APL-2019-00166

Court of Appeals
of the
State of New York

PROTECT THE ADIRONDACKS! INC.,

Respondent-Appellant,

-AGAINST-

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

Appellants-Respondents.

BRIEF OF AMICI CURIAE ADIRONDACK COUNCIL, INC. AND ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE IN SUPPORT OF RESPONDENT-APPELLANT

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Appellate Division, Third Department Appeal No. 527256

CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of this Court's Rules of Practice (22 NYCRR § 500.1[f]), Adirondack Council, Inc. and Adirondack Wild: Friends of the Forest Preserve state that they do not have any parents, subsidiaries, or affiliates.

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PRELIMINARY STATEMENT

Nearly a century ago, this Court, in *Association for Protection of Adirondacks v MacDonald* (253 NY 234 [1930]), defined when a proposed cutting of timber in the State's protected Forest Preserve runs afoul of the Forever Wild clause of the New York Constitution's express prohibition on the sale, removal, and destruction of timber. Rejecting the State's proffered balancing of policy interests, the *MacDonald* Court reaffirmed the primacy of the Forever Wild constitutional protections, and held that if the proposed tree cutting is substantial in nature and material in degree, it cannot stand. And there, this Court held, the cutting of 2,500 trees in the Forest Preserve for an Olympic bobsled run was indeed material, notwithstanding the countervailing policy interests of opening the Preserve for outdoor sports.

Ninety years later, the State here seeks to upset this Court's long-standing *MacDonald* substantial and material standard, and replace it once again with the same balancing of competing policy interests that the *MacDonald* Court expressly rejected. The Forever Wild clause of the New York Constitution, however, permits no such balancing. Both its mandatory language and the history underlying its adoption in the

1894 Constitutional Convention make clear that the destruction of timber is prohibited, not just a policy interest to weighed in a balancing by the political branches of our State government.

Indeed, the People of this State in 1895 declared resoundingly that the Forest Preserve is entitled to constitutional protection from the very type of legislative and agency discretion to balance competing interests that the State seeks to readopt here. Because the State's "contextual analysis" of the tree cutting is contrary to the words and purpose of the Forever Wild clause, this Court should reject the State's invitation to rewrite the constitutional standards that have stood to defend our State's Forest Preserve from the ever-changing whims of the political branches of government.

Amici curiae Adirondack Council, Inc. and Adirondack Wild: Friends of the Forest Preserve have long advocated to ensure the ecological integrity and wild character of the Adirondack Park and the Forest Preserve and thus submit this brief in support of the affirmance of the Opinion and Order of the Appellate Division, Third Department (Egan Jr., J.P., Lynch, Clark, Mulvey, and Pritzker, JJ.) entered July 3, 2019 (*see Protect the Adirondacks! Inc. v New York State Dept. of Envtl.*

Conservation, 175 AD3d 24 [3d Dept 2019]) that the State's construction of Class II Community Connector snowmobile trails "constitutes an unconstitutional destruction of timber" in violation of Article XIV, § 1 of the New York Constitution (*Protect the Adirondacks! Inc.*, 175 AD3d at 29).

For the reasons that follow, the Appellate Division order should be modified to the extent of declaring that the destruction of timber for the Class II Community Connector snowmobile trails also impairs the wild forest character of the Forest Preserve in violation of the Forever Wild clause of the New York Constitution and, as so modified, affirmed.

STATEMENT OF INTEREST

The Adirondack Park is the world's largest intact temperate deciduous forest (*see generally* Adirondack Council, State of the Park 2020-2021, *available at* https://www.adirondackcouncil.org/vs-uploads/sop_archive/1599077695_SOP_2020_FINAL.pdf). It contains six million acres (9,300 square miles) and covers one-fifth of New York State. Nearly half of the Park is publicly owned Forest Preserve, protected as "Forever Wild" by the New York Constitution since 1895. About 1.1 million acres of these public lands are protected as

Wilderness, where non-mechanized recreation may be enjoyed, but motorized vehicles are prohibited. Most of the remaining public land (more than 1.4 million acres) is designated as Wild Forest, where under the Adirondack Park State Land Master Plan defined, selective motorized uses, while not being encouraged, are conditionally permitted on selected and designated waters, roads, and trails.

The Adirondack Council, Inc. is a not-for-profit organization that advocates to ensure the ecological integrity and wild character of the Adirondack Park and the Forest Preserve. Founded in 1975, the Adirondack Council has advocates who reside in all 50 states and the District of Columbia, and has offices in Elizabethtown and Saranac Lake in the Adirondack Park and in Albany. Through public education and advocacy for the protection of the Park's ecological integrity and wild character, the Adirondack Council advises public and private policymakers on ways to safeguard this great expanse of wild forest. The Council's vision is for the Adirondack Park to have clean air and water and large wilderness and wild forest areas surrounded by farms, forests, and vibrant communities.

With strong partner organizations, collaboration with government officials, and citizen participation, the Council advocates for policies and funding that benefit the environment and communities of the Adirondack Park. Among the Council's recent key initiatives was the "Be Wild New York" campaign in which it led a coalition of regional and national conservation organizations in promoting the expansion of the Adirondack High Peaks Wilderness to create more than 275,000 acres of contiguous wilderness. Using science as the basis for its policy decisions, the Adirondack Council educates the public and policymakers; advocates for regulations, policies, and funding to benefit the Park's environment and communities. The Adirondack Council secures public and private actions that preserve this unique national treasure for future generations, monitors proposals, legislation, and policies impacting the Park and, when necessary, takes legal action to uphold constitutional protections and agency policies established to protect the Adirondack Park.

Adirondack Wild: Friends of the Forest Preserve is a not-for-profit membership organization whose mission is to safeguard the legal protections governing New York's Forest Preserve lands in the

Adirondack and Catskill Parks, and to promote public and private land stewardship in those parks that is consistent with wild land values through education, advocacy and research. Adirondack Wild is on the wild's side and considers itself a conscience of the Forest Preserve. The organization and its 900 members take very seriously their role in defending Article XIV, Section 1 of the New York Constitution and in monitoring the snowmobile community connector trails and related management actions of the New York State Department of Environmental Conservation in the Adirondack Park, as well as serving as a watchdog to ensure that the Constitution, laws, and regulations protecting the Park's wild lands, natural resources, and scenic beauty are not violated.

STATUTORY AND REGULATORY BACKGROUND

Adopted in 1895, the Forever Wild clause of the New York Constitution governs the use of state-owned land in the Adirondack Park. In particular, it provides:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed

(NY Const., Art. XIV, § 1).

When it was first proposed during the 1894 Constitution Convention, the clause's preamble made clear the importance that it would play in preserving New York's pristine forest lands: "[t]he preservation of the forests and water-sheds of this State is of the greatest importance to all people, and to every interest within the borders of the State" (Journal of 1894 Constitutional Convention, No. 39, July 31, 1894, at 426). David McClure, a convention delegate and proposer of the Forever Wild clause, noted that the people of the state "had forgotten that it was necessary for the life, the health, and the comfort not to speak of the luxury of the people of this State, that our forests should be preserved" (Record of the New York State Constitution Convention, No. 113, September 8, 1894, at 2048). Additionally, McClure noted that the Adirondack forest "is vastly more valuable to the people of the State in its present condition than it can be by any change" (*id.* at 2049).

Although there have been several efforts to amend the Forever Wild clause both by Legislature and by subsequent constitutional conventions, the clause has stood the test of time as the foremost

protector of the State's forest lands. This Court has also repeatedly reaffirmed the importance of the Forever Wild clause (*see People v Adirondack Ry. Co.*, 160 NY 225, 228 [1899], *affd* 176 US 335 [1900]; *Association for Protection of the Adirondacks v MacDonald*, 228 App Div 73, 80 [3d Dept 1930], *affd* 253 NY 234 [1930]).

The State seeks to circumvent the Constitution's and this Court's strict protections for the state's wild forest lands in the Adirondack Park by introducing a balancing of policy interests to determine when tree cutting in the Preserve may be permitted under the Forever Wild clause of the Constitution. The State's interpretation, however, conflicts with the plain language of the Forever Wild clause, the very purpose why the People of this State enshrined it in the Constitution in the first place, and this Court's holding in *Association for Protection of Adirondacks v MacDonald* (253 NY 234 [1930]). This Court should reject the State's invitation to rewrite the Constitution and to, in effect, overrule *MacDonald*.

THE APPELLATE DIVISION ORDER

In this challenge to the construction of more than 27 miles of Class II Community Connector snowmobile trails in the State's

protected Forest Preserve within the Adirondack Park, which would result in the destruction of approximately 25,000 trees of any size, the Appellate Division, Third Department (Garry, P.J., McCarthy, Devine, Mulvey, and Rumsey, JJ.), with one Justice dissenting, held that the State's construction of the Class II snowmobile trails "constitutes an unconstitutional destruction of timber" in violation of Article XIV, § 1 of the New York Constitution (*Protect the Adirondacks! Inc.*, 175 AD3d at 29).

In particular, the Appellate Division held, "the use of the word 'timber' in the constitutional provision at issue is not limited to marketable logs or wood products, but refers to all trees, regardless of size," and that the destruction of 25,000 trees for the project constituted a substantial and material destruction of timber under this Court's standard in *MacDonald* (*id.* at 31-32). Although the Appellate Division understood that the project did not call for the destruction of wide swaths of trees, it nonetheless held that "[i]t 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'" (*id.* at 31).

Notwithstanding that it held that the State's tree cutting violated Article XIV, § 1 of the Constitution, and that no further analysis was required to dispose of the case, the Appellate Division nevertheless concluded that the project did not violate the first sentence of section 1 requiring State Forest Preserve lands to be kept forever as wild forest lands because the trails "have similar aspects to foot trails and ski trails and have less impact than roads or parking lots" and, thus, do not "impair[] the wild forest qualities of the Forest Preserve" (*id.* at 28-29). That conclusion was unnecessary to the Appellate Division's determination.

ARGUMENT

POINT I

THE FOREVER WILD CLAUSE OF THE NEW YORK CONSTITUTION DOES NOT PERMIT A BALANCING OF POLICY INTERESTS TO DETERMINE WHETHER IT HAS BEEN VIOLATED

The "Forever Wild" clause of the New York Constitution provides:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be *forever kept as wild forest lands*. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed

(NY Const art XIV, § 1 [emphasis added]).

The Forever Wild clause has been "[t]he primary source of any powers regulating the use of State owned lands in the Adirondacks" (*Matter of Helms v Diamond*, 76 Misc 2d 253, 256 [Sup Ct, Schenectady County 1973]). The mandatory plain language of the Forever Wild clause portends its strength. Forest Preserve lands "shall be kept forever as wild forest lands" (NY Const art XIV, § 1). They "shall not" be leased or sold (*id.*). And timber thereon "shall not" be removed, sold, or destroyed (*id.*). These mandatory commands written into our State's Constitution do not permit a balancing of interests to decide if trees may be cut to make way for an economic development project or a recreational snowmobile corridor (*see Matter of Tishman v Sprague*, 293 NY 42, 50 [1944]; *People v DeJesus*, 21 AD2d 236, 239 [4th Dept 1964] ["While it may be proper, in some instances, to construe a statute employing the word 'shall' in a permissive or directory sense, such construction is not available when the interpretation of a constitutional provision is involved. In such cases the language is mandatory." (citations omitted)]).

> The constitutional provision eliminates the need for weighing the respective benefits since it also prohibits, absent a constitutional amendment, the sale or exchange of state land in the Forest Preserve, no matter how beneficial

> the exchange may be. "Forever wild" means forever, or at least until the voters decide otherwise.

(Kevin Anthony Reilly, Practice Commentaries, McKinney's Cons Laws of NY, ECL 9-0101; *see e.g.* NY Const., Art. XIV, § 1 [constitutional amendments to permit, for example, the transfer of 10 acres of land to the Sagamore Institute for historic preservation purposes in exchange for 200 acres of land to be added to the Preserve and the transfer of one acre to the Town of Long Lake for a drinking water supply in exchange for 10 acres to be added to the Preserve]).

Although an absolute no tree cutting prohibition certainly could be justified under the plain language of the Forever Wild clause, this Court has held that the provision must be given a reasonable construction to permit only nonmaterial and nonsubstantial tree cutting within the Forest Preserve (*see Association for Protection of Adirondacks v MacDonald*, 253 NY 234, 238-239 [1930] [noting that "[s]ome opinions, notably those of the Attorneys-General of the State, . . . have even gone so far as to state that a single tree, and even fallen timber and dead wood, cannot be removed; that to preserve the property as wild forest lands means to preserve it from the interference in any way by the hand of man"]). No reasonable construction of the Forever Wild clause,

however, permits a balancing of competing policy interests in determining whether the cutting of trees in the Forest Preserve passes constitutional muster.

Indeed, in *MacDonald*, this Court specifically rejected the State's proffered balancing of interests to allow the cutting of 2,500 trees in the Forest Preserve for an Olympic bobsled run (*see id.* at 236, 242). As this Court noted, the State argued that "the erection of a toboggan slide for sport is within" the purposes for which the Forever Wild clause was adopted, including to "preserve [State Forest Preserve lands] for the free use of all the people for their health and pleasure" (*id.* at 241). The State thus asked this Court to weigh that interest in permitting outdoor sports for the Olympics and for the public against the constitutionally enshrined interest in protecting the Forest Preserve from destruction (*see id.*). The *MacDonald* Court emphatically declined the State's invitation:

> However tempting it may be to yield to the seductive influences of outdoor sports and international contests, we must not overlook the fact that constitutional provisions cannot always adjust themselves to the nice relationships of life. The framers of the Constitution, as before stated, intended to stop the willful destruction of trees upon the forest lands, and to preserve these in the wild state now existing; they adopted a measure forbidding the cutting

> down of these trees to any substantial extent for any purpose.
>
> . . . [T]his plea in behalf of sport is a plea for an open door through which abuses as well as benefits may pass. The Constitution intends to take no more chances with abuses, and, therefore, says the door must be kept shut. The timber on the lands of the Adirondack Park in the Forest Preserve, or that on the western slope of the Sentinel range cannot be cut and removed to construct a toboggan slide simply and solely for the reason that section 7, article VII, of the Constitution says that it cannot be done

(*id.* at 241-242).

The State now attempts here to re-introduce a similar balancing of interests which this Court expressly rejected in *MacDonald*. In particular, the State argues that the Court must undertake a "contextual analysis" of a number of policy considerations to determine whether the proposed tree cutting runs afoul of the mandatory prohibition on tree cutting in the Forever Wild clause (State Appellants-Respondents' Opening Brf, at 52-63). In particular, the State argues, the Third Department majority should have considered the "public purpose served by the trails' construction," including whether they "enable members of the public of varying physical capabilities to access and enjoy the wild forest nature of the Preserve year-round," where the trails will be built, what the resulting impact to the remainder of the

Forest Preserve would be, and whether "ecologically sound trail-building techniques" will be used (*id.* at 59-63).

The balancing of policy considerations that the State asks this Court to undertake is precisely what the People of this State intended to prevent when the Forever Wild clause was adopted in 1895. Indeed, one of the foremost purposes of enshrining the protections for the Forest Preserve in the Constitution was to protect them from the discretion of the political branches (*see Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d 184, 206-207 [2019] [Wilson, J., dissenting] ["By a unanimous vote, the convention adopted the 'forever wild' provision to create an 'unpassable constitutional barrier' to executive branch actions facilitating the depredation of the forest reserve," quoting Frank Graham, Jr., The Adirondack Park: A Political History 127-131 (1978)]; *People v Santa Clara Lbr. Co.*, 213 NY 61, 65 [1914] ["The Constitution of the state, effective January 1, 1895, reserved to the People the title to the lands and timber then or subsequently owned by them within the forest preserve, and *forbade the legislature and each officer and department to dispose or in any manner deprive them of it.*" (emphasis added)]).

That was done for a good reason. In the years leading up to the 1894 Constitutional Convention, Governor Roswell Flower, who had previously created the Forest Preserve by legislation (*see* L 1885, ch 283 [providing that "the lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private"]), signed another law allowing the State's Forest Commission to sell timber from any part of the Forest Preserve (*see* L 1893, ch 332; *MacDonald*, 253 NY at 239; Charles Z. Lincoln, Constitutional History of New York, at 428 [1906]). Within the next year, the Forest Commission had sold timber on 17,500 acres of Preserve, thereby eviscerating the very purpose of protecting the Forest Preserve lands as wild forests in the first place (*see* A Political History of the Adirondack Park and Forest Preserve, Prior to 1894 Constitutional Convention, *available at* https://www.adirondack-park.net/history/political/pre-const.html). With this as the backdrop, the delegates to the 1894 Constitutional Convention adopted the Forever Wild clause unanimously, thereby removing any legislative and agency discretion from its enforcement (*see* Lincoln, *supra*, at 433-434 ["By

including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for the constitutional interference."]; *see also Adirondack Wild,* 34 NY3d at 206 [Wilson, J., dissenting] ["'By 1894, the public's faith in legislative protection of the Adirondacks had been seriously eroded and the Constitutional Convention of 1894 seemed to offer one last hope,'" *quoting* The Adirondacks: New York's Forest Preserve and a Proposed National Park, at 7]).

The delegates' foresight to transfer the protections for the Forest Preserve away from interference from the political branches proved important. Less than one year after the Forever Wild clause was added to the Constitution, with the Legislature unsatisfied with the withdrawal of its authority, a new amendment to the Constitution was introduced that would have again allowed the sale and exchange of Forest Preserve lands (Lincoln, *supra,* at 435-436). Although the amendment passed two successive legislatures, in 1895 and 1896, it was resoundingly defeated by the People of the State by a 2 to 1 margin (*see id.*). Indeed, "the people at the first opportunity gave their verdict for absolute forest preservation, and for restoring so far and as rapidly as

possible the forest conditions which existed when the state became the owner of the forest lands" (*id.* at 436).[1]

This Court has thereafter consistently enforced the withdrawal of legislative and agency discretion when attempts have been made to avoid the Forever Wild clause's mandatory commands. In *McDonald*, as noted, this Court declared to be unconstitutionally substantial and material the cutting of 2,500 trees in the Forest Preserve for the Olympic bobsled run—only 10 percent of the tree cutting now before this Court. In *Santa Clara*, this Court struck down an attempt by the forest, fish, and game commissioner to abandon title to timber in the Forest Preserve to a private corporation through an ultra vires settlement of claims (*see* 213 NY at 66).

The State may wish to have flexibility to determine the total amount and sizes of timber that can be removed or destroyed in the Preserve using a balancing test to "contextualize" the removal of trees

[1] The State's reliance on comments made at subsequent constitutional conventions, and proposed amendments to the Constitution that the voters never adopted, to support its narrow reading of the Forever Wild clause is misplaced, and cannot be considered as evidence of constitutional intent (*see e.g. McKechnie v Ortiz*, 132 AD2d 472, 475 [1st Dept 1987] ["To give this law the expansive reading now urged by appellants based on the post-enactment statements of the bill's sponsor, would be inconsistent with basic legislative principles. The post-enactment statements of a member of the legislature, even one who sponsored the law in question, are irrelevant as to the law's meaning and intent."], *affd* 72 NY2d 969 [1988]).

for a project that the State believes in in the public interest, based on considerations of public access, economic development, and trail maintenance.[2] But that simply is not permitted under the plain text and constitutional history of the Forever Wild clause.[3]

The State's argument also misreads *MacDonald*. The State contends that by using "relative" terms such as "substantial extent" and "material degree," the *MacDonald* Court actually endorsed a contextual analysis that would permit the destruction of any number of trees so long as countervailing factors (*e.g.*, "old growth trees were not adversely impacted, there was no clearcutting, the trails retained a closed canopy throughout . . . ") outweigh the destruction of the trees (State Appellants-Respondents' Reply Brf, at 21-22). The State's interpretation divorces these terms from their proper context (*see e.g. Matter of Mestecky v City of New York*, 30 NY3d 239, 243 [2017]).

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[2] This Court's *MacDonald* material and substantial standard will not likely ever prevent trail maintenance on existing trails within the Forest Preserve because such maintenance likely will not be deemed substantial or material under the standard. Thus, it would be surprising to see a challenge brought to trail maintenance activities.

[3] Nor could the State enter into any agreement that would require it to violate the terms of the Forever Wild clause's prohibition on the destruction of timber (*see e.g. Santa Clara*, 213 NY at 66).

Reading the two key *MacDonald* phrases in context shows the flaw in the State's analysis. As this Court explained,

> The purpose of the constitutional provision, as indicated by the debates in the Convention of 1894, was to prevent the cutting or destruction of the timber or the sale thereof, as had theretofore been permitted by legislation, to the injury and ruin of the Forest Preserve. To accomplish the end in view, it was thought necessary to close all gaps and openings in the law, and to prohibit any cutting or any removal *of the trees and timber to a substantial extent.* The Adirondack Park was to be preserved, not destroyed. Therefore 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*

(*MacDonald*, 253 NY at 238-239 [emphasis added]).

Clearly, the Court was addressing the reasonable interpretation of the constitutional language regarding the trees that are threatened, and articulated a standard that no substantial or material tree cutting was permitted. To be sure, the *MacDonald* substantial and material test allows for consideration of the amount, character, and quality of the trees that would be cut, as the Appellate Division majority properly concluded, and the substantiality and materiality is determined based on those characteristics (*see Protect the Adirondacks! Inc.*, 175 AD3d at 31 ["tree size and maturity may be considered in determining whether a

proposed project's tree cutting is substantial or material"]). Expert proof such as the parties presented here would assist the court in making the constitutional determination of substantiality and materiality. What is not permitted under the *MacDonald* Court's substantial and material test, however, is what the State here proposes, a so-called "contextual" or "balancing" analysis in which substantial and material tree cutting is permissible because of other countervailing factors or considerations.

The "contextual" balancing of policy interests standard that the State urges this Court to adopt would undoubtedly result in litigation whenever the State seeks to advance development projects in the Preserve that entail significant tree cutting. This would place the courts in the position of having to determine when the destruction or cutting of large numbers of trees can be countenanced in the interests of economic development or other policies, presumably *de novo*, and without any specific constitutional guidance. That is not workable.

The parties also make much of the size of trees that may be counted as "timber" subject to the Forever Wild clause's protections. But, this case does not compel this Court to pass on that issue. Applying this Court's standard in *MacDonald*, the tree cutting the State has

proposed here fails under any definition. The cutting of 6,184 trees of at least 3 inches diameter at breast height ("DBH"), or 25,000 trees of any size—as the parties have stipulated—for the Class II snowmobile trails is substantial and material (*see id.* at 239-242; *see also Protect the Adirondacks! Inc.*, 175 AD3d at 29-32).

Specifying a constitutional definition of timber that would extend beyond its plain meaning would be impractical (*see* Miriam-Webster's Online Dictionary, timber ["growing trees or their wood"] [https://www.merriam-webster.com/dictionary/timber]). Indeed, doing so would require the courts to resolve disputes concerning the character and quality of the trees proposed to be cut based simply on the measurement of the trees involved. Many trees in the Forest Preserve have unique characteristics that would warrant their preservation even if they fall beneath the State's proposed 3-inch DBH standard. For example, alpine trees that are typically stunted by exposure to fierce mountaintop conditions such that they may be decades or longer in age, but less than 3-inch DBH, if they ever reach that height, would not be granted any protection under the State's proposed constitutional definition of timber even though they represent a critical part of the

Forest Preserve's wilderness ecosystem. It was even acknowledged at trial that the commercial exploitation of the lands that would become the Forest Preserve included the harvesting of pulpwood trees as small as 1-inch DBH (R3204-3208).

The *MacDonald* Court's substantial and material standard, in contrast, has been successfully applied for nearly a century. In fact, the courts have only been asked to apply it a handful of times over the 91 years since *MacDonald* was issued, and have done so without much difficulty (*see e.g. Matter of Balsam Lake Anglers Club v Department of Envtl. Conservation*, 199 AD2d 852, 853-854 [3d Dept 1993]; *cf. Matter of Residents' Comm. to Protect Adirondacks, Inc. v Adirondack Park Agency*, 24 Misc 3d 1221[A] [Sup Ct 2009]).

MacDonald has worked well, and the State knows and understands its requirements. A change to a new standard after nearly a century of experience will invite a decade or more of litigated interpretations concerning what policy interests may be considered, resulting in uncertainty in the standard's application. This Court's *MacDonald* standard, based upon a clearly written provision of the Constitution, should not be converted into years of uncertainty and

dispute, absent a formal amendment to the Forever Wild clause of the Constitution adopted by the People of this State.

Rather, this Court should reaffirm the long-standing *MacDonald* formulation that a proposed project's tree cutting violates the Forever Wild clause of the New York Constitution when it "call[s] for the removal of the timber to any material degree" (*MacDonald*, 253 NY at 238). Here, the violation was apparent. Thus, the Third Department majority properly declared that the State's proposed cutting of at least 6,000 trees in the Forest Preserve violates the Forever Wild clause of the New York Constitution.

POINT II

THE APPELLATE DIVISION MAJORITY ERRONEOUSLY CONSIDERED CLAUSES OF THE FOREVER WILD PROVISION OF THE NEW YORK CONSTITUTION SEPARATELY

Although the Appellate Division majority properly held that the destruction of timber for the Class II Community Connector snowmobile trails violated the final clause of Article XIV, § 1, in doing so, it improperly divorced that clause from the remainder of the Forever Wild provision and held that Protect! had not established that the trails "impair[] the wild forest qualities of the Forest Preserve" (*Protect the*

Adirondacks! Inc., 175 AD3d at 29). Because the Forever Wild clause cannot be so divided, that holding was error and is worthy of this Court's correction.

It is a well-settled principle of construction that "a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other" (*People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979]). Where, as here, a single section is at issue, the principle applies with even more force.

In light of the constitutional history of its adoption, it is clear that the Forever Wild clause was organized with the protection of the Forest Preserve as forever wild forest lands as the overarching rule; the second sentence prohibiting the disposition of state lands and the destruction of timber are expressly stated implementing principles of the forever wild rule. That is, the Forever Wild clause's second sentence prohibiting the disposition of state lands and the destruction of timber are the non-exclusive means the drafters of the 1894 Constitution chose to achieve their end of ensuring that State Forest Preserve lands "shall be forever kept as wild forest lands" (NY Const., Art. XIV, § 1; *see Chittenden Lbr. Co. v Silberblatt & Lasker*, 288 NY 396, 403 [1942] ["we view the parts

of the statute without reference to verbal niceties, but rather in their logical relation as means directed to an end"]). As noted, the delegates to the 1894 Constitutional Convention were particularly concerned with the Legislature's authorization to sell timber and lease state lands that immediately preceded the Convention, and so they chose to specify those protections under the Forever Wild clause expressly (*see* Lincoln, *supra*, at 428-436).

A violation of the second sentence of the Forever Wild clause, therefore, is a violation of the first, by operation of constitutional construction. The Appellate Division majority, however, failed to recognize that principle, and the evident intent of the constitutional provision. The Third Department erred in holding that the tree cutting for Class II snowmobile trails did not violate the first sentence of the Forever Wild clause.

Even if the two sentences of the Forever Wild clause could be considered separately, the Appellate Division erred in holding that the Class II snowmobile trails do not impair the wild forest nature of the Forest Preserve. The State Land Master Plan, which the Legislature has given the force and effect of law (*see* Executive Law § 816[1]),

provides that "[p]ublic use of motor vehicles will not be encouraged and there will not be any material increase in the mileage of roads and snowmobile trails open to motorized use by the public in wild forest areas that conformed to the master plan at the time of its original adoption in 1972" (R2306). Only in "rare circumstances" is the State permitted to open new snowmobile trails by cutting trees and only when those trails do not "adversely affect the essentially wild character of the land" (R2308-2310).

Yet, that is precisely what the State has done here. The Class II snowmobile trails at issue are more like roads than hiking or other "wild forest" trails (R 700-705, R761, R774, R822, R3519-3522, R3527-3537, R3546-3547, R3905-3944, R4851-4852). Permitting extensive snowmobile use, with the attendant noise, traffic, air pollution, and other impacts, to a materially greater extent than existed prior to the State Land Master Plan's adoption is inconsistent with the wild character of the lands, and violates the Forever Wild clause of the Constitution. This Court should, therefore, modify the Appellate Division order to the extent of declaring that the destruction of timber for the Class II Community Connector snowmobile trails impairs the

wild forest character of the Forest Preserve in violation of the Forever Wild clause of the New York Constitution.

CONCLUSION

The Adirondack Council and Adirondack Wild: Friends of the Forest Preserve respectfully request that this Court modify the Appellate Division order to the extent of declaring that the destruction of timber for the Class II Community Connector snowmobile trails impairs the wild forest character of the Forest Preserve in violation of the Forever Wild clause of the New York Constitution and, as so modified, affirm.

Dated: January 29, 2021
Albany, New York

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CERTIFICATION PURSUANT TO RULE 500.13(C)(1)

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of this Court (22 NYCRR § 500.13[c][1]), I hereby certify that this brief was prepared on a computer using Microsoft Word 2016 and complies with the word count requirement of Rule 500.13(c)(1) because the total word count for all printed text in the body of the brief is 5,841.

Dated: January 29, 2021

Robert S. Rosborough IV