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Tribal Fishing Rights on Trial in the Second Circuit

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In late August, the U.S. Court of Appeals for the Second Circuit issued a decision that may have significant implications for members of the Shinnecock Indian Nation, a federally recognized Indian tribe, who reside on the Shinnecock Reservation on Long Island. In *Silva v. Farrish*, No. 21-0616 (2d Cir. Aug. 25, 2022), the Second Circuit ruled that a lawsuit filed by three members of the Shinnecock Indian Nation, alleging that enforcement of state fishing regulations against the plaintiffs in Shinnecock Bay violated their fishing rights, could proceed.

The circuit court held that the U.S. District Court for the Eastern District of New York should not have granted summary judgment to the officials of the New York State Department of Environmental Conservation (DEC) who were named as defendants in the plaintiffs' action.

Although a final resolution of the dispute may not occur for quite some time, the Second Circuit's decision makes it clear that the *Silva* plaintiffs

will have an opportunity to demonstrate that they retain the aboriginal right to fish in Shinnecock Bay without the need to comply with the state's fishing regulations, and that the U.S. Constitution's Supremacy Clause protects this right from state laws that would abridge it.

Background

The events underlying *Silva* arose nearly 15 years ago, in October 2008, when Gerrod Smith was prosecuted for possessing 18 out-of-season and

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undersized summer flounder, 16 out-of-season and undersized porgy, and two undersized blackfish harvested from Shinnecock Bay in violation of state law. Around the same time, Jonathan Smith received a civil infraction ticket

and a criminal summons for operating an "unpermitted aquaculture facility" in Shinnecock Bay in violation of New York Environmental Conservation Law (ECL) § 13-0316(2) and for using "improper shellfish tags" in violation of ECL Section 13-0319.

These two cases were ultimately dismissed. In 2017, David Silva was charged with fishing without a license as well as unlawful possession of underage eels and possession of eels over the limit. See ECL § 13-0355(3) (fishing without a license); 6 N.Y.C.R.R. § 40.1(b)(1)(ii) (undersized eels); 6 N.Y.C.R.R. § 40.1(b)(1)(iii) (eels over the limit).

While *Silva's* criminal prosecution was pending in state court, the plaintiffs filed their lawsuit against a variety of defendants—including three DEC officials in their official capacities. The plaintiffs alleged, among other things, that when the Shinnecock ceded land to colonial settlers, the tribe retained the aboriginal "right to fish in the waters of Shinnecock Bay and its estuary" and that the application of state fishing regulations to the plaintiffs violated those fishing rights.

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The plaintiffs sought a declaration of their fishing rights and an injunction preventing the defendants from continuing the criminal prosecution against Silva and from otherwise interfering with the plaintiffs' "use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters."

The plaintiffs moved for a preliminary injunction, and the district court denied their motion. The district court concluded that Silva failed to show a likelihood of success on the merits and that, even if he had, abstention was required under *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, the U.S. Supreme Court held that a federal court should not enjoin a criminal proceeding in a state court. The district court in *Silva* further held that the Smiths lacked standing because their injuries were "entirely speculative and remote."

The defendants moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim. The district court referred the motions to a magistrate judge, who recommended dismissing the plaintiffs' complaint in its entirety. The magistrate judge concluded that state sovereign immunity under the Eleventh Amendment to the U.S. Constitution barred the claims against the DEC and its officials.

In so holding, the magistrate judge rejected the plaintiffs' argument that, under *Ex parte Young*, 209 U.S. 123 (1908), plaintiffs may sue state officials acting in their official capacity for prospective, injunctive relief from

violations of federal law notwithstanding the Eleventh Amendment. (*Ex parte Young* does not permit similar suits against state agencies such as the DEC). The magistrate judge also decided that the plaintiffs lacked standing to seek prospective relief and that *Younger* abstention precluded consideration of Silva's claims for prospective relief.

The district court neither adopted nor rejected the magistrate judge's

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recommendation but, instead, terminated the dismissal motions and set a briefing schedule for summary judgment motions. The district court then referred the summary judgment motions to a magistrate judge for another report and recommendation. Among other things, the magistrate judge recommended granting summary judgment to the defendants on the plaintiffs' claims for declaratory and injunctive relief for the same reasons that were provided in the first magistrate judge's report and recommendation.

In their objection to the new magistrate judge's report and recommendation, the plaintiffs disclosed that Silva had "abandoned" his state court criminal appeal and argued that *Younger* abstention, therefore, no longer barred Silva's claims. The district court rejected this argument, concluding that Silva's abandonment of his state court appeal did not equate to exhausting state appellate remedies so *Younger* still applied. The district court then adopted the report and recommendation in its entirety and granted summary judgment to the defendants.

The plaintiffs appealed to the Second Circuit.

The Second Circuit's Decision

The Second Circuit held that (i) the *Ex parte Young* exception to state sovereign immunity applied to the plaintiffs' claims against the DEC officials; (ii) the plaintiffs had Article III standing to pursue prospective relief; and (iii) *Younger* abstention did not bar Silva's claims for prospective relief. Accordingly, it ruled that the district court erred in granting summary judgment to the DEC officials.

In its decision, the Second Circuit explained that *Ex parte Young* applied to a complaint that alleged an "ongoing violation of federal law" and that sought relief "properly characterized as prospective."

The Second Circuit found "no doubt" that the plaintiffs' suit satisfied both prongs and that *Ex parte Young* applied. First, the circuit court noted that the plaintiffs alleged that the enforcement of state fishing regulations violated their federally protected fishing rights. Then, the circuit court

decided that the plaintiffs' requested relief – namely, that the DEC officials be enjoined from enforcing the state fishing regulations against them – would prospectively end the alleged violation.

The Second Circuit rejected the DEC defendants' reliance on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), where the Supreme Court ruled that if the effect of the requested relief was “the functional equivalent of quiet title” to land, then the suit had effectively been brought against the state and was barred by state sovereign immunity.

In the Second Circuit's opinion, the *Silva* plaintiffs' request for a declaration that the law granted them a right to fish in Shinnecock Bay without interference and that the DEC officials were unlawfully denying them that right “would not transfer ownership and control of the Shinnecock Bay from the state to an Indian tribe” and it would not allow the *Silva* plaintiffs “to prevent others from fishing in the Shinnecock Bay.” Rather, the Second Circuit reasoned, it would “merely resolve the plaintiffs' individual claims that they have their own right to fish there.”

Accordingly, the Second Circuit held that the plaintiffs' claims seeking prospective relief against the DEC officials fell within the *Ex parte Young* exception to state sovereign immunity and could proceed.

Turning to the issue of the plaintiffs' standing, the Second Circuit explained that plaintiffs seeking relief from threatened criminal prosecutions could seek “forward-looking, injunctive relief to prevent the harm from

occurring” if the risk of harm was sufficiently “imminent and substantial.”

It added that an imminent injury was “apparent” when plaintiffs alleged (i) “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute,” and (ii) “a credible threat of prosecution thereunder.”

The Second Circuit found that the plaintiffs demonstrated that the threat of enforcement of the state fishing laws amounted to an injury in fact because they alleged “an intention to engage in a course of conduct” arguably protected by federal law but proscribed by state law. Specifically, the circuit court pointed out that the plaintiffs said that “they would fish if they did not fear prosecution.”

The circuit court also found that the plaintiffs alleged a “credible threat” of future enforcement of the state fishing regulations. It noted that every plaintiff had already been subject to fines and enforcement proceedings for violating the fishing regulations, and it stated that “past enforcement against the same conduct” was “good evidence” that the threat of enforcement was not illusory.

Moreover, the Second Circuit added, the DEC had not stated that it would not enforce the fishing regulations. Thus, the circuit court found that the plaintiffs had adequately alleged a credible threat of prosecution, and it held that the plaintiffs showed an injury in fact for standing to pursue declaratory and injunctive relief.

Finally, the circuit court decided that *Younger* abstention did not bar consideration of *Silva*'s claim seeking to “enjoin [] the Defendants from....

interfering with Plaintiffs' use of the waters, fishing, taking fish, and holding fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters.” The circuit court acknowledged that there was an ongoing state prosecution when *Silva* filed his federal complaint, but found that that proceeding had ended. Therefore, it concluded, he could proceed on that claim for injunctive relief.

Conclusion

The *Silva* case is not the only lawsuit brought recently in federal court in New York by a Native American tribe challenging the DEC's efforts to regulate, and criminally prosecute, members' ability to fish in customary fishing waters. See *Unkechaug Indian Nation v. New York State Dep't of Environmental Conservation*, No. 18-CV-1132 (WFK) (April 23, 2019). Whether the plaintiffs in *Silva* or in the *Unkechaug Indian Nation* case will be able to obtain a judgment or a favorable settlement remains to be seen, but the legal issues these actions raise may require analysis of centuries-old treaties and decades-old caselaw. Stay tuned.