2016 WL 3667160 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

RITE AID CORPORATION, Petitioner,
v.
Terie HUSEBY, Assessor and Board of Assessment Review of Town of Irondequoit, Respondents.
Rite Aid Corporation, Petitioner,
v.
Stephen Haywood, Assessor, and Board of Assessment Review of Town of Williamson, Wayne County, Respondents.

No. 16-36.
July 5, 2016.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

Petition for a Writ of Certiorari

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***i** QUESTIONS PRESENTED

This case challenges the constitutionality of the judicial rule in New York State that requires local tax assessors to value some properties based on the value of their above market leases, while all other taxpayers are assessed based on the value of the underlying real property alone without regard to their leases. These assessments are used to determine the annual real property tax liability for all real property owners. To apply different methods of taxation to the same class of taxpayers results in invidious discrimination and violates the taxpayer's right to Equal Protection under the 14th Amendment of the United States Constitution.

Question: Was it a violation of the national drugstore taxpayer's constitutional right of Equal Protection for the Appellate Division Fourth Department to reverse the trial court and reinstate the taxpayer's assessments which were based on the value of above market leases encumbering their stores, when all other taxpayers are assessed based on the value of their real property alone?

***ii** PARTIES TO THE PROCEEDING

The parties to the proceeding are Rite Aid Corporation, Terie Huseby, assessor of the Town of Irondequoit, New York, the Board of Assessment Review of the Town of Irondequoit, New York, Stephen Haywood, assessor of the Town of Williamson, New York, the Board of Assessment Review of the Town of Williamson, New York

***III CORPORATE DISCLOSURE STATEMENT**

Rite Aid Corporation has no Corporate Parent. No publically traded shareholder owns 10% or more of the company's stock.

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STATUTES AND OTHER AUTHORITIES

*1 OPINIONS BELOW

The two opinions of the Appellate Division Fourth Department for the State of New York are reported at:
1. *Rite Aid Corp. v Haywood*, 130 A.D.3d 1510, 1510-11 (4th Dep't 2015), *lv. to appeal denied*, 132 A.D.3d 1329 (4th Dep't 2015), and *lv. to appeal denied*, 26 N.Y.3d 915 (2016), *rearg. denied*, 27 N.Y.3d 976 (2016), *and lv. to appeal denied sub nom;*

2. *Rite Aid Corp. v Huseby*, 130 A.D.3d 1518, 1519 (4th Dep't 2015), *lv. to appeal denied*, 132 A.D.3d 1329 (4th Dep't 2015), *and lv. to appeal denied*, 26 N.Y.3d 916 (2016), *rearg. denied*, 27 N.Y.3d 977 (2016).

STATEMENT OF JURISDICTION

This Petition relates to two matters appealed to the Appellate Division Fourth Department of the Supreme Court of the State of New York argued on the same day and involving the same legal issues. The Appellate Division and the Court of Appeals denied leave to appeal further to the New York Court of Appeals. The Court of Appeals denied re-argument on April 5, 2016. This court has jurisdiction pursuant to 28 U.S.C. 1257(a)

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States of America

*2 STATEMENT OF THE CASE

The assessor in both cases determined the tax assessments of the subject properties based on the value of the drugstore leases encumbering the properties. The rents were above market so the assessments were above market value. Consequently, the taxpayer paid more taxes than it would have, had the assessments been determined in a manner the same as other taxpayers; based on the market value of the real property alone.

The trial court found that modern drugstores are build-to-suit, which means developers charge rent based on the cost of assembling multiple smaller parcels of real property, tearing down any improvements, and constructing their stores. That is the only way these taxpayers can redeveloped a major portion of an entire city block. These costs are all added together to determine the rent. Rent does not change for at least 20 years. These rents have no correlation to market rent because they are arbitrarily based on construction cost. Consequently, the trial court found that a valuation based on a build-to-suit lease is a leased fee valuation, tantamount to a valuing a property based on its original cost:

The testimony adduced by Petitioner at trial established that a "first generation build-to-suit" transaction arises when an end user hires a developer to build a new retail store in exchange for a long term lease. The developer assembles parcels of real estate to create the desired site, and it builds a building to match the retailer's national prototype. The site selection and building design are driven by ***3** marketing considerations; not by real estate market conditions. The unique design and signage allows a consumer to recognize the site even before he or she sees the retailer's sign. A ubiquitous example of this concept is the "McDonald's Golden Arches." The look and style of the site are marketing tools, but they do not add value to the real estate. They enhance the value of the first user's business, but they do not provide the same utility and appeal to other users.

Rents under a "build-to-suit" lease are structured based upon a cost formula designed to repay the developer for the costs of the land, demolition of existing improvements, and the cost of constructing a building to match a prototype designed by a national retailer. The rents under a "build-to-suit" lease are not market rents, they are somewhat artificial and typically much higher than market rents. The Court finds relevant and enlightening the "paired lease" analysis contained in the Petitioner's Appraisal of almost identical Rite Aid drug stores in Albany, New York area. While almost identical in size, location and lease term, one store (Cohoes, New York) was leased at $18.00/sq. ft. and the other (Troy, New York) was leased for $37.72/sq. ft. The one factor which explained the difference in rental rate was the cost to assemble the parcel for development as a Rite Aid drug store. The costs to assemble the lots to complete the development of the Troy Rite Aid store were ***4** 3 1/2 times more than the assemblage cost of the Cohoes store; thus, indicating that first generation "build-to-suit" leases are driven by factors other than free market forces. *Rite Aid v Huseby, Assessor of the Town of Irondequoit,* Monroe County, March 26, 2014 Rosenbaum, J. at Page 5.

The trial court recognized that redeveloping part of a city block to build a new store can be costly. Assembling small land parcels improved with existing buildings drives up cost. The developer must not only pay more for smaller parcels, he must pay for and demolish any existing improvements.

Developers pay top dollar when a national drugstore is trying to assemble parcels for a new store. Some sellers may hold out, placing the entire project in jeopardy. The developer must pay what it takes to finish the assemblage. Then he tears down all existing improvements and builds the store, but only because he has a pre-existing 20-year lease commitment with the drugstore company. All of these costs are added together to determine the taxpayer's rent.

The trial court relied upon an analysis prepared by the Petitioner's appraiser to show how assembling small land parcels drives up rent. The judge compared two similar build-to-suit drugstores in the Capitol District of New York near Albany. One property was assembled from a single parcel, and one was assembled from five parcels. The rent for the five parcel assemblage was more than *twice* the rent of the single parcel assemblage. (The rent for the five parcel Troy assemblage was $37.72 per square ***5** foot, compared to only $18 per square foot for the Cohoes single parcel assemblage). The assemblage cost impact is one of the main reasons why build-to-suit lease rents are above market rents and should not be used to establish fee simple market value.

There is a direct correlation between assemblage costs and rent. Developers receive annual rent for at least 20 years equal to between 10% and 11% of total project costs. The developer never offers the finished building for lease at market rates. Drugstores pay these high rents for business reasons. That is the only way they can redevelop a major part of an entire city block to build a new store.

1. The Investor Premium

Investors buy these leases. They do not require a return of between 10% and 11%. Investors require a return of only 5% to 7% because rents are guaranteed for twenty years by tenants with superior credit like Rite Aid, Walgreens and Walmart. Investors often pay more than one-million-dollars over what these drugstores cost to build, which reduces the rate of return from 10.50% to under 7%. The table below shows the impact of an investor's lower rate of return on sale price:

Annual Rent	10.50% Rate of Return	8% Rate of Return	6.50% Rate of Return

$210,000	$2,000,000	$2,625,000	$3,230,769

The sale price mathematically rises from $2,000,000 to $3,230,769 solely because the rate of return fell from ***6** 10.5% to 6.5%. The $1.2 million premium is solely due to the value of the lease and the lower rate of return accepted by a net-lease investor because the rent is guaranteed for 20 years by a national retailer. ($210,000 divided by $3,230,760 equals a 6.5% rate of return)

Investors do not care about the property's condition or location. Buying these leases is tantamount to buying government bonds; these days, better than buying government bonds. The sale price, however, does not just reflect the value of the real property. The premium is attributable to the lease.

The trial court found that the sale price of all first-generation drugstores includes the value of the lease, and that nobody would buy these properties at a price near the assessment, had they not been encumbered by these above-market leases. Consequently, the leased fee sale price is not evidence of these properties' fee simple market value:

> Accordingly, the Petitioner has established by a preponderance of the evidence that the rent charged under the "first generation build-to-suit" lease encumbering the Property was above market rent and that the excess value attributable to the above market rent should not be considered in determining the *fee simple interest* of the Property. To do otherwise, would value the *lease fee interest.*

The trial court reduced the assessment of the Williamson property from $3,750,000 to $1,100,000 and $1,000,000, and the assessment of the Irondequoit property from ***7** $3,950,000 to 1,490,000 and $1,440,000. *Rite Aid v Huseby, Assessor of the Town of Irondequoit, Monroe* County, March 26, 2014 J. Rosenbaum at Page 2 and 8; *Rite Aid v Haywood, Assessor of the Town of Williamson,* Wayne County, October 15, 2013, J. Rosenbaum at Page 2 and 6.

REASONS FOR GRANTING THE PETITION

The common practice of taxing owners of newly built first-generation retail properties based on the value of their above market build-to-suit leases is becoming a multi-billion-dollar wealth confiscation in many areas of the country, and it is causing far too much litigation. New York alone has spawned nine drugstore appeals in ten years going both ways on the issue. The taxpayer in this case now must pay an additional $100,000 in taxes every year for each of the stores in these two cases. Rite Aid has several hundred first-generation drugstores in New York and thousands across the nation. Walgreens and CVS each have more stores than Rite Aid. And this issue affects other retailers like Home Depot, Walmart and even Starbucks who finance their new stores using these leases.

The trial court ruled that the assessor should not have assessed Rite Aid based on the value of its lease in both cases; i.e. the assessor should not have valued the taxpayer's leased fee interest in the property. Instead, like all other taxpayers, the assessment should be based only on the value of the real property, i.e. the land, sticks, and bricks as if the property were unencumbered by a lease; i.e. the value of the taxpayer's fee simple interest. *Rite Aid v Terie Huseby, Assessor and the Board of Assessment Review of the Town of Irondequoit, Monroe County, New* ***8** *York* Monroe County, March 26, 2014, J. Rosenbaum; *Rite Aid v Stephen Haywood, Assessor and the Board of Assessment Review of the Town of Williamson, Wayne County, New York,* Wayne County, October 15, 2013, J. Rosenbaum.

The Appellate Division Fourth Department reversed and held that net-lease properties must be valued based on the value of their build-to-suit leases; the assessor must value the taxpayer's leased fee interest, but only for first-generation build-to-suit drugstores. It did not matter that the trial court found that an assessment based on a build-to-suit financing lease results in an assessment above the property's fee simple market value; i.e. the market value of the real property alone, because the rent is

based on the cost of building the property. While both appraiser's claim they followed the New York rule by valuing the property's fee simple interest, the Appellate Division for the first time in the case mandated a valuation based of the leased fee interest only for net-lease drugstore properties. The court specifically held that an assessor must value drugstores by comparing them to other drugstores encumbered by the similar leases where rents are above market. The taxpayer's appraisal was disregarded solely because the appraiser valued the fee simple interest by comparing the subject to similar retail properties encumbered by leases with market value rents. The Appellate Division Fourth Department for the first time in the case expressly prohibits a valuation method unless it is based on net-lease drugstores, departing from the New York rule mandating a valuation of the fee simple interest. *Rite Aid Corp. v Haywood,* 130 A.D.3d 1510, 1510-11 (4th Dep't 2015), *lv. to appeal denied,* 132 A.D.3d 1329 (4th Dep't 2015), *and lv. to appeal denied,* 26 N.Y.3d 915 (2016), *rearg. denied,* ***9** 27 N.Y.3d 976 (2016), *and lv. to appeal denied sub nom; Rite Aid Corp. v Huseby,* 130 A.D.3d 1518,1519 (4th Dep't 2015), *lv. to appeal denied,* 132 A.D.3d 1329 (4th Dep't 2015), *and lv. to appeal denied,* 26 N.Y.3d 916 (2016), *rearg. denied,* 27 N.Y.3d 977 (2016).

The Petitioner's motion for leave to appeal to the New York Court of Appeals was denied, even though the Appellate Division's decisions in both cases included a dissenting opinion. This is the second and third time the New York Court of Appeals has denied the taxpayer's motion for leave to hear the issues in a drugstore case. Leave was denied in a similar case involving the sale of a Rite Aid lease in the Town of Malta. *Matter of Rite Aid Corporation v Otis, Town of Malta* 102 A.D.3d 124, 954 N.Y.S.2d 666 (3rd Dep't 2012).

The taxpayer's constitutional issue, first arising after the Appellate Division reversed the trial court has never been addressed by any court. That is why this application is being made. The assessor's method of taxation should be the same for all taxpayers. There must be a legislative reason to treat classes of taxpayers differently. That did not happen here because the fee simple and leased fee distinction was judicially imposed. The discrimination was not imposed by the legislature. Now net-lease property owners must pay more taxes solely because their property was financed by a build-to-suit lease with above market rents. This amounts to invidious discrimination, and violates the taxpayer's right to Equal Protection guaranteed under the 14th Amendment of the United States Constitution.

***10** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. US Const amend. XIV. The Equal Protection Clause applies to taxation which in fact bears unequally on persons or property of the same class. *Allegheny Pittsburgh Coal Co. v County Com'n of Webster County, W. Va.,* 488 U.S. 336, 343, 109 S. Ct. 633, 637-38, 102 L. Ed. 2d 688 (1989). Taxpayers who are similarly situated have the right to be taxed in a fair and consistent manor.

While it might seem like good policy to fill the coffers of local governments with money from these *wealthy* retailers, that is no justification for singling out one class of taxpayers to pay more than their fair share in real property taxes. The tax overpayment to state and local governments could be used for expansion, more jobs, and even lower prices to consumers. So this is not just another case of Robin Hood taking from the rich to feed the poor. Taxpayers do not even have a patriotic duty to pay more than their fair share of taxes. *Helvering v Gregory,* 69 F.2d 809, 810 [2d Cir 1934], *affd,* 293 U.S. 465, 55 S. Ct. 266, 79 L Ed 596 [1935].

2. Reversal on Appeal

The Appellate Division Fourth Department reversed the trial court decision in its entirety, but with one dissenting opinion. The appellate court held that an assessor must value drugstore properties by valuing the leases even though rents are above market. Assessor's must now value the leased fee interest of all first-generation drugstores:
***11** On the other hand, respondents' expert utilized 11 rental comparables, nine of which were occupied and used as national chain drugstores in the applicable market. The use of these comparables demonstrated that the adjusted comparable median market rent for these similar national chain drugstores was $36.76 per square foot, which yielded a valuation between $3,590,000 to $3,940,000 on the relevant valuation dates.

In light of the foregoing, we conclude that the failure of petitioner's expert to use the recent sale of the subject property, as well as readily available comparable sales of national chain drugstore properties in the applicable market, as evidence of

value demonstrates the invalidity of the expert's conclusion with respect to the sales comparison valuation (*see Matter of Thomas v Davis*, 96 A.D.3d 1412, 1415, 946 N.Y.S.2d 336, *lv. denied*, 21 N.Y.3d 860, 993 N.E.2d 759, 971 N.Y.S.2d 81). We further conclude that petitioner's expert's use of sales not comparable to the subject and outside of the applicable market should have been rejected by the court as unreliable (*see Matter of Adcor Realty Corp. v Srogi*, 54 A.D.2d 1096, 1096, 388 N.Y.S.2d 962, *lv. denied*, 41 NY.2d 806). Moreover, the failure of petitioner's expert to use the actual rent, negotiated at arm's length and without duress or collusion, as well as the failure to use similar rental comparables from the applicable submarket as evidence of value, demonstrates the invalidity of the expert's ***12** conclusions using the income capitalization method (*see Matter of Conifer Baldwinsville Assoc. v Town of Van Buren*, 68 N.Y.2d 783, 785, 498 N.E.2d 417, 506 N.Y.S.2d 853; *see generally Techniplex III*, 125 A.D.3d at 1413). We thus conclude that the court's decision to credit the appraisal of petitioner's expert was against the weight of the evidence (*see Matter of Rite Aid Corp. v Otis*, 102 A.D.3d 124, 127, 954 N.Y.S.2d 666, *lv. denied*, 21 N.Y.3d 855, 989 N.E.2d 971, 967 N.Y.S.2d 689; *see also Matter of Kohl's Ill. Inc. #691 v Board of Assessors of the Town of Clifton Park*, 123 A.D.3d 1315, 1317, 999 N.Y.S.2d 250). *Rite Aid Corp. v Huseby*, 130 A.D.3d 1518, 1523 (4th Dep't 2015), *lv. to appeal denied*, 132 A.D.3d 1329 (4th Dep't 2015), *and lv. to appeal denied*, 26 N.Y.3d 916 (2016), *rearg. denied*, 27 N.Y.3d 977 (2016).

The *Rite Aid v Huseby* case involving the drugstore in the Town of Irondequoit is hereinafter sometimes referred to as "*Irondequoit*"). The Appellate Division Fourth Department reversed the *Rite Aid v Haywood* case involving the town of Williamson (hereinafter sometimes referred to as "Williamson") for the same reasons. *Rite Aid Corp. v Haywood*, 130 A.D.3d 1510, (4th Dep't 2015), *lv. to appeal denied*, 132 A.D.3d 1329 (4th Dep't 2015), and *lv. to appeal denied*, 26 N.Y.3d 915 (2016), *rearg. denied*, 27 N.Y.3d 976 (2016), and lv. to appeal denied sub nom;

New York assessors must assess the lease fee interest of all first-generation net-lease properties. The assessment must be determined based on value of the two subject properties' leases, the sale price of those ***13** leases, and based on sales and leases of other similar first-generation drugstores all encumbered by above market leases. All other taxpayers pay tax based on the value of the fee simple interest in their real property.

The Court of Appeals has grappled with a rule that calls for assessing leases only when they are above market like the subject. The Fourth Department in *Williamson* and *Irondequoit* relies on the Court of Appeals Decision *In The Matter of Conifer Baldwinsville Associates V. Town of Van Buren, et al.*, 68 N.Y.2d 783, 498 N.E.2d 417, 506 N.Y.S.2d 853 (1986) as authority for rejecting the taxpayer's appraisal report. *Conifer Baldwinsville* says that an assessor must use a properties actual above market rent, but not a properties actual below market rent:

The Appellate Division committed no error of law in using actual income as distinct from market rents and in using actual expenses as found by it rather than as stated in petitioner's bill of particulars. *Not only was there* "no showing that the rents fixed by HUD do not reflect the value of the property", as that court noted (115 A.D.2d 325, 495 N.Y.S.2d 869), but also there was evidence in testimony of petitioner's appraiser that the income actually received exceeded the market rent. *It is only "when fair market rents exceed rental income [that] the latter may, in whole or in part, be made to defer to more precise means of fixing a base on which to compute capitalization." (* ***14** *Matter of Merrick Holding Corp. v Board of Assessors*, 45 N.Y.2d 538, 543, 410 N.Y.S.2d 565, 382 N.E.2d 1341). (Emphasis added, *Conifer Baldwinsville Assoc. v Town of Van Buren*, 68 N.Y.2d 783, 785 (1986))

Conifer Baldwinsville says the assessor must value the leased fee interest in property only if it is encumbered by a lease with above-market rent. All other taxpayers are assessed based on the value of their property's fee simple interest.

3. New York Bases Assessments on the Value of the Fee Simple Interest for Most Taxpayers

Fee simple and leased fee are merely appraisal terms, but fee simple is what assessors have been valuing in New York for more than 50 years. Until recently, an assessor was required to adjust all leases encumbering a property to remove the impact of above or below market rent. The seminal New York case *People ex rel. Loring R. Gale et al. v. Tax Com. of the City of New York* 17 A.D.2d 225; 233 (1st Dep't 1962) made crystal clear the difference between a leased fee valuation and a fee simple valuation:

An outstanding lease may be a *benefit or a detriment* to the subject property, and thus its duration, covenants and the rental

fixed are simply elements along with many other considerations used to arrive at the value of the property. *The amount of rental fixed by a lease, even though negotiated at arm's length, could be very misleading, as to the true value of property, for it is well known that many rental contracts may be at excessive or inadequate rentals because of poor business judgment on the part of one party or another.* Then, ***15** too, long-term rental contracts may be made in boom times or in times of depression, so do not necessarily reflect true value on a change in times.

Finally, the evidence of the price paid at a bona fide sale during or reasonably near the tax years is *not conclusive* in determining the value of the property. *It would only be one element for consideration to be weighed with all other relevant factors. (People ex rel. Parklin Operating Corp. v. Miller,* 287 N. Y. 126, *supra; People ex rel. Four Park Ave. Corp. v. Lilly,* 265 App. Div. 68.)

Here, the court in weighing the sales price of the property as evidence of value was bound to take into consideration the fact that *the price was necessarily affected by the encumbrance upon the property of the outstanding long-term lease* binding the owner to accept a rental fixed many years ago when rentals were at a comparatively low ebb. The sale subject to such a lease was not a sale under "ordinary circumstances" (Emphasis Added.)

Gale acknowledges that rents may not reflect current market rates due to changes in the times, or for business reasons which may not make good real estate sense. The assessor must account for any departures from market rates to determine value for assessment. Under *Gale*, assessors must value only the real property and must disregard the impact of rents that are above-market or below-market, even when there is a sale of a property encumbered by an above market lease.

***16** It is the ultimate goal of assessment practice to have property owners pay their fair share of taxes. Assessments are only fair if they are determined in the same manner for all taxpayers. *Matter of Merrick Holding Corp. v Board of Assessors,* 45 N.Y.2d 538, 544, 382 N.E.2d 1341, 1344, 410 N.Y.S.2d 565, 568, (1978). The Court of Appeals in *Merrick Holding* explained how to value leased property when actual rents are different from market rent. The Court did not rely upon a shopping plaza's actual rents because some were below-market. They reversed and sent the case back with instructions to adjust for *both above and below-market rents:*

> For, though realized income will often turn out to be the surest indicator of full value (see *Rockaway Crest Section 1 v. Tax Comm. of City of N.Y.* 38 A.D.2d 759, 329 N.Y.S.2d 620; *People ex rel. Gale v. Tax Comm. of City of N.Y.S.* 17 A.D.2d 225, 230, 233 N.Y.S.2d 501, 506), when fair market rents exceed rental income the latter may, in whole or in part, be made to defer to more precise means of fixing a base on which to compute capitalization (see Encyclopedia of Real Estate Appraising (Friedman ed., 1968), pp. 40-41; 1 Bonbright, Valuation of Property, p. 229; see Babcock, The Valuation of Real Estate, pp. 384-385). *Matter of Merrick Holding Corp. v Board of Assessors,* 45 N.Y.2d 538, 543, 382 N.E.2d 1341, 1343, 410 N.Y.S.2d 565, 567.

It was appropriate for the assessor to raise below-market rents to determine the property's value based on market rents. However, the *Merrick* Court expressly held that it works both ways; above-market rents are also reduced downward:

> ***17** For all these reasons it cannot be said that the board's use of leasehold bonuses was inappropriate. Of course, in arriving at the value of the entire property, *if Merrick's leases with its lesser tenants were at above market rents these should be offset against the below market rentals received from the three flagship tenants.* In that connection, in remitting for review of the facts we note that, though the record contains proof that the rentals paid by Merrick's numerous lesser tenants were not below market, there is no finding as to whether these exceed market and, if so, the extent to which such excess counterbalanced the below market stream of income that flowed from the three major leases to which the bonuses were applied. (Emphasis Added, *Matter of Merrick Holding Corp. v. Board of Assessors of the County of Nassau* 45 N.Y.2d 538; 382 N.E.2d 1341; 410 N.Y.S.2d 565 (1978)

The New York Court of Appeals in *Merrick* also stands for valuing the fee simple interest by adjusting both above-market and below-market rents, which results in the value of the fee simple interest alone, as if unencumbered and available for lease at market rates.

4. Assessing the Leased Fee Interest Only for Drugstores and Other Net-Lease Properties Violates the Equal Protection Rights of the Taxpayer

The constitutionality of the court's decisions in *Williamson* and *Irondequoit*, to the extent that they ***18** mandate a valuation of the leased fee interest only for first-generation drugstores violates the equal protection rights of the taxpayer:

The Federal and State Constitutions do not prohibit dual tax rates or require that all taxpayers be treated the same. They require only that those similarly situated be treated uniformly. Thus, the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class (see, *Shapiro v. City of New York*, 32 N.Y.2d 96, 103-107, 343 N.Y.S.2d 323, 296 N.E.2d 230, *appeal dismissed*, 414 U.S. 804, 94 S. Ct. 68, 38 L. Ed. 2d 40; *New York Steam Corp. v. City of New York*, 268 N.Y. 137, 197 N.E. 172; *People ex rel. Hatch v. Reardon*, 184 N.Y. 431, 77 N.E. 970, *supra; Matter of *257 McPherson*, 104 N.Y. 306, 10 N.E. 685; *see, Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351). "[S]ubject to constitutional inhibitions, the Legislature has very nearly unconstrained authority in the design of taxing impositions" (*Matter of Long Is. Light. Co. v. State Tax Commn.*, 45 N.Y.2d 529, 535, 410 N.Y.S.2d 561,382 N.E.2d 1337; see also, *Trump v. Chu*, 65 N.Y.2d 20,25,489 N.Y.S.2d 455, 478 N.E.2d 971). Indeed, the Supreme Court has held that even a State tax which has the effect of destroying a business must be sustained if it is not invidious. The remedy for an oppressive tax is political, not judicial (see ***19** *Magnano Co. v. Hamilton*, 292 U.S. 40, 45, 54 S. Ct. 599, 601, 78 L. Ed. 1109). *The classification violates constitutional equal protection guarantees, however, if the distinction between the classes is "palpably arbitrary" or amounts to "invidious discrimination"* (see *Lehnhausen v. Lake Shore Auto Parts Co., supra*, 410 U.S. at p. 360, 93 S. Ct. at p. 1004; *Shapiro v. City of New York, supra*, 32 N.Y.2d at p. 103, 343 N.Y.S.2d 323, 296 N.E.2d 230). (Emphasis added, *Foss v City of Rochester* 65 N.Y.2d 247, 254, 65 N.Y.2d 247, 480 N.E.2d 717 (1985)).

Valuing the leased fee interest for first-generation net-lease properties while valuing fee simple interest for all other taxpayers results in two different and discriminatory valuation methods for similarly situated taxpayers. It is not even a legislative rule. No statute or rule calls for a fee simple valuation for most taxpayers and a leased fee valuation only for net-lease drugstores.

All assessments should be determined based on a fair and consistent method for similarly situated taxpayers. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. US Const amend. XIV. The Equal Protection Clause applies to taxation which in fact bears unequally on persons or property of the same class. *Allegheny Pittsburgh Coal Co. v County Com'n of Webster County, W. Va.*, 488 U.S. 336, 343, 109 S. Ct. 633, 637-38, 102 L. Ed. 2d 688 (1989). Taxpayers who are similarly situated have the right to be taxed in a fair and consistent manner.

***20** That means an assessment must be based on the fee simple market value of the real property alone, and not based on the value of a lease with above market rent determined based on the cost of a brand new building, or the premium paid by an investor to acquire one of these leases. There can be no judicially created rule for treating first-generation drugstores differently than all other taxpayers. Such unfair and discriminatory treatment is not permitted under the New York or Federal Constitutions. *Foss v City of Rochester* 65 N.Y.2d 247, 65 N.Y.2d 247, 480 N.E.2d 717 (1985).

5. The Sale of a Lease in the Net-Lease Submarket is Not Evidence of the Market Value of the Real Property Alone

The Appellate Division Fourth Department also relied upon the existence of a national net-lease marketplace where these first-generation net-leases are bought and sold on a regular basis:

> On the other hand, respondents' expert, Ronald Rubino, testified, and his appraisal concluded, that there is an established national submarket for the sale and purchase of built-to-suit net lease national chain drugstores, which provides an abundance of drugstore comparable sales, both local and regional, for use in the sales comparison approach. Respondents' expert testified that such a submarket is the subject of a national real estate publication which he incorporated into his appraisal. *Rite Aid Corp. v Huseby for the*

Assessor for the Town of Irondequoit, 130 A.D.3d 1518, 1521 (4th Dep't 2015)

***21** The national net-lease submarket is where investors buy and sell drugstores. However, these investors buy and sell drugstore leases; not just the real property. A drugstore would not sell in the national net-lease market if it was not encumbered by a long-term lease. It is a submarket for the sale of leases, not just the real property, which is the only interest being valued here.

Nevertheless, the Appellate Division Fourth Department found that a failure to use leased fee sales from the national net-lease submarket invalidated the Petitioner's appraisal report:

> In light of the foregoing, we conclude that the failure of petitioner's expert to use the recent sale of the subject property, as well as readily available comparable sales of national chain drugstore properties in the applicable market, as evidence of value demonstrates the invalidity of the expert's conclusion with respect to the sales comparison valuation (*see Matter of Thomas v Davis,* 96 A.D.3d 1412, 1415, 946 N.Y.S.2d 336, *lv. denied,* 21 N.Y.3d 860, 993 N.E.2d 759, 971 N.Y.S.2d 81).

The Appellate Division Fourth Department also said that build-to-suit leases are traded in the national net-lease submarket, which "has no boundaries". That should have raised a red flag:

Thus, we conclude that there is no serious dispute that the submarket identified and relied upon by respondents' expert exists, and sales and rental data for that submarket is readily ***22** available (*see Brooks Drugs, Inc.,* 51 A.D.3d at 1095; *Matter of Eckerd Corp. v Gilchrist,* 44 A.D.3d 1239, 1241, 843 N.Y.S.2d 871, *lv. denied,* 10 N.Y.3d 707, 888 N.E.2d 396, 858 N.Y.S.2d 654). It is noteworthy that petitioner's expert also recognized that the boundaries of the applicable submarket "are not purely physical or geographical" and, "to the extent that the market is the meeting place for buyers and sellers of real estate of a given type, the participants who deal within its confines set the boundaries of the market." Nonetheless, in his appraisal, petitioner's expert disregarded the applicable submarket and relied upon properties that are clearly outside of the well-recognized parameters of the net lease national drugstore market. *Rite Aid Corp. v Huseby for the Assessor for the Town of Irondequoit,* 130 A.D.3d 1518, 1521 (4th Dep't 2015)

The court said the market for leases has no *physically or geographical* boundaries. It does not matter where the underlying real property is located. However, any real estate broker will tell you that a property's value is determined by *location, location, location.* Location always affects property value.

Net-lease investors buy leases based solely on future rent. It does not matter to an investor in California whether the lease is in Manhattan, Rochester, Buffalo, Syracuse or Albany. Location plays no role in the net-lease investor's purchase of a 20-year lease, because it has no impact on his cash flow. He will receive his rent for 20 years even if the building burns down. The net- ***23** lease submarket should play *no role* in the assessment of a build-to-suit drugstore.

Some locations are better than others. But not the location in the *Williamson* case. The store was remote and rural. The urban *Irondequoit* store location was better. Yet the sale prices were almost the same because the rents were similar. Location had nothing to do with it. There is no correlation between a first-generation drugstore's leased fee sale price, and the fee simple market value of the real property alone.

It is not disputed that these sales are *arms-length transactions.* But they are arm's length sales of leases, not just sales of real property. They do not provide evidence of the fee simple market value of the real property alone.

6. National Problem

This case highlights a multi-billion-dollar national problem. There are hundreds of recently built drugstores in New York State run by Rite Aid, Walgreens and CVS. There are thousands nationally. They are almost always financed by these long-term leases. Those in New York will soon be over assessed. The problem is even greater when you take into account

national retailers Home Depot, Loews, Walmart, and even Starbucks, who also finance their new properties through developers with build-to-suit leases.

This issue has spawned an article in the national real estate publication The Appraisal Journal published by the Appraisal Institute. Both appraisers in this case are members of the Appraisal Institute and acknowledge its ***24** publications to be authoritative. The renowned author of the article entitle *You Can't Get the Value Right if You Get the rights Wrong* by David C. Lennhoff, MAI, SRA discussed the issues in this case and recognizes that the discriminatory treatment of first generation drugstores is a common national problem. (The Appraisal Journal, winter 2009, Page 60)

Other state courts have found the New York method of valuing net lease properties to be wrong. Earlier this year, in *Rite Aid of Ohio, Inc. v Washington Cty. Bd. of Revision,* 2016-Ohio-371, *reconsideration denied,* 2016-Ohio-1596, 145 Ohio St. 3d 1447, 48 N.E.3d 585 (2016), the Supreme Court of Ohio rejected the county's argument and adopted Rite Aid's argument and recognized that build-to-suit transactions must be adjusted to value the real property alone:

> The rent in a build-to-suit drugstore is often above market, which will elevate its sale price. *See, e.g., Rhodes v. Hamilton Cty. Bd. of Revision,* 117 Ohio St. 3d 532, 2008-Ohio-1595, 885 N.E.2d 236, ¶ 3,5-6 (sale price of build-to-suit drugstore with admittedly above-market rent was found to be the value of the property). To the extent that building costs, by being included in elevated lease payments, have been incorporated into the value of the realty, an adjustment would need to be made to determine the value of a different drugstore property that was not so encumbered.

The Supreme Court of Wisconsin reverse and found that a Walgreens should not be valued based on its actual build- ***25** to-suit rent. A value based on the income stream would have established the leases income stream, but it did not establish the value of the real property alone. "With such guidance and information available for a market-based income approach assessment, there is no need to rely solely on Walgreens' actual lease terms, let alone legal authority to do so." *Walgreen Co. v City of Madison,* 2008 WI 80, ¶ 72, 311 Wis. 2d 158, 200, 752 N.W.2d 687, 707 (2008).

While these and most other state tax assessment cases deal with the merits of the issues at hand, none deal with a mandate imposed by a court that dictates a leased fee valuation for one group of taxpayers, and a fee simple valuation for all others. This case addresses a constitutional issue of first impression. All taxing jurisdictions must choose how they will value taxpayers' properties, and then they must always adopt a fair and consistent method for all. Courts cannot impose a discriminatory and confiscatory standard of taxation on one class of taxpayers just because they can afford it better than the rest of the taxpayers.

Now the store in this case is a finished building specifically suited for Rite Aid, but only Rite Aid. Nobody would claim that adding "Golden Arches" and other similar trade fixtures to a McDonald's restaurant adds value to the underlying real estate. However, installing Golden Arches is still a good business decision for McDonald's. These business improvements attract customers. But subsequent buyers won't pay extra for business improvements, unless they acquire the franchise and continue using the property as a McDonald's. These improvements are business assets, not real estate assets.

***26** This is characteristic of all branded national net-lease properties from drugstores, to big box retailers, and even to Starbucks. The next buyer pays much less for the property than what is cost to build. The store does not have the same value in the marketplace because it is no longer brand new, and the next user will either compromise and use it as is, or make substantial modifications so that it accommodates the needs of the user's business. That is why specially built retail properties sell for less than their original cost, even months after they are built. The assessment should be based on the value of the property to the market, not to the first user.

The drugstore net-lease market has exploded in recent years with baby-boomers approaching the prescription drug age. Falling interest rates have made these leases more valuable. This is a timely issue of national importance.

CONCLUSION

There is no justification for a different method of tax assessment depending upon how an owner chooses to finance its property. Two companies could construct identical adjacent buildings for the exact same cost. One could own the fee simple interest and finance construction traditionally with a bank. The other could finance their transaction using a lease. The competitor using traditional financing can challenge his assessment because the property is unencumbered by a lease. However, the taxpayer using lease financing will have a greater tax liability indefinitely, solely because his property is encumbered by a lease. This discrimination violates the equal protection right of theses taxpayers guaranteed under the United Sates Constitution.

***27** This court should grant review of this matter.

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