21-616

United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR STATE DEFENDANTS

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PRELIMINARY STATEMENT

Plaintiffs Gerrod Smith, Jonathan Smith, and David Silva, members of the Shinnecock Indian Nation, claim an unlimited entitlement to harvest fish and shellfish from state waters, even when such takings violate state environmental laws designed to protect New York's fisheries for the benefit of all people in the State. Plaintiffs claim that state officials violated their purported fishing rights by issuing them citations after they harvested undersized, out-of-season, and/or restricted fish and shellfish from state waters without proper permits. Plaintiffs also assert that the state defendants' enforcement of state fishing regulations amounted to intentional racial discrimination.

The United States District Court for the Eastern District of New York (Feuerstein, J.) granted summary judgment to all defendants, including state defendants the New York State Department of Environmental Conservation (DEC), DEC's Commissioner, and two DEC conservation officers, based on Eleventh Amendment immunity and abstention under *Younger v. Harris*, 401 U.S. 37 (1971).[1] This Court should affirm.

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[1] This brief is filed on behalf of all of the state defendants. Defen-

(*continued on the next page*)

As the district court correctly held, the state defendants are immune from suit in their official capacities under the Eleventh Amendment. Plaintiffs do not dispute that DEC is an arm of the State or that DEC's commissioner and officers are state agents. And the district court correctly rejected plaintiffs' attempt to apply the narrow exception to Eleventh Amendment immunity under *Ex parte Young*, 209 U.S. 123 (1908). As the Supreme Court held in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), and this Court held in *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004), that exception does not apply when, as here, plaintiffs seek to divest the state of regulatory jurisdiction over public land and navigable waters, and effectively to impinge on the State's sovereign exercise of fee title in such land and waters.

The district court also correctly held that the claims of one plaintiff, Silva, are barred by *Younger* abstention due to the pendency of state-court litigation regarding Silva's unlawful fishing. Meanwhile, the court properly dismissed Gerrod Smith's and Jonathan Smith's claims for injunctive relief for lack of standing because they were last cited by DEC

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dants the Suffolk County District Attorney's Office and Assistant District Attorney Jaime Greenwood are separately represented.

over a decade ago and can point to no evidence suggesting any concrete plan to violate DEC regulations again in the future.

These threshold defects are enough on their own to affirm the district court's grant of summary judgment. But even putting aside these defects, plaintiffs' claims would fail on the merits. Plaintiffs' assertion of an unrestricted right to fish in state waters finds no support in the historical record, which shows that the Shinnecock Tribe's 1640 deed of sale to the founders of the Town of Southampton conveyed all fishing rights to the town. Plaintiffs' asserted right also conflicts with the conservation necessity doctrine, which would independently empower the State to enforce state environmental laws. And plaintiffs' intentional discrimination claim against the state defendants in their personal capacities fails as well, since plaintiffs failed to establish even a prima facie case of intentional discrimination. If anything, the handful of internal emails that they point to only confirms DEC's commitment to diligently and evenhandedly enforcing the State's environmental laws regardless of race or creed.

ISSUES PRESENTED

1. Are plaintiffs' claims against the state defendants in their official capacities barred by Eleventh Amendment immunity, *Younger* abstention, and lack of standing?

2. Did plaintiffs' fail to state a claim to an unrestricted right to harvest fish and shellfish from state waters, free of any regulation by the State?

3. Did plaintiffs fail to state intentional discrimination claims against the state defendants in their personal capacities because plaintiffs did not put forward sufficient evidence of animus or discriminatory intent to create a triable issue for a jury?

STATEMENT OF THE CASE

The following facts are drawn from the evidence in the record and are undisputed unless otherwise noted.

A. The New York State Department of Environmental Conservation (DEC) Regulates Fisheries in State Waters, Including the Shinnecock Bay

1. DEC's regulation of state fisheries

New York law provides that the State "owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership." N.Y. Environmental Conservation Law (ECL) § 11-0105. The DEC is entrusted with the authority to manage the "fish and wildlife resources" of the State, including the habitats of fish and wildlife, for the benefit of all New Yorkers. *Id.* § 11-0303(1). Such habitats include the marine environments where fish, shellfish, crustaceans, and other marine life live, such as bays, estuaries, rivers, lakes, and streams. *Id.*

DEC manages the State's wildlife resources by, among other things, regulating when and how those resources may be harvested. For example, DEC has long maintained a licensing regime for fishing and requires persons in New York to obtain a license in order to raise or catch fish or

shellfish in state waters. *E.g.*, ECL §§ 11-0701(4); 13-0355(1); *see also* Ch. 40, 1938 N.Y. Laws 468, 481 (establishing licensing regime and requiring that "[n]o person shall . . . engage in hunting, trapping or taking fish . . . without first having procured a license"); *see also, e.g.*, DEC, *New York State Freshwater Fishing: Regulations Guide* 86 (Apr. 1, 2021) (internet).[2] DEC also maintains certain regulations designed to ensure healthy wildlife populations, for example, by requiring that all fisherman take only fish that have grown to a certain minimum size, or that certain species be fished only during certain seasons. *E.g.*, 6 N.Y.C.R.R. § 40.1(f). These rules work together to combat overfishing, and to ensure that fish species have a chance to reproduce and maintain their populations.

Such rules are thus especially important for conserving protected species whose populations are depleted or endangered. Indeed, DEC often works hand-in-hand with interstate and federal authorities to safeguard certain critical fish species that are protected by federal as well as state laws. (*E.g.*, Joint Appendix (JA) 770-771.)

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[2] For internet sources, URLs are provided in the Table of Authorities.

One prominent example of such protected species is the American eel. (JA 585, 770.) American eels are an important prey species, and also support valuable commercial and recreational fisheries. (*See* JA 343-344, 586, 770.) In their juvenile stages, when they are typically less than four inches long, American eels are called "glass eels" (for their transparent skin) and then, later, "elvers." (JA 334, 343, 585, 770.) American eels start and end their lives in the Sargasso Sea, migrating from there to the Atlantic Coast and back. They may take decades—up to thirty years—to reach sexual maturity. (*See* JA 329, 334, 343-345.) Historically, American eel were abundant along the East Coast, but the eel's population has declined in recent decades, due to (among other factors) excessive fishing of juvenile eels that have not yet had a chance to reproduce. (*See* JA 334-335, 343-347, 585, 770.)

The American eel is protected by the efforts of the Atlantic States Marine Fisheries Commission ("ASMFC"), an interstate body created in 1942 by a congressionally approved interstate compact among the States that border the Atlantic Ocean in order "to promote the better utilization of the fisheries . . . of the Atlantic seaboard," *New York v. Atlantic States Marine Fisheries Comm'n*, 609 F.3d 524, 528 (2d Cir. 2010) (quotation

marks omitted) (citing Atlantic States Marine Fisheries Compact, Pub. L. No. 77-539, 56 Stat. 267 (1942), *as amended by* Pub. L. No. 81-721, 64 Stat. 467 (1950)). In approving the ASMFC Compact and enacting the corresponding Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. § 5101 et seq., Congress and the ASMFC member States (including New York) recognized that patchwork, state-by-state regulation of protected species was ineffective and "ha[d] been detrimental to the conservation and sustainable use of [marine] resources." *Id.* § 5101(a).

In order to restore and maintain stocks of protected species on a long-term basis, the ASMFC generates fishery management plans for protected species, including the American eel. 16 U.S.C. § 5104(a). (*See* JA 178-179, 343-347, 586.) Once the ASMFC adopts a plan, member States like New York are required by federal law 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. Consistent with the ASMFC's current management plan for the American eel, New York, through DEC, bans the taking of juvenile eels under nine inches in length. *See* 6 N.Y.C.R.R. §§ 10.1 (a), (b), 40.1(f), (i). (*See also* JA 179, 586.)

These regulatory efforts are necessary because ASMFC scientists have repeatedly categorized the American eel's population as "depleted," and the International Union for the Conservation of Nature has classified the American eel as "endangered." (JA 344-345, 585.) The stress on American eel populations is due in part to the existence of a lucrative trade for glass eels and elvers in overseas markets, where they can fetch over $2,000 per pound. (*See* JA 178, 344, 586.) *See also, e.g.*, U.S. Fish & Wildlife Serv., Off. of Law Enforcement, *Operation Broken Glass* (Apr. 11, 2019) (internet); Rene Ebersole, *Inside the Multimillion-Dollar World of Eel Trafficking*, National Geographic (June 7, 2017) (internet). Seeking to profit from this trade, litigants across the country have attempted to challenge the validity of various regulations protecting the American eel, and courts in this circuit, among others, have rejected those attempts.[3]

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[3] *See United States v. McDougall*, 25 F. Supp. 2d 85, 92-93 (N.D.N.Y. 1998) (rejecting arguments that DEC regulation was preempted or otherwise invalid), *aff'd* 216 F.3d 1074 (2d Cir. 2000) (summary order); *see also Fregia v. Bright*, 750 F. App'x 296, 300 (5th Cir. 2018) (rejecting argument that Texas Parks and Wildlife Department regulations protecting American eels violated Due Process Clause); *Delaware Valley Fish Co. v. Fish & Wildlife Serv.*, No. 09-cv-142, 2009 WL 1706574, at *5-8 (D. Me. June 12, 2009) (finding no likelihood of success on substantive challenge to U.S. Fish and Wildlife Service regulations preventing export of live glass eels).

2. The Shinnecock Bay

One important habitat for the American eel and other important fish species managed by DEC is the Shinnecock Bay, a shallow, 9,000-acre coastal bay that is connected via inlets through barrier beaches to the Atlantic Ocean. *See* N.Y. Dep't of State, *Coastal Fish & Wildlife Habitat Assessment Form*: *Shinnecock Bay* 2 (last rev. Dec. 15, 2008) (internet). The Shinnecock Bay complex includes or is connected to various creeks, marshes, and other aquatic habitats, and the Bay is in turn part of a larger complex of estuarine coastal waters that extends along the southern shore of Long Island. *Id.* The Bay has been designated a "significant coastal fish and wildlife habitat" by the New York State Department of State, *id.*, and is regulated by DEC and considered to be state waters (*see* JA 179). The Bay is located within the Town of Southampton in Suffolk County on Long Island. *See Coastal Fish & Wildlife Habitat Assessment Form*, *supra*, at 2.

The Town of Southampton was founded in 1640 by English settlers, who purchased the land for the town from the Shinnecock Indian Nation (alternately, the "Shinnecock Tribe" or the "Tribe"). (*See* JA 587, 771.)

The deed of sale, signed by Mandush, the Shinnecock sachem, provides that the Tribe

> doe[s] absolutely and forever give and grant . . . all the lands, woods, waters, water courses, easem[en]ts, profits & emoluments thence arising whatsoever, from the place commonly known by the name of the place where the Indians hayle over their canoes out of the North bay to the south side of the Island, from thence to possess all the lands lying eastward betweene the foresaid boundes by water, to wit all the land pertaining to the parteyes aforsaid, as also all the old ground formerly planted lying eastward from the first creek at ye westermore end of Shinecock plaine. To have & to hold forever without any claime or challenge of the least title, interest, or propriety whatsoever of vs the sayd Indians or our heyres or successors or any others by our leave, appointment, license, counsel or authority whatsoever, all the land bounded as is abovesaid.

(JA 681-682; *see* JA 140-142, 587, 711-712.) Nothing in that 1640 agreement, or in any of the other private deeds entered into around this time to land that would become part of Southampton,[4] reserves any fishing or shellfishing rights to the Tribe.

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[4] Over the next 25 years, the Tribe and its members also sold tracts of land west of the town to private parties. (*E.g.*, JA 737-738 (1662 private sale of land to Captain Thomas Topping by members of the Shinnecock Tribe), 741 (sale of same land to Town of Southampton by authorized representatives of Tribe).) In 1666, after a dispute over ownership of those tracts was submitted to Colonial Governor Richard Nicolls, Nicolls ordered

(*continued on the next page*)

In 1676, New York's colonial governor, acting on royal authority, issued an order (the "Andros patent") formally recognizing the Town of Southampton's existence, as well as its boundaries and ownership of the land within them, including "all Rivers, Lakes, waters Quarrys Wood land Plaines Meadows, pastures, Marshes, ffishing, Hawking Hunting and ffowling, and all other Proffits, Commodities, Emoluments and heredita-ments." (JA 593-594, 760-761.) Ten years later, in response to requests to resolve boundary disputes between the town and local native people, including from the Shinnecock Tribe, the new colonial governor issued another order (the "Dongan patent") reconfirming the grants set forth in the Andros patent and the town's ownership of the "Rivers Rivolets waters lakes ponds Brookes streames beaches . . . Creeks harbors . . . and Easements fishing hawking hunting and fowling" within its boundaries. (JA 594 (quotation marks omitted); *see also* 672-676, 762-768.) There is "no historical evidence" that the Tribe ever challenged the validity or legality of the Andros or Dongan patents. *New York v. Shinnecock Indian*

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all deeds to the tracts turned over to the town. (JA 742-744.) Those tracts expanded the town to its present size.

Nation, 523 F. Supp. 2d 185, 204, 205 (E.D.N.Y. 2007) (Bianco, J.), *vacated and remanded on other grounds*, 686 F.3d 133 (2d Cir. 2012).

The Tribe, which has about 1,000 members, maintains an 800-acre reservation within the Town of Southampton to this day.[5] (JA 179, 460.) The reservation is on a peninsula adjacent to the Shinnecock Bay; according to DEC and the Southampton town tax assessor, the Tribe's on-reservation jurisdiction is limited to this peninsula and extends to the edge of the water along its coast (in particular, to the mean high-tide mark) (JA 179, 194.3; *see also* JA 315-316, 423, 663, 665) while the Bay is considered state waters (JA 179, 771).[6] Under New York law, hunting and fishing within the boundaries of the Shinnecock reservation (i.e., "upon such reservation") is subject only to regulation by the Tribe. ECL § 11-0707(8).

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[5] The federal government recognized the Shinnecock Tribe in 2010. (JA 455-457.) *See generally* 25 U.S.C. § 5131 (setting forth process for federal recognition of Native American tribes). New York State has recognized the Tribe since at least 1792, when state legislation re-organized the Tribe as a trusteeship and set forth the process for annual elections of trustees, which have occurred every year since. (JA 455.)

[6] *See also People v. Miller*, 235 A.D. 226, 228-31 (2d Dep't) (*reprinted at* JA 684-689) (holding, with respect to a neighboring bay in Southampton, that "title to the waters and land thereunder is in the town" pursuant to, inter alia, the Andros and Dongan patents), *aff'd*, 260 N.Y. 585 (1932).

Outside the reservation, however—including in the Shinnecock Bay itself—all fish and wildlife are under state control and subject to state regulation, *e.g.*, ECL § 11-0105, though state law provides for certain accommodations for tribal members, such as free fishing permits during fishing season, *e.g.*, *id.* § 11-0715(2); *see also New York State Freshwater Fishing Regulations Guide*, *supra*, at 86. Thus, when the Tribe has undertaken projects in the Bay—such as environmental reclamation work or building oyster beds—it has done so with DEC's knowledge and permission.[7]

[7] Evidence in the record from Silva's trial indicated that the Shinnecock tribal government had performed environmental reclamation work in the wake of Superstorm Sandy that extended 100 feet from shore into the Bay, but that this work was done in conjunction with Suffolk County, and subject to DEC oversight. (*See* JA 300-304). Similarly, there was evidence that the Tribe had developed oyster beds in the Bay since the 1970s, but with DEC's knowledge and permission. (*See* JA 308-309 (discussing Tribal development of oyster beds along the coast line with DEC's knowledge), 464 (noting Shinnecock Tribe had sought and received DEC permits for their shellfishing activities).)

B. Plaintiffs Harvest Protected Eels and Other Prohibited Fish from the Shinnecock Bay Without a License, and Are Prosecuted in Local Court

Plaintiffs Gerrod Smith, Jonathan Smith, and David Silva are members of the Shinnecock Tribe and reside on the Shinnecock Reservation. (JA 17-18, 44, 46, 48, 581.) Plaintiffs each fish in the Shinnecock Bay and its estuary and have each been ticketed and subsequently prosecuted in Southampton Town Justice Court for violating state laws and DEC regulations regarding fishing and shellfishing activities in the Bay. (*E.g.*, JA 18.) Each asserts in this action an unlimited "usufructuary" right to fish in state waters free from state regulation, despite the fact that such activities in Shinnecock Bay have been subject to state supervision for centuries.[8] (JA 21.)

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[8] Usufructuary rights are property rights to the use of the fruits of the property, i.e., "hunting, fishing, and gathering rights." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176 (1999); *see Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1357 (Fed. Cir. 2018) ("[W]ater rights are usufructuary in nature—meaning that the property right 'consists not so much of the fluid itself as the advantage of its use . . . .'"); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) ("The Tribes' right to take fish is a property right.")

1. Gerrod Smith

Gerrod Smith was prosecuted in October 2008 in Southampton Town Justice Court for allegedly possessing eighteen out-of-season and undersized summer flounder, sixteen out-of-season and undersized porgy, and two undersized blackfish harvested from the Bay, all in violation of state law. (*E.g.*, JA 19-20, 73.) DEC conservation officer Brian Farrish boarded Smith's boat near the entrance to Heady Creek in Shinnecock Bay, examined Smith's catch, and issued the citations that led to Smith's prosecution. (JA 19-20, 73-74.) Smith's fishing companion, a non-Indian named Salvatore Ruggiero, was also cited and later prosecuted for possessing the out-of-season and undersized fish, but Ruggiero's case was dismissed after a bench trial, with the Town Justice Court concluding that Ruggiero had "creat[ed] doubt" as to whether he was fishing in state waters or on the Shinnecock Reservation, and accordingly that the prosecution had failed to prove its case beyond a reasonable doubt. (JA 73-75, 640-642.)

Smith sought to remove his case to federal court, arguing that the local prosecution violated a federally protected right to fish in the Bay outside of the Shinnecock Reservation, but the district court (E.D.N.Y.,

Seybert, J.) remanded to the Southampton Town Justice Court, holding that Smith could assert any such rights there. *See New York v. Smith*, No. 08-cv-4422, 2009 WL 2390809, at *1-3 (E.D.N.Y. July 31, 2009). The case against Gerrod Smith was ultimately dismissed in October 2009. (*E.g.*, JA 20, 644.)

2. Jonathan Smith

Jonathan Smith was prosecuted around the same time, also in Southampton Town Justice Court, for operating an unlicensed shellfish farm. (*E.g.*, JA 20.) Specifically, in December 2008, Smith received a civil infraction ticket and a criminal summons for, respectively, operating an "unpermitted acquaculture facility" in Shinnecock Bay in violation of ECL § 13-0316(2), and using "improper shellfish tags" in violation of ECL § 13-0319. (JA 102 (quotation marks omitted).)

Smith removed the civil infraction to federal court, and the case was subsequently dismissed for failure to prosecute. (JA 69-71, 646, 648-649.) *See also* Notice of Removal, *New York v. Smith*, No. 09-cv-571 (E.D.N.Y. Feb. 11, 2009) (Wexler, J.), ECF No. 1. Smith also removed the criminal summons, but the district court (E.D.N.Y., Hurley, J.) remanded to state court after determining that Smith's purported "Indian fishing rights"

were not guaranteed by any federal statute that might serve as a basis for removal, and that in any case Smith could raise any such arguments in state court. (JA 102-108 (quotation marks omitted).) The state-court case was subsequently dismissed.

Smith was also cited by DEC conservation officers a few years later in Montauk for possession of undersized scallops. *New York v. Smith*, 952 F. Supp. 2d 426, 429 (E.D.N.Y. 2013).

3. David Silva

Silva was prosecuted in 2017, also in Southampton Town Justice Court, for unlawfully fishing in the Bay for undersized eels. (*E.g.*, JA 20.) Specifically, Silva was ticketed in April 2017 by DEC conservation officers Farrish and Evan Laczi (both defendants here) while fishing for elvers near Taylor Creek, an area in the far eastern section of the Bay that is not immediately adjacent to the Shinnecock Reservation. (JA 20, 51, 54, 57, 582, 652; *see also* JA 194.7, 215, 270, 285-286, 315-316, 663.) The officers had been notified of Silva's activities by a town constable, who had learned of a potentially illegal eel net that had been installed in Taylor Creek. (JA 194.3-194.4, 695-696.) Assisted by town constables, officers Laczi and Farrish observed and documented the net, and then waited in

plainclothes near the net at high tide to see if anyone came to collect their catch. Silva arrived around 6:00 a.m. and proceeded to collect a large bucket of elvers from the net. (JA 194.4, 696.) According to the officers' trial testimony, Silva at first told the officers that the eels were just bait fish, but after the officers identified themselves as DEC agents, Silva admitted they were elvers. (JA 194.5, 697-698.) Officer Laczi, who was specially trained as a conservation officer to identify American eels, testified that he recognized the eels as elvers, and that they were approximately two inches long. (JA 194.5, 697.) The officers seized Silva's catch—247 eels in buckets in his possession, and another 98 that were in the net—as well as his net and his fishing equipment.[9] (JA 20, 194.6, 696-697.) The officers also obtained a statement from Silva admitting that he had installed a net in Taylor Creek and that he was harvesting elvers with it. (JA 194.6, 698.)

Silva was ultimately charged with fishing without a license as well as unlawful possession of underage eels and possession of eels over the limit. (JA 20, 50, 52-53, 55-56, 58-59, 62, 651.) *See also* ECL § 13-0355(3)

[9] The net was later determined to be a "fyke net," a type of fish trap, and measured almost 80 feet long. (JA 194.4, 529, 696.)

(fishing without a license); 6 N.Y.C.R.R. § 40.1(b)(1)(ii) (undersized eels); *id.* § 40.1(b)(1)(iii) (eels over the limit).

Silva moved to dismiss the charges against him, claiming that DEC lacked jurisdiction over him because he was "fishing in the traditional Shinnecock fishing grounds of the Shinnecock Bay estuary, an area of retained fishing rights, whether or not outside Shinnecock Reservation waters." (JA 606-612.) The motion was denied. (JA 62-63.) The Town Justice Court (Weber, J.) held that "[i]t may well be" that Silva could prevail at trial on his theory that his conduct was exempt from state fishing regulations, but that such a determination could not be made without factfinding, and thus a trial. (JA 63.)

A bench trial followed. The prosecution called one town constable and DEC officers Laczi and Farrish, all of whom testified regarding Silva's use of the net to harvest hundreds of juvenile eels. (JA 194.3-194.6.) The prosecution also called the Town of Southampton's town tax assessor (who happened to be a Shinnecock Tribe member), who confirmed that Taylor Creek is outside the boundaries of the Shinnecock Reservation. (JA 194.7, 314-318.) Silva called a member of the Shinnecock tribal government, who testified that the Tribe's "official position" is that it never relinquished

its rights in the Shinnecock Bay, but who also admitted that the area where officers Laczi and Farrish found Silva was outside the reservation in any event. (JA 194.7; *see* JA 307.) Professor John Strong, an emeritus professor of history at Long Island University, also testified about the history of the Shinnecock Tribe. (JA 194.7.)

In June 2019, the Town Justice Court issued its decision. The court concluded that, "based upon the current and indisputed mapping of the area," the net had been placed in Taylor Creek, which was outside the jurisdiction of the Shinnecock Reservation. (JA 194.8.) The court rejected Silva's argument that DEC lacked jurisdiction over his activities, explaining that it was "without the power to alter the legally established boundaries of the Shinnecock Nation or of the State of New York" and that, "on this record at least, no other conclusion can be drawn except that" Silva's net had been placed "on territory within the jurisdiction of the State of New York, acting through its" DEC. (JA 194.8.) Silva was ultimately convicted of fishing without a license and using an improper net, but found not guilty of the remaining charges (relating to the number and

size of the eels).[10] (JA 194.10.) After his conviction, Silva indicated his intention to appeal. (JA 585.)

C. Plaintiffs File This Lawsuit, Claiming an Unrestricted Tribal Right to Harvest Fish and Shellfish from the Bay

Plaintiffs filed this lawsuit in June 2018, while Silva's criminal case in the Town Justice Court was still pending. (JA 16-23.) Plaintiffs named as defendants Jaime Greenwood (the Assistant District Attorney who prosecuted Silva's case), the Suffolk County District Attorney's Office, DEC conservation officers Laczi and Farrish, DEC Commissioner Basil Seggos, and DEC itself. (JA 17-18.) Pointing to various "Colonial Deeds," plaintiffs claimed that they had an unrestricted right "to use waters, fish, take fish, and hold their fish clearly within an area of aboriginal usufructuary fishing rights unrelinquished and retained by Plaintiffs' ancestors," and that the "repeated interference, seizures, and prosecution of the

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[10] The Town Justice Court held that it would not consider the evidence regarding the nature of the eels in the bucket or Silva's statement to officers Laczi and Farrish after concluding that Silva had initially refused a search of his bucket and that his subsequent consent to the search was not voluntary under the circumstances. (194.8-194.9.) Accordingly, the court declined to convict on the charges relating to the size and number of eels taken.

Plaintiffs by application of New York State fishing regulations" violated those purported aboriginal rights. (JA 21.) For relief, plaintiffs sought a declaration and a corresponding injunction "enjoining the Defendants from enforcing the laws of the State of New York against Plaintiff Silva . . . , and from otherwise interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters." (JA 22.)

Plaintiffs also claimed in their complaint that their citation and prosecutions for violation of DEC fishing regulations "constitute a continuing pattern and practice of purposeful acts of discrimination based on their race as Native Americans" in violation of 42 U.S.C. §§ 1981 and 1982. (JA 21.) Plaintiffs sought monetary damages on their discrimination claim, including $102 million in punitive damages. (JA 22.)

Along with their complaint, plaintiffs moved for a preliminary injunction enjoining Silva's pending prosecution as well as any other state or county action "interfering" with their taking of fish from the waters of the Shinnecock Bay. (JA 31, 42.) In support of their motion, plaintiffs submitted various colonial-era documents, as well as a report prepared

by Professor Strong opining based on those documents that "the Shinnecock and the other native peoples of eastern Long Island" have the right "to fish in the waters adjacent to their communities 'without let or hindrance' and to dispose of their catches, as they think good." (JA 34-35 (quotation marks omitted); *see* JA 261-263; *see also* JA 265-269 (additional report by Prof. Strong).)

The district court (Feuerstein, J.) denied the application for a preliminary injunction. (JA 184-194.) As to Silva, the court held that he had not shown he was likely to succeed on the merits of his claims, and that even if he had, the court would be required under *Younger v. Harris*, 401 U.S. 37 (1971), to abstain from enjoining his pending case in Southampton Town Justice Court. (JA 191-193.) As to Gerrod Smith and Jonathan Smith, the court concluded that their "request for injunctive relief [wa]s entirely speculative and remote," and that, because their prior prosecutions had been dismissed years ago and they did not allege that they were currently facing any charges, they lacked "the requisite concrete and particularized injury needed to establish standing" to seek such relief. (JA 193-194.)

Defendants then moved to dismiss, and the district court referred the motion to a magistrate judge for a report and recommendation. (JA 581.) The magistrate judge (Locke, J.) recommended dismissing plaintiffs' claims (Dkt. No. 63),[11] and plaintiffs objected to report and recommendation in the district court (Dkt. No. 64). The district court then held a conference with the parties, after which the court terminated the pending dismissal motions and set a briefing schedule for summary judgment motions. (Dkt. No. 74.) The district court then referred the motions back to the magistrate judge for another report and recommendation. (Order, (Nov. 19, 2019).)

D. The District Court Grants Summary Judgment in Defendants' Favor

In May 2020, the magistrate judge issued a report and recommendation recommending that summary judgment be granted against the plaintiffs. (JA 900-939.) The magistrate judge concluded that plaintiffs' claims against the State and the individual state defendants in their official capacities were barred by the Eleventh Amendment, and that the limited

[11] Citations to "Dkt. No. __" refer to the docket entries for this action, No. 18-cv-3648 (E.D.N.Y.).

exception provided by *Ex parte Young*, 209 U.S. 123 (1908), did not apply because plaintiffs were "essentially seeking a declaration 'that the [areas] in question are not even within the regulatory jurisdiction of the State"—something closer to an action to quiet title as opposed to mere prospective injunctive relief.[12] (JA 917 (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 282 (1997)); *see* JA 910-918.)

The magistrate judge in the alternative recommended granting summary judgment with respect to Silva's claims pursuant to the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), because Silva's state court case was still ongoing, and because plaintiffs had not established any triable issue on whether the exception to *Younger* abstention for bad faith conduct by state actors applied in their case. (JA 918-925.) The magistrate judge also found alternative threshold grounds for granting summary judgment against Gerrod Smith and Jonathan Smith due to lack of standing, explaining that "Plaintiffs have offered no new evidence which would lead the Court to reach a conclusion different from that

[12] Plaintiffs conceded below that their claims for monetary damages are barred by the Eleventh Amendment (JA 912) and they have not attempted to revive those claims on appeal.

reached by Judge Feuerstein," such as a "concrete plan to violate the State's fishing regulations" in the future.[13] (JA 925-928.)

The magistrate judge also recommended that summary judgment be granted to defendants on plaintiffs' claims against the state defendants in their individual capacities for intentional racial discrimination. (JA 928-932.) The magistrate judge reasoned that Gerrod Smith's and Jonathan Smith's claims stemming from their decades-old arrests were time-barred, and that Silva had not put forward sufficient evidence to make out a prima facie case that his citation by DEC officers for illegally harvesting elvers was motivated by racial animus. (JA 929-932.) The magistrate judge also noted that plaintiffs had not raised a triable issue regarding DEC Commissioner Seggos's involvement in plaintiffs' individual cases. (JA 932.)

Plaintiffs objected to the report and recommendation, disclosing in their objections that Silva had "abandoned" the state court appeal of his Town Justice Court convictions in December 2019 (Dkt. No. 90, at 8).

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[13] The magistrate judge further recommended that summary judgment be granted against Silva on this ground as well because he too had not produced any evidence of future plans to violate state regulations. (JA 928 n.19.)

In February 2021, the district court adopted the report and recommendation and entered summary judgment against plaintiffs. (Special Appendix (SPA) 1-7.) The court agreed that plaintiffs' official-capacity claims were barred by the Eleventh Amendment, and that the *Ex parte Young* exception did not apply because, as the magistrate judge had explained, "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." (SPA 5-6.)

The court also explained that Silva's abandonment of his state court appeal did "not equate to 'exhausting . . . state appellate remedies'" and that accordingly *Younger* abstention still applied to Silva's claims. (SPA 4 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610 (1975)).) On de novo review, the court also agreed with the magistrate judge that the bad faith exception to *Younger* abstention did not apply as a matter of law on this record. (SPA 4-5.) The court further agreed that Gerrod Smith and Jonathan Smith lacked standing. (SPA 6.) The court also agreed that, unlike in another district court decision involving the fishing rights of a different tribe, the Unkechaug Indian Nation, the three individual plaintiffs here had not articulated a "concrete plan" to violate state fishing regulations

in the future. (SPA 6-7 (quoting *Unkechaug Indian Nation v. New York State Dep't of Env't Conservation*, No. 18-cv-1132, 2019 WL 1872952, at *6 (E.D.N.Y. Apr. 23, 2019)).)

The court also rejected plaintiffs' objections as to the claims against the state defendants in their personal capacities, explaining that plaintiffs' objections were "perfunctory" and finding no error in the magistrate judge's reasoning. (SPA 7 & n.2.) This appeal followed. (JA 969.)

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews the district court's grant of summary judgment de novo. *E.g.*, *Seneca Nation of Indians v. New York*, 382 F.3d 245, 258 (2d Cir. 2004). Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is not in genuine dispute when the moving party demonstrates that no rational jury could find in the nonmovant's favor with respect to that fact. *E.g.*, *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 86 (2d Cir. 1996). In deciding a motion for summary judgment, the Court must "construe the facts in the light most favorable to the non-moving party and must resolve all

ambiguities and draw all reasonable inferences against the movant." *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004) (quotation marks omitted). However, in opposing summary judgment, the non-moving party may not rely on unsupported assertions or conjecture and must present more than a "scintilla of evidence" to support their claims. *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) (quotation marks omitted).

Here, the district court properly granted summary judgment in the state defendants' favor, and this Court should affirm.

As an initial matter, the district court properly held that all of the claims against the state defendants in their official capacities are barred on threshold grounds. DEC and its agents are arms of the State for purposes of the Eleventh Amendment, which bars federal court suits against a State unless its sovereign immunity has been waived or abrogated by Congress. *E.g., Board of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 363 (2001). Plaintiffs invoke the limited exception to Eleventh Amendment immunity supplied by *Ex parte Young*, 209 U.S. 123 (1908), but that exception does not apply here. Rather, as in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), and *Western Mohegan Tribe & Nation*

v. Orange County, 395 F.3d 18 (2d Cir. 2004), the Eleventh Amendment applies here because plaintiffs seek to divest the State of its regulatory authority over state waters, and accordingly their suit implicates the State's sovereign interests.

Plaintiffs' claims are also dismissible on alternative threshold grounds, as the district court and the magistrate judge held. Specifically, Silva's claims are subject to abstention under *Younger v. Harris*, 401 U.S. 37 (1971) because he brought this action during the pendency of the challenged state court action enforcing state environmental laws, and then failed to exhaust his state court appeals after he was convicted of taking eels without a license. And Gerrod Smith and Jonathan Smith meanwhile do not claim or point to any evidence showing that they have a concrete plan to violate state laws in the future—and thus cannot establish standing to seek any injunctive relief.

In the alternative, this Court can affirm on the merits. On this summary judgment record, plaintiffs point to nothing to support their supposed aboriginal rights to use and take fish from state waters free from any and all state regulation. Indeed, the original deeds by which the Shinnecock Tribe conveyed the area including the Bay to the Town of

Southampton reserve no fishing rights at all, and subsequent grants and patents by New York's colonial governors later confirmed that no such rights in the Shinnecock Bay were reserved. Moreover, even if there were an enforceable reservation of rights upon which plaintiffs could rely (and there is not) plaintiffs claims would still fail under the conservation necessity doctrine, which allows the State to enforce neutral, reasonable environmental regulations in state waters notwithstanding a claim of tribal rights. And in addition, Silva's claim would also fail on the merits as a matter of collateral estoppel, because he already litigated the same arguments in state court.

Finally, plaintiffs' discrimination claims also fail. Plaintiffs point to nothing in the summary judgment record from which a reasonable fact-finder could conclude that the DEC conservation officers who cited them for violating state fishing regulations harbored any racial animus or improper motivation, as required to make out a prima facie case for the violation of 42 U.S.C. §§ 1981 and 1982.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE STATE DEFENDANTS DUE TO NUMEROUS THRESHOLD DEFECTS WITH PLAINTIFFS' CLAIMS

A. The Eleventh Amendment Bars All of Plaintiffs' Official-Capacity Claims.

Plaintiffs' claims against DEC and the individual state defendants in their official capacities are barred by the Eleventh Amendment, which provides that a State is immune from suit in federal court unless it has expressly consented to be sued. *E.g., Board of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 363 (2001). This immunity applies to claims against state agencies and state officials acting in their official capacities, and bars both monetary and equitable relief. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Plaintiffs do not (and cannot) contest that DEC and its officials in their official capacities are arms of the State for Eleventh Amendment purposes. *See, e.g.*, *Morabito v. New York*, 803 F. App'x 463, 465 (2d Cir. 2020) (summary order) (affirming determination that DEC and Commissioner Seggos in his official capacity were immune from suit).

Plaintiffs instead invoke (Br. for Pls.-Appellants (Br.) at 19-21) *Ex parte Young*, 209 U.S. 123 (1908), which provides a limited exception to the application of Eleventh Amendment immunity. But that narrow exception does not apply here, as the district court correctly recognized.

The *Ex parte Young* exception applies when a plaintiff sues an individual state official based on an ongoing violation of federal law and seeks relief that is properly characterized as prospective. *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 372 (2d Cir. 2005) (citing *Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002)). But the exception does not apply "when 'the state is the real, substantial party in interest,' as when the 'judgment sought would expend itself on the public treasury or domain, or interfere with public administration.'" *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (quotation marks and citations omitted). And both the Supreme Court and this Court have squarely held that *Ex parte Young* does not apply in cases like this one, where tribal plaintiffs seek to declare exclusive rights over state land, since such disputes necessarily implicate the State's interests as a sovereign.

Thus, in *Idaho v. Coeur d'Alene Tribe*, the Supreme Court held that the *Ex parte Young* exception did not apply in an action by a tribe for a declaratory judgment "to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment" of submerged lands beneath Lake Coeur d'Alene and the rivers and streams the fed it, and to invalidate "all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate, authorize, use or affect in any way the submerged lands." 521 U.S. 261, 265, 287 (1997). The tribe's action, the Court explained, essentially sought "a determination that the lands in question are not even within the regulatory jurisdiction of the State," which declaration "would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Id.* at 282. The intrusion on the State's "sovereign interest in its lands and waters" from such relief would be just as great as "almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287. Indeed, the intrusion on sovereign interests that such relief would entail was especially profound because "lands underlying navigable waters have historically been considered 'sovereign lands,'" and "[s]tate ownership of them has been 'considered an essential attribute of sovereignty.'" *Id.* at 283.

This Court applied those same principles in *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004), holding that New York was immune from a tribal lawsuit seeking a declaration of "Indian title" (described as "the right 'to camp, to hunt, to fish, [and] to use the waters and timbers'") in certain state lands and waters. *Id.* at 22-23. While this assertion of mere "Indian title" to State lands was non-exclusive, and less extensive than the rights claimed by the Tribe in *Coeur d'Alene*, it was nevertheless "fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas," because the tribe sought "a declaration from this court that New York's exercise of fee title remains 'subject to' the Tribe's rights,"—in essence, "a 'determination that the lands in question are not even within the regulatory jurisdiction of the State.'" *Id.* at 23 (quoting *Coeur d'Alene*, 521 U.S. at 282). This Court thus concluded that the relief sought by the tribe in *Western Mohegan*, "as much as that sought in *Coeur d'Alene*," was "the functional equivalent of quiet[ing] the Tribe's claim to title" in the contested land. *Id.* (citing *Coeur d'Alene*, 521 U.S. at 281).

Coeur d'Alene and *Western Mohegan* control here. Like the plaintiffs in those cases, plaintiffs here seek a declaration of their purported

"aboriginal" or "usufructuary" rights to use state waters, fish in state waters, and harvest marine life from state waters unrestricted by any state laws or regulation. (JA 16, 19.) Indeed, they seek an order barring the State and its agencies and agents from "interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters." (JA 22.) Consistent with the breadth of the rights they purport to assert, plaintiffs have at various points even suggested that ownership all or part of the Shinnecock Bay is itself "contested," or that all or part of the Bay is under Shinnecock "jurisdiction."[14] (*See* Dkt. No. 64, at 7, 9; Dkt. No. 73-2.)

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[14] If the Court were to narrowly construe plaintiffs' proposed aboriginal rights (notwithstanding the broad terms in which plaintiffs themselves have framed those rights) and determine that *Coeur d'Alene* and *Western Mohegan* accordingly do not apply, the district court should still be affirmed on multiple other grounds, including abstention, standing, and failure to state a claim on the merits. See *infra* at 41-58.

Moreover, the claim against DEC would still need to be dismissed as barred by the Eleventh Amendment, because the *Ex parte Young* exception "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The relief plaintiffs seek would block New York from enforcing state environmental laws in state waters, and would thus directly implicate the same sovereignty concerns that drove the Court's reasoning in *Coeur d'Alene*. Plaintiffs' assertion of rights that trump the regulatory power of the State over its own waters is, as in *Western Mohegan*, "fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas." 395 F.3d at 23. Because this action implicates New York's fundamental sovereign interests, the State is "the real, substantial party in interest," and *Ex parte Young* does not apply. *Stewart*, 563 U.S. at 255.

Plaintiffs' contrary arguments lack merit. They argue (Br. at 20-21) that their complaint did not ask "for determination of a fee simple ownership right," but that distinction is irrelevant. The question is whether, as in *Western Mohegan*, plaintiffs' claimed rights to unlimited use of state waters would interfere with *the State's* fee simple ownership right, and thus implicate sovereign interests protected by the Eleventh Amendment. 395 F.3d at 23. Here, they would: the relief plaintiffs seek would prevent the State from safeguarding state resources by enforcing its own fish and wildlife rules in state waters.

Plaintiffs also misplace their reliance on *Unkechaug Indian Nation v. New York State Department of Environmental Conservation*, No. 18-cv-1132, 2019 WL 1872952 (E.D.N.Y. Apr. 23, 2019), an unreported district court decision involving a different tribe's assertion of fishing rights in a different Long Island bay under a different set of colonial-era documents. That decision, which denied a motion to dismiss on Eleventh Amendment and other grounds, did not even mention the controlling decisions in *Coeur d'Alene* and *Western Mohegan*. Instead, the court concluded only that, at the motion-to-dismiss stage,[15] the *Unkechaug* plaintiffs had alleged sufficient facts to support their framing of the case as seeking "prospective relief"—for example, the plaintiffs alleged that they had received a letter from DEC's general counsel threatening a future enforcement action, and affirmatively asserted that they "continue[] to fish in violation of the NYSDEC laws and shall continue to exercise our rights to fish despite

[15] The State will soon file a motion for summary judgment in the *Unkechaug* matter re-asserting its Eleventh Amendment arguments and calling the court's attention to *Coeur d'Alene* and *Western Mohegan*. *See* Letter from James M. Thompson, Assistant Att'y Gen., N.Y. State Office of Att'y Gen. to Judge William F. Kuntz, *Unkechaug Indian Nation v. New York State Dep't of Env't Conservation*, No. 18-cv-1132 (E.D.N.Y. May 3, 2021), ECF No. 78.

the NYSDEC laws and criminal prosecution." 2019 WL 1872952, at *4 (quotation marks omitted). Even setting aside the *Unkechaug* court's failure to grapple with controlling precedent, plaintiffs here, unlike those in *Unkechaug*, point to no future threats of enforcement or future plans to violate DEC regulations that might support characterizing the relief they seek as "prospective."

Finally, in addition to the reasons above, *Ex parte Young* is also inapplicable because Plaintiffs never alleged an ongoing violation of federal law as to Gerrod Smith and Jonathan Smith. To the contrary, those plaintiffs based their claims on only separate single incidents, each over a decade ago, that resulted in dismissed prosecutions. Even assuming that their citations for violating state law and DEC regulations did constitute a violation of federal law at the time, those citations are not enough to demonstrate an "ongoing violation of federal law" sufficient to invoke the *Ex parte Young* exception, as opposed to a mere "dispute about the lawfulness of [defendants'] past actions," to which the exception does not apply. *Green v. Mansour*, 474 U.S. 64, 73 (1985). The only "ongoing" action alleged in plaintiffs' complaint was the prosecution of Silva in Southampton Town Justice Court, which was pending when the complaint was filed.

B. Silva's Claims Are Independently Barred by *Younger v. Harris*.

Even if they were not barred by Eleventh Amendment immunity, Silva's claims for injunctive or declaratory relief would also be barred by the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention is required when (1) there is an ongoing state proceeding for which appellate remedies have not yet been exhausted; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of their federal claims. *See, e.g.*, *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002). As a matter of comity and federalism principles, *Younger* requires federal courts to abstain from asserting jurisdiction over or otherwise taking action to "call into question ongoing state proceedings"—and to presume that, "in the ordinary course, a state proceeding provides an adequate forum for the vindication of federal constitutional rights." *Id.* (quotation marks omitted).

Plaintiffs do not contest (*see* Br. at 22-23) that the second and third prongs of the *Younger* analysis are satisfied here—namely, an important state interest and an adequate state forum. As for the first prong, Silva's state-court case was ongoing when he brought this suit, and he never

exhausted his state court appellate remedies, choosing instead to abandon his state court appeal after his conviction. See *supra* at 27. But abandoning a state court appeal is no substitute for exhausting state appellate remedies: "[T]he considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610 (1975). If the rule were otherwise, litigants would be incentivized to forgo appellate review in the state system in favor of collateral attacks on state court judgments in federal court—precisely the type of conflict that *Younger* abstention is meant to avoid. *See Miller v. Silbermann*, 951 F. Supp. 485, 491-92 (S.D.N.Y. 1997) (abstention is proper even absent a pending proceeding where the relief sought "would inappropriately require the federal court to supervise institutions central to the state's sovereignty," such as state courts (citing *O'Shea v. Littleton*, 414 U.S. 488, 500-02 (1974))).

Plaintiffs' only other argument is that the "bad faith" exception to *Younger* abstention applies here. That exception applies only if a plaintiff can make the extraordinary showing "that the state proceeding was

initiated with and is animated by a retaliatory, harassing, or other illegitimate motive." *Diamond "D" Constr. Corp.*, 282 F.3d at 198. Plaintiffs come nowhere close to satisfying this stringent standard. Neither of the two pieces of evidence that they identify (Br. at 22) demonstrate that DEC and its agents engaged in harassment or bad faith tactics in initiating the state-court proceeding against Silva.

First, plaintiffs claim (Br. at 22) that the state defendants "ignored [their] own policy" in pursuing the state-court proceeding against Silva. The policy referenced by plaintiffs is DEC's policy entitled "Contact, Cooperation, and Consultation with Indian Nations," which provides, among other things, that DEC "will consult with appropriate representatives of Indian Nations on a government-to-government basis on environmental and cultural resource issues of mutual concern" and "will seek to develop cooperative agreements with Indian Nations on such issues" where doing so is "appropriate and productive" (JA 425-430). That policy is wholly inapplicable here because Silva is not a tribal official, and there is no indication that he was acting on behalf of the Shinnecock Tribe when he was engaged in unlawful fishing outside of the reservation. (*See* JA 194.3-194.4.) Plaintiffs do not otherwise identify any evidence showing

that DEC failed to engage in government-to-government discussions with the Shinnecock Tribe regarding its efforts to protect the American eel.

Second, plaintiffs point to two emails as examples of bad faith, claiming that they show "illegal racial profiling of Shinnecock people of the Native American race" (Br. at 22), but the emails do no such thing. One email, from DEC Captain Dallas Bengel to a large group of DEC employees (including officers Laczi and Farrish), explained that "[w]ord is out that the Shinnecocks are actively seeking a shipper for glass eels," and noted that DEC "will have to work the off-reservation areas diligently to prevent illegal harvest." (JA 420.) The term "Shinnecocks" is not a racial slur; it is an appellation for the Tribe and its members. And the email on its face does not instruct DEC agents to harass or profile Tribe members, but instead directs them to work "diligently to prevent an illegal harvest" of juvenile eels—a perfectly legitimate and nondiscriminatory law-enforcement objective. (JA 420.)

The other email is even farther afield. In that email, a DEC lawyer, Monica Kreshik, explained that "[t]he Shinnecock assert that they have a treaty right to exercise their aboriginal fishing practices," and that "[t]his may be true." (JA 422-423.) However, Kreshik continued, "State

law or regulation may impair an off-reservation treaty fishing right when (1) It represents a reasonable and necessary conservation measure and (2) does not discriminate against the Native American treaty rightholders." (JA 4423.) As the magistrate judge explained, "Kreshik's acknowledgment that the Tribe may have fishing rights, followed by an explanation that such rights could be regulated, so long as such regulation 'does not discriminate against' the Tribe, only bolsters the state defendants' position," by demonstrating that "they did not enforce State fishing laws against Plaintiffs to harass or retaliate against them on the basis of their race." (JA 922-923.)

Plaintiffs' attempt to identify bad faith in the state-court proceeding against Silva accordingly fails.

C. Gerrod Smith and Jonathan Smith Lack Standing.

To establish standing, a plaintiff must demonstrate that he or she has suffered an injury in fact; that the injury was caused by the defendant's conduct; and that judicial relief is capable of offering redress for the injury. *E.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Where a plaintiff seeks injunctive relief, he "cannot rely on past injury to satisfy the injury requirement [for standing] but must show a likelihood

that he . . . will be injured in the future." *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) (quoting *Deshawn E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998)); *see City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Nor can "[a]llegations of a subjective 'chill'" serve as "an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Here, Gerrod Smith and Jonathan Smith point to no evidence that they are currently being or will soon be cited or prosecuted for violating state fishing regulations. Instead, they point only to proceedings that were dismissed a decade ago. Those proceedings are too remote to support standing to obtain prospective injunctive relief. *Shain*, 356 F.3d at 215.

Plaintiffs point out (Br. at 17-19) that the unreported *Unkechaug* decision held that the plaintiff tribe had standing to sue. But as noted earlier (see *supra* at 39-40), in *Unkechaug*, the tribe had alleged specific plans to continue violating DEC regulations and had offered up "repeated statements of their intent to actively fish for glass eels and harvest crustaceans" from State waters, 2019 WL 1872952, at *4. The court found these concrete assertions sufficient to establish standing, at least at the motion-to-dismiss stage. *Id.* at *6. In stark contrast, Gerrod Smith and

Jonathan Smith make no such concrete assertions here, nor do they point to any evidence in the summary judgment record to substantiate any such future plans. Accordingly, Gerrod Smith and Jonathan Smith lack standing on their claims for injunctive relief.

POINT II

PLAINTIFFS' CLAIM TO AN UNRESTRICTED RIGHT TO FISH IN STATE WATERS FAILS AS A MATTER OF LAW

This Court can and should affirm the district court's grant of summary judgment on the threshold grounds discussed above. In the alternative, this Court may also affirm because plaintiffs have failed to state any claim on the merits. *See, e.g.*, *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 343 (2d Cir. 1994).

This section discusses plaintiffs' claim to an unrestricted right to fish and state waters. The following section discusses plaintiffs' discrimination claims.

A. Plaintiffs Have No Treaty or Aboriginal Right to Fish in the Bay Outside of the Shinnecock Reservation Without a License.

Plaintiffs have identified no legal basis for their asserted right to fish in state waters outside of the Shinnecock Reservation free from any state regulation. To the contrary, in the original 1640 deed, the Shinnecock Tribe conveyed to the town's founders, in unqualified terms, "all the lands, woods, waters, water courses, easem[en]ts, profits & emoluments, thence arising whatsoever" in the area "from the place commonly known by the name of the place where the Indians hayle over their canoes out of the North bay to the south side of the Island"—i.e., including the "waters" that comprise the Shinnecock Bay. (JA 682-683; *see* JA 587, 711-712.) *See, e.g.*, *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 267 (E.D.N.Y. 2007) (Bianco, J.) ("The use of language such as 'all our right title and interest' is precisely the type of language used when there is an intent to transfer all title in land.'"), *vacated and remanded on other grounds*, 686 F.3d 133 (2d Cir. 2012). No other deed involving land that ultimately became part of the town or the Shinnecock Bay contains any reservation of fishing rights or regulatory jurisdiction by the Tribe. (*See, e.g.*, JA 737-738 (1662 private sale of land in present-day western

Southampton by Shinnecock members not reserving fishing rights), 741 (sale of same land to Town of Southampton by other Tribe members also not reserving fishing rights).) *See also Shinnecock Indian Nation*, 523 F. Supp. 2d at 266-68 (discussing those deeds).

Moreover, even if the Tribe had not itself conveyed to the town all of its interests in the Bay, any remaining rights it had would have been subsequently extinguished by order of the colonial government. "The right to extinguish Indian title, sometimes called a right of extinguishment, was held by the sovereign—Great Britain in the period prior to the American Revolution." *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1150 (2d Cir. 1988). The sovereign could extinguish aboriginal title through contracts, treaty, or other means. *Seneca Nation of Indians v. New York*, 382 F.3d 245, 248 n.4 (2d Cir. 2004); *see also United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941).

Here, New York's colonial governors, acting on behalf of the King, repeatedly determined that the Shinnecock Tribe had no rights in the area comprising the Town of Southampton, including the Bay. Thus, in 1666, a Shinnecock group, seeking to sell a parcel of land west of the Town of Southampton to the town trustees, appealed to then-Governor Richard

Nicolls for a determination of their rights in the parcel, which had previously been sold to Captain Thomas Topping by another group of Shinnecock people (the "Topping Purchase"). (*E.g.*, JA 741.) Governor Nicolls determined that "all the right and interest . . . in the said tract of land meadows or beach mentioned in the[] said deeds is belonging, doth and shall belong unto the towne of Southampton." (JA 742-744.) The language Nicolls deployed demonstrated his "plain and unambiguous intent . . . to extinguish the Shinnecock's aboriginal title to the lands of the Topping Purchase . . . and to recognize that those lands were now owned exclusively by the Town, subject to no other rights or interests." *Shinnecock Indian Nation*, 523 F. Supp. 2d at 270.

Subsequent orders issued by New York's colonial governors ratified all of the conveyances from the Shinnecock Tribe to Southampton and confirmed the extinguishment of any aboriginal rights. In 1676, Governor Edmund Andros issued a patent under royal authority recognizing the Town of Southampton, and its ownership of the land in its general present-day boundaries, including all "Rivers, Lakes, waters Quarrys Wood land Plaines Meadows, pastures, Marshes, ffishing, Hawking Hunting and

ffowling, and all other Proffits, Commodities, Emoluments and hereditaments" with those boundaries. (*E.g.*, JA 760-761; *see also* JA 593-594.)

Again, in 1686, in response to a Southampton freeholder's application to "confirm . . . in a more full & ample manner all the abovecited tracts and parcells of land within the limitts and bounds aforesaid and finally determine the difference between the Indyans and the ffreeholders of the said towne of Southampton," Governor Thomas Dongan, acting under royal authority, issued another patent, which confirmed and reiterated the grants of the Andros patent. (*See* JA 594; *see also* JA 672-676, 762-768.) The Dongan patent recited that the Governor had:

> examined the matter in variance between the ffreeholders of the said Towne of Southampton and the Indyans and do finde that the ffreeholders of the Towne of Southampton aforesaid have lawfully purchased the lands within the Limitts and bounds aforesaid of the Indyans and have payd them therefore according to agreement so that all the Indyan right by virtue of said purchase is invested into the ffreeholders of the Towne of Southampton aforesaid.

(JA 763-764.) And the Dongan patent went on to explicitly grant, ratify, and convey to freeholders and inhabitants of the town, all the "Rivers Rivolets waters lakes ponds Brookes streames beaches . . . Creeks harbors . . . and Easements fishing hawking hunting and fowling" within

its boundaries. (JA 764.) As Judge Bianco explained in a written opinion resolving a prior land dispute between the Shinnecock Tribe and the State, the Dongan patent thus "emphasize[d] in clear and unmistakable language the prior extinguishment of the Shinnecock's aboriginal rights to any and all lands within the bounds of Southampton." *Shinnecock Indian Nation*, 523 F. Supp. 2d at 273.

The smattering of irrelevant deeds and colonial-era materials that plaintiffs cited below are not to the contrary. For instance, the original 1648 deed for the Town of East Hampton (JA 706-708) does contain a reservation of fishing rights, but by its terms it does not apply to the Town of Southampton or to the Shinnecock Bay. Indeed, Southampton provided one of the boundaries to limit the East Hampton deed: "all the Land lyinge from the bounds of the Inhabitants of Southampton . . . not Intrenching uppon any in length or breadth, which the Inhabitants of Southampton, have and do possess, as they by Lawful right shall make appeare." (JA 707.) Similarly, the 1659 Quogue Purchase, a private sale from the Montaukett Tribe sachem Wyandanch to John Ogden, reserved fishing rights, but only, by its express terms, outside of Southampton. (*See* JA 678-679.) The various contracts between Wyandanch and Lion

Gardiner, selling Gardiner grazing access for horses and cattle on a specific beachfront land tract to the west of the Town of Southampton, and divvying up the right to harvest drift whales from the beach,[16] are also inapposite private agreements between a non-Shinnecock Native American and an individual settler, and in any case these contain no reservation of fishing rights at all. (JA 716-717, 719-720, 727-730, 733-734.) And the May 1676 order of New York's colonial governor regarding the fishing rights of the Unkechaug Tribe are inapplicable here both because the Unkechaug Tribe is a separate tribe from the Shinnecock Tribe, and in any case because the order reserves no unlimited fishing rights, and instead provides only that the Unkechaug are entitled to fish in the same manner as English subjects, "according to law and Custome of the Government." (JA 755-757.)

[16] Drift whaling—the processing and sale of the carcasses of dead whales that washed up on shore—was a lucrative aspect of the early Long Island economy. *See* John A. Strong, *The Montaukett Indians of Eastern Long Island* 25 (2001). The various royal orders plaintiffs pointed to below, discussing the Crown's interest in such drift whales, make no mention of the Shinnecock Tribe or any fishing rights. (*See, e.g.*, JA 748-751.)

Because there is no legal basis for the unrestricted fishing rights that plaintiffs assert here, this Court may affirm the grant of summary judgment to the state defendants on this alternative ground as well.[17]

B. In Any Event, the State May Permissibly Regulate Plaintiffs' Conduct Under the Conservation Necessity Doctrine.

Plaintiffs' assertion of an unrestricted right to fish in state waters, off their reservation, in violation of state environmental laws also fails on the independent ground that any such right is subject to the conservation necessity doctrine. The Supreme Court has "repeatedly reaffirmed" that States have the "authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering

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[17] Even if plaintiffs had identified some basis for their asserted fishing rights, equitable principles would at this point bar them from asserting those rights against the State. Both the Supreme Court and this Court have held that the belated assertion of Indian land claims may be barred under the doctrines of laches, acquiescence, and impossibility. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 216-17 (2005); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 274 (2d Cir. 2005). This doctrine applies here because plaintiffs' claim is "disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief." *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 135 (2d Cir. 2010); *see also Shinnecock Indian Nation v. New York*, 628 F. App'x 54, 55 (2d Cir. 2015) (summary order); *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 165 (2d Cir. 2014).

rights in the interest of conservation." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999). Notwithstanding any treaty or other tribal rights (such as the deed-based rights claimed here), "[t]he manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968); *see Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1015 (2019) (noting, in the context of a dispute over the meaning of certain treaty language regarding fishing, that the State "retained the power to impose on Indians, equally with others, such restrictions of a purely regulatory nature . . . as are necessary for the conservation of fish" (quotation marks omitted)).

Here, the laws and regulations from which plaintiffs claim immunity are precisely the type of "purely regulatory" fishing restrictions (on size, number, maturity, and season) that the conservation necessity doctrine preserves. For example, the restrictions imposed on harvesting American eel in state waters are both "reasonable and necessary" and "non-discriminatory" towards Native Americans. *See Mille Lacs*, 526 U.S. at 205

The American eel is an important species whose population is in depleted status according to the ASMFC, the interstate body that manages the eel fisheries located along the Eastern Seaboard. (JA 338-347.) The ASMFC is thus actively managing the eel's population in an effort to conserve it. (JA 338-341.) Notably, one important reason that the population of American eel is depleted is overfishing. (*E.g.*, JA 338-341, 345.) DEC's restriction on the taking of juvenile eels under nine inches long, *see* 6 N.Y.C.R.R. §§ 10.1(a), (b), 40.1(f), brings New York into compliance with the ASMFC's fishery management plan (which is required to avoid federal law penalties, *see* 16 U.S.C. § 5106(c)). Such restrictions, which federal and state policymakers have deemed to be "necessary for the conservation of fish," are precisely the type protected by the conversation necessity doctrine. *E.g.*, *Cougar Den, Inc.*, 139 S. Ct. at 1015 (quotation marks omitted).

Nor are the restrictions on harvesting juvenile eels discriminatory. DEC's rules governing the taking of juvenile eels and other fish are entirely neutral, "purely regulatory" provisions relating to the size and species of the fish, and the season in which it is being harvested. *See Cougar Den, Inc.*, 139 S. Ct. at 1015 (quotation marks omitted). Plaintiffs

point to nothing that might support a finding that such neutral rules governing state waters are in fact discriminatory towards native people. To the contrary, state law and DEC regulations if anything favor native people by making state fishing licenses available to members of the Tribe free of charge. See *supra* at 14.

C. Silva's Claims Are Also Barred by Collateral Estoppel Principles.

Independent of all of the above, Silva's claims are also barred on the merits by collateral estoppel principles.

New York law applies to determine whether a New York state-court judgment has collateral estoppel effect. *Sullivan v. Gagnier*, 225 F.3d 161, 166 (2d Cir. 2000). Under New York law, for a judgment in one proceeding to have collateral estoppel effect in a subsequent proceeding, "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling." *Buechel v. Bain*, 97 N.Y.2d 295, 303-04 (2001).

That standard is met as to Silva. He moved to dismiss the proceeding against him in Southampton Town Justice Court on the basis of the

same unrestricted fishing rights asserted here, based on the same colonial-era deeds and other documents raised in this proceeding, and asserted that the proceeding should be dismissed because his eel net was placed in "an area of retained fishing rights, whether or not outside Shinnecock Reservation waters." (JA 611; *see* JA 63, 606-612.) The issue was decided against him in the state court action; the Town Justice Court held that Silva's net was "placed not on waters or land belonging to the Shinnecock Nation, but on territory within the jurisdiction of the State of New York, acting through" DEC, and accordingly that Silva could be properly charged with and convicted of violating DEC regulations. (JA 194.8, 194.10.) By convicting Silva, the Town Justice Court necessarily rejected his aboriginal rights claim. Moreover, Silva had a full and fair opportunity to litigate the issue, which he briefed before the Town Justice Court in a pre-trial motion and then re-raised at trial. (*See, e.g.*, JA 606-612.) Accordingly, and in addition to all the other grounds for affirmance, collateral estoppel applies here, at least as to Silva.

POINT III

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' DISCRIMINATION CLAIMS

A. Plaintiffs Failed to Raise a Triable Issue on Their Discrimination Claims.

Sections 1981 and 1982 prohibit discrimination on the basis of race with respect to matters of contract, property, and employment, among other areas. *See* 42 U.S.C. §§ 1981-1982. "Sections 1981 and 1982 reach 'only purposeful discrimination.'" *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67, 80 (2d Cir. 2021) (en banc) (quoting *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982)); *see also, e.g.*, *Albert v. Carovano*, 851 F.2d 561, 571 (2d Cir. 1988). Where a plaintiff cannot establish a triable question on intentional racial discrimination, their §§ 1981 and 1982 claims will fail as a matter of law. *See Francis*, 992 F.3d at 80.

Here, plaintiffs have put forth no evidence from which a rational trier of fact could find racially discriminatory intent. The evidence in the record shows that all three plaintiffs were cited by DEC officers for violating race-neutral, generally applicable fishing regulations in state waters. (*E.g.*, JA 19-20.) See *supra* at 16-22. There is no evidence or allegation

that either DEC officer named as a defendant here did or said anything indicative of racial malice. Nor is there evidence that they treated non-Indians more favorably than plaintiffs. To the contrary, Gerrod Smith's non-Indian fishing companion Salvatore Ruggiero was treated in the exact same manner as Smith: he too was cited by DEC agents for taking under-sized and out-of-season fish and ultimately prosecuted in the Town Justice Court. (JA 640-642.) On this record, no jury could determine that DEC's enforcement actions amounted to intentional racial discrimination.

Plaintiffs argue (Br. at 23-26) that the same evidence that they proffered in support of their "bad faith" argument in the *Younger* abstention context—namely, the Bengel and Kreshik internal DEC emails, and DEC's general policy of consultation with Indian tribes—supports the conclusion that the State defendants intended to discriminate on the basis of race. That argument fails.

The agency's policy of promoting cooperation with and respect for Native American tribes cannot reasonably be construed as evidence of racial animus against those tribes or their members. (*See* JA 425-430.) And, as discussed already (see *supra* at 43-44), Plaintiffs have not demonstrated how that general policy of intergovernmental cooperation and

dialogue was violated here, let alone how any failure to heed that general policy could be reasonably construed as evidence of racial animus against them.

Similarly, and as already discussed, the Kreshik email explicitly states that the state environmental regulations must be enforced in a way that "does not discriminate against the Native American treaty right-holders." (JA 422-423.) *See also Puyallup Tribe*, 391 U.S. at 398. Nor does it matter that Bengel used the term "Shinnecocks" in his own internal email describing how the tribe was investigating shippers to bring juvenile eels to market. (JA 420.) Nothing about Bengel's email, which focused on information he had learned about possible harvesting of elvers by a number of tribes, and the need for diligent enforcement off of the Shinnecock Reservation to stop an "illegal harvest," contains anything that a reasonable juror might mistake for racial animus of any kind. (*see* JA 420.) See *supra* at 44-45.

B. Gerrod Smith's and Jonathan Smith's Discrimination Claims Are Time-Barred.

Additionally, Gerrod Smith's and Jonathan Smith's §§ 1981 and 1982 claims are also time-barred under the three-year statute of limitations applicable to those claims—an independent ground for dismissing their claims on that score. *See Duplan v. City of New York*, 888 F.3d 612, 619-20 (2d Cir. 2018). Plaintiffs argue (Br. at 26-27) that the statute of limitations was "tolled" for them under the "continuing violations exception," but that concept is inapposite here. "To trigger the continuing violation doctrine when challenging discrimination, the plaintiff 'must allege both the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy.'" *Shomo v. City of New York*, 579 F.3d 176, 181 (2d Cir. 2009).

Plaintiffs can point to neither. They point to no "proof of specific ongoing discriminatory polic[ies] or practices" at DEC beyond the (insufficient) evidence they proffered to support their general discrimination claim. *See Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994). Nor do they allege even a single discriminatory act as to them within the limitations period. Accordingly, the continuing violation doctrine has no place

here, and Gerrod Smith's and Jonathan Smith's claims are time-barred. *See Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996).

C. The Discrimination Claims Also Fail as Against DEC Commissioner Seggos for Lack of Personal Involvement.

Even if plaintiffs had substantiated their claim as to DEC officers Laczi and Farrish (and they have not), their claims against DEC Commissioner Seggos would still fail. In their opening brief, Plaintiffs offer no evidence of Commissioner Seggos's personal involvement or direct connection to the alleged events here, nor does the record contain any such evidence. The fact that Commissioner Seggos "held a high position of authority" at DEC is insufficient to prove his personal involvement. *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 127 (2d Cir. 2004) (quotation marks omitted).

CONCLUSION

The judgment should be affirmed.

Dated: New York, New York
September 29, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 12,742 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Kelly Cheung*