Without oral argument

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Court of Appeals
of the State of New York

FRIENDS OF THAYER LAKE LLC; BRANDRETH PARK ASSOCIATION, CATHRYN POTTER, AS TREASURER; BRANDRETH PARK ASSOCIATION RECREATIONAL TRUST, CATHRYN POTTER, AS INITIAL TRUSTEE; AND WILLIAM L. BINGHAM, JR., INDIVIDUALLY AND AS A REPRESENTATIVE MEMBER OF THE BRANDRETH PARK ASSOCIATION AND A REPRESENTATIVE BENEFICIARY OF THE BRANDRETH PARK ASSOCIATION RECREATIONAL TRUST,

Plaintiffs-Appellants,

- against -

PHIL BROWN AND JANE DOE (THE "LADY IN RED") AND ANY OTHER PERSON, KNOWN OR UNKNOWN ,

Defendants-Respondents,

- and -

THE STATE OF NEW YORK AND THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Intervenors-Defendants-Respondents.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NEW YORK FARM BUREAU, INC., AND PROPERTY RIGHTS FOUNDATION OF AMERICA, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f), of the Rules of Practice for the Court of Appeals of the State of New York, Amici hereby state the following:

Pacific Legal Foundation (PLF), New York Farm Bureau, Inc. (Farm Bureau), and the Property Rights Foundation of America, Inc. (Property Rights Foundation), are non-profit corporations organized under the laws of California (PLF), and New York (Farm Bureau and Property Rights Foundation). None of these foundations have parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PRELIMINARY STATEMENT

From the beginning of our nation, the law has recognized the importance of private property ownership. Simply put, our nation's founders understood that the protection of private property is necessary for the security of all individual liberties. At the core of the rights we recognize as private property is the right to control access to private real property, including the right to exclude others from using it without the owner's permission. The fundamental right to exclude is undermined, however, if courts can drastically redefine the navigable rivers doctrine so as to create public access on private land.

That is the problem presented by this case. Under state law, a "navigable" waterway is subject to public use, even though it is bounded by private land. Indeed, some case law indicates that, in limited circumstances, the public is allowed to access and traverse private land immediately abutting a navigable water, in order to reach and use the waterway. *See Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y.2d 591, 607 (1998). This properly balances public and private interests, as long as navigability is defined narrowly, so that it covers only waters that are truly useful for boating as a practical matter and which have some history as a public waterway. *See Meyer v. Phillips*, 97 N.Y. 485, 486 (1884) ("The spasmodic use at intervals by a few individuals cannot deprive [a non-navigable-in-fact waterway] of its character of private property or confer upon the public any rights.").

Here, however, the lower court adopted an expansive and unreasonable definition of navigability, one that allowed a trespasser's canoe trip to turn a small, narrow, and obstructed non-navigable stream surrounded by private land into a public waterway. *Friends of Thayer Lake LLC v. Brown*, 126 A.D.3d 22, 31 (N.Y. 3d Dep't 2015). Under this ruling, the public may cross the adjacent private land to reach the stream, creating a liability issue for the landowners and stripping those owners of their privacy expectations and right to control access to their land. *See id.* at 31, 32 (Rose, J., dissenting) (noting that traversing the waterway requires individuals to trespass on to private property).

The lower court's ruling thus injected uncertainty into private property ownership and undermined the rights of all New York landowners. This Court should hold that a waterway must be useable in a reasonable and meaningful sense to qualify as navigable, and that the facts of Brown's attempted canoe trip do not rise to that level. Indeed the lower court's decision unfairly destroys the Brandreths' vested property rights and expectations and takes their property without compensation. Therefore, this Court should reverse the decision below.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), the New York Farm Bureau, Inc. (Farm Bureau), and the Property Rights Foundation of America, Inc. (PRFA), respectfully submit this brief amicus curiae in support of the Plaintiffs-Appellants.

PLF is a non-profit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. PLF has numerous supporters and contributors nationwide, including in the State of New York. Since 1973, Pacific Legal Foundation has litigated in support of property rights. PLF has participated, either through direct representation or as amicus curiae, in nearly every major property rights case heard by the United States Supreme Court in the past three decades, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. U.S. Envtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF is currently participating as amicus in two cases pending in this Court, *Pink v. Ricci*, No. APL-2015-00073, and *In re NYC Asbestos Litigation*, No. APL-2014-00209.

The Farm Bureau is a non-governmental, voluntary, general farm organization, organized in 1953 as a not-for-profit corporation under the Membership Corporation Law. Farm Bureau's purpose is to promote, protect, and represent the economic, social, and educational interests of New York's farmers, as well as to encourage the development and preservation of agricultural areas within the state. Farm Bureau currently has a statewide membership of more than 21,300 members in 52 counties. Membership in the Farm Bureau nationally through the American Farm Bureau Federation is approximately 6 million members. The present lawsuit involves

property rights and the decision will impact the property holdings of the Farm Bureau's members.

The PRFA is a New York-based nonprofit organization dedicated to providing information and education regarding the fundamental Constitutional rights of America's citizens, especially the right to own and use private property. The PRFA is a volunteer, grassroots organization committed to assisting citizens, policymakers, and those in the media concerned with protecting the rights of property owners against governmental abuse. Since 1994, the PRFA has published *Positions on Property*, cataloging and exposing the multitude of land-use regulations and controls in the State of New York, and *New York Property Rights Clearinghouse*, a quarterly newsletter of information and analysis about property rights issues in the State of New York. The PRFA also helps other grassroots organizations seeking advice or assistance by providing information and connecting those organizations to members of the PRFA's National Advisory Board and other experts.

Between 1994 and 2016, PRFA President Carol W. LaGrasse has testified on property rights in multiple hearings before the U.S. Congress and the New York Legislature. Reflecting its strong interest and involvement in the development of property rights law at both the federal and state levels, the PRFA has submitted amicus curiae briefs in many cases, including at the certiorari and merits stages at the United States Supreme Court in *Kelo v. City of New London*, 546 U.S. 49 (2005), as

well as in *Serrone v. City of New York*, Docket No. 2011-05147, in the Appellate Division for the Second Department. The PRFA has a particular interest in the instant case because it raises important Constitutional questions related to private property rights.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The facts and procedural posture of the case are set forth in detail in the parties' briefs. In short, the case concerns the Mud Pond Waterway (hereinafter the Waterway), a series of creeks and streams deep in the Adirondacks that, until the lower court entered its decision, were privately owned and not available for public use without permission from the surrounding landowners. *Friends of Thayer Lake LLC v. Brown*, 126 A.D.3d 22, 23-24 (N.Y. 3d Dep't 2015). The parties agree that the Waterway includes the Narrows of Lilypad Pond, Mud Pond, the Mud Pond Outlet Rapids, the Mud Pond Outlet Brook, and part of the Shingle Shanty Brook. *Id.*; R. 566, 1210-11, 1787-1787A. Judge Rose summarized the physical nature of the Waterway:

> Mud Pond itself is shallow and narrow, and the rapids at the outlet are approximately 500 feet in length. Given the rocky terrain and shallowness of the water, the rapids are impassable, even by canoe. The Mud Pond Outlet Brook and Shingle Shanty Brook are so narrow in spots that a rowboat cannot navigate them because its oars will hit the banks, and the water course meanders, twists and turns back upon itself, with beaver dams, downed trees and dense vegetation growing out from the banks and up from the bed. It is only through plaintiffs' efforts that

the Waterway is cleared of natural debris that would otherwise render it impassable.

126 A.D.3d at 31-32 (Rose, J., dissenting). The parties agree that the Mud Pond cannot be traversed—even by canoe—without leaving the Waterway and portaging along a 500-foot trail on the Brandreth property that the Brandreths built for their own use. *Id.*

This brief examines the navigability definition used below and argues that the lower court misapplied the "recreational use" factor for identifying navigable waters in a way that causes a taking of private property in this particular case. Navigability doctrine in New York has historically required that a waterway be capable of meaningful commercial use to qualify as a navigable and thus, public, water. *Morgan v. King*, 35 N.Y. 454, 459 (1866). This Court modified that test in *Adirondack League Club* to allow for "recreational use" as a factor in proving commercial viability and thus, navigability. But, it did not decide that *any* recreational use alone is enough to establish navigability. *Dale v. Chisholm*, 67 A.D.3d 626, 627 (N.Y. 2d Dep't 2009) (holding that recreational use of a waterway, without some evidence of trade or travel on that waterway, did not give rise to a finding of navigability-in-fact). The decision below failed to properly apply these principles.

Indeed, in holding that a waterway conveyed long ago to private parties in fee simple, and treated as private property for 150 years, instantly becomes public

property because a canoe managed to go down it—albeit with significant portage—the lower court decision unjustly and unconstitutionally took the Brandreths' vested property rights. *See Hughes v. Washington*, 389 U.S. 290, 297-98 (1967) (Stewart, J., concurring) (change in state property law that impairs pre-existing property ownership without just compensation amounts to an unconstitutional taking).

For those reasons, the Court should reverse the lower court decision.

ARGUMENT

I

THE LOWER COURT MISINTERPRETED THE DOCTRINE OF NAVIGABILITY BY CONCLUDING THAT A SINGLE CANOE TRIP ESTABLISHES COMMERCIAL VIABILITY AND NAVIGABILITY

Non-tidal waterbodies in the State of New York have distinct qualities under the law, depending on whether they are considered navigable or not.[1] Most importantly, non-tidal navigable waters, such as freshwater rivers, are open to public use, even if surrounded by private land. Non-navigable waters are subject to private control and use.[2] *Morgan*, 35 N.Y. at 459; *Hanigan v. State*, 213 A.D.2d 80, 84

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[1] Tidal waters are generally subject to public use. *See Morgan*, 35 N.Y. at 458 ("the public have . . . a right [of way or easement] to all tide waters").

[2] But, as argued *infra* at 16-18, the State can—and in this case, did—sell all rights to waterways that are non-navigable-in-fact. Even the majority below effectively (continued...)

(N.Y. 3d Dep't 1995). That is, if a waterway is non-navigable-in-fact, then the public has no right to access it without owner permission (or just compensation). *See, e.g.*, *The Daniel Ball*, 77 U.S. 557, 560 (1870).

In this case, the lower court badly misconstrued the doctrine of navigability. While recreational use may be *a factor* in identifying commercially navigable and thus, publicly useable waters, that factor must be applied in a reasonable and practical sense. The only recreational use that might lead to a finding of navigability is that which reasonably and reliably indicates that a water could be used commercially. Under such a construction, the canoe trip in this case cannot make the waters navigable.

A. New York Uses the Commercial Use Test To Identify Waters That Are Navigable-in-Fact

Among the states, there are generally two different ways to identify navigable waters. The majority of states follow the commercial utility standard, which generally requires that a waterway be amenable to commercial boating and transport to qualify as navigable. A minority of others do not require commercial use; they instead consider recreational use adequate for navigability. *See, e.g.*, *Lamprey v. Metcalf*, 52 Minn. 181, 199-200 (1893) (adopting recreational use test and explaining: "we

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[2] (...continued)
conceded that when it was sold to the Brandreths, the Waterway was understood to be non-navigable. *See Friends of Thayer Lake LLC*, 126 A.D. 3d at 31 n.5.

do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit").

New York subscribes to the commercial utility test, with a recent modification. *See Adirondack League Club*, 92 N.Y.2d at 591 (modifying commercial use test and finding river navigable); *Hanigan*, 213 A.D.2d at 80 (finding pond to be non-navigable); *Morgan*, 35 N.Y. at 459 (finding river to be non-navigable).

In *Adirondack League Club*, this Court refined the commercial use test for the State of New York by holding that evidence of recreational use could serve as a factor that might support finding a river is "susceptible to commercial use" and thus, navigable under New York law. *Adirondack League Club*, 684 N.Y.S.2d at 171. The Court went on to note, however, that a boat, raft, or skiff would still have to have the ability to completely traverse a waterway before the courts could find a showing of navigability. *Id.* at 171-72.

Although *Adirondack League Club* held that recreational use of the waterway could help prove navigability, the Second Department correctly interpreted *Adirondack League Club* to hold that "recreational use *alone* is insufficient to establish that a body of water is navigable[-]in[-]fact[.]" *Dale v. Chisholm*, 67 A.D.3d at 627 (emphasis added). In *Dale*, a property owner who owned a property containing a lake sued a neighbor for trespass after that neighbor built a dock on the lake. *Id.* The trespasser argued that as a riparian owner along the lake, he was

entitled to build the dock. *Id.* The trespasser contended that the lake was subject to the public easement because the public used the lake for recreational canoeing and kayaking. *Id.* The Second Department rejected that argument. It pointed out that recreational use, without some evidence that the lake could support transport of trade or travel, did not give rise to a finding of navigability-in-fact. *Id.* Since the lake was non-navigable, the trespasser had indeed trespassed onto private property. *Id.*

B. Properly Construed, the Recreational Use Factor Requires Evidence of Sustained, Widespread, and Feasible Use Without Significant Portaging

Although *Adirondack League Club* allows for the consideration of recreational use as a factor in establishing navigability, it did not hold that *any* recreational use is sufficient to create a navigable water. To the contrary. After all, the point of the recreational use factor is to help courts identify waters that are capable of hosting *commercial* traffic, as commercial utility is the ultimate and dispositive criteria. This means that the only recreational water use that might lead to a finding of navigability under *Adirondack* is that which is similar to commercial use. More to the point, recreational floating might support a navigability finding if it is similar in nature and degree to that which occurs in commercial boating.

Sustained and uninterrupted recreational boating in crafts capable of carrying goods might logically indicate a waterway is commercially useful and navigable. But if recreational use of a waterway requires very small water craft and significant

portaging, such use cannot support a finding of commercial utility. It therefore cannot lead to navigability. *Adirondack League Club*, 92 N.Y.2d at 602 (The "touchstone" of New York's navigation law is the principle that a river must have "practical usefulness to the public as a highway for transportation.").

In short, the practical commercial utility contemplated by the Court necessarily requires that, to demonstrate that a waterway meets New York's commercial use test, a waterway must allow for substantial and sustained boating without significant portaging. *Cf. LeBlanc v. Cleveland*, 198 F.3d 353, 360 (2d Cir. 1999) (rejecting argument that a waterway which requires multiple portages in order to navigate by canoe amounts to a navigable waterway under the federal admiralty test for navigability).

C. The Waters in This Case Do Not Qualify as Navigable

Under this State's commercial utility test, properly construed, the Waterway at issue here cannot be considered navigable. At the outset, there is no evidence the Waterway is used for transport of commercial goods. The Plaintiffs argue instead, and the lower court agreed, that a canoe trip down the Waterway, facilitated by portaging on private land, qualifies as "recreational use" sufficient to make the water navigable. This is wrong.

The critical facts are that the Waterway at issue here can only be traversed in a very small craft—a canoe—during certain times of the year and only with

significant portaging. A canoe-sized craft is not designed for, or capable of facilitating, commercial activity. It is fit only for personal use by one or maybe two people. Water travel that requires substantial portaging is not commercially viable; that is exactly why commercial activity typically occurs on wide, unobstructed waterways. Similarly, if a waterway is impassable at certain times even for a canoe, as is the case here, it cannot be considered useful for commercial transport. Given these realities, the Waterway does not have any "practical usefulness to the public as a highway for transportation." *Adirondack League Club*, N.Y.2d at 602 (citation omitted).

Indeed, the only recreational use possible on the Waterway is occasional passage for aesthetic purposes by boating and exercise enthusiasts. This *de minimis* use does not rise to the kind of regular and meaningful recreational navigation that might satisfy the commercial use test adopted by this Court in *Adirondack League Club*.

Hanigan, 213 A.D.2d at 80, buttresses the point. In *Hanigan*, the plaintiffs sued the state for declaratory relief after fishermen trespassed onto their pond in order to fish and the police refused to eject the trespassers. *Id.* at 84. The fishermen contended that the pond was navigable-in-fact because it allowed for recreational fishing. *Id.* The Second Department rejected the contention. *Id.* The court held that such minimal recreational use could not create a navigable waterway.

A similar analysis controls here. A trespasser's ability to squeeze a canoe down a narrow waterway only with major portaging might show perseverance, but it does not indicate commercial viability. Without any showing that this Waterway can truly be reasonably and practically used in commerce, or even just for transport or travel, the Waterway fails to meet the test of navigability.

II

NEW YORK CONSIDERED THE WATERWAY NOT NAVIGABLE IN 1851, THUS THE FINDING OF A PUBLIC EASEMENT OVER THE WATERWAY CAUSES AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

There is an additional reason why the Court should find that the Waterway is not open to public use: it was conveyed to the Brandreths in a non-navigable state and without any reservation of a public easement, and the Brandreths relied on that conveyance for more than 150 years. The lower court decision to declare the Brandreths' property public, when both the State and the Brandreths had considered it private property for all those years, radically unsettles their expectations and amounts to a taking of their property rights in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

A. The Takings Clause Protects Settled Property Expectations

The Takings Clause of the Fifth Amendment is designed to prevent government from forcing "some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also, Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 391 (1994) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978)).

Although there are different ways to identify a taking of property which unjustly burdens a property owner, the Supreme Court has repeatedly explained that state action that upends settled property expectations amounts to an unconstitutional taking requiring compensation. *See Hughes v. Washington*, 389 U.S. at 297-98 (change in state property law that impairs pre-existing property ownership without just compensation amounts to an unconstitutional taking); *see also*, *Penn Central*, 438 U.S. at 124 (the degree to which the government interferes with distinct investment-backed expectations is a critical takings issue).

To be sure, "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense[.]" *Id.* Nevertheless, where a governmental action imposes a "retroactive" taking of property from an individual who could not have reasonably anticipated that imposition, fairness and justice demand that the government compensate that individual. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998) (legislation that required corporation to provide retirement and health benefits to coal miner far exceeding any commitment corporation had made violated Fifth Amendment as an unconstitutional taking).

Several state court decisions illustrate how the creation of navigable waters can eviscerate pre-existing expectations and understandings and cause a taking. For example, in *Bott v. Comm'n of Natural Resources*, 415 Mich. 45 (1982), the Michigan Supreme Court considered a case where the trespassers argued that privately owned creeks had become subject to public easements as navigable-in-fact because the trespassers could use the creeks for recreational passage. *Id.* at 58-62. The court rejected the argument because: (1) "the rules of property law which it is proposed to change have been fully established for over 60 years, and the underlying concepts for over 125 years"; (2) riparian and littoral land has been purchased in reliance on these rules of law; and (3) "expenditures have been made to improve such land in the expectation, based on [the law,] that the public has no right to use waters not accessible by ship . . . ." *Id.* at 61-62. To the same effect is *Mountain Properties, Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1100 (Pa. Super. 2001) (refusing to turn previously non-navigable waters into navigable waters due to the takings problem created by such an expansion and the associated disruption of vested property rights).

As shown below, given the facts of this case, a decision that classifies the Brandreths' water and adjacent land as a publicly accessible navigable waterway causes a taking.

B. The Brandreths Acquired Full Fee Simple Title to the Waterway and Surrounding Land

Where property owners have long-settled expectations of private property ownership, a ruling that overturns those expectations and makes their private property public amounts to a taking. The history of the Brandreth ownership of this property demonstrates that they had every reason to believe they owned the Waterway free and clear of any public easement.

1. In 1851, New York Law Allowed the State To Grant Full Control of Non-navigable Waterways to Private and Adjacent Littoral and Riparian Land Owners

In order to properly understand how this State's law developed with respect to the various sizes and types of waterbodies within its territorial borders, it is necessary to review the State's legislative and judicial history beginning shortly after the Revolution. From the late 1700's to the late 1800's, State legislators and judges struggled with the proper balance between public rights and private rights regarding the State's water resources. *People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461, 499 (1865) (noting that, in "applying the principles of the common law to the waters of this continent[,]" the courts have reached "contradictory and unsatisfactory" results). Contradictory decisions were handed down while the courts struggled to apply the English common law to rights to navigable and non-navigable waters. *Id.*

Despite these contradictions, the State Legislature wanted the ability to grant to private citizens land containing navigable waterbodies for various reasons. *Loomis*, 33 N.Y. at 466 (relating early history of New York water rights law). Thus, in 1786, the Legislature passed an act allowing the State to make private grants to riparian landowners of lands under navigable waters when they deemed such grants necessary to promote the commerce of the State. *Loomis*, 33 N.Y. at 466.

In 1815, the Legislature extended that power to include the allowance of such grants under navigable lakes. *Id.* The Legislature again enacted the power to grant lands under navigable rivers and lakes to promote commerce in the Revision of Laws of 1830. *Id.* As such, prior to 1850, it was clear that the State Legislature was only willing to part with the State's navigable waterbodies when the riparian landowner or littoral landowner would use the grant to "promote commerce." *Id.* But, that changed in 1850, when legislation was enacted that also allowed grants of navigable waterbodies simply for the "beneficial enjoyment" of adjacent landowners. *Id.*

As has been shown above, the State Legislature authorized the grant, in perpetuity, of lands under the waters of even navigable streams, let alone non-navigable-in-fact waterways, for the purpose of beneficial enjoyment of same by the adjacent landowner, without any reservation of rights for the public. Such was the State of New York law at the time the State conveyed the Waterway (and the rest of the property) to the Brandreths in 1851.

2. There Was No Implied Easement for the Public When the Non-navigable Waterway Was Transferred to the Brandreths

The lower court implicitly acknowledged that at the time the State transferred the property to the Brandreths in 1851, nobody would have considered the Waterway to be navigable-in-fact. *Friends of Thayer Lake LLC*, 126 A.D. 3d at 31 n.5. Indeed, at that time the navigability-in-fact doctrine would have required a finding that the Waterway would support commercial transportation, *see Morgan*, 35 N.Y. at 458-59, or at least support a "small boat, raft, or skiff." *See Adirondack League Club*, 92 N.Y.2d at 603-04. Since the Waterway would have been considered non-navigable-in-fact, there was no implied condition of public use held back when the State conveyed the property to the Brandreths. *See Douglaston Manor v. Bahrakis*, 89 N.Y.2d 745, 480-81 (1997). Likewise, the original State grant to the Brandreths did not exclude from the grant any easements for water passage. R. 1796.

The State did not reserve any rights over any waterbodies, water rights, or any other exclusion over non-navigable waters that might be viewed as a limitation on the grant related to retained public easements or use, except the required reservation of gold and silver mines. *Id.* For this reason, regardless of the rule of *Adirondack League Club*,[3] the lower courts erred when they decided that the public was entitled

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[3] Likewise, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), presents no hurdle to this argument, in that *Illinois Central Railroad* speaks to tidal waters and (continued...)

to use the Waterway based on its navigability-in-fact. Regardless of whether the Waterway is presently navigable-in-fact under the *Adirondack League Club* test, the fact remains that in 1851, when this property was transferred to the Brandreths, the Waterway was as a matter of law non-navigable-in-fact. As such, there was no implied public use held back as a condition on the transfer, and the implied public use could not "spring to life" when the court below decided to change the law of the State.

C. The Brandreths Reasonably Relied on 150 Years of Private Ownership; To Declare the Waterway Public Violates the Takings Clause

In light of the constitutional requirements of justice and fairness, recognized by this Court, other state appellate courts, and the Supreme Court of the United States as described above, the Court must recognize that upending the 150 years of settled expectations of private property that the Brandreths relied upon amounts to a taking for which compensation is due.

The court below acknowledged these principles at Footnote 5 of its opinion. The majority explained:

> Prior to the State's acquisition of the adjoining lands, there was no question that the Waterway was understood to be private property, not

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[3] (...continued)
the Great Lakes, whereas the Waterway was neither tidal nor one of the Great Lakes, and was non-navigable-in-fact in 1851.

> subject to public use. The law is clear that no taking without just compensation results from a determination of navigability-in-fact; however, it appears most unlikely that anyone contemplated that this remote property was burdened by a public easement of any nature when the property was conveyed into private hands in 1851, or indeed, at any time prior to the State's purchase of the adjoining lands. While it is well established that property ownership *rights* are not altered by adjudications of navigability-in-fact, we share the dissent's concern that the application of the rule in cases such as this may destabilize long-established expectations as to the nature of private ownership.

Friends of Thayer Lake, 126 A.D.3d at 31 n.5 (emphasis in original). The majority correctly recognized that it should be concerned regarding its decision, but it did not spell out *why* it should have been concerned. The majority should have been concerned because its decision amounts to a violation of the Brandreths' right to not be deprived of their property without just compensation.

Just as the property owners in *Hughes*, *Armstrong*, *Eastern Enterprises*, and *Bott* relied on their settled expectations of private property rights, the Brandreths relied on 150 years of private ownership of the Waterway when they asked the State of New York to enforce the State's trespassing laws on their property. Once the State refused to do so, a decision ratified by the lower courts, then the State effectively took their property without compensation and without an exchange that led to a reciprocity of advantage for the Brandreths. They lost one valuable stick in their bundle, and received nothing in return.

By acknowledging that its decision would "destabilize long-established expectations as to the nature of private ownership[,]" the court impliedly conceded that its decision went too far and violated the protections guaranteed to the Brandreths under the Takings Clause. *Friends of Thayer Lake*, 126 A.D.3d at 31 n. 5. Fundamental fairness protects an individual's reasonable reliance on long-term understandings of ownership, and simply invoking the fact that some portions of the Waterway were and are, to some extent, at times navigable does not mean the expectations were not long in place. To the contrary, the lower court admitted the Brandreths—and the State—had every reason to consider the Waterway private property since 1851. In *Bott*, 415 Mich. 45, the Michigan court rejected the invitation to adopt a recreational-use test for navigability-in-fact, and its rationale applies with equal force on these facts.

First, the majority in the instant case acknowledges that the law considered the Brandreths' Waterway non-navigable-in-fact for at least 150 years. For the Michigan Supreme Court, refusing to overturn stable precedent was sufficient reason to leave well enough alone. *Id.* But not so for the lower court here. The majority below acknowledged that settled "expectations" of property law would have led everyone to believe in 1851 that the Brandreths' Waterway was non-navigable. *Friends of Thayer Lake*, 126 A.D.3d at 31 n.5. Therefore, here, as in *Bott*, both courts acknowledged that more than a century's worth of law informed the property owners

at issue that they owned their waterways free and clear of any public easement. But where the Michigan court recognized the error of erasing more than a century's worth of reliance on the law by the property owners, the lower court's decision establishes an unconstitutional taking.

Further, the Michigan court recognized that the property owners in *Bott* had expended their own capital to improve and maintain the private property that the trespassers asked the Court to turn into public property by the stroke of a pen. Likewise here, the Brandreths expended their capital and sweat over many years to make the Waterway passable for the family within the confines of their private property: they cleared a pathway that they then maintained for portage and cleared downed trees and dense vegetation. The lower court ignored this sweat equity, plus the taxes remitted over more than a century on the property, in order to turn over the most essential of sticks in the property ownership bundle—the right to exclude others—without compensation, because a single trespasser made a semblance of a canoe trip. That is unconstitutional.

CONCLUSION

New York courts have relied on the commercial use test for navigability-in-fact for more than a century. Even though *Adirondack League Club* modified the test, it did not eviscerate it. On these facts, Brown has not shown that the Waterway is navigable-in-fact, and the Brandreths correctly relied on a century of established law

when they expended money and effort in maintaining their private property. This Court should reverse and remand because the Waterway was simply non-navigable-in-fact, and the courts cannot change settled law without violating the Constitutional rights of property owners like the Brandreths.

For the foregoing reasons, Amici respectfully request that this Court reverse the lower court's decision, hold that Phil Brown trespassed when he entered onto the Brandreth property, and direct the trial court to enter a judgment finding that the Waterway is private property.

DATED: February 4, 2016.

Respectfully submitted,

By _____

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AFFIDAVIT OF SERVICE

I, MARK MILLER, being duly sworn depose and say that I am over 18 years of age and that I am not a party to this action. I hereby certify that 3 true copies of the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NEW YORK FARM BUREAU, INC., AND PROPERTY RIGHTS FOUNDATION OF AMERICA, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS were served this 4th day of February, 2016, via Federal Express overnight delivery, postage prepaid, upon each of the following:

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NOTARY PUBLIC

PAULA PUCCIO
MY COMMISSION # FF 179406
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