14-3348

U.S. Court of Appeals for the Second Circuit

AMERICAN TRUCKING ASSOCIATIONS, INC.,
WADHAMS ENTERPRISES, INC.,
LIGHTNING EXPRESS DELIVERY SERVICE INC.,
WARD TRANSPORT & LOGISTICS CORP.,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

(caption continued on inside cover)

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS AMERICAN TRUCKING ASSOCIATIONS, INC., WADHAMS ENTERPRISES, INC., LIGHTNING EXPRESS DELIVERY SERVICE INC., AND WARD TRANSPORT & LOGISTICS CORP.

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v.

NEW YORK STATE THRUWAY AUTHORITY, NEW YORK STATE CANAL CORPORATION, THOMAS J. MADISON, JR., in his official capacity as Executive Director of the New York State Thruway Authority, HOWARD MILSTEIN, in his official capacity as Chair of the New York State Thruway Authority/Canal Corporation Boards of Directors, DONNA J. LUH, in her official capacity as Vice-Chair of New York State Thruway Authority/Canal Corporation Boards of Directors, E. VIRGIL CONWAY, in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, RICHARD N. SIMBERG, in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, BRANDON R. SALL, in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, J. RICE DONALD, JR., in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors, JOSE HOLGUIN-VERAS, in their official capacities as members of the New York State Thruway Authority/Canal Corporation Board of Directors,

Defendants-Appellees.

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INTRODUCTION

The order under review rests on a single, indispensable premise: that if plaintiffs were to prevail on the merits, the state would be forced to take on the Thruway Authority's massive canal-related expenses in order to avoid defaulting on the state's constitutional obligation not to "abandon" the canals. JA105. Our opening brief explains why that reasoning is untenable. The Thruway Authority now tacitly concedes as much: It no longer argues that a judgment for plaintiffs would risk abandonment of the canals. Nor does it contend that an adverse judgment would prevent it from "provi[ding] for the expenses of the superintendence and repairs of the canals" (N.Y. CONST. art. XV, § 3), or that the state might have to assume financial responsibility for those expenses, or that the state would be liable for even a penny of the Thruway Authority's debts.

Having forsaken the entire basis for the judgment below, the Thruway Authority now offers a host of alternative interests that purportedly render New York an indispensable party under Rule 19. But those asserted interests are amorphous, legally unsupportable, and ultimately grounded in the same fundamental misconception about plaintiffs' claims as the judgment below: Plaintiffs are ***not*** challenging expenditures on the canals; they are challenging the Thruway Authority's collection of highway and bridge tolls for purposes other than the construction, maintenance, and operation of the roads and bridges that

plaintiffs are being charged to use. How the excess toll revenues might be spent is beside the point as a legal matter—though as a factual matter the public record of canal-related expenditures (not to mention the Thruway's Authority's concessions throughout its brief) proves irrefutably that toll money is in fact being spent on the canals. The constitutional violation here lies in the Thruway Authority's collection of larger tolls than it needs for, or spends on, the roads—regardless of the uses to which it diverts the excess funds.

In the end, the appeal comes down to this: *Mancuso v. New York State Thruway Authority*, 86 F.3d 289 (2d Cir. 1996), *ConnTech Development Co. v. University of Connecticut Educational Properties, Inc.*, 102 F.3d 677 (2d Cir. 1996), and *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), foreclose both the district court's stated grounds for the ruling below and the arguments for dismissal that the Thruway Authority instead advances on appeal. Equally clear precedent bars the Thruway Authority's statute-of-limitations and laches defenses. The decision below should be reversed, the action ruled timely, and the case remanded for consideration of the merits of plaintiffs' claims.

ARGUMENT

I. NEW YORK IS NOT AN INDISPENSABLE PARTY.

The decision below cannot be squared with *Mancuso*, *Hess*, or *ConnTech*. The Thruway Authority offers no valid legal ground for

departing from controlling precedent, and there is none. Nor does the Thruway Authority assert any valid alternative interests for purposes of Rule 19's indispensable-party requirement.

A. The District Court's Rule 19 Determination Is Irreconcilable With Controlling Supreme Court And Second Circuit Precedent.

1. To the extent that the Thruway Authority bothers to defend the reasoning of the decision below, it does so by dismissing the district court's end-run around *Mancuso* as "dicta." Br. 39. Yet the Thruway Authority concedes that the basis for the district court's disagreement with *Mancuso* was also "one of the main considerations supporting [the district court's] conclusion that the State was a necessary party." *Id.*[1] As for the Thruway Authority's charge (Br. 38-39) that we have misstated the district court's reasoning or holding, our opening brief merely quotes the opinion below. The district court forthrightly declared its disagreement with *Mancuso*,

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[1] The Thruway Authority also suggests that it is "questionable whether *Mancuso* would bar a finding of sovereign immunity as to the Thruway Authority's canal-related functions"—while simultaneously assuring this Court that it "need not address the immunity question here." Br. 39 n.10. But as we explained in our opening brief (at 18 n.2), *Mancuso* ***did*** consider the Thruway Authority's operation of the Canal System. The Court simply—and correctly—concluded that operation of that system was insufficient to render the Thruway Authority an arm of the state rather than a political subdivision for Eleventh Amendment purposes. *See Mancuso*, 86 F.3d at 293, 296. Moreover, because this case challenges the Thruway Authority's collection and diversion of truck tolls, not its management of the canals, *Mancuso* would preclude extending sovereign immunity to the Thruway Authority even if that decision did not cover operation of the canals.

recognized that it was nonetheless "bound by *Mancuso*," and then stated that it "can recognize constitutional reality in a different way"—i.e., reach the result indirectly that *Mancuso* forbade it to reach directly. JA106.

True to that aim, the district court functionally conferred sovereign immunity on the Thruway Authority by defining the Thruway Authority's stake in the case as a financial interest of the state for purposes of Rule 19 and then dismissing the action for failure to join an indispensable party that cannot be joined because of sovereign immunity. But *Mancuso* does not allow that result.

Mancuso squarely rejects the notion that the Thruway Authority's potential liability for damages might "have the practical effect of requiring payments from New York." 86 F.3d at 296. As this Court recognized, the Thruway Authority was "structured … to be self-sustaining," and the state has no legal or practical obligation to satisfy any verdict against it. *Id.* (internal quotation marks omitted).

The Thruway Authority therefore attempts to distinguish between "potential damages liability," which it acknowledges that New York does not have (Br. 41 n.12), and loss of "a stream of money on which the State relies to cover its own obligations," which the Thruway Authority claims to be a Rule 19 interest of New York (Br. 23). To be sure, the requested injunctive relief would bar the Thruway Authority from expending truck-toll revenues on canals, recreational trails, or other projects unrelated to

the roads. But the possibility that the Thruway Authority might not respond by raising enough money from other sources to develop the recreational facilities at a level that the legislature may wish and that the legislature might then elect to appropriate funds to provide additional support for those facilities is pure speculation. And "[s]peculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983); s*ee also Manning v. Energy Conversion Devices, Inc.*, 13 F.3d 606, 609 (2d Cir. 1994) ("'The speculative possibility of future litigation' … does not furnish a basis for compulsory joinder."); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir. 1980).

2. In all events, the Supreme Court has already rejected this lost-stream-of-money theory. In *Hess*, the Port Authority (an entity created by compact between New York and New Jersey) sought to invoke Eleventh Amendment immunity on the ground that a judgment against it would "reduc[e] the Authority's surplus available to fund … projects" for which a state would otherwise pay and therefore would "produce[] an effect equivalent to the impact of a judgment directly against the State." 513 U.S. at 50. The Supreme Court disposed of that argument this way:

> A charitable organization may undertake rescue or other good work which, in its absence, we would expect the State to shoulder. But none would conclude, for example, that in times of flood or

> famine the American Red Cross, to the extent it works for the public, acquires the States' Eleventh Amendment immunity. ***The proper focus is not on the use of profits or surplus, but rather is on losses and debts.*** If the expenditures of the enterprise exceed receipts, ***is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise?*** When the answer is "No"—both leally and practically—then the Eleventh Amendment's core concern is not implicated.

Id. at 51 (emphasis added). The Court explained that it would "heighten a 'mystery of legal evolution' were we to spread an Eleventh Amendment cover over an agency that consumes no state revenues but contributes to the State's wealth." *Id.* at 51 n.21 (brackets omitted). Yet that is precisely what the district court did here.

The fact that New York has no obligation to pay the Thruway Authority's debts means that the state's interest in the public fisc "is not implicated" (*id.* at 51) in any legally cognizable way. Were Rule 19 to have the practical effect of extending sovereign immunity to the Thruway Authority, the holding in *Hess* would be nullified. The Thruway Authority points to no decisions of the Supreme Court, this Court, or any other court that would authorize that outcome; and we are aware of none.

3. If any further support for our position were necessary, *ConnTech* provides it. As explained in our opening brief (at 19-23), *ConnTech* unequivocally holds that a state may not create a public-benefit corporation, disclaim liability for that entity's actions, and then invoke

Rule 19 to extend sovereign immunity to the entity when litigation arises. *See ConnTech*, 102 F.3d at 682-83.

The Thruway Authority asserts that Connecticut "was not a party to the contract" between the public-benefit corporation and the party that sued it, and that, "as in *Mancuso*, there was no reason [in *ConnTech*] to believe the State would end up being responsible for any judgment." Br. 40. But the same is true here. New York created the Thruway Authority; empowered it to "sue and be sued," "make contracts," "borrow money[,] and issue negotiable notes" (N.Y. PUB. AUTH. LAW § 354); expressly disavowed any obligation for the Thruway Authority's liabilities (*see* N.Y. CONST. art. X, § 5); and does not participate in the collection—or diversion—of truck tolls. The Thruway Authority does not dispute any of that. New York is thus no more a party to the transactions challenged here than Connecticut was in *ConnTech*. And the Thruway Authority effectively concedes that New York would not be responsible for any judgment. *See, e.g.*, Br. 41 n.12 ("[T]he State's interests are not premised on the Thruway Authority's potential judgment liability."). In short, this case is indistinguishable from *ConnTech*, and dismissal under Rule 19 was therefore improper as a matter of law.

Reversal is equally appropriate under *ConnTech* for the independent reason that the Thruway Authority is not entitled to assert Rule 19 interests on New York's behalf. The legislature structured the Thruway

Authority to keep the state out of disputes like this one. Unless the state affirmatively acts to say otherwise, that choice is dispositive. *See ConnTech*, 102 F.3d at 683 ("'it is the absent party that must "claim an interest"' for Rule 19(a)(2) purposes," and therefore, when a state has "declined to claim an interest in the subject matter of [the] dispute," the public-benefit corporation may not do so for it).

The Thruway Authority responds that New York has not declined to assert an interest because the Canal Law deems the Thruway Authority to be the state for purposes of managing the canals. Br. 41. That is not the same, however, as giving the Thruway Authority legal authority to claim a Rule 19 interest on the state's behalf. More importantly, the Thruway Authority's power to stand in the state's shoes is strictly limited to management of the barge canal, which we do not challenge. It does not cover the collection or diversion of truck tolls or nullify the constitutional and statutory provisions by which the state made the Thruway Authority an independent entity for those purposes.

Nor is there any merit to the contention (Br. 42) that had the state itself invoked Rule 19, it would have risked waiving sovereign immunity. Sovereign immunity is a "'jurisdictional bar.'" *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237 (2d Cir. 2006) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996)). Non-parties may always enter a special appearance for the limited purpose of contesting

jurisdiction without waiving the jurisdictional defense. *See, e.g.*, *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972). The Thruway Authority's reliance (Br. 42) on *Lapides v. Board of Regents*, 535 U.S. 613 (2002), shows the depth of its error: There, Georgia waived sovereign immunity by voluntarily removing the case against it to federal court, not by contesting federal-court jurisdiction. *Id.* at 619-20.

Finally, the fact that courts "***may***" consider Rule 19 issues *sua sponte* (*Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008) (emphasis added)) does not mean that they ***must***—or even ***should***—here. When an absent party's "decision to forgo intervention indicates that [it] does not deem its own interests substantially threatened by the litigation, the court should not second-guess this determination, at least absent special circumstances." *United States v. San Juan Bay Marina*, 239 F.3d 400, 407 (1st Cir. 2001); *accord, e.g.*, *Sch. Dist. v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 266 (6th Cir. 2009) ("[I]t would turn Rule 19 analysis on its head to argue that the States' interests are now impaired because they declined to participate in this much-publicized case."); *Northrop*, 705 F.2d at 1043-44 (when the absent party has "never asserted a formal interest in either the subject matter of [an] action or [the] action itself,"

courts should not "second-guess the Government's assessment of its own interests" by ordering joinder).[2]

B. The Thruway Authority Implicitly Concedes That A Judgment In Plaintiffs' Favor Would Not Implicate The State's Obligation Not To Abandon The Barge Canal.

Even assuming *arguendo* that *Mancuso*, *Hess*, and *ConnTech* do not foreclose the district court's Rule 19 determination, reversal is still warranted because that ruling is based on a false premise—namely, that the possibility of a judgment in plaintiffs' favor would threaten the state with default on its constitutional "obligation not to 'abandon' the canal system." JA105. In our opening brief (at 23-32), we explained why the no-abandonment requirement is not implicated. Although the Thruway Authority insists that it is not free to abandon the canals (*see, e.g.*, Br. 23, 30, 46-48), it no longer argues that this case presents any risk of abandonment, contending instead only that "every dollar [it] spends for canal purposes satisfies a financial obligation that the Constitution imposes on the State" (Br. 22). Yet concern over abandonment was the sole rationale (other than the district court's disagreement with *Mancuso*) for

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[2] Although this Court said in *Manning* that it was "obliged" to consider *sua sponte* whether non-parties were indispensable (*see* 13 F.3d at 609), *Manning* predates *Pimentel*, which makes clear that such a *sua sponte* inquiry is permissive, not mandatory (*see* 553 U.S. at 861). And *Manning* itself relied solely on cases recognizing the permissive nature of the inquiry, strongly suggesting that the panel never meant to imply that it is mandatory.

the decision below. Because the Thruway Authority no longer advances that rationale, nothing remains to support the ruling.

The Thruway Authority argues (Br. 30 n.8) that the district court also relied on Article XV, Section 3—which requires the state to "make provision for the expenses of the superintendence and repairs of the canals"—but that the court mistakenly cited that requirement as a provision of the Canal Law. The citation error notwithstanding, the district court expressly viewed this superintendence-and-repair requirement as part of the state's duty not to abandon the canals, not as a separate constitutional obligation. *See* JA105 (concluding that the state "is ultimately obligated to pay for the upkeep and maintenance of the canal system, so that it will not 'abandon' the system"). More importantly, the Thruway Authority's assertion that Section 3 imposes independent obligations adds nothing, for the Thruway Authority does not contend that a judgment in plaintiffs' favor would threaten the state with default on those obligations either. In all events, as explained above (at page 5), speculation about hypothetical future events does not render a non-party indispensable.

Finally, the Thruway Authority disagrees with us that the barge canal, which is all that Article XV of the state constitution protects, is but a subset of what the Thruway Authority manages under the terms of the Canal Law. *Compare* Br. 5-19, 22-23, 27, 43-48, *with, e.g.*, Opening Br. 30-

35. In the Thruway Authority's view, all the canals are covered by Article XV, and hence most of the money spent on the "Canal System" goes to facilities that the state is required to maintain. *See* Br. 44-46.[3] But how much of the improperly diverted toll revenues the Thruway Authority expends on the barge canal (as opposed to other canals, defunct canals, trails, and whatnot) is beside the point. Because the Thruway Authority declines to defend the rationale of the decision below and avoids any suggestion of a risk of constitutional default, the contention that "every dollar the Thruway Authority spends for canal purposes satisfies a financial obligation that the Constitution imposes on the State" (Br. 22) devolves into the precise argument that the Supreme Court rejected in *Hess*.[4]

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[3] The Thruway Authority improperly looks outside the four corners of the Complaint to argue that the trails make up only a "small portion of the Authority's canal-related costs." Br. 45. In doing so, it concedes that it has spent or budgeted to spend nearly $36 million on "capital investments" and "capital projects" for the trails from 2005 through 2015 (Br. 45 n.14), and expenditures for ordinary maintenance, upkeep, staffing, and the like would be on top of that amount.

[4] The Thruway Authority's claims about the scope of the barge canal and the state's duties with respect to it are wrong in any event. As we explained in our opening brief (at 6-7 & n.1), the Canal Law's definition of the "Canal System" is on its face broader than the state constitution's definition of the barge canal, most obviously because it covers everything ever designated as a canal—including, therefore, portions of the old, unimproved canals—plus such elements as feeder canals and reservoirs. *Compare* N.Y. CONST. art. XV, § 1, *with* N.Y. CANAL LAW § 2. The Thruway Authority's protestations notwithstanding, the constitution specifies not just that the state "shall" provide for the "superintendence and repairs of the canals" (N.Y. CONST. art. XV, § 3), but also that this

C. The Thruway Authority Offers No Other Cognizable Interests Requiring Joinder.

Declining to defend the district court's rationale (and not disputing that New York's presence is unnecessary to protect against multiple recoveries or to ensure complete relief), the Thruway Authority offers as alternative grounds for affirmance a host of vaguely defined "interests" that purportedly render the state an indispensable party. Br. 25-38. But New York's generic interest in having a public-benefit corporation do things that the legislature likes is not a Rule 19 interest. And none of the cases on which the Thruway Authority relies in asserting other interests on behalf of the state offer any support for its position.

1. Principally, the Thruway Authority contends that a judgment in plaintiffs' favor will "invalidate the Legislature's selected means of making the required provisions" for the canals. Br. 25; *see also* Br. 1, 37. In other words, an injunction preventing the Thruway Authority from diverting toll revenues supposedly would invalidate the statutory mandates respecting the canals. Not so.

The expenditure of truck tolls on the canals is a policy choice and discretionary act by the Thruway Authority, not the state. So is the Thruway Authority's decision to spend a billion dollars on recreational

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obligation "shall not apply" to lands and structures that "have or may become no longer necessary or useful" for the barge canal (*id.* § 2). And although the state "***may*** provide for the improvement of the canals" (*id.* § 3 (emphasis added)), the constitution does not require that it ***must*** do so. Finally, recreational trails are not within the definition of the canals.

facilities. By empowering the Thruway Authority "to fix and collect such fees, rentals and charges for the use of the thruway system or any part thereof" (N.Y. PUB. AUTH. LAW § 354(8)), the legislature authorized it to charge user fees for the roads—fees that must be spent on those roads in order to be constitutionally permissible (*see Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 86-88 (2d Cir. 2009)). Giving the Thruway Authority license to "transfer to the canal corporation any moneys" (N.Y. PUB. AUTH. LAW § 382(2)) in no way ***required*** it to divert truck tolls to the canals and trails. The Thruway Authority apparently does not disagree. *Cf.* Br. 28-29 (explaining that the legislature "empowered" and "authorized"—not ***required***—it to "use all of its financial resources, highway-toll revenues included, to fulfill its expanded mission"). A judicial determination that the Thruway Authority has unconstitutionally overcharged truckers for use of the roads and diverted the excess toll revenues to impermissible non-road uses accordingly would not invalidate any state statute; it would merely require the Thruway Authority to comply with the federal constitution when deciding how to perform its non-Thruway functions.[5]

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[5] What is more, even if the current schedule of canal lock fees may be insufficient to meet the Thruway Authority's funding desires for the canals and trails, as the Thruway Authority maintains (Br. 24), the Thruway Authority has the discretion, for example, to increase fees for boating permits and recreational licenses. Or it can develop other sources of canal-related revenue, such as instituting, expanding, or raising the price of

2. The Thruway Authority relies almost exclusively on cases in which absent sovereigns were found to be necessary parties, purportedly because their "sovereign fiscal interests [were] threatened in similar fashion" to what the Thruway Authority claims to face here. Br. 31. Most of those cases considered whether Indian tribes were necessary parties because they had contract or compact rights that were directly threatened by the litigation. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) (holding that a judgment "amount[ed] to a declaratory judgment that the present [activities] conducted by [a] tribe" as required by existing compacts were "illegal," thus threatening to impair "[t]he sovereign power of the tribes to negotiate compacts"); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) (holding that "a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement"); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 544, 547 (2d Cir. 1991) (holding that a tribe that was a party to a lease conditioned on receipt of payments made under a statute was an indispensable party in case challenging both the lease and the statute). Another case, *Kickapoo Tribe of Indians v. Babbitt*,

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licenses to concessionaires. Or it can moderate its economic-development objectives so that the costs are sustainable. Nothing in the state constitution or state law requires the Thruway Authority—or, for that matter, the state—to spend a billion dollars on recreational facilities in order to generate hundreds of millions of dollars per year in economic benefits for Upstate New York. *See* Opening Br. 30-35.

43 F.3d 1491, 1495 (D.C. Cir. 1995), addressed the closely related question whether Kansas was an indispensable party in litigation over whether that state's compact with a tribe was valid.

The sole case on which the Thruway Authority relies (Br. 34) that did not turn on direct threats to contract rights is *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986). In that case, Native American beneficiaries of a government-supervised trust were deemed indispensable because they "[stood] to lose if" the plaintiff succeeded on its claim for "redistributions of future income" from the trust. *Id.* at 774. Nothing about that decision suggests the possibility of a Rule 19 interest based on the generic desire of a state to have a non-state actor continue making expenditures that the state legislature happens to like.

3. Relying on *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999), the Thruway Authority also invokes the even more amorphous concept of New York's "additional sovereign interests in the validity of its laws." Br. 35. But the absent tribe in *Davis* was deemed indispensable because the lawsuit threatened to invalidate tribal ordinances that established membership criteria for the tribe—and hence entitlement to the $56 million judgment fund created to compensate the tribe for unlawfully appropriated tribal lands. *See* 192 F.3d at 959.

Nothing about this case threatens to invalidate any state statute, regulation, or compact. But even if this case had "challenge[d] … the

constitutionality of a state statute," that would at most be grounds for "notify[ing] the Attorney General … that he may intervene in this matter in support of the statute's constitutionality," not a basis for mandatory joinder or dismissal under Rule 19. *Liquifin Aktiengesellschaft v. Brennan*, 383 F. Supp. 978, 983-84 (S.D.N.Y. 1974); *see* 28 U.S.C. § 2403(b) (in any federal suit "to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn into question … the court … shall permit the State to intervene … for argument on the question of constitutionality"); *cf. California v. Grace Brethren Church*, 457 U.S. 393, 417 n.38 (1982) (holding that Tax Injunction Act deprived district court of jurisdiction, and rejecting argument that litigating case in state court would raise issues of sovereign immunity because federal government was not indispensable party to action challenging federal and state statutes on federal constitutional grounds); *Vives v. City of New York*, 405 F.3d 115, 116 n.1, 118 (2d Cir. 2004) (reviewing presumptive constitutionality of statute for purposes of qualified-immunity determination and resolving case despite New York's failure to appear either in district court or in court of appeals to defend constitutionality of statute after receiving notice from both courts).

4. Next, citing *Seneca Nation of Indians v. New York*, 383 F.3d 45 (2d Cir. 2004), the Thruway Authority invokes "the State's sovereign

interests in … appropriate management of property held in trust for the public." Br. 36. But in *Seneca*, the state owned a legal interest in real property—an easement—that the lawsuit threatened to extinguish. 383 F.3d at 46. There is no risk here that New York will be dispossessed of any title to or interest in land—or anything else. Plaintiffs do not claim to own the canals, do not contest the state's ownership of them, and do not challenge the legislature's authority to delegate management of them to the Thruway Authority. This case is about tolls, not property rights.

5. Finally, the Thruway Authority contends that plaintiffs have waived objection to the district court's determination under Rule 19(b) that "in 'equity and good conscience,' the action should not proceed in the State's absence." Br. 49 (quoting JA106-107). Nonsense. The district court was merely concluding that because states have sovereign immunity, dismissal under Rule 19(b) followed from its determination that New York is a necessary party under Rule 19(a)—the determination that we contest. There is no independent Rule 19(b) ruling, and no waiver. But lest there be any question about the equities, the class members suffer prejudice every day that this suit goes unresolved and they are forced to pay unconstitutionally excessive tolls.[6]

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[6] We suspect, too, that New York would seek to be dismissed as a party, were it named as one in a suit in state court, on the ground that it would not be liable for any judgment rendered against the Thruway Authority—the very reason that the state is not a necessary party here.

In sum, the decision below is contrary to controlling Second Circuit precedent, irreconcilable with Supreme Court precedent, indefensible on its own terms, and equally indefensible on the alternative grounds that the Thruway Authority asserts.

II. THIS ACTION WAS TIMELY.

A. The Statute Of Limitations Does Not Bar Suit.

The Thruway Authority does not disagree that this Court can and should rule on whether the three-year statute of limitations bars plaintiffs' claims. Nor does it deny that we seek repayment of only the unconstitutionally excessive truck tolls collected within the limitations period—i.e., since November 2010. Instead, the Thruway Authority contends that the New York State Motor Truck Association and unspecified "others" in the "trucking industry" "kn[ew] and complained" about the funding scheme for the Canal System and lobbied against toll increases in 2000 and 2008. Br. 51-52. The Thruway Authority then attempts to attribute the knowledge of those non-parties to plaintiffs, as if that could have triggered the commencement of the limitations period for ATA individually, for the other named plaintiffs, and for every member of the plaintiff class. The Thruway Authority's argument is both wrong and irrelevant as a matter of law.

1. Knowledge of toll rates, toll increases, or the Thruway Authority's funding scheme for the canals and trails has no bearing on the timeliness

of the constitutional claims here. That is because the violations alleged are the daily collection of excessive tolls that the Thruway Authority does not use to fund the roads. *See, e.g.*, JA8-9, ¶¶ 5-7; JA24, ¶¶ 139-40; JA25, ¶ 143; JA26, ¶ 149. Although a cause of action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his action" (*Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002) (internal quotation marks omitted)), "[a] claim does not accrue, of course, until the challenged conduct causes the claimant injury" (*Veal v. Geraci*, 23 F.3d 722, 725 (2d Cir. 1994)). Thus, because each unconstitutionally excessive exaction is a new, separate, affirmative unlawful act that causes a new, distinct injury, each carries its own three-year statute of limitations. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) ("when a defendant commits successive violations, the statute of limitations runs separately from each violation" because "[e]ach wrong gives rise to a discrete 'claim' that 'accrues' at the time the wrong occurs"). The limitations period matters here solely as a bar on claims for monetary relief for unconstitutional exactions before November 2010—which plaintiffs are not seeking.

The Thruway Authority's charge that we have redefined on appeal the theory of constitutional injury (Br. 52) is simply wrong. The Complaint makes abundantly clear—and the Thruway Authority itself acknowledges (Br. 51)—that plaintiffs' claims are based on the "enforcement" of

unconstitutionally excessive truck-toll rates and diversions of the excess revenues. *See* JA8-9, ¶¶ 5-7; JA24, ¶ 139-40; JA25, ¶ 143; JA26, ¶ 149. "Enforcement" occurs every time an excessive toll is collected or a motorist is punished or threatened with punishment for not paying—not when the Thruway Authority first sets the toll rates that it subsequently enforces. *Cf.* JA8-9, ¶ 7 (seeking, *inter alia*, "declaratory and injunctive relief barring Defendants from continuing to collect constitutionally excessive truck tolls" as a remedy for "enforc[ement]" of unconstitutional tolls). Our briefing below likewise clearly defined the constitutional injuries as arising from "the collection and expenditure of unconstitutionally excessive tolls during the defined Class Period." *See, e.g.*, Opp. to Defs.' Mot. to Dismiss 8, *Am. Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, No. 1:13-cv-08123 (S.D.N.Y. Mar. 19, 2014), ECF No. 22.

Descriptions in the Complaint of the "enactment" of the "toll regime" (JA26, ¶ 149 (quoted at Br. 51)) change none of that. It is well settled that "'[a] law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within [three] years of its enactment.'" Opening Br. 41 (quoting *Kuhnle Bros. v. Cnty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997)). That the Thruway Authority might have set inflated toll rates and charged unconstitutionally excessive tolls before November 2010 does not change the fact that it has violated motorists' rights every day since then.

"We've been violating the Constitution for years" is not a valid legal defense. *See* Opening Br. 40-41 (collecting cases).[7]

2. Even if there had been only one unconstitutional act rather than an ongoing violation, and even if that one act had occurred more than three years before the Complaint was filed, dismissal on statute-of-limitations grounds still would be unavailable, for two reasons. First, a cause of action accrues only "when ***the plaintiff*** knows or has reason to know of the injury." *Pearl*, 296 F.3d at 80 (emphasis added) (internal quotation marks omitted). NYSMTA is not a plaintiff in this action. Although it is a member of ATA, the two entities are distinct both factually and legally—just as with any membership organization and its individual members. The Thruway Authority does not contend otherwise; and it presents no factual or legal basis for imputing the knowledge of NYSMTA or unnamed "others" to ATA—or any of the named plaintiffs.[8]

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[7] The Thruway Authority is of course correct that this case is not identical to *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Br. 53 n.16. But what the Fourth Circuit made clear when ***it*** invoked *Brown*—in a case that likewise had nothing to do with race discrimination, denials of equal rights to education, or equal protection—is that long-standing wrongs are not insulated from challenge if they keep recurring. *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989). That rule is not nullified just because a plaintiff seeks retrospective damages as well as—or instead of—prospective injunctive relief. *See, e.g.*, *Petrella*, 134 S. Ct. at 1968; *Kuhnle Bros.*, 103 F.3d at 523.

[8] Moreover, the plaintiff class includes all motor carriers that have paid Thruway tolls during the limitations period. JA24, ¶ 137. Trucking companies, like all businesses, come and go. At least some members of the

Second, the Thruway Authority must establish that its statute-of-limitations defense is clear on the face of the Complaint (*see, e.g.*, *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 426-27 (2d Cir. 2008))—i.e., that the Complaint conclusively establishes the requisite knowledge on the part of all named plaintiffs. Yet the Thruway Authority points to nothing in the Complaint; indeed, it must turn wholly outside the Complaint even to show knowledge by irrelevant ***non-parties***. That in no way meets the Thruway Authority's burden.

B. The Doctrine Of Laches Does Not Apply.

The Thruway Authority concedes that, to establish the defense of laches, it must show plaintiffs' actual knowledge of the violations, inexcusable delay in filing suit, and prejudice. Br. 53. As just explained, the Thruway Authority points to nothing in the Complaint—or anywhere else—to demonstrate actual knowledge. *See* pages 22-23, *supra*. And because the constitutional violations here are ongoing and new causes of action accrue each day, the Thruway Authority cannot show inexcusable delay. *See* pages 20-21, *supra*; Opening Br. 44. Each of those failings is enough to doom the laches defense. *See Ikelionwu v. United States*, 150 F.3d 233, 238 (2d Cir. 1998) ("[T]he burden remains on the defendant to prove all the elements of the defense.").

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class did not even exist—much less pay tolls or know that those tolls were excessive—before November 2010.

The Thruway Authority also has not demonstrated prejudice. It implicitly concedes that the passage of time has not impaired its ability to defend itself or negatively affected the courts' ability to adjudicate this dispute. It contends only that it "has changed its position" in the time that it has been collecting excessive tolls because it has "issu[ed] bonds," "enact[ed] and implement[ed] budgets and capital improvement plans," "hir[ed] and pa[id] salaries and pensions for employees," and "enter[ed] into contracts with third party contractors" for "Thruway System" purposes. Br. 53-54. But as we have explained, laches is an equitable doctrine that as a matter of law does not apply to legal claims for monetary relief. *See Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 261 (2d Cir. 1997).[9] That a defendant has already spent or made plans to spend its ill-gotten gains does not give it a valid laches defense. *See* Opening Br. 45 n.9. And past expenditures or future commitments for roads, bridges, and the people who administer and maintain them would

[9] By contrast, we did not and do not argue, as the Thruway Authority suggests (Br. 55), that "laches can never apply to equitable claims where an applicable statute of limitations already exists." Rather, the controlling law of this Circuit is that when "'a limitation on the period for bringing suit has been set by statute, laches will generally not be invoked to shorten the statutory period,'" and hence, "'if the applicable legal statute of limitations has not expired, there is rarely an occasion to invoke the doctrine of laches,'" and the defendant must prove "'all the elements of the defense.'" Opening Br. 43 (quoting *Ikelionwu*, 150 F.3d at 238). The Thruway Authority cannot meet that extraordinary burden at all, much less at the motion-to-dismiss stage.

be unaffected by an injunction barring expenditures of toll revenues for non-road purposes, so the Thruway Authority's vague references to obligations and plans for the "Thruway System" do not even speak to the pertinent question here.

The Thruway Authority's assertion that *Ivani* is not controlling "because the claims in that case were timely filed" (Br. 54-55) ignores that what is alleged here is an ongoing series of distinct violations.[10] And as for the Thruway Authority's dislike of *Ivani* (*see* Br. 54), Circuit precedent remains Circuit precedent. That precedent is also correct. Contrary to the Thruway Authority's assertion (*id.*), the Supreme Court's decision in *Petrella* does not "criticize[]" *Ivani*, much less abrogate it, but instead underscores why *Ivani* is right and the doctrine of laches is inapplicable here as a matter of law.

Petrella was an action against MGM by the holder of the copyright for a screenplay on which the 1980 movie *Raging Bull* was based. The plaintiff brought a copyright-infringement action in 2009, seeking damages for MGM's sales of the film within the Copyright Act's three-year limitations period (i.e., since 2006). The district court dismissed the

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[10] The Thruway Authority mistakenly substitutes the entirely different continuing-violation doctrine under Title VII and argues, based solely on Title VII cases addressing that distinct doctrine, that laches may bar claims of continuing violations. Br. 54-55 & nn.17-18. We already laid bare that shell game in our opening brief (at 42 n.8).

complaint, and the Ninth Circuit affirmed the dismissal, under the doctrine of laches. The Supreme Court reversed, explaining: "To the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period, … courts are not at liberty to jettison Congress' judgment on the timeliness of suit. Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window." *Petrella*, 134 S. Ct. at 1967.

In reaching that conclusion, the Court identified three key principles governing application of laches. First, the doctrine is "essentially gap-filling" and therefore serves no useful purpose when there is an applicable statute of limitations. *Id.* at 1974-75. Second, because the separate-accrual rule balances the equities by limiting plaintiffs' recovery to damages within the limitations period, it would be inequitable and improper to go further by cutting off retrospective relief entirely. *Id.* at 1969-70. And third, the doctrine does not immunize "present and future" violations against either injunctive relief or damages. *Id.* at 1979. Those principles are dispositive here: Plaintiffs are entitled to an injunction and to refunds of all unconstitutional tolls paid from the start of the limitations period until the violations cease; and as in *Petrella*, that is all that we seek.

The Thruway Authority raised the statute-of-limitations and laches defenses in its motion to dismiss, both sides fully briefed the issues below,

and they have done so again here. In none of its three briefs (two below and one here) has the Thruway Authority showed that the Complaint establishes on its face the elements of either defense. Nor could it—at least not once its mistaken suggestion that plaintiffs' claims are governed by the continuing-violation doctrine is rejected. Accordingly, the question whether the Complaint should be dismissed under either the statute of limitations or the laches doctrine is ripe for resolution now. Moreover, the circumstances warrant the Court's exercise of its discretion to resolve the matter. This case has already been pending for nearly a year and a half, with no progress toward consideration of the merits of a straightforward claim that, in view of the Thruway Authority's repeated acknowledgment that it has been engaging in the precise conduct of which plaintiffs complain (*see, e.g.*, Br. 1, 3, 17-18, 22, 32), should succeed as a matter of law under this Court's controlling decision in *Bridgeport*.[11] Accordingly,

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[11] The Thruway Authority's assertion (Br. 19) that this Court "reject[ed] a similar theory" of liability in *Selevan v. New York Thruway Authority*, 711 F.3d 253 (2d Cir. 2013), is both incorrect and irrelevant to this appeal. The plaintiffs in *Selevan* challenged the charging of people living on one side of a bridge lower bridge tolls than were charged to people living on the other side. In upholding the disparate toll schedule, this Court reasoned that "[t]here [was] simply no evidence in the record"—and no claim by the plaintiffs—"that tolls from the … [b]ridge were diverted for other, unrelated uses … that would make them excessive." *Id.* at 260 n.6. Here, plaintiffs have alleged in detail that "tolls … were diverted for other, unrelated uses … that would make them excessive" (*see* JA7, ¶ 3; JA8, ¶ 5; JA16-20, ¶¶ 73-103; JA27, ¶ 151), and the Thruway Authority has admitted as much (*see* Br. 1-2, 17-18 & n.4, 22, 24, 27, 30).

the Court can and should hold that the statute-of-limitations and laches defenses are unavailable as a matter of law; at minimum, the Court should hold that the defenses are not established on the face of the Complaint and therefore cannot be a valid basis for dismissal. *See* Opening Br. 46 n.10.

Respectfully submitted,

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Dated: March 4, 2015

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Plaintiffs-Appellants certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B)(ii) because it contains 6,992 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

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CERTIFICATE OF SERVICE

I hereby certify that that on March 4, 2015, the foregoing reply brief was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

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