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The City of New York
Waste Management of New York, L.L.C.

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SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff,

vs.

Index No.: E2022000699

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

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS BY WASTE MANAGEMENT OF NEW YORK, L.L.C.

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PRELIMINARY STATEMENT

Plaintiff Fresh Air for the Eastside, Inc. ("FAFE" or "Plaintiff") submits this Memorandum of Law in opposition to the Motion to Dismiss filed by Defendant Waste Management of New York, L.L.C. ("WMNY"). In this action, FAFE complains, *inter alia*, the constitutional rights of its members (the "Members") to clean air and a healthy environment, guaranteed by Section 19 of Article I of the New York Constitution (the "Green Amendment"), are being violated as a result of the actions or inactions on the part of the Defendants regarding the High Acres Landfill ("the Landfill"). Complaint, Docket No. 2 ("Compl.") ¶ 1. WMNY owns and operates the Landfill, which accepts and disposes of mostly garbage generated by NYC and transported to the Landfill via rail. Compl. ¶¶ 1, 4. Defendants State of New York and the New York State Department of Environmental Conservation (together "the State") regulate the Landfill. *Id.* ¶ 12.

A full Preliminary Statement and recitation of relevant Facts can be found in FAFE's response to the Motion to Dismiss of Defendants State of New York and the New York State Department of Environmental Conservation (together "the State"), and is incorporated herein by reference. *See* Docket No. 65.

As detailed below, WMNY's Motion should be denied in its entirety because the Green Amendment gives FAFE the right to bring this lawsuit; WMNY is liable under the Green Amendment and is a necessary party; FAFE's claims are timely and justiciable; and FAFE did not need or fail to exhaust its administrative remedies.

LEGAL ARGUMENT

LEGAL STANDARD

WMNY seeks to dismiss FAFE's complaint in its entirety pursuant to CPLR § 3211(a)(1), (2) and/or (7). *See* Docket No. 41. 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). Pursuant to CPLR § 3211(a)(1), "dismissal is warranted 'only where the documentary evidence that forms the basis of the defense utterly refutes the ... factual allegations [underlying the counterclaim], and conclusively disposes of the [counterclaim] as a matter of law."' *Shah v. Mitra*, 171 A.D.3d 971, 973 (2d Dep't 2019) [citations omitted]. The documentary evidence must be "unambiguous and of undisputed authenticity." *Fontanetta v. Doe*, 73 A.D.3d 78, 86 (2d Dep't 2010).

When seeking dismissal pursuant to CPLR § 3211(a)(2), a party must show that this 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).

POINT ONE

THE GREEN AMENDMENT CAN BE ENFORCED BY A PRIVATE RIGHT OF ACTION AND THIS CASE IS PROPERLY SITUATED BEFORE THIS COURT

A. The Green Amendment is Self-Executing.

> I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstance, institutions must advance also to keep pace with the times.

Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (manuscript available online from the Library of Congress: http://hdl.loc.gov/loc.mss/mtj.mtjbib022494). The Green Amendment has created a paradigm shift, yet Defendants seek to ignore Jefferson's wisdom, and ask this Court to adhere to the old one.

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, and thus vesting the State with the affirmative duty to ensure, "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 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 endows indispensable rights owed to the People.

i. The Green Amendment Illustrates the Legislature's Intent; to Endow a Self-Executing, Enforceable Right to 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."); *People v. Turza*, 193 Misc.2d 432, 435 (Sup. Ct. Suffolk Co. 2002) ("Moreover, the well-established rule in New York is that constitutional provisions are presumptively self-executing."). WMNY claims that the Green Amendment lacks sufficient clarity to be self-executing by pointing to a singular logically misplaced, antiquated example, the civil rights clause (NY Const, Art I, §11). This example, however, runs contrary to the broad array of rights within Article I that have been held as self-executing. *See Carroll*, 3 N.Y.2d at 690-691 (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 v. State*, 51 Misc.3d 376, 379 (2015) (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 (1984) (same); *Brown v. State*, 89 N.Y.2d 172 (1996) (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). Constitutional provisions are to be "liberally construed." *People v. P.J. Video*, 68 N.Y.2d 296, 303 (1986).

WMNY's reliance on *Carroll* and *Dorsey* to find that the Green Amendment is not self-executing is misplaced. *See* Docket No. 60 ("WMNY MOL") at 5 (*citing Dorsey v. Stuyvesant Town Corp.*, 299 NY 512, 531 (1949)). In fact, throughout its MOL, WMNY points to numerous statements/language that was not included in the final text of the Green Amendment. *See* WMNY

MOL at 4-5, 7-8, 9, 10. However, this type of interpretation by omission runs afoul of familiar canons of statutory construction. *Williams v. State*, 136 Misc. 2d 438, 441 (N.Y. Ct. Cl. 1987), *aff'd as modified*, 137 A.D.2d 277 (3d Dep't 1988) ("It is a general rule of statutory construction that in the absence of ambiguity, a court may not endeavor to supply what it views as an omission in the statute without transcending the judicial function"); *Kuhn v. Curran*, 294 N.Y. 207, 213 (1945) (refusing to construe amendment to rest on an implication by omission, instead focusing on the "express terms"). As discussed more fully below, this Court should not stray from the clear and unambiguous language used in the Green Amendment.

However, WMNY's reliance on *Carroll*, *Dorsey*, and the civil rights clause is separately misplaced because the civil rights protected by the clause in question within *Dorsey* were already denominated as such in the Constitution itself, in Civil Rights Law, or in other statutes. The Green Amendment, however, has been designed to augment our existing laws by addressing contamination events, threats to public health, and environmental justice issues, which are not adequately addressed elsewhere. Even if this Court believes additional legislation would be helpful, *Carroll* clarifies the "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* at 692-693 (*citing* 16 C.J.S., Constitutional Law, p.144 and cases there cited); *see also*, 11 Am. Jur., Constitutional Law, §75, p.692.

Ultimately, the Green Amendment is distinct from the constitutional provision in *Carroll* because the Green Amendment by its plain language alone is self-executing, and when compared to the civil rights clause, where the legislative history of the clause had to be examined to make a self-executing determination.

ii. *This Court Need Not Look at the Legislative History Because the Green Amendment Is Unambiguous.*

The language of the Green Amendment is concise and clear. While WMNY wishes this Court to enter the mind of the Legislature in hopes of clouding the intention behind the Green Amendment, this Court need not look at the legislative history to decide whether there has been a constitutional violation. *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]; *Tishman v. Sprague*, 293 N.Y. 42, 50 (1944) (courts have no right, by construction "by construction, to vary the meaning made clear by the exact language used"); *Best Way Beer & Soda Distribs. v. New York State Liq. Auth.*, 99 A.D.2d 727 (1st Dep't 1984) ("Where the wording of the statute and the intent and purpose of the Legislature is clear and unambiguous, the courts are not privileged to lightly ignore its evaluation of the effect of the legislation and to interpose contrary views of what the public need demands"); *Day v. Summit Sec. Services Inc.*, 53 Misc. 3d 1057, 1063 (Sup. Ct. N.Y. Co. 2016), *aff'd*, 159 A.D.3d 549 (1st Dep't 2018) ("If the language is clear and unambiguous, the courts must follow the plain meaning of the statute."). The Green Amendment's language is a clarion call to endow New York citizens with the fundamental right to clean air, clean water, and a healthful environment.

When construing language of New York Constitution with respect to a term that is not defined therein, "courts look to the intent at the time of adoption and 'give to the language used its ordinary meaning.'" *White v. Cuomo*, 2022 N.Y. Slip Op. 01954, 5 (2022) [citations omitted]; *see also Harkenrider v Hochul*, 2022 NY Slip Op 02833 (2022) ('"[we] look for the intention of the

People and give to the language used its ordinary meaning'") [citations omitted]. 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 define the language in a manner consistent to what the voters surmised. 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.

One simple way to understand the unambiguous meaning of the Green Amendment is to look at the dictionary definitions of the alleged terms "clean" and "healthful," which WMNY claims are unclear. Here, the dictionary definitions of "clean" include "free form dirt or pollution," "free from contamination or disease," "free or relatively free from radioactivity," "free from any dirty marks, pollution, bacteria, etc."[1] "Healthful" is defined to mean "beneficial to health of body or mind" or "helping to produce good health."[2] Thus, it is not necessary for this Court to conclude that outside legislation is necessary in order for the Green Amendment to be self-executing, as WMNY argues, WMNY MOL at 5, because the language in the Green Amendment is clear, and was fully understood by the New York voters who adopted this Amendment based on the plain dictionary meanings. The Landfill infringing on both FAFE's right to "clean" air and a "healthful" environment.

Thus, this Court should thus disregard the legislative history cited by WMNY because it is outside the scope of what this Court can consider on a Motion to Dismiss, and because the Green

[1] *Clean*, Merriam-Webster Dictionary, (2022) https://www.merriam-webster.com/dictionary/clean; *Clean*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/clean (2022).
[2] *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).

Amendment is unambiguous. *See Posner v. Empire Tr. Co.*, 65 N.Y.S.2d 25, 26 (Sup. Ct. Kings Co. 1946) (in determining motion to dismiss complaint for failure to state cause of action, this court is limited to facts pleaded in complaint and may not consider other facts set forth in affidavits accompanying a motion to dismiss).

B. WMNY Mischaracterizes the Constitutional History of the Green Amendment Which Illustrates that the Green Amendment Provides a Right of Action

In the alternative, if this Court determines the Green Amendment's language is ambiguous and requires judicial interpretation, 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* Affirmation of Linda R. Shaw, affirmed June 17, 2022 ("Shaw Aff.") Ex. B, p. 145 (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 can be illustrated in Assemblymember Gottfried's comments:

> And our rights should not, 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.

See Affirmation of Kelly S. Foss, affirmed May 6, 2022 (Docket No.42) ("Foss Aff.), Ex.13. p.64-

65 (statement by Richard N. Gottfried).

i. WMNY's Reliance on Select Assemblymembers' Comments is Improper and Flawed.

WMNY argues a right of action does not lie primarily by relying on the debates involving Assemblymembers Steve Englebright, Jennifer Lunsford, and Jo Anne Simon. While Steve Englebright was the lead sponsor of the Green Amendment, he is not an attorney. *See* Foss Aff., Ex.13, p.40. Assemblymember Englebright is a geologist and not a litigator, and as such was disadvantaged and frankly unqualified to give legal opinions when answering questions on the debate floor from attorney members of the Assembly. When directly questioned about the Green Amendment giving the right for individuals to bring a lawsuit if they felt their constitutional rights were being violated, Assemblymember Englebright remarked, "Just like I am a geologist and not a lawyer, I will leave that for the lawyers to determine." Foss Aff. Ex.13, p.40. Several attorney Assemblypersons continued their questions and asked if groups or individuals felt their new Green Amendment Constitutional rights were not met, if this would create a private right of action, to which Assemblymember Englebright responded, "I'm, again, a geologist, not a lawyer. I would leave that to the lawyers to decide." Foss Aff. Ex.13, p.84.

Assemblymember Engelbright's statement with respect to whether the Green Amendment created a new cause of action at most referred to a claim for damages, not the declaratory and equitable relief sought in this action, much like Assemblymember Jo Anne Simons' comments about environmental damages, which is likewise not on point. WMNY MOL at p.7. FAFE is not seeking damages as a remedy in this action and thus this comments of Assemblymembers Simons and Englebright are not even pertinent.

Therefore, this Court should disregard any legal statements by Assemblymember Englebright because he clearly stated he was not equipped to answer any legal questions related to

the Green Amendment. 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. Foss Aff. Ex.5. p.30 and Ex.13. p.31, 93.

WMNY refers to Assemblymember Jennifer Lunsford's comments on existing avenues of legal action to argue the Green Amendment fails to create a private right of action. This reasoning is flawed and conflicts with precedent, and certainly does not support the proposition that the citizens in New York cannot sue to protect their constitutional rights under the Green Amendment. The principle pronounced by the Supreme Court in *Marbury* dictates that where there is a right, there is a remedy. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Further, the Supreme Court in *Bivens* held a private right of action existed for damages against federal officials who violated the search and seizure provisions of the Fourth Amendment. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1999). *Bivens'* underlying rationale is that constitutional guarantees are worthy of protection on their own terms without being linked to some common-law or statutory tort, and that courts have the obligation to enforce these rights by ensuring that each individual receives an adequate remedy for unconstitutional acts. *Brown v. State*, 89 N.Y.2d 172, 187-89 (1996).

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. *Id.*

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. Likewise, pursuant to the reasoning of *Brown* and *Bivens*, the Green Amendment can be enforced by the courts. Nothing in the Green Amendment abridged the right under *Brown* to seek redress in the courts to enforce constitutional rights set forth in the Bill of Rights. There is no ambiguity on that point.

ii. WMNY Disregarded Legislative History Which Indicated the Green Amendment Could Be Enforced in a Private Action.

WMNY selectively curated the legislative history of the Green Amendment, disregarding comments from the Legislature which indicate the Green Amendment *could* be enforced in a private action, and in situations such as this matter. The following chart is a non-exhaustive list of State Assemblymembers and Senators comments indicating the Green Amendment *would* empower the People to act upon a constitutional violation of their new rights, especially in situations like the instant matter. *See also* Shaw Aff. Ex. A.

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."	Shaw Aff. Ex. B, p. 147 (statement by Senator Jackson)
"when you have constitutional amendments, there's far more strength to that…when it's a constitutional amendment, it has more teeth, more strength, and it also indicates to the people of the State the moral convictions of government."	Foss. Aff. Ex. 5, p.42-43 (Assemb. Barron)
"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	Foss. Aff. Ex. 13, p.65 (Assemb. Forrest)

is safe and clean, and that you should expect that the air that you're breathing will not trigger asthma, COPD or anything else."	
"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."	Foss. Aff. Ex. 13, p.75 (Assemb. Stec)
"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."	Foss. Aff. Ex. 7, p.52 (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."	Foss. Aff. Ex. 9, p.47 (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."	Foss. Aff. Ex. 13, p.41 (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."	Foss. Aff. Ex. 9, p.46 (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."	Foss. Aff. Ex. 9, p.48 (Assemb. Epstein)
"I am proud that one of my first votes as Senator is to codify these basic rights into our State Constitution."	Shaw Aff. Ex. B, p. 150 (statement by Senator Hinchey)
"The air, water and a healthful environment are as fundamental to us as speech, religion, assembly and other basic rights."	Foss. Aff. Ex. 7, p.53 (Assemb. Cahill)
"We should be held accountable. We should be accountable to everyone in the State for providing this basic human right"	Foss. Aff. Ex. 13, p.60 (Assemb. Burdick)
"this 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"	Foss. Aff. Ex. 13, p.67 (Assemb. Glick)
"people 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."	Foss. Aff. Ex. 9, p.49 (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	Foss. Aff. Ex. 13, p.31 (Assemb. Englebright)

due to governmental inaction or negligence that may otherwise damage our air, land or water."	
"odor 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."	Foss. Aff. Ex. 13, p.49-50. (Assemb. Englebright)
When Assemblymember Mankeltow asked whether the Green Amendment would apply to the High Acres Landfill, 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."	Foss. Aff. Ex. 9, p.40-41 (Assemb. Mankeltow); Foss. Aff. Ex. 9, p.41 (Assemb. Englebright)
"this is an elementary concept the premise being that part of the fundamental rights of being a citizen of this great State should be that one of those rights of being a citizen is a right to have a healthful environment. And it isn't yet in the Constitution, but it should be. And, certainly, there have been recent events that have reminded us of 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. I'm reminded that this is not a new issue."	Foss. Aff. Ex. 5, p.30 (Assemb. Englebright)
"I just want to add that there is a context of need to reassure the people of the State that this proposed Constitutional amendment is intended to address. That need is defined in the newspapers almost every day: New contamination events, new threats to the public health in places like Hoosick Falls and Newburgh and West Hampton. There's a need to reassure the people that it is their right to know that this is a priority, that the environment itself deserves to have the support of our attention and that the proposed amendment to our Constitution is an initiative that will, I believe, enhance the expectation that the intertwined and mutually-interdependent ideas of environmental protection and public health are worthy of our collective best efforts and attention."	Foss. Aff. Ex. 7, p.53-54. (Assemb. Englebright)

C. Even if this Court Finds that the Legislative History Indicates the Legislature Did Not Intend for the Green Amendment to Be Enforced by a Private Right of Action, this Court May and Should Imply One.

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. See the above section discussing *Marbury, Bivens*, and *Brown.*

This Court should follow the recent example in the Southern District when it addressed an Article I § 3 violation where the Plaintiff sought a private right of action, and the court took a more liberal interpretation of the right to a private cause of action. *See Clark v. City of New York,* 560 F.Supp.3d 732, 743 (S.D.N.Y. 2021) (court denied a motion to dismiss which argued the state constitution did not provide a private cause of action under Art. 1. Section 3 of the Constitution) (*citing Martinez v. City of Schenectady*, 97 N.Y.2d 78 (2001)). FAFE, similarly to the Plaintiffs in *Clark,* asserts a constitutional violation in which a determination of private right of action is a novel question of law. There, the court held that courts should imply a right of action under 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, FAFE members have been blighted by unclean air and an unhealthy environment. Over 26,000 complaints about the Landfill have been documents since late 2017. Compl. ¶ 56. Existing state laws, regulations and policies have proved to be inefficient at ensuring clean air and a healthful environment for FAFE's members, and thus, the Green Amendment is necessary to uphold their newly created rights.

POINT TWO

WMNY IS LIABLE UNDER THE GREEN AMENDMENT

This Court should find that WMNY is liable under the Green Amendment because 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.

When analyzing whether the acts of a private entity violate the Constitution and thus can be held liable, courts look at three tests: (1) whether the entity is controlled by the state; (2) whether it acts jointly with the state or its functions are entwined; or (3) whether the entity has been delegated a public function by the state. *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). 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).

Here, the actions of WMNY could fall into any one of these three tests. *See* Compl. ¶ 164. WMNY is highly controlled by the State and must comply with State laws, regulations and policies regarding the management of solid waste. Its actions are so entwined with the State that is often difficult to discern who is truly responsible for the management of the Landfill and controls the operations. There is no question that the NYSDEC has been delegated the responsibility to manage solid waste in the State and solid waste management programs, "[i]n the interest of public health, safety and welfare." *See* Environmental Conservation Law ("ECL") § 27-0106. Yet, the relationship the State has with WMNY blurs those responsibilities, and the State has essentially delegated WMNY with the public function of waste management. Compl. ¶ 164. It is no secret that the majority of municipal solid waste (MSW) is managed by private companies in New York,

and historically that was a municipal function.[3] In fact, it is public knowledge that privately owned landfills dominate the landfill market, accepting more than half of the total waste disposed of in New York, while privately operated landfills accept over 80% of the total waste generated, with the top three companies accounting for over 70% of the market.[4]

Thus, the Green Amendment must apply where private entities, such as WMNY, are acting jointly in a symbiotic relationship with government to violate applicable environmental state laws, regulations and permits and causing environmental harm by emitting, over a multi-year period, noxious air gasses miles beyond the perimeter of their property boundaries. This matter illustrates exactly why it is so necessary for the Green Amendment to apply to private parties such as WMNY, because the only way for the State to come into compliance with the Green Amendment is to regulate the conduct of WMNY, the Landfill operator, as well as NYC, the major generator of waste at the Landfill so that the actions of all of these entities do not violate FAFE's right to clean air and a healthful environment.

Even if this Court finds that WMNY cannot be held directly liable pursuant to the Green Amendment, it should not dismiss WMNY from the action, since WMNY is a necessary party because its Landfill is causing the constitutional violations. *Overhill Bldg. Co. v. Delany*, 28 N.Y.2d 449, 458 (1971) (when constitutional questions are at stake, all necessary parties must be included in the action). Further, Plaintiff is entitled to injunctive relief abate the ongoing constitutional violation, *U.S. v. City of Yonkers*, 96 F.3d 600, 619 (2d Cir. 1996), but full relief cannot be granted without the participation of WMNY.

[3] https://www.dec.ny.gov/docs/materials_minerals_pdf/frptbeyondwaste.pdf
[4] https://www.osc.state.ny.us/files/local-government/publications/pdf/landfills-2018.pdf

POINT THREE

FAFE'S CLAIMS ARE TIMELY AND JUSTICIABLE

The categories that WMNY attempts to pigeonhole FAFE's Complaint into are based on a complete misreading and misunderstanding of FAFE's claims. WMNY MOL at 10.[5] WMNY argues first that FAFE's Complaint is untimely; next that FAFE's claims are nonjusticiable; and finally that government has discretion to violate the Constitution. For the reasons stated below, WMNY's arguments lack merit and its Motion should be denied.

A. FAFE'S Complaint Is Timely.

Initially, WMNY's objection that FAFE's claims are untimely relief should be completely disregarded, since they failed to move under CPLR § 3211(a)(5). Further, WMNY has failed to carry its burden to show that an applicable statute of limitations has expired. *Barry v. Cadman Towers*, Inc., 136 A.D.3d 951, 952 (2d Dep't 2016).

Despite the fact that the Green Amendment was enacted a mere 27 days before FAFE filed this action, WMNY somehow argues to this Court that its action is untimely. WMNY's timeliness arguments rests on the assumption that FAFE challenges actions that took place prior to the enactment of the Green Amendment. FAFE's Complaint is clear that it is challenging Defendants' daily actions or inactions that result in the current and on-going violations of the New York State Constitution regarding the Landfill, which continuously emits Odors and Fugitive Emissions which violate the constitutionally protected, affirmative rights of the Members to "clean air … and a healthful environment." Compl. ¶¶ 152, 153. The actions being challenged are what the

[5] "1. Specific government actions that occurred before the ERA became effective; 2. Broad policy decisions (as opposed to specific actions); and/or 3. Failure by the government to take a particular action or adopt a policy that Plaintiff prefers (i.e., government inaction)." WMNY MOL at 10.

Defendant have and have not done since the enactment of the Green Amendment. At least 99 of complaints regarding Odors and Fugitive Emissions have been documented since January 1, 2022. *Id.* ¶ 52. The Odor and Fugitive Emissions are continuing in nature. *Id.* ¶ 10. The combined acts and omissions of the Defendants have resulted in the violation of the Constitution since it went into effect on January 1, 2022. *Id.* ¶ 153.

Thus, FAFE timely commenced this action on January 28, 2022. FAFE has satisfied all applicable statute of limitations, regardless if this action is treated as one for a Declaratory Judgment or a proceeding under CPLR Article 78. However, it is well-understood that constitutional violations are subject to the six-year statute of limitations under CPLR § 213, therefore, there is no question that FAFE's claims are not time-barred. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801 (2003).

Even if this Court somehow found that the Defendants' actions or inactions FAFE challenges pre-date the enactment of the Green Amendment, once the Green Amendment did become effective, Defendants were required to correct and comply with the Constitution. *City of Yonkers*, 96 F.3d at 622 (once a constitutional violation occurs, a state agency whose actions have contributed to violation have duty to take necessary steps to eliminate the violation, and each instance of failure or refusal to fulfill this affirmative duty continues the violation). Thus, it is not necessary for this Court to find that the Green Amendment has a retroactive effect because the actions/inactions that occurred after the Green Amendment became effective on January 1, 2022 and are still occurring. A claim to abate a continuing wrong reaccrues every day. *Jensen v. General Electric Co.*, 82 N.Y.2d 77 (1993).

Further, even if this Court somehow found that the Defendants' actions or inactions FAFE challenges pre-date the enactment of the Green Amendment, it should also find that the Green

Amendment is remedial in nature and thus retroactive. "An exception to the general principle that statutes are to be applied prospectively unless the language expressly, or by necessary implication, requires otherwise is commonly made for "remedial legislation or statutes governing procedural matters." *See Jaquan L. v. Pearl L.*, 179 A.D.3d 457, 458–59 (1st Dep't 2020) (*citing Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998)). "Remedial statutes should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible, and therefore should be accorded retroactive effect." *Lesser v. Park 65 Realty Corp.*, 140 A.D.2d 169, 173 (1st Dep't 1988).

The Green Amendment was enacted despite the existing laws of the State of New York, which created the New York State Department of Environmental Conservation with the purpose to "conserve, improve and protect [New York's] natural resources and environment." *See* ECL §§ 1-0101, 3-0101. The Green Amendment seeks to reform the State's air, water, and environment, and thus, should be treated as retroactive, meaning that to the extent this Court found that FAFE was challenging actions or inactions prior to the enactment of the Green Amendment, its action is timely. *Lesser*, 140 A.D.2d at 173.

B. FAFE'S Claims Are Justiciable.

WMNY attempts to parse FAFE's claims and label them as "political questions" instead of what they truly are -- constitutional violations. Its reliance on *SHAD All. v. Smith Haven Mall*, is misplaced, as there the plaintiff sought to remove the requirement that a state action occur, prior to finding a violation of the Constitution. 66 N.Y.2d 496, 504 (1985). FAFE does not seek for this Court to reach that conclusion. Rather, FAFE seeks for this Court to find that the Defendants' combined actions or inactions have resulted in a constitutional violation by deprivation of FAFE's right to clean air and healthful environment.

WMNY has failed its burden pursuant to CPLR § 3211(a)(2), because it has not shown that this Court lacks subject matter jurisdiction over FAFE's claims. "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*, 195 A.D.3d at 776. Courts are of course empowered to determine whether a constitutional violation as occurred. *See Sterling v. Constantin*, 287 U.S. 378, 398 (1932) ("When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression"). Even if this Court finds that FAFE is directly challenging the policymaking by Defendants, it should not dismiss FAFE's Complaint on a Motion to Dismiss because FAFE has alleged constitutional violations. *Nurse v. U.S.*, 226 F.3d 996, 1002 (9th Cir. 2000) (legislature's discretionary function exception cannot shield unconstitutional governmental action).

When the Green Amendment was approved and adopted by the voters, despite the existing laws, regulations, and policies, it conveyed a fundamental right to clean air and a healthful environment to the citizens of the State. Essentially, the voters determined that the existing laws, regulations and policies were insufficient to protect the State's air, water, and environment, and thus a new right must be created.

Thus, WMNY's extensive reliance on *NY State Inspection, Sec. & Law Enforcement Emps., Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233, 239 (1984) is misplaced, since this case concludes that only the judiciary, not the executive branch, has the jurisdiction to determine if

Constitutional rights have been violated. There, the government's decision whether to close a correctional facility was an exercise of executive discretion, and thus a nonjusticiable controversy, and did not even involve a constitutional violation. *Id.* at 238. While the Court held the justiciability doctrine does not allow the judicial branch to usurp powers afforded to the executive branch, and found that the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government, it noted that the judiciary has to power to declare constitutional rights. *Id.* at 238, 240. Here, the Defendants have no discretion whether or not to comply with the Constitution. Thus, the Court of Appeals in *NY State Inspection* was not faced with a constitutional rights question as this Court is here.

WMNY's cries that "[FAFE's relief] will force closure of a private landfill," ring hollow. FAFE's relief will merely seek to bring Defendants into compliance with the newly enacted environmental right embodied in the Constitution, thereby upholding New York's constitutional right to clean air, water, and a healthful environment. WMNY knows what is needs to do to fix the problems at the Landfill, but these fixes cost money, and the two governmental bodies that have control over waste disposal at the Landfill, namely NYSDEC as its primary regulator and NYC as its primary waste generator, have utterly failed to require the improvements that FAFE contends would in fact serve to abate the current constitutional violations.

C. Defendants Do Not Have Discretion to Violate the Constitution.

Initially, FAFE has not improperly sought its relief via its Declaratory Judgment action. FAFE's requests that the Court order the Landfill to close or the Odors/Fugitive gasses be abated is proper in a Declaratory Judgment action. "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it

useful and necessary. The discretion must be exercised judicially and with care." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations … No limitation has been placed, or attempted to be placed, upon its use…" *Id.* [citations omitted]. The method to "quie[t]" FAFE's dispute is to close the Landfill or abate the Odors/Fugitive Emissions, and thus the relief it seeks is proper. Regardless, even if this action is more appropriate in the form of a special proceeding, it should be converted and not dismissed. *See* CPLR § 103(c); *City of New York v. State Bd. of Equalization and Assessment*, 60 A.D.2d 932, 933 (3d Dep't 1978) (court converted a declaratory judgment action to an Article 78).

However, the thrust of WMNY's argument is that FAFE has failed to identify a nondiscretionary act on behalf of the Defendants. WMNY MOL at 19. WMNY's argument must fail. It is well-understood that Defendants lack the discretion to violate the Constitution. *See D.J.C.V., v. USA*, 2022 WL 1912254, at *16 (S.D.N.Y. June 3, 2022) (the government '"lack discretion to violate the Constitution."') [citations omitted]; *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647, 655 (1969) (State agencies are obligated to conduct its activities in conformity with the Constitution). 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 violation have 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 City of Yonkers*, 96 F.3d at 622; *see also Connolly v. McCall,* 254 F.3d 36, 41 (2d Cir. 2001) (applying continuing wrong document 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 such that usual time limits did not bar review).

Similar to the State, WMNY's attempts to confuse this Court by arguing that FAFE is challenging the issuance of the Permits, but that is not so. *See* FAFE's Memorandum of Law in Response to State's Motion to Dismiss. Rather, FAFE challenges the State's daily actions or inactions that result in the current and on-going violations of the New York State Constitution regarding the Landfill since January 1, 2022, which has resulted in continued unacceptable levels of Odors and Fugitive Emissions extending miles beyond the Landfill property boundary, which violate the constitutionally protected, affirmative rights of the Members to "clean air … and a healthful environment." Compl. ¶¶ 152, 153. WMNY's cases relying on petitions to modify or revoke NYSDEC-issued permits, and thus are irrelevant. WMNY MOL at 21.

Lastly, WMNY's argument that FAFE must first make a demand to Defendants and await a refusal is without merit. WMNY MOL at 23. This appears to be in addition to their alleged claim FAFE also has the burden to exhaust its administrative remedies. However, WMNY's authority is unpersuasive. *See Schwartz v. Morgenthau*, 23 AD3d 231, 233 (1st Dept 2005) (party failed to demand an inquiry into allocation of forfeited funds); *Austin v. Bd. of Higher Educ.*, 5 NY2d 430, 442 (1959) (party failed to obtain restatement of former position). WMNY fails to present any authority necessitating dismissal of FAFE's constitutional rights action for failure to act prior to bringing suit. Regardless, as the State indicated in its MOL, FAFE has made several demands on Defendants, all of which have fallen on deaf ears. *See* State MOL, at 11, footnote 3.

POINT FOUR

FAFE HAS NOT FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

Once again, similar to the State's argument in its MOL, WMNY urges this Court to dismiss FAFE's Complaint for failure to exhaust its administrative remedies. WMNY believes that NYSDEC is better suited than this Court to determine whether a constitutional violation has occurred. WMNY attempts fear mongering by claiming that "chaos would result," should the citizens of New York seek to pursue their Constitutional rights to clean air, water and the environment in court. WMNY MOL at 23. These arguments must fail.

The law in the State of New York is clear "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978). There are however exceptions to the general rule. One exception is if "an agency's action is challenged as either unconstitutional or wholly beyond its grant of power." *Id.; Stallone v. Fischer*, 67 A.D.3d 125, 130 (2d Dep't 2009). Another exception is if the exhaustion of "administrative remedies would be futile." *Klein v. New York State Off. of Temp. and Disability Assistance*, 84 A.D.3d 1378, 1379 (2d Dep't 2011). Here, both exceptions apply.

Ignoring the fact that FAFE seeks resolution of a constitutional violation, not Permit violations, WMNY argues that NYSDEC and its process to seek a request, modification, suspensions or revocation of a permit pursuant to 6 NYCRR § 621.13(b) is the more appropriate avenue for FAFE's Constitutional rights claim. WMNY MOL at 24. Though WMNY argues that FAFE attempts to violate the separation of powers principle in certain sections of its brief (e.g. MOL at 13), it apparently disregards this principle a few pages later (MOL at 24).

One of the most fundamental principles of the United States' legal system is the separation

of powers between the three branches of government. *See Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018) (‘“To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.”’) [citations omitted]. The Checks and Balances system provides each branch of government with individual powers to check the other branches and prevent any one branch from becoming too powerful. NYSDEC, an executive body, is not equipped to interpret the newly enacted Green Amendment; that is the role of this Court. Any suggestion to the contrary infringes upon our system of Checks and Balances. *See Commodity Futures Trading Commn. v. Schor*, 478 U.S. 833, 848 (1986) (system of checks and balances “protect[s] ‘the role of the independent judiciary within the constitutional scheme of tripartite government,’ and ... safeguard[s] litigants' ‘right to have claims decided before judges who are free from potential domination by other branches of government.”’) [citations omitted]; *see also Seaman v. Fedourich*, 16 N.Y.2d 94, 102 (1965) (“Nor can there be any question that the courts of New York, obliged as they are to uphold [this State's Constitution]” and “are vested with jurisdiction of actions brought to vindicate the” rights contained in the Bill of Rights); *People v. Glubo*, 5 N.Y.2d 461, 474 (1959) (“It goes without saying that the courts construe statutes, not the [Executive Branch]”).

The State is obligated to comply with the Constitution. *See D.J.C.V.*, and *Finn's Liquor, supra.* The administrative process outlined in 6 NYCRR § 621.13 does not afford the State with the right to violate the Green Amendment. In fact, NYSDEC, as a state agency, has limited authority and has only been granted certain power to it by the State Legislature. *See* ECL §§ 1-0101, 3-0101. It has not been granted the right to violate the Constitution or interpret it. *Id.; New York Const. Materials Ass'n, Inc. v. New York State Dept. of Envtl. Conservation*, 83 A.D.3d 1323

(3d Dep't 2011) (state agencies must not act beyond the powers granted to them by the legislature); *Lighthouse Pointe Prop. Associates LLC v. New York State Dept. of Envtl. Conservation*, 14 N.Y.3d 161, 176 (2010) (NYSDEC acted beyond its statutory power to deny a brownfield site from entry into the State's Brownfield Cleanup Program).

Thus, any attempt by FAFE to exhaust its administrative remedies and first proceed pursuant to 6 NYCRR § 621.13 would be inappropriate because of the constitutional question at stake, and ultimately futile because NYSDEC has not been granted authority to make constitutional determinations. NYSDEC is not only not better suited than this Court to determine whether a constitutional violation has occurred, but it lacks the power to do so.

CONCLUSION

For the reasons stated above, WMNY has failed its burden to succeed on its Motion to Dismiss FAFE's Complaint, and thus its Motion should be denied.

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WORD COUNT CERTIFICATION

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