

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

In the Matter of the Application of
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.

NOTICE OF MOTION

Index No. CA 23-00179

PLEASE TAKE NOTICE that upon the annexed Affirmation of Rachel Spector, affirmed February 23, 2024, and the accompanying proposed brief amicus curiae, and upon all papers, pleadings and proceedings had herein, PfoaProject, Brookhaven Landfill Action and Remediation Group, South Bronx Unite, Southeast Queens Residents Environmental Justice Coalition, and Newburgh Clean Water Project will move this Court on Monday, March 11, 2024, or as soon thereafter as counsel may be heard, at the M. Dolores Denman Courthouse located at 50 East Avenue, Suite 200, Rochester, NY 14606, for an order granting them leave, pursuant to 22 NYCRR § 1250.4(f), to serve and file a brief of amicus curiae, in support of affirmance.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 2214(b), answering affidavits and notices of cross-motion, if any, must be served upon the undersigned attorney at least seven days prior to the return date of this motion.

Dated: February 23, 2024
New York, New York

EARTHJUSTICE

by: 

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**AFFIRMATION OF
RACHEL SPECTOR,
ESQ. IN SUPPORT OF
MOTION FOR LEAVE
TO FILE A BRIEF
AMICUS CURIAE**

Index No. CA 23-00179

RACHEL SPECTOR, an attorney at law duly admitted before the courts of the State of New York, hereby affirms the following under penalty of perjury:

1. I am a Senior Attorney at the law firm Earthjustice.
2. I am counsel for proposed *amici curiae* PfoaProject, Brookhaven Landfill Action and Remediation Group, South Bronx Unite, Southeast Queens Residents Environmental Justice Coalition, and Newburgh Clean Water Project. I am fully familiar with the facts and circumstances of this matter.
3. Proposed *amici* have an interest in the issues to be resolved in this litigation, as detailed in the proposed *amicus curiae* brief, attached hereto as Exhibit A.
4. This Court has the discretion to accept an *amicus curiae* brief provided that the movant submits an affirmation supporting its interests with a proposed brief attached, the case concerns questions of important public interest, the *amici curiae*'s participation will not

substantially prejudice the rights of the parties, and the *amici curiae*'s participation will invite the court's attention to the law or arguments that might otherwise escape its consideration or otherwise be of special assistance to the court. *See Kruger v. Bloomberg*, 1 Misc.3d 192 (Sup. Ct. New York Cnty. 2003).

5. Proposed *amicus* PfoaProject is a grassroots organization based in Hoosick Falls, New York, that advocates for communities affected by per-and polyflueroalkyl ("PFAS") contamination, advances legislation to limit PFAS exposure, and spreads awareness about the devastating effects of PFAS and Perfluorooctanoic acid ("PFOA") exposure.

6. Proposed *amicus* Brookhaven Landfill Action and Remediation Group is a community organization advocating for environmental justice for the community living in the shadow of the Brookhaven Landfill on Long Island.

7. Proposed *amicus* South Bronx Unite is a community organization dedicated to improving and protecting the environmental future of the Mott Haven and Port Morris neighborhoods of the South Bronx, which suffer from disproportionately high levels of air pollution.

8. Proposed *amicus* Southeast Queens Residents Environmental Justice Coalition is a community organization determined to improve environmental conditions such as waste facilities, illegal dumping, and frequent flooding in Jamaica, Queens.

9. Proposed *amicus* Newburgh Clean Water Project is a grassroots group advocating for clean drinking water in the city of Newburgh, New York, where drinking water has been contaminated with high levels of both PFAS and lead.

10. Proposed *amici* have an interest in this case because they are all working to secure clean air, clean water, and healthful environments for their communities but face many barriers to

realizing those rights under previously existing legal frameworks. Proposed *amici* have a strong interest in ensuring that New York's new Environmental Rights Amendment in Article I, §19 of the State Constitution can be a meaningful tool that provides access to the courts and an opportunity for New Yorkers to realize their right to clean air, clean water, and a healthful environment.

11. This case is of significant public interest because it is the first appellate case regarding New Yorkers' new constitutional right to clean air, clean water, and a healthful environment. The Court's ruling is likely to impact the interpretation of the scope of this new right, and the ability of New Yorkers facing environmental crises like those experienced by proposed *amici* to access the courts to vindicate their fundamental rights.

12. Because the motion is filed well before the court will hear oral arguments and because Defendants-Appellants-Respondents will have a full opportunity to respond to this motion, proposed *amici*'s participation in this proceeding will not prejudice the parties.

13. *Amici*'s proposed brief provides the Court with alternative arguments and theories that the parties to the action herein have not set forth in their respective briefs. The participation of proposed *amici*, with their extensive history of environmental advocacy, will invite the Court's attention to arguments that might otherwise escape its consideration.

14. I have informed Defendant-Appellant-Respondents New York State, New York State Department of Environmental Conservation and Waste Management of New York of the proposed *amici*'s intent to move this Court for leave to file an *amicus curiae* brief. The parties have not indicated that they object or consent to the participation of proposed *amici*.

Wherefore, for the reasons set forth herein and in the papers herewith submitted, proposed *amici curiae* respectfully request that this motion be granted and that the proposed *amicus curiae* brief be accepted by this Court.

Dated: February 23, 2024
New York, New York



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Residents Environmental Justice Coalition,
Newburgh Clean Water Project*

Exhibit A

No. CA 23-00179

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YORK, L.L.C.,

Defendants-Appellants-Respondents,

and

THE CITY OF NEW YORK,

Defendant-Respondent.

***BRIEF OF AMICI CURIAE PFOA PROJECT, BROOKHAVEN LANDFILL
ACTION AND REMEDIATION GROUP, SOUTH BRONX UNITE,
SOUTHEAST QUEENS RESIDENTS ENVIRONMENTAL JUSTICE
COALITION, NEWBURGH CLEAN WATER PROJECT***

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Group, South Bronx Unite, Southeast Queens
Residents Environmental Justice Coalition,
Newburgh Clean Water Project*

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PRELIMINARY STATEMENT

This case involves a recently adopted amendment to the New York Constitution that provides “[e]ach person shall have a right to clean air and water, and a healthful environment.” N.Y. Const. art. I, § 19. State courts construing the many constitutional amendments New Yorkers have adopted over the years have established a long tradition of protecting individual rights through the state constitution and recognizing amendments that were adopted to institute change. This Court similarly should vigilantly protect New Yorkers’ new fundamental right and ensure they can access the courts to vindicate their right to clean air, clean water, and a healthful environment.

INTEREST OF PROPOSED AMICI CURIAE

Amici curiae are organizations representing communities that suffer persistent environmental harms from the failure of existing environmental laws to adequately protect them. *Amici* have an interest in this case because they seek to ensure that the Environmental Rights Amendment (“ERA”) is a meaningful tool that provides access to the courts and an opportunity to realize the right to clean air, clean water, and a healthful environment. The environmental injustices these

communities face are among the reasons New Yorkers overwhelmingly voted to add this right to the state Constitution.¹ Each organization is described below.

PfoaProject

Amicus curiae PfoaProject is a grassroots organization based in Hoosick Falls, NY, that advocates for communities affected by per- and polyfluoroalkyl (“PFAS”) contamination, advances legislation to limit PFAS exposure, and spreads awareness about the devastating effects of exposure to PFAS. Loreen Hackett leads the PfoaProject, and few people can personally understand the devastating effects of PFAS better than Loreen and her Hoosick Falls neighbors. The small village northeast of Albany became “the epicenter of a sprawling public health crisis”² from the public water supply’s contamination with Perfluorooctanoic acid (“PFOA”), one of the 1,200 toxic chemicals under the class of PFAS. This public health crisis and the subsequent outcry from Hoosick Falls residents has been called “the beginning of a long campaign” for a constitutional right to a healthy environment in New York.³ When Loreen founded PfoaProject in June 2016, New

¹ 70% of the electorate voted yes and approved the ERA. Ballotpedia, *New York Proposal 2, Environmental Rights Amendment (2021)*, [https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_\(2021\)](https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_(2021)) (last visited Feb. 21, 2024).

² Jesse McKinley, *After Months of Anger in Hoosick Falls, Hearings on Tainted Water Begin*, The New York Times (Aug. 30, 2016), <https://www.nytimes.com/2016/08/31/nyregion/hoosick-falls-tainted-water-hearings.html>.

³ Joshua Solomon, *Ballot Proposal 2: A ‘Green Amendment’ with Capital Region Roots*, Times Union (Oct. 25, 2021), <https://www.timesunion.com/state/article/Ballot-Proposal-2-A-Green-Amendment-with-16556496.php>.

York had no legal limit on PFAS in water sources. This statutory gap was cited by legislators as a key motivation behind the ERA. Now that each person in New York has the right to clean air and water, and a healthful environment, PfoaProject has an interest in this case to ensure that the right will prevent other communities from experiencing the contamination and neglect theirs did.

Multiple factories operating in Hoosick Falls released PFOA for decades.⁴ Commonly known as “forever chemicals,” PFAS accumulate within the human body and can take thousands of years to break down in the environment.⁵ Copious studies link PFAS exposure to devastating health effects, including multiple forms of cancer,⁶ developmental harm,⁷ and female reproductive disorders.⁸ There is no safe amount of PFAS exposure.⁹ Hoosick Falls residents first detected PFOA in the local water supply in 2014 and brought it to the attention of local, state, and federal

⁴ *Judge approves \$65M Settlement in Polluted Water Lawsuit*, Associated Press (Feb. 5, 2022), <https://apnews.com/article/business-new-york-lawsuits-albany-class-action-lawsuits-ea1bd2b3afac2f2aae74f7307cf0d719>.

⁵ *Protecting Against ‘Forever’ Chemicals*, Harvard T.H. Chan School of Public Health News (Mar. 16, 2023), <https://www.hsph.harvard.edu/news/hsph-in-the-news/protecting-against-forever-chemicals/>.

⁶ Scott M. Bartell and Verónica M. Vieira, *Critical Review on PFOA, Kidney Cancer, and Testicular Cancer*, 71 *J. of the Air & Waste Management Ass’n* 663 (2021).

⁷ Jessie P. Buckley et al., *Associations of Maternal Serum Perfluoroalkyl Substances Concentrations with Early Adolescent Bone Mineral Content and Density: The Health Outcomes and Measures of the Environment (HOME) Study*, 129 *Env’t Health Persp.* 9 (2021).

⁸ Wei Wang et al., *The Effects of Perfluoroalkyl and Polyfluoroalkyl Substances on Female Fertility: A Systematic Review and Meta-Analysis*, 216 *Env’t Rsch.* 114718 (2021).

⁹ PFAS National Primary Drinking Water Regulation Rulemaking, 88 *Fed. Reg.* 18638, 18639 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. pts 141 & 142).

officials. Government officials failed to act quickly to protect residents from exposure. Indeed, New York Department of Health (“DOH”) officials repeatedly told residents that their water was safe to drink, up until EPA issued a “do not drink” order in November 2015. It took another four months for DOH to begin blood testing residents. DOH did not provide residents with any information about PFAS until they mailed test results. Like many town residents, Loreen Hackett and her family discovered shockingly high levels of PFOA in their blood, some at hundreds of times the national average. Members of PfoaProject have spent years expressing their concerns about PFAS exposure at every level of government, armed with alarming blood test results, a plethora of unexplained health issues, and scientific evidence tying PFOA contamination to detrimental health effects. It took five years of advocacy for New York to pass the Emerging Contaminants Bill in 2021—seven years after the discovery of widespread PFOA contamination in the Hoosick Falls water supply—which established New York’s first list of emerging contaminants and requires water utilities to test for these contaminants and notify the public about dangerous levels of the contaminants.¹⁰ If Hoosick Falls residents had a constitutional right to clean air and water, and a healthful environment at the

¹⁰ Pub. Health L. § 1112.

time of the PFOA crisis, it could have provided them with a tool to force the state to protect their water and health.

Brookhaven Landfill Action and Remediation Group

Amicus curiae Brookhaven Landfill Action and Remediation Group (“BLARG”) is an environmental justice community organization advocating for the community of North Bellport, which lies in the shadow of the 270-foot-tall Brookhaven Landfill (“the landfill”). Despite the many laws and regulations governing landfills, the siting and poor management of the landfill—including allegations that a toxic type of incinerator ash was unlawfully dumped there for years—has been called a “textbook case of environmental racism.”¹¹ BLARG has an interest in ensuring that the ERA will secure clean air, water, and a healthful environment for communities like theirs.

In 1974, the Town of Brookhaven chose the predominantly Black, Latinx, and Indigenous neighborhood of North Bellport as the site of the new Brookhaven Landfill despite strong resistance from community members. The landfill receives 720,000 tons of construction and demolition waste and about 350,000 tons of incinerator ash from trash burned at the Covanta incinerator in Hempstead, New

¹¹ Nicholas St. Fleur, *Listen: ‘A Textbook Case of Environmental Racism’: The Battle Over the Brookhaven Landfill*, STAT (May 22, 2023), <https://www.statnews.com/2023/05/22/north-bellport-new-york-brookhaven-landfill-environmental-racism/>.

York.¹² According to a recent Newsday investigation, for eight years Covanta has “struggled” to ensure the safety of the ash delivered to the landfill.¹³ Although there is tight regulation of incinerator ash disposal, the investigation found that DEC had “abdicated its watchdog role” over the facility on multiple occasions, and that neither Covanta nor DEC could be sure that the ash delivered to the Brookhaven Landfill was nonhazardous and compliant with regulations.¹⁴

The operation of the landfill and apparent dumping of toxic ash has harmed air quality, contaminated groundwater, and affected the health and well-being of the North Bellport community.¹⁵ For years residents have complained of odors from the landfill, and the community has a high rate of emergency room visits for asthma, which many believe is from breathing in toxic ash.¹⁶ Local residents have long been concerned about the impact the landfill has on the nearby Frank P. Long Intermediate School, where many students and teachers have been diagnosed with

¹² St. Fleur, *supra* note 11.

¹³ Paul LaRocco, *Insiders Worried Brookhaven Landfill Ash Was Hazardous, Covanta’s Internal Records Show*, Newsday (Oct. 5, 2023), <https://www.newsday.com/long-island/investigations/brookhaven-landfill-covanta-environment-hjd09o4d>.

¹⁴ *Id.*

¹⁵ North Bellport has the lowest life expectancy in Long Island, at 73.2 years. Associated Press, *Will You Live to 73 – or 93? It May Depend on Your Neighborhood*, Newsday (Dec. 18, 2018), <https://projects.newsday.com/long-island/neighborhood-life-expectancy/>.

¹⁶ Linda Leuzzi, *With Town’s Landfill Plan Revoked, They’re Still Pushing for Change*, Long Island Advance (Apr. 15, 2021), <https://www.longislandadvance.net/stories/with-towns-landfill-plan-revoked-theyre-still-pushing-for-change,87839>.

cancer and other illnesses.¹⁷ There is also a groundwater plume containing PFAS levels above the newly-set legal limits just south of the landfill, exposing residents to potential dangers in their drinking water.¹⁸

BLARG members have left no stone unturned in their advocacy to close and remediate the landfill and to reduce and sustainably dispose of Long Island’s garbage. They know from experience that even with environmental laws and regulations in place, a constitutional right to clean air, clean water and a healthful environment is critical to ensure that municipal and state governments act to fully protect the environment and public health—especially in communities of color that are overburdened with environmental hazards.

South Bronx Unite

Amicus curiae South Bronx Unite (“SBU”) is a community organization dedicated to improving and protecting the “social, environmental, and economic future” of the Mott Haven and Port Morris neighborhoods in the South Bronx. The South Bronx hosts a cluster of polluting sources—each individually allowed under the law but together causing disproportionately high levels of air pollution. SBU

¹⁷ *Is a Landfill to Blame for 35 Cases of Cancer at one Long Island School?*, WABC (Feb. 14, 2018), <https://abc7ny.com/brookhaven-landfill-frank-p-long-intermediate-school-belpport/3082900/>.

¹⁸ Robert Brodsky, *Plume of ‘Forever’ Chemicals Found South of Brookhaven Town Landfill*, *DEC Says*, Newsday (Aug. 11, 2023), <https://www.newsday.com/long-island/environment/brookhaven-landfill-plume-chemicals-dec-aoaoq2i3>.

has an interest in this case because the legal framework in existence before adoption of the Environmental Rights Amendment simply has not protected them.

Environmental laws that fail to account for cumulative, community-level impacts have saddled the South Bronx with polluting infrastructure and facilities that are detrimental to human health and an affront to dignity. SBU members, and many others within and beyond the South Bronx, have called this environmental racism.¹⁹ In the 1950s and 60s, with no environmental review, New York built multiple highways directly through the South Bronx's communities of color, sending thousands of trucks through the neighborhood and contributing to "one of the highest death and disease rates from asthma in the country."²⁰ Later, multiple waste transfer stations were built, bringing much of the Bronx and Manhattan's trash into the neighborhood via polluting trucks, and exposing local residents to diesel pollution and foul odors.²¹

¹⁹ See e.g. South Bronx Unite, *Environmental Justice*, <https://www.southbronxunite.org/environmental-justice-2> (last visited Feb. 21, 2024); Angelina Ruiz, *What Does Sustainability Mean in the Bronx?*, Vox (Sep. 8, 2021), <https://www.vox.com/the-goods/22654323/sustainability-bronx-environmental-racism-zero-waste/>; Richard J. Lazarus, *Environmental Racism! That's What It Is*, 2000 U. Ill. L. Rev. 255 (2000).

²⁰ Columbia Center for Children's Health, *Asthma*, Mailman Sch. of Pub. Health, <https://www.publichealth.columbia.edu/research/centers/columbia-center-childrens-environmental-health/our-research/health-effects/asthma> (last visited Feb. 21, 2024).

²¹ Transform Don't Trash NYC Coal. et al., *Clearing the Air*, https://transformdonttrashnyc.org/wp-content/uploads/2016/09/Final-draft-v3_TDT-Air-Qual-Report_Clearing-the-Air-1.pdf/.

In the early 2000s, the State evaded full environmental review when it built several fossil fuel power plants in the neighborhood,²² which continue to spew nitrogen oxides and other toxic pollutants.²³ And when SBU brought a lawsuit challenging the siting of a truck-intensive Fresh Direct warehouse, a court allowed the facility to be built with no scrutiny beyond a 21-year-old environmental impact statement.²⁴

The many polluting facilities in the area collectively contribute to not just heightened air pollution from increased truck traffic, but also noise pollution,²⁵ smells of “hot, rotting garbage,” and disproportionately high neighborhood heat levels.²⁶ Despite years organizing their local community, SBU believes New York’s existing environmental laws have failed to guarantee the community clean air or water, or a healthful environment.

²² See Richard Pérez-Peña, *State Admits Plants Headed to Poor Areas*, N.Y. Times (Mar. 15, 2001), <https://www.nytimes.com/2001/03/15/nyregion/state-admits-plants-headed-to-poor-areas.html>; Audrey Carleton, *Two South Bronx Power Plants Face Elimination*, Hunts Point Express (Dec. 19, 2020), <https://huntspointexpress.com/2020/12/19/days-dwindling-for-two-south-bronx-peaker-plants-as-new-york-power-authority-reaches-agreement-with-environmental-justice-organizations/>.

²³ The PEAK Coalition, *Dirty Energy, Big Money*, 9, 21 (May 2020)

<https://www.cleangroup.org/wp-content/uploads/Dirty-Energy-Big-Money.pdf>.

²⁴ See *South Bronx Unite! v. New York City Industrial Dev. Agency*, 115 A.D.3d 607 (1st Dept. 2014).

²⁵ Jenni A. Shearston et al, *Opening a Large Delivery Service Warehouse in the South Bronx: Impacts on Traffic, Air Pollution, and Noise*, 17 Int’l J. Env’t Rsch. & Pub. Health 3208, 13–15 (2020) (finding that truck traffic increased 10–40% after a Fresh Direct facility began operating in Mott Haven, and noise pollution increased 0.06dBA.).

²⁶ Capa Strategies, *Heat Watch Report: Bronx & Manhattan New York* (2021), <https://osf.io/pvd9f>.

Southeast Queens Residents Environmental Justice Coalition

Southeast Queens Residents Environmental Justice Coalition (“SQREJC”) is a community organization composed of long-time local activists and civic leaders who are determined to improve environmental conditions in their neighborhood of Jamaica, Queens. SQREJC members feel that their predominantly Black and Brown community has been treated as a dumping ground, with numerous waste facilities, illegal dumping, and idling trucks. SQREJC has an interest in this case because it wants the ERA to provide additional protections so that each person in their community can enjoy clean air and water, and a healthful environment.

SQREJC has worked tirelessly to address the impacts of a flawed waste management system on their Jamaica neighborhood. Despite securing the passage of laws to prevent and ameliorate environmental harm from waste management,²⁷ several waste transfer stations in the neighborhood still receive municipal solid waste and construction and demolition waste from across the city, bringing many diesel trucks that idle in the streets. The trucks also stir up dust that exacerbates asthma, while the waste creates odors so strong, they wake residents up in the middle of the night. Furthermore, the neighborhood has long been a site of illegal dumping, due to lax enforcement of anti-dumping laws. The community has unpaved roads that further fill the air with dust and soot, worsening asthma and

²⁷ See e.g. 24 N.Y.C. Admin Code § 24-163; 16 N.Y.C. Admin. Code § 16-498.

respiratory illnesses. It also lacks catch basins, leading to frequent flooding in the area, exposing people to water that may be contaminated with toxic chemicals, sewage, and water-borne pathogens.²⁸

SQREJC advocates to address these environmental injustices. SQREJC members canvass, educate, and energize their community and are active in civic organizations and community boards to combat the governmental neglect they see in their neighborhood. They have used their voice and used the law, but it has not been enough. Their community still copes with an unhealthy environment. SQREJC and their community need the ERA to fulfill its promise and offer more protection than previous environmental laws and regulations that have left them, literally, in the dust.

Newburgh Clean Water Project

Newburgh Clean Water Project (“NCWP”) is a grassroots group of Newburgh, New York, residents who advocate for “long-term access to clean drinking water, comprehensive health resources for those who’ve been affected by PFAS and lead, and the restoration of [their] watershed . . . for future

²⁸ Parham Azimi & Joseph Allen, *Respiratory Health Harms Often Follow Flooding: Taking These Steps Can Help*, Harv. Health Publ’g (Nov. 9, 2022), <https://www.health.harvard.edu/blog/respiratory-health-harms-often-follow-flooding-taking-these-steps-can-help-202211092848>.

generations.”²⁹ NCWP has an interest in this matter because they know firsthand that New York’s environmental laws have failed to protect vulnerable and marginalized communities like theirs from toxic contamination, and want to make sure the ERA will truly guarantee clean air and water and a healthful environment as intended.

Due to decades of environmental injustice in the predominantly Black and Hispanic city of Newburgh, which NCWP members believe is fueled by a lack of sufficient legal protections and government’s failure to act, NCWP has had to fight for clean water on many fronts. The organization was born in response to the water crisis that shook their city after Washington Lake, Newburgh’s primary water source, was found to be contaminated with PFAS. Like Hoosick Falls, there were no laws regulating PFAS in drinking water at the time, and government similarly failed to act quickly. Even with extensive advocacy by NCWP, it took nearly a year before the city was connected to an alternative water supply.

That alternative water supply, however, exposed residents to another drinking water hazard: lead. The slightly-more-acidic water from the new source, the Catskill Aqueduct, accelerated the breakdown of aging lead pipes, prevalent in Newburgh. Lead levels in Newburgh’s water soared above the EPA’s action level

²⁹ Newburgh Clean Water Project, <https://newburghcleanwaterproject.org/> (last visited Feb. 20, 2024).

of 15 parts per billion. Experts agree that there is no safe level of lead exposure.³⁰

One NCWP member described the devastating impact of worrying while pregnant whether you have permanently harmed your baby simply by drinking water.

NCWP members are fighting to have their right to clean water realized. They have an interest in ensuring that the ERA is meaningful and enforceable so that theirs and similar communities will no longer be left unprotected.

DISCUSSION

I. THE CONSTITUTIONAL ENVIRONMENTAL RIGHT IS A FUNDAMENTAL RIGHT THAT CALLS FOR HEIGHTENED VIGILANCE FROM THE COURTS

A. The Environmental Right is a Fundamental Right Under the State Constitution.

The language and framing of the Environmental Right, its placement in the New York Constitution, and Legislator and voter understanding of the Environmental Rights Amendment establish that the right is fundamental. The official justification for the Right, stated within all sponsor memos, explains that the “proposed constitutional amendment would . . . ensure that clean air and water are treated as fundamental rights for New Yorkers.” *See* Assemb. Englebright, Sen.

³⁰ Deidre McPhillips, *EPA Proposes Requirement to Remove Lead Pipes from US Water Systems Within 10 Years*, CNN (Nov. 30, 2023), <https://www.cnn.com/2023/11/30/health/lead-water-pipes-removed-10-years-epa-proposed-rule/index.html>.

Carlucci and Sen. Jackson Sponsor Memos.³¹ Both supporters and non-supporters of the Environmental Right also acknowledged during legislative debates that the right would be a fundamental right if added to the state constitution. *See, e.g.*, Tr. of Assembly Debate on 2017 Assembly B. 6279, Apr. 24, 2017 at 30, 32, 40; Tr. of Assembly Debate on 2018 Assembly B. 6279, Apr. 24, 2018 at 46, 53; Tr. of Assembly Debate on 2019 Assembly B. 2064, Apr. 30, 2019 at 48. Such statements support interpretation of the Environmental Right as fundamental. *See infra* Section II.A; *Hernandez v. State*, 173 A.D.3d 105, 113 (3d Dept. 2019) (concluding state constitutional right to organize and collectively bargain fundamental based on description of right during constitutional convention of 1938, history of right, and tradition in support).

That the Environmental Right is an expressly enumerated right and enshrined in the Bill of Rights to the State Constitution also evinces that the Right is fundamental. *See Hernandez*, 173 A.D.3d at 113–14; *see also Pointer v. Texas*, 380 U.S. 400, 404 (1965) (placement of right in Bill of Rights reflects framers’ belief that right was fundamental); *Montana Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 296 Mont. 207, 225 (1999) (right found in state constitution Declaration of Rights is a fundamental right); *Penn. Env’t. Def. Found. v. Pennsylvania*, 161

³¹ Available at Pace University, *New York’s Environmental Right Repository*, <https://nygreen.pace.edu/legislative-history/> (accessed Feb 21, 2024).

A.3d 911, 931–32 (Pa. 2017) (rights reserved in Article I of state constitution, including environmental rights amendment, are fundamental).

Finally, voters—the people who adopted the Right—likely also believed that the Right, which states that each person “*shall* have” certain environmental rights, N.Y. Const. art. I, § 19 (emphasis added), would be fundamental. Materials available to voters prior to their vote explained that the Environmental Right would be a fundamental right on par with other fundamental rights. For example, a letter to the New York State Legislature from more than 70 environmental groups, shared with the press and on social media, stated that the at-the-time proposed Environmental Right would be an “inalienable and self-executing right of all New Yorkers to clean water, clean air, and a healthful environment . . . as fundamental as a person’s right to free speech and assembly.” Letter from Green Amendments for the Generations et al., to New York State Legislature (Jan. 22, 2021), <https://eany.org/wp-content/uploads/2021/01/Green-Amendment-Organizational-Sign-on-Letter.pdf>. And after hosting two webinar-based legal panels on the proposed Amendment, the New York Water Environment Association (“NYWEA”) reported that Environmental Rights proponents explained that the Right’s placement in the Bill of Rights signifies it as a fundamental right.³² *See*

³² NYWEA, a nonprofit educational organization, compiled a list of questions and answers provided by the two expert panels. NYWEA did not recommend how New Yorkers should vote

also Peter Iwanowicz, *Op-Ed: Should Clean Air and Water Be Added to the New York State Bill of Rights?* Env't Advocates NY (Mar. 21, 2021) (Environmental Right on par with rights of free expression afforded the highest legal protection); *Harkenrider v. Hochul*, 38 N.Y.3d 494, 447 (2022) (it must be presumed that voters understood the “force of the language used,” in a constitutional amendment, focusing on the word “shall”).

B. Heightened Vigilance for Fundamental Rights Requires the Opportunity to Seek Redress in a Court of Law.

For the ERA to fulfill its intended purpose, people must have an opportunity for their claims to be heard on the merits. The ERA’s affirmative language affording “each person” in New York certain rights requires courts to use “particular vigilance . . . in safeguarding” those rights. *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991). Thus, persons who believe their Environmental Rights have been violated must have access to the courts. Curtailing the public’s ability to seek redress for potential violations of a fundamental constitutional right, for example by setting too high a bar for stating a cause of action, is contrary to legal and democratic tradition in New York State. As

on the proposed right. *NYWEA Water-Related Questions and Answers on the Proposed NY Environmental Rights Constitution Amendment*, <https://www.nywea.org/Training%20%20Conferences%20Documents/Other/EnvironmentalRightsResponses1021.pdf> (hereinafter “NYWEA Q&A”).

the Supreme Court explained when denying the State’s motion to dismiss, the rights guaranteed by the ERA “would be meaningless if [people] could not seek redress for violations.” *Fresh Air for the Eastside, Inc. v. State*, 2022 N.Y. Slip Op. 34429 at 10 (Sup. Ct. Monroe Cnty. 2022). Indeed, the Court of Appeals has held “that enforcement of a clear constitutional or statutory mandate is the proper work of the courts.” *Hurrell-Harring v. State*, 15 N.Y.3d 8, 26 (2010). That statement draws on the deeply embedded legal principle that “where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Others have noted that state constitutions are particularly important for ensuring redress of rights, and while “there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court . . . a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, *particularly a claim of deprivation of a constitutional right*, seems to be not only the wrong tool but also a dangerous tool for solving the problem.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 498 (1977) (emphasis added).

New Yorkers voting on the Environmental Rights Amendment also likely believed individuals would be able to seek recourse in the courts. A New York Law Journal article published close to the vote noted, “[r]ather than enduring two

years of cooking and bathing with poisoned water, as Hoosick Falls residents did in 2014–16, individuals could seek judicial intervention to secure their right to clean water.” Nicholas A. Robinson & Maya K. van Rossum, *New York’s November Ballot: A Right to the Environment?*, N.Y. L. J. (Oct. 21, 2021). And NYWEA reported that those opposed to adoption of the Right similarly acknowledged that New Yorkers would be able to vindicate their Environmental Rights through the courts, explaining that, for example, “a case may be brought under the amendment to require municipalities to develop a plan addressing the raw sewage issues more quickly than the currently required planning timeframe.” NYWEA Q&A at 5.

Here, where the amendment passed with 70% of the vote, restricting the ability for New Yorkers to vindicate their newly acquired environmental rights would undermine the will of the voters. Amending the New York Constitution requires a majority vote in both legislative bodies for two consecutive sessions, as well as a majority vote in a referendum of the people of New York. N.Y. Const. art. XIX, § 1. The addition of the Environmental Rights Amendment to the state Constitution reflects the will of the people of New York and their elected representatives, embodying the democratic nature of state constitutions. *See* Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 Duke L. J. 275, 296–97 (2022).

II. THE ENVIRONMENTAL RIGHTS AMENDMENT SHOULD BE INTERPRETED TO ENHANCE GOVERNMENT’S OBLIGATION TO PROTECT THE ENVIRONMENT ABOVE EXISTING STATUTORY REQUIREMENTS.

A. New York Courts Rely on Both an “Interpretive” and a “Non-Interpretive” Analysis when Construing State Constitutional Rights.

New York courts do not apply one “single methodology” when interpreting the meaning and scope of rights under the New York State Constitution; rather, the “proper approach may vary with circumstances.” *See Immuno*, 77 N.Y.2d at 251. Courts start with an “interpretative” analysis, looking at the text, the events that gave rise to, and the purpose of the adoption of the amendment. *Id.* at 250; *Harkenrider*, 38 N.Y.3d at 509, 511 (“We look for the intention of the People and give to the language used its ordinary meaning”; “In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect and it must be presumed that its framers understood the force of the language used and, as well, the people who adopted it.”) (internal quotations omitted); *White v. Cuomo*, 38 N.Y.3d 209, 220 (2022) (explaining courts must look at plain language, relevant precedent, history and purpose of constitutional provision to understand its meaning and scope).

New York courts then engage in a “noninterpretive analysis” that “proceeds from a judicial perception of sound policy, justice and fundamental fairness.” *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303 (1986). That analysis seeks to

“discover, for example, any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.” *Id.*; *see also People v. Scott*, 79 N.Y.2d 474, 489 (1992) (using noninterpretative analysis to conclude state constitution provision regarding search and seizure provides more protection than federal counterpart).

Indeed, focusing on voters’ understanding of a new constitutional amendment and why it was proposed has deep roots in New York jurisprudence. *See, e.g., Kuhn v. Curran*, 294 N.Y. 207, 217 (1945) (“[I]n construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter.”); *see also Carey v. Morton*, 297 N.Y. 361, 366 (1948). As one court explained, “consideration must be given to what the people had in mind when they went to the polls. We must also consider the cause or necessity for its adoption.” *Chamberlin, Inc., v. Andrews*, 159 Misc. 124, 141 (Sup. Ct. Onondaga Cnty. 1936), *aff’d in part, rev’d in part*, 271 N.Y. 1 (1936), *aff’d*, 299 U.S. 515 (1936) (internal citation omitted).

Finally, constitutional provisions setting forth affirmative rights “accord[] greater protection to individual liberties and rights” than provisions that “merely restrain the sovereign power of the State.” *Video*, 68 N.Y.2d at 303.

B. New York Courts Have a Long History of Interpreting State Constitutional Rights to Provide Stronger Protections Than Previously Existing Laws.

New York courts have repeatedly interpreted constitutional amendments as overriding or providing more protection than laws in effect prior to the enactment of the amendments. Courts are particularly inclined to find that a new state constitutional amendment creates additional protections when the amendment is enacted in response to the failures by government or law to protect the public. *See e.g. Hernandez*, 173 A.D.3d at 112; *see also Ass’n for Prot. of Adirondacks v. MacDonald*, 253 N.Y. 234, 238 (1930). For example, in *Hernandez* the Court found that a constitutionally adopted right of employees to organize and collectively bargain overrode a farmworker exclusion in state right-to-organize legislation passed just one year earlier. *Hernandez*, 173 A.D.3d at 112–13. The Court reasoned that, since members of the Constitutional Convention understood the statute excluded certain workers, their decision to use the broad term “employees” without any limitation evinced an intent to cover a broader scope of workers than the statute. *Id.*; *see also Ass’n for Prot. of Adirondacks*, 253 N.Y. at 238 (purpose of provision was “to close all gaps and openings in the law,” and

prevent actions that “had theretofore been permitted by legislation”); *Chamberlin, Inc.*, 159 Misc. at 141 (concluding that amendment’s purpose was to enable stronger legislation than previous statute, which had been struck down as unconstitutional).

And just recently, the Court of Appeals held the state legislature’s process of creating electoral maps violated a redistricting amendment added to the State Constitution because the legislature did “exactly what they would have done had the 2014 constitutional reforms never been passed.” *See Harkenrider*, 38 N.Y.3d at 501. The amendment created an Independent Redistricting Commission, but the Commission could not agree on a new map, and the legislature instead created its own. *Id.* The Court invalidated the legislatively created maps because the process used resembled the one previously used, when the amendment’s purpose was to change that process. *Id.*

C. The Environmental Rights Provision Enhances Government’s Affirmative Obligation to Protect the Environment and Public Health Above and Beyond Previously Existing Protections.

The relevant factors New York courts look to when interpreting constitutional provisions—the text, the events that gave rise to the amendment and its purpose, whether the right is of particular State or local concern, and the legislative and voter intent—all lead to one conclusion: the Environmental Rights

Amendment provides environmental protections to New Yorkers above and beyond what was afforded to them before its adoption.

The State asserts it can continue doing business as usual and asks this Court to cabin the Right to require only that it “ensure that its executive and legislative actions do not infringe on that right.” Defs.’ Br. at 24 (emphasis removed). But such an interpretation is unsound under New York law, ignoring the language of the amendment and the history and purpose of its adoption.

1. The Affirmative Language of the Environmental Rights Amendment Warrants an Expansive Interpretation of Its Scope Beyond Mere Restraint of Government.

The direct language in the Environmental Rights Amendment reflects clear intent: “Each person shall have a right to clean air and water, and a healthful environment.” N.Y. Const. art I, § 19. The language reflects a deliberate choice not to “merely restrain the sovereign power of the State,” *Video*, 68 N.Y.2d at 303, but rather to set forth individual rights “in strong affirmative terms,” *Immuno*, 77 N.Y.2d at 249. That language, together with “New York’s long tradition of interpreting [its] State Constitution to protect individual rights,” commands a strong and robust interpretation of the right beyond merely restraining executive and legislative action. *Video*, 68 N.Y.2d at 303; *See also Hernandez*, 173 A.D.3d at 113–14 (unqualified, expressly enumerated right in Bill of Rights must be afforded the strongest of protections).

The New York Court of Appeals’ approach to interpretation of the State Constitution’s freedom of expression provision is instructive. The Court held that a state provision provides greater protection than its federal counterpart when it contains an affirmative guarantee of liberty rather than only restraining government action. *See Immuno*, 77 N.Y.2d at 249; *see also, O’Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 529 n.3 (1988) (“Article I, § 8 of the Constitution assures, in affirmative terms, the right of our citizens to ‘freely speak, write and publish.’”); *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 159–61 (1978).³³

The deliberate use of affirmative language in the Environmental Rights Amendment must be central to its interpretation. The State’s argument that the Right merely restrains its actions, Defs.’ Br. at 24, ignores the choice the Legislature made, and the voters overwhelmingly confirmed. And the State’s citation to cases distinguishing liability of government actors versus private parties in support of its proposed interpretation, *see id.*, is inapt to the bounds of its responsibility as a government actor.

³³ *See also, Video*, 68 N.Y.2d at 303 (freedom of expression and search and seizure); *People v. Gordon*, 36 N.Y.3d 420, 436 (2021) (search and seizure); *Bellanca v. New York State Liq. Auth.*, 54 N.Y.2d 228 (1981) (freedom of expression); *People v. Hobson*, 39 N.Y.2d 479, 483–84 (1976) (privilege against self- incrimination, the right to the assistance of counsel, and due process of law).

2. The Environmental Right Was Adopted as an Antidote to Statewide and Local Environmental Concerns Insufficiently Addressed by Then-Existing Laws.

Other considerations—the history that led to the adoption of the Environmental Right, the purpose of the Amendment, and what legislators and voters would have understood the Right to mean—support an interpretation that the Right is designed to provide additional protections and fill gaps in the law that have allowed the proliferation of environmental harms such as those Fresh Air for the Eastside and *amici* face today. *See Video*, 68 N.Y.2d at 303. The justification set forth in the legislation and sponsor memos in support describe how the proposed Amendment would be a salve for the concerns motivating its passage:

Recent water contamination and ongoing concerns about air quality have highlighted the importance of clean drinking water and air as well as the need for additional protections. . . . This proposed constitutional amendment would follow [] models [of a few states] and ensure that clean air and water are treated as fundamental rights for New Yorkers and to protect the overall health of the people and the environment.

Assemb. Englebright Sponsor Memo (emphasis added).

a. The Environmental Right Was Adopted to Address Environmental Concerns Specific to New York.

The consideration of the events that gave rise to the adoption of the Amendment and that the right is one of “peculiar State or local concern” weigh in favor of interpretation of the Environmental Right as strongly protective. *See Video*, 68 N.Y.2d at 303. Threats to New York communities’ air, water, and

environment under then-existing laws were matters of particular concern for legislators and New York voters when considering the Amendment. *See Id.*

For example, the Assembly amendment sponsor explained that “events . . . have reminded us to the need for this, in places like Hoosick Falls and Newburgh, Long Island . . . where there have been really horrific insults to the environment and to the communities’ well-being and to the health of individuals.” Tr. of Assembly Debate on 2017 Assembly B. 6279, Apr. 24, 2017, at 30. Other legislators discussed environmental pollution in their districts when debating the Amendment. *See, e.g.*, Tr. of Assembly Debate on 2021 Assembly B. 1368, Feb. 8, 2021 at 76 (chemicals in Southeast Queens water supply); Tr. of Assembly Debate on 2017 Assembly B. 6279, Apr. 24, 2017 at 43 (anticipated air pollution from proposed wood-burning incinerator in East New York), 60 (fumes from airplanes flying into JFK airport).

Public debate also highlighted local environmental concerns across the State. An op-ed highlighted the need for the Amendment to address contaminated drinking water in many New York towns, acid rain in the Adirondacks, and the fact that “6,000 New Yorkers die prematurely each year because of unhealthy levels of air pollution.” Iwanowicz, *supra*; *see also* NYWEA Q&A at 5 (highlighting “asthma alley” in the Bronx due to air pollution); Katrina Fischer Kuh, *Why Do We Need the Green Amendment?*, N.Y. L. J. (Mar. 15, 2021) (failure of laws to set

limits for PFOAS and other emerging contaminants regularly found in New York’s drinking water). *Amici* supported the adoption of the amendment because of similar concerns, described in their statements of interest.

b. Legislators and Voters Understood the Environmental Right Would Provide Additional Protections and Fill Gaps in the Law.

New York legislators and information available to voters conveyed an understanding that the Environmental Rights Amendment was meant to close the gaps in existing legal frameworks. As mentioned above, the explicit “need for additional protections” was set forth in sponsor memos describing the legislation.

“[D]istinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right,” also reflect a similar understanding voters shared that the Environmental Right, when adopted, would provide additional protections to remedy the environmental harms New Yorkers suffer, particularly those in overburdened communities like *amici*. *See Video*, 68 N.Y.2d at 303. For example, NYWEA explained that “[a]ccording to amendment proponents, the Environmental Rights Amendment is needed to fill gaps in the state’s environmental protection rules [because of] the current state of environmental contamination and environmental justice issues.” NYWEA Q&A at 5.

The letter from more than 70 organizations, referenced earlier, explained that the Environmental Right would be:

a powerful and important tool for combating environmental racism and rebalancing the inequities communities of color and low-income communities have faced for decades being disproportionately exposed to and negatively impacted by hazardous pollution and industrial practices. [The Right] will prevent and help course correct situations or conditions in which water becomes too polluted, air too dirty, land too contaminated, and natural landscapes too decimated to support healthy lives, including a healthy economy.

Letter from Green Amendments for the Generations et al., *supra*; *see also* Laura Rabinow and Abigail Guisbond, *New York's Potential Green Amendment – A Primer*, Rockefeller Inst. of Gov. (Oct. 27, 2021).

The widespread sentiment that past environmental crises could have been avoided or redressed had the Right been adopted earlier evinces that the purpose of the amendment was to ensure, going forward, that actors could not do “exactly what they would have done had the . . . constitutional reforms never been passed.” *See Harkenrider*, 38 N.Y.3d at, 501; Kuh, *supra* (“[W]ith a constitutional right to a healthy environment, the citizens of Hoosick Falls might never have been exposed to PFOA, or at least not for such a long time at such high levels.”); NYWEA Q&A at 4 (“Amendment proponents note that the amendment could be used to help prevent the next emerging contaminants from having significant environmental impacts, and use the recent concern over PFAS as an example.”).

Accordingly, while as the State notes it has long “had discretion to determine whether and how to enforce the laws,” Defs.’ Br. at 17,³⁴ there is a new sheriff in town—the Environmental Right. The State cannot claim that this affirmative, fundamental Right newly enshrined in the State Constitution’s Bill of Rights has no bearing on its decisions, and that it must be permitted to do “exactly what [it] would have done had the . . . constitutional reforms never been passed.” *See Harkenrider*, 38 N.Y.3d at 501.³⁵ Decades of precedent and legislative history of the Amendment require the Court to reject the State’s attempt to render the Environmental Right hollow and limit the ability of New Yorkers to vindicate their new constitutional right.

CONCLUSION

In keeping with the will of the people who overwhelmingly voted to adopt the Environmental Right, and pursuant to New York courts’ tradition of protecting affirmative, individual state constitutional rights, the Court should affirm the Supreme Court’s decision below denying the State’s motion to dismiss.

³⁴ But, as even New York State concedes, that discretion has limits when an agency has abdicated its statutory responsibilities. *See* Defs.’ Br. at 22.

³⁵ Waste Management similarly discusses DEC’s enforcement authority and administrative discretion with respect to environmental statutes and regulations, and mistakenly characterizes Fresh Air for the Eastside’s arguments and request for relief as one of mandamus regarding administrative procedure. *See* Def. Waste Management of New York, L.L.C. Br. at 59–68.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR 1250.8(f), I hereby certify that the forgoing brief was prepared on a word processor, using 14-point Times New Roman proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations and this certificate of compliance is 6,615.

Dated: February 23, 2024

/s/ Rachel Spector

Rachel Spector