

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK : CIVIL TERM: PART 15

3 - - - - - X

4 In the Matter of EAST RIVER PARK ACTION,
5 Pat Arnow, Chair; ORCHARD STREET BLOCK
6 ASSOCIATION, Hope Beach, Chair;
7 WASHINGTON SQUARE PARK ECO PROJECTS,
8 Loyan Beausoleil, Chair;
9 YORK CLIMATE ACTION GROUP, Judith K.
10 Canepa, Chair, et al.,

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Petitioners,

- against -

CITY OF NEW YORK,
Respondent,

10 For an Order Pursuant to Article 78 of the
11 Civil Practive Law and Rules.

12 - - - - - X

13 Index No. 151491/2020 (Article 78)

14 August 20, 2020
15 71 Thomas Street via Skype
16 New York, New York 10035

17 B E F O R E: Hon. MELISSA A. CRANE, Justice

18 A P P E A R A N C E S:

19 ADVOCATES FOR JUSTICE
20 Attorneys for Petitioners
21 225 Broadway, Suite 1902
22 New York, New York 10007
23 BY: ARTHUR Z. SCHWARTZ, ESQ., of Counsel

24 CORPORATION COUNSEL
25 Attorneys for Respondent
100 Church Street,
New York, New York 10007
BY: ROBERT L. MARTIN, ESQ.
DEVON GOODRICH, ESQ.
TESS DERNBACH, ESQ.

Proceedings

1 M O R N I N G S E S S I O N

2 THE COURT: Hi. Can everyone see me and hear me?

3 Somehow we got two lines for the Skype and I was
4 on the other one, so I figured that out at least.

5 Okay. So how is everyone today?

6 MR. SCHWARTZ: Okay.

7 THE COURT: So this is an Article 78 about the
8 East River Park. I would like to hear from Mr. Schwartz
9 first, since it's your petition, but I want to make sure
10 that we all agree that the East River Park needs protection
11 from storm surges. Is that correct?

12 MR. MARTIN: That's the City's position,
13 certainly.

14 MR. SCHWARTZ: Well, your Honor, that -- I mean,
15 it's an element of what we're arguing because it doesn't
16 need the same type of protection that the community
17 adjacent to it needs because after Hurricane Sandy it
18 recovered rather quickly whereas the buildings that were
19 flooded didn't, so it's not exactly the same.

20 THE COURT: I understand. Okay. All right. So
21 go on.

22 MR. SCHWARTZ: So, your Honor, there is a -- I'm
23 sure, knowing -- having been in front of you before, that
24 you've gone through the papers, which we gave you lots of
25 paper. And the plan that started to get developed in 2015

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1 or earlier to address the flooding caused by Hurricane
2 Sandy has always, until, I think, until this brief
3 submitted by the City, been characterized as a "flood
4 protection plan" for the Lower East Side of Manhattan. I'm
5 going to use that term broadly. The area that's being
6 addressed by the East Side Coastal Resiliency Project is
7 from 23rd Street down to, I guess, around South Street
8 Seaport, and until this brief it was never really described
9 as a plan to enhance the park.

10 It has been developed over a number of years and
11 we cited -- we cited all the discussion of all the
12 elements, whether it was in the prior plan where the City
13 was going to seek alienation, or in the current plan where
14 the City had decided that it, for some reason, it doesn't
15 want to ask the State Legislature to weigh in. It has
16 always been described as a flood protection system.

17 From the beginning, the project elements -- and
18 these words continue to be used in various ULURP documents,
19 SEQRA documents, National Environmental Protection Act
20 documents. The first sentence -- the first paragraph in
21 every one of these documents reads similarly: "The purpose
22 of the ESCR Project is to address coastal flooding
23 vulnerability along a segment of Manhattan's East River
24 waterfront by implementing a flood protection system that
25 reduces flood risk, improves access to the waterfront and

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1 enhances waterfront parkland." Now, that was in the --
2 that's been in the description from the start.

3 And the plan that was originally developed with
4 community support was a plan that involved, instead of
5 raising the whole park, involved creating a series -- I'm
6 using my hands but you can't see me -- a series of berms
7 that would have -- the park would have been at the current
8 level and then it would have raised -- it would have had a
9 step up to the FDR Drive. There would have been a wall
10 basically on the east side of the FDR Drive that would have
11 been protecting the buildings and the community to the west
12 somewhat, because part of what's -- this is another
13 question. A lot of the flooding that happened in 2012 was
14 water that came in above 23rd Street and then flooded
15 south, but that's another -- that's not the issue here.

16 So even -- the way that this system is being
17 described is as a "flood protection system." It involves a
18 flood wall. It involves a below-grade flood system. It
19 involves creating all kinds of draining processes. It
20 involves building -- raising the -- involves building a
21 wall. They call it now a "below-grade flood protection
22 system."

23 And the whole project, even if split into two
24 parts, is a -- is planned to last until 2025 and that was
25 when there was a discussion of starting it in March of this

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1 year. It's now August. We have COVID. Who knows when
2 it's going to start. I would be -- just as an aside, it
3 would be somewhat amazing for the City, which is now in the
4 midst of opening all kinds of spaces for the public to use,
5 closing streets, encouraging distancing -- use of parks but
6 with distancing, closing streets, putting restaurants in
7 the street levels, encouraging bike use, for it to close
8 East River Park, which is maybe the second biggest park in
9 Manhattan after Central Park, to just close it entirely
10 during this COVID period.

11 THE COURT: But they're not, right? They're
12 closing half of it or 40 percent.

13 MR. SCHWARTZ: Closing half of it. It's still a
14 fairly significant -- because half of it doesn't mean you
15 can walk through and go -- it's half meaning cut in half
16 north/south, not cut in half longitudinally, so whatever
17 community is adjacent to it would be deprived of use of
18 that. It runs several miles. So if it's two miles they
19 want to cut it in half of it, one mile of it would be
20 closed.

21 The project itself would basically involve the
22 entire destruction of the existing East River Park, killing
23 991 trees, pulling up all the shrubs, knocking down all the
24 structures that exist there, and then raising -- using it
25 as a staging ground because the park itself is not the

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1 whole project; it's just part of the project. They have to
2 build all of this, all of this infrastructure beneath it
3 and adjacent to it, use it as a staging grounds. And they
4 say each portion of the project will take, they say, one
5 and a half to two years, so that means that the park is
6 closed for that -- that part of the park is closed for that
7 period of time. And then they have to basically recreate a
8 park on top of this 10-foot elevated structure that they're
9 building.

10 So the park -- and that's with the best of
11 developments occurring, not only in terms of problems that
12 arise in terms of construction but also budget, money, in a
13 city that's running in a state -- the City is contributing
14 to this project. The City is, you know, talking about
15 laying off tens of thousands of employees, so we don't know
16 how that's going to get affected by -- how the plan is
17 going to get affected by the realities of what's going on
18 in the City.

19 And the critical -- the critical question here
20 is, so the City tries characterize this -- this is not
21 like -- I've been a park activist -- believe it or not
22 that's my MO where I live in the West Village --
23 rebuilding -- building Hudson River Park, which where there
24 wasn't a park before, rebuilding parks and playgrounds,
25 renovating parks and playgrounds. Those goes into -- like

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1 where my kids grew up, Bleecker Playground, at some point
2 we renovated it, but that was the project. It was a
3 project to renovate Bleecker Playground. Until they ripped
4 it up, they rebuilt the structures, they rebuilt the
5 drainage, they put in new electrical, they put new surfaces
6 in, they put new swings in, they put new slides in, et
7 cetera. It was a project -- it was wholly a project
8 designed to modernize and improve Bleecker Playground. So
9 there was no need for alienation legislation because that
10 was what they were doing. It was totally dedicated to
11 recreating the playground.

12 THE COURT: Let me ask you a question, because
13 the way I sort of saw these issues crystallizing was, one,
14 does this project involve a non-park purpose? And if it's
15 no, then I go onto asking whether the plan is so bad that
16 it's arbitrary and capricious, right? If it's yes, then
17 they need legislative approval.

18 MR. SCHWARTZ: Well, it doesn't have to be
19 arbitrary and capricious to need legislative approval.

20 THE COURT: No, I understand that. So if it's
21 for a non-park purpose, if the answer to is this for a
22 non-park purpose is yes, which is where I think you're
23 going, then you would need legislative approval to do it.

24 MR. SCHWARTZ: Right.

25 THE COURT: If it's no, then we still have the

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1 question of whether the plan is so bad that it's arbitrary
2 and capricious, meaning that if you get past -- if it ends
3 up being a *Van Cortland Park*, you know, the seminal case, I
4 do agree with you this is the most applicable case. It's
5 *Friends of Van Cortland Park v. City of New York*, 95 NY2d
6 623 from 2001. If it ends up being a non-park purpose,
7 like in *Friends of Van Cortland Park*, then we would need
8 State Legislative approval. Correct?

9 MR. SCHWARTZ: Right. And there aren't a lot of
10 cases. I was amazed at how few there were. But that case,
11 I think, is very illustrative of the issues here because
12 they were going to put the water filtration plant under the
13 park, dig it up, put the plant under the park, rebuild the
14 park, and, you know, they would have planted new grass and
15 new trees and whatever it is that they were going to use
16 for a small section of the park, not half the park at a
17 time. It was only for a small piece of Van Cortland Park
18 and it was an important public purpose.

19 And the court said -- this is on page 631-632:
20 "Though the water treatment plant plainly serves an
21 important public purpose, indeed, even the State Attorney
22 General believes it should be built at the site selected.
23 Our law is well settled: dedicated park areas in New York
24 are impressed with a public trust for the benefit of the
25 people of the State. Their 'use for other than park

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1 purposes, either for a period of years or permanently,
2 requires the direct and specific approval of the State
3 Legislature, plainly conferred.'" "

4 And that's the key. To me, one of key issues
5 here is that for a period of years -- nobody can dispute
6 that it's going to be for a period of years, and that's why
7 there's so much concern in the community, for a period of
8 years, and then it will be restored as a park exactly like
9 Van Cortland Park was going to be. They didn't wind up
10 building it.

11 And the court didn't even -- they made a point of
12 saying they didn't even get to the question of whether
13 having a filtration plant under the park also required
14 alienation legislation. It's simply the fact that it was
15 going to involve use of -- for non-park purposes for a
16 period of years, even if it wasn't permanently, required
17 alienation legislation. And that's really the crux of this
18 case, because -- because, yes, in the end they will restore
19 East River Park as a park, maybe -- that's question number
20 two.

21 So one of the -- if one looks at cases involving
22 alienation and some of the -- we attached the State's own
23 pamphlet about -- their alienation handbook that the State
24 puts out. One of the purposes of alienation -- this is not
25 just, like, oh, the State Legislature gets to overrule the

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1 City Council, right? That would be silly.

2 One of the purposes of alienation legislation is
3 you get a law, it creates a law. The Legislature passes a
4 law. It doesn't say we give approval and it's, like,
5 approving the appointment of a judge to the Court of
6 Appeals. They create a law and part of the law is that
7 this park must be restored as a park. So they can permit
8 it. There's nothing that says they can't do it. The
9 alienation is not a prohibition. It's simply putting the
10 question to the Legislature to set parameters on a project,
11 and they can say no, and I don't think there's any -- most
12 of the litigation is not about the State Legislature saying
13 no.

14 And in that alienation handbook that we attach to
15 our papers you'll see the discussion from the State's
16 perspective is not about -- it's when do you need it as
17 opposed to people being upset because the State has denied
18 the alienation legislation. But one of the critical parts
19 is when they pass that bill it says this parkland must be
20 restored as parkland after the project is completed. So
21 it's not a bar. Alienation is not a bar on using the
22 parkland. It's a bar on not restoring the parkland.

23 What we're left with without alienation
24 legislation here -- and that's why this -- that's really
25 why this and Van Cortland Park stand together. If they

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1 pass the law, the law says you must restore it as a park
2 and it will even have a date in the legislation, by X date.
3 If we don't have that legislation the City can change its
4 mind. The City has -- they can say that -- they'll say --
5 Mr. Martin is going to say, oh, but it's mapped as
6 parkland; we can't change it.

7 Well, that's not true because they can then go
8 through a process under -- they de-map parkland all the
9 time and that could be the subject of litigation, whether
10 they're doing it properly under ULURP, but without a state
11 law saying you must restore the parklands, they're free,
12 frankly, to not restore it, or to restore only part of it,
13 or to build something else there. And I think that's one
14 of the --

15 THE COURT: But wouldn't that run afoul of *Van*
16 *Cortland*?

17 MR. SCHWARTZ: That would run afoul, yes.

18 THE COURT: To renew -- let's say I decide that
19 because this is a project that will actually save the park,
20 that it falls outside of *Van Cortland*, because in *Van*
21 *Cortland* they were building a water filtration plant that
22 really had nothing to do with the health of the park, and
23 this project will actually save the park from flooding and
24 wrecking it. So if they were to change their mind
25 midcourse and take half the park for, I don't know, putting

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1 up condos, wouldn't that just bring us back here?

2 MR. SCHWARTZ: It would bring you back here after
3 it was already done, after the park --

4 THE COURT: Oh, okay. Why?

5 MR. SCHWARTZ: Because they would have destroyed
6 the existing park and then in the process of restoring it
7 they'd say, oh, by the way, we need to build apartment
8 buildings to fund it, like they did in Brooklyn Bridge
9 Park.

10 THE COURT: I see.

11 MR. SCHWARTZ: Which was actually -- well, that's
12 what happened in Brooklyn Bridge Park, but Brooklyn Bridge
13 Park was not built on parkland. It was built on vacant
14 waterfront property.

15 THE COURT: But this is parkland, right?

16 MR. SCHWARTZ: This is parkland. But they didn't
17 need to go through alienation legislation, but the thing
18 is --

19 THE COURT: So they would need to go through
20 alienation legislation if they wanted to take part of the
21 park for condos, right?

22 MR. SCHWARTZ: Right.

23 THE COURT: That's the way I see it.

24 MR. SCHWARTZ: Yes.

25 THE COURT: Okay. All right.

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1 MR. SCHWARTZ: But they would have already --
2 we'd be back, you know, it would be a sort of
3 after-the-fact request. The purpose of the whole
4 alienation process, which *Van Cortland* is really addressed
5 to, is about removing a piece of the park, because in the
6 end in Van Cortland they were going to put the park back.
7 They weren't building it above ground. The whole water
8 filtration thing was going to be under the ground. It
9 wasn't going to be -- it was going to be part of the water
10 tunnel that runs -- happens to run under Van Cortland Park.

11 It wasn't going to be -- it wasn't going to be
12 anything that would have blighted Van Cortland Park once
13 the project was done, but because they were removing the
14 park from the public for an extended period of time, the
15 Court of Appeals said they needed to -- just because of
16 that reason, they dropped the footnote and said we're not
17 going to reach the question of whether having a new thing
18 under the park itself was a separate item that required
19 alienation.

20 And here, you know, your Honor started with isn't
21 this going to protect the park? All of the proposals --
22 all of the description of what occurred after Hurricane
23 Sandy did not really talk about destruction of East River
24 Park, because East River Park while -- which flooded, the
25 floodwaters actually receded by the next morning. I

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1 actually went down there and it was muddy, but the water
2 had gone back -- you could see how high the water had risen
3 on the trees, but the water was back in the East River.
4 The community to the east had flooded basements, had, you
5 know, basements where elevators didn't work, compactors
6 didn't work, electrical systems were knocked out. There
7 was -- water had to be pumped out.

8 THE COURT: Didn't you mean the community to the
9 west?

10 MR. SCHWARTZ: Sorry, to the west, right, the
11 community to the west. The community to the east is the
12 river.

13 So the park -- nobody talks about -- nobody
14 talked all the years until 2019 when they changed this
15 plan, nobody talked about, oh, we need to do this to save
16 East River Park from destruction, because that wasn't what
17 this project was about. This project was about the
18 flooding that went on between Avenue D and First Avenue --
19 actually the FDR Drive because there are NYCHA buildings
20 between FDR Drive and Avenue D, the flooding that went on
21 all the way over to First Avenue from the highway over to
22 First Avenue. That's what all the discussion about why
23 this project should happen.

24 I dare say that if the park itself had been
25 flooded and not the community to the east -- to the west,

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1 we wouldn't be talking about spending a billion and a half
2 dollars to protect East River Park. This is the project --
3 and nobody disagrees that there's a need for a wall,
4 there's a need for protection for the surrounding
5 community, and there was a plan that didn't involve using
6 more than a very small part of the park.

7 They were going to put this berm on the west side
8 of the park that would have had a wall. I think we gave
9 you links to some photographs in the -- in our brief.
10 There would have been a wall and everyone agrees there
11 needs to be some sort of a wall. Some people think that
12 the wall that they want to build is too short, is too low,
13 that the sea rise may be higher than the eight to 10 feet
14 that they want to build, but that's a whole other question.

15 Nobody disputes the need for the wall, but the
16 purpose at all times has always been to protect the
17 community. And if for whatever reason -- and we don't
18 really know. There's not like a great history here. They
19 went through years of workshops, community board meetings,
20 planning, where the community accepted -- the surrounding
21 community accepted the fact that there would be a berm and
22 a wall on the west side of the park.

23 All of a sudden, at the end of 2018, early 2019,
24 to accomplish the same purpose -- and they actually said at
25 that time that -- and in all of the descriptions -- and

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1 that's why I provided all the descriptions -- you'll see,
2 it all talks about enhancing access to the waterfront,
3 enhancing park use. They never didn't use that
4 description.

5 All of a sudden they change this plan, never
6 really explained why, because this became a more expensive
7 plan, they didn't explain why. They just said, well, we
8 have a new idea; we want to raise the whole park. They
9 didn't say, well, we just realized -- 2019, seven years
10 after the storm, eight and a half years after the storm,
11 that one of the great tragedies of the storm was the
12 flooding of East River Park. You don't see that anywhere.
13 That's not -- that's never been part of what's going on.

14 Only to defend the project now -- that's why I
15 said in the beginning of this argument -- it's only in
16 defense of this project now that -- and the desire to avoid
17 a Legislative vote, that's all this is about. They don't
18 want to let the Assembly and the Senate address this issue.

19 THE COURT: Well, maybe you could ask the City --
20 and, Mr. Martin, I assume, are you arguing?

21 MR. MARTIN: Yes.

22 THE COURT: I was curious why the community's
23 plan was abandoned. I don't know if it's relevant to my
24 analysis, but it might be.

25 MR. MARTIN: I don't think it's wholly irrelevant

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1 to the analysis, but there is a critical component of why
2 that plan was abandoned. The prior plan, as counsel for
3 petitioners noted, would construct a wall between the FDR
4 and East River Park and it would have sacrificed East River
5 Park to future flooding and storms, such as Hurricane
6 Sandy, which by the City's own projection, it's 2100, East
7 River Park would be flooded daily at high tide. And the
8 City saw an opportunity to re-envision this project, to
9 raise the park and preserve this important community
10 resource moving forward, and that was a huge driver for the
11 change of heart.

12 And, your Honor, if I could direct you to
13 exhibit -- to the City's opposition, I believe it's
14 Exhibits V -- there are two slide show presentations
15 explaining the considerations for changing. Exhibit V is
16 one of them and it's considerations for changing. We
17 wanted to protect the park. There were constructability
18 issues with constructing a wall on the FDR Drive.

19 Again, I think your Honor aptly noted in the
20 beginning this isn't wholly relevant to your Honor's
21 decision, but the important part is that the plan was
22 changed to protect the park, to raise the park. That's the
23 crucial difference between the prior plan and the new plan.
24 The prior plan did not protect East River Park and make
25 various park improvements; the new plan does. And I'll

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1 talk more about that later once it's my turn to argue.

2 THE COURT: Okay.

3 MR. SCHWARTZ: Your Honor, I want to direct the
4 Court's attention to some of the cases that we cited in our
5 brief, which really -- where temporary use was addressed by
6 the various courts. In the *Stephenson v. Monroe County*
7 case, where the -- I guess Monroe County was going to use
8 landfill, and then at the end of using it as landfill, they
9 were going to create a ski slope, which was a park purpose.
10 And they made -- what we said -- this is just a five-year
11 plan to build a ski slope and we're going to be creative
12 and use the debris to build a park. And the court, the
13 Fourth Department said no, you had to seek alienation
14 legislation first.

15 In the Kings County case, *Matter of Raritan*
16 *Baykeeper*, where the City wanted to put a composting
17 facility on the parkland to deal with organic matter
18 collected, some of it from the park. And the court said:
19 "The Municipal Respondents assert that the use of the
20 Facility to compost leaves and branches is a 'park use' and
21 is needed to generate compost for the various New York City
22 parks, including Spring Creek Park. The composting of
23 leaves is said to reduce soil compaction and increase water
24 retention, minimizing erosion and storm water runoff. The
25 composting material also adds nutrients to park soil and is

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1 used in planting, horticultural projects and capital
2 projects, among other uses."

3 And then they said -- the court said it
4 couldn't -- if it was going to take, in that case, five
5 years to build this facility and the court said, well, even
6 if that purpose ultimately services the park, you can't
7 take it over for five years, not you can't take it over for
8 five years at all, but you can't take it over for five
9 years without alienation legislation.

10 And then we also attached an opinion by the State
11 Attorney General's Office from 2008 where the Town of
12 Hempstead, Nassau County, was going to transfer 250 acres
13 of developed and undeveloped parkland to the Town of
14 Hempstead, and the deed said it would forever be used and
15 maintained as a public park. And the Attorney General, who
16 at that point was actually Andrew Cuomo, found that the
17 transfer created a risk that the use or change or access
18 from previous uses of the parkland could be changed and
19 that alienation legislation was needed before the parkland
20 was transferred from one entity to the other.

21 And then the State's handbook on alienation,
22 which we attached as Exhibit D, on page 8 said -- and this
23 is from the State -- says: "Legislative approval is
24 required even for non-permanent disruptions of parkland
25 where municipalities intend to restore the parkland. While

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1 courts allow for the possibility of de minimus exceptions
2 to the public trust doctrine, inconsistent uses as short as
3 two years have been found to be alienations."

4 So here there's no question that half the park,
5 even if the best of all worlds occurs over the next two
6 years, half the park is going to be out of service for two
7 years and then the other half of the park will be out of
8 service for two years. And all we're seeking here is have
9 the terms get reviewed pursuant to New York's very unique
10 common law by the State Legislature, and it's not imposing
11 a horrible burden on the City, but it does allow for the
12 elected body, which is responsible for maintaining the
13 sanctity of parkland, to pass the appropriate legislation.

14 I think I've said enough.

15 THE COURT: Thank you.

16 Mr. Martin.

17 MR. MARTIN: Thank you, your Honor.

18 I'm going to address a couple of specific points
19 that petitioners made at the end of my argument, but first
20 I'd like to point out why petitioners are wrong on both the
21 facts and the law here.

22 So the East Side Coastal Resiliency Project, or
23 ESCR, will create a vibrant, more accessible and resilient
24 East River Park for the enjoyment of New Yorkers for
25 generations to come and protect approximately 110,000 New

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1 York City residents and important city infrastructure from
2 the inevitable impacts of coastal flooding and climate
3 change. And it accomplishes these goals by raising East
4 River Park eight to nine feet, moving it out of the
5 floodplain to protect the park, by making various park
6 infrastructure improvements and by building an above-ground
7 flood protection structure to the north and south of the
8 park.

9 Now, petitioners have made clear that they don't
10 agree with the execution of this project and in order to
11 prevent it from coming to fruition have brought this
12 lawsuit, arguing that the closure of the East River Park
13 violates the public trust doctrine. But petitioners'
14 arguments in support of their claim fall short for a number
15 of reasons.

16 First, because this resiliency project serves an
17 important park purpose, it does not require alienation
18 legislation and run afoul of the public trust doctrine.
19 And second, the closure of the park that their novel legal
20 theory that they've proffered here, that the closure of a
21 park for any reason for an extended period of time requires
22 alienation legislation is simply unsupported by the
23 applicable case law.

24 And to my first point, importantly, New York
25 courts have repeatedly reiterated that the public trust

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1 doctrine is not an appropriate vehicle for voicing
2 disagreement about how park space is used, and instead it's
3 only a means to object to uses that categorically are not
4 legally considered to be proper park purposes.

5 And what petitioners refuse to acknowledge here,
6 despite overwhelming evidence to the contrary in the
7 record, is that ESCR does serve a proper park purpose. You
8 hear throughout their brief that this project is about
9 flood protection and it's always been about flood
10 protection and it's not about protecting the park or park
11 improvements, but what they do not recognize, and what this
12 Court must, is that those two components are inseparable
13 parts of this resiliency project. A component of this
14 project absolutely involves protecting the community on the
15 east side of Manhattan from storm surge and sea level rise,
16 but an equally important and inextricably linked component
17 involves protecting and improving East River Park.

18 Now, there's a number of points raised in the
19 City's opposition brief and in the affidavits we've
20 submitted in support of our opposition brief and exhibits
21 that petitioners have utterly failed to respond to
22 substantively in their reply and thus remain undisputed
23 here. And these issues are crucially important because
24 they go to the core of the park purpose of this project,
25 and I'd like to highlight a few of these critical points

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1 now.

2 Petitioners do not dispute that East River Park
3 was badly damaged during Sandy, that the park was inundated
4 with salt water damaging park infrastructure and amenities,
5 and that in 2014, 258 trees were removed from the park via
6 poor health and damage from Sandy. And since that time the
7 tree canopy within the park has greatly decreased as a
8 result of the limited diversity of species within the park.
9 Most of the species that are currently there were planted
10 back in 1939 when planting decisions and design decisions
11 made surrounding parks had a focus on formal design and
12 geometry and not plant diversity and ecology, and those
13 trees are not meant to withstand salt spray and strong
14 winds and disease are nearing the end of their lives.

15 Petitioners also don't dispute that there's an
16 important need to ensure equitable access to the East River
17 Park or that there's a need to repair deteriorating park
18 infrastructure.

19 THE COURT: I have a question. Do we have native
20 trees in the northeast that can withstand winds and salt
21 water or do you have to import them from Florida?

22 MR. MARTIN: That's a valid question, your Honor.
23 I don't know that we have native trees here and that would
24 be a question I'd have to confer with our Parks Department
25 expert. However, in the slides that I referenced to you

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1 earlier they set forth a very clear and diverse planting
2 palette and general planting plans which show the types of
3 vegetation and trees that they feel would be more suitable
4 for that sort of environment.

5 THE COURT: Okay.

6 MR. MARTIN: So, as I was saying, in addition,
7 petitioners don't dispute that the park is vulnerable today
8 to tidal flooding, and that by 2100, based on the City's
9 own projections, the park would be flooded twice daily at
10 high tide, rendering it virtually unusable. And the City
11 has clearly explained how this resiliency project addresses
12 each of those very real issues.

13 It increases accessibilities through the
14 construction of numerous universally accessible pedestrian
15 bridges. It reconstructs the deteriorating bulkhead and
16 completes much needed -- upgrades the park's
17 infrastructure. It incorporates new resources that do not
18 currently exist in the park that were specifically
19 requested by the public during the public engagement
20 process, the basketball courts, the playgrounds,
21 multipurpose passive lawns and solar lighting.

22 And to your point, your Honor, it will improve
23 the park's landscape with over 50 different diversities of
24 trees and plants, with special attention given to those
25 that can withstand salt spray and strong winds. And then,

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1 finally and importantly, this project raises East River
2 Park to protect East River Park out of the floodplain.

3 And there's a good reason that petitioners don't
4 acknowledge or highlight these facts for the Court in their
5 reply and that's because if the Court recognizes these
6 facts as such, then petitioners' alienation claims fail as
7 a matter of law. And they fail as a matter of law because
8 the public trust doctrine prohibits the use of parkland for
9 non-park purposes, either permanently or for an extended
10 period of time, without seeking alienation legislation from
11 the State. And that doctrine is simply inapplicable here
12 where East River Park is being closed for a park purpose,
13 namely, to undertake work that will protect and benefit
14 East River Park and preserve it for generations of New
15 Yorkers to come.

16 Now, courts that have interpreted the public
17 trust doctrine throughout the years have consistently held
18 that only uses that have no connection to a park purpose
19 are forbidden within a park, and that's simply not the case
20 here where this project clearly implements, based on the
21 undisputed record, park improvements to preserve the
22 longevity of the park and ensure that it can be used by
23 generations of New Yorkers to come.

24 Now, in addition to serving this clear park
25 purpose by protecting and improving the East River Park,

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1 the fact that this project also provides flood protection
2 shouldn't change this Court's analysis. A project that
3 servings dual purposes, or a park purpose and then some
4 other purposes as well, courts have found those to be okay
5 and not require alienation legislation. And one case we
6 cited to in our brief, the *Friends of Petrosino Square*
7 case, which found that a Citi Bike station within a park
8 served a proper park purpose, even though it served other
9 purposes, such as providing a service to commuters, and
10 that's precisely how this Court should respond to
11 petitioners' arguments here. ESCR serves a proper park
12 purpose by improving and protecting East River Park, and
13 the fact that this project also provides flood protection
14 to the community does not invalidate that very real park
15 purpose.

16 Now, I'd like to take a minute here to just
17 briefly distinguish some of the case law that's cited
18 throughout petitioners' brief and I'll start with the *Van*
19 *Cortland Park* case, and the crucial distinction with the
20 *Van Cortland Park* case is that it was not about a project
21 that had dual purposes or a project that had disputably a
22 park purpose. And petitioners recognize this clear
23 distinction in quoting from this case throughout their
24 brief. And on page 25 of their reply brief they quote from
25 the *Van Cortland Park* case saying that: "We begin the

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1 analysis with two points of agreement by the parties: that
2 this water treatment plant is a non-park purpose, and that
3 *Williams v. Gallatin* is controlling precedent." And
4 therein lies the clear distinction here.

5 We don't agree that ESCR serves a non-park
6 purpose or is a non-park purpose. In fact, the City would
7 offer to the Court that on the undisputed record, the
8 affidavits and the exhibits and the history of this
9 project, this project clearly serves a park purpose. And
10 for that same reason, many of the other cases cited to by
11 petitioners are clearly distinguishable. The *Stephenson*
12 case was about a landfill being not a proper park purpose
13 within a park; that's clear. The *Raritan Baykeeper* case
14 was about composting not being a proper use within a park.
15 Neither of them were about closing a park for an extended
16 period of time to implement a project that improves the
17 park.

18 THE COURT: Wait a minute. What about
19 *Stephenson*? *Stephenson* was the ski slope one, right?

20 MR. MARTIN: Right.

21 THE COURT: That's right. Which one was the one
22 in Monroe County? Was that *Stephenson*?

23 MR. MARTIN: I believe that was *Stephenson*, but
24 the court held --

25 THE COURT: So didn't that improve the park, the

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1 ski slope?

2 MR. MARTIN: No. The fact that for an extended
3 period of time the park was being used for something that
4 wasn't a park purpose. It was actively being used as a
5 landfill and the Court found that that landfill was not a
6 park purpose. The issue in *Stephenson* was not does closure
7 of the park to build a ski slope require alienation
8 legislation. The problem in *Stephenson* is that when the
9 park was closed it was being used as a landfill and
10 sometime in the future maybe it was going to be used as a
11 ski slope, maybe not, and that's a clear distinction from
12 the current case where this project is being implemented
13 to -- it's not being closed and the park isn't being used
14 for something else in the interim. The park will be closed
15 to improve the park and to implement very real park
16 improvements, and I think that's the key distinguishing
17 factor from *Stephenson*.

18 So, finally, the Court need not just take the
19 City's word for the fact that this project serves a park
20 purpose and that there are park operations and maintenance
21 components to it and in fact both the State parks and
22 National Park Service agree that this project involves very
23 real and important park operations and maintenance
24 improvements. And, your Honor, I'll reference you to
25 Exhibits Y and Z --

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1 THE COURT: I saw them.

2 MR. MARTIN: -- which show that correspondence
3 between the City and State.

4 So in conclusion of my first point, petitioners'
5 argument here asks either that this Court ignore the
6 undisputed record before it and find that there is no park
7 purpose here, or demand an interpretation of the law that
8 would find that park uses must have no other community
9 benefit, another assertion that is wholly unsupported by
10 the law, and for that reason the Court should reject those
11 arguments and deny the petition.

12 And moving to my second point, no court has ever
13 adopted this broad interpretation of the alienation
14 doctrine that petitioner suggests in this case, that the
15 closure of a park for park improvements, such as those
16 implemented as a part of ESCR, constitutes alienation, and
17 that's for a good reason. Even petitioners acknowledge
18 they had trouble finding cases on point here and that's
19 because the public trust doctrine attempts to ensure that
20 the municipalities and states fulfill their public trust to
21 preserve and protect parks as sources of public enjoyment
22 and that's precisely what the ESCR project does. It
23 preserves the park by raising it out of the floodplain and
24 it protects the park for future generations by ensuring
25 that it will not be flooded on a regular basis and making

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1 the park a more resilient resource for the public to use.

2 Now, aside from not being supported by the
3 applicable law, petitioners' theory also would have grave
4 implications for resiliency projects and other park
5 improvement projects within the city. As petitioners
6 acknowledge, parks frequently close for repairs and for
7 remediation and for renovation, and to place this onerous
8 burden on the City that it seek alienation legislation from
9 the State which, is a time-consuming process and can also
10 involve spending a significant amount of additional money
11 on the project, that would simply discourage and
12 disincentivize the City from undertaking these very
13 important projects that are meant to benefit the public.
14 So, for these reasons, as a matter of both law and policy,
15 this novel and theory of alienation doctrine offered by
16 petitioners should be rejected.

17 So, in conclusion, since its inception, the
18 public trust doctrine in New York has allowed park
19 closures for valid park purposes. Based on the clear
20 evidence in the record here, this resiliency project does
21 just that, and therefore the Court should reject
22 petitioners' novel interpretation of the public trust
23 doctrine and allow this important City project to proceed.

24 And I'd like to take just a brief moment to
25 directly address, as I mentioned earlier, some of

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1 petitioners' arguments that they've raised. You've heard
2 them raise in the brief a couple of times and also you
3 heard argument that the City is in the midst of a pandemic
4 and a budget crisis and that's a policy argument that
5 really doesn't have any bearing on petitioners' real legal
6 claim here.

7 But to respond directly to that, climate change
8 and storms aren't stopping simply because we're in the
9 midst of a pandemic. And the response to the pandemic
10 across the country and the world shows what happens when
11 cities and states are caught offguard by a crisis. ESCR is
12 a proactive project, which is a means to avoid a future
13 crisis by minimizing certain damage to the park and the
14 community, not if but when the next storm or flood hits.
15 And the current unfortunate circumstances with the pandemic
16 is not a reason to delay this proactive and thoughtfully
17 considered \$1.45 billion City project.

18 Finally, I'd like to address the notion that
19 petitioners have raised that the project is, for some
20 reason, going to take longer than five years and that State
21 legislation is necessary to make sure that the City returns
22 the park to the public. So, first, this argument doesn't
23 really have any connection to petitioners' legal claim
24 either. The issue before the Court for the Court to decide
25 here is whether or not this project serves a park purpose.

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1 And if the Court finds that this project doesn't serve a
2 park purpose, then it should require the City to undertake
3 alienation legislation.

4 And now we get to the point where petitioners are
5 saying that the State has to have ongoing oversight, but
6 that in and of it is not a justification that this Court
7 finds the project does not serve an important park purpose
8 here.

9 And in addition to that, petitioners don't in
10 their reply brief really substantively respond to any of
11 these, the City's valid arguments, and raise this argument
12 as a red herring. The idea that somehow getting the State
13 Legislature involved makes this a more democratic process
14 or ensures that the City has to return this parkland more
15 so than it does already is simply false. This project was
16 approved overwhelmingly by Manhattan Community Board 3 and
17 6, by the Manhattan Borough President and by the City
18 Council, the democratically-elected body that's meant to
19 represent the City. And, your Honor, you can be sure --
20 and those parties aren't named here, but they certainly
21 have an interest in ensuring that their constituents and
22 the individuals that they represent in the communities that
23 they represent see this project come to fruition.

24 I think in conclusion, your Honor, I have no
25 other arguments to respond to and for the reasons I

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1 previously mentioned this Court should deny the petition
2 because this project does not require alienation
3 legislation.

4 Thank you.

5 THE COURT: Okay. Mr. Schwartz, do you have
6 anything further? You're on mute.

7 MR. SCHWARTZ: Sorry. Keeping household noise
8 out of the courtroom.

9 Just briefly. I think I have three points. One
10 is -- I quote this on page 7 of my brief. It's also in
11 Record Document 70. This is how the City describes this
12 project. They're not saying that it would benefit the
13 park. That doesn't make it a park project, right? Just
14 like probably if they had dug up part of Van Cortland park
15 we would have ultimately benefited some things in the park
16 at that point. But the description and this really held
17 true all the way: "The Proposed Project is intended to
18 advance coastal resiliency along Manhattan's East Side to
19 mitigate against expected future flooding from events like
20 Hurricane Sandy. The Proposed Project was identified by
21 HUD in a winning Rebuild by Design proposal. To that end,
22 the Proposed Project involves the installation of a flood
23 protection system on the East Side of Manhattan between
24 Montgomery Street and East 23rd Street with the objective
25 of reducing flood hazards, protecting a diverse and

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1 vulnerable residential population, and safeguarding
2 critical energy, infrastructure, commercial and
3 transportation assets."

4 And then it says: "The principal goals of the
5 Proposed Project include: Provide a reliable flood
6 protection system for the flood hazard area that is mapped
7 between East 23rd Street on the north and Montgomery Street
8 on the south; two, improve and enhance access to the
9 waterfront, including John V. Lindsay East River Park..."

10 So that's always been the description. It is a
11 coastal flood resiliency project designed to address far
12 broader matters than just protecting the East River Park,
13 even if in the end it makes East River Park less -- more
14 resilient to flooding by, you know, it's one thing if they
15 say the park is going to be closed for two to five years,
16 but by cutting down every tree, pulling up every tree,
17 destroying every bush, eliminating every species that lives
18 in the park, eliminating all -- whether it's flower
19 species, whether it's insect species, whether it's animal
20 species, everything is gone and you're starting all over
21 again.

22 And, yes, in the end it may be, if it's 8 to
23 10 feet higher, it may be that it protects the park against
24 future flooding. That's a whole other -- you know, there
25 are a lot of people that say that when we get to that point

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1 where counsel was talking about, twice a day high tides
2 being higher than the park, when that happens nobody is
3 going to live on the east side of Manhattan because,
4 frankly, you could build a wall up to 23rd Street and then
5 the water will come pouring in at 23rd Street and flood
6 Manhattan anyway. If the regular tide on the east side of
7 Manhattan is 8 feet higher, high tide is 8 feet higher than
8 it is now, at that point we're in trouble all over the
9 eastern side of Manhattan, not just on the Lower East Side.

10 Second, counsel really only points to one case --
11 two cases -- sorry -- but their leading case is the
12 *Petrosino* case. I don't know if your Honor has ever been
13 to Petrosino Park.

14 THE COURT: I have.

15 MR. SCHWARTZ: It's a postage stamp, right?

16 THE COURT: Yes.

17 MR. SCHWARTZ: It was created by people in the
18 neighborhood. They demanded to have a park on what was a
19 barren piece of concrete and they got it. And on the
20 northeastern side of the park, in the street, the City
21 wanted to build a Citi Bike stand, not in the middle of the
22 park, and there was litigation about it, and it was
23 theoretically parkland because the way New York City works
24 is the street adjacent to a park is part of the park, and
25 that way they can control vendors and parking and whatever

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1 else they want to control.

2 THE COURT: In this case, Justice Kern held that
3 the City -- that the Citi Bike station did not violate the
4 public trust doctrine.

5 MR. SCHWARTZ: Right. But it wasn't in the
6 middle of the park and she actually also found that it
7 wasn't taking away anything that was being used at the
8 time. They were building a bike stand in the street
9 adjacent to the park, not inside the park, and she said not
10 only that, it actually was a park use. Biking enhances the
11 park use. People can come there; people can leave there.
12 So she basically said bicycles are a park use. She said it
13 was incidental and she also said that it was not within a
14 park; it was adjacent to the park.

15 Here, we have a project -- so that's their main
16 case. That's their main case. All the other cases that
17 address large-scale projects that are going to take the
18 parkland out of action, even if it's going to, in the end,
19 result in the parkland being restored -- that *Monroe County*
20 case is one of them -- says in order to do it you need
21 alienation legislation.

22 Now, what's interesting, counsel says, oh, that's
23 a burden. Until the end of 2018, their own materials on
24 their own ULURP submission said that the project that they
25 were describing, which would have included building berms

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1 in the park, required alienation legislation. They said
2 that, but they hadn't asked for it yet. But they
3 anticipated that between 2015 and the beginning of 2019,
4 four years, all of their materials say we're going to need
5 to get alienation legislation. So it isn't like this is a
6 novel concept that just came up now. It was only when they
7 changed the plan, and then they used it as a reason not to
8 seek the alienation legislation that this issue of
9 alienation arose.

10 So the fact that they would have to do it now --
11 and I'm not sure why it's an extensive and lengthy
12 legislative process, because the legislators are very well
13 aware -- the two elected officials whose districts border
14 the park, Assemblymember Harvey Epstein and State Senator
15 Brad Hoylman, both testified at the hearing on the EIS,
16 that, in their opinion -- and we attached this to the
17 original petition, their testimony -- that it required
18 alienation legislation. If they need to get this in front
19 of the legislature, just go to your local elected officials
20 and say, you know, we need a bill, and then they will put
21 certain conditions on it and it will go forward.

22 This year the legislature -- it's wonderful. The
23 legislature has been meeting after July 1 -- after
24 June 21st, whenever it is they usually go out of session,
25 they're continuing to meet. They're passing all kinds of

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1 important legislation. We actually have a year-round State
2 Legislature. Go to the State Legislature; ask them for the
3 approval. That's all we're seeking here is go to the
4 legislature, get the approval. And if they want certain
5 guarantees and they want to add certain guarantees as the
6 elected officials responsible for protecting parkland, and
7 that is their job. The City Council deals with zoning and
8 ULURP. The State Legislature deals with parkland and
9 alienation of parkland. That's how the legislative
10 responsibilities have been split up, and really that's all
11 that we seek. And I think I've said my piece.

12 THE COURT: All right. So I'm going --

13 MR. MARTIN: Your Honor, may I make one brief
14 correction? I know we can go back and forth all day, but
15 I'd like to say to counsel's first point when they're
16 citing to page 7 of their brief, they're quoting from a
17 letter that was submitted by the Parks Department in 2015,
18 prior to the project redesign that would protect the park.
19 So it follows that, you know, a letter from 2015 wouldn't
20 have extensive mention of protecting the park. That's all
21 I'd like to point out. That was in 2015 prior to the
22 park --

23 THE COURT: I think I heard enough. I'm going to
24 try to decide this from the bench, but I need about 20, 25
25 minutes. Can everyone hang out while I do that? I need to

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1 research a few things. Can everyone wait?

2 MR. MARTIN: Yes, your Honor.

3 MR. SCHWARTZ: Yes. I have an argument at two.

4 THE COURT: We'll be done by then. All right.

5 So just stand by. Thank you.

6 (Recess taken.)

7 THE COURT: Okay. I'm back.

8 So, as I stated at the beginning, the issue for
9 the Court to determine is whether there's a -- and I'm
10 quoting from *Van Cortland* -- "there is a substantial
11 intrusion on parkland for non-park purposes" that the Court
12 of Appeals found prohibitive in *Friends of Van Cortland*.

13 While I do find that the City's plan involves a
14 substantial intrusion, as a matter of law, it is for a park
15 purpose and this analysis involves how we define what is
16 and what is not a park purpose. And here, the record
17 supports that without this plan we will likely not even
18 have a park at all. Although the original impetus for the
19 project was to protect the surrounding community from
20 flooding, on further investigation the project grew to
21 involve the overriding concern of protecting the park as
22 well, and saving the park, therefore, is a park purpose.
23 *Van Cortland* would be distinguishable, then, because the
24 water treatment plant had nothing to do with protecting the
25 park from any danger like climate change.

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1 Now, petitioners conceded that were the City not
2 to restore the entire park, let's say by allowing
3 residences to be built on part of it, or something like
4 that, the City surely would need alienation legislation at
5 that point. And *Avella v. City of New York*, which is 29
6 NY3d 425, supports that requirement, but at this point the
7 danger of the City using the park for something else is
8 speculation. *Stephenson v. Monroe County*, which is 43
9 A.D.2d 897, the main thrust of that project was to use the
10 park to dispose of refuse, which is clearly inconsistent
11 with a park purpose, so that case is distinguishable.

12 Petitioner doesn't point out anything about the
13 City's proposed plan in terms of the details, that it's
14 arbitrary and capricious. For example, removing the
15 current flora and replacing it with plants that can
16 withstand storms is not arbitrary and capricious.

17 So, in sum, were the project not to go forward,
18 there would be a substantial danger. The park may not
19 exist at all with the buildings and flora being damaged or
20 washed away. So I am denying the petition. However, I do
21 realize that given the size of this park and its location,
22 it's really difficult for the people that live near it,
23 particularly during the time of COVID where we need to be
24 outside and that really shows you the limits of a judicial
25 solution to this.

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1 You know, I can't tell you what to do in terms of
 2 the -- I can decide whether something is arbitrary and
 3 capricious. I can decide whether something is for a park
 4 purpose, but in terms of the details maybe something can be
 5 worked out that doesn't involve the Court's decision in
 6 terms of maybe using less of the park at a time or, I don't
 7 know, if there's some other solution where people who live
 8 in that neighborhood or neighborhoods near the park can
 9 have access to a park.

10 So thank you. And thank you, Mr. Schwartz, for
 11 another very interesting case. I appreciate it. It was
 12 fascinating. Everybody stay safe.

13 (Proceedings concluded.)

14

15 * * *

16 C E R T I F I C A T E

17

18 I, Debra Lynn Salzman, an Official Court Reporter
 19 of the State of New York, do hereby certify
 20 that the foregoing is a true and accurate transcript
 21 of my stenographic notes.

22 *Debra Lynn Salzman, RMR*

23 _____

24 Debra Lynn Salzman, RMR
 Official Court Reporter

25

Debra Salzman, Official Court Reporter

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