To Be Argued By: Alan J. Knauf, Esq.
Time Requested for Argument: 20 Minutes

STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION – FOURTH DEPARTMENT

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff-Respondent-Appellant,

vs.

THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, WASTE MANAGEMENT OF NEW YORK, L.L.C.

Defendants-Appellants-Respondents,

and

THE CITY OF NEW YORK,

Defendant-Respondent.

Monroe County Index No. E2022000699
Docket No. 23-00179

BRIEF OF PLAINTIFF-RESPONDENT-APPELLANT

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QUESTIONS PRESENTED

1. Did the court below correctly determine that Section 19 of Article I of the New York Constitution (the "Green Amendment") is self-executing?

   Consistent with decades of New York State constitutional law, the court below found that the Green Amendment is self-executing. R. 22.

2. Did the court below correctly determine that Plaintiff stated a claim against the State of New York and the New York State Department of Environmental Conservation under the Green Amendment?

   The court below determined that Plaintiff's claim against the State could proceed because the State lacks discretion to violate the Constitution. R. 27.

3. May a private entity be sued under the New York State Constitution where its conduct is entwined with governmental policies or so impregnated with a governmental character that its actions can be regarded as governmental action?

   The Court did not directly address this question, only answering more broadly that the Green Amendment does not provide for a direct claim against private entities. R. 22-23.

4. Did Plaintiff state a claim against the City of New York under the Green Amendment and the City's own charter where the City is knowingly acquiescing in the use of its solid waste to violate Plaintiff's members' constitutional rights despite having the clear power and duty to abate that violation?

   The court below did not directly address this question, misconstruing Plaintiff's claim against the City of New York as being based on contracts between the City and Waste Management of New York L.L.C. and the fungible nature of garbage. R. 23.

STATEMENT OF THE CASE

Plaintiff-Respondent-Appellant ("Plaintiff") Fresh Air for the Eastside, Inc. ("FAFE") commenced this action against Defendants-Appellants-Respondents ("Defendants") State of New York, New York State Department of Environmental Conservation ("NYSDEC"), the City of New York ("NYC"), and Waste Management of New York L.L.C. ("WMNY") by filing a Summons and Complaint on January 28, 2022. R. 34-63. Plaintiff claims that the constitutional rights of its members (the "Members") to clean air and a healthful environment, guaranteed by the Green Amendment, are being and have been violated as a result of the actions or inactions on part of the Defendants and the improper operation of the High Acres Landfill (the "Landfill"), located in the Town of Perinton, Monroe County, and in the Town of Macedon, Wayne County, owned and operated by Defendant WMNY, in a manner that negatively affects Plaintiff's Members' right to breathe clean air and live in a healthful environment. *Id*.

All three Defendant groups – the State of New York and NYSDEC (together "State"), NYC, and WMNY – moved to dismiss, which Plaintiff opposed. R. 64-65; 511-12; 697-98; 700-37. By an Amended Decision and Order (the "Decision") dated December 20, 2022, Hon. John J. Ark, J.S.C. granted the Motions of NYC and WMNY and denied the State's Motion. R. 11-33. WMNY, Plaintiff and the State filed Notices of Appeal on January 18, 20, and 23, 2023, respectively. R. 1-10.

As stated in greater detail below, the court below correctly determined that the Green Amendment is self-executing, as constitutional provisions are presumptively self-executing in the State of New York. The Legislature had the opportunity to include language in the Green Amendment that would rebut that presumption but affirmatively chose not to, and the text of the Amendment that was presented to voters unambiguously excluded such limitation. In looking at the voters' intent in approving the Green Amendment, we therefore cannot add limitations which were not present on the ballot, as constitutional provisions are to be construed liberally in favor of the citizen. While the text of the Green Amendment is clear and unambiguous, if the Court does look at legislative history, the legislative record is replete with references to the self-executing nature of the Green Amendment.

The court below also correctly determined that Plaintiff stated a claim against the State. A violation of an individual's constitutional rights by the government may be by action or by inaction, both of which have occurred. NYSDEC affirmatively approved the Landfill, which now operates and violates Plaintiff's members' constitutional rights with the full imprimatur of the State. When presented with evidence that Landfill violates Plaintiff's newly recognized constitutional rights, the State declined to abate that violation, despite possessing the clear legal authority to do so. The failure to abate the violation is not insulated from judicial review. The State lacks discretion to violate the Constitution, but still issued the permits.

However, the court below did err in dismissing Plaintiff's claims against WMNY and the City of New York. Plaintiff's claim against WMNY was based on the fact that its conduct is so entwined with governmental policies or so impregnated with a governmental character that its actions can be regarded as governmental action. The court below construed this claim as only alleging that the Green Amendment provides a right of action against private entities, and declined to review the doctrine cited by Plaintiffs. Plaintiffs also established that the City of New York has a duty to abate the constitutional violations pursuant to its Charter.

STATEMENT OF FACTS

A. The Landfill.

The Landfill is located at 425 Perinton Parkway in the Town of Perinton, Monroe County, and on adjacent property in the Town of Macedon, Wayne County, in the State of New York. R. 34. The Landfill causes fugitive emissions ("Fugitive Emissions") of landfill gas ("Landfill Gas"), including among other constituents, greenhouse gasses ("GHG") laced with hazardous substances released and otherwise discharged into the air, as well as persistent, noxious, and offensive odors ("Odors") from garbage and Landfill Gas. *Id.*

The Landfill has been in operation since about 1972, at which time it was much smaller in size and did not ship in waste by rail. R. 37. When the rail transportation of waste from NYC commenced in about 2015, serious problems began. R. 47; 57-59. The Landfill is governed by numerous permits issued by the State and other government agencies, including for example, its 6 N.Y.C.R.R. Part 360 Solid Waste Management Facility Permit (the "Landfill Permit") and Title V Clean Air Act Permit (the "Air Permit") (together, the "Permits"). R. 38. The Landfill Permit expired on July 8, 2023, and the Air Permit expired on December 1, 2021. R. 38.

The Landfill Permit was modified in 2013 to allow WMNY to construct and operate a rail siding to manage waste brought to the Landfill via intermodal rail from NYC, and since 2015, waste from NYC ("NYC Garbage") has represented an increasing majority of the total municipal solid waste ("MSW") the Landfill accepts for disposal. R. 39. In fact, beginning in mid-2015, rates of NYC Garbage brought to the Landfill by rail caused the total MSW disposed there to increase by more than 250%. NYC Garbage currently represents about 90% of all MSW disposed at the Landfill. *Id*.

B. The Landfill Causes Unclean Air and an Unhealthful Environment.

Since at least 2015, the Landfill's Odors and Fugitive Emissions have invaded the community, including public places, private properties, and homes of FAFE Members. R. 40. The Landfill's untreated Fugitive Emissions, which include at least 15% of the total Landfill Gas created by the Landfill, are well-documented, and at the time the

Complaint was filed, the quarterly surface scans for methane exceeded the 200 parts per million (ppm) action level on at least 188 occasions. R. 40, 48. The Fugitive Emissions consist of methane, carbon dioxide, and non-methane organic compounds, which include volatile organic chemicals and hazardous air pollutants, as well as hydrogen sulfide and other odorous reduced sulfur compounds that smell of rotten eggs, even in miniscule amounts. R. 40-41. The methane present in the Fugitive Emissions is a potent GHG. *Id*.

The Members formed FAFE in late 2017 because the Odors and Fugitive Emissions emanating far beyond the Landfill boundary were negatively impacting the rights of Members and their children to breathe clean air. R. 36. The Members include more than 200 individuals who own property and/or reside about 0.3 to 4 miles from the Landfill, and whose lives and properties have been and continue to be adversely impacted by persistent, noxious, offensive Odors and Fugitive Emissions. *Id*. FAFE Members complained to the Town of Perinton and NYSDEC but were so frustrated by the lack of response, that they developed a software application ("FAFE App") to help them document complaints of Odors and/or Fugitive Emissions in real time. R. 42. The FAFE App automatically documents certain data such as wind direction, wind speed, weather conditions, and barometric pressure. *Id*.

Between its creation in 2017 and January 4, 2022, the FAFE App has logged over 23,670 complaints of Odors and Fugitive Emissions over a widespread area around the Landfill. R. 42. At least 99 of those complaints were made between the effective date of the Green Amendment, January 1, 2022, and the date the Complaint was filed four weeks later on January 28, 2022. *Id*. As of the date of the Complaint, NYSDEC had logged at least 2,626 separate complaints of Odors and/or Fugitive Emissions. R. 43. The Odor and Fugitive Emissions are continuing in nature. R. 36. FAFE Members are exposed to Odors and/or Fugitive Emissions not only when they are outside in public spaces and in their own backyards, but also inside their private residences since the gasses contaminate the indoor air in their homes. R. 57.

Members are concerned with Fugitive Emissions that pollute their air as NYSDEC does not require monitoring by WMNY on a frequent and continuous basis. Members are also concerned about the impacts that large GHG emitters like the Landfill have on climate change and their environment. R. 59. This is especially concerning because WMNY admits that changes to weather conditions interfere with its ability to properly operate the Landfill and control the Odors and Fugitive Emissions emanating from the Landfill. *Id*.

C. The Landfill Is Not in Compliance with State Environmental Laws and Regulations.

The Odors and Fugitive Emissions at the Landfill are a well-known problem. The Complaint details the various ways that the Landfill is already operated contrary to or in violation of current laws and regulations: the Landfill is not complying with cover requirements (R. 45-46); the Landfill constantly exceeds its emission limits (R. 46); the Landfill is contributing to global climate change (R. 49-50); the Landfill and its emissions are contrary to the New York Climate Leadership and Community Protection Act ("CLCPA") (R. 51-53); and the Landfill is contrary to the State's Solid Waste Hierarchy[1] (R. 53-54).

Defendants' misapplication of the current and ineffective laws and regulations fail to protect FAFE and its Members from the Odors and Fugitive Emissions. The State has failed to take any meaningful and proper action to uphold or enforce the applicable laws and regulations. WMNY claims it has tried to mitigate the Odor and Fugitive Emissions within the confines of its Permits and the existing State laws and regulations, but the Emissions, which are causing unclean air and an unhealthful environment, persist. R. 44.

[1] Supreme Court Monroe County previously recognized the applicability of the Hierarchy to the Landfill in *Preserve Scenic Perinton Alliance, Inc. v. Porter*, 32 Misc. 3d 1216(A) (Sup. Ct. Monroe Co. 2010) ("Consistent with ECL § 27-0106, a [Waste-to-Energy] facility would be preferred to a landfill, a position not lost on the DEC.").

D. New York City

NYC Garbage currently represents about 90% of all MSW disposed at the Landfill. R. 39-40. Since 2015, NYC Garbage has represented an increasing majority of the total MSW the Landfill accepts for disposal, which corresponds with the timing of the dangerous exacerbation of Odors and Fugitive Emissions. R. 39. NYC Garbage is transported to the Landfill via rail and is significantly more odorous than waste transported to the Landfill by other means because of, *inter alia,* the increased transport time and the inevitable delays in intermodal transportation on the rail line. R. 40. The NYC Charter and the various contracts NYC has with WMNY demonstrate that NYC is empowered to, and is capable of, abating the Odors and Fugitive Emissions. R. 37. NYC has to date declined to do so.

E. Summary

The voters in this State have empowered impacted citizens to enforce the Green Amendment when their rights to breathe clean air and live in a healthful environment have been violated. Defendants can no longer allow the Landfill to cause so much harm and impact so many people. The Green Amendment requires proper intervention from the State to prevent this harm, and mandated compliance by the Landfill operator (WMNY) and the major waste generator (NYC).

LEGAL ARGUMENT

LEGAL STANDARD

On a CPLR § 3211 motion to dismiss, "[a]ny facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true, and the benefit of every possible favorable inference is afforded to the plaintiff." *Gibraltar Steel v. Gibraltar Metal Proc.*, 19 A.D.3d 1141, 1142 (4th Dep't 2005). The question before the Court is not whether Plaintiff's Members are factually being deprived of clean air and a healthful environment. The time for that review will come later. In the context of the instant Motions to Dismiss, that deprivation is assumed.

When seeking dismissal pursuant to CPLR § 3211(a)(2), a party must show that the court lacks subject matter jurisdiction. "Subject matter jurisdiction has been defined as the 'power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under the general question' … As a 'court of original, unlimited and unqualified jurisdiction' the New York State Supreme Court is vested with general original jurisdiction." *21st Cent. Pharm. v. Am. Intl. Group*, 195 A.D.3d 776 (2d Dep't 2021). This Court reviews these determinations *de novo*. *Consol. Rest. Operations, Inc. v. Westport Ins. Corp*., 205 A.D.3d 76, 81 (1st Dep't 2022).

While the Motion to Dismiss of WMNY was granted in the court below, it still appealed, and Plaintiffs moved to dismiss that appeal (Dkt. 5). By an Order dated June 12, 2023 (Dkt. 7), this Court denied Plaintiff's Motion without prejudice, and with leave to renew. Plaintiff now renews its request that the appeal of WMNY be dismissed and incorporates by reference its previous arguments made in its May 23, 2023 Memorandum of Law (Dkt. 5).

Whether a party is aggrieved is a threshold question for this Court, and "a necessary component to invoke this Court's jurisdiction." *Dolomite Prod. Co. v. Town of Ballston*, 151 A.D.3d 1328, 1330 (3d Dep't 2017). This Court must dismiss an appeal brought by a party who is not aggrieved. *See* CPLR § 5511; *Olney v. Town of Barrington*, 162 A.D.3d 1610, 1611 (4th Dep't 2018). A party that obtains an "'order in [its] favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal.'" *Benedetti v. Erie County Med. Ctr. Corp.*, 126 A.D.3d 1322, 1323 (4th Dep't 2015). Therefore, the appeal of WMNY should be dismissed.

POINT ONE

THE COURT BELOW CORRECTLY DETERMINED THAT THERE IS A PRIVATE RIGHT OF ACTION UNDER THE GREEN AMENDMENT

In November 2021, New Yorkers voted to amend the New York State Constitution, effective January 1, 2022, to add the Green Amendment to the Bill of Rights (Art. 1 § 19), which provides that "[e]ach person shall have a right to clean air and water, and a healthful environment." WMNY calls the Green Amendment a "laudable constitutional commitment," while unambiguously advocating that the Court adopt an interpretation of it which would effectively eviscerate it, rendering the will of the voters to hold the State to a higher environmental standard nothing more than unenforceable greenwashing. The court below, despite WMNY's urging, declined to deviate from decades of settled law in New York State holding that constitutional provisions are presumptively self-executing. R. 22-23. *See generally Brown v. State*, 89 N.Y.2d 172 (1996); *Boggs v. State*, 51 Misc. 3d 376 (Ct. Cl. 2015); *People v. Turza*, 193 Misc. 2d 432 (Sup. Ct. Suffolk Co. 2002). For the reasons stated below, this holding should be affirmed.

A. New York Jurisprudence Establishes Unequivocally that the Green Amendment is Self-Executing.

The Decision of the court below is consistent with the bedrock canon of New York constitutional construction, that constitutional provisions are to be "liberally construed." *People v. P.J. Video*, 68 N.Y.2d 296, 303 (1986). It is fundamental that a constitution should receive a liberal interpretation *in favor of a citizen*, especially with respect to provisions designed to safeguard the citizen's liberty and security in regard to both person and property. *Sawyer v. Town of Southport*, 6 A.D.2d 553 (3d Dep't 1958) [emphasis added]. Express provisions of the state constitution should be vigilantly enforced, and the rights they protect zealously guarded. *People v. Page*, 88 N.Y.2d 1 (1996).

WMNY recites a brief history of New York jurisprudence as to the self-executing nature of constitutional provisions. WMNY Br. at 13 (Dkt. 36). Ignoring the fact that New York has long since moved on from the time when constitutional provisions were not considered self-executing,[2] WMNY boldly refers to the reformist and progressive Green Amendment as a "throwback" to a time when constitutional amendments had no legal effect. WMNY infers in this interpretation that the voters of New York did not intend to provide for a constitutional right to clean air and a healthful environment when they overwhelmingly voted to explicitly add those rights to the State Bill of Rights.

[2] Though WMNY at one point recognizes that the days of a presumption against self-execution are long past (WMNY Br. at 13), it bases the substance of its arguments on caselaw ranging from the 19th century to the 1930s, before the presumption shifted in favor of self-execution. *Id* at 18. For example, they rely heavily on *Matter of Sweeley*, 12 Misc. 174 (Sup. Ct. Albany Co. 1895), *aff'd* 101 Sickels 401 (1895), a case not cited by a reported New York decision in eight decades.

The Legislature of New York and its citizens have, through careful deliberation and consideration, chosen to change the State Constitution to enact a Green Amendment, and place it within the Bill of Rights, thus vesting the State with the affirmative duty to ensure that "each person shall have a right to clean air and water, and a healthful environment." New York Constitution Art. 1 § 19. The Bill of Rights in the federal Constitution is the primary source of expressed information as to what is meant by constitutional liberty. *Poe v. Ullman,* 367 U.S. 497, 517 (1961) (Douglas, J., dissenting). The Framers added the Bill of Rights to enshrine those constitutional guarantees which experience indicated were indispensable to a free society. *Id.* The same is true about the New York Bill of Rights. *SHAD All. v. Smith Haven Mall*, 66 N.Y.2d 496 (1985). The Green Amendment now enshrines indispensable rights of the People.

In New York, constitutional provisions are presumed to be self-executing. *People v. Carroll*, 3 N.Y.2d 686, 690-691 (1958) (observing that "the process in this case would have to start with the presumption that the provision is self-executing" and "it is now presumed that constitutional provisions are self-executing."); *Turza*, 193 Misc.2d at 435 ("Moreover, the well-established rule in New York is that constitutional provisions are presumptively self-executing."). In determining if a constitutional provision is not self-executing, courts will look to whether it contains phrases such as "in the manner to be prescribed by law," which implies that the method or procedure of implementation is left to the legislature. *Carroll*, 3 N.Y.2d at 688 (1958) (referring to language found in the

first sentence of N.Y. Const. Art. I, § 2 relating to the waiver of a jury trial in civil cases). Similarly, courts have observed that language specifying that "the legislature shall pass appropriate laws" to prevent a constitutional provision's violation suggests the need for legislative supplementation. *People ex rel. Collins v. McLaughlin*, 128 A.D. 599 (1st Dep't 1908).

This particular doctrine was addressed very recently in *White v. Cuomo*, 181 A.D.3d 76, 85 (3d Dep't 2020) (*rev'd on other grounds,* 38 N.Y.3d 209 (2022)), where the Third Department held that a constitutional provision is not self-executing specifically because it explicitly provided such by including the language "the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section." This unambiguous rule is vastly preferable to the nebulous standard that WMNY asks the Court to apply in determining whether a constitutional provision is self-executing. The decision in *White v. Cuomo* was issued less than a year before the Legislature passed the Green Amendment. If the Legislature truly intended for the Green Amendment to be a "throwback" to the days before the presumption of self-execution, it would have been as simple as including the words "and the legislature shall pass appropriate laws" in the text of the amendment. Case law has made this mechanism clear and unambiguous, and the Court should not reject a well-settled bright line rule in favor of subjective analysis which deviates from a presumption established more than half a century ago.

WMNY asks the Court to find that the Green Amendment is nothing more than a statement of policy and goals. However, WMNY itself recognizes that the New York State Constitution already contained such a policy pointing out that Art. XIV, § 4 states: "[t]he policy of the state shall be to conserve and protect its natural resources" and assigns to "[t]he legislature" the task of "implementing this policy." WMNY Br. at 40. WMNY inexplicably contends (for the first time on appeal) that the State Constitution requires two unenforceable general statements of a policy in favor of environmental conservation. If that were true, the Green Amendment would be meaningless. Surely the voters of New York intended otherwise.

A broad array of rights in the New York State Bill of Rights have been found to be self-executing. *See Carroll*, 3 N.Y.2d at 690-91 (Art. I, § 2 criminal waiver of trial provision); *People v. Diaz*, 10 A.D.2d 80, 83 (1st Dep't 1960), *aff'd*, 8 N.Y.2d 1061 (1960) (same); *Boggs*, 51 Misc.3d at 379 (Art. I, § 5 cruel and unusual punishment provision); *Remley v. State*, 174 Misc.2d 523, 525 (Ct. Cl. 1997) (Art. I, § 6 due process provision); *Under 21*, *Catholic Home Bureau for Dependent Children v. City of New York*, 126 Misc.2d 629, 642 (Sup. Ct. N.Y. Co. 1984) (same); *Brown*, 89 N.Y.2d at 172 (Art. I, § 11 equal protection provision and Art. I, § 12 search and seizure provision); *In re Tel. Commc'ns*, 55 Misc.2d 163, 165 (Sup. Ct. Queens Co. 1967) (Art. I, § 12 wiretap provision).

WMNY notes that the court below specifically relied on the self-executing nature of the constitutional provisions at issue in *Brown*, involving "the equal protection of the laws," and the right "to be secure in their persons, houses, papers and effects." 89 N.Y.2d at 172. These provisions are obviously "broad generalities" without "legislative exposition," but the Court of Appeals noted that they were self-executing in the absence of language explicitly stating otherwise. In attempting to distinguish this directly analogous Court of Appeals authority, WMNY notably stops including citations to cases, opining without authority that these examples do not matter because the provisions at issue "were plainly modeled on preexisting federal constitutional provisions." WMNY Br. at 15.

The implication of WMNY's unsupported and novel argument, which is improperly raised for the first time on appeal, is that broad constitutional provisions can only be self-executing if we already possess some undefined quantity of federal or sister-state case law interpreting similar provisions in other contexts. Beyond having no authority for this argument, WMNY ignores that even those "federal precursors" lacked explanatory jurisprudence at their enactment. The Green Amendment is no different. A new enforceable constitutional right has been created, the contours of which will be defined by the courts in the coming years.[3] This argument also ignores that the Court of

[3] Indeed, the State itself appears to have recognized that the Green Amendment gives rise to an enforceable right, as shown by its recently filed lawsuit, *People of the State of New York v. PepsiCo, Inc., et al.*, Index No. 814682/2023, in Supreme Court, Erie County. In that case, the

Appeals has "given our State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution." *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 159 (1978).

B. The Court Need Not Look at Legislative History to Determine That The Green Amendment is Self-Executing.

WMNY next argues that the Court should look to legislative history to interpret the Green Amendment. While Plaintiff maintains that the legislative history supports its interpretation, this analysis is unnecessary. The Legislature was not the only party involved in the adoption of the Green Amendment. New Yorkers voted in favor of the Green Amendment and the Court's first inquiry should be *their* intent. *See e.g. Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022). In *Harkenrider*, the Court of Appeals held:

> To determine whether the legislature's 2022 enactment of redistricting legislation comports with the Constitution, **our starting point** must be the text thereof. In construing the language of the Constitution as in construing the language of a statute, we look for **the intention of the People** and give to the language used its ordinary meaning."

State argues that PepsiCo is liable for public nuisance due to its contribution to widespread plastic pollution in the Buffalo River, as such pollution has interfered with citizens' rights under the Green Amendment. It would be an absurd result to conclude that a party may assert a claim under the Green Amendment via the tort of public nuisance but cannot apply for a declaratory judgment of the same environmental right.

[Emphasis added] (*citing White v. Cuomo*, 38 N.Y.3d at 217-19; *Burton v. New York State Dept. of Taxation & Finance*, 25 N.Y.3d 732, 739 (2015); *Matter of Carey v. Morton*, 297 N.Y. 361, 366 (1948). *See also State ex rel. Kaino v. Oregon Comm'n on Jud. Fitness & Disability*, 335 Or. 633, 637 (Or. Sup. Ct. 2003) ("When interpreting an initiated or referred constitutional amendment, this court seeks **the intent of the voters** by first considering the text and context."). WMNY purports to cite *King v. Cuomo* for the premise: "Interpreting a provision of the New York State Constitution entails a search for 'the intention of the framers' who drafted it." WMNY Br. at 12. However, WMNY has selectively quoted this case. The full text of that statement is as follows:

> When language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers **as indicated by the language employed and approved by the People.**

King v. Cuomo, 81 N.Y.2d 247 (1993) (internal quotations omitted) (*citing Settle v. Van Evrea*, 49 N.Y. 280, 281 (1872); *People v Rathbone*, 145 N.Y. 434, 438 (1895). As has been the case throughout this litigation, WMNY has attempted to remove the will of the voters from analysis of the Green Amendment.

As stated above, the Court's guidepost in interpreting Constitutional amendments is to do so liberally in favor of the citizen. *Sawyer*, 6 A.D.2d at 553. Were the Court to render the Green Amendment nothing more than a legally unenforceable "laudable constitutional commitment" based on individual legislators' comments which were not

available in the voting booth, it would disenfranchise every voter who thought it appropriate to add the right to clean air and a healthful environment to the New York State Bill of Rights.

Instead, we look to the language of the Green Amendment itself, which is concise and clear. *See Makinen v. City of New York*, 30 N.Y.3d 81, 85 (2017) ("Inasmuch as '[t]he text of a statute is the clearest indicator of such legislative intent,' where the disputed language is 'unambiguous,' we are bound 'to give effect to its plain meaning' … Moreover, '[w]here[, as here,] the legislative language is clear, [we have] no occasion [to] examin[e] . . . extrinsic evidence to discover legislative intent.'") [citation omitted]; *Burton*, 25 N.Y.3d at 739 ("In construing the language of the Constitution, as in construing the language of a statute, the courts ... give to the language used its ordinary meaning." [citations omitted]). *See also Tishman v. Sprague*, 293 N.Y. 42, 50 (1944) (Courts have no right, "by construction, to vary the meaning made clear by the exact language used."). The Green Amendment's language is a demand by New York citizens that their fundamental right to clean air, clean water, and a healthful environment be protected.

This Court should construe the language of the Green Amendment to be consistent with the meaning which the words would convey to an intelligent, careful voter. The People ratified this Amendment, and this Court should interpret the language in a manner consistent with what the voters understood. Here, citizens who are breathing unclean air,

containing gasses emanating miles beyond the boundaries of a landfill, thought, when they overwhelmingly adopted the Green Amendment and placed it in the Bill of Rights, that they would be able to seek redress from the courts to vindicate their right to clean air.

Thus, the Court should rely on the Dictionary for "common English" definitions of terms used in the Green Amendment like "clean" and "healthful." *See Lighthouse Pointe Property Associates LLC v. NYSDEC*, 14 N.Y.3d 161, 176-77 (2010). "Clean" means "free from dirt or pollution," "free from contamination or disease," "free or relatively free from radioactivity," or "free from any dirty marks, pollution, bacteria, etc.,"[4] while "healthful" is defined to mean "beneficial to health of body or mind" or "helping to produce good health."[5] Similarly, the lack of precise constitutional or statutory definitions has never been a bar, based on vagueness, to enforcing other rights in the Bill of Rights like freedom of speech, religion or the press, or guarantees of due process, equal protection or just compensation, which have instead been interpreted through caselaw.

Questions that arise in particular cases regarding the meaning and application of the terms used in the Bill of Rights "can be competently handled by our courts until such time as the Legislature, pursuant to its constitutional permission, assumes to act." *Carroll*,

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[4] *Clean,* Merriam-Webster Dictionary, (2022) https://www.merriam-webster.com/dictionary/clean; *Clean,* Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/clean (2022).

[5] *Healthful,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/healthful (2022) and *Healthful,* Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/healthful (2022).

3 N.Y.2d at 692. In fact, environmental law is filled with cases where "how clean is clean" is debated by lawyers and courts despite numerous statutory and regulatory standards. *See e.g., Lighthouse Pointe Property Associates LLC v. NYSDEC,* 14 N.Y.3d 161, 170-73 (2010) (whether site was sufficiently contaminated to qualify as a "brownfield site"); *State of Ohio v. U.S.E.P.A.*, 997 F.2d 1520 (D.C. Cir. 1993) (validity of regulatory definition of "applicable" or "relevant and appropriate" environmental standards). Whether the odors and other emissions at issue constitute an infringement of Members' right to clean air and a healthful environment is a matter for trial and cannot be determined on a motion to dismiss.

In any event, "[t]he fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing." *Carroll*, 3 N.Y.2d at 692. While the Environmental Conservation Law and NYSDEC regulations already provide various standards and requirements, clearly the voters wanted something more. But they certainly did not expect the Green Amendment, which in part *restrains* the Legislature, to be held hostage waiting for further action *by* the Legislature. Rather, the Green Amendment creates a new paradigm for environmental rights in New York.

The language in the Green Amendment is clear and was fully understood by the New York voters who adopted it based on the plain meaning of commonly understood words. The Landfill infringes on FAFE's right to "clean" air and a "healthful" environment when it emits noxious odors and GHGs far beyond its boundaries into Plaintiff's Members' yards and homes, and into the atmosphere.

C. If the Court Does Consider Legislative History, it Supports a Finding that the Green Amendment is Self-Executing.

In the alternative, even if the Court determines that the text as presented to the voters is insufficient to determine the meaning of the amendment the voters approved, the legislative history also supports the finding that the Green Amendment is self-executing and provides a right of action. If ambiguous terms are used, courts can look to the legislative history to reveal the meaning. *Campaign for Fiscal Equity Inc. et al. v. State of New York*, 86 N.Y.2d 307 (1995). Here, the words used in the Green Amendment were carefully chosen and are not merely aspirational. The Legislature took extreme caution and chose the words "clean" and "healthful" on purpose. *See* R. 731 (statement by Senator Stec) ("Words matter. We need to be very cautious and careful about our language. We are passing a law, we are not passing goals."). Further evidence the Legislature knew what was at stake when crafting the Green Amendment is illustrated by Assemblymember Gottfried's comments:

> And our rights in America, **should not be seen as something that is graciously enforced on our behalf by the Legislature**… a bad smell might be indicative of something really serious. And a bad smell coming from your neighbor's property might be something that is so severe that it is essentially depriving you of the use of your property, in which case one of the reasons why we've had courts for the last, I don't know, thousand or so years of Anglo-Saxon American history is to protect us in circumstances like that. That's among the reasons why we have courts to protect our rights, and it's also why occasionally we need to take action to add to the bundle of rights that we, as New Yorkers, are entitled to. [Emphasis added] R. 480-81.

WMNY points to the comments of Steve Englebright in support of its argument that there is no private right of action. However, Mr. Englebright was careful to point out that he is not a lawyer, and that his comments should not be taken as legal analysis. When directly questioned about the right for individuals to bring a lawsuit if they felt their rights were violated, Mr. Englebright remarked, "Just like I am a geologist and not a lawyer, I will leave that for the lawyers to determine." R. 456. He made this qualifying comment multiple times. R. 500.

Instead, if the legislative history should even be considered, this Court should examine Assemblymember Englebright's statements on the intent and spirit of the Green Amendment, which was intended by the voters to be self-executing. Assemblymember Englebright's comments consistently advocated for the empowerment of the People, for the environment to be elevated to a fundamental status, and to ensure the health and well-being of the People will not be compromised due to governmental inaction or negligence. R. 447, 509, 608.

Therefore, complaints about violations of the Green Amendment are not bound by formerly existing avenues of legal redress under environmental and common law, but rather the heightened constitutional guarantees of clean air, clean water, and a healthy environment are enforceable by the courts. "Implicit in this reasoning is the premise that the Constitution is a source of positive law, not merely a set of limitations on government." *Brown*, 89 N.Y.2d at 187. In *Brown*, the Court of Appeals held that, "[i]n New York, constitutional provisions are presumptively self-executing." *Id.* at 186. It went on to apply *Bivens* to determine that a private right of action was available to enforce Due Process and Equal Protection rights guaranteed by the New York Bill of Rights. *Id.* at 188.

The legislative history of the Green Amendment is replete with additional statements that support a finding of a right of action. For instance:

Language	**Source**
"New Yorkers will finally have the right to take legal action for a clean environment, because it will be in the State Constitution."	R. 733 (Senator Jackson)
"This bill sets the expectation for all citizens, corporations, government agencies, that the environment should be safe…The expectation and trust that everyone is held accountable, that the air is safe and clean, and that you should expect that the air that you're breathing will not trigger asthma, COPD or anything else."	R. 481 (Assemb. Forrest)
"Of course everyone is for clean air and clean water, but for some, laws are only symbolic of our aspirations. I disagree. I favor enforcement of the law. Laws are meant to be real and really accomplish things, not just to be avoided every time someone conjures up a doomsday scenario."	R. 491 (Assemb. Steck)

"…this would give a Constitutional right to every individual to bring a private right of action against their local government or against the MTA or against NYSERDA or against their city claiming that whatever the city is doing or the MTA is doing or the City of New York is doing or any local government is doing or any local business or industry is violating their Constitutional right."	R. 443 (Assemb. Goodell)
"This legislation [the Green Amendment] would give all of the neighbors [to windmill farms] the right to bring a private lawsuit claiming that their constitutional rights to a clean and healthy environment are being adversely impacted."	R. 670 (Assemb. Goodell)
"This will certainly create a right of private action for individuals to bring – file for lawsuits as an individual person from a Constitutional perspective."	R. 457 (Assemb. Palmesano)
"This [Green Amendment] would no longer allow us to give any safe harbor, no safe harbor for any employer, no safe harbor for any manufacturer."	R. 669 (Assemb. Goodell)
"The reality is that we know that our environment is slowly deteriorating and the issues of climate change have serious impact on all of us. Issues of clean water, air is such a fundamental right to have them folded in our Constitution will really take us forward."	R. 671 (Assemb. Epstein)
"I am proud that one of my first votes as Senator is to codify these basic rights into our State Constitution."	R. 736 (Senator Hinchey)
"The air, water and a healthful environment are as fundamental to us as speech, religion, assembly and other basic rights."	R. 444 (Assemb. Cahill)
"We should be held accountable. We should be accountable to everyone in the State for providing this basic human right"	R. 476 (Assemb. Burdick)
"[T]his Constitutional Amendment which will go before the public will be something that will create a framework in the Constitution and that the vagaries of lawmaking will not undermine"	R. 483 (Assemb. Glick)

"[P]eople need to know and be assured that we, in the Legislature, are not going to be conceited to think that only we should manage the environment, but that, in fact, citizens have a participatory expectation and right."	R. 672 (Assemb. Englebright)
"It is intended to assure our citizens that they will not be betrayed circumstantially by environmental degradation, and that the health and well-being of they and their families will not be compromised due to governmental inaction or negligence that may otherwise damage our air, land or water."	R. 447 (Assemb. Englebright)
"[O]dor from a landfill or from any activity that is authorized by – by government, really causing great discomfort, that's a warning sign. That's why we have olfactory capability, to warn us when we are in harm's way from having biological harm to the tissues and functions of our organs…in terms of expectation to the extent that State agencies may help oversee these landfills or – or dumps, there – they would be put on a higher level, I would hope, a higher level of performance expectation."	R. 465-66 (Assemb. Englebright)
When Assemblymember Mankeltow asked whether the Green Amendment would apply to the High Acres Landfill (the Landfill at issue in this case), after stating "the smell's been an issue. The landfill smell is an issue…It never seems to stop," Assemblymember Englebright responded, "yes, but for many of our citizens, they would look at the landfill such as the one you described which is harming people in the community and they would say, We have a right and our government is not living up to its obligation."	R. 663-64 (Assemb. Mankeltow); R. 664 (Assemb. Englebright)

If the Court does review the Legislative record, there is ample evidence establishing an intent that the Green Amendment be self-executing and provide for a private right of action.

D. Court Interpretations of Other States' Green Amendments Do Not Support a Finding that the New York Green Amendment is Not Self-Executing.

WMNY also tries to distinguish other states' Green Amendments in support of its argument that New York's Green Amendment is a legal nullity, without pointing to a single one that was held not self-executing. Initially, the Court should reject any effort to invoke the environmental standards of other states, as New York has announced that it intends to be a "leader" in environmental protection, as exemplified by the adoption of the recent Climate Leadership and Community Protection Act, by which New York assumed a "global leadership role on greenhouse gas mitigation and climate change adaptation." CLCPA § 1(12). Accordingly, it would be inapposite to nullify New York's Green Amendment by reference to constitutional amendments from other states largely enacted in the 1970s.

But in any event, reference to the non-New York Green Amendments does not support a finding that New York's Green Amendment is not self-executing. Most notably, the Court should look at the Pennsylvania Green Amendment, which states:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. Art. I § 27.

Review of this constitutional provision reveals no detailed environmental standards or cleanup objectives. Additionally, absent from this provision is any statement explicitly noting a private right of action. Yet this unambiguous constitutional mandate has been determined by the courts of Pennsylvania to be self-executing. WMNY attempts to diminish the Pennsylvania Green Amendment by reference to *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), which was expressly rejected by *Pennsylvania Env't Def. Found. v. Commonwealth*, 640 Pa. 55, 65 (Pa. 2017). There, the Pennsylvania Supreme Court found that the Pennsylvania Environmental Defense Foundation could maintain a private action to enforce Pennsylvania's Green Amendment, opposing oil-and-gas lease sales provided for in the budget. *Id* at 79, 98.[6]

A similar point can be made about the Montana Green Amendment. In a case which post-dates all of the Montana authority provided by WMNY, a private right of action has been found under the constitutional provision. *Cape-France Enterprises v. Est. of Peed*, 305 Mont. 513, 519 (Mont. 2001).

[6] WMNY also attempts to distinguish the Pennsylvania Green Amendment by pointing out that it made the state a "trustee of Pennsylvania's natural resources." WMNY Br. at 66. However, this is no distinction at all, as New York was already a trustee of the State's natural resources under the State's public trust doctrine. *Capruso v. Village of Kings Point*, 78 A.D.3d 877 (2d Dep't 2010).

Reference to the Massachusetts Green Amendment is also illuminating. This provision reads:

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights.

Mass. Const., Part the First, Art. XCVII. WMNY is careful to point out that the New York Legislature clearly had the text of these earlier Green Amendments at its disposal when drafting ours. Why then, in a state which utilizes a presumption that constitutional provisions are self-executing (*Carroll*, 3 N.Y.2d at 690-691), would the Legislature have decided to omit any clause stating that the legislature "shall have the power to enact legislation necessary or expedient to protect such rights?" Its omission can only be viewed as intentional.

Finally, of the seven states to pass Green Amendments, only New York, Pennsylvania, and Montana have placed those amendments within their State's Bill of Rights. This cannot be considered coincidental, since each of those three states have found a private right of action. Accordingly, Plaintiffs request that the Court recognize New York's leadership role in environmental protection, hold New York to the highest environmental standard, and acknowledge the clear intent that the New York Green Amendment be self-executing.

E. Alternatively, the Court Should Find An Implied Private Right of Action.

In the event this Court finds the plain language and legislative history of the Green Amendment fail to show sufficient evidence to establish a cause of action, this Court should imply a right of action. The right-remedy principle combined with existing precedent dictates that constitutional violations are worthy of protection upon their own terms and not be reliant upon common law avenues of redress.

This Court should follow the recent example set by the Southern District when it adopted a liberal interpretation and denied a motion to dismiss a private claim for violation of the guarantee to free exercise of religion under New York State Constitution Article I § 3. *See Clark v. City of New York,* 560 F.Supp.3d 732, 743 (S.D.N.Y. 2021) (*citing Martinez v. City of Schenectady*, 97 N.Y.2d 78 (2001)). Plaintiff, similarly to the Plaintiffs in *Clark,* asserts a constitutional violation where existence of a private right of action is a novel question of law. *Clark* held that courts should imply a right of action under the New York Constitution when it is "necessary to effectuate the purpose of the state constitutional protection the plaintiff invokes" and is "appropriate to ensure the full realization of the Plaintiff's rights." *Id* at 743.

Here, to effectuate the purposes of the Green Amendment, citizens must be entitled to sue to protect their Constitutional rights to clean air, water, and a healthful environment. Without the ability to seek redress, the new Constitutional rights would never be realized and would be meaningless. For years, Plaintiff's Members have been

blighted by unclean air and an unhealthy environment. Over 26,000 complaints about the Landfill have been documented on the FAFE App since late 2017. R. 44. Existing state laws, regulations, and policies have proven ineffective at ensuring clean air and a healthful environment for Plaintiff's Members, and thus, the Green Amendment is necessary to protect their newly recognized constitutional right.

POINT TWO

THE COURT BELOW CORRECTLY DETERMINED THAT PLAINTIFF STATED A CLAIM AGAINST THE STATE DEFENDANTS

A. The State Does Not Possess Discretion To Violate The Constitution.

The State did not join WMNY in arguing that the Green Amendment is not self-executing. Rather, the crux of the State's argument in support of its Appeal is the contention that the Green Amendment does not provide a basis for a court to compel State agencies to take enforcement action to curtail State-permitted conduct that deprives New Yorkers of clean air and a healthful environment. This appeal to the deference due in a typical Article 78 proceeding is unavailing here. As the court below succinctly put it, "the State lacks the discretion to violate the Constitution." R. 26. *See D.J.C.V., v. USA*, 605 F.Supp.3d 571 (S.D.N.Y. 2022) ("government officials lack discretion to violate the Constitution") [citations omitted].

Liability for a constitutional violation by a state agency may be premised not only on action but on a refusal to act. *See Arthur v. Nyquist*, 573 F.2d 134, 141 (2d Cir. 1978). *See also Duchesne v. Sugarman,* 566 F.2d 817, 832 (2d Cir.1977) ("[w]here conduct of the supervisory authority is directly related to the denial of a constitutional right it is not to be distinguished, as a matter of causation, upon whether it was action or inaction").

Once a constitutional violation occurs, a state agency whose actions have contributed to a violation have the duty to take necessary steps to eliminate the violation, and each instance of failure or refusal to fulfill this affirmative duty continues the violation. *See U.S. v. City of Yonkers*, 96 F.3d 600, 622 (2d Cir. 1996); *see also Connolly v. McCall,* 254 F.3d 36, 41 (2d Cir. 2001) (applying continuing wrong doctrine to constitutional violations); *Grossman v. Rankin,* 43 N.Y.2d 493, 506 (1977) (failure to follow constitutional mandate in classifying civil service positions is continuing wrong); *New York Ass'n of Convenience Stores v. Urbach,* 169 Misc. 2d 906, 914-15 (Sup. Ct. Albany Co. 1996) (failing to utilize enforcement authority to the detriment of another was a constitutional violation). NYSDEC has been delegated the responsibility to manage solid waste in the State, "[i]n the interest of public health, safety and welfare." Environmental Conservation Law § 27-0106. When carrying out that charge, it must not infringe upon citizens' rights under the Green Amendment.

The Court of Appeals discussed the position that the State has taken here in *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 131-32 (1965). There, the Court assessed a claim that State officials were expending public funds on large public works projects in which Black workers were denied employment by the discriminatory conduct of the involved labor unions in contravention of the Equal Protection clauses of the Federal and State Constitutions. *Gaynor*, 15 N.Y.2d at 120. The Court observed that the policy of the courts not to review the exercise of discretion by public officials in the enforcement of State statutes only applied "in the absence of a clear violation of some constitutional mandate." In denying the plaintiffs' claims, the Court specifically noted:

> No basis is here shown for charging the State or City with **being a party to** the denial to the plaintiffs of the equal protection of the laws in violation of Federal or State constitutional guarantees. Neither the State nor the City has here either **affirmatively sanctioned** any discriminatory practices by statute or announced policy or, indeed, even **knowingly acquiesced** therein. [Emphasis added].

This holding stands in clear contrast to the circumstances raised in this lawsuit, where WMNY is only able to operate the Landfill which deprives Plaintiff's Members of clean air and a healthful environment pursuant to NYSDEC-issued permits. The State has unequivocally affirmatively sanctioned and knowingly acquiesced to the continued operation of the Landfill in a manner which deprives individuals of their Green Amendment rights. Without those permits, the Landfill could not operate.

B. The State's Reference to Alternative Legal Mechanisms is Disingenuous.

The State suggests that Plaintiff possesses other legal mechanisms by which they could raise their environmental objections to the Landfill.[7] First, the State argues that there are existing environmental standards in place in New York to govern the operation of the Landfill and only they can determine if the Landfill is or is not in compliance. However, this does not mean that a party may not maintain an action to force compliance with the Green Amendment when the standards are not being enforced[8] or are insufficient to ensure that New Yorkers realize their right to clean air and a healthful environment. If anything, those standards bolster that Plaintiff has a claim here. If the State has enacted environmental standards but declines to enforce them, or they are insufficient, how can the State claim that an affected individual has not experienced a violation of his or her constitutional rights?

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[7] While the State has abandoned its claim that this action should be converted to an Article 78 proceeding, State Br. at 10, n. 2, WMNY persists in this argument. However, a declaration of constitutional rights is most appropriate in a declaratory judgement action, not a CPLR Article 78 proceeding. *See Bunis v. Conway*, 17 A.D.2d 207, 208 (4th Dep't 1962) ("It is the settled law that an action for a declaratory judgment will lie 'where a constitutional question is involved'"); *Parry v. County of Onondaga*, 51 A.D.3d 1385, 1387 (4th Dep't 2008); *Levenson v. Lippman*, 4 N.Y.3d 280, 287 (2005). Because of the summary nature of an Article 78 proceeding, '[i]t is ill fit as a vehicle for constitutional analysis.'" *See Skelos v. Paterson*, 25 Misc. 3d 347, 354 (Sup. Ct. Nassau Co. 2009), *aff'd*, 65 A.D.3d 339 (2d Dep't 2009), *rev'd on other grounds*, 13 N.Y.3d 141 (2009) [citations omitted]. Furthermore, no permit decision is being challenged. Thus, the court below correctly determined that an Article 78 proceeding was not proper. R. 24.

[8] According to existing regulations at 6 N.Y.C.R.R. § 360.19(i), odors from a landfill must be effectively controlled so that they do not constitute a nuisance.

Frustratingly, the State claims the following: "FAFE may still participate in DEC's reviews of Waste Management's permit renewals, seek judicial review of any permits ultimately issued, petition DEC for changes to those permits, and seek judicial review of DEC's denial of any such petitions." State Br. at 18. The State admits that WMNY's solid waste permit expired on July 8, 2023, and its air permit expired in 2021. State Br. at 9-10. It has allowed WMNY to proceed under its expired permit for years under SAPA § 401(2). The State has repeatedly extended and suspended the deadline to decide WMNY's renewal application, while Plaintiff's members continue to breathe unclean air.

A permit renewal process does not afford Plaintiff the right to active participation in a future permitting process, which the State has failed to commence now for almost three years. The failure to act on the permit renewals alone should be considered a violation of Plaintiff's Green Amendment rights.

POINT THREE

PLAINTIFF STATED A CLAIM AGAINST WMNY

Even though the court below correctly allowed Plaintiff's Green Amendment claim to proceed against the State, it erred when it dismissed Plaintiff's claim against WMNY. R. 22-23.[9] Plaintiff stated a claim under the Green Amendment that WMNY's actions are so entwined with governmental policies or so impregnated with a governmental character that its actions can be regarded as governmental action.

The question is whether there is "significant government participation in private conduct that limits" the constitutional rights at issue. *SHAD All.*, 66 N.Y.2d at 508. Several factors must be considered:

> State action is in fact an elusive principle, one which cannot be easily discerned by resort to ritualistic incantations or precise formalisms. Instead, a number of factors must be considered in determining whether a State is significantly involved in statutorily authorized private conduct. These factors include: the source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person.

[9] Since WMNY prevailed on this issue in the Court below, its appeal should be dismissed, and its briefing on this issue in its opening Brief struck. Rather, Plaintiff is properly cross-appealing on this issue, which it lost in the court below.

Sharrock, 45 N.Y.2d at 158; *see also SHAD All.*, 66 N.Y.2d at 505; *Sybalski v. Indep. Group Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008); *Kaplan v. County of Orange*, 528 F. Supp. 3d 141, 153 (S.D.N.Y. 2021). While "satisfaction of one of these criteria may not necessarily be determinative to a finding of State action," *Sharrock*, 45 N.Y.2d at 158, as explained below, in the case at bar all of the criteria are satisfied. The "ultimate issue" in this analysis is whether the private entity's actions are "fairly attributable" to the State. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

This doctrine has been utilized by the courts since long before the passage of the Green Amendment. Though the court below recited that Plaintiff was raising this doctrine in support of its claim against WMNY, its analysis of WMNY's Motion to Dismiss did not address it. Rather, the court below simply analyzed the claim against WMNY under the lens of whether the Green Amendment provides for actions against private parties directly. Plaintiff did not claim that it did.

While there is no need to satisfy all of the criteria set forth in *Sharrock*, the allegations of the Complaint show that the WMNY's operation of the Landfill should be considered state action:

1. *"Source of authority for the private action."* The source of authority for operation of the Landfill is from the State, since WMNY can only operate the Landfill because it has been authorized by permits from NYSDEC.

2. *"Whether the State is so entwined with the regulation of the private conduct as to constitute State activity."* The Landfill is highly controlled by NYSDEC, and must comply with State solid waste laws, regulations and policies. Its actions are so entwined with the State that it is often difficult to discern who controls the operations and is truly responsible for the management of the Landfill.

3. "*Whether there is meaningful State participation in the activity."* Not only does NYSDEC highly regulate and inspect the Landfill, but it actually has a full-time on-site monitor. R. 61. NYC, a political subdivision of the State, has contracted with WMNY to manage its garbage, which is about 90% of the Landfill's intake. Clearly, there is meaningful government participation in the Landfill's operation.

4. *"Whether there has been a delegation of what has traditionally been a State function to a private person."* Historically and legally, solid waste management and operation of landfills has been a governmental function, as documented in NYSDEC's new 2023 Solid Waste Management Plan ("SWMP").[10] *Nehrbas v. Inc. Vill. of Lloyd Harbor*, 2 N.Y.2d 190, 195 (1957); *Little Joseph Realty, Inc. v. Babylon*, 41 N.Y.2d 738, 742 (1977). However, this function has been delegated to a few private companies like WMNY, which manages solid waste pursuant to permits issued by NYSDEC, and under contract with NYC. R. 13.

[10] https://dec.ny.gov/sites/default/files/2023-12/finalsswmp2023.pdf.

The SWMP notes that there were formerly 1,900 MSW landfills, most municipally owned. But their number has been reduced to only 25, of which 82% of the working MSW capacity in 2018 was privately owned or operated. SWMP at 8, 18. The State has allowed only a few private companies to take over this significant formerly public function to dispose of New York's waste safely and fairly.

Unfortunately, NYSDEC, and all New Yorkers, are now at the mercy of these few privately owned landfill operators, because without them, there is no place for the mounting garbage to go. While NYSDEC admits in its new SWMP at 35 that "[c]ommunities that have been disproportionately impacted must be supported and able to meaningfully participate in the decision-making process about waste and sustainable materials management that will help communities thrive," this lawsuit is a perfect example of how the State is *not* implementing this policy and is doing little to help this community from being impacted by the Landfill.

Thus, the Green Amendment must apply where private entities are acting jointly in a symbiotic relationship with government to violate the Constitution and to cause environmental harm by emitting, over a multi-year period, noxious gasses miles beyond the perimeter of their property. This matter illustrates *exactly* why the Constitution must apply to conduct of private parties like that of WMNY, whose operations are inextricably intertwined with governmental functions, because the only way for the State to comply with the Green Amendment is to regulate WMNY.

POINT FOUR

PLAINTIFF STATED A CLAIM AGAINST NYC

A. FAFE's Allegations Also Rest on Conduct by NYC.

NYC is violating the Green Amendment by arranging for disposal of its solid waste in the Landfill. It cannot escape responsibility by loading its waste on a train and forgetting about it. Liability attaches to waste generators. *See e.g. Andres v. Town of Wheatfield*, 2020 WL 7764833, at *9 (W.D.N.Y. 2020) (at pleading stage, court did not dismiss case alleging strict liability of generator of waste when waste was deposited on another's property); *City of New York v. Exxon Corp.*, 766 F. Supp. 177 (S.D.N.Y. 1991) (generator liability attaches pursuant to CERCLA).

Rather, NYC is well aware of the Odors and Fugitive Emissions, but it continues to deliberately send 90% of the waste that is causing those offensive conditions and has failed to develop adequate recycling programs for its own waste. One who contributes to a constitutional violation is still liable for the violation, even if they were not the direct cause. *See Monell v. Dept. of Soc. Services of City of New York,* 436 U.S. 658, 694 (1978) ("when execution of a government's policy or custom … inflicts the injury that the government as an entity is responsible" for, a constitutional violation can arise). *See also Hussain v. City of New York*, 146 A.D.3d 430, 430 (1st Dep't 2017). If a governmental body's policy is causing a constitutional violation, liability attaches. *Id.*

B. Plaintiff's Allegations Also Rest on Duties Embodied in the NYC Charter.

NYC attempted to confuse the issues in the court below by arguing that NYC's duty to act arises solely from the Contracts NYC has with WMNY. However, Plaintiff's claims against NYC also relied on the City's Charter, which clearly sets forth NYC's responsibility for the proper management of its solid waste. The court below held that "New York City has no duty to… police WMNY's compliance with its permits." R. 23. This is not the case. NYC's Charter provides a nondiscretionary duty.

The Charter describes NYC's "powers and duties" as pertains to sanitation as having "charge and control of and be[ing] responsible for all those functions and operations of the city relating to … the disposal of waste," which includes the "regulation of the use of … landfills … necessary for or useful for performing the functions and exercising the powers and duties enumerated in this section." *See* R. 61; NYC Charter Chapter 31.[11] The Charter further states that NYC will regulate:

the kind of ashes, garbage, refuse, rubbish or other material or substance that will be collected by the city, from whom it will be taken, the manner in which it shall be arranged or sorted, the time when it will be collected and the place at which it shall be deposited for collection." *Id*.

[11] https://nyccharter.readthedocs.io/c31/.

A city's charter confers on it a duty to act. *People v. Corp. of Albany*, 11 Wend. 539, 542 (Sup. Ct. of Jud. of N.Y. 1834). A charter contains nondiscretionary duties when it contains language like "shall" and otherwise "unequivocal[y] and [] clearly directs the" municipality to take some action. *See Marone v. Nassau County*, 39 Misc. 3d 1034, 1045 (Sup. Ct. Nassau Co. 2013); *Korn v. Gulotta*, 72 N.Y.2d 363, 373 (1988) (charter that contains the word "shall" provided a "mandatory" duty on the government). "Mandamus will lie to compel acts that public officials are duty bound to perform regardless of how they may exercise their discretion in doing so." *Korn*, 72 N.Y.2d at 370. Plaintiff does not allege that NYC's duty arises from its Contracts with WMNY. Rather, NYC's Charter provides for the nondiscretionary duty to properly manage its solid waste. By allowing WMNY to violate Plaintiff's Green Amendment rights, NYC is in violation of its own Charter.

Nevertheless, the contracts *do* illustrate that NYC is empowered to abate this constitutional violation. NYC Garbage currently represents about 90% of all MSW disposed at the Landfill. R. 39. Since NYC began shipping MSW by rail in 2015, NYC Garbage has represented an increasing majority of the total MSW the Landfill accepts. *Id*. NYC is empowered under the Contracts to require WMNY to abate the Odors and Fugitive Emissions, and its failure to do so knowingly causes Members to breathe unclean air which violates its Charter and results in a deprivation of Plaintiff's constitutional rights secured by the Green Amendment.

CONCLUSION

For these reasons, Plaintiff respectfully requests that the Court grant its Appeal, deny the Appeals of the State and WMNY, hold that all Motions to Dismiss should be denied, and grant such other and further relief as the Court determines just and proper.

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Pursuant to the Uniform Practice Rules of the Appellate Division, 22 NYCRR § 1250.8(j), this Brief was prepared on a computer. The font used was Times New Roman, point size 14, with double line spacing. The word count for this Brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized is **10,700**.