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,

Defendant -Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

MICHAEL L. ROY
Hobbs, Straus, Dean & Walker LLP
1899 L Street, NW, Suite 1200
Washington, DC 20036
(202) 822-8282

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* United South and Eastern Tribes Sovereignty Protection Fund certifies that it has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

/s/ Michael L. Roy
MICHAEL L. ROY
Hobbs, Straus, Dean & Walker LLP
1899 L Street, NW, Suite 1200
Washington, DC 20036
(202) 822-8282
mroy@hobbsstraus.com

November 19, 2021

Counsel for Amicus Curiae

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INTEREST OF *AMICUS*[1]

Amicus Curiae is the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), which represents thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.[2] USET SPF was formed in 2014 as an affiliate of the United South and Eastern Tribes, Inc. to advocate on behalf of USET SPF's Tribal Nation members by upholding, protecting, and advancing their inherent sovereign

[1] No counsel for any Party authored this brief in whole or in part, no Party or Party's counsel contributed money intended to fund preparation or submission of this brief, and no other person or entity other than *Amicus*, its members, and its counsel provided any monetary contribution to fund the preparation or submission of this brief. Plaintiff is one of the 33 member Tribal Nations of USET SPF, but Plaintiff provided no funds towards the preparation or submission of this brief.

[2] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

rights and authorities. Because of their location in the South and Eastern regions of the United States, the USET SPF-member Tribal Nations have the longest continuous direct relationship with the United States government, dating back to some of the earliest treaties. One of the most significant aspects of this long relationship has been the steady loss of tribal land.

Today, USET SPF member Tribal Nations retain only small remnants of their original homelands as a result of the long history of deprivation of their lands by the federal government and the States. Because of their small land base, maintaining access to the courts to enforce ongoing violations of federal law and treaty rights is of paramount importance to USET SPF-member Tribal Nations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants-Appellants seek to characterize this case as nothing more than an attempt by the Seneca Nation to renegotiate a "deal" the State of New York claims it made in 1954 allowing the State to acquire an easement for a 300-acre parcel of the Nation's restricted fee lands on its Cattaraugus Reservation in exchange for $75,000. As is all too common in Indian country, this "deal" was precisely the type of sham transaction that Congress prohibited under numerous treaties and federal law in order to protect Tribal Nations from the "artful scoundrels"—often states—"who [were] least inclined to respect [tribal rights]." *Tuscarora Nation of Indians v. Power Auth.*, 257 F.2d 885, 888 (2d Cir. 1958),

vacated as moot sub nom. *McMorran v. Tuscarora Nation of Indians*, 362 U.S. 608 (1960); *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2462 (2020).

In the present case, the purported "deal" was never approved by the United States and is therefore unlawful and unenforceable. Rather than address the issue on the merits, Defendants-Appellants have sought to bar the Nation from having its claims heard in court by advancing a cramped interpretation of the *Ex Parte Young* doctrine intentionally designed to protect States from being called to task for their unlawful takings of tribal land. USET SPF submits this *amicus* brief to provide the Court with additional background on the importance of Tribal Nations' treaty rights and federal laws with respect to the alienation of Tribal Nations' lands and the importance of allowing Tribal Nations to enforce such rights and laws in court.

ARGUMENT

I. GRANTS OF RIGHTS-OF-WAY ACROSS TRIBAL NATIONS' LANDS REQUIRES FEDERAL APPROVAL BECAUSE IT IS PART OF THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY TO TRIBAL NATIONS

Federal jurisdiction to deal with Tribal Nations is exclusive of State jurisdiction and is constitutionally authorized by the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, and in the exercise of the Supremacy Clause, U.S. Const. art. VI, cl. 2. This principle dates back to the founding of the republic. In its infancy, the United States made

the deliberate decision to prevent States and other actors from entering into agreements to take or encumber Tribal Nations' land without federal approval. One of the abiding concerns of the Framers of the Constitution was that the Indian tribes—both those who already fell under the jurisdiction of the original United States, and those that did not—would ally themselves with foreign powers against the interests of the young and vulnerable new republic. *See generally*, Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 165-170 (2008). The Indian Commerce Clause was not part of the original Articles of Confederation. It was adopted by the Continental Congress in part to remedy difficulties with Article IX of the Articles of Confederation, which had been interpreted by some of the States to authorize them to treat directly with Tribal Nations. *Id.* at 165-170; *see also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 616 (2d. Cir. 1980). In the Framers' eyes, this interpretation of Article IX impermissibly interfered with the federal-tribal relationship and necessitated adoption of the Indian Commerce Clause to prevent States from acting unilaterally with regard to Tribal Nations. Fletcher, *supra*, 165-170.

Upon adoption of the Constitution in 1789, Congress possessed sole and exclusive jurisdiction over the affairs of all Tribal Nations in the United States *vis-a-vis* the States. One of the earliest acts of Congress was the first Trade and

Intercourse Act, which asserted exclusive federal power with regard to trading with Indians. The Act provided that "no person shall be permitted to carry on any trade or intercourse with the Indian tribes . . . ." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137.

Though initially temporary, the Trade and Intercourse Act was reenacted several times (collectively the Non-Intercourse Acts) with minor changes and additions. 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1. Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729; *see Mohegan Tribe*, 638 F.2d at 616-618. Congress made the law permanent in 1802, and amended the Act again in 1834. 2 Stat. 139; 4 Stat. 729.

Each of the Non-Intercourse Acts codified the principle that the alienation or encumbrance of Tribal Nations' land may only be accomplished with federal approval, thus preventing States from entering into agreements with Tribal Nations to divest them of their land or property interests without the requisite approval. To be sure, the motivation of the United States in enacting these laws was to ensure that it retained the exclusive benefit of its assumed supremacy over Indian country to the detriment of States and other non-tribal actors. It also allowed the United States to claim it could act unilaterally in taking the lands of Tribal Nations for its benefit without interference. While USET SPF disputes the United States'

assumed supremacy with regard to Tribal Nations, it is clear that through these laws Congress prohibited States from acting unilaterally in acquiring Tribal Nations' land.

The most recent iteration of these laws—the 1834 Non-Intercourse Act—is codified at 25 U.S.C. § 177 and prohibits "grant[s], lease[s], or other conveyance[s]" without the approval of the Secretary of the U.S. Department of the Interior (Interior) and forbids any person not employed or acting as a licensee of the federal government from "attempt[ing] to negotiate" an agreement for a conveyance of Tribal Nations' land. 25 U.S.C. § 177.

Congress has also asserted exclusive authority over grants of rights-of-way across Tribal Nations' land. Between 1899 and 1948 Congress passed numerous laws authorizing only the Secretary of the Interior to issue grants of easements over such lands. Act of Mar. 2, 1899, ch. 374, § 1, 30 Stat. 990 (codified at 25 U.S.C. §§ 312-318) (providing for the acquisition of "rights-of-way by railroad companies through Indian reservations, Indian lands, and Indian allotments"); Act of Mar. 3, 1901, ch. 832, § 4, 31 Stat. 1084 (codified at 25 U.S.C. § 311) (providing for the opening of highways over Indian reservations and allotment lands); Act of Mar. 11, 1904, ch. 505, §§ 1, 2, 33 Stat. 65 (codified at 25 U.S.C. § 321) (providing for rights-of-way for pipelines); Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253 (codified at 43 USC § 961) (repealed by Pub. L. 94–579, title VII, § 706(a), Oct. 21,

1976, 90 Stat. 2793) (providing for rights-of-way for power and communication lines over public lands including reservations); Indian Right of Way Act of 1948, Pub. L. No. 80-407, 62 Stat. 17 (1948) (codified at 25 U.S.C. §§ 323 to 328) (governing rights-of-way for all purposes).

Of particular relevance here is the Indian Right of Way Act of 1948. 25 U.S.C. §§ 323 *et seq*. Section 1 of the Act authorizes the Secretary of the Interior:

> [T]o grant rights-of-way for all purposes . . . over and across any lands now or hereafter held in trust by the United States for . . . Indian tribes, communities, bands, or nations, ***or any lands now or hereafter owned, subject to restrictions against alienation, by . . . Indian tribes***, communities, bands, or nations, . . . and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C. § 323 (emphasis added).

Notwithstanding these protections, the United States and the individual States took millions of acres of lands and natural resources from Tribal Nations—often by force and coercion. The size of the United States is 2.3 billion acres, which was once all Indian country. By 1934, within the lifetime of our grandparents, Tribal Nations' landholdings were reduced to 48 million acres. Cohen's Handbook of Federal Indian Law § 15.07[1][a] n. 3 (2012 ed.) (citing *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs)); *see also* 73rd Cong. Rec. 11726 (daily ed. June 15, 1934) (statement of Rep. Howard). The United States continued to diminish

the remaining land base of USET SPF Tribal Nation members and placed some Tribal Nations on reservations, often in remote areas with little or no resources or economies.

As Indian country lost, the United States and the individual States gained. Indian country's dramatic loss of land had the inverse effect of providing an extraordinary gain for non-Native people and the surrounding state, county, and local jurisdictions. The strength and wealth of the United States today is rooted in the colonization, predation, and shameful illegal theft of Indian lands.

As a result of the involuntary cession of land and natural resources by Tribal Nations, the United States has taken on unique legal and moral trust and treaty obligations to Tribal Nations and Native people. The federal government's involvement and approval of conveyances of Tribal Nations' land is based on that trust responsibility. *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (acknowledging United States through treaty making and other political actions "took possession of [Tribal Nations'] lands" and in exchange "assumed the duty of furnishing . . . protection"); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942)).

Although it has never fully lived up to it, the United States still has a trust responsibility to uphold Tribal Nations' treaty rights and administer federal laws that it enacted to shield Tribal Nations from land predations by the States. The

federal government's role in negotiations for the conveyance of Tribal Nations' land is "not merely to be present at the negotiations or to prevent actual fraud, deception, or duress alone; improvidence, unfairness, [and] the receipt of an unconscionable consideration would likewise be of federal concern." *United States v. Oneida Nation of N.Y.*, 477 F.2d 939, 943 (Ct. Cl. 1973). Indeed, the Second Circuit has found that in enacting the Non-Intercourse Acts Congress intended "to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain." *Tuscarora Nation of Indians*, 257 F.2d at 888; *see Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). On more than one occasion, the "artful scoundrels" have been States, including the State of New York. *See, e.g.*, *Mohegan Tribe*, 638 F.2d at 614; *Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 54-55 (2d Cir. 1994); *Oneida Nation of N.Y.*, 477 F.2d at 940; *Cayuga Indian Nation of N.Y. v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990); *Cayuga Indian Nation of N.Y. v. Seneca Cty. N.Y.*, 260 F. Supp. 3d 290 (W.D.N.Y. 2017).

The United States Supreme Court and the Second Circuit have held that the Non-Intercourse Acts apply to Tribal Nations' lands throughout the United States, including those located within the boundaries of the State of New York. *Oneida Indian Nation of N.Y. State v. Cty. of Oneida*, 414 U.S. 661 (1974); *see Mohegan*

Tribe, 638 F.2d 612 at 621; *Cayuga Indian Nation of New York*, 730 F. Supp. at 485-86; *Cayuga Indian Nation of N.Y.*, 260 F. Supp. 3d at 293.

Restrictions on the alienation of rights-of-way across Tribal Nations' land applies to "all of the States, including the original 13." *Oneida Indian Nation of N.Y. State*, 414 U.S. at 670. As an "original State," New York had the authority to purchase Tribal Nations' land, but the United States extinguished that authority shortly after the State of New York ratified the Constitution in 1788 when Congress enacted the first Non-Intercourse Act in 1790. In December of that year, President Washington swore to the Seneca Nation that "[n]o State, nor person, can purchase . . . [Seneca Nation] lands" except pursuant to a treaty authorized by the United States. I American State Papers: Indian Affairs 142 (1832).

The State of New York has always lacked authority to unilaterally purchase or obtain rights-of-way across the Seneca Nation's lands. Just four years before the Seneca Nation's supposed grant of a right-of-way to the State, Congress enacted a law authorizing the State of New York to exercise *limited* civil jurisdiction over Indians on Indian lands. 25 U.S.C. § 233. In doing so, Congress expressly maintained "[t]hat nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York." *Id.*

Defendant-Appellants' cabined and cramped interpretation of *Ex Parte Young* could leave Tribal Nations unable to access the courts to enforce ongoing violations of federal law and treaty rights. This Court should reject Defendant-Appellants novel *Ex Parte Young* claims and allow the Seneca Nation to have its case heard on the merits.

CONCLUSION

USET SPF stands with and fully supports the arguments made in the Seneca Nation's principal brief and hopes that this brief provides the Court with useful background highlighting the continued importance of Tribal Nations' treaty rights and federal laws restricting the alienation Tribal Nations' land. We urge the Court to deny Defendant-Appellants' interlocutory appeal and allow the Seneca Nation's claims to proceed and be heard on their merits.

Respectfully submitted,

/s/ Michael L. Roy
MICHAEL L. ROY
Hobbs, Straus, Dean & Walker LLP
1899 L Street, NW, Suite 1200
Washington, DC 20036
(202) 822-8282
mroy@hobbsstraus.com

Counsel for Amicus Curiae

November 19, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Second Circuit Local Rule 29.1(c) because it contains 2,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

/s/ Michael L. Roy
MICHAEL L. ROY
Hobbs, Straus, Dean & Walker LLP
1899 L Street, NW, Suite 1200
Washington, DC 20036
(202) 822-8282
mroy@hobbsstraus.com

November 19, 2021

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 19th day of November, 2021 to be served on all counsel of record via ECF.

/s/ Michael L. Roy
MICHAEL L. ROY
Hobbs, Straus, Dean & Walker LLP
1899 L Street, NW, Suite 1200
Washington, DC 20036
(202) 822-8282
mroy@hobbsstraus.com

November 19, 2021

Counsel for Amicus Curiae