's allegation that "DEC filed a Complaint against the Nation in 1994 or '95, I believe, for saying that we were dumping illegally on our territory when we were putting shell into the water," and that the Unkechaug had received another citation as allegedly relating to disposal of shells from August 29, 2008 for violation of ECL § 25-0401. Wallace Tr. 30:12-15, 193:5-9, 194:1-9; Kreshik Decl. Ex. J. However, this citation from 2008 was not for placing shells in the water, but rather for placing large stones on the reservation's shoreline using a barge. Kreshik Dec. ¶ 27. Plaintiff Wallace further testified that he did not know what became of the 2008 violation, and that he could not "recall any – other threats that were made" by the DEC concerning the disposal of shells after that time. Wallace Tr. 195:22-25, 196:13-17. During his deposition as a 30(b)(6) witness on behalf of the Unkechaug, Wallace later contended that there was another citation concerning dumping from 2014 that 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. 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.

Simply put, the Plaintiffs have never adduced evidence "such that a reasonable jury could return a verdict" in their favor regarding the claim that DEC interfered with the creation and disposal of wampum. Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Plaintiffs have presented no admissible evidence sufficient to create a question of fact as to whether their religious beliefs concerning returning shells to the water have actually been burdened by any action of Defendants. They identified only three incidents in which they were purportedly cited for this practice in an approximately 25-year span, but have presented no evidence that any of these citations actually resulted in any penalty, let alone were actually for the practice of returning shells to the water, despite the fact that they claim to return shells to the water approximately every six months. Wallace Tr. 44:6-9. Moreover, the DEC does not even prohibit this practice, and has no record of issuing any citations to any Unkechaug member for the practice of returning shell to the water. Kreshik Dec. ¶¶28. Because the Plaintiffs have not carried their burden to "set forth specific facts showing that there is a genuine issue for trial," Weinstock, 224 F.3d at 41, summary judgment should be granted against their Free Exercise claim.

B. Plaintiffs' Free Exercise Claims Are Time-Barred

Even if the Plaintiffs had adduced evidence of any interference with their creation of wampum, summary judgment would nonetheless be warranted because the alleged incidents

occurred outside the three-year § 1983 limitations period. [30]

"The statute of limitations for civil rights actions brought pursuant to 42 U.S.C. § 1983 in federal courts in New York State is three years." Muhammadali v. City of N.Y., No. 18 Civ. 1521, 2018 WL 10808575, at *1 (E.D.N.Y. Apr. 5, 2018) (Kuntz, J.) (citing Patterson v. Cty. of Oneida, 375 F.3d 206, 224 (2d Cir. 2004)). However, the latest alleged (though unsubstantiated) violation of Plaintiffs' free-exercise rights relating to Wampum was in 2014, more than three years prior to when this action was commenced on February 21, 2018. Plaintiff Wallace's allusions to alleged incidents "in 1994 or '95, I believe," Wallace Tr. 30:12-13, or in 2008, see id. 194:4-5, are even further outside the limitations period, and similarly not actionable. "As Plaintiff[s'] claims accrued 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." Muhammadali, 2018 WL 10808575 at *1 (citing Milan v. Wertherimer, 808 F.3d 961, 963-64 (2d Cir. 2015)).

C. Plaintiffs Lack Standing to Seek Relief Based on Unsupported Speculation as to Possible Future Enforcement of the Challenged Environmental Laws

Just as the Plaintiffs have not adduced evidence of DEC enforcement against their creation of wampum in the past, they cannot show any likelihood of enforcement in the future, either, and accordingly lack standing to bring their Free Exercise claim. As the Supreme Court recently reiterated in California v. Texas, a plaintiff may not rely on the mere existence of a statute that allegedly "threatens" the plaintiff to establish standing, as "our 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

[30] Although Plaintiffs do not specify that they are bringing their Free Exercise claim pursuant to 42 U.S.C. § 1983, "Constitutional claims, such as Plaintiff's Free -Exercise Clause claim, must be brought under 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must allege both that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the right was violated by a person acting under the color of state law, or a 'state actor.'" Monroe v. Rockland Cty. Dist. Attorney's Off., 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)).

contemporary enforcement, we have said that a plaintiff claiming standing must show that the likelihood of future enforcement is 'substantial.'" 141 S. Ct. 2104, 2114 (2021) (citing Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) ("The party who invokes the power [of Article III courts] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement") and Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's *operation or enforcement*.") (emphasis in original)); see also Adam v. Barr, 792 F. App'x 20, 22 (2d Cir. 2019) (summary order) ("A credible threat is not established by imaginary or speculative fears of prosecution.").

Here, the Plaintiffs have vaguely speculated about the possibility of future enforcement, alleging that DEC "has threatened the continuation of criminal prosecution of the fishing by the Unkechaug members and officials to obtain the shells necessary to create ceremonial wampum" and prosecution "for returning the remaining shell fragments to shorelines as prescribed by [Unkechaug] religious and cultural environmental practices." Compl. ¶ 51-52. However, as stated above, Plaintiffs have not provided any evidence of such a "continuation of criminal prosecution" or any concrete or even theoretical plans on the part of State Defendants to interfere with their creation of wampum, and indeed, there are none. Kreshik Dec. ¶¶ 28-30. In fact, crucially, the DEC does not actually prohibit the Plaintiffs' practice of returning shell to the water, nor does the text of ECL § 25-0401.[31] Kreshik Dec. ¶¶ 29-30.

[31] 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."

Plaintiff Wallace acknowledged at his deposition that he had no knowledge of any intent on DEC's part to enforce dumping regulations against the Plaintiffs. See Wallace Tr. 196:1-17 ("Q: Do you have any personal knowledge of any intention on DEC's part to enforce any dumping regulations against you or the tribe? A: Dumping regulations, is that what you're saying? Q: Yeah. A: I don't know. Q: So sitting here today, you're not aware of anything; is that correct? A: Sitting here today, I – I can't recall any – any other threats that were made about that other than – so I don't know."). Wallace later tried to shift the burden, stating that the State Defendants "haven't given me any indication that they're not going to issue any violations, so it's either way. It's a – there's no indication either way that . . . they have or they have not." Id. 197:2-6.

This falls far below the showing required to establish standing for a constitutional tort, which requires that a Plaintiff "must demonstrate that enforcement . . . is certainly impending, or at least a substantial risk." Jones v. Schneiderman, 101 F. Supp. 3d 283, 293-94 (S.D.N.Y. 2015) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) and Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 414 n.5. (2013)). The Plaintiffs have supplied no evidence, beyond their own unsupported speculation, that there is any threat of future enforcement, let alone a "substantial" threat, that would inhibit their ability to produce wampum. Accordingly, they lack standing to assert these claims.

D. The Plaintiffs' Scattershot Assertions During Discovery That State Eel Fishing Limitations Also Potentially Burden Their Free Exercise Rights Are Unpled and Should Be Disregarded.

As stated above, the Plaintiffs' Complaint predicates their Free Exercise claims solely on the alleged burden on their ability to collect and dispose of shells to create wampum (see Section IV(A), *supra*)—an activity completely unrelated to fishing for eels. However, at various times during discovery, Plaintiffs also claimed, albeit only vaguely or indirectly, that their religious

practice is unconstitutionally burdened by the State's regulation of eel fishing off reservation lands. See, e.g., Plaintiffs' Interrogatory Responses, Thompson Dec. Ex. K at 9 ("Defendants interference with any and all fishing by the Plaintiffs have created and caused interference with their cultural and religious practices."). It is thus unclear whether Plaintiffs purport to assert a Free Exercise claim based on eel fishing, but to the extent that the Plaintiffs intend to, because they have never actually *pled* such a claim, it should be disregarded. It is well-established that the assertion of an unpled claim cannot defeat summary judgment. Southwick Clothing LLC v. GFT (USA) Corp., 2004 WL 2914093, at *9 (S.D.N.Y. Dec. 15, 2004) ("plaintiffs cannot rely on an unpled theory of recovery as a means of defeating summary judgment"); Sherald v. Embrace Techs., Inc., 2013 WL 126355, at *8 (S.D.N.Y. Jan. 10, 2013) (where a "claim is completely beyond the scope of the pleadings, the court will not adjudicate it on summary judgment."); 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").

E. The Plaintiffs' Free Exercise Claims Concerning Both Eel Fishing and Wampum Nevertheless Fail as a Matter of Law Because the Laws Are Valid, Neutral, and Generally Applicable

As set forth above, the Plaintiffs are not entitled to relief on their Free Exercise claims because they are factually deficient, time-barred, lacking standing, and/or unpled. But even if that were not the case, they would nonetheless fail as a matter of law. It is 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 Employment Division v. Smith, 494 U.S. 872, 879 (1990)). "'A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of

burdening a particular religious practice.'" Id. (quoting Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993)). These 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.

The right of free exercise does not relieve any individual or entity of the obligation to comply with a "valid and neutral law of general applicability." Smith, 494 U.S. at 879. As a result, where a limitation on the exercise of religion is not the object, "but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Id. at 878. Though the Plaintiffs do not cite to the specific laws they are challenging, 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,[32] and 6 NYCRR §§ 10.1 (a) and (b), 40.1(f) and (i), make it illegal to take or possess American eels less than nine inches in New York State. Id. There is nothing in the text of these laws, or in their application, that targets or singles out any religion. New York's ban on taking American eels under nine inches in length applies equally to anyone fishing in the State's waters, and the same is true of its prohibition on dumping in tidal wetland areas. Accordingly, these laws, which only incidentally impose a burden on the exercise of religion, need only be supported by a rational basis. See Fortress Bible Church v. Feiner, 694 F.3d 208, 220 (2d Cir. 2012); WTC Families for a Proper Burial, Inc. v. City of N.Y., 567 F.Supp.2d 529, 539-40 (S.D.N.Y. 2008).

[32] As stated above, contrary to Plaintiffs' unsubstantiated claims, ECL § 25-0401 does not actually prohibit Plaintiffs' practice of returning shell to the water, and the DEC does not consider the practice to violate any New York State law. Kreshik Dec. ¶¶ 29-30; see also ECL § 25-0401 permitting "depositing or removal of the natural products of the tidal wetlands by recreational or commercial fishing, shellfishing, aquaculture, hunting or trapping, . . . where otherwise legally permitted."

These laws easily satisfy a rational basis inquiry. "Under the rational basis test, a statute will be upheld 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" Roman Catholic Diocese of Rockville Ctr. v. Inc. Vill. of Old Westbury, 128 F. Supp. 3d 566, 581 (E.D.N.Y. 2015) (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)). ECL § 25-0401 was enacted to further "the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of this state." ECL § 25-0102. See also 6 N.Y.C.R.R. § 661.2 ("Tidal wetlands constitute one of the most vital and productive areas of the natural world and collectively have many values. These values include, but are not limited to, marine food production, wildlife habitat, flood and storm and hurricane control, recreation, cleansing ecosystems, sedimentation control, education and research, and open space and aesthetic appreciation, as set forth in the legislative findings contained in Section 1 of Chapter 790 of the Laws of 1973. Therefore, the protection and preservation of tidal wetlands are essential."). Likewise, New York's laws limiting fishing for glass eels were enacted pursuant to the ASMFC's FMP and its addenda as required by 16 U.S.C. § 5104. As discussed in section V(A), *infra,* the ban on taking eels under nine inches was adopted to conserve American eels in response to its peer-reviewed finding that "American eel population is *depleted* in U.S. waters. The stock is at or near historically low levels." (emphasis in original). Kerns Dec. Ex. F at 15. These laws unquestionably bear a rational relationship to New York's interest in protecting its natural resources, both wildlife and tidal wetlands. Accordingly, summary judgment should be granted to Defendants on Plaintiffs' Free Exercise claims.

V. EVEN IF THE ANDROS ORDER WERE A TREATY, PLAINTIFFS WOULD NOT BE EXEMPT FROM THE CHALLENGED ENVIRONMENTAL LAWS

Even if Plaintiffs' claims were not subject to dismissal for the reasons set forth above, and even if the Andros Order were a treaty – which it is not, see Point VII.A, *infra* – and even if its language could support the Plaintiffs' desired interpretation – which it does not, see Point VII.B, *infra* – the Andros Order still would not exempt the Plaintiffs from New York State conservation regulation for at least four separate reasons. Cf. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) ("Indian treaty-based usufructuary rights do not guarantee the Indians 'absolute freedom' from state regulation.").

A. Plaintiffs' Claims Would Be Barred By the Conservation Necessity Doctrine

The "'conservation necessity' [doctrine] permits states to directly regulate the exercise of tribal reserved rights if the resources at issue are in jeopardy and it is necessary in the interests of conservation for states to regulate tribal rights." O. Yale Lewis III, Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement As A Reserved Right, 30 ENVTL. L. 279, 341 (2000). Indeed, 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." Mille Lacs, 526 U.S. at 205; accord Herrera v. Wyoming, 139 S.Ct. 1686, 1695 (2019) ("States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation."). Accordingly, any fishing right the Plaintiffs claim "is not an exclusive one. Rather, the exercise of that right [is] subject to reasonable regulation by the State pursuant to its power to conserve an important natural resource." Pullyallup Tribe, Inc. v. Dep't of Game of State of Wash., 433 U.S. 165, 175 (1977) (quotation omitted).

The applicable Supreme Court cases repeatedly refer to two necessary elements to invoke the conservation necessity doctrine: (1) the State regulation must be "reasonable and necessary," and (2) it must be "nondiscriminatory" towards Native Americans. Mille Lacs, 526 U.S. at 205; accord Herrera, 139 S.Ct. at 1695 ("States can impose reasonable and nondiscriminatory regulations . . ."); Antoine v. Washington, 420 U.S. 194, 207 (1975) (State must show that "the regulation meets appropriate standards and does not discriminate against the Indians," including that that "its regulation is a reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation.") (quotation and internal citation omitted). New York's prohibition on taking eels under nine inches in length comfortably passes both tests.

The American Eel needs protection. It is listed by the International Union for the Conservation of Nature as endangered, and the ASMFC's most recent stock assessments, conducted in 2012 and 2017, concluded that the stock of American eel was at or near historically low levels and in such poor health that removals of American eel are too high to maintain their population. Kerns Dec. ¶¶ 26-31, 36, Exs. F and I**;** see also Jacoby, D., Casselman, J., DeLucia, M. & Gollock, M. (2017). *Anguilla Rostrata* (amended version of 2014 assessment). The IUCN Red List of Threatened Species 2017: e.T191108A121739077.[33] Its equivalent species in Europe, the European Eel (*anguilla anguilla*), which like the American eel is supported by a single spawning population in the Sargasso Sea, is critically endangered in part due to overfishing. Kerns Dec. ¶ 16, Ex. H at 2-3. In order to save the American Eel from suffering the same fate, the fifteen East Coast states, through the federally-established ASMFC, have conducted stock assessments of the American eel, based on available harvest data, fishery-

[33] Available at: https://www.iucnredlist.org/species/191108/121739077.

independent surveys, and life history information, to estimate the health of the species and determine the best practices to preserve it. Id. ¶¶ 26-331, 36, Exs. F and I. Based on this information, the ASMFC has found that fishing is a major source of mortality for American Eels, particularly fishing for glass eels (given its lucrative nature and the relative ease of taking eels in large numbers at that life stage), and that a comprehensive ban on glass eel fishing was necessary to protect the species. Id. ¶¶ 33-35. The ASMFC also found that lesser measures than New York's ban on taking eels under nine inches were insufficient; although New York and other states had previously limited the ban to eels under six inches, the Commission found that the measure had not arrested the American Eel's decline and mandated the nine-inch limit that is the law today. Id. ¶¶ 33-35, Ex. G. Without the rules promulgated by the ASMFC in the FMP and its addenda, including prohibiting fishing for eels under nine inches, the American eel population would likely collapse. See Kerns Dec. ¶ 38.

Nor is there any good-faith argument to be made that New York's comprehensive ban on taking eels under nine inches in length is somehow "discriminatory." DEC's regulations are manifestly neutral, and apply equally to all New Yorkers, Native and non-Native alike. See 6 NYCRR §§ 10.1 (a) and (b), 40.1(f) and (i). The case law applying the conservation necessity doctrine establishes that discrimination exists only where a proposed hunting or fishing restriction treats Natives and non-Natives differently. See U.S. v. State of 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"). The binding precedent on point is Dep't of Game of Wash. v. Pullyallup Tribe, 414 U.S. 44 (1973), in which the Supreme Court found that a Washington State regulation that banned Indian net fishing in the Pulyallup River, but permitted the hook-and-line fishing conducted by (non-

Native) sport fishermen, was discriminatory. See id. at 48 ("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, it is not discriminatory. See Anderson v. Evans, 371 F.3d 475, 498 (9th Cir. 2004) (statute "cannot be said to discriminate . . . because members of the Tribe are not being singled out").

New York's eel fishing ban applies equally to everyone: no one is permitted to take an American eel under nine inches, for any purpose, by any method. See 6 NYCRR §§ 10.1 (a) and (b), 40.1(f) and (i). Accordingly, summary judgment should be granted in favor of the State Defendants.

B. The Sherrill Doctrine Bars The Plaintiffs' Disruptive And Long-Unasserted Claims Of Sovereignty

The Plaintiffs' reliance on the Andros Order is belied by the fact that they are only now asserting it after 342 years, and after having acknowledged for generations that New York law applies to their off-reservation fishing. This delay of centuries, along with the massive disruption that would be caused were they to succeed in obtaining sovereignty over New York's waters, would nevertheless bar their claim under the Supreme Court's holding in City of Sherrill v. Oneida Indian Nation of N.Y., 544 US. 197 (2005), and its progeny.

In Sherrill, the Oneida Tribe, which had repurchased land that was formerly part of its reservation, contended that it had sovereign immunity from taxation on businesses operating on the land in question, including based on a claim that its sovereignty had never been alienated. The late Justice Ginsburg, writing for an 8-1 majority, held that law and equity "preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold." Id. at 214. The Court found that the long passage of time between the Oneidas' exercise of sovereignty over the land

and their lawsuit, combined with the settled expectations of other parties built up over the centuries, including expectations "grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested," rendered the plaintiffs' relief too disruptive to be granted. Id. at 215-17. Accordingly, "the doctrines of laches, acquiescence, and impossibility" applied to bar the injunctive aspects of the Oneidas' suit. Id. at 221.

The Second Circuit's subsequent case law has further defined the manner in which Sherrill applies to bar claims based on long-neglected assertions of alleged ancient sovereignty. In Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 275 (2d Cir. 2005), the Circuit explained that the holding of Sherrill did not depend on the nature of the relief sought, reversing a $248 million judgment because "disruptiveness is inherent in the claim itself—which asks this Court to overturn years of settled land ownership—rather than an element of any particular remedy which would flow from the possessory land claim." Id. at 275. In Oneida Indian Nation of N.Y. v. County of Oneida, 617 F.3d 114 (2d Cir. 2010), the Circuit explained that the equitable defense recognized by Sherrill is not limited to situations where the traditional elements of laches apply, but rather focuses "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." And in Onondaga Nation v. New York, 500 F. App'x 87 (2d Cir. 2012) (summary order), the Circuit explained that Sherrill will bar a disruptive claim of ancient property rights even if the plaintiff tribe could show that it has "strongly and persistently protested" the encroachment on their rights by other parties. Id. at 90. In the wake of these precedents, "it is now well-established that Indian land [and water] claims asserted generations after an alleged dispossession are inherently disruptive of state and local

governance . . . and are subject to dismissal on the basis of laches, acquiescence, and impossibility." Stockbridge-Munsee Cmty. v. New York, 756 F.3d 163, 165 (2d Cir. 2014).

The same outcome is warranted here. There is nothing particularly "traditional" about the waters that the Plaintiffs are claiming sovereignty over – Plaintiff Wallace admitted at his deposition that the Unkechaug were claiming *all* the navigable waters of New York State, and indeed beyond. See Wallace Tr. 129:13-21; see also id. at 137:18-138:10 (explaining that the claimed waters include "the whole shore of Long Island," the "Hudson River," the "Atlantic Ocean," and even "Lake Ontario"). Further, Plaintiffs seek not only to be free of any State fishing regulation in all New York waters, but to also have the power to grant licenses to other non-members of the Tribe to fish off-reservation, subject only to their own regulatory authority, which they have already done. Wallace 30(b)(6) Tr. at 72:6-73:22; Signed Unkechaug Glass Eel Fishing Permits, Thompson Dec. Exs. H & I; see also Wallace Tr. 136:20-137:14 (claiming the authority to fish the species to extinction, but saying "I would not do it, so that's the best answer I can give you.").

New York State has consistently exercised regulatory oversight over its waters for centuries. See People ex rel. Kennedy v. Becker, 215 N.Y. 42, 42 (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"); see, e.g., 1911 N.Y. Laws 647 (creating a Conservation Department and charging it with making "a comprehensive system for the entire state, for the conservation, development, regulation[,] and use of the waters in each of the principal watersheds of the state"); 1938 N.Y. Laws 481 *et seq.* (requiring that "[n]o person shall . . . engage in hunting, trapping or taking fish . . . without first having procured a license"

and laying out specific procedures for Native Americans to obtain such licenses.).[34] And the Plaintiffs have not sought to challenge New York State's jurisdiction over their off-reservation fishing; in fact, Plaintiff Wallace admitted at his deposition that the Unkechaug Tribal Council worked with DEC to help tribe members obtain New York State fishing licenses, Wallace Tr. 117:15-118:3, and that he himself obtained such licenses for off-reservation fishing every year for over a decade.[35] Id. 116:8-117:4; see id. at 117:16-17 (stating that such licenses "were issued routinely"); see also Kreshik Dec. Ex. A (listing the dozens of hunting and fishing permits Plaintiff Wallace has applied for and received from DEC).

With Plaintiffs claiming a new, perpetual, and unlimited right to fish in all of New York State's navigable waters, free from any conservation regulation, and the right to grant non-members of the Unkechaug Tribe license to do so as well, "[t]he disruptive nature of the claims is indisputable as a matter of law." Onondaga, 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 property rights over New York's waters. Sherrill, 544 U.S. at 215-16.

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[34] "The enrolled members of an Indian tribe having a reservation located wholly or partly within the state and such other Indians as are permitted by the tribal government having jurisdiction over such reservation may hunt, fish, trap upon such reservation subject only to rules, regulations and fish and wildlife laws established by the governing body of such reservation." ECL § 11-0707. While a license is required for off-reservation fishing, and a "member of the Shinnecock tribe or the Poospatuck tribe or a member of the six nations, residing on any reservation wholly or partly within the state, is entitled to receive free of charge a fishing license, a hunting license, a muzzle-loading privilege, a trapping license, and a bowhunting privilege. . ." Id. § 11-0715. Further, in practice, the DEC has employed enforcement discretion to allow use of Nation Enrollment from cards New York recognized Native American Nations in lieu of a fishing license, subject to the same requirements as a license. Kreshik Dec. ¶ 10, fn. 1.

[35] In fact, in a 2006 lawsuit in which the Plaintiffs sought to establish their tribal status under federal common law, they made no mention of any sweeping aboriginal fishing rights and immunity from State regulation, instead asserting simply that "[t]he Unkechauge Indian Tribal members are exempt from having to *purchase* a New York State license to hunt or fish off their reservation and require no license to hunt and fish on their own territory." Unkechauge [sic] Pre-Trial Memorandum of Law, Gristede's Foods, Inc. v. Poospatuck (Unkechaug) Nation, No. 06 Civ. 1260, Dkt. No. 148 at 3-4 (emphasis added). The Tribe's statement of the law was correct: within their reservation tribal members can hunt or fish subject to regulation only by the Tribe, but outside the reservation's boundaries they are subject to the same laws and licensing requirements as any other New Yorker.

C. The Supreme Court Has Already Rejected The Plaintiffs' Legal Theory

The Plaintiffs in this case contend that they have "ancient rights to fish uninhibited by any interference from any government," Wallace Tr. 100:1-2, in particular based on the 1676 Andros Order. But the Supreme Court has already considered this issue and ruled that New York's conservation laws apply to off-reservation fishing by Native Americans, even where aboriginal or treaty-based fishing rights are uncontested.

In People of the State of New York ex rel. Kennedy v. Becker, the New York Court of Appeals considered a challenge brought by members of the Seneca Nation who had been charged with spearing fish on a tract of non-reservation land near Buffalo, in violation of the New York Conservation Law. Although the defendants pointed out that the Treaty of Big Tree established that members of the nation would have "the privilege of fishing and hunting on the said tract of land," the New York Court of Appeals had held that this right to fish was still subject to the Conservation Law, declaring that the treaty right did not "relieve[] the Indians from all of these regulations which are applicable to [] other members of the community," but rather "gives them a right or easement . . . . subject[] to such regulation as the state deems to be necessary for the advantage of all of its inhabitants in preserving game and fish." People ex. rel. Kennedy v. Becker, 215 N.Y. 42, 44, 45 (1915).

The Senecas appealed to the Supreme Court of the United States, which affirmed the Court of Appeals. See 241 U.S. 556 (1916). Writing for a unanimous Court, Justice Charles Evans Hughes opined that the Senecas' argument that New York could not regulate their off-reservation fishing amounted to "the denial with respect to these Indians . . . of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the State." Id. at 562. The Plaintiffs have taken precisely that position in this action: in the words of Plaintiff Wallace, "[t]here'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." Wallace Tr. 129:13-16.

The Supreme Court rejected that argument in Kennedy, holding that a treaty-based fishing right amounted to "a reservation of a privilege of fishing and hunting in common with . . . others to whom the privilege might be extended, but subject, nevertheless, 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." Kennedy, 241 U.S. at 563-64.[36] The Court noted that the plaintiffs' proposed formulation, where the land was "subject to a joint property ownership and the dual sovereignty of the two peoples" would make conservation impossible, since New York could not prevent the Senecas from damaging protected species (or vice versa): "[s]uch a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both." Id. at 563; see also id. (rejecting any interpretation that would "divide the inherent power of preservation as to make its competent exercise impossible."). Kennedy is still cited by federal courts considering challenges to government regulation of off-reservation hunting or fishing. See Anderson v. Evans, 371 F.3d 475, 497 n.22 (9th Cir. 2004) (citing Kennedy and its progeny and noting that "[t]he Supreme Court authority . . . remains good law."); see, e.g., Confed. Tribes of Colville Reserv. v.

[36] The Kennedy Court noted that "treaties with the Indians should be construed in the sense in which the Indians understood them," and that it was clear that no one at the time of the treaty had considered a potential need for conservation two centuries later. 241 U.S. at 563 ("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."). However, Justice Hughes wrote that "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. The Andros Order similarly indicates that the Unkechaug understood the concept of state sovereignty in 1676, noting that the fishing rights request was "that they may have leave to have a whale boate with all other materiells 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. The Governor then considered the request and ruled that "[w]hat they desire is granted them as to their free liberty of fishing." Id.

Anderson, 903 F. Supp. 2d 1187, 1197 (E.D. Wash. 2011) (citing Kennedy and other Supreme Court precedent in holding that "a state has the authority to regulate 'in common' hunting rights").

D. Any Unkechaug Sovereignty Over State Waters Derived From the Andros Order Has Been Abrogated

Even if the Andros Order were considered a treaty that conferred to the Unkechaug sovereignty over New York waters, it has long since been abrogated. New York State, through its laws and its actions, has made clear its intent not to be bound by this centuries-old act of the nation of England.

"[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). Here, even if the Andros Order were to be viewed as a treaty providing an unlimited right to fishing free of all State conservation regulation, it would have no force in 2021.

First, New York has enacted 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. Id.; see also N.Y. Gen. Constr. Law § 72 (McKinney) ("The resolutions of the congress of the colony of New York and of the convention of the state of New York, shall not be deemed to be the laws of this state hereafter."). Second, pursuant to the New York State Navigation Law, the State has asserted "jurisdiction over navigation on the navigable waters of the state" and declared that nothing

authorized by that law "shall be construed to convey any property rights, either in real estate or material, or any exclusive privilege; nor authorize any injury to private property or invasion of private rights or any infringement of federal, state or local laws or regulations. . ." N.Y. Navigation Law § 30. Third, New York State has declared that it "owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. 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." ECL § 11-0105. And fourth, New York has declared that no one may fish in its waters absent a license issued by DEC.[37] See ECL §§ 11-0701(4); 13-0355(1); see also Kreshik Dec. ¶¶ 7-10. Even if the Andros Order had the meaning the Plaintiffs ascribe to it in 1676, these laws provide "a clear expression" of a subsequent intent on the part of New York State "of a purpose to override" any such protection. Havana Club, 203 F.3d at 124.

The result is the same even if the Court were to apply U.S. v. Dion, 476 U.S. 734 (1986), which governs abrogation of treaties with Native Americans entered into by the United States. In Dion, the Supreme Court held that the Bald Eagle Protection Act (the "Act") abrogated a 1858 treaty with the Yankton Sioux Tribe insofar as it made it illegal to hunt Bald Eagles. 476 U.S. 734 (1986). When the Act was passed in 1940, it did not contain any explicit reference to Native Americans. Id. at 740-41. In 1962 Congress amended the Act to extend its ban to Golden Eagle as well as to provide a mechanism through which Native American tribes could hunt and possess protected eagles for religious purposes upon permit by the Secretary of the Interior. Id. In

[37] In practice, the DEC has employed enforcement discretion to allow use of Nation Enrollment cards from New York recognized Native American Nations in lieu of a fishing license when all other regulatory requirements concerning hunting and fishing are complied with, including seasons, bag limits and size limits. The free license does not include commercial permits. Kreshik Dec. ¶ 10, fn.1.

finding abrogation, the Court held that the 1962 Amendment to the Act "reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to permit, is inconsistent with the need to preserve those species. We therefore read the statute as having abrogated that treaty right." Id. at 745.

The rule of Dion is that abrogation requires "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." Id. at 739-40. The act of the Legislature need not directly reference a treaty or express an intent to abrogate – in Dion it was enough that "Congress expressly chose to set in place a regime in which the [United States] had control over Indian hunting, rather than one in which Indian [] hunting was unrestricted." Here, the New York Legislature, as did the U.S. Congress in Dion, expressly considered the hunting and fishing rights of Native Americans when passing the New York Environmental Conservation Law.

In 1938, the ECL was amended, and the legislature specifically considered Native American fishing and hunting rights. The law provided that "[n]o person shall . . . tak[]e fish by angling, spearing, hooking, or tip-ups, except as herein provided, without first having procured a license and then only during the times and period when it shall be lawful," and that Native American "residents of the state or members of the six nations residing on any reservation wholly or partly within the state" require such a license. 1938 N.Y. Laws 468, Chapter 40, § 180. Further, the law was later amended to explicitly provide that Native Americans have sole jurisdiction over fishing on their reservations. ECL § 11-0707 ("The enrolled members of an Indian tribe having a reservation located wholly or partly within the state and such other Indians as are permitted by the tribal government having jurisdiction over such reservation

may hunt, fish, trap upon such reservation subject only to rules, regulations and fish and wildlife laws established by the governing body of such reservation."). The intent of the New York State legislature to regulate fishing by Native Americans *off* of reservations lands is unmistakable. Accordingly, even if the Andros Order were to operate as a treaty, and even if the Dion standard were to apply, it has long since been abrogated by the New York Legislature.

VI. PLAINTIFFS' SOVEREIGNTY CLAIMS, SEPARATE FROM THE ANDROS ORDER, ALSO FAIL

In a separate cause of action, see Compl. ¶¶ 40-45, the Plaintiffs claim that regardless of the Andros Order, regulation of "fishing on reservation waters and customary Unkechaug fishing waters violates the Unkechaug inherit [sic] right of self-governing." Id. at ¶45. As set forth above, New York State recognizes the right of the Unkechaug to hunt and fish on their own reservation land subject only to their own regulation. See ECL § 11-0707(8). However, the claimed "customary Unkechaug fishing waters" reach far beyond their reservation, and encompass all waters in New York State. For any waters located off of the Unkechaug reservation, the Plaintiffs' "off-reservation activities . . . are generally subject to the prescriptions of . . .'nondiscriminatory state law' in the absence of 'express federal law to the contrary.'" New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). As discussed at length in sections III and V.A, *supra*, New York's laws regulating fishing for American eel are non-discriminatory and not preempted by any federal law.

VII. IN ANY EVENT, THE ANDROS ORDER IS NOT A "TREATY," AND DOES NOT PRECLUDE STATE REGULATION

Even if the Court were to reach the issue of the Andros Order's meaning, the document's text cannot support the Plaintiffs' position. "[T]he Supreme Court has cautioned that 'even though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain

language [in the treaty] that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims.'" Seneca Nation of Indians v. N.Y., 206 F. Supp. 2d 448, 507 (W.D.N.Y. 2002) (brackets in original) (quoting Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985)). Accordingly, "'treaties [with Native Americans] cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.'" Perkins v. Commissioner of Internal Revenue, 970 F.3d 148, 155 (2d Cir. 2020) (quoting Choctaw Nation of Indians v. U.S., 318 U.S. 423, 432 (1943)). The plain text of the Andros Order therefore determines its legal meaning, and forestalls the Plaintiffs' position: the Order does not purport to be a treaty, and even if it did, its text does not support the Plaintiffs' claim of a perpetual right to unlimited off-reservation fishing free from all state regulation.

A. The Andros Order Is Not A Treaty

As a threshold matter, both the minutes of the meeting with the Unkechaug and the text of the Andros Order itself demonstrate that it is not a treaty, but rather an executive order of New York's English Governor and his council. According to the minutes for May 23, 1676, the Unkechaug delegation informed the Governor that "[t]hey desire they being free borne on [Long] Island, that they may have leave to have a whale boate with all other materials to fish and dispose of what they shall take, as and to whom they like best." Andros Order, Thompson Dec. Ex. J. The minutes for the following day state that the Unkechaug met again with the Governor, this time "in presence of The Councell," and that the colonial government determined that "[w]hat they desire is granted them as to their free liberty of fishing." Id. at 1. The minutes then say that "[t]hey are to have an Order to shew for their priviledge." Id.

The next section, referred to as an "Order Granting The Above Fishing Rights," states that "[u]pon the request of the Ind[ian]s of Unchechauge upon Long Island," it is "[r]esolved and

ordered that they are at liberty and may freely whale or fish" according to the terms specified. Id. The document concludes "By Order of the Go: in Councell," and notes that it is endorsed with an "Order of Councell may 24, 1676." In total, the word "order" appears five times in the document, the word "liberty" twice, and "leave" and "privilege" once each. The word "treaty" appears nowhere in the document; nor does any other language indicating that either party viewed the Andros Order as such.

This lack of necessary treaty language stands in stark contrast to actual contemporary treaties between English colonies and Native American tribes, which expressly delineate themselves as such and include clear consideration from all parties. For instance, the 1646 treaty between Virginia and the Powhatan Indians refers to itself as "articles of peace." Thompson Dec. Ex. L ("articles of peace" delineating, *inter alia*, land and territory rights between the parties). The 1664 Fort Albany Treaty with the "New York Indians" similarly refers to itself as "Articles made and agreed to." Thompson Dec. Ex. M at 2-3. (Native American parties would have "all such wares and commodities from the English" that they previously had from the Dutch, and were "under the protection of the English," but would also be subject to English law for any "wrong injury or damage to the English, Dutch, or Indians under protection of the English."). Other Anglo-Native American treaties from the same period similarly refer to themselves as treaties or articles of peace.[38]

[38] Further examples include: the 1666 agreement between Maryland and eleven Native American tribes was similarly referred to as "Articles of peace & amity." Thompson Dec. Ex. N (Providing *inter alia* that "the priviledge of hunting Crabbing fishing & fowleing shall be preserved to the Indian inviobly" and that "all the Indians shall be bound to call a lowed before they come within three hundred pacies of any English mans cleare ground & lay downe their armes. . ."). The 1677 Treaty of Middle Plantation, entered into one year after the Andros Order, describes itself as "Articles of Peace between the most Mighty Prince, and our Dread Sovereign Lord CHARLES the Second . . . And the several Indian Kings and Queens." Thompson Dec. Ex. O at 3; see also id. at 4 (referring to the treaty as "Articles and Overtures, for the firm Grounding, and sure Establishment of a good and just Peace with the said Indians," and further providing *inter alia* land rights to the Native American parties to the treaty in exchange for *inter alia* "subjection to the Great King of England"). The 1638 Treaty of Hartford between the "English in

None of these documents refers to itself as an Order, and each of these agreements contains consideration from all parties, not a unilateral grant in response to a straightforward request. "'As a general matter, a treaty is a contract . . . between nations,'" and "is 'to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals.'" Georges v. United Nations, 834 F.3d 88, 92-93 (2d Cir. 2016) (quoting BG Grp., PLC v. Republic of Argentina, 572 U.S. 25, 37 (2014) (brackets and internal quotation marks omitted)); see also Lozano v. Montoya Alvarez, 572 U.S. 1, 12 (2014) ("A treaty is in its nature a contract between ... nations, not a legislative act.") (citing 2 Debates on the Federal Constitution 506 (J. Elliot 2d ed. 1863) (James Wilson) ("[I]n their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make ...")). As is apparent from the minutes and the Andros Order itself, the Unkechaug unilaterally came to the Governor with their complaints and requests, so that he could address them. Thompson Dec. Ex. J. There is no indication that the English obtained any benefit from the Andros Order, that its specific terms were the subject of any negotiation between the parties, or that the parties themselves considered the Andros Order a "treaty."

B. The Andros Order Provides for Government Regulation of Fishing

Even if the Andros Order were considered a treaty binding on New York State, it does not actually prohibit State regulation of fishing by the Unkechaug. The Andros Order explicitly limited the Unkechaug's ability to fish and dispose of their effects "according to law and custome of the Government," so long as the Unkechaug were "comporting themselves civilly and as they ought." It specifically did not guarantee the Unkechaug an unbridled right to commercially fish for profit or forswear any government regulation of their activities.

Connecticut" and several Native American tribes is referred to as "Articles of Agreement" and "A Covenant and Agreement." See Thompson Dec. Ex. P.

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), the Plaintiffs' own expert, Dr. Strong, testified that the Unkechaug would have understood the Andros Order to subject their right to fish to the same laws that bound others. Strong Tr. Day 2 104:5-105:22 (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 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). [39] Further, concerning the second limitation on fishing rights contained in the Andros Order, that it remained effective so long as the Unkechaug were "comporting themselves civilly and as they ought[,]" Dr. Strong testified that he was "certain" 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.

While courts are bound to construe treaties liberally, in favor of Native Americans, "even Indian treaties cannot be re-written or expanded beyond their clear terms." Choctaw Nation of Indians, 318 U.S. at 432. The Andros Order is unambiguous. The grant of fishing rights it affords the Unkechaug is expressly limited "according to law and Custome of the Government." The plain meaning of that phrase is unmistakable, and as Dr. Strong testified, the Unkechaug understood that it subjected the Unkechaug to the same laws applicable to everyone else. See Strong Tr. Day 2 at 104:5-105:22. While the New York State ECL was not enacted at the time the Andros Order was signed – indeed the United States itself did not exist – it falls plainly

[39] State Defendants have moved to partly preclude the expert testimony of John Strong, Ph.D. (ECF Nos. 85-87, 92), and do not concede to its admissibility in full as expert testimony.

within the scope of a "law and Custome of the Government" and applies to all people fishing in New York waters, be they Unkechaug, English, Dutch, or citizens of any nation.

In People of State of New York ex rel. Kennedy v. Becker, as discussed in Point V.C above, the Supreme Court was confronted with a practically identical issue of interpretation. The Kennedy 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. Justice Hughes continued:

> We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, 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 241 U.S. 563–64. The Andros Order similarly indicates that the Unkechaug understood the concept of state sovereignty in 1676, noting that the fishing rights 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. The Governor then considered the request and ruled that "[w]hat they desire is granted them as to their free liberty of fishing." Id. at 2.

Moreover, the "law and Custome of the Government" at the time explicitly contemplated that the State had the authority to limit the species a fisherman could take, or to forbid the taking

of a certain species entirely. During the reign of Edward II in the early part of the 14th Century, Parliament passed a law declaring "whales and great sturgeons taken in the Sea or elsewhere within the Realm" to be the exclusive property of the King. See Statute Prerogativa Regis, 17 Edward II cap. 1 (1322).[40] This law, which recognized what came to be known as "royal fish," became a fundamental part of the British common law, and is referenced several times in Blackstone's Commentaries. See, e.g., 2 William Blackstone, Commentaries on the Laws of England ch. 27 p. 409 (12th ed. 1794), *available at* https://bit.ly/3AMic5Z (noting that certain chattels "are originally and solely vested in the crown," such as "royal fish," and that this property right is "not *transferred* to the sovereign from any former owner, but [is] originally *inherent* in him by the rules of law" (emphasis in the original)).[41] Accordingly, whales and other royal fish could only be taken by "such of his subjects to whom he has granted the same royal privilege." Id.; 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.").

Although the doctrine of the "royal fish" did not restrict the taking of the species for conservation purposes, but rather "on account of their superior excellence," 1 William Blackstone, Commentaries on the Laws of England ch. 8 p. 289 (12th ed. 1794), it establishes that the government had the authority even in the 17th Century to restrict the taking of certain species, or allow it only on appropriate terms.[42] It is undisputed that this law applied at the time

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[40] *Available at:* https://www.legislation.gov.uk/aep/Edw2cc1317/15/13/section/xiij#commentary-c918984.

[41] Blackstone wrote that the Crown's ownership of royal fish actually extended even further back than King Edward, noting that it had been "the prerogative of the kings of Denmark and the dukes of Normandy." 1 William Blackstone, Commentaries on the Laws of England ch. 8 p. 289 (12th ed. 1794), available at https://bit.ly/3mao0C7.

[42] The doctrine of the "royal fish" has remained the law of Great Britain into the Twenty-first Century. For instance, in the Spring of 2004 a fisherman off the coast of Wales netted a 10-foot sturgeon and promptly contacted Queen Elizabeth to ask permission to keep the catch. See BBC News, Police Inquiry Over Sturgeon Sale, 3 June 2004, available at http://news.bbc.co.uk/2/hi/uk_news/wales/3773171.stm. The fisherman received a fax back from Buckingham Palace informing him that he was "free to dispose of it as he wished," mirroring the Andros Order's

of the Andros Order; during his deposition, Professor Strong testified that the laws relating to the King's ownership of royal fish would be part of the meaning of the term "law and Custome of the government" in that document. 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.").

Finally, to read the Andros Order as providing an unlimited grant to fish in all of New York's waters without limitation, subject only to 17th century English colonial laws, concerning, for example, rendering whale oil, which have long been abrogated and replaced by New York State and the United States, would yield an absurd result: effectively stripping New York State of its sovereignty in its waters by virtue of the acts of the English colonial government. Such a result would be contrary both to the plain meaning of the Andros Order and the stated understanding of the Unkechaug at the time the Andros Order was issued.

CONCLUSION

For the reasons set forth above, Defendants Basil Seggos and the New York State Department of Environmental Conservation respectfully request that the Court grant summary judgment in their favor, dismiss the Complaint with prejudice, and grant such other and further relief as the Court deems just and proper.

language three centuries earlier stating that the Unkechaug could "dispose of their [catch] as they thinke good." Id.; Compare Andros Order, Thompson Dec. Ex. J at 2.

Dated: New York, New York
August 20, 2021

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