20-4247

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SENECA NATION, *a federally recognized Indian tribe*,
Plaintiff-Appellee,
v.
ANDREW M. CUOMO, *in his official capacity as Governor of New York,* LETITIA A. 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,* THE NEW YORK STATE THRUWAY AUTHORITY,
Defendants-Appellants.

On Appeal from the U.S. District Court
for the Western District of New York

BRIEF OF PLAINTIFF-APPELLEE SENECA NATION

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The District Court denied Appellants' motion to dismiss on September 3, 2020. This Court granted Appellants' motion for leave to take an interlocutory appeal on December 29, 2020. This Court has jurisdiction under 28 U.S.C. § 1292(b).

ISSUES PRESENTED FOR REVIEW

Under *Ex parte Young*, 209 U.S. 123 (1908), a party may seek prospective equitable relief against state officials in their official capacities to remedy ongoing violations of federal law, even if the state declines to waive sovereign immunity. The questions presented are:

1. Whether the ordinary operation of *Ex parte Young* permits a suit against state officials to enjoin ongoing violations of federal law following the dismissal of a prior suit brought against an immune state directly.

2. Whether the Seneca Nation of Indians may seek to remedy the state officers' ongoing illegal use of the Nation's reservation land, notwithstanding the narrow exception to *Ex parte Young* the Supreme Court carved out in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), which concerned a state's longstanding ownership of and regulatory control over submerged lands.

3. Whether the Nation adequately pleaded its claims—which seek limited, prospective, equitable relief designed to bring the state officers' ongoing illegal use of a purported easement into compliance with federal law—under *Ex parte Young*.

INTRODUCTION

Under the longstanding doctrine of *Ex parte Young*, 209 U.S. 123 (1908), parties may sue state officials in their official capacities for prospective injunctive and declaratory relief to remedy ongoing violations of federal law. An *Ex parte Young* suit may proceed even when a suit implicates sovereign interests and even when a state declines to waive its sovereign immunity. Indeed, enabling such suits is the whole point of *Ex parte Young*.

Here, the Seneca Nation of Indians ("the Nation") sued New York state officers under *Ex parte Young* for equitable relief regarding the officers' illegal use of a purported easement bisecting the Nation's sovereign reservation land. The District Court denied the state officers' motion to dismiss and held that the Nation's lawsuit readily satisfies *Ex parte Young*'s two straightforward requirements, in that it seeks (i) forward-looking equitable relief for (ii) ongoing violations of federal treaties and other laws. This Court should reject the state officers' various arguments for weakening *Ex parte Young*, and affirm the District Court's order.

First, the state officers' collateral estoppel argument misstates the issues this Court decided in an earlier suit the Nation brought against New York State directly, and collapses the fundamental distinction between a suit against a sovereign state and a suit against state officials. In the Nation's earlier suit, a federal magistrate judge had found it to be "undisputed" that the purported easement violates federal requirements. Nevertheless, the district court and this Court held that the Eleventh Amendment prevented the Nation from proceeding to the merits of its claim against the Thruway Authority and its Executive Director, given that New York State was an indispensable party. As the state officers correctly conceded below, however, "failure to join an indispensable, immune party can be cured by suing state officials in their official capacity for prospective injunctive relief." JA235. Thus, the earlier decision finding New York *State* to be indispensable does not preclude the Nation's current litigation against New York's *state officials*. Although the state officers argue that the substitution of state officials for New York State in this lawsuit is a "distinction without a difference," this distinction is the very foundation of the *Ex parte Young* doctrine. Embracing the state officers' view would kneecap *Ex parte Young*.

Second, the state officers ask this Court to blow open the narrow exception to *Ex parte Young* a divided Supreme Court carved out in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). There, the Court held that the Eleventh Amendment proscribed a suit that sought wholly to remove a state's regulatory power and divest it of title over a swath of submerged lands, even though the suit otherwise would have satisfied *Ex parte Young*'s requirements. As this Court and several others have recognized, *Coeur d'Alene* narrowly applies to cases implicating the unique sovereignty interests that inhere in submerged lands and seeking to completely divest a state of its regulatory powers. *Ex parte Young* remains available in virtually all cases—including those that concern weighty sovereign interests like state use and control of property. Were it otherwise, state officials could (among many other things) appropriate federally protected Indian land and permanently escape suit in federal court. *Coeur d'Alene* thus does not prevent the Nation from invoking *Ex parte Young*—particularly because the Nation has explicitly disclaimed ejectment or any other remedy that might intrude on the State's regulatory powers.

Third, the state officers' characterization of the Nation's requested relief as a backward-looking request to "renegotiate" the purported easement misapprehends both Supreme Court precedent and the Nation's complaint. The Nation's complaint requests prospective equitable relief requiring the state officers to obtain a valid easement to correct an ongoing infringement of the Nation's federal treaty rights and other federal laws. This is precisely the kind of ongoing violation tribes have asserted in analogous *Ex parte Young* suits. As the District Court observed, the Nation targets the state officers' *current* unlawful use of the Nation's lands and seeks a remedy going forward. Under *Papasan v. Allain*, 478 U.S. 265 (1986), it makes no difference that the officers' ongoing violation can be traced back to a specific illegal act.

The District Court's decision to deny the state officers' motion to dismiss is consistent with basic, deep-rooted *Ex parte Young* principles. It did not reach the merits of the Nation's claims—indeed, no court has—but rather merely rejected the state officers' novel, crabbed reading of *Ex parte Young*. Because that decision was correct, this Court should affirm.

STATEMENT OF THE CASE[1]

In 2018, the Nation, a sovereign and federally recognized Indian tribe, filed the current suit against New York state officers in their official capacities seeking equitable relief on a going-forward basis for their illegal use of a portion of the Nation's historic Cattaraugus Reservation. JA11. The Nation named these defendants pursuant to *Ex parte Young*, which permits such relief against state officers despite the State's immunity under the Eleventh Amendment. *Id.*

A. The Nation's Reservation And The Purported Easement

The Nation owns and occupies the Cattaraugus Reservation in western New York. JA11. The Cattaraugus Reservation has always consisted of lands held by the Nation in restricted fee, subject to federal restraints on alienation of those lands to New York or private parties. JA13. The United States has recognized the Nation's ownership and possession of the land since at least 1794, when the Nation and the United States entered into the Treaty of Canandaigua. JA11. The treaty

[1] Because this case arises from the denial of a motion to dismiss, the background facts are taken from the well-pleaded allegations in the complaint.

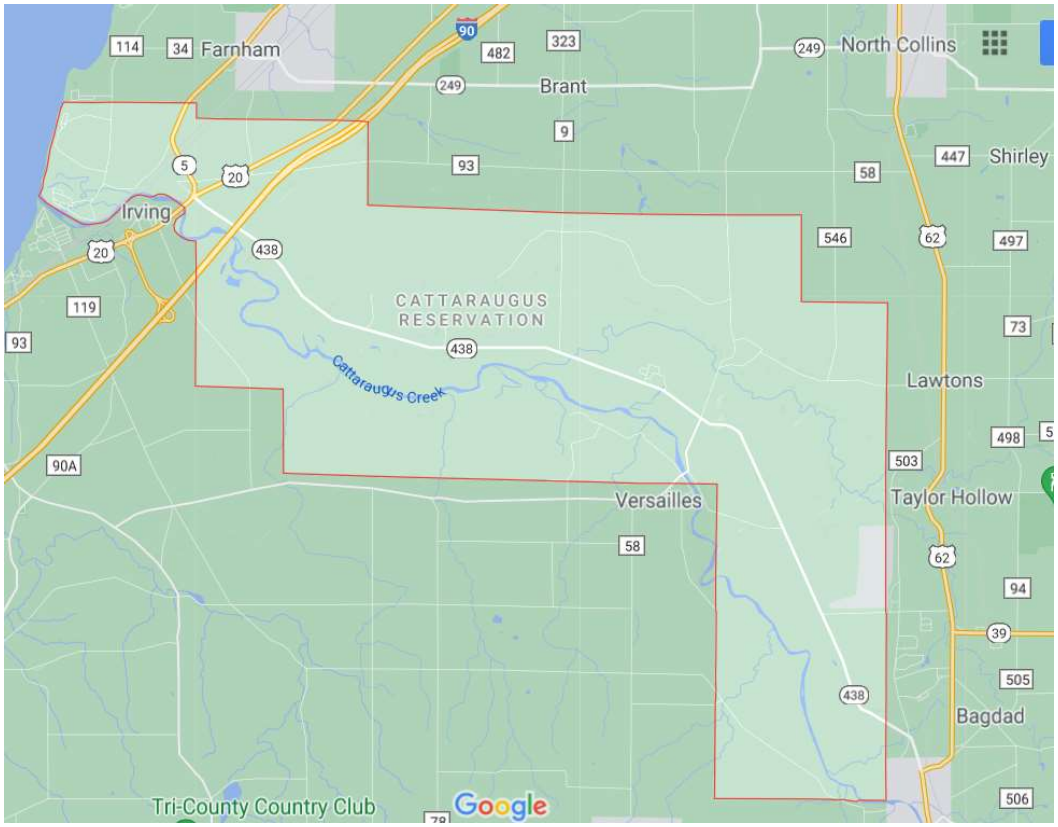
provided that "[t]he land of the Seneca Nation is *** to be the property of the Seneca Nation," whose members shall not be disturbed "in the free use and enjoyment thereof." *Id.* (ellipsis in original); *see also* Treaty with the Six Nations, 7 Stat. 44-45 (Nov. 11, 1794).

In the 1940s, the State of New York began constructing the New York State Thruway. JA15. As a postwar development boom intensified in New York, state officials came under intense pressure from local chambers of commerce, transportation companies, and others to extend the Thruway to include a connection between Buffalo, New York, and Erie, Pennsylvania. JA15-17. This development period coincided with the "termination era" of federal Indian policy, which has been referred to as "the most concerted drive against Indian property and Indian survival" since the 19th-century Indian tribe removals. JA14; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (2005 ed.). The termination era was characterized by federal policies aimed at ending the trust relationship between the United States and Indian nations, permitting increased state influence over tribes, breaking up reservations, and relocating Indians to off-reservation lands. JA14. These federal policies and state development goals combined to place the

Seneca Nation in New York's crosshairs, because the only direct route between Buffalo and Erie was across the Nation's Cattaraugus Reservation. JA17.

In April 1954, the Governor of New York announced that the Thruway's link between Buffalo and Erie would be built. JA17. Because the Nation's Cattaraugus Reservation abuts Lake Erie, the announcement compelled New York officials to demand an easement from the Nation that would effectively cleave its Reservation in two, as the below image illustrates (the present-day Thruway is marked as I-90).[2]

[2] The image, captured from Google maps, is available at https://www.google.com/maps/place/Cattaraugus+Reservation,+Gowanda,+NY/@42.531181,-79.1017282,12z/data=!4m5!3m4!1s0x89d2dd7238f6e5c5:0x32be063215fb18ed!8m2!3d42.5508932!4d-79.0386484 (last visited July 12, 2021).



To increase pressure on the Nation to comply with their demands, state officials took, or threatened to take, a variety of actions that would imperil the Nation's lands. JA16. For instance, New York officials began working with Pennsylvania state officials to impound the Allegheny River, which runs through western Pennsylvania and New York. *Id.* This proposal would jeopardize the Nation's use of its nearby Allegany Territory Reservation. *Id.* Under one scenario, the Nation could retain possession of the land, but its members would have to endure periodic inundations and floods from operation of the proposed dam. *Id.* Under another potential outcome, the Allegany Territory Reservation would be

eliminated entirely and the Seneca Indians living there forced to relocate elsewhere. *Id.*

Eventually New York state officials engaged in formal negotiations with the Nation to obtain a purported easement. The Nation was represented by a state-appointed, state-funded attorney, who was hired the same day the first negotiating session was held and who knew little about the federal laws protecting Indian nations and restricting the alienation of their lands. JA17. The State's lead negotiator was Paul Baldwin, the Director of the Bureau of Rights of Way and Claims in the State's Department of Public Works. *Id.* On October 5, 1954—after only two negotiating sessions, neither of which involved a professional, independent appraisal of the value of the proposed easement—the Nation purported to convey a permanent easement to the State of approximately 300 acres of the Cattaraugus Reservation. JA17. Mr. Baldwin reported that after "several hours of very frank talk," the price was "hammered down" to a one-time payment of $75,000, which was "much lower than

any of us expected to acquire these lands for[.]" *Id.* (alteration in original).[3]

No federal official participated in the negotiations or approved the purported easement, as federal law expressly required. *See* 25 U.S.C. § 177 (1949) (no land purchase or conveyance "from any Indian nation or tribe of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution"); *see also id.* § 323 (empowering the Secretary of Interior "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, *** subject to restrictions against alienation"); 25 C.F.R. § 169 (governing valid rights-of-way across Indian lands). New York proceeded to construct the Thruway across the Cattaraugus Reservation, and today operates that portion of the Thruway without the Nation's consent and without remitting to the Nation any portion of the toll monies it collects.

[3] Even accepting the present-day value of $750,000 that the state officers reference (Br. 4 n.1), the Nation received only $2,500 per acre in exchange for New York's permanent right to operate a multi-lane interstate highway across its Reservation. JA18.

According to the Thruway Authority, "[a]bout 250 million vehicles travel more than 8 billion miles on the Thruway each year."[4]

B. Prior Litigation Regarding The Purported Easement

In 1993, the Nation filed a lawsuit in the district court for the Western District of New York raising two claims. The first claim addressed ownership of certain land within New York State's geographic boundaries, including Grand Island, a town in Erie County. JA33, 38-39. The Nation brought the Grand Island land claim against New York State and a variety of state officials, including then-Governor George Pataki. JA34, 38-39. Because the United States joined the Nation in bringing that claim, the State was unable to invoke its Eleventh Amendment immunity as to that claim. JA117-119; *see also Seneca Nation of Indians v. New York*, 178 F.3d 95, 97 (2d Cir. 1999).

The second claim challenged the State's continuing operation of the Thruway across the Nation's Cattaraugus Reservation in violation of federal law. JA40-41. Unlike the Grand Island land claim, the second claim was not joined by the United States, and it was not asserted against

[4] https://www.thruway.ny.gov/about/faqs.html (last visited July 12, 2021).

Governor Pataki or any other state officials. JA119. Instead, it was asserted against only three defendants: the Thruway Authority, its Executive Director, and the State of New York itself. JA41; *see* Br. 12 (acknowledging that Thruway Authority is not an "arm of the State" entitled to Eleventh Amendment immunity). The Thruway claim sought a declaration that the purported easement was null and void, an order ejecting the State and the Thruway Authority from the Nation's reservation land, and damages representing the purported easement's fair rental value for "the entire period of occupancy of the land." JA43.

The case was referred to a magistrate judge, who issued a report and recommendation on the parties' cross-motions for summary judgment. JA116. The report first considered whether the federal government had approved New York's purported easement, consistent with federal requirements. The magistrate judge found it "undisputed" that it had not, so the federal regulatory requirements for New York to obtain a valid right-of-way across the Nation's land "were never met." JA126. The magistrate judge emphasized that "[t]hese requirements are not merely ministerial formalities, but are necessary for the Secretary [of

the Interior] to carry out his trust responsibilities to the Indian tribes" and "to protect fully Indian interests." JA126-127.

Nevertheless, the magistrate judge recommended that the Nation's Thruway claim be dismissed under Federal Rule of Civil Procedure 19. JA138. New York State could not be joined to the suit because it declined to waive its sovereign immunity. *Id.* Applying the "Rule 19(b) factors" to the Thruway claim, the magistrate judge concluded that the State was an indispensable party and "equity and good conscience require dismissal." JA137-138. The district court adopted the magistrate judge's conclusion that the State was an indispensable party, but declined to address whether New York's purported easement was obtained in compliance with federal law. JA184. Because the Nation did not name state officials as defendants in its Thruway claim, neither the district court nor the magistrate judge considered whether *Ex parte Young* would permit the Nation to bring that claim against New York state officials for prospective injunctive relief.

On appeal, this Court affirmed the district court's order of dismissal "under Rule 19(b) [because] the action could not proceed against the Thruway Authority and its executive director in the State's absence."

Seneca Nation of Indians v. New York, 383 F.3d 45, 47-49 (2d Cir. 2004). Like the magistrate judge, this Court considered the case-specific Rule 19(b) "factors" for determining "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." *Id.* at 48 (quoting FED. R. CIV. P. 19(b)). Like the magistrate judge and the district court, the Court agreed that these factors supported dismissal of the Thruway claim. *Id.* at 49.

C. The Current Litigation

In the years following the original lawsuit, the Nation continued to challenge New York's ongoing unlawful use of the Nation's reservation lands, but was unsuccessful. For example, the Nation's Council asked the Thruway Authority to collect tolls on behalf of the Nation for the use of its lands, but the Thruway Authority refused to do so. JA19. The Nation also sued to invalidate the purported easement in the Nation's Peacemakers Court, but neither New York nor the Thruway Authority appeared in the suit. JA61:9-12, 207:5-7. Instead the Authority and the State continued to treat the purported easement as valid despite the lack of federal approval. JA19.

After these efforts failed, the Nation filed a new lawsuit in April 2018 that sought to remedy the first suit's procedural defect by invoking the *Ex parte Young* doctrine. Instead of filing suit against New York State and the Thruway Authority, the Nation's new action named the Thruway Authority and a group of New York state officers—the Governor of the State of New York, the New York State Attorney General, the Acting Commissioner of the New York State Department of Transportation, and the New York State Comptroller—as defendants. JA12. These state officers have authority to obtain valid easements on behalf of New York State and to account for Thruway toll money, yet have instead perpetuated the Thruway's ongoing unlawful intrusion onto the Nation's tribal lands. JA19-20.

In addition, and consistent with *Ex parte Young*, the Nation sought different and more limited relief than the damages and ejectment it had pursued in the earlier litigation. The Nation's current lawsuit seeks: (1) an injunction requiring the state officers to obtain a valid easement or, in the alternative, enjoining state officers from collecting tolls for the portion of the Thruway crossing the Cattaraugus Reservation until a valid easement is obtained; (2) an injunction requiring the New York

State Comptroller to segregate and hold in escrow future Thruway toll amounts attributable to the portion of the highway operated in violation of the Nation's rights; and (3) a declaration that the state officers are violating federal law, and unlawfully receiving Thruway tolls, by failing to obtain a valid easement. JA23. The Nation expressly disclaimed "eject[ment]" or any similarly disruptive remedy. JA20.

D. The District Court's Decision

The state officers moved to dismiss the Nation's claims. The officers did not assert that the purported easement complies with federal law and is thus valid. Instead, they argued that the Nation's suit fails at the threshold for a variety of procedural reasons. *First*, the state officers argued that principles of collateral estoppel barred the Nation from raising a new challenge to the purported Thruway easement because New York is an indispensable party. JA232. *Second*, the state officers claimed that the exception to *Ex parte Young* the Supreme Court carved out in *Coeur d'Alene* applied to, and prohibited, the Nation's suit. JA241. *Third*, the officers claimed that even if *Coeur d'Alene* did not apply, the suit could not proceed under *Ex parte Young* because it effectively sought monetary relief for a past violation of federal law, not prospective

injunctive relief as *Ex parte Young* requires. JA238. *Finally*, the state officers asserted that the suit was barred by laches. JA246. The District Court referred the case to a magistrate judge, who recommended dismissal on collateral estoppel grounds without reaching the remaining issues. JA100.

The District Court rejected the magistrate judge's recommendation and denied the state officers' motion to dismiss. As an initial matter, the District Court held that collateral estoppel could not apply for the straightforward reason that "[t]he issues raised in the current litigation are different than those decided *** in the 1993 suit." JA234. The District Court noted that "there were no state-official defendants in the 1993 case with respect to the easement" and therefore no basis for the courts in the first suit to address issues related to *Ex parte Young*. JA235. The District Court thus concluded that the previous decisions "did not consider whether the joinder of the state officials who are defendants in this suit could cure the Rule 19 [indispensable party] defect." *Id.* Reinforcing that conclusion, the District Court highlighted the officers' "conce[ssion] that the Nation 'may be correct that a Rule 19 failure to join

an indispensable, immune party can be cured by suing state officials in their official capacity for prospective injunctive relief.'" *Id.*

Turning to *Ex parte Young*, the District Court held that the Nation's suit was proper. The District Court held that the Nation sought the very type of relief *Ex parte Young* contemplates: prospective declaratory and injunctive relief. JA240. The District Court relied on the Supreme Court's decision in *Papasan*, 478 U.S. at 278, which had held that "relief that serves directly to bring an end to a *present violation* of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." JA239 (quoting *Papasan*, 478 U.S. at 278). The Nation's claims alleging "an ongoing violation of federal law" from the State's use and derivation of income from "an invalid easement," and seeking "compensation only for the use of [that] easement *going forward*," fit comfortably within this articulation of *Ex parte Young*. JA240. The District Court was careful to note that this ruling did not touch on the merits of the Nation's claim. It explained that although the state officers might "have valid factual defenses," "that is not a viable argument on a motion to dismiss." JA241.

The District Court also rejected the state officers' attempt to invoke *Coeur d'Alene*. JA241. In that case, the District Court explained, "a tribe sought to establish sovereignty over, and exclusive rights to, certain submerged lands that had been claimed and governed by Idaho for centuries." *Id.* Those "particular and special circumstances" warranted the exception to *Ex parte Young* that a divided Supreme Court had created. *Id.* (quoting *Coeur d'Alene*, 521 U.S. at 287). The District Court held that those circumstances do not apply to the Nation's case, where "in contrast to *Coeur d'Alene*, the land at issue is *owned by the Nation*, not the State," and "the Nation does not seek to *divest* the State of a property right." JA242-243. The District Court emphasized that the Second Circuit had only applied *Coeur d'Alene* once in the course of nearly a quarter-century, and had done so only in circumstances virtually identical to those presented in *Coeur d'Alene* itself. JA241-242 (distinguishing *Western Mohegan Tribe & Nation v. Orange Cty.*, 395 F.3d 18 (2d Cir. 2004)). The District Court also cited various cases in which this Court, and other courts in this circuit, had permitted *Ex parte Young* suits in cases involving tribal lands or state property interests. JA244-246.

Finally, the District Court rejected the state officers' laches defense as premature, finding that "it is not plain *from the complaint*" that the Nation had unreasonably delayed in bringing its suit. JA246-247. "[J]ust as it is too soon to weigh in on the merits of this lawsuit, so it is premature to decide whether laches applies." JA247 (citation omitted).

The District Court held that only two of the several issues it decided in the Nation's favor were "close": whether the Nation's requested relief is prospective under *Ex parte Young* and whether the *Coeur d'Alene* exception applies. It therefore permitted the state officers to apply to this Court for interlocutory appeal. JA247. The state officers filed a petition for permission to appeal (JA249), which this Court granted.

SUMMARY OF ARGUMENT

This case calls for a straightforward application of the *Ex parte Young* doctrine. The point of *Ex parte Young* is to permit plaintiffs to sue sovereign officials for prospective injunctive relief even when the sovereign refuses to waive its sovereign immunity. That is exactly what the Nation has done here. The state officers' arguments each seek to undercut *Ex parte Young*'s basic function.

I. The Nation's suit is not barred by collateral estoppel. The state officers' contrary contention would eliminate the distinction at the heart of *Ex parte Young* between a suit against a state itself (which the Nation previously brought), and a suit against state officials (which the Nation now brings). The premise of the state officers' collateral estoppel argument is that this is a "distinction without a difference" and the State of New York is a necessary party regardless of the presence of state officials. Accepting this argument would violate the core holding of *Ex parte Young*. It would also distort Rule 19(b), which was the lone basis for dismissal of the first case.

II. The state officers' assertion that *Ex parte Young* is unavailable because this case implicates state property interests would, if adopted, dramatically constrict *Ex parte Young* in a way that the Supreme Court and other courts have expressly declined to do. *Ex parte Young* provides a vehicle to hold state officials accountable for violations of federal law, even when important sovereign interests are at stake. Nothing in the Supreme Court's *Coeur d'Alene* decision or related authority is to the contrary.

III. The Nation's suit for prospective injunctive and declaratory relief is properly brought under *Ex parte Young*. The Nation seeks relief for an ongoing violation of federal law—the state officers' current and continuing illegal use of, and profit from, an invalid easement they use to operate a toll highway over the Nation's Reservation in violation of federal treaties and laws. The Nation also seeks limited, equitable relief with respect to the purported easement on a strictly prospective basis. The state officers' efforts to recharacterize the Nation's complaint as seeking "renegotiation" of a valid easement impermissibly ignores the complaint itself, which (as the District Court recognized) expressly does not seek compensation for past harm.

ARGUMENT

I. THE NATION IS NOT COLLATERALLY ESTOPPED FROM SUING NEW YORK STATE OFFICIALS FOR PROSPECTIVE EQUITABLE AND DECLARATORY RELIEF.

The District Court correctly rejected the state officers' argument that the Rule 19(b) dismissal of the Nation's earlier lawsuit against New York State precludes the Nation from suing New York state officials for forward-looking relief. As the state officers conceded below, a Rule 19 defect stemming from the State's sovereign immunity can be cured with a new lawsuit naming state officials. Barring such suits on collateral

estoppel grounds would distort Rule 19 and, more importantly, cripple *Ex parte Young*.

A. The Nation Is Not Relitigating An Issue Decided In The First Thruway Lawsuit.

The officers cannot show that collateral estoppel applies. The collateral estoppel test requires, among other things, that the "identical" issue was raised in the first lawsuit and "actually litigated and decided" against the Nation. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 400 (2d Cir. 2011) (quoting *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 918 (2d Cir. 2010)). The state officers argue that the Rule 19 dismissal establishes that the State is a necessary and indispensable party in "any" litigation challenging the purported Thruway easement. Br. 14. But the previous decision's Rule 19 holding is not so broad. It considered only the claim before it, which was directly against the State. It did not and could not consider—let alone decide—whether the State is an indispensable party in a case like this one naming *state officials* as defendants.

Rule 19(b)'s indispensable party analysis—which the state officers do not even discuss in their brief—is far more limited and case-specific than the state officers imply. Under Rule 19(b), if the joinder of a

necessary party is not feasible—as where the party is immune—the court must consider whether the action can proceed against the "remaining parties" or, instead, if the party is indispensable. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 132 (2d Cir. 2013). By its terms, Rule 19 provides that whether a party is indispensable is a context-specific determination turning on the identity of the "existing parties," their relationship to the absent party, and various equitable factors bearing on whether principles of "equity and good conscience" permit the suit to go forward. FED. R. CIV. P. 19(b) (directing courts to consider, *inter alia*, the adequacy of a judgment rendered in the party's absence, whether such a judgment would be prejudicial, and whether relief can be shaped among the existing parties to reduce that prejudice).

The Supreme Court has confirmed that "[t]he design of the Rule *** indicates that the determination whether to proceed will turn upon factors that are *case specific*[.]" *Republic of Phil. v. Pimentel*, 553 U.S. 851, 862-863 (2008) (emphasis added). The answers to the "multiple factors [that] bear on the decision whether to proceed without a required person"—such as whether the remaining parties can adequately represent the absent party's interests—will vary depending on the other

parties present in the case. *Id.* at 863. For this reason, whether a party is necessary or indispensable "can only be determined in the context of particular litigation." *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 912 (9th Cir. 1991).

Viewed through the proper Rule 19 lens, the District Court's collateral estoppel determination is correct. As the District Court noted (JA235), this Court previously held that the Nation's first suit "could not proceed against *the Thruway Authority and its executive director* in the State's absence." *Seneca Nation*, 383 F.3d at 47-49 (emphasis added). This determination was a "case-specific" conclusion that the Nation's lawsuit could not "in equity and good conscience" proceed against those particular parties. *Republic of Phil.*, 553 U.S. at 862-863.

But the Court did not address whether the State would be indispensable in a suit naming various state officials who have the authority to seek valid easements and allocate toll monies. JA19; *see also* JA225-226. And it could not have done so because the Nation's prior easement claim was pleaded against only the State of New York, the Thruway Authority, and the Thruway Authority's Executive Director.

JA41.[5] As the state officers acknowledge, the Thruway Authority is not itself an "arm of the State" entitled to immunity. Br. 12 (citing *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 296 (2d Cir. 1996)). And the only individual named in the easement claim was the Thruway Authority's Executive Director, not a New York state official. Contrary to the state officers' argument, the previous case could not, and did not, decide whether New York State is indispensable for "*any* claim challenging the validity of the Thruway easement." Br. 14 (emphasis added).[6]

Accepting the state officers' characterization of the Rule 19 dismissal as an "insurmountable bar" (Br. 11) to this lawsuit would also dramatically alter Rule 19's operation. Rule 19 dismissals must be

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[5] The state officers point out that individual officers were also present in the 1993 suit. Br. 15-16. But those state officers were named as defendants solely with respect to the Nation's Grand Island land claim (JA33-34), as the District Court noted. *See* JA235; *see also supra* pp. 13-16. Because no state officers were named as defendants to the Thruway claim in the 1993 suit, the court could not and did not decide whether the Thruway claim could proceed against them in the State's absence.

[6] For similar reasons, the state officers' claim that the Nation is raising a "new theor[y] to support a different resolution of an already-decided issue" (Br. 16), is incorrect. Here, the Nation is not advancing a new *theory*, it is pursuing a case against different *parties*. The Court's previous decision did not address whether a suit against state-officer defendants could proceed. JA235-236.

without prejudice so that parties have the option to re-plead to correct the Rule 19 problem. 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4438 (3d ed. 2021) (describing "the long-settled rule that the dismissal [under Rule 19] does not bar a new action that corrects the deficiency of parties"); *see also Schwan-Stabilo Cosmetics GmbH & Co. v. Pacificlink Int'l Corp.*, 401 F.3d 28, 35 (2d Cir. 2005) (dismissal under Rule 19 is "without prejudice"). The state officers conceded this below. JA236 (acknowledging defendants' concession that "a Rule 19 dismissal is without prejudice and the plaintiff may bring a new action if it cures the earlier infirmity") (internal quotation marks and citation omitted). But under the state officers' approach, a subsequent suit against new parties would be barred by collateral estoppel. A Rule 19 dismissal would thus effectively mark the end of the case—a result contrary to the Rule's longstanding interpretation. *See, e.g.*, *Schwan-Stabilo Cosmetics*, 401 F.3d at 35; *see also Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1284 (10th Cir. 2012) (holding that Rule 19(b) dismissal must be "without prejudice, and without preclusive effect"); *Cahill v. Liberty Mut. Ins. Co.*, 24 F.3d 245, at *2 (9th Cir. 1994) (unpublished) ("Where an indispensable party is not

joined, the appropriate action is to dismiss the case, without prejudice, to allow it to proceed in state court or another federal court."); *Dredge Corp. v. Penny*, 338 F.2d 456, 464 (9th Cir. 1964) (holding that a Rule 19 dismissal "operates only to abate the particular action").

B. The State Officers' Collateral Estoppel Argument Would Hobble *Ex Parte Young*.

The state officers' collateral estoppel argument also seeks to undo the very function of the *Ex parte Young* doctrine. *Ex parte Young* permits suits for "prospective injunctive relief against state officials to prevent a continuing violation of federal law," notwithstanding that the Eleventh Amendment would preclude a suit against the State itself. *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 371-372 (2d Cir. 2005). The state officers' argument would curtail *Ex parte Young* suits, if not eliminate many of them altogether. At a minimum, the state officers' proposed approach would prevent plaintiffs from remedying a Rule 19 defect by bringing an *Ex parte Young* suit against state officials when the State is immune. But the officers' approach has far more sweeping ramifications, because the officers suggest the State is a necessary and indispensable party under Rule 19 in a wide variety of *Ex parte Young* cases. Br. 15 (describing cases "call[ing] into question a real property

interest of the sovereign" (internal citations and quotation marks omitted)). Indeed, they argue that it makes no "difference" whether "individual state officers had been named" in the 1993 lawsuit because the state would have been a necessary party regardless. *Id.*

As then-Judge Kavanaugh explained, "that is not how the *Ex parte Young* doctrine and Rule 19 case law has developed." *Vann v. United States Dep't of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012). The purpose of *Ex parte Young* is to "allow[] suits for declaratory and injunctive relief against government officials in their official capacities—notwithstanding the sovereign immunity possessed by the government itself." *Id.* at 929. Treating the sovereign as a necessary party under Rule 19 would mean that "official-action suits against government officials would have to be routinely dismissed." *Id.* at 930. This result would "effectively gut the *Ex parte Young* doctrine." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012).

Consistent with this authority, various other courts have held that *Ex parte Young* "permits actions for prospective non-monetary relief against state *** officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe."

Salt River Project, 672 F.3d at 1181; *see also Thlophthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1236 (10th Cir. 2014) (Muscogee Nation tribe not indispensable party in *Ex parte Young* suit against tribal officials); *Kansas v. United States*, 249 F.3d 1213, 1226 (10th Cir. 2001) (holding that "tribe was not an indispensable party under Rule 19(b)"). And another court has permitted exactly what the Nation seeks to do in this action: to "cure the indispensability defect" in a suit against a sovereign by naming the "official whose actions *** violate federal law." *Nisqually Indian Tribe v. Gregoire*, No. 08-5069-RBL, 2008 WL 1999830, at *3-*6 (W.D. Wash. May 8, 2008) (permitting the plaintiff to name "an official of the tribe," notwithstanding that the tribe was a "necessary party to th[e] suit"). These decisions recognize that Rule 19 cannot supersede *Ex parte Young*'s core principles. *See, e.g.*, *Vann*, 701 F.3d at 930.

These cases also implicitly confirm the conflict between the state officers' interpretation of Rule 19 and the *Ex parte Young* doctrine. *Ex parte Young* is designed to "end ongoing violations of federal law and vindicate the overriding federal interest in assuring the supremacy of [the] law" through prospective, equitable relief. *NAACP v. Merrill*, 939 F.3d 470, 475 (2d Cir. 2019) (alteration in original) (quoting *In re Deposit*

Ins. Agency, 482 F.3d 612, 618 (2d Cir. 2007)). Yet the state officers would apply Rule 19 to withdraw a (potentially limitless) category of cases from *Ex parte Young*'s reach. If adopted, their argument would badly weaken *Ex parte Young* and, consequently, permit the unlawful activity the doctrine is designed to curtail.

The state officers do not identify any authority supporting their interpretation of Rule 19 and *Ex parte Young*. None of the decisions they cite held that collateral estoppel precludes a plaintiff from remedying a Rule 19 defect by naming state officials in an *Ex parte Young* suit. Indeed, most of these cases did not involve or address *Ex parte Young* at all. *See* Br. 15 (citing *American Trucking Ass'n, Inc. v. New York State Thruway Auth.*, 795 F.3d 351 (2d Cir. 2015); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542 (2d Cir. 1991)). In the one case that did, the Ninth Circuit held that the tribe was an indispensable party in a suit challenging the tribe's very existence because tribal officials would not adequately protect the tribe's interest. *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 997 (9th Cir. 2020). That fact-specific determination does not suggest that the State is a necessary party in all cases, let alone the present case.

Proving the point, the District Court here expressly reserved the Rule 19 question that no court has decided (and which the state officers never asked below): whether the Governor and other state officers named *in this case* can adequately represent New York's interests. *See* JA235-236; *cf.* Br. 15 (arguing that absence of state officials from prior suit is "a distinction without a difference"). The District Court's opinion thus left open the possibility that further factual development could show that "the state-official defendants cannot adequately represent the State's interests." *See* JA235-236 & n.4. Should that occur, the state officers "would not be precluded from moving for dismissal under Rule 19" at that point. *Id.* The officers thus have no need to invoke collateral estoppel—and mangle Rule 19 and *Ex parte Young* in the process—to protect the State's interests.

II. THE SUPREME COURT'S *COEUR D'ALENE* DECISION DOES NOT APPLY TO THIS CASE.

The Court should also reject the state officers' effort to shoehorn this case into *Coeur d'Alene*'s limited exception to *Ex parte Young*. The state officers advance an expansive interpretation of *Coeur d'Alene*, and a cramped understanding of *Ex parte Young*, that no other court has adopted, and that the District Court correctly rejected.

A. *Coeur d'Alene* Does Not Bar The Nation's *Ex Parte Young* Suit.

1. The "Narrow" Coeur d'Alene *Exception Applies Only To Suits Challenging State Title And Sovereign Authority Over Submerged Lands.*

The District Court rejected the state officers' *Coeur d'Alene* argument because that decision "carved out a very narrow exception" to *Ex parte Young* "on the particular facts of that case." JA243. The state officers argue that *Coeur d'Alene* applies, at a minimum, to cases that are the federal equivalent of a "quiet title action" (Br. 20)—or perhaps even more broadly to any cases implicating "the state's political or property rights" (*id.* at 17 (quoting *In re Dairy Mart*, 411 F.3d at 374)). But the Supreme Court and myriad other courts have held that *Coeur d'Alene* applies to the "particular and special circumstances" presented in that case, where a tribe sought to eject the State entirely from certain submerged lands the State had governed for centuries. *See Coeur d'Alene*, 521 U.S. at 287; *Indiana Prot. & Advoc. Servs. v. Indiana Fam. & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010) (describing *Coeur d'Alene* as an "unusual case"); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000) (describing *Coeur d'Alene* as "unique" and "narrow"); *Elephant Butte Irrigation Dist. of N.M. v.*

Department of Interior, 160 F.3d 602, 612 (10th Cir. 1998) (describing *Coeur d'Alene* as "extreme and unusual").

The divided *Coeur d'Alene* Court found the nature of the property—"the submerged lands and bed of Lake Coeur d'Alene and *** the various navigable rivers and streams that form part of its water system"—essential to its decision. 521 U.S. at 264; *see also Gila River Indian Cmty. v. Winkelman*, No. CV 05-1934-PHX-EHC, 2006 WL 1418079, at *1, *3 (D. Ariz. May 22, 2006) (finding the unique status of submerged lands "central to the decision" in *Coeur d'Alene*). As the Court explained, "submerged lands *** [have] a unique status in the law" and are "infused with a public trust" that "arises from ancient doctrines." *Coeur d'Alene*, 521 U.S. at 283-284. Citing historical authority ranging from the Institutes of Justinian to the Magna Carta to the English common law, *id.* at 284-286, the Court identified a "strong presumption of state ownership" over navigable waters and submerged lands, *id.* at 284; a longstanding "principle that submerged lands are held for a public purpose *** for the benefit of every individual," *id.* at 284-285 (citation omitted); and a clear indication "that these lands are tied in a unique way to sovereignty," *id.* at 286. As Justice O'Connor observed in her

controlling concurrence, this historical authority shows "the importance of submerged lands to state sovereignty [because] [c]ontrol of such lands is critical to a State's ability to regulate use of its navigable waters." *Id.* at 289. The Court thus concluded that submerged lands are uniquely imbued with the "State's own sovereignty." *Id.* at 287.

At the same time, the *Coeur d'Alene* Court observed that the plaintiff there sought "unusual" and sweeping relief. 521 U.S. at 281. The tribe sought declaratory relief establishing its entitlement to exclusive use and occupancy of the lands and declaring all Idaho laws, ordinances, regulations, and customs invalid as applied to the submerged lands. *Id.* at 265; *see also Virginia Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 257 (2011) (noting that the plaintiff in *Coeur d'Alene* sought to "establish[] its exclusive right to the use and enjoyment of certain lands in Idaho and the invalidity of all state statutes and regulations governing that land"). The requested relief went "well beyond the typical stakes in a real property quiet title action." *Coeur d'Alene*, 521 U.S. at 282. Instead, the suit, if successful, would "bar the State's principal officers from exercising their governmental powers and authority over the lands," "extinguish[] the State's control over a vast reach of lands and

waters" that had long been part of the State's territory, and withdraw the lands from the State's "regulatory jurisdiction" entirely. *Id.*

Justice O'Connor, in her controlling opinion, emphasized that "the Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law," but rather to "divest" the State of its sovereign jurisdiction altogether. *Coeur d'Alene*, 521 U.S. at 289. This far-reaching relief made the case "unlike a typical *Young* action," because it would effectively grant the tribe both possession of and "title" to the submerged lands. *Id.* at 289-291. In these "particular and special circumstances," *id.* at 287, the Court concluded that "the *Young* exception to the Eleventh Amendment's bar is not properly invoked," *id.* at 291 (O'Connor, J., concurring in part and concurring in judgment).

This Circuit has recognized *Coeur d'Alene*'s narrow reach and has applied it only once, on "virtually identical" facts, where a plaintiff sought to deprive the State of both *title* and *sovereign authority* over *submerged lands*. *Western Mohegan*, 395 F.3d at 23 & n.4. The *Western Mohegan* plaintiff sought to take title to and possession of lands that the State of New York had long held in fee title. *Id.* at 23. Like the *Coeur d'Alene*

plaintiffs, the tribe sought to divest New York of its ability to exercise regulatory jurisdiction over the lands, and to obtain relief including "ejectment and trespass" to exclude all others from the disputed territory. *Id.* at 22. And the lands in question were nearly identical to those at issue in *Coeur d'Alene*: submerged lands including "state-managed lakes and wetlands," as well as other areas including "state parks, state wildlife management areas, *** state historic sites, and Empire State Plaza—where the state capitol is located." *Id.* at 20. This Court found *Coeur d'Alene* "directly controls" in light of these factual overlaps. *Id.* at 23. Other courts have followed a similar approach. *See, e.g.*, *MacDonald v. Village of Northport*, 164 F.3d 964, 966, 972 (6th Cir. 1999) (invoking *Coeur d'Alene* to bar suit challenging title to "right of way" providing "public access to navigable and public trust waters" in Michigan's Grand Traverse Bay).

2. This Case Does Not Implicate Coeur d'Alene.

This case involves none of the features central to *Coeur d'Alene* and its progeny.

First, the purported Thruway easement does not implicate submerged lands or navigable waters. This is a critical distinction. As

other courts have recognized, "[t]he extent to which *Coeur d'Alene* is limited" to circumstances involving submerged lands "cannot be overstated." *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1054 n.8 (9th Cir. 2014); *see also Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1075-1076 (9th Cir. 2001) (noting that navigable waters uniquely implicate sovereign interests); *Gila River Indian Cmty.*, 2006 WL 1418079, at *2 ("*Coeur d'Alene* only limits the application of the *Young* exception when a state's control of submerged lands is challenged.").

The state officers' comparison of the purported Thruway easement to submerged lands and public waterways (Br. 20-21), is not persuasive, as the District Court recognized. *See* JA243-244 (holding that the important sovereign interests in submerged lands "are not at issue in this case"). Although the State's use of the purported easement to operate a toll highway provides members of the public with significant benefits (Br. 20-21), those benefits are not equivalent to a state's interest in retaining title and regulatory authority over submerged lands and navigable waterways—an interest with roots dating back centuries. *Coeur d'Alene*, 521 U.S. at 283-287; *see also Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C.

Cir. 2008) (noting the "historical pedigree" of the public interest in submerged lands, and declining to extend *Coeur d'Alene* to "relatively newfangled [sovereign] interest[s]").

Second, the property rights at stake here are not comparable to those in *Coeur d'Alene* or *Western Mohegan*. In both those decisions, the plaintiffs sought "unique divestiture of the state's broad range of controls over its own lands." *Western Mohegan*, 395 F.3d at 21, 23 n.4; *see also Coeur d'Alene*, 521 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment). Because the Nation already has undisputed title to the restricted fee lands comprising the Reservation, JA13, it is not seeking to alter fee title long vested in the State, as was true in *Coeur d'Alene* and *Western Mohegan*. *See Coeur d'Alene*, 521 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment) (noting distinction "between *possession* of the property and *title* to the property"); *see also Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1205-1206 (10th Cir. 2002) (a "state has no sovereign interests over Indian land *** [or] sovereign Indian territory"); *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 362 F.3d 512, 517 (8th Cir. 2004) (finding *Coeur d'Alene* "not

comparable" because "[t]his lawsuit does not involve lands that South Dakota *owns*").

The Nation does not seek to alter the possession or use of the land, but instead simply requests that a lawful easement—*i.e.*, a "*nonpossessory* right to enter and use land in the possession of another"—be put in place. *Martin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 105 (2014) (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (1998)) (emphasis added). Other courts have agreed that *Coeur d'Alene* does not apply in these circumstances. *See Severance v. Patterson*, 566 F.3d 490, 492-493 (5th Cir. 2009) (holding that *Coeur d'Alene* does not apply to a suit challenging a state's claim to an easement). Where state officials "do not claim title," and the issue instead is "whether the State may constitutionally impose an easement, or an encumbrance, on [a plaintiff's] fee simple estate," "the 'particular and special circumstances' of *Coeur d'Alene* *** are not present." *Id.*

Finally, the relief the Nation seeks will not "strip the State of any of its jurisdiction or authority to regulate the land." *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 502 (5th Cir. 2001). In her *Coeur d'Alene* concurrence, Justice O'Connor distinguished

between suits that involve land that will "remain subject to state regulation" or that seek "to bring the State's regulatory scheme into compliance with federal law," on the one hand, and suits that would "eliminate altogether the State's regulatory power over the *** lands at issue," on the other. 521 U.S. at 289. The Nation's claim unquestionably falls into the former category. The Nation already has undisputed title to the restricted fee lands comprising its Reservation, and the outcome of this litigation will not affect the scope of the State's limited civil and criminal jurisdiction within the Nation's lands under federal law. *See* 25 U.S.C. §§ 232-233. Instead, the lawsuit will require the state officers only to obtain a valid easement for its continued use of the Thruway, to cure ongoing violations of federal treaties and laws. The District Court correctly held that *Coeur d'Alene* and *Western Mohegan* both implicated property rights "far more expansive than the Thruway easement at issue here." JA243.

3. The State Officers' Attempt To Expand Coeur D'Alene Should Be Rejected.

The state officers invoke *Coeur d'Alene* for two other reasons, but neither is convincing. The officers primarily argue that *Coeur d'Alene* applies to "quiet title action[s]," which under New York law can include

challenges to an easement. Br. 20 (citing *Ingold v. Tolin*, 784 N.Y.S.2d 573 (App. Div. 2004)). The officers point to no authority supporting the argument that state-law characterizations of legal remedies can dictate the scope of federal constitutional doctrines like *Ex parte Young*. Regardless, this Court has held that the phrase "quiet title" has no special significance in the *Coeur d'Alene* context. *See In re Deposit Ins. Agency*, 482 F.3d at 619 (rejecting argument that because New York banking law referred to vesting of "title" in the state superintendent, suit was the "functional equivalent of an action to quiet title"). And, as other circuits have held, a suit challenging the State's claim to an easement is "*not* the functional equivalent of a quiet-title action" in this context. *Severance*, 566 F.3d at 495 (emphasis added). Thus, the fact that New York law characterizes easement challenges as a type of "quiet title" action does not mean that *Coeur d'Alene* applies. Indeed, such actions often involve relatively minor property interests—like rights of way, limited ingress/egress easements, and so forth—that are nothing like the far-reaching interests at stake in *Coeur d'Alene*. *See, e.g.*, *Nassau Point Prop. Owners Ass'n, Inc. v. Tirado*, 815 N.Y.S.2d 674, 677 (App. Div. 2006) (applying New York Real Property Actions and Proceedings Law

§ 1501 in case challenging defendants' planting of trees across easement); *Jem Inc. v. Dewey*, 599 N.Y.S.2d 707, 708-709 (App. Div. 1993) (invoking Section 1501 in case addressing right-of-way easement for egress and ingress from residential home).

Regardless, the state officers' "quiet title" argument is based on an overly broad interpretation of *Coeur d'Alene*. Contrary to the officers' assertion (Br. 20), *Coeur d'Alene* does not apply to *all* suits similar to quiet title actions, but only to those with "consequences going *well beyond those typically present* in a real property quiet title action," such as where "substantially all benefits of ownership and control would shift from the State to the Tribe." *Coeur d'Alene*, 521 U.S. at 262, 282 (emphasis added). As the Nation has already shown, those additional consequences do not exist here.

The state officers further argue that the Nation's suit threatens "disruption" of the State's regulatory regime, including the prospect that State officials will be ejected from the portion of the Thruway on the Nation's lands. Br. 21. But this argument is also incorrect. The Nation has repeatedly disavowed any claims for ejectment, trespass, or the other far-fetched, disruptive scenarios the state officers describe. *See* JA20

("The Nation does not seek to eject anyone from the purported easement, but seeks only to prevent further violation of its rights to a valid easement for such usage."); *see also, e.g.*, JA59:10-12, 196:10-14, 205:12-15.[7] The state officers cannot rewrite the Nation's complaint to create a regulatory disruption when none otherwise exists. Br. 21. As *Coeur d'Alene* made clear, this Court must focus on "the realities of the relief the Tribe demands." 521 U.S. at 282. The Nation's targeted suit simply seeks prospective relief from the ongoing, daily, unlawful intrusion onto the Nation's lands by requiring the state officers to obtain a valid easement on equitable terms under the District Court's supervision. Nothing in *Coeur d'Alene* prevents such a lawsuit, as the District Court correctly held. JA245.

[7] Given these representations, the Nation will not—and indeed could not, under the doctrine of judicial estoppel—seek broader remedies at some later point in the case. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[J]udicial estoppel[] generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (internal quotation marks omitted); *see also Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 618-620 (2d Cir. 2012) (holding that judicial estoppel prohibits "about-face" arguments).

B. Courts Routinely Permit *Ex Parte Young* Suits That Directly Implicate State Property Interests.

Longstanding *Ex parte Young* principles provide additional support for the District Court's determination that this case does not implicate *Coeur d'Alene*. The state officers' *Coeur d'Alene* argument is premised on an unwritten exception to *Ex parte Young*, in which the doctrine supposedly is disabled whenever a suit implicates the State's "sovereign interest" in property. But the Supreme Court rejected such a sweeping approach in *Coeur d'Alene* itself, 521 U.S. at 279 (plurality opinion of Kennedy, J.), and the state officials fail to cite a single case adopting it. Rather—and consistent with *Coeur d'Alene*'s narrow scope—courts routinely apply *Ex parte Young* in cases challenging state property interests or when other important sovereign interests are at stake (as is often the case in *Ex parte Young* suits).

For example, the District Court relied on a 1975 Western District of New York decision, *Seneca Nation of Indians v. New York*, 397 F. Supp. 685 (W.D.N.Y. 1975), which involved a challenge to New York State's land rights. JA244. In *Seneca Nation*, New York State had filed maps "describing land within the [Seneca Nation's] Allegany Reservation," which the State "wished to appropriate" to construct a "highway." 397 F.

Supp. at 685. The State claimed that the filing "vested title in the State of New York and extinguished" the Seneca Nation's right to use and occupancy of the lands. *Id.* The Nation sued the state Commissioner of Transportation, arguing that this appropriation was unlawful and expressly challenging the State's purported "vested title" in property. *Id.* Nevertheless, the court rejected the State's sovereign immunity defense, holding that *Ex parte Young* permitted the Nation to sue a state official for prospective relief from an unlawful land grab. *Id.* at 686-687. The District Court recognized the circumstances in *Seneca Nation* as "akin" to those in the present case. JA244.

Seneca Nation is consistent with a long line of *Ex parte Young* cases, both from this Court and others, applying the doctrine to permit challenges to state property interests. In *In re Deposit Agency*, this Court permitted an *Ex parte Young* suit directed to the New York State Superintendent of Bank's possession and retention of assets. 482 F.3d at 618. The Court held that *Ex parte Young* embraces such suits, notwithstanding that they might seek to "dispossess a state official of assets and some of the incidents of ownership thereof." *Id.*

Similarly, the Tenth Circuit allowed an *Ex parte Young* suit against state officials alleged to be "illegally retaining net profits under a recreational land lease" the State of New Mexico had signed. *Elephant Butte Irrigation Dist.*, 160 F.3d at 605. The suit asked for a determination of "the validity of a property interest—New Mexico's claim to profits under the lease." *Id.* at 612. Nevertheless, the court held the suit did not implicate any "special state sovereign interest," and *Ex parte Young* applied. *Id.* The Eighth Circuit, too, found *Ex parte Young* embraced a suit by an Indian tribe seeking to prevent ongoing violations of its rights to hunt, fish, and gather on land under a treaty. *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 124 F.3d 904, 912-914 (8th Cir. 1997), *aff'd sub nom. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). And the Fifth Circuit has authorized *Ex parte Young* suits challenging state officials' enforcement of an unlawful easement, *Severance*, 566 F.3d at 492-493, and seeking to prevent state officials from voiding local trust land leases, *Lipscomb*, 269 F.3d at 498.

As these cases demonstrate, plaintiffs frequently invoke *Ex parte Young* in cases challenging sovereign use or treatment of property. Indeed, these cases lie at the heart of *Ex parte Young*'s purpose, which is

to permit federal courts to arrest ongoing violations of federal law. *See Merrill*, 939 F.3d at 475; *Santiago v. New York State Dep't of Corr. Servs.*, 945 F.2d 25, 28-29 (2d Cir. 1991). If *Ex parte Young* truly did not apply whenever a state property interest is at stake, then state officials could appropriate Indian land—or otherwise put property to illegal use—and permanently escape suit in federal court. *See Seneca Nation*, 397 F. Supp. at 685. That precise concern has animated the Supreme Court's Eleventh Amendment jurisprudence for more than a century. *See Tindal v. Wesley*, 167 U.S. 204, 222 (1897) (rejecting reading of Eleventh Amendment that would allow state officers to illegally "seize for public use the property of a citizen" and then leave "the citizen *** remediless"); *see also Public Serv. Co. of N. Ill. v. Corboy*, 250 U.S. 153, 158-159 (1919) (declining to apply sovereign immunity in lawsuit against state drainage commissioner regarding allegedly unconstitutional diversion of water); *Pennoyer v. McConnaughy*, 140 U.S. 1, 10 (1891) (holding that Eleventh Amendment did not limit federal court's authority to enjoin Oregon state officials from selling land "under the color of an unconstitutional [state] statute").

Besides property interests, courts regularly address a range of important sovereign interests in *Ex parte Young* suits, including state election redistricting plans, *Merrill*, 939 F.3d at 476; state tax collection systems, *CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98-99 (2d Cir. 2002); the state eminent domain power, *Dakota*, 362 F.3d at 516; and state emergency powers, *Duke Energy*, 267 F.3d at 1054. *Ex parte Young* itself involved a constitutional challenge to a state railroad scheme affecting widespread property interests. 209 U.S. at 165. To hold that *Ex parte Young* is inapplicable to suits implicating such "core" sovereign interests "would effectively overrule the *Ex parte Young* doctrine." *Dakota*, 362 F.3d at 517.

The state officers' invocation of a "sovereign *** interest" in "disputed land" (Br. 20), is inconsistent with the purpose and enduring application of *Ex parte Young*. Carving out cases implicating state property interests—and the vast number of cases that might implicate "political or property rights" (Br. 17)—from *Ex parte Young* would allow state officers to violate federal law with impunity. No other court has enfeebled *Ex parte Young* in the manner the state officers advocate. This Court should not be the first to do so.

III. THE NATION SEEKS PROSPECTIVE RELIEF FOR ONGOING VIOLATIONS OF FEDERAL LAW, CONSISTENT WITH *EX PARTE YOUNG*.

A. The Nation's Suit Easily Satisfies *Ex Parte Young*'s "Straightforward" Requirements.

Ex parte Young imposes two "straightforward" requirements: The plaintiff must allege "an ongoing violation of federal law" and "seek[] relief properly characterized as prospective." *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Coeur d'Alene*, 521 U.S. at 296). The District Court correctly held that the Nation's allegations satisfy this standard at this "early stage" of the case. JA240-241.

The Nation alleges present, ongoing violations of federal law based on the "continuing operation" of the portion of the Thruway bisecting the Nation's land. That use violates the comprehensive federal regulatory requirements governing rights of way across Indian land. *See* 25 U.S.C. § 323 and 25 C.F.R. § 169; *see also* JA11. It also violates the federal treaties and laws establishing the Cattaraugus Reservation, including the Canandaigua Treaty of 1794, which provides that the Nation shall not be disturbed "in the free use and enjoyment" of the Reservation. JA11; *see also* Treaty with the Six Nations, 7 Stat. 44-45 (Nov. 11, 1794).

Yet due to the state officers' ongoing conduct, every day the Nation is subject to the State's unlawful intrusion onto its lands. JA18-19; *see also* JA240 ("[E]very day cars are driving on the easement *** without just compensation to the Nation."). This is the same present, ongoing federal-law violation at issue in other cases that allowed claims to proceed under *Ex parte Young*. *See Mille Lacs Band*, 124 F.3d at 914 (claims that seek prospective injunctive relief "for continuing violations of the Bands' federal treaty rights" "fall squarely within the *Ex parte Young* exception to the Eleventh Amendment"); *Seneca Nation*, 397 F. Supp. at 686 (permitting Nation's claim to proceed based on New York's infringement of "use and enjoyment" of land guaranteed by Treaty with the Six Nations and other treaties).[8]

Thus, the Nation's allegations easily satisfy the generous standard for pleading an *Ex parte Young* claim. *See In re Dairy Mart*, 411 F.3d at

[8] Although neither *Coeur d'Alene* nor *Western Mohegan* permitted *Ex parte Young* claims because of the unique state interests at issue, both cases assumed the plaintiffs had alleged an ongoing violation of federal law. *See Coeur d'Alene*, 521 U.S. at 281 ("The Tribe has alleged an ongoing violation of its property rights in contravention of federal law and seeks prospective injunctive relief."); *Western Mohegan*, 395 F.3d at 21 (assuming that the tribe "alleged ongoing violations of federal law by virtue of the State's claims to certain contested lands").

376 (in ruling on motion to dismiss *Ex parte Young* suit, district court must determine that "the relief sought does not rest upon a disingenuous allegation of a continuing federal law violation"); *see also Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 738 (5th Cir. 2020) (holding that "straightforward, present-tense allegations 'are sufficient to demonstrate the ongoing nature of the alleged un[lawful] conduct'") (alteration in original) (quoting *NiGen Biotech L.L.C. v. Paxton*, 804 F.3d 389, 395 (5th Cir. 2015)).

The Nation also seeks multiple forms of *prospective* equitable relief, as the District Court observed. JA240 (determining that the Nation seeks "compensation only for the use of the easement *going forward*"). The Nation asks that the state officers "obtain a valid easement for the portion of the Nation's Reservation on which the Thruway is situated *** on terms that will *in the future* equitably compensate the Nation pro rata for *future* use of its lands." JA11-12 (emphases added). In the alternative, the Nation asks that the state officers be enjoined from collecting tolls for the portion of the Thruway located on the Nation's lands without obtaining a valid easement. *Id.* The Nation also requests that the State Comptroller "segregate and hold in escrow any future toll

monies collected on the Thruway that are fairly attributable to the portion of the Thruway operated in violation of the Nation's federally protected property rights until the [state officers] obtain a valid easement." *Id.* Each form of the Nation's requested relief is entirely forward-looking. To the extent the Nation seeks monetary relief, that request is appropriate under *Ex parte Young*, which permits forward-looking relief even if "accompanied by a substantial ancillary effect on the state treasury." *Papasan*, 478 U.S. at 277-278.

B. The State Officers Mischaracterize The Nation's Suit.

The state officers argue that the Nation's complaint seeks retrospective relief in disguise. Br. 25-26. They invoke the Supreme Court's decision in *Papasan*, which held that the Eleventh Amendment precluded school officials and schoolchildren from suing state officials to secure backward-looking relief for a breach of trust obligations arising out of historical transactions involving Indian lands. *Id.* (citing *Papasan*, 478 U.S. at 278). The state officers say that the Nation's claims likewise concern a "past wrong"—the negotiation of the purported Thruway easement in 1954—rather than a continuing violation of federal law. Br. 25.

But as the District Court correctly held (JA239), *Papasan* supports the Nation, not the state officers. The state officers gloss over *Papasan*'s *second* holding: that the same plaintiffs *could* invoke *Ex parte Young* to remedy the ongoing, longstanding disparity in school funding stemming from those historical land transactions. 478 U.S. at 282. Even though the disparity stemmed from a specific event (the unlawful breach of trust), the "alleged ongoing constitutional violation—the unequal distribution by the State of the benefits of the State's school lands—is precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." *Id.* The Nation seeks the very same sort of prospective relief here based on the harmful effects of the state officers' continuing violation of federal treaties and laws.

That this unlawful conduct began when the purported easement was illegally conveyed does not defeat the Nation's *Ex parte Young* claim. As other courts have recognized, under *Papasan*, "as long as the claim seeks prospective relief for ongoing harm, the fact that a current violation can be traced to a past action does not bar relief under *Ex parte Young*." *Williams*, 954 F.3d at 738; *see also Rossborough Mfg. Co. v. Trimble*, 301 F.3d 482, 489 (6th Cir. 2002). For instance, the Fifth Circuit recently

held that a water utility district could invoke *Ex parte Young* to challenge a public utilities commission's (PUC) order stripping the utility of the right to provide wastewater services. *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472-473 (5th Cir. 2020). The court rejected the defendant officials' argument that the utility pointed to a "discrete event"—the PUC's withdrawal of the utility's wastewater certification—with "no ongoing violation of which to speak." *Id.* at 472. Even though the "ongoing harms that [the utility] alleges it suffers can be traced to the PUC's [decertification] order," *Ex parte Young* permitted the utility to seek to enjoin the PUC from enforcing the order or awarding sewer services to any other entity in the future. *Id.* at 472-473. The same principle applies here. The Nation's "present" injuries from continuing unlawful conduct are sufficient to state a claim under *Ex parte Young*. *Papasan*, 478 U.S. at 281. That these injuries can be "traced" back to the purported easement's illegal origins does not foreclose a forward-looking suit. *Green Valley*, 969 F.3d at 471-472 (quoting *Williams*, 954 F.3d at 738).

The Nation's claims are also different from the breach of trust claims the *Papasan* plaintiffs unsuccessfully pursued. It is true, as the

state officers point out (Br. 24), that the *Papasan* Court found the plaintiffs' breach of trust remedy to be backward-looking even though it was styled as a prospective claim. *Papasan*, 478 U.S. at 280-281. But the Court emphasized the unique aspects of a breach of trust claim that effectively prevented the plaintiffs from seeking prospective relief. *Id.* Regardless whether the plaintiffs in *Papasan* styled their claim as a "past breach of trust" or the "continuing obligation to meet trust responsibilities," the trustee would in both cases be required to compensate for the "past loss of the trust corpus" by "us[ing] its own resources to take the place of the corpus or the lost income from the corpus." *Id.* at 281. The "continuing payment" the plaintiffs sought was not truly prospective at all. *Id.* Rather, it was "essentially equivalent *** to a one-time restoration of the lost corpus itself" and was therefore "in substance" a claim for an "accrued monetary liability." *Id.* (emphasis omitted). By contrast, here the Nation does not seek any compensation for the state officers' use of the purported easement from 1954 until now. JA11-12. And there is no sense in which a monetary award directed to *future* toll collections from *future* Thruway traffic will compensate the Nation for the decades of harm the unlawful easement has already

caused. JA240 (rejecting argument that Nation is seeking compensation for an accrued monetary liability). While *Papasan* reinforced that plaintiffs cannot seek retrospective relief in the guise of a prospective remedy, 478 U.S. at 281, the Nation has not brought such a claim.

C. The Nation's Suit Does Not Seek A "Contractual Remedy."

Besides arguing that the Nation's suit improperly seeks retrospective relief, the state officers also claim that the Nation seeks a contractual remedy unavailable in an *Ex parte Young* action. Br. 26-27. The officers argue that the Nation seeks to "renegotiate the terms of the easement" and cite *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 133 (2d Cir. 2010), for the proposition that this "contract-based" remedy is barred by the Eleventh Amendment. Br. 26. But the officers misstate the Nation's core allegation, which is that the parties never entered into a valid easement at all. JA13-14. The state officers cannot rewrite the Nation's complaint as seeking to "renegotiate" a lawful contract (Br. 26-29), when the Nation instead challenges the continued operation of the Thruway across the Nation's land in violation of federal law. *In re Dairy Mart*, 411 F.3d at 376 ("[W]hen passing on a motion to dismiss" because of Eleventh Amendment immunity, courts

"need not accept the defendant's recharacterization of the plaintiff's suit[.]").

Even if this were a case about contract negotiation, there is no exception to *Ex parte Young* for so-called "contract-based" claims. Br. 26. This Court and others have routinely considered claims relating to easements, leases, and contracts in *Ex parte Young* suits. *See State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96-97 (2d Cir. 2007) (collective bargaining agreement); *see also Severance*, 566 F.3d at 492-493 (easement); *Elephant Butte Irrigation Dist.*, 160 F.3d at 605 (lease); *Town of Barnstable v. O'Connor*, 786 F.3d 130, 140-141 (1st Cir. 2015) (contract to buy state-generated wind power).

Oneida Indian Nation did not come close to establishing a contrary rule—in fact, it did not address *Ex parte Young* at all. Rather, the plaintiff tribes in that case had filed suit against the State of New York and several local counties—but not any state or county officials—regarding their ancestral lands. *Oneida Indian Nation*, 617 F.3d at 116. Among other causes of action, the tribes alleged a "common law 'contract' claim" asserting that the tribes "received unconscionable consideration" when engaging in land transactions with the State. *Id.* at 129. Although

this Court held that New York's sovereign immunity barred those claims, it did so for reasons having nothing to do with *Ex parte Young*—or any other principle bearing on this case. *Id.* at 132-134. Rather, the Court considered whether the tribes' contract claim overlapped with claims the United States had raised as an intervenor in the suit. *Id.* at 131-132. If it did, the Eleventh Amendment would not bar the claim. *Id.* (citing *Alden v. Maine*, 527 U.S. 706, 755 (1999) (state sovereign immunity does not bar suits by the United States); *Alabama v. North Carolina*, 560 U.S. 330, 356 (2010) (parties may bring claims against states that "entirely overlap[]" with those brought by the United States)). But "even construing the United States' *** complaint liberally," the Court found it "does not contain the contract-based claim" the tribes sought to assert. *Id.* at 132. The Court thus held that "New York [wa]s immune from suit with regard to the 'contract' claim" the tribes asserted. *Id.* at 135. That is, the Court held that the particular contract-based claim the tribes alleged was precluded because the United States did not also raise it. *Id.* The Court did not establish any sweeping Eleventh Amendment protection for "contract-based claims," as the state officers argue here. Br. 26.

As the District Court held, neither *Papasan* nor any other principle requires dismissal of this case on Eleventh Amendment grounds. JA240. And as the District Court also acknowledged, the Nation's lawsuit is still in its nascent stages, with no discovery yet begun. JA235-236, 241, 246-247. The District Court's ruling simply declined to cut off the Nation's suit at the outset and instead allowed it to proceed to factual development. This Court should do the same by affirming the District Court's decision and order.

CONCLUSION

The District Court's denial of the state officers' motion to dismiss should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Century Schoolbook proportional font and contains 12,157 words as determined by Microsoft Word, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rule of Appellate Procedure, and thus complies with the typeface, typestyle, and type-volume requirements set forth in Rule 32(a)(5)-(7)(B) of the Federal Rules of Appellate Procedure.

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