

Court of Appeals
STATE OF NEW YORK



PROTECT THE ADIRONDACKS! INC.,

—against—

Respondent-Appellant,

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and ADIRONDACK PARK AGENCY,

Appellants-Respondents.

**BRIEF FOR *AMICI CURIAE* OPEN SPACE INSTITUTE
AND ADIRONDACK MOUNTAIN CLUB IN SUPPORT OF
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION AND ADIRONDACK PARK AGENCY,
APPELLANTS-RESPONDENTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f), Amicus Open Space Institute, Inc., and Amicus Adirondack Mountain Club both state that neither has any parents, subsidiaries, or affiliates.

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PRELIMINARY STATEMENT

The Forest Preserve is a treasure of the State of New York. Comprising nearly 3 million acres in the Adirondack and Catskill Parks, the Forest Preserve contains nearly 2,300 miles of trails for New York's visitors and residents to experience and appreciate the Forest Preserve's majesty and serenity.

The Forest Preserve has long been protected by Article XIV of the New York State Constitution, which requires the Forest Preserve to "be forever kept as wild forest lands" and prohibits the sale, removal, and destruction of the Forest Preserve's timber. As this Court has long appreciated, Article XIV seeks to preserve the Forest Preserve's natural resources while simultaneously ensuring that it remains accessible to the public for their use and enjoyment. Balancing those two objectives is crucial. Over-erring on the side of protection risks sequestering nature from the people—depriving them of all that the outdoors has to offer—and constricting the ability of entities like the Department of Environmental Conservation (DEC) to sustainably build and maintain trails and access points within the Forest Preserve.

The Third Department's decision creates those precise risks. It myopically held that, based solely on the total number of trees removed—including seedlings and saplings with a diameter breast height (dbh) of under three inches—the construction of certain trails in the Forest Preserve required the removal of timber

to a “material degree” and thus violated Article XIV’s prohibition on the removal of timber. This is a misinterpretation of Article XIV. By looking in isolation at the total number of trees removed, and including seedlings and saplings as part of the count, the Third Department failed to balance Article XIV’s twin goals of preserving the forest and allowing for public access to it. And by misinterpreting Article XIV, the Third Department has now cast a legal shadow over *all* efforts to maintain and construct necessary trails and access points within the Forest Preserve. This Court should correct that error.

INTEREST OF AMICI

Open Space Institute, Inc. (OSI) is a nonprofit environmental conservation organization that works to protect scenic, natural, and historic landscapes to provide public enjoyment, conserve habitat and working lands, and sustain communities. OSI has decades of experience partnering with the agencies of New York State and other nonprofit organizations to acquire and protect large tracts within the Forest Preserve. OSI partners with these same agencies and organizations to establish and carry out environmentally sustainable development of trails to promote public access to such lands.

Adirondack Mountain Club (ADK) is a nonprofit organization dedicated to the conservation, preservation, and responsible recreational use of the Forest Preserve, as well as other parks, wild lands, and waters. For nearly a century,

ADK has worked to promote environmental stewardship and ethical outdoor recreation in New York State. In particular, ADK has long been engaged in trail construction and maintenance throughout New York, including in the Forest Preserve. ADK constructed the 121-mile Northville-Lake Placid Trail in the Forest Preserve in 1923. Since then, ADK has built and maintained several other trails in the region. And today, ADK’s volunteer and professional crews conduct intensive trail reconstruction in the Catskills and Adirondacks, working each week to ensure that trails remain passable and sustainable.

Both OSI and ADK have an interest in ensuring the proper balancing of forest preservation, public access, and public recreation within the Forest Preserve. OSI and ADK have worked for decades to promote responsible conservation and recreation in the Forest Preserve. They therefore have an interest in ensuring that the Forest Preserve remains protected and publicly accessible within the scope of Article XIV of the New York State Constitution.

ARGUMENT

I. ANY INTERPRETATION OF ARTICLE XIV MUST BALANCE FOREST PRESERVATION WITH PUBLIC ACCESS.

Article XIV, Section 1 of the New York State Constitution provides that “the forest preserve” must “be forever kept as wild forest lands” and prohibits the sale, removal, or destruction of “timber thereon.” The purpose of this provision, however, is not to sequester New York’s forests from any human interaction. To

the contrary, the drafters of Article XIV sought to preserve New York's natural landscape *for* the people.

The constitutional history makes clear that the drafters of Article XIV specifically sought to maintain the Adirondacks as a sanctuary for the people's enjoyment. The drafters recognized "that it was necessary for the life, the health, the safety, and the comfort not to speak of the luxury of the people of this State, that our forests should be preserved." 4 Rev. Rec., 1894 N.Y. Constitutional Convention at 128. They saw the forest as "a great resort," a place where people could escape "the trials, tribulations and annoyances of business and every-day life in the man-made town." *Id.* at 131. The Adirondacks, for the drafters, was a "vast sanitarium," and they envisioned people from across the United States flocking to the Adirondacks "to have their health restored and to have their vigor renewed and to have their constitutions built up." *Id.* at 143.

Indeed, Article XIV was enacted against the backdrop of a broader conservationist movement that also sought to preserve natural resources as a common heritage for the people. "The seedling ideas for the creation of a public park in the Adirondacks may have been planted when Congress established Yellowstone National Park as a place for public recreation because the bill creating New York's State Park Commission was introduced just two weeks after Yellowstone was approved by the President." Claudia Braymer, *Improving Public*

Access to the Adirondack Forest Preserve, 72 Alb. L. Rev. 293, 297 (2009).

Nature, as the early conservationist Frederick Law Olmstead saw it, was a place “to draw people out of the routine of daily life, to create a total and encompassing experience, to change the entirety of their pace and permit the rhythm of the park to take over.” Joseph L. Sax, *America’s National Parks: Their Principles, Purposes, and Prospects*, 85 *Natural History* (1976). To quote one of the most famous champions of American conservation—President Theodore Roosevelt—the forests must be preserved “as a heritage for the children and the children’s children of the men and women of this generation.” *Conservation as a National Duty* (1908).

This Court, and others, has long appreciated that “[t]he Forest Preserve and the Adirondack Park within it are for the reasonable use and benefit of the public.” *Ass’n for Prot. of Adirondacks v. MacDonald*, 253 N.Y. 234, 241 (1930); *see also Helms v. Reid*, 394 N.Y.S.2d 987, 1000 (Sup. Ct., Hamilton Cty. 1977) (“The park was comprised of land in certain designated forest preserve counties, and the land was to be forever reserved, maintained and cared for as ground open for the free use of all the people, for their health and pleasure[.]”). As the Court put it in *MacDonald*, “[w]hatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for every one within the State and for the use of the people of the State.” 253 N.Y. at 238–39.

Accordingly, any “reasonable interpretation” of Article XIV must protect the Forest Preserve from commercial exploitation while also not deterring public enjoyment by making its access impracticable. *Id.* at 238. For this reason, this Court has long understood that Article XIV must allow for at least some immaterial amount of tree removal to maintain public access to the lands. *Id.* Specifically, “all things necessary were permitted, such as measures to prevent forest fires, the repairs to roads and proper inspection, or the erection and maintenance of proper facilities for the use by the public which did not call for the removal of the timber to any material degree.” *Id.*

What constitutes a “material degree,” or a “substantial extent,” must hinge, therefore, not simply on the total number of trees cut but on the extent to which the cutting is necessary to facilitate meaningful public access and enjoyment. *Id.* The goal is to balance “the preeminent interest in maintaining the character of pristine vistas with ensuring appropriate access to remote areas for visitors of varied interests and physical abilities.” *Matter of Adirondack Wild Friends of the Forest Pres. v. New York State Adirondack Park Agency*, 34 N.Y.3d 184, 187 (2019). Striking that balance, admittedly, is no simple task, as “it is precisely man’s presence in the preserve which threatens its wild forest character in the first instance.” *Helms*, 394 N.Y.S.2d at 999. Nevertheless, “it is still necessary to

arrive at some formula or balance in order to fully satisfy the constitutional mandate.” *Id.*

The Third Department, however, ignored that balance. The court simply counted the total number of trees lost—irrespective of size, location, or maturity—and then determined that “[i]t would be anomalous to conclude” that destroying that many trees “does not constitute the destruction of timber ‘to a substantial extent’ or ‘to any material degree.’” *Protect the Adirondacks! Inc. v. New York State Dep’t of Env’tl. Conservation*, 106 N.Y.S.3d 178, 183 (3rd Dep’t 2019). The Third Department further undermined the constitutional balance between preservation and public access by erroneously inflating its tree count. The Third Department included trees with a diameter at breast height (dbh) of under three inches, which are not “timber” within the meaning of Article XIV,¹ and thus included small seedlings and saplings as part of its overall count.

To appreciate the error of the Third Department’s interpretation, consider that there are more than 2,300 miles of trails in the Forest Preserve for hiking. *See* N.Y. Dep’t of Env’tl. Conservation, “Adirondack Backcountry Information,” <https://www.dec.ny.gov/outdoor/7865.html>. The construction and maintenance of those trails alone necessarily involves the removal of hundreds of thousands of

¹ The New York State DEC, in its brief, persuasively explains why trees under 3 dbh are not “timber” under Article XIV. *See* DEC Opening Br. at 43–52. There is therefore no need to expand upon that argument here.

trees of varying sizes and ages. But the constitutionality of those hiking trails in the Forest Preserve cannot seriously be questioned.

Affirming the Third Department’s approach would therefore undermine the very purpose of Article XIV: “preserv[ing] the wild forest character of the forest preserve and at the same time enabl[ing] the public to use and enjoy it as was intended by the framers of this constitutional provision.” *Helms*, 394 N.Y.S.2d at 999.

II. THE THIRD DEPARTMENT’S HOLDING ERRONEOUSLY CASTS A LEGAL SHADOW OVER FUTURE EFFORTS TO IMPROVE PUBLIC ACCESS TO THE FOREST PRESERVE.

The need to improve public access to the Adirondacks is pressing. In recent years, many popular trails have seen “exponential increase in use.”² The Adirondack Park now hosts around 12.4 million visitors annually,³ with the average trail experiencing dramatic increases in foot traffic over the last decade.⁴ There has been “significant congestion,” and “[t]he large number of visitors has resulted in trail erosion and damage to vegetation in heavily used areas.”⁵ The

² See NYS High Peaks Strategic Planning Advisory Group Immediate Action Recommendations Report, at 10 (June 1, 2020), https://www.dec.ny.gov/docs/lands_forests_pdf/hpagintrmrpt.pdf

³ See Adirondack Council, State of the Park, 2020-2021, at 14, https://www.adirondackcouncil.org/vs-uploads/sop_archive/1599077695_SOP_2020_FINAL.pdf.

⁴ See Adirondack High Peaks Over Use, https://www.adirondackcouncil.org/vs-uploads/pdf/1580059286_Adirondack_High_Peaks_Over_Use2020.pdf.

⁵ See N.Y. Dep’t of Env’tl. Conservation, “Hikes Outside the Adirondack High Peaks,” <https://www.dec.ny.gov/outdoor/9163.html>.

overcrowding of trails has been further highlighted and exacerbated by the COVID-19 pandemic, during which millions of New Yorkers have flocked to hiking trails both within and outside the Forest Preserve.⁶ The ever-increasing use of recreational trails in the Forest Preserve emphasizes the importance of creating and managing public trail access points, creating new trails to alleviate overuse, and maintaining existing trails.⁷

But the Third Department’s approach to Article XIV erroneously casts a legal shadow over any comprehensive attempt to improve public access to the Forest Preserve.

Basic trail construction and maintenance involves clearing the trail tread of seedlings, small saplings, and other vegetation and side cutting.⁸ Especially because several trails in the Forest Preserve require more maintenance than they have received,⁹ many small saplings typically sprout between each round of

⁶ See, e.g., Aaron Cerbone, *Gorgeous day saw ‘probably the highest use in High Peaks history*, Adirondack Daily Enterprise (Sep. 20, 2020), <https://www.adirondackdailyenterprise.com/news/local-news/2020/09/gorgeous-day-saw-probably-the-highest-use-in-high-peaks-history/>.

⁷ See Adirondack Council, *supra* note 3, at 18 (observing that overuse is a “[r]eal” and “serious issue” and identifying a need for “[b]uilding more [s]ustainable [t]rails”).

⁸ See United States Forest Service, Trail Construction & Maintenance Notebook, “Clearing and Brushing” & “Removing Trees,” <https://www.fs.fed.us/t-d/pubs/htmlpubs/htm07232806/page07.htm#clea>.

⁹ See Trails in Need, Adirondacks High Peaks Wilderness Region, https://www.adirondackcouncil.org/vs-uploads/pdf/1541000782_Trails%20in%20Need%20map%20and%20assessment2.pdf

maintenance. Removing those small saplings—which are between one to three inches dbh—is a common and necessary part of keeping trails safe and identifiable for hikers.¹⁰

The Third Department’s holding, however, erroneously makes removal of seedlings and small saplings constitutionally suspect. For the Third Department, what ultimately mattered was the total number of trees cut, regardless of their location, size, or maturity. *See* 106 N.Y.S.3d at 183 (“It would be anomalous to conclude that destroying 925 trees per mile of trails, or approximately 25,000 trees in total, does not constitute the destruction of timber ‘to a substantial extent’ or ‘to any material degree.’” (quoting *MacDonald*, 253 N.Y. at 238)).

By looking just to the total number of trees removed and including seedlings and small saplings as part of that count, the Third Department’s holding will disincentivize trail construction and maintenance. Trail managers will reasonably worry that *any* project involving the construction of new trails or maintenance of existing trails is unconstitutional. Moreover, going through the process of tabulating all the seedlings and saplings under three inches dbh will be so time consuming and tedious for the DEC that many trails will expectedly go unmaintained for an extended period of time until they can no longer be cut short of a statewide constitutional amendment.

¹⁰ *See* United States Forest Service, *supra*, note 8.

These fears are not unfounded. Following the Third Department's decision, the DEC severely limited projects involving tree cutting and, as a result, largely canceled the 2020 trail work season.¹¹ The DEC enacted these drastic limitations precisely because, under the Third Department's decision, it would need to count trees in such great numbers so as to render its projects untenable.¹²

The Third Department's ruling harms trail development in the places where maintenance is most needed. For example, many trails within the High Peaks Wilderness are badly eroded and in serious need of replacement.¹³ Indeed, the DEC's High Peaks Strategic Planning Advisory Group has identified around 80 miles of trails whose conditions are in serious need of assessment.¹⁴ The Third Department's decision, however, casts a legal cloud over any effort to repair and improve trail sustainability in that area of the Forest Preserve.

In addition, the Third Department's decision will skew the incentives of trail managers to unduly avoid the cutting of saplings and minor vegetation, even if it results in a less sustainable trail from a preservation and erosion standpoint. The

¹¹ See Phil Brown, *Trail progress halts along with tree cutting after Article 14 decision*, Adirondack Explorer (July 31, 2019), <https://www.adirondackexplorer.org/stories/trail-progress-halts-along-with-tree-cutting-after-article-14-decision>.

¹² See Rick Karlin, *After court ruling, tree-clearing along hiking trails is on hold*, Times Union (Aug. 5, 2019), <https://www.timesunion.com/news/article/After-court-ruling-tree-clearing-on-trails-is-on-14281895.php>.

¹³ See NYS High Peaks Strategic Planning Advisory Group Immediate Action Recommendations Report, at 9-11 (June 1, 2020).

¹⁴ *Id.*

High Peaks Wilderness again illustrates the problem. To allow for proper drainage and maximum sustainability, hiking trails there—and in the upper elevations of the Forest Preserve more generally—need to be switchbacked.¹⁵ But switchbacked trails, by their nature, have longer distances¹⁶ and thus require a greater removal of trees than non-switchbacked trails. Similarly, trails sometimes need to be relocated to reduce forest fragmentation,¹⁷ but relocation, too, often requires additional tree cutting. Looking solely at tree counts thus undermines sustainable trail construction and perverts Article XIV’s command to “preserve” the forest.

¹⁵ Mike Lynch, *Beyond Peak Capacity*, Adirondack Explorer (Aug. 26, 2016), <https://www.adirondackexplorer.org/stories/beyond-peak-capacity> (quoting DEC forester explaining the importance of switchbacks to promote sustainable trail construction).

¹⁶ See United States Forest Service, Trail Construction & Maintenance Notebook, “Additional Trail Elements” <https://www.fs.fed.us/t-d/pubs/htmlpubs/htm07232806/page12.htm>.

¹⁷ See, e.g., R4495 (expert testimony explaining that “closing more interior trails” while adding a trail “that’s more to the perimeter of the forest block” will decrease fragmentation).

CONCLUSION

For these reasons, this Court should vacate the decision of the Third Department and remand for further proceedings.

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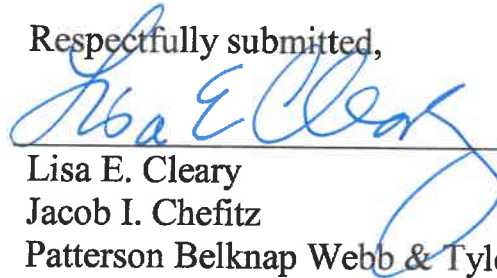
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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the corporate disclosure statement; the table of contents, and the table of cases and authorities, is 2,692 words.

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