20-4247

United States Court of Appeals for the Second Circuit

SENECA NATION, *a federally recognized Indian tribe*,

Plaintiff-Appellee,

v.

ANDREW CUOMO, *in his official capacity as Governor of New York*; LETITIA JAMES, *in her official capacity as New York State Attorney General*; PAUL A. KARAS, *in his official capacity as Acting Commissioner of the New York State Department of Transportation*; THOMAS P. DINAPOLI, *in his official capacity as Comptroller of the State of New York*; and THE NEW YORK STATE THRUWAY AUTHORITY,

Defendants-Appellants.

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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Dated: August 3, 2021

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

PAGE

PRELIMINARY STATEMENT

The Eleventh Amendment bars the Seneca Nation's challenge to a permanent easement held by the State of New York. Obtained by the State in 1954, the easement permits the operation of the New York State Thruway across a portion of the Seneca Nation's Cattaraugus Reservation. This is the second time the Nation has challenged the easement in federal court. This Court properly affirmed the dismissal of the earlier action because the real party in interest was the State, and the State was immune from suit under the Eleventh Amendment.

While the Nation tries to fit its claims into the confines of *Ex parte Young*, its effort is defeated by the key fact supporting defendants' assertion of Eleventh Amendment immunity: that the real party in interest here is the State. Indeed, the state officers named as defendants in this action—the Governor, Attorney General, Department of Transportation Commissioner, and Comptroller, all in their official capacity—have no alleged connection to either the easement or the operation of the Thruway; they are mere stand-ins for the State itself. Because the Nation's challenge to the State's Thruway easement is the functional equivalent of a quiet title action against the State that

implicates core state sovereignty interests, it may not be brought in federal court. Moreover, given this Court's earlier decision, the Nation is collaterally estopped from contesting that the State is the real party in interest.

The Eleventh Amendment bars the claims against the state officer defendants for the additional reason that the Nation essentially seeks compensatory relief for a past alleged wrong. The Nation tries to fit this case into the *Ex parte Young* exception by arguing that the State is violating its treaty rights. But the Nation alleges no interference with its free use and enjoyment of the Cattaraugus Reservation, nor does it complain about the presence of the Thruway on its land. Rather, the core of the Nations' claims is the alleged violation of the Non-Intercourse Act in 1954, when the Nation sold the Thruway easement to the State allegedly without federal approval. By way of relief, the Nation seeks to renegotiate the monetary terms of that conveyance. That relief is unavailable in this forum.

Because the Eleventh Amendment bars this action, this Court should reverse the district court's order denying defendants' motion to dismiss.

ARGUMENT

The Eleventh Amendment protects states from suit in federal court absent their consent. The Nation seeks to avoid the State's Eleventh Amendment immunity by invoking the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which permits a plaintiff to seek prospective relief against state officers in federal court to prevent those officers from violating federal law. But *Ex parte Young* "is limited to that precise situation," *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011), and has no application here. Even a suit against state officers must be dismissed "when the state is the real, substantial party in interest." *Id.* (citation omitted). That is precisely the case here.

Although nominally brought against state officers and the Thruway Authority, the Nation's claims are in fact against the State itself for two reasons. First, the Nation challenges the validity of a permanent easement held by the State along which runs a major state highway. This challenge is the functional equivalent of a quiet title action, and implicates the State's significant sovereign interest in that highway. Indeed, this Court held that the State was the real party in interest in the Nation's earlier challenge to the Thruway easement, and the Nation

is collaterally estopped from asserting otherwise. Second, the Nation essentially seeks backward-looking, monetary relief for a past alleged wrong (the sale of the Thruway easement without federal approval). For both reasons, the first of which this Court has already embraced in the earlier case, the Nation's claims are barred by the Eleventh Amendment.

POINT I

THE NATION IS BARRED FROM CHALLENGING THE VALIDITY OF THE THRUWAY EASEMENT

A. This Suit Is the Functional Equivalent of a Quiet Title Action Against the State, Which Cannot Be Brought in Federal Court.

It is well settled that "[a] federal court cannot summon a State before it in a private action seeking to divest the State of a property interest." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 289 (1997) (O'Connor, J., concurring). "The Eleventh Amendment would bar it." *Id.* at 282 (citing *Tindal v. Wesley*, 167 U.S. 204, 223 (1897)). As the Supreme Court recognized in *Coeur d'Alene*, the same bar applies to "the functional equivalent of a quiet title action" in which the real party in interest is the state. *Id.* at 281.

That is the nature of the Nation's claims here. By challenging the validity of the Thruway easement, the Nation seeks to extinguish a real property right held by the State for over sixty years. And that right protects the State's "special sovereignty interests" in an immensely important public highway, much as the real property right in *Coeur d'Alene* protected the state's longstanding sovereign interests in submerged land. 521 U.S. at 281. Thus, here as in *Coeur d'Alene*, "it simply cannot be said that the suit is not a suit against the State." *Id.* at 296 (O'Connor, J., concurring).

Indeed, as discussed further below (Point I.B), this Court has already held that the Nation's challenge to the Thruway easement is a claim against the State. *Seneca Nation of Indians v. New York*, 383 F.3d 45 (2d Cir. 2004) (affirming district court's conclusion that the State is an indispensable party), *cert. denied*, 547 U.S. 1178 (2006). The Nation contends (Br. 24, 27) that by naming state officers as defendants, it avoids the Eleventh Amendment bar on suing the State in federal court. But merely naming state officers does not suffice to fit this case into *Ex parte Young*. "Under *Ex parte Young*, the state officer against whom a suit is brought 'must have some connection with the enforcement of the

act' that is in continued violation of federal law." *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372-73 (2d Cir. 2005) (quoting *Ex parte Young*, 209 U.S. at 154, 157). No such connection exists here. The Nation does not and cannot allege that the state official defendants are involved with the operation of the Thruway, or are otherwise violating federal law. Absent such allegations, the only plausible reading of the complaint is that the state officer defendants are merely stand-ins for the State itself. *See Ex parte Young*, 209 U.S. at 157 ("In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party."); *see also Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 995 (9th Cir. 2020) (concluding that tribal official defendants were stand-ins for tribe itself because complaint "fail[ed] to articulate any connection between the particular named tribal officers and any allegedly unlawful conduct"), *petition for cert. docketed*, No. 20-1559 (May 11, 2021).

The Nation does not even attempt to explain what actions of the individual state defendants constitute ongoing violations of federal law. To the contrary, the Nation appears to accept that this action challenges a real property interest of the State. (*E.g.*, Br. 23.) And while the Nation spends much of its brief trying to distinguish *Coeur d'Alene* and the principles it applies, its attempts to do so are unavailing.

First, the Nation argues that the Court's holding in *Coeur d'Alene* applies only to submerged lands and navigable waterways. (Br. 35-40.) Yet in *Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004), this Court applied *Coeur d'Alene* to a claim asserting Indian title over a vast swathe of public land across ten counties in upstate New York. *W. Mohegan*, 395 F.3d at 20, 22. The tribe in that case sought "the right to camp, to hunt, to fish, and to use the waters and timbers in the contested lands and waterways," as well as to exclude others from the land. *Id.* at 22 (internal quotation marks and brackets omitted). To be sure, the disputed territory included some submerged lands. But the State's sovereign and regulatory interest in the remainder of the territory—including the State Capitol—was no less significant merely because it was not submerged. *See id.* at 20.

Other courts have applied *Coeur d'Alene* to property disputes that did not involve submerged lands or navigable waterways. For example, the Sixth Circuit has held that the Eleventh Amendment barred a homeowner's challenge to a public right-of-way providing beach access under Michigan law. *MacDonald v. Village of Northport*, 164 F.3d 964, 966, 972 (6th Cir. 1999). Likewise, the Ninth Circuit has held that tribal immunity barred a suit seeking a declaration that a tribe's "federal trust land is not part of its reservation." *Jamul Action Comm.*, 974 F.3d at 996. Neither case involved submerged lands. And in both cases, the court held that the sovereign was the real party in interest, even though (as here) the actions were nominally brought against individual officials. *Jamul Action Comm.*, 974 F.3d at 995 (holding that "suit falls outside the class of suits allowed under *Ex parte Young*" because "the Village, not the named tribal officers, is the real party in interest"); *MacDonald*, 164 F.3d at 972-73.

Second, the Nation argues that the State's property rights in the Thruway easement "are not comparable to those in *Coeur d'Alene* or *Western Mohegan*." (Br. 41; *see also* Br. 47-51.) The property interests at stake in those cases were weighty, but so is the State's interest here. The

disputed land is profoundly important to the State and its residents. As the Nation itself notes, 250 million vehicles travel 8 billion miles on the Thruway annually. (Br. 13.) And while the State does not own the disputed land, it holds a permanent easement permitting operation of the Thruway in perpetuity. (JA110.) If the Nation were to prevail in this suit, "substantially all benefits of ownership and control would shift from the State to the [Nation]." *Coeur d'Alene*, 521 U.S. at 282. The Nation's challenge to the validity of the easement thus "implicates special sovereignty interests"—namely, the State's ability to maintain a critical piece of its highway infrastructure. *Id.* at 281.

In arguing that *Coeur d'Alene* does not apply to a challenge to an easement held by a state, the Nation relies exclusively on one Fifth Circuit case, *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009). Its reliance is misplaced. That case principally involved a takings claim and an unlawful seizure claim by a homeowner whose house was subject to a removal order by Texas state officials. *Severance*, 566 F.3d at 494-95. Those officials sought to remove the plaintiff's house because, after significant beach erosion, the house came to be located on dry beach, which is subject to a public easement under Texas law. *Id.* at 493-94. The

plaintiff sought declaratory and injunctive relief to prevent those officials from enforcing the easement. *Id.* at 494. In seeking that prospective relief, the plaintiff therefore challenged the *extension* of a public easement to appropriate plaintiff's property without just compensation—not, as here, the validity of a sixty-year-old easement held by the State. *See id.* at 502. Nor did the easement in *Severance* implicate significant sovereignty interests. Thus, the Fifth Circuit's summary conclusion that the suit was "not the functional equivalent of a quiet-title action," *id.* at 495, has no bearing here.[1]

The Nation also cites several other cases in which courts declined to apply *Coeur d'Alene*, but those cases—unlike this one—were not the functional equivalent of a quiet title action. This Court's decision in *In re Deposit Insurance Agency*, 482 F.3d 612 (2d Cir. 2007), for example, was a dispute about custody of bank assets—not title to real property. Likewise, *Timpanogos Tribe v. Conway*, 286 F.3d 1195 (10th Cir. 2002),

[1] For the same reason, the Nation finds no support in *Seneca Nation of Indians v. New York*, 397 F. Supp. 685 (W.D.N.Y. 1975). The Nation in that case challenged the State's *appropriation* of land by seeking to enjoin a specific state officer from exercising eminent domain within the Nation's Allegany Reservation.

and *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), concerned tribal members' hunting and fishing rights. And the Tenth Circuit's decision in *Elephant Butte Irrigation District of New Mexico v. Department of Interior*, 160 F.3d 602 (10th Cir. 1998), involved future profits from an allegedly invalid recreational land lease. The court found that this challenge to a purely monetary interest in land did "not rise to the level of implicating special sovereignty interests." *Id.* at 612; *see also Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 501-02 (5th Cir. 2001) (*Coeur d'Alene* did not apply to Contract Clause challenge seeking to enjoin Mississippi state officials from changing price terms in renewable, long-term leases).

Third, the Nation vastly understates the effect of the relief it seeks, in a futile effort to claim that the State's sovereign authority over land is not at issue. (Br. 42-43, 45-46.) As in *Coeur d'Alene* and *Western Mohegan*, the consequences of the relief sought here "go[] well beyond the typical stakes in a real property quiet title action." *Coeur d'Alene*, 521 U.S. at 282. (*See* Br. 45.) While the Nation disclaims any present intent to eject the State from the Cattaraugus Reservation, the Nation concedes—as it must—that this case "challenges the continued operation

of the Thruway across the Nation's land." (Br. 59.) And every one of the remedies the Nation seeks is premised on the invalidity of the State's Thruway easement. For instance, the Nation seeks a declaration that defendants "are violating federal law by not obtaining a valid easement for the portion of the Thruway over the Nation's Reservation lands" and an injunction barring defendants "from continuing unauthorized use [of the Reservation] for the purpose of operating a toll road without a valid easement." (JA20, 23.)

If granted, the relief sought by the Nation would effectively extinguish the State's title to the easement, thereby undermining the sole legal basis by which the State operates the portion of the Thruway that crosses the Nation's Cattaraugus Reservation. Although the Nation has not asked for ejectment or similar relief in this action, its success here would open the door to future enforcement of its sovereign rights over the land covered by the easement.[2] For this reason, as in *Coeur d'Alene*, "[t]o

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[2] Contrary to the Nation's assertion (Br. 46, n.7), the doctrine of judicial estoppel would not bar the Nation from seeking to enforce its sovereign rights to the land encompassed by the State's easement should a federal court declare the easement to be invalid. Judicial estoppel prevents a party from taking inconsistent legal or factual positions in the

(*continued on the next page*)

pass this off as a judgment causing little or no offense to [the State's] sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands." *Coeur d'Alene*, 521 U.S. at 282.

Fourth, the Nation mistakenly asserts that if the Eleventh Amendment bars this suit, then "state officials could appropriate Indian land" and "permanently escape suit in federal court." (Br. 50.) Not so. As this Court noted in *In re Deposit Insurance Agency*, the Eleventh Amendment does not "prevent[] a federal court from providing relief from governmental officials taking illegal possession of property in violation of federal law." 482 F.3d at 619. For example, a tribe could seek ejectment of individual state officials. *See Coeur d'Alene*, 521 U.S. at 290 (O'Connor, J., concurring); *see also Tindal*, 167 U.S. at 223-24. A tribe could also assert a takings claim against individual state officials. *See Severance*, 566 F.3d at 495; *Seneca Nation of Indians v. New York*, 397 F. Supp. 685 (W.D.N.Y. 1975). Alternatively, the federal government could intervene in a land claim to abrogate the State's immunity, as it did when the

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same or subsequent proceedings. But there is no inconsistency between asserting invalidity of the easement now, and ejecting the State in the future.

Nation sought to invalidate the 1815 sale of certain islands in the Niagara River to the State. *See Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004).

What the Nation cannot do in federal court, however, is seek to invalidate a sixty-year-old permanent easement held by the State that permits the operation of a critical piece of the State's highway infrastructure. The Eleventh Amendment requires dismissal of the Nation's claims.

B. Collateral Estoppel Bars the Nation from Relitigating Eleventh Amendment Immunity Here.

Not only is the State the real party in interest here, but the Nation is collaterally estopped from asserting otherwise. In the Nation's earlier challenge to the Thruway easement, this Court affirmed the district court's holding that the State was a necessary and indispensable party under Federal Rule of Civil Procedure 19. *Seneca Nation*, 383 F.3d at 47-49. Thus, the Court held, the action could not proceed against the other named defendants—the Thruway Authority and its Executive Director.

In reaching that conclusion, this Court expressly determined that the Nation's challenge to the easement was essentially a claim against

the State, and that is the very issue that determines the State's Eleventh Amendment immunity here. In the earlier case, the Court was required to determine whether the State was a necessary party, and if so whether the action should proceed without the State.[3] The Court held that the State was a necessary party to the suit because the State, "rather than the Thruway Authority, owned the [Thruway] easement." *Seneca Nation*, 383 F.3d at 48. The Court then proceeded to analyze whether the case could proceed in the absence of the State. In affirming that it could not, the Court specifically emphasized "the significance sovereign immunity plays in weighing the Rule 19(b) factors." *Id.* at 49. The Court found no abuse of discretion in the magistrate judge's conclusion that a judgment for the Nation "would undeniably prejudice the State's governmental interest in securing and protecting property rights acquired on behalf of the people of the state" and that "relief could not [have been] shaped so as to lessen this prejudice." *Id.* at 48. Given the "paramount importance to be accorded to the State's immunity from suit," the Court affirmed the

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[3] The Nation had named the State as a defendant, but on appeal the Nation did not contest that the State was immune from suit. *Seneca Nation*, 383 F.3d at 47.

district court's holding that the Rule 19(b) factors weighed in favor of dismissing the claims against the non-State defendants, *i.e.*, the Thruway Authority and its Executive Director. *Id.* at 48-49.

As noted above, the only difference between the earlier action and this one is that the Nation now names individual state officials instead of the State itself. But naming state officials who are merely stand-ins for the State does not cure the Rule 19 defect this Court previously found. In this regard, this Court's decision in *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542 (2d Cir. 1991), which the Court cited in *Seneca Nation*, is instructive.

Fluent involved a challenge to an agreement between the Seneca Nation and the City of Salamanca—most of which falls within the boundaries of the Nation's Allegany Reservation—governing leases to non-native residents of the city. Several of those residents sued the Nation as well as various officers of the Nation. Notwithstanding that Nation officers were named as defendants, the Court affirmed the district court's holding that the Nation itself was a necessary and indispensable party. Under Rule 19(a), the Court determined that "the Nation's interest in the validity of the lease agreement is significant" given that the Nation

was a party to the agreement "negotiated for over two decades." *Fluent*, 928 F.2d at 547. The Court noted the common law principle that "in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Id.* (quoting *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)). And under Rule 19(b), the Court agreed with the district court that the claim should not be adjudicated in the Nation's absence because of "the emphasis placed on immunity in the weighing of rule 19(b) factors." *Id.* at 548. The Court explained that tribal immunity weighs heavily under Rule 19(b) because "society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Id.* (quoting *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986)).[4]

Just as the Nation was an indispensable party in *Fluent*, the State is an indispensable party here. The Court's ruling on that very issue

[4] As the D.C. Circuit noted in *Wichita & Affiliated Tribes*, "there is very little room for balancing of other factors" when a necessary party is immune because immunity is "one of those interests compelling by themselves." 788 F.2d at 777 n.13 (citation omitted); *accord White v. Univ. of California*, 765 F.3d 1010, 1028 (9th Cir. 2014).

"stands for the unsurprising proposition that an absent sovereign may be a necessary party to a lawsuit that calls into question a real property interest of the sovereign." *Am. Trucking Ass'n, Inc. v. N.Y. State Thruway Auth.*, 795 F.3d 351, 357 n.2 (2d Cir. 2015). And the Nation cannot circumvent the Rule 19 defect by naming individual state officers as defendants, no more than the plaintiffs in *Fluent* could have circumvented Rule 19 by naming Nation officials.

The Nation mistakenly contends (at 30-34) that applying collateral estoppel here would "hobble" the *Ex parte Young* doctrine. If the earlier case (or this case) had sought prospective relief to remedy an ongoing violation of federal law, and were not the functional equivalent of a quiet title action, then of course the Nation could bring a claim against state officers—as opposed to the State itself—under *Ex parte Young*. The Nation cites several cases which stand for that unsurprising proposition. *See Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012); *see also Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1236 (10th Cir. 2014); *Salt River Project Agr. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012); *Kansas v. United States*, 249 F.3d 1213, 1226-27 (10th Cir. 2001). But in each of those cases, the court held that the

sovereign was *not an indispensable party*, precisely because the claim could proceed against individual officers under *Ex parte Young*.

Here, the Court held that the State itself was indispensable, even though the Thruway Authority and its Executive Director were also named as defendants. At bottom, the Nation merely disagrees with that holding. But as much as the Nation may wish to relitigate the issues in the earlier action, it is collaterally estopped from doing so.

POINT II

THE NATION IS BARRED FROM SEEKING TO RECOVER THE VALUE OF THE THRUWAY EASEMENT

The Eleventh Amendment bars the relief the Nation seeks against the individual defendants for the additional, independent reason that the Nation essentially seeks to recover the fair value of the Thruway easement it sold to the State, allegedly in violation of the Non-Intercourse Act, 25 U.S.C. § 177. This is not prospective relief designed to remedy an ongoing federal law violation. Rather, the Nation's requested relief "is tantamount to an award of damages for a past violation of federal law." *Papasan v. Allain*, 478 U.S. 265, 278 (1986). Such relief is not available in an *Ex parte Young* suit.

In attempting to shoehorn this case into the *Ex parte Young* exception, the Nation obscures the federal law violation at issue. The core of the Nations' claims is that the Thruway easement was void *ab initio* because in 1954, the Nation transferred the easement to the State without federal approval. The Nation claims that this land sale violated the Non-Intercourse Act. (JA13-14, 18.) In their brief on appeal, defendants pointed out that the Non-Intercourse Act is not a statute that may be continuously violated. (Def. Br. 25.) Apparently conceding that point, the Nation now changes course. It mentions the Non-Intercourse Act only in passing (Br. 12), and instead principally argues that operation of the Thruway in the Cattaraugus Reservation disturbs its right to "the free use and enjoyment" of the Reservation under the Canandaigua Treaty of 1794 (Br. 52). *See* Treaty with the Six Nations, 7 Stat. 44, 45 (Nov. 11, 1794). This Court has interpreted that treaty right "as preventing American encroachment onto Seneca lands, or interference with the Seneca Nation's use of its lands." *Perkins v. Comm'r of Internal Revenue*, 970 F.3d 148, 158 (2d Cir. 2020), *petition for cert. docketed*, No. 20-1388 (Apr. 6, 2021).

The problem with the Nation's argument is that the complaint fails to allege any interference with the Nation's free use and enjoyment of the Cattaraugus Reservation. The Nation raises no complaint about the State's operation of the Thruway apart from its failure to render fair compensation for this use; the Nation assures the Court that it does not allege any trespass and does not seek ejectment. (*E.g.*, Br. 45.) Nor does the Nation suggest that the State is preventing its members from using the Thruway.[5] Thus, the Nation's claims "rest upon a disingenious [sic] allegation of a continuing federal law violation." *In re Dairy Mart*, 411 F.3d at 376.

Moreover, the relief the Nation seeks would not "directly [] bring an end" to any interference with the Nation's use and enjoyment of its land, as *Ex parte Young* requires. *Papasan*, 478 U.S. at 278. Rather, the Nation's requested relief would remedy only the past alleged violation of

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[5] In this way, the Nation's claims differ from claims alleging genuine interference with treaty rights, like those asserted in *Mille Lacs Band*, 124 F.3d at 914, and *Seneca Nation v. New York*, 397 F. Supp. at 686. (*See* Br. 53.) In *Mille Lacs Band*, the plaintiffs sought to vindicate their "treaty rights to hunt, fish, and gather in the ceded lands free of state regulation." 124 F.3d at 910. And in *Seneca Nation*, the Nation challenged the State's appropriation of land to construct a highway. 397 F. Supp. at 685.

the Non-Intercourse Act. The Nation seeks an order (1) declaring that defendants "are violating federal law by not obtaining a valid easement," and that tolls attributable to the portion of the Thruway situated on the easement "are derived from this violation of federal law"; (2) requiring defendants to obtain a "valid easement" "on terms that will in the future equitably compensate the Nation pro rata for future use of its lands" or, alternatively, barring defendants from collecting tolls derived from the easement; and (3) requiring the Comptroller to hold any such collected tolls in escrow until defendants obtain a valid easement. (JA23.) Each of these requested remedies relies on the same alleged predicate: not that the operation of the Thruway is interfering with the Nation's use and enjoyment of its land, but that the 1954 sale of the Thruway easement violated the Non-Intercourse Act. (JA13-14, 18.) And the state officials are named as defendants not because they have any personal involvement in the operation of the Thruway—the complaint contains no such allegations—but because they have the authority to renegotiate the terms of the easement on behalf of the State (or, in the case of the Comptroller, because he has access to toll proceeds). (JA19-20.)

The Nation's argument that an *Ex parte Young* suit may lie to enjoin ongoing violations traceable to a past wrong is beside the point. The case it cites in support of that argument, *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460 (5th Cir. 2020), merely held that the Eleventh Amendment did not bar a "request to restrain state officials from enforcing an unlawful order." *Id.* at 473. The officials' continuing *conduct* in relation to that order permitted injunctive relief under *Ex parte Young*. Here, by contrast, the Nation pleads only continuing *harm* from a past wrong for which it seeks fair compensation. That is not enough to defeat Eleventh Amendment immunity.

The Nation's claims are also barred because even though the Nation styles its relief as equitable, in substance its claims seek money from the State. Each of its requested remedies focuses on the tolls attributed to the Thruway easement. And although the Nation seeks a new easement, it has no objection to the operation of the Thruway along the easement. Thus, its request for a new easement focuses on one term—the price term—such that the new easement would "equitably *compensate* the Nation." (JA23 (emphasis added).) *See Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 129-32 (2d Cir. 2010) (holding that

Eleventh Amendment barred contract claim to recover fair market value of land sold to State), *cert. denied*, 565 U.S. 970 (2011).[6]

To be sure, a plaintiff in an *Ex parte Young* suit is not barred from seeking equitable relief even though such relief is "accompanied by a substantial ancillary effect on the state treasury." *Papasan*, 478 U.S. at 278. Thus, the plaintiffs in *Papasan* were entitled to seek relief remedying Mississippi's unequal distribution of school funds in violation of the Equal Protection Clause. "[B]ut the essence of the equal protection allegation," the Court explained in that case, was "the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State." *Id.* at 282.

As defendants explained in their opening brief (at 23-26), the Court in *Papasan* reached a different conclusion with respect to the plaintiffs' breach of trust claim. That claim sought "continuing payment of the income" from land that the state was allegedly obligated to have held in

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[6] In attempting to distinguish *Oneida Indian Nation*, the Nation argues that it does not seek to renegotiate the allegedly invalid sale of the Thruway easement. (Br. 59-60.) But that is the inevitable effect of the relief the Nation seeks: requiring the State to obtain a new easement giving it the same right to operate the Thruway, but on terms that will equitably compensate the Nation. (JA23.)

trust for the plaintiffs' school districts. *Papasan*, 478 U.S. at 281. Because of the "past loss of [that] trust corpus," Mississippi would have been required "to use its own resources to take the place of the corpus." *Id.* The Court regarded Mississippi's "continuing obligation to meet trust responsibilities" as the equivalent of "a not-yet-extinguished liability for a past breach of trust," and thus held that the plaintiffs' breach of trust claim sought compensation for a past wrong. *Id.*

Contrary to the Nation's argument (Br. 57-59), its claims resemble the breach of trust claim in *Papasan*, not the equal protection claim. Just like the plaintiffs in *Papasan*, the Nation is attempting invoke *Ex parte Young* by repackaging the State's alleged unextinguished liability for a past invalid conveyance as a "continuing obligation" to remit current income attributable to the conveyed interest. And to remedy that alleged past wrong, the State would have to use its own resources to compensate the Nation for the fair value of the Thruway easement. Such compensatory relief against the State is not available in federal court.

This Court and others have come to the same conclusion in many other cases in which plaintiffs ostensibly seek equitable relief under *Ex parte Young*. In *Ford v. Reynolds*, 316 F.3d 351 (2d Cir. 2003), for

example, the plaintiffs sought an order enjoining the state official defendants from denying honoraria to certain individuals who had spoken at a college event. The Court had no trouble seeing through the equitable nature of this relief; because "[t]he only relief sought" was "payment of the honoraria," no injunctive relief was available under *Ex parte Young*. *Ford*, 316 F.3d at 355. And in *Waterfront Commission of New York Harbor v. Governor of New Jersey*, 961 F.3d 234 (3d Cir. 2020), *petition for cert. docketed*, No. 20-772 (Dec. 8, 2020), the plaintiff commission sought to enjoin enforcement of a statute that would redirect assessments from the commission to the State of New Jersey. The Third Circuit noted that the suit was "no mere attempt to compel or forestall a state official's actions consistent with *Ex parte Young*'s holding." *Id.* at 240. Rather, because the requested injunction "would divert state treasury funding," it would impermissibly "operate against the State." *Id.* at 241.

Nor can the Nation avoid the Eleventh Amendment by purporting to disavow a request for past compensation. The Nation assures the Court that it "does not seek any compensation for the state officers' use of the purported easement from 1954 until now," and on that basis seeks

to distinguish the breach of trust claim in *Papasan*. (Br. 58.) But the Court in *Papasan* explicitly addressed, and rejected, a similar claim for future compensation. The relief the plaintiffs sought there included the payment of continuing income on the lost trust corpus. *Papasan*, 478 U.S. at 281. The Court explained that even if the plaintiffs were seeking *only* the continuing income from the lost corpus, "such payment would be merely a substitute for the return of the trust corpus itself." *Id.* at 281. In other words, "continuing payment of the income from the lost corpus [was] essentially equivalent in economic terms to a one-time restoration of the lost corpus itself." *Id.* Here, likewise, future income from toll proceeds is economically equivalent to a lump sum payment for the fair value of the Thruway easement.

Thus, while the Nation disclaims seeking "retrospective relief in the guise of a prospective remedy" (Br. 59), that is precisely the nature of its requested relief. As such, the Nation's lawsuit does not come within *Ex parte Young*, and its official-capacity claims against the individual defendants must be dismissed under the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's denial of defendants' motion to dismiss.

Dated: Albany, New York
August 3, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Beezly J. Kiernan, 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 **5,706** words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Beezly J. Kiernan