# 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

**BRIEF FOR DEFENDANTS-APPELLANTS**

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## PRELIMINARY STATEMENT

In this lawsuit, plaintiff Seneca Nation of Indians (the Nation) seeks to compel various state officials and the New York State Thruway Authority to renegotiate an agreement the Nation made with the State of New York in 1954. Under that agreement, the Nation granted the State a permanent easement to build and maintain the New York State Thruway over a portion of the Nation's Cattaraugus Reservation. In exchange, the State paid $75,000 to the Nation in addition to compensating individual landowners affected by its acquisition of the easement.

The Nation brought this action in the U.S. District Court for the Western District of New York (Vilardo, J.), contending that its 1954 conveyance of the Thruway easement violated the Non-Intercourse Act of 1834, which requires that any conveyance of land by an Indian tribe be approved by the federal government. On that basis, the Nation claimed that the easement was void *ab initio*, thereby setting the stage for the Nation's demand for compensation for a new easement. The district court declined to dismiss the Nation's claim, leading to the current appeal.

This is not the first time the Nation has sought to invalidate the Thruway easement. The Nation brought a federal lawsuit against the State and the New York State Thruway Authority in 1993 over the easement; that suit was dismissed on the ground that the State—as owner of the easement—was a necessary and indispensable party, yet was immune from suit in federal court under the Eleventh Amendment. This Court affirmed. A decade and a half later, the Nation brought this federal lawsuit against the Thruway Authority and various officers of the State in their official capacities. Defendants moved to dismiss based on the State's Eleventh Amendment immunity and collateral estoppel. The district court denied the motion, but certified the issues for interlocutory appeal, and this Court granted defendants' petition for permission to appeal.

This Court should reverse. As an initial matter, the Thruway Authority itself is not a proper defendant because the State, not the Thruway Authority, is the holder of the easement. And relief is unavailable against the individual State officers for any of three independent reasons as demonstrated below: the suit is barred by collateral estoppel; the suit is barred by the Eleventh Amendment

because it challenges the State's title and sovereign interest in a major highway; and the suit is barred by the Eleventh Amendment for the additional reason that it is in effect a suit against the State for compensation.

## ISSUES PRESENTED

1. Whether the Nation is collaterally estopped by this Court's 2004 decision from relitigating the issue of whether the State's Eleventh Amendment immunity to suit in federal court bars the tribe's challenge to the State's easement.

2. Whether this challenge to the State's easement fails to satisfy the requirements for a suit against individual state officers under *Ex parte Young*, 209 U.S. 123 (1908), because the lawsuit is equivalent to a quiet title action that contests not only the State's title to the easement but also its sovereign interest over a major highway. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

3. Whether this challenge to the State's easement fails to satisfy the requirements for an *Ex parte Young* suit against individual state officers because the relief that it seeks—requiring defendants to acquire a new easement or hold all future toll proceeds in escrow on the tribe's

behalf until they do so—amounts to retrospective, compensatory relief for a past wrong. *See Papasan v. Allain*, 478 U.S. 265, 280 (1986).

## STATEMENT OF THE CASE

### A. The Thruway Easement

The Seneca Nation of Indians, once part of the Iroquois Confederacy, is a federally-recognized tribe based in Western New York. The Nation's Cattaraugus Reservation borders Lake Erie and is located approximately 30 miles southwest of Buffalo. In the 1940s, the State of New York began planning the New York State Thruway, on a route that would travel along the Lake Erie shoreline between Buffalo and Erie, Pennsylvania. (JA15-17.)

In 1954, the Nation granted the State of New York a permanent easement over the relevant portion of its Cattaraugus Reservation for construction of the New York State Thruway. (JA18; *see also* JA110-112.) In exchange, the State agreed to pay the Nation $75,500,[1] in addition to compensation for the individual landowners whose property would be affected by the Thruway. (JA18.) The State later built approximately

[1] This amount is equivalent to nearly $750,000 today.

three miles of the Thruway, covering about 300 acres, across the Cattaraugus Reservation. (JA18.)

### B. The Nation's 1993 Lawsuit

In 1993, the Nation sued the State of New York, the New York State Thruway Authority, and the Authority's Executive Director, seeking to void the same easement at issue in this action. *See Seneca Nation of Indians v. New York*, Case No. 93-CV-688A (W.D.N.Y.). (JA31-44.) The Nation alleged that its conveyance of the Thruway easement to the State in 1954 violated the Non-Intercourse Act of 1834, 25 U.S.C. § 177, because the federal government did not approve the transfer, and that the defendants therefore were "trespassers upon the land." (JA41.) The Nation sought a declaration that the easement was null and void, ejectment, and compensatory damages. (JA42-43.)[2]

The district court dismissed that claim under Federal Rule of Civil Procedure 19 upon determining that the State of New York, as the owner of the easement, was a necessary and indispensable party, and that

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[2] In the same lawsuit, the Nation brought an additional claim against the State and various State officials challenging the 1815 sale of certain islands in the Niagara River. (JA38-39.)

Eleventh Amendment immunity prevented it from being named as a defendant.

This Court affirmed. *Seneca Nation of Indians v. New York*, 383 F.3d 45 (2d Cir. 2004), *cert. denied*, 547 U.S. 1178 (2006). On appeal, the Nation did not "contest that the State of New York enjoys sovereign immunity," but argued that the action could proceed against the Thruway Authority without the State. *Id.* at 47. The Court disagreed, explaining that the State, as owner of the easement, "had an 'interest relating to the subject of the action and was so situated that the disposition of the action in its absence may as a practical matter have impaired or impeded its ability to protect that interest.'" *Id.* at 48 (quoting Fed. R. Civ. P. 19(a)(2)(i)) (brackets and ellipsis omitted). The Court then upheld the district court's determination that the State was an indispensable party under Rule 19(b), noting "the significance sovereign immunity plays in weighing the Rule 19(b) factors." *Id.* at 49.

### C. This Litigation

In 2018, the Nation brought the current lawsuit based on the same theory as its earlier 1993 lawsuit—that title to the easement did not pass to the State because the transfer was effectuated contrary to federal law.

(*Compare* JA18-20, *with* JA41.) This time, the Nation named the Governor, Attorney General, Comptroller, and Acting Commissioner of New York State Department of Transportation—along with the Thruway Authority—as defendants. (JA12.)

By way of relief, the Nation seeks an order (1) enjoining defendants from "continuing unauthorized use" of its reservation "for the purpose of operating a toll road without a valid easement"; (2) requiring defendants to obtain a "valid easement" in compliance with federal law, "on terms that will in the future equitably compensate the Nation pro rata for future use of its lands"; (3) barring defendants from collecting tolls attributable to the portion of the Thruway situated on the easement until they obtain a valid easement; (4) alternatively, requiring the Comptroller to hold any such collected tolls in escrow until defendants obtain a valid easement. (JA11-13.) Additionally, the Nation requests (5) a declaration that defendants "will continue to violate federal law by not obtaining a valid easement for the portion of the Thruway over the Nation's Reservation Lands and that some of the funds being collected by the Thruway and being deposited with the Comptroller on a continuing basis are derived from this violation of federal law." (JA23.)

Defendants moved to dismiss the complaint on three grounds. First, defendants argued that the Nation was collaterally estopped from relitigating the issue of the State's Eleventh Amendment immunity, because this Court, in the 1993 lawsuit, had already ruled that the State was a necessary and indispensable party in whose absence the case could not proceed. Second, defendants argued that, even aside from collateral estoppel, the State was the real party at interest and its Eleventh Amendment immunity barred the lawsuit. Nor could the Nation evade this bar by invoking *Ex parte Young*, 209 U.S. 123 (1908), and suing State officers individually, as it had attempted, both because its claim was functionally equivalent to a "quiet title" action that implicated the State's sovereign and regulatory interests, *see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and because the relief sought by the tribe was the substantive equivalent of retrospective relief, *see Papasan v. Allain*, 478 U.S. 265 (1986). And third, defendants argued that the Nation's challenge to the easement is barred by laches, given its long delay in bringing its challenge and the consequent prejudice to defendants.

While the magistrate judge recommended dismissal on the ground of collateral estoppel (JA100), the district court disagreed and denied

defendants' motion, allowing the claims to proceed (JA248). First, the court found that collateral estoppel did not apply, because the "issue" in the current lawsuit was whether the tribe could proceed against individual officers under *Ex parte Young*, and that issue was not raised or decided in the 1993 case. (JA232-237.) Second, the court rejected defendants' argument that *Coeur d'Alene* and this Court's decision in *Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 23 (2d Cir. 2004), precluded the tribe from attempting to circumvent the State's sovereign immunity through the vehicle of an *Ex parte Young* suit against individual officers. (JA241-246.) Third, the court rejected defendants' argument that *Papasan* barred the Nation's suit, finding that the Nation's allegation of ongoing harm in the form of defendants' continuing failure to remit toll proceeds was not equivalent to retrospective relief. (JA238-240.) Finally, the court concluded that laches was not a basis for dismissal at the pleadings stage of this case. (JA246-247.)

Despite denying defendants' motion to dismiss, the district court recognized that the case presents "difficult and weighty issues" and *sua sponte* certified an interlocutory appeal under 28 U.S.C. § 1292(b).

(JA247.) Defendants filed a petition for permission to appeal (JA249), which this Court granted on December 29, 2020 (2d Cir. Doc. No. 27).

## STANDARD OF REVIEW

This Court reviews a denial of a motion to dismiss on sovereign immunity grounds de novo. *See Vega v. Semple*, 963 F.3d 259, 281 (2d Cir. 2020). Likewise, a district court's application of collateral estoppel is a question of law reviewed de novo. *See M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 689 F.3d 263, 284 (2d Cir. 2012).

## SUMMARY OF ARGUMENT

This Court should reverse the district court's denial of defendants' motion to dismiss. As an initial matter, as this Court held in the prior litigation over the State's easement, the case may not proceed against the Thruway Authority in the absence of the State of New York, because the State is the holder of the contested easement and a necessary and indispensable party. The outcome of this case thus turns on whether the Nation may circumvent the State's Eleventh Amendment immunity by suing individual officers under *Ex parte Young*. For any of three independent reasons, it may not.

First, the Nation is collaterally estopped from relitigating the issue of whether the State's Eleventh Amendment immunity presents an insurmountable bar to suit in federal court. Second, the Nation cannot circumvent the State's Eleventh Amendment immunity by suing individual officers under *Ex parte Young*, because the Nation's claims are the functional equivalent of a quiet title action and implicate not only the State's title to the easement, but its sovereign and regulatory interest in a major highway. Third, the Nation's claims against the individual State defendants are barred for the additional reason that the claims essentially seek compensatory relief from the State for an alleged past violation of federal law. Such relief is outside the scope of the *Ex parte Young* exception to sovereign immunity, which may be invoked only to halt ongoing violations of law.

## ARGUMENT

The State and its officers generally enjoy immunity from suit in federal court. *See* Const. amend. XI; *Vega v. Semple*, 963 F.3d 259, 281 (2d Cir. 2020). This sovereign immunity extends to suits brought by Indian nations. *See Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 781-82 (1991). In *Ex parte Young*, 209 U.S. 123 (1908), the

Supreme Court carved out "a limited exception to the general principle of sovereign immunity." *W. Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 21 (2d Cir. 2004). There, the Court held that "sovereign immunity did not bar actions seeking only prospective injunctive relief against state officials to prevent a continuing violation of federal law." *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 371 (2d Cir. 2005).

Although this Court has held that the Thruway Authority is not an arm of the State and therefore does not enjoy sovereign immunity, *see Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 296 (2d Cir.), *cert. denied*, 519 U.S. 992 (1996), this case may not proceed against the Thruway Authority in the absence of the State. That is because, as this Court held in the Nation's prior litigation over the easement, the State, as the holder of the easement, is a necessary and indispensable party under Federal Rule of Civil Procedure 19. *Seneca Nation of Indians v. New York*, 383 F.3d 45 (2d Cir. 2004), *cert. denied*, 547 U.S. 1178 (2006).

For the reasons below, the Nation is collaterally estopped by this Court's prior holding from contesting the issue of the State's Eleventh Amendment immunity. Nor may the Nation attempt to circumvent the State's immunity by proceeding against individual State officers under

*Ex parte Young*. The Rule 19 defect with regard to the claims against the Thruway Authority thus cannot be cured by naming these officers, and this Court should reverse.

## POINT I

### THE NATION IS COLLATERALLY ESTOPPED BY THIS COURT'S EARLIER DECISION FROM CONTESTING THE STATE'S ELEVENTH AMENDMENT IMMUNITY

The district court erred in ruling that the Nation's claims challenging the validity of the Thruway easement may proceed notwithstanding this Court's earlier holding that such claims are barred by the State's Eleventh Amendment immunity to suit in federal court. The Nation's second attempt to invalidate the easement is barred by collateral estoppel, which prevents a party from relitigating an issue that was decided against it in a prior proceeding where it had a full and fair opportunity to litigate the issue, and where the issue was necessary to support a final judgment. *See, e.g.*, *Wyley v. Weiss*, 697 F.3d 131, 141 (2d Cir. 2012).

In its 2004 decision addressing the Thruway easement, this Court decided the very issue the Nation now seeks to relitigate: whether a claim challenging the validity of the State's title to the Thruway easement may

proceed notwithstanding the State's Eleventh Amendment immunity. *Seneca Nation*, 383 F.3d at 46 (agreeing with lower court's finding that Nation's action to invalidate easement was "barred by sovereign immunity"). This Court squarely held that the State is a necessary and indispensable party in whose absence the Nation's claim could not proceed. *Id.* at 48. The Court explained that the State was a necessary party because it owned the disputed easement. *Id.* And the State's Eleventh Amendment immunity—which the Nation did not contest—meant that it could not be joined, necessitating dismissal. *Id.* (citing Fed. R. Civ. P. 19(b)). Indeed, this Court emphasized "the significance sovereign immunity plays in weighing the Rule 19(b) factors." *Seneca Nation*, 383 F.3d at 49.

The district court's ruling that the instant case may proceed under *Ex parte Young* cannot be reconciled with this Court's earlier decision. If, as this Court held, the State is a necessary and indispensable party to any claim challenging the validity of the Thruway easement, then the Nation's claims here are barred by Eleventh Amendment immunity—just as they were in the 1993 lawsuit.

In rejecting this argument, the district court relied on the fact that in the 1993 lawsuit the Nation did not name individual state officers with respect to the easement claim. (JA235.) Given the nature of the Nation's claim, this is a distinction without a difference. Even if individual state officers had been named, the State still would have been a necessary party because it was the owner of the easement the Nation was seeking to void. Indeed, this Court has explained that *Seneca Nation* "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); *see also Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991) (holding that Seneca Nation was a necessary and indispensable party to claim alleging that lease agreement was null and void because Nation was a party to the agreement); *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 997 (9th Cir. 2020) (because tribal village was real party in interest, village was indispensable party and *Ex parte Young* did not apply).

Moreover, individual state officers were defendants on other claims in the 1993 lawsuit. If the State's Eleventh Amendment immunity could

have been circumvented through the simple expedient of suing individual officers—who were already parties in the suit—then the State would not have been a necessary and indispensable party. Nor would the State's sovereign immunity have played any role in the Court's Rule 19(b) analysis. *Ex parte Young* thus offers the Nation no relief from this Court's earlier Rule 19(b) ruling.

In any event, the Nation's invocation of *Ex parte Young* at most presents a new argument or legal theory for why this case may proceed notwithstanding the State's immunity. But a party cannot defeat collateral estoppel by advancing new theories to support a different resolution of an already-decided issue. *See Ramallo Bros. Printing Inc. v. El Dia, Inc.*, 490 F.3d 86, 92 (1st Cir. 2007) (so holding); *Simmons v. Small Bus. Admin.*, 475 F.3d 1372, 1374 (Fed. Cir. 2007) (a party may not assert a "different ground" to reargue an issue that has already been decided) (citing Restatement of the Law (Second) Judgments § 27, comment c, illustration 4). For all these reasons, the district court erred in rejecting defendants' collateral estoppel defense.

## POINT II

### ALTERNATIVELY, THE STATE'S ELEVENTH AMENDMENT IMMUNITY BARS THE NATION'S ATTEMPT TO ADJUDICATE THE STATE'S TITLE TO A MAJOR HIGHWAY

Even if the Court were to revisit its earlier ruling, it should reach the same result: dismissal of the Nation's claims, which are barred by the State's Eleventh Amendment immunity. And the Nation may not circumvent the State's immunity by suing individual State officers under *Ex parte Young*, because the Nation's claims in this suit, like those brought in the 1993 litigation, challenge the State's title to the Thruway easement. Not only is this challenge the functional equivalent of a quiet title action against the State, which may not be brought in federal court, but it is even more intrusive than such an action because it implicates the State's sovereign interest in a major highway.

It is well settled that a state's sovereign immunity extends to cases in which the state is the real party in interest, even though other parties are named as defendants. *See In re Dairy Mart*, 411 F.3d at 374. For example, a state may be the real party in interest "when enforcement of the court's decree would affect the state's political or property rights." *Id.* Thus, as the Supreme Court explained in *Idaho v. Coeur d'Alene Tribe of*

*Idaho*, 521 U.S. 261 (1997), a quiet title action or its "functional equivalent" may not be maintained against a state in federal court. *Id.* at 281-82. Nor does the *Ex parte Young* exception apply, even if the plaintiff ostensibly seeks prospective relief against individual state officers. *Id.*; *see also W. Mohegan*, 395 F.3d at 23 n.4.

In *Coeur d'Alene*, a federally recognized Indian tribe sued state officers and requested a declaratory judgment that the tribe was entitled to exclusive use of certain submerged lands. 521 U.S. at 265. Those lands, comprising the bed of Lake Coeur d'Alene and its navigable tributaries, were located within the boundaries of the tribe's reservation, but had long been under the jurisdiction of the State of Idaho. *Id.* The tribe also sought an injunction prohibiting future state regulation of this area. *Id.*

The U.S. Supreme Court concluded that the tribe had commenced "the functional equivalent of a quiet title action" which may not be brought against states in federal court absent their consent. *Coeur d'Alene*, 521 U.S. at 281-82. That is because, if the relief were granted, "substantially all benefits of ownership and control would shift from the State to the Tribe." *Id.* at 282. And the "far-reaching and invasive" relief sought by the tribe would have "consequences going well beyond the

typical stakes in a real property quiet title action," because the tribe sought a determination that the lands in question "are not even within the regulatory jurisdiction of the State." *Id.* at 282. The Court further noted that the tribe's suit "implicate[d] special sovereignty interests" because the "public character of submerged lands" tied them "in a unique way to [the State's] sovereignty." *Id.* at 282, 286. As Justice O'Connor stated in her concurrence, *id.* at 296, "[w]here a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State."

The Court in *Coeur d'Alene* thus held that because the relief requested by the tribe would be "fully as intrusive" as a money damages award, the Eleventh Amendment barred the suit even though the tribe nominally sought prospective relief against state officers. 521 U.S. at 287; *see also W. Mohegan*, 395 F.3d at 23 (tribe's assertion of "Indian title" over disputed land is inconsistent with the State's regulatory authority); *Jamul Action Comm.*, 974 F.3d at 995-96 (tribal village was real party in interest in suit "call[ing] into question the status of the Village's property and the validity of its contracts").

The Nation's claim similarly implicates the State's sovereign and regulatory interest over the disputed land. Although the Nation holds fee title to that land, the State holds a permanent easement. By contesting the State's title to that easement, the Nation's suit is the functional equivalent of a quiet title action. *See MacDonald v. Vill. of Northport*, 164 F.3d 964, 972 (6th Cir. 1999) (holding that federal suit against state officials challenging public right of way was sufficiently "similar to a quiet title action" as to be barred under *Coeur d'Alene*). Indeed, a challenge to an easement in New York State court may be brought as a quiet title action under Real Property Actions and Proceedings Law § 1501. *See, e.g.*, *Ingold v. Tolin*, 784 N.Y.S.2d 573 (App. Div. 2004). And the relief sought by the Nation would be far more invasive than an ordinary quiet title action, *see Coeur d'Alene*, 521 U.S. at 282, because it *would* divest the State of its regulatory authority over a portion of a major state highway, one which has been under State control since its creation over sixty years ago.

Indeed, like the submerged lands and waterways discussed in *Coeur d'Alene*, the Thruway has a uniquely "public character." 521 U.S. at 286. The Thruway exists for "the benefit of the people of the state of

New York" (including members of the Nation): "for the increase of their pleasure, convenience and welfare, for the improvement of their health, to facilitate transportation for their recreation and commerce and for the common defense." Pub. Auth. L. § 353; *cf. Coeur d'Alene*, 521 U.S. at 286-87 (citing Idaho statutes providing that waterways and Lake Coeur d'Alene be held in trust for the public benefit). The Nation's challenge to the Thruway easement threatens the State's sovereign interest in a major public good, and is thus barred by the Eleventh Amendment even though it was nominally brought against individual state officers and the Thruway Authority.

Although the district court relied on the fact that the Nation has not sought to force the State to "remove the portion of the Thruway that runs over the easement" (JA243), that does not render its lawsuit any less an action to quiet title: the tribe in effect seeks a declaration that the easement was void *ab initio*, thus extinguishing the State's current title.

Moreover, a federal court's invalidation of the Thruway easement would carry significant consequences. The potential for disruption would extend far beyond the individual defendants named in this suit, who are essentially stand-ins for the State itself. If the Thruway easement were

invalidated, it would extinguish the State's authority to operate the three miles of the Thruway that cross the tribe's Cattaraugus Reservation. Such a declaration would open the door to any one of a number of more drastic remedies for trespass—including ejectment. All State officials—not just the individual defendants here—could thus be prevented from maintaining this portion of the Thruway. *Cf. United States v. Lee*, 106 U.S. 196 (1882) (plaintiff may sue government officials to recover possession of real property, but judgment in such suit cannot bind the sovereign itself or extinguish its title). And the thousands of motorists who travel the relevant portion of the Thruway every day would suddenly be trespassing absent the Nation's permission. That the relief sought would entail such a serious disruption to the State's operation of a major highway only highlights the weight of the State's interest.

The district court thus erred in holding that a categorically lesser property interest was at stake here than in *Coeur d'Alene*. Because the State is the real party in interest, the Nation's claims are barred by the State's Eleventh Amendment immunity.

## POINT III

### THE STATE'S ELEVENTH AMENDMENT IMMUNITY APPLIES FOR THE ADDITIONAL REASON THAT THE NATION SEEKS RETROSPECTIVE AND COMPENSATORY RELIEF

The district court further erred in permitting the Nation's official-capacity claims against the individual defendants to go forward because those claims essentially seek compensation for a past wrong. Claims seeking such relief against state officers sued in their official capacity cannot be brought in federal court under the *Ex parte Young* exception to states' Eleventh Amendment immunity.

As the Supreme Court explained in *Papasan v. Allain*, 478 U.S. 265 (1986), a party seeking compensation for a past wrong may not proceed against individual state officers under *Ex parte Young*—even if the requested relief is cast in prospective terms. The plaintiffs in *Papasan* were schoolchildren and school officials who sued Mississippi state officials, alleging that the State had unlawfully disposed of land that it was supposed to have held in trust for the plaintiffs' benefit. 478 U.S. at 274-75. Although the sale of the land occurred over one hundred years earlier, the plaintiffs argued that the state officials' continued failure to

pay over to them income from those lands constituted an ongoing violation of federal law. *Id.* at 279-80.

The Court rejected the *Papasan* plaintiffs' argument, holding that they could not bring their trust claims within *Ex parte Young* because those claims were essentially compensatory. As the Court explained, "[r]elief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant." *Papasan*, 478 U.S. at 278. The Court discerned "no substantive difference" between a "not-yet-extinguished liability" for a past breach of trust, and "the continuing obligation to meet trust responsibilities." *Id.* at 281. The perpetual income stream sought by the plaintiffs, the Court observed, "is essentially equivalent in economic terms to a one-time restoration of the lost corpus itself," albeit in the form of "continuing income" rather than a "lump sum of 'an *accrued* monetary liability.'" *Id.* at 281 (citation omitted).[3]

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[3] Although the breach of trust claim was barred by Eleventh Amendment immunity, the Court held that the plaintiffs could pursue their equal protection claim in federal court. That claim alleged "the unequal distribution by the State of the benefits of the State's school

Like the plaintiffs in *Papasan*, the Nation seeks compensation for a past wrong. Each of the Nation's claims is based on the allegedly invalid transfer of the Thruway easement to the State in 1954. According to the complaint, "[t]he State officials who negotiated and obtained the easement did not comply" with the Non-Intercourse Act. (JA14.) The Nation does not assert that the individual defendants themselves are currently violating this statute. Nor could they, as the statute is not one that may be continuously violated; it governs the act of "purchase, grant, lease, or other conveyance" of an interest in lands from an Indian tribe, requiring the federal government to approve such act. 25 U.S.C. § 177.

To remedy the allegedly wrongful conveyance, the tribe—again, like the plaintiffs in *Papasan*—seeks an injunction allowing it to recover the value of the wrongly-conveyed property. Thus, it requests that the State officials be compelled to acquire a new easement "on terms that will in the future *equitably compensate* the Nation pro rata for future use of its lands." (JA21, 23 (emphasis added).) And the Nation requests that the

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lands," which is "the type of continuing violation for which a remedy may permissibly be fashioned under [*Ex parte*] *Young*." *Papasan*, 478 U.S. at 282.

Comptroller be compelled to hold in escrow any toll proceeds attributable to that portion of the Thruway that crosses its reservation until the State obtains a "valid easement." (JA22, 23.) This relief, though styled as injunctive, "is tantamount to an award of damages for a past violation of federal law." *Papasan*, 478 U.S. at 278; *see also Vega*, 963 F.3d at 282 (in determining whether relief is retrospective or prospective, court "look[s] to the substance rather than to the form of the relief sought"); *Ford v. Reynolds*, 316 F.3d 351, 355 (2d Cir. 2003) (because harm suffered by plaintiffs could be remedied by monetary damages, injunctive relief was unavailable and *Ex parte Young* was inapplicable). Indeed, the district court itself referred to the State's withholding of toll proceeds as a failure to pay the Nation "just compensation." (JA240.) The tribe's casting of its requested relief in prospective terms cannot disguise its essentially compensatory nature.

Not only does the relief sought by the tribe have a compensatory purpose, but it also tries to replicate a "contract-based" remedy that is not cognizable under *Ex parte Young*. By seeking an injunction that would require the State to renegotiate the terms of the easement, the Nation essentially seeks to reform an allegedly invalid land sale

agreement. In *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 133 (2d Cir. 2010), *cert. denied*, 565 U.S. 970 (2011), this Court held that such relief is barred by the Eleventh Amendment. In particular, the Oneidas could not proceed against the State on a "contract-based" claim to reform nineteenth century land sales allegedly supported by "unconscionable consideration." *Id.* at 132-35. The injunctive relief sought by the Nation seeks the same relief and is barred for the same reason.

The declaratory relief requested by the Nation is similarly backward-looking: a declaration that defendants "are violating federal law by not obtaining a valid easement" and that some portion of Thruway tolls "are derived from this violation of federal law." (JA22-23.) The only violation of federal law allegedly committed by the State would have occurred in 1954 in connection with its acquisition of the easement. The Nation cannot rely on this alleged past violation to obtain declaratory relief. *See Green v. Mansour*, 474 U.S. 64, 73 (1985) (declaratory judgment is inappropriate under *Ex parte Young* in the absence of a continuing violation of federal law).

The district court's attempt to distinguish *Papasan* is not persuasive. The court concluded that the State's continuing failure to remit toll proceeds to the Nation represents an "ongoing" harm. (JA240.) But that "ongoing" failure is no different from Mississippi's "ongoing" failure, in *Papasan*, to remit to the plaintiffs, in perpetuity, income equivalent to what the lost trust corpus would have yielded. That the State's alleged past wrong can be cast as a continuing failure to remedy that wrong by paying what is owed does not alter the fundamentally retrospective, compensatory nature of the relief.

Indeed, just like the trust income in *Papasan*, future toll income earned through ownership of the easement is "essentially equivalent in economic terms" to a "one-time restoration" of the easement's present value. *See Papasan*, 478 U.S. at 281; *see also Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1221 (11th Cir. 2000) ("The fact that harm is ongoing in the sense that Plaintiffs are continuing to suffer the effects of Defendants' prior [violations of federal law] does not make the relief any less retrospective."); *Kelley v. Metro. Cty. Bd. of Educ.*, 836 F.2d 986, 991 (6th Cir. 1987) (whether "'compensatory interest' is being satisfied only

prospectively is a circumstance devoid of constitutional significance" in Eleventh Amendment analysis).

Although the district court found (JA240) this case differs from *Papasan* because the Nation alleges ongoing wrongs whereas the plaintiffs in *Papasan* alleged a past breach of trust, that contrast is not apt. The plaintiffs in *Papasan* did attempt to allege an ongoing wrong; it was simply derivative of the state's past breach of trust obligations. Similarly here, the ongoing wrongs identified by the district court, such as the alleged "unsanctioned use of [the Nation's] lands," are derivative of the allegedly wrongful transfer. Notably, the Nation does not otherwise complain about the presence of the Thruway on its lands: the complaint does not allege that the State's operation of the Thruway interferes with the Nation's use and enjoyment of the Cattaraugus Reservation, or that the individual defendants are trespassing on the Reservation. To the contrary, the Nation wants to *maintain* the State's easement—so long as the State renegotiates the deal it struck with the Nation in 1954. This past deal, not any current violation of federal law, is what gives rise to the Nation's claims in this suit.

In sum, because the alleged violation of the Non-Intercourse Act, like the breach of trust in *Papasan*, occurred in the past, there is no continuing violation of federal law that would support prospective relief under *Ex parte Young*. Thus, the individual defendants are immune from suit in federal court, and the district court erred by not dismissing the Nation's claims against them.

## CONCLUSION

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

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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 **5,873** words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

*/s/ Beezly J. Kiernan*