No. 20-3366

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMMUNITY HOUSING IMPROVEMENT PROGRAM, et al.,
Plaintiffs-Appellants,

v.

CITY OF NEW YORK, et al.,
Defendants-Appellees,

N.Y. TENANTS AND NEIGHBORS, et al.,
Intervenors.

On Appeal from the United States District Court for the
Eastern District of New York
Honorable Eric Komitee, District Judge
No. 1:19-cv-4087

BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Plaintiffs-Appellants Community Housing Improvement Program, Rent Stabilization Association of N.Y.C., Inc., Constance Nugent-Miller, Mycak Associates LLC, Vermyck LLC, M&G Mycak LLC, Cindy Realty LLC, Danielle Realty LLC, and Forest Realty, LLC (collectively, "CHIP").[1]

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 45 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g., Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), and Second Circuit Rule 29.1(b), PLF states this brief was authored by PLF attorneys, and no portion was authored by counsel for any party. No person other than PLF contributed money that was intended to fund preparation of this brief.

PLF attorneys have extensive experience with the questions at issue in this case, having participated in many cases where courts discuss facial takings claims. *See, e.g., Goodwin v. Walton Cty. Fla.*, 248 F. Supp. 3d 1257, 1262–65 (N.D. Fla. 2017); *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1116–22 (9th Cir. 2010). Additionally, PLF attorneys have participated in many cases where courts must weigh the *Penn Central* factors. *See, e.g., Murr v. Wisconsin,* 137 S. Ct. 1933, 1942–45 (2017) (discussing the *Penn Central* factors); *Walcek v. United States*, 303 F.3d 1349, 1354–57 (Fed. Cir. 2002) (evaluating the lower court's use of *Penn Central*'s ad hoc balancing test). PLF believes that this experience will assist the Court in its adjudication of this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges New York's recently amended rent-stabilization laws (RS Laws). *See Community Housing Improvement Program v. City of New York*, __ F. Supp. 3d __, 2020 WL 5819900 (E.D.N.Y. Sept. 30, 2020). Originally, New York's RS laws were generally written to protect tenants from eviction. However, these RS laws have been amended numerous times, with each iteration increasing in severity and further limiting landlords' rights.

Under the RS laws most recent 2019 amendment, New York, in part: (1) limited the number of units a landlord can recover for personal use to one; (2)

repealed the luxury decontrol provisions, which previously allowed landlords to decontrol a unit when the rent reached a high value; (3) repealed the vacancy and longevity provisions, which previously allowed landlords to charge higher rent when certain units became vacant; (4) repealed the preferential rate provisions, which previously allowed landlords who had been charging rates below the legal maximum to increase those rates when a lease ended; (5) reduced the value of capital improvements that landlords could pass onto tenants through rent increases; (6) increased the fraction of tenant consents needed to convert a building to cooperative or condominium use; and (7) extended the time period in which state housing courts may stay the eviction of breaching tenants from six to twelve months. N.Y. Reg. Sess. § 6458 Parts B–N (2019); *Community Housing Improvement Program v. City of New York*, 2020 WL 5819900 at *2.

These new provisions upended the reasonable expectations of landlords, so CHIP brought a facial regulatory takings claim to challenge them. *See* Complaint, Joint Appendix (JA) Vol. I of III, ECF No. 72, Page ID 44–149. The district court dismissed CHIP's facial regulatory takings claim, finding no set of circumstances existed under which the RS laws could result in a taking. *See* Memorandum and Order, ECF No. 2, Page ID 17–24. The district court worked its way through the *Penn Central* factors to reach that conclusion. *Id.*

Under the *Penn Central* factors, a trial court must evaluate the economic impact of the regulation, the extent to which the regulation interferes with a property owner's reasonable investment-backed expectations, and the character of the government action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978). As to the RS Laws' economic impact, the district court found CHIP's allegations about the average diminution in value across their properties was not enough to prove their finances were negatively affected by the RS Laws. *See* Memorandum and Order, ECF No. 2, Page ID 17–24. Additionally, the district court found CHIP lacked reasonable investment-backed expectations because CHIP and the other landlords all purchased their properties at different times and under different incarnations of the RS Laws. *Id.* Finally, the district court altogether ignored the character of the government action prong and instead relied on CHIP's supposed failure of satisfying the other two prongs. *Id.* These findings were all in error.

The Takings Clause prohibits the government from taking private property for a public use without paying just compensation. U.S. Const. amend. V. Here, by virtue of their very enactment, the newly amended RS Laws took CHIP's property by severely restricting their landlords' ability to recover and utilize their rental properties. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (finding the basis of a facial takings challenge is the very enactment of the statute

itself). When properly utilized, the *Penn Central* factors prove New York's amended RS Laws effected a facial taking. This is because the RS Laws severely impact CHIP's landlords' finances and the CHIP landlords had reasonable investment-backed expectations in their rental properties.

"[T]he right of property has always been a cornerstone of the Common Law. . . . '[The] right of property is the guardian of every other right and to deprive the people of this, is in fact to deprive them of their liberty.'" *See W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1008 (N.Y. 1998) (quoting Arthur Lee, An Appeal to the Justice and Interests of the People of Great Britain, *The Present Dispute with America* 14 (4th ed. 1775)) (internal citations omitted). By their very enactment, the amended RS Laws violate CHIP's landlords' property rights. Therefore, this Court should reverse the district court's decision.

ARGUMENT

I. THE RS LAWS EFFECT A FACIAL REGULATORY TAKING UNDER THE *PENN CENTRAL* FACTORS

A. The Development of Facial Regulatory Takings and the *Penn Central* Factors

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for a public use without paying just compensation. U.S. Const. amend. V. The Clause was established to prevent the "[g]overnment 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).

Like most other constitutional claims, Takings claims can be divided into two categories, facial and as-applied. *See* David Zhou, *Rethinking the Facial Takings Claim*, 120 Yale L.J. 967, 968–69 (2011). Facial challenges, unlike as-applied challenges, do not require a final governmental decision; instead "the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed." *Levald, Inc.*, 998 F.2d at 688.

In addition to the facial and as-applied division, case law has also separated the Fifth Amendment's takings clause into three broad categories: (1) per se physical takings, (2) regulatory takings, and (3) exactions. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002) (finding an uncompensated physical taking violates the Constitution regardless of the circumstances); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (finding a regulatory taking exists when the government enacts a regulation that "goes too far"); *Koontz*, 570 U.S. at 613 (affirming the proposition that landowners are entitled to just compensation when the government takes property in return for a permit).

Regulatory takings challenges, like the case here, developed from the United States Supreme Court's finding that "if [a] regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.*, 260 U.S. at 415. Out of that idea, two tests evaluating whether a regulatory taking has occurred were created. First, a categorical *per se* test under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), which only applies when a government action deprives a property owner of "all economically beneficial use," and second, an ad hoc balancing test set forth in *Penn Central*, 438 U.S. at 124–25. *See Tenn. Scrap. Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 455 (6th Cir. 2009) ("In all other cases —that is, where the property is not rendered valueless—the Court uses the balancing test of *Penn Central*[.]"). In engaging in the ad hoc, factual inquiry, the court evaluates: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with the claimant's investment-backed expectations, and (3) the character of the government action. *Penn Central*, 438 U.S. at 124.[2] Importantly, these factors are not considered in isolation but are rather viewed holistically. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

[2] Whether the *Penn Central* analysis is the appropriate test for evaluating facial regulatory takings claims is disputed. *See Guggenheim*, 638 F.3d at 1118 ("We assume, without deciding, that a facial challenge can be made under *Penn Central*."); *Tahoe-Sierra*, 535 U.S. at 334 ("Finally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis."). However, because the district court analyzed the validity of CHIP's claim under *Penn Central*,

B. The Economic Impact of the Regulation on the Claimant

The first factor in a takings analysis is the economic impact on the claimant. *CAA Assocs. v. United States*, 667 F.3d 1239, 1244 (Fed. Cir. 2011). The economic impact of the government's regulatory action is mainly a factual question. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1267 (Fed. Cir. 2009); *Cf. City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question.").

Here, the 2019 amended RS Laws have a substantial economic impact on rent-stabilized properties across New York. Under the amended RS Laws, tenants are given carte blanche to occupy landlords' properties without paying fair market rent. N.Y. Unconsol. Law Tit. 23 § 26-501 et seq.; N.Y. Unconsol. Law. Tit. 23 § 8621 et seq.; Complaint, JA Vol. I of III, ECF No. 72, Page ID 44–56.

Before the amended RS Laws took effect, landlords were permitted to deregulate stabilized units when certain conditions were met, namely when a tenants' income exceeded a certain threshold or when the charged rent reached a predetermined level. N.Y. Unconsol. Law Tit. 23 § 26-501 et seq.; N.Y. Unconsol. Law. Tit. 23 § 8621 et seq.; Ian Port, *New York Rent Laws: What's Changed for NYC*

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this brief addresses the *Penn Central* factors as if they were the proper mechanism for evaluating a facial takings claim.

Renters in 2020?, StreetEasy Reads (June 18, 2020), https://streeteasy.com/blog/new-york-rent-laws-2019/; Complaint, JA Vol. I of III, ECF No. 72, Page ID 44–56. Landlords were also permitted to recover the costs of improvements to individual units. *Id.* However, the amended RS Laws destroyed these limited protections, drastically reducing New York landlords' property values and inflicting a direct and substantial impact on the regulated properties. *Id.* Consequently, this factor weighs in favor of finding a taking.

However, if this Court disagrees, CHIP and its landlords should still be provided an opportunity to prove the RS Laws have negatively impacted their finances. *See Rent Stabilization Ass'n of New York City, Inc. v. Dinkins*, 805 F. Supp. 159, 161 (S.D.N.Y. 1992) ("In considering a 12(b)(6) motion to dismiss, the allegations in the complaint must be taken as true. 'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.'") (internal citation omitted). Additionally, although this Court has previously found that the denial of a "reasonable return" does not necessarily prevent an owner from having economically viable use of his land, in this case, CHIP and its landlords are alleging an economic loss that far exceeds a reasonable return on investment. *See Fed. Home Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 46–48

(2d Cir. 1996); *see* Complaint, JA Vol. I of III, ECF No. 72, Page ID 34–37, 41–44, 53–56. Therefore, at a minimum, this Court should reverse for further factual inquiry.

C. Reasonable Investment-Backed Expectations

In addition to the economic impact of the RS Laws on CHIP, this Court must also evaluate the extent to which the RS Laws interfere with CHIP's distinct investment-backed expectations. *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 264 (2d Cir. 2014).

Generally, very little instruction has been given on how to identify and weigh a claimant's reasonable investment-backed expectations. However, several courts, including the district court in this case, have found a homeowner's decision to purchase a piece of property with prior knowledge of a regulation negatively effects the owner's expectations and, in many cases, precludes a taking. That finding is in error.

In *Palazzolo v. Rhode Island*, the United States Supreme Court examined whether post-regulation acquisition of title was fatal to a regulatory takings claim. 533 U.S. at 626–30. And although the Court ruled in a 5-4 decision that post-enactment transfer of title did not absolve the State of its obligation to defend land use actions and compensate homeowners for takings, the Court disagreed on how post-enactment transfer of title, also known as post regulation acquisition, should be

evaluated. *Id.* at 626–28, 632–37. Justice O'Connor believed post regulation acquisition should be evaluated within the *Penn Central* factors; in contrast, Justice Scalia believed post regulation acquisition should have no bearing on a takings analysis. *Id.* at 627–28, 632–37.

A disagreement over which method is correct exists to this day. *Cmty. Hous. Improvement Program v. City of New York*, 2020 WL 5819900, at *11 n.16 ("Whether the time of acquisition matters to the *Penn Central* inquiry appears to be subject to some debate among the Justices."); Gregory M. Stein, *The Modest Impact of* Palazzolo v. Rhode Island, 36 Vt. L. Rev. 675, 682–730 (2012). Some courts have adopted the O'Connor approach.[3] *See, e.g., Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348-49 (Fed. Cir. 2004) (discussing Justice O'Connor's concurrence in *Palazzolo* and concluding *Palazzolo* helps shape the reasonableness of investment-backed expectations); *City of Houston v. Trail Enters., Inc.*, 377 S.W.3d 873, 881–83 (Tex. App. 2012) (finding, as Justice O'Connor noted, post-regulation acquisition

[3] To the extent the Defendants-Appellees may attempt to argue the United States Supreme Court subsequently adopted Justice O'Connor's post-regulation acquisition approach in *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. 302, it is important to note that this is not the case. Instead, while the Supreme Court mentioned Justice O'Connor's concurring opinion, the Court refrained from adopting her concurrence because the Court had "no occasion to address [the post-regulation acquisition] issue." *Id.* at 335–36; J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After* Palazzolo, *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 Sw. U. L. Rev. 351, 377–79 (2005).

should be evaluated under *Penn Central*'s reasonable investment-backed expectations prong). Meanwhile, others utilize the Scalia approach. *See 1256 Hertel Ave. Assocs.,* 761 F.3d at 266–67 (dismissing, despite *Palazzolo*, a *Penn Central* claim because the plaintiff acquired title after the challenged law became a "background principle of the State's law of property," which made his expectation that the law would not change unreasonable); *Heaphy v. State*, No. 03-45407-AA, 2004 WL 5573600 (Mich. Cir. Ct. Sept. 15, 2004) (finding post-regulation acquisition categorically did not bar plaintiffs' takings claim).

In the present case, the district court utilized the O'Connor approach, finding the timing of the landlords' purchase fatal to their takings claim. *See* Memorandum and Order, ECF No. 2, Page ID 22 ("[T]he nature of each landlord's investment-backed expectations depends on when they invested in the property and what they expected at that time."). However, Justice O'Connor's view improperly devalues property rights and regulates them to second-tier status, running afoul of the Constitution. Max Gibbons, *Of Windfalls and Property Rights:* Palazzolo *and the Regulatory Takings Notice Debate*, 50 UCLA L. Rev. 1259, 1294–95 (2003) ("The common law protects the rights of property owners to alienate property and to feel secure in those transactions. Justice O'Connor's proposal would run contrary to this goal."). As a result, this Court should not have utilized Justice O'Connor's stance and instead should adopt Justice Scalia's viewpoint.

As mentioned above, Justice Scalia argued that post-regulation acquisition was irrelevant to a takings analysis. *Id.* at 636–37. Justice Scalia reasoned this view was proper because any other interpretation would result in a "windfall" for the government whose unconstitutional actions caused the original miscarriage of justice. *Id.* at 637. Justice Scalia also believed *Penn Central*'s investment-backed expectations prong was inadequate to evaluate the magnitude of the taken property. *Id.*

Justice Scalia's approach accords with history and the belief that property rights are of paramount importance. *See* James Madison, The Federalist No. 54 (1788) ("Government is instituted no less for the protection of the property than of the persons of individuals."); James Madison, The Federalist No. 10 (1787) ("[T]he faculties of men, from which the rights of property originate . . . is the first object of government."). Justice O'Connor's view does not. Her view deprecates property rights and finds them less than or subordinate to other personal rights. Gibbons, 50 UCLA L. Rev. at 1294–95 ("The common law protects the rights of property owners to alienate property and to feel secure in those transactions. Justice O'Connor's proposal would run contrary to this goal."); *Knick*, 139 S. Ct. at 2170 ("Fidelity to the Takings Clause and our cases construing it requires . . . restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.").

Consequently, for the above-mentioned reasons, this Court should find the timing of CHIP's property acquisition immaterial to its reasonable investment-backed expectations.

Without the problem of post-regulation acquisition, it is clear CHIP and its' landlords have reasonable investment-backed expectations in their properties. *See* Complaint, JA Vol. I of III, ECF No. 72, Page ID 37–44. CHIP's landlords all acquired their properties with the intent of renting them and recovering the rental income. *See id.* Therefore, CHIP and its landlords had reasonable investment-backed expectations in their properties and this factor weighs in favor of finding a taking**.**

D. Character of the Governmental Action

Finally, courts sometimes evaluate the character of the governmental action as part of the *Penn Central* analysis.[4] The district court in this case did not, and it was right to avoid it because that factor has been effectively abrogated by cases subsequent to *Penn Central*. *See* Eric Pearson, *Some Thoughts on the Role of Substantive Due Process in the Federal Constitutional Law of Property Rights Protection*, 25 Pace Envtl. L. Rev. 1, 32 (2008) (*Lingle* "effectively eviscerates the 'character of the government action' factor"); Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* § 10.6,

[4] The district court failed to evaluate this factor. Memorandum and Order, ECF No. 2, Page ID 23–24. Instead, the district court relied on CHIP's alleged failure of satisfying the other two prongs to dismiss CHIP's facial regulatory takings claim.

at 430 (2d ed. 2007) (*Lingle* "eliminates evaluation of the legitimacy of the regulation.").

In *Penn Central*, the United States Supreme Court explained the character of the governmental action prong by contrasting a physical invasion by the government with a public program adjusting the benefits and burdens of economic life to promote the common good. Thomas W. Merrill, *The Character of the Governmental Action*, 36 Vt. L. Rev. 649, 652 (2012); *Penn Central*, 438 U.S. at 124–38. From that explanation, two general understandings of the character prong have developed.

First, many lower courts have followed this "physical invasion" description of the character factor, treating it primarily as a test for whether a challenged governmental action causes a physical invasion of property. *See Bottini v. City of San Diego*, 27 Cal. App. 5th 281, 314 (Cal. Ct. App. 2018); *Strode v. City of Ashland*, 886 N.W.2d 293, 309 (Neb. 2016); *Embassy Real Estate Holdings, LLC v. Dist. of Columbia Mayor's Agent for Historic Pres.*, 944 A.2d 1036, 1052 n.18 (D.C. 2008).

On the other hand, a number of courts have taken their cue from *Penn Central*'s reference to the "common good" and applied the character factor as a test for whether the challenged regulatory action promotes a legitimate interest. *See Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1370 (Fed. Cir. 2004); *Sadowsky v. City of New York*, 732 F.2d 312, 318 (2d Cir. 1984) (character weighed against a taking because the law "as a whole has a valid, even admirable purpose"); *Quinn v.*

Board of Cty. Comm'rs for Queen Anne's Cty., Maryland, 862 F.3d 433, 443 (4th Cir. 2017) ("Regulations that control development based 'on density and other traditional zoning concerns' are the paradigm" of a program that promotes the common good.); *City of Minot v. Boger*, 744 N.W.2d 277, 283 (N.D. 2008).

Both views are misguided. As a "physical invasion" test, the factor violates the clear line between physical and regulatory taking set out in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Tahoe-Sierra*, 535 U.S. at 322, paradoxically making a regulatory taking contingent on whether there was a physical taking. R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 737 (2011) (suggesting the "character" factor was "rendered superfluous by *Loretto*."). Meanwhile, as a "common good" test it conflicts with *Lingle* and its conclusion that the takings tests focus only on the "burden" of regulation on property rights. 544 U.S. at 538–48. Consequently, both tests, regardless of their intent, run contrary to modern day takings law and should be obviated. *See* D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process,* 69 Alb. L. Rev. 343, 353 (2005) ("the analysis in *Lingle* illustrates why the character of the government act generally should have no role").

However, if this Court disagrees, then it is clear that under either test the character of the City of New York's action weighs in CHIP's favor. First, although CHIP brought both a physical and regulatory takings claim, its facial *regulatory* takings claim presupposed that the Defendants-Appellees' action caused a regulatory burden on their properties. *See* Complaint, JA Vol. I of III, ECF No. 72, Page ID 147-48. Consequently, the "physical invasion" description of the character factor is inapplicable.

Additionally, because the RS Laws increasingly restrict landlords' rights and force them alone to bear the burden of the housing crisis, the "common good" description, weighs in CHIP's favor. *See Armstrong*, 364 U.S. at 49 ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar 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."). Therefore, even if this Court does not expunge the character of the governmental action prong from the *Penn Central* analysis, it is clear this prong weighs in favor of finding a taking.

Consequently, because all three *Penn Central* factors weigh in CHIP's favor, this Court should reverse the district court's decision.

CONCLUSION

This Court should reverse and remand to the court below for further proceedings consistent with the property rights principles discussed above.

DATED: January 22, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) & 32(a)(7)(B) because this brief contains 4,121 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 14-point Times New Roman font.

DATED: January 22, 2021.

/s/ Kathryn D. Valois
KATHRYN D. VALOIS

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kathryn D. Valois
KATHRYN D. VALOIS