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BRIAN D. GINSBERG
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New York Supreme Court

Appellate Division—Fourth Department

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff-Respondent-Appellant,

– against –

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

Defendants-Appellants-Respondents,

– and –

THE CITY OF NEW YORK,

Defendant-Respondent.

Docket No.: CA 23-00179

BRIEF FOR DEFENDANT-APPELLANT-RESPONDENT WASTE MANAGEMENT OF NEW YORK, L.L.C.

Kelly S. Foss
Brian D. Ginsberg
Steven P. Nonkes
Laura W. Smalley
HARRIS BEACH PLLC
Attorneys for Defendant-Appellant-Respondent Waste Management of New York, L.L.C.
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
bginsberg@harrisbeach.com

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (cont'd)

PAGE

TABLE OF CONTENTS (cont'd)

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (cont'd)

CONSTITUTIONAL PROVISIONS (cont'd) **PAGE**

STATUTES, RULES, AND REGULATIONS

TABLE OF AUTHORITIES (cont'd)

OTHER AUTHORITIES **PAGE**

TABLE OF AUTHORITIES (cont'd)

OTHER AUTHORITIES (cont'd) **PAGE**

PRELIMINARY STATEMENT

Under the State of New York's tripartite system of government, the Legislature makes policy in the form of laws, the Executive administers those laws, and the Judiciary objectively interprets them. Consistent with that fundamental separation of powers, constitutional amendments that are too vague and open-ended for courts to construe in a principled fashion are regarded as "non-self-executing": not enforceable in litigation unless and until the Legislature passes laws that enable courts to interpret the rights given and duties imposed without having to engage in political policymaking.

In 2021, the People of the State of New York adopted the "environmental rights amendment" to the New York State Constitution—often called the "ERA"—and the amendment became part of the Constitution on January 1, 2022. The ERA states, in full: "Each person shall have a right to clean air and water, and a healthful environment" (NY Const, art I, § 19). The provision reflects a general commitment to natural resources and public health. But its substance is entirely undefined, and largely, if not fully, in the eye of the beholder. What does it mean for air to be "clean" or for the environment to be

"healthful"? Legislators, and administrators with properly-delegated authority, answer questions like these routinely, and they do so by making numerous, discretion-infused policy choices. However, such policy choices are the opposite of judicial decision-making.

The abstract quality of the ERA's text—the reason why those policy choices are needed—shows that its framers intended for the Legislature to clarify what the constitutional "right to clean air and water, and a healthful environment" entails before that right becomes judicially enforceable. The ERA's drafting history likewise supports this conclusion. Most notably, the ERA's principal sponsor repeatedly described the amendment as the "frame" of a painting whose substantive "composition" will be filled in by the political branches.

Yet, Supreme Court, Monroe County (Ark, J.) found the ERA judicially enforceable as-is. In a decision and order issued December 20, 2022, the court refused to dismiss a complaint filed by plaintiff Fresh Air for the Eastside, Inc., alleging, in relevant part, that Waste Management of New York, L.L.C. was operating the High Acres Landfill in Western New York in violation of plaintiff's members' "right to clean air … and a healthful environment," and that the State and its Department of

Environmental Conservation were violating the ERA by not responding with sufficiently aggressive enforcement action. In the court's view, plaintiff had stated a cause of action that, if successful, would entitle it to a declaratory judgment that the defendants were violating the ERA, as well as an injunction directing the defendants to effectuate closure of, or operational changes to, the landfill.

Supreme Court was wrong across the board. Plaintiff failed to state a cause of action against any defendant because the ERA is not self-executing. The provision furnishes no principled framework enabling courts to determine whether air is "clean" and whether the environment is "healthful." Absent legislative guidance, judicial interpretation of the ERA would be tantamount to environmental policymaking in violation of the separation of powers. Worse still, it would be environmental policymaking *via interpretation of the Constitution*, and therefore beyond the reach of the Legislature if and when the Legislature decided to go in a different direction.

Moreover, even if the ERA can be regarded as self-executing, it still does not support a cause of action entitling plaintiff to relief interfering with Waste Management's operation of the High Acres Landfill. There

can be no relief against Waste Management directly, because the ERA constrains only governmental conduct—not the company's private operation of the landfill. Nor is there any basis for relief in the form of court-ordered administrative action—*i.e.*, mandamus to compel—because the ERA does not clearly and unequivocally create any duty, much less a ministerial one, on the part of the State and DEC to intervene against alleged ERA violations. The decision whether and how to intervene remains committed to the State and DEC's enforcement discretion, rendering mandamus relief unavailable.

QUESTIONS PRESENTED

1. Did plaintiff fail to state a cause of action against any defendant because the ERA is not self-executing?

2. Did plaintiff fail to state a cause of action against Waste Management because the ERA constrains only governmental conduct, and not the company's private operation of the High Acres Landfill?

3. Did plaintiff fail to state a cause of action against the State and DEC because the injunctive relief requested against them amounts to mandamus to compel executive action affecting the landfill—an improper judicial override of the government's enforcement discretion?

STATEMENT OF THE CASE[1]

A. Waste Management Operates The High Acres Landfill

Waste Management owns and operates the High Acres Landfill in Western New York, a facility that provides safe and convenient waste disposal services for communities, businesses, and industries throughout the State (*see* R34,37). Among those customers is the City of New York; its waste is transported to the landfill via rail (R35,39). High Acres disposes of waste received from its customers including New York City by placing the waste in numbered areas known as "cells" (*see* R38-39). Some of those cells are located in the Town of Macedon, and the others are located in the neighboring Town of Perinton (R38-39).

The High Acres Landfill operates pursuant to a number of permits issued by DEC (R38). As particularly relevant here, one of the permits covers general landfill activities, including the operation of a rail terminal to accept waste delivered by rail, and another permit sets allowable gas emission levels (R38-39,75-89,238-335). Through the

[1] The facts recited herein are taken primarily from the factual assertions set forth in plaintiff Fresh Air for the Eastside, Inc.'s complaint. Waste Management does not concede that those assertions are accurate.

obligations imposed by those permits as well as by the Environmental Conservation Law and regulations promulgated thereunder, DEC maintains extensive oversight and enforcement authority over the landfill.

DEC has not hesitated to exercise that authority when it has found intervention warranted, including with respect to odor and emission control. For example, in 2018, after some people living near High Acres complained to DEC of unpleasant odors, the agency issued a "notice of violation" directing Waste Management to implement a variety of mitigation measures (R44). The company complied, and DEC found that the odor control measures "prove[d] effective" (R393).

B. Plaintiff Sues Waste Management In Supreme Court, Alleging That Landfill Odors And Emissions Violate The ERA

Plaintiff Fresh Air for the Eastside is a corporation that describes itself as having been "formed to ... preserve and protect the environment" (R36). Its members include "individuals who own property and/or reside about 0.3 to 4 miles from the Landfill" (R36).

On January 28, 2022, plaintiff commenced this action by filing a complaint against Waste Management, New York City, and the State of

New York and DEC, in Supreme Court, Monroe County. In the complaint, plaintiff alleged that "Odors and Fugitive Emissions" supposedly produced by High Acres were "invading the Community including public places, private properties, and homes of Community residents, including Members" (R40). On that basis, plaintiff asserted a single claim that all of the defendants were "violat[ing] the constitutionally protected, affirmative rights of the Members to 'clean air ... and a healthful environment'" conferred by the ERA (R60).

Plaintiff claimed that Waste Management was violating the ERA by operating High Acres in a way that failed to prevent the alleged "continuing emissions of Odors and Fugitive Emissions by the Landfill" from escaping into nearby communities (R60). Plaintiff asserted that New York City was violating the ERA by "ship[ping] NYC Garbage to the Landfill" and therefore contributing to the allegedly offensive odors and emissions (R61). And the State and DEC supposedly violated the ERA by "fail[ing] to adequately use [their] enforcement powers to cause [Waste Management] to control the Odors and Fugitive Emissions at the Landfill" (R61).

Plaintiff sought a declaratory judgment that all defendants were violating the ERA (R62). Plaintiff also sought an injunction "ordering the immediate proper closure of the Landfill, or alternatively directing Defendants to immediately abate the Odors and Fugitive Emissions in the Community," by "at a minimum, installing a permanent cover as defined in the 6 NYCRR Part 360 regulations on all the side slopes of the Landfill Cells 1-11 not being actively landfilled in Perinton, and [performing] daily [surface emission] monitoring of the entire surface of the Landfill" (R62).

C. Supreme Court Denies Waste Management's Motion To Dismiss Plaintiff's Complaint For Failure To State A Cause Of Action

The defendants filed motions to dismiss some or all of plaintiff's complaint, including Waste Management, which moved under CPLR 3211 (a) (7) to "dismiss the Complaint in its entirety" for failure to state a cause of action (R521). On December 20, 2022, Supreme Court (Ark, J.) issued a decision and order adjudicating the motions.

In the decretal language, Supreme Court purported to grant Waste Management's motion (R30). However, the language of the court's *decision*—which ultimately controls (*Wilson v Colosimo*, 101 AD3d 1765,

1766 [4th Dept 2012])—makes clear that in fact the court had *denied* Waste Management's motion because it did not dismiss the complaint in its entirety (as Waste Management had requested), and instead allowed claims impacting the landfill to survive.

Supreme Court rejected Waste Management's argument that plaintiff failed to state a cause of action against any defendant because the ERA is not self-executing. However, the court did not explain how the Judiciary could plausibly interpret the vague and undefined ERA right in an objective, consistent manner absent legislative guidance. Rather, the court's rationale for finding the ERA self-executing was limited to its supposition that "[t]he general rule is that constitutional provisions are presumptively self-executing," and its evident conclusion that this presumption had not been rebutted because the ERA does not expressly "mention ... involvement of the legislature or legislative process as a predicate to implementation" (R22).

While purporting to dismiss Waste Management as a party, Supreme Court refused to dismiss plaintiff's complaint insofar as it seeks relief against Waste Management and its privately owned and operated landfill. The court allowed plaintiff to continue pursuing a shutdown of,

and other injunctive relief against, the landfill—despite recognizing that the ERA does not authorize "direct action against private entities" (R22). Indeed, the court opined that, despite having dismissed Waste Management from participating in the case, "[t]his lawsuit may result in the closure of the landfill by court order" against the company (R23).

Nor did Supreme Court dismiss plaintiff's complaint as against the State and DEC—another species of relief that Waste Management had requested, given that plaintiff sought to compel those entities to take action against Waste Management. The court properly recognized that the injunctive relief plaintiff sought against the State and DEC was in the nature of mandamus: an order directing affirmative enforcement action against Waste Management's landfill (R26). The court also correctly articulated the rule that "mandamus is available only to force a public official to perform a ministerial duty enjoined by law" (R26). Further, the court seemingly acknowledged that no such duty applied here, admitting that "[u]tilizing its enforcement authority is just one of the ways the State could respond … , but is not the sole option it has" (R26). Nevertheless, the court found that plaintiff "has properly stated a

cause of action" against the State and DEC for the requested mandamus-style relief (R27).

Waste Management filed a timely notice of appeal (R1-3).

ARGUMENT

Supreme Court erred in denying Waste Management's CPLR 3211 (a) (7) motion to dismiss plaintiff's complaint in its entirety. The complaint does not state a cause of action under the New York State Constitution's ERA—against *any* defendant, for *any* relief. Plaintiff's complaint certainly does not state a cause of action warranting declaratory or injunctive relief impacting Waste Management's operation of the High Acres Landfill. Supreme Court's ruling should be reversed, and Waste Management's motion should be granted.

I.

THE ERA IS NOT SELF-EXECUTING AND CANNOT BE JUDICIALLY ENFORCED UNTIL THE LEGISLATURE SUPPLIES THE OBJECTIVE GUIDANCE NECESSARY FOR COURTS TO INTERPRET THE PROVISION WITHOUT ENGAGING IN POLITICAL POLICYMAKING

Plaintiff's complaint fails to state a cause of action because the ERA is not "self-executing": It is not judicially enforceable absent necessary guidance that the Legislature has not yet provided. By conferring a "right

to clean air ... and a healthful environment," the ERA establishes the broad contours of a laudable constitutional commitment. However, on its own terms, that right is too vague and subjective for courts to apply in a principled, consistent way. Nor is there any federal constitutional counterpart to the ERA upon which courts can draw to ensure objective interpretation. Thus, the Judiciary cannot decipher the ERA's gauzy guarantee without making environmental policy—a task that is better suited for, and already exclusively committed to, the political branches. The framers' choice to cast the ERA in language so open-ended shows an intent for the Legislature to flesh out what the provision entails before courts start enforcing it.

A. Like Most Constitutional Provisions Phrased Entirely In Broad Generalities, The ERA Is Presumptively Non-Self-Executing And In Need Of Legislative Exposition To Be Judicially Enforceable

Interpreting a provision of the New York State Constitution entails a search for "the intention of the framers" who drafted it (*Matter of King v Cuomo*, 81 NY2d 247, 253 [1993], quoting *Settle v Van Evrea*, 49 NY 280, 281 [1872]; *accord Niagara Falls Urban Renewal Agency v O'Hara*, 57 AD2d 471, 475-476 [4th Dept 1977, Hancock, J.]). And the inquiry into whether the framers of the ERA intended it to be self-executing does not

begin from square one. There is a thumb on the scale: a presumption that provisions written in undefined, open-ended terms are *not* self-executing and instead become operative only after the Legislature furnishes the guidance necessary to enable principled, consistent application. Supreme Court erred by beginning from the opposite presumption (*see* R22).

"Originally, when the Federal Constitution and the first State Constitutions were written, their clear purpose was to establish a broad framework of basic principles within which the Nation and States should function" (*People v Carroll*, 3 NY2d 686, 690 [1958]). "Actual administration and implementation was, in large part, left to departments created by the Constitution and was not attempted in those instruments" (*id.*). During the period in which that approach predominated, "the presumption was that provisions in a Constitution were merely general directions and that legislation was necessary to effectuate them" (*id.* at 691).

The same presumption applies here, because the ERA is of a piece with the constitutional amendments adopted during that leave-it-to-the-Legislature era. Though adopted by popular vote in 2021, the ERA is a throwback to that earlier time. The amendment announces a "right to

clean air ... and a healthful environment"—a facially broad guarantee reflecting an important constitutional commitment to the environment and public health. But the ERA says nothing at all about what that right entails. Nothing about "administration" (*Carroll*, 3 NY2d at 690). Nothing about "implementation" (*id.*). And most fundamentally, nothing about definition. The ERA does not define what is meant by "clean air" and "a healthful environment," and as explained more fully below (*infra* 25-37), those concepts are far from self-defining. In withholding express guidance, the framers of the ERA are presumed to have crafted a "broad framework of basic principles" (*Carroll*, 3 NY2d at 690) for the Legislature to flesh out.

The ERA represents a marked departure from the recent trend in which "the function of the various Constitutions has evolved into more like that of a legislative body" (*Carroll*, 3 NY2d at 691). That deviation renders inapposite the contemporary presumption, invoked by Supreme Court (R22), that this new breed of constitutional amendments is self-executing. In direct contrast to many of those new amendments, the ERA does not "speak[] its meaning with sufficient clarity to make further inquiry unnecessary" (*Carroll*, 3 NY2d at 689). Its adoption was not a

situation "where the intent of the provision's drafters to make specific and immediately effective the right [at issue] is evidenced by the insertion of operational details" (*id.* at 691). The ERA is the antithesis of "constitutional provisions of a statutory character"—provisions that *do* speak their meaning clearly—for which the presumption of self-execution is generally reserved (Gail Donoghue & Jonathan I. Edelstein, *Life After* Brown: *The Future of State Constitutional Tort Actions in New York*, 42 NYLS L Rev 447, 475-476 n 143 [1998]).

Nor does the ERA bear any similarity to the provisions of the New York State Constitution regarded as presumptively self-executing in *Brown v State of New York* (89 NY2d 172 [1996]), on which Supreme Court relied (R22). At issue in *Brown* were article I, § 11, adopted as part of the Constitution of 1938, which entitles New Yorkers to "the equal protection of the laws of this state or any subdivision thereof," and article I, § 12, also adopted as part of the 1938 Constitution, which safeguards "[t]he right of the people to be secure in their persons, houses, papers and effects." Those provisions, while not of a statutory character, were plainly modeled on preexisting federal constitutional provisions: the Equal Protection Clause of the Fourteenth Amendment (US Const, 14th

Amend, § 1), adopted in 1868, and the Fourth Amendment (US Const, 4th Amend), adopted in 1791, respectively. Thus, it was reasonable to presume that the framers intended to incorporate at least substantial portions of the rich guidance that had developed in connection with the federal analogs, even if the framers did not intend to adhere to every jot and tittle of the federal framework (*cf. People v Jiles*, 158 AD3d 75, 80-81 [4th Dept 2017] [discussing relationship between the New York and federal search-and-seizure provisions], *lv denied*, 31 NY3d 1149 [2018]).

The ERA could not be more different. There is no federal constitutional precursor. And as explained in detail below (*infra* 29-37), the ERA's sister-state precursors only confirm its textual vagueness and subjectivity—and thus confirm the need for legislative exposition to make it capable of anything other than *ad hoc* enforcement.

In conclusion, because the language of the ERA does not supply operational details, definitions, or other objective guidance from which the meaning of its key terms can be discerned and applied in a principled way, the presumption of non-self-execution applies. Thus, plaintiff was required to affirmatively demonstrate that the ERA *is* self-executing. Plaintiff did not, and could not, make that showing.

B. Evidence Of The Framers' Intent Confirms That The ERA Is Not Self-Executing And Makes Clear That Legislative Exposition Is Required

Plaintiff has not shown and cannot show that the ERA is self-executing. Relevant evidence of the framers' intent reinforces, rather than rebuts, the presumption of non-self-execution. But no matter which presumption applies, or if no presumption applies at all, standard principles of constitutional interpretation conclusively demonstrate a desire on the part of the framers for the Legislature to explain the meaning of the ERA's "right to clean air ... and a healthful environment" before courts begin enforcing it. Legislative guidance *must* precede judicial enforcement if courts are to interpret the ERA in the consistent, objective manner characteristic of the Judiciary, rather than in the policy-driven fashion used appropriately by the political branches.

1. A Constitutional Provision Is Self-Executing Only If It Supplies A Rule Sufficient To Permit Objective Application—And Is *Not* Self-Executing If It Is Phrased Entirely In Undefined General Terms

The intent behind the framing of a provision of the New York State Constitution "is first to be sought from the words employed" (*Settle*, 49 NY at 281; *see e.g. City of Buffalo v Lawley*, 6 AD2d 66, 68 [4th Dept 1958] [rejecting an interpretation of the New York State Constitution

that had "no justification in the text of the constitutional provision" at issue]). That principle of constitutional interpretation is particularly important where the question is whether a provision is self-executing: an inquiry that itself hinges on the text. Namely, a constitutional provision is self-executing only if it "supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced" (*People ex rel. Sweeley v Wilson*, 12 Misc 174, 179 [Sup Ct, Albany County 1895] [quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 99 (6th ed. 1890)], *aff'd without op.*, 146 NY 401 [1895][2]; *People v Carroll*, 7 Misc 2d 581, 590 [Kings County Ct 1957] [same], *aff'd*, 4 AD2d 537 [2d Dept 1957], *aff'd*, 3 NY2d 686 [1958]). A constitutional provision is *not* self-executing "when it merely indicates principles without laying down rules by means of which those principles may be given the force of law" (*Sweeley*, 12 Misc at 179, quoting Cooley

[2] In *Sweeley*, the Court of Appeals did not expressly state that it was adopting Supreme Court's opinion as its own. However, the Court later clarified that it had indeed done so. In a subsequent case, the Court explained that, in *Sweeley*, "Judge Herrick wrote so able and exhaustive an opinion at Special Term that this court, in affirming, did not deem it necessary to write" (*Matter of Keymer*, 148 NY 219, 224 [1896]).

at 100; *Carroll*, 7 Misc 2d at 590 [same]). "Most likely [a] total absence of specifics indicate[s] the delegation of power ... to the Legislature" for the purpose of filling in at least some of the critical gaps (*Carroll*, 3 NY2d at 690).

Consider, for example, the now-repealed New York State constitutional provision concerning responsibility for bank debts (1894 NY Const, art VIII, § 7; 1846 NY Const, art VIII, § 7). The bank-debt provision was found non-self-executing even though it lacked an express call for legislative guidance.

The bank-debt provision stated: "The stockholders of every corporation and joint stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind." The provision was "silent as to how and by whom the stockholders' responsibility may be enforced, and as to 'when liability arises, upon whom it falls, and how long it continues'" (*Broderick v Weinsier*, 278 NY 419, 423 [1938], quoting *Broderick v Aaron*, 268 NY 260, 264 [1935]). Perhaps most notably, the provision did not "define the term 'stockholder'" (*id.*, quoting *Broderick v Adamson*, 270 NY 228, 231

[1936]). This omission was significant because the term could plausibly apply to three categories of persons: "the stockholders of record, the legal owners of the stock, or the equitable owners" (*Aaron*, 268 NY at 263).

In a series of actions addressing claims asserted under the bank-debt provision, the Court of Appeals determined, and then reaffirmed, that "[t]he constitutional provision is not self-executing" (*Weinsier*, 278 NY at 423, quoting *Adamson*, 270 NY at 231). The Court described the provision as "couched in general terms" that "depend[ed] upon formulation of rules or tests" by the Legislature in order to permit judicial enforcement (*Aaron*, 268 NY at 263-264). In other words, "statutes were necessary to define what the Constitution has left undefined" (*Weinsier*, 278 NY at 426).

The aforementioned bank-debt cases notwithstanding, neither the Court of Appeals nor the Departments of the Appellate Division have been called upon to apply the "sufficient rule" test on a regular basis to provisions conferring individual rights. But, courts from other states applying the same test have consistently held that individual constitutional rights cast in open-ended, nebulous terms require

legislative exposition before they can be judicially enforced—*i.e.*, before they can be applied in a principled way, rather than *ad hoc*.

Start with Vermont's constitutional "unalienable rights" provision, stating that "all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety" (Vt Const, ch I, art 1). In *Shields v Gerhart* (163 Vt 219 [Vt 1995]), the Vermont Supreme Court held that this provision is not self-executing.

As the Vermont Supreme Court explained, under the "sufficient rule" test, "a self-executing provision should do more than express only general principles," such as "describe the right [conferred] in detail, including the means for its enjoyment and protection" (163 Vt at 224). The unalienable rights provision does not fit this definition. It merely "expresses fundamental, general principles" (*id.*). It speaks in terms of "philosophical truisms" rather than concrete entitlements (*id.* at 225). Thus, the unalienable rights provision "is not 'so certain and definite in character as to form rules for judicial decision'" (*id.*, quoting *Vermont v*

Carruth, 81 A 922, 923 [Vt 1911]). "Alone, it does not provide rights to individuals that may be vindicated in a judicial action" (*id.* at 226).

The Ohio Supreme Court reached the same conclusion with respect to the Ohio Constitution's "inalienable rights" provision, under which "all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defining life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety" (Ohio Const, art I, § 1). "In order for a court of law to enforce any right, there must be a fixed standard to ensure equal and uniform application," the Ohio Supreme Court observed (*Ohio v Williams*, 728 NE2d 342, 354 [Ohio 2000], *cert denied sub nom.*, *Suffecool v Ohio*, 531 US 902 [2000]). Stated differently, there must be "a methodology to determine how to accord protections to the[] rights" conferred (*id.*). The inalienable-rights provision sets forth no methodology or standard whatsoever. It is simply "a statement of fundamental ideals" that "lacks the completeness required to offer meaningful guidance for judicial enforcement" (*id.*). It "requires other provisions of the Ohio Constitution or legislative definition to give it practical effect" (*id.*).

Same goes for the Iowa Constitution's "inalienable rights" provision, which provides that "[a]ll men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness" (Iowa Const, art I, § 1). That promise "consists of lofty—though inspiring—language that sets forth aspirational principles rather than definitive adjudicative rules," an Iowa federal court held, with "no substantive guide to how an Iowa court would measure the notions of freedom, equality, happiness, or safety captured by article I, § 1" (*Meyer v Herndon*, 419 F Supp 3d 1109, 1132 [D Iowa 2019]; *accord Blea v City of Espanola*, 870 P2d 755, 759 [NM Ct App 1994], *cert denied*, 871 P2d 984 [NM 1994] [reaching a similar conclusion as to the New Mexico Constitution's comparable "inalienable rights" provision]).

The same analysis resulted in a similar conclusion concerning the California Constitution's safe-schools provision, which provides that "[a]ll students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful" (Cal Const, art I, § 28 [c]). Like so many

other inalienable-rights provisions, this one, too, "merely indicates principles, without laying down rules by means of which those principles may be given the force of law" (*Leger v Stockton Unified Sch. Dist.*, 202 Cal App 3d 1448, 1455 (Cal Ct App 1988)]). It "declares a general right without specifying *any* rules for its enforcement" (*id.*).

For that reason, the safe-schools provision does not create a property interest protectible by the Due Process Clause of the United States Constitution's Fourteenth Amendment (*Doe v Butte Valley Unified Sch. Dist.*, 2009 US Dist LEXIS 73628 [ED Cal, Aug. 5, 2009, No. 2:09-cv-00245-WBS-CMK]). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it" (*id.* at *14, quoting *Town of Castle Rock v Gonzales*, 545 US 748, 756 [2005]). The safe-schools provision is too indefinite to qualify. It is akin to "a 'policy statement' in a state statute 'to protect children whose health and welfare may be adversely affected through injury and neglect,'" which "created 'no discrete rights or reasonable expectations in any specific protective measures' amounting to an entitlement" (*id.* at *16-17, quoting *Sealed v Sealed*, 332 F3d 51, 56-57

[2d Cir 2003]; *accord Bandoni v Rhode Island*, 715 A2d 580, 587-588 [RI 1998] [holding that the Rhode Island constitutional right of a crime victim "to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime" and "to address the court regarding the impact which the perpetrator's conduct has had upon the victim" is not self-executing]).

2. The ERA Lacks Any Rule For Objectively Defining "Clean Air" And "A Healthful Environment"

The ERA sets forth the broad contours of a constitutional commitment to natural resources and public health, giving each person a "right to clean air ... and a healthful environment." Although, as Supreme Court observed, the ERA does not explicitly call on the Legislature for guidance (R22), the provision nevertheless is devoid of "a sufficient rule by means of which the right given may be enjoyed and protected" (*Sweeley*, 12 Misc at 179). The ERA contains a "total absence of specifics" in that regard (*Carroll*, 3 NY2d at 690). Most significantly, the ERA does not explain the substance of what the right actually *is*. What does it mean for air to be "clean"? How does one determine whether the environment is "healthful"? The ERA does not say. It does not even

hint. It does not set forth *any* rule for answering those critical questions, let alone a sufficiently clear rule.[3]

The framers' decision to withhold any express guidance is powerful evidence of non-self-execution, because a sufficient rule for judicial application cannot be derived from the ERA implicitly. The right to clean air and a healthful environment is inherently subjective and in the eye of the beholder.

Start with the notion of "clean air." There is no "objective standard of cleanliness" (*Dyson, Inc. v Oreck Corp.*, 2009 US Dist LEXIS 19097, at *23 [ED La, Mar. 4, 2009, No. 2:07-cv-09633-SSV-KWR]). "Statements of cleanliness convey 'inherently subjective' concepts" (*Counts v General Motors, LLC*, 237 F Supp 3d 573, 597 [ED Mich 2017], quoting *Seaton v TripAdvisor LLC*, 728 F3d 592, 598 [6th Cir 2013]; *Gamboa v Ford Motor Co.*, 381 F Supp 3d 853, 875 [ED Mich 2019] [same]). They are "matter[s] of opinion ... based on individual tastes and preferences" (*Dyson*, 2009 US Dist LEXIS 19097, at *23).

[3] Nor does the ERA set forth a rule for determining the extent to which one person's "right to clean air … and a healthful environment" must give way to the right of another in contexts in which those rights may be at odds (*see infra* 45-48).

The concept of "a healthful environment" is similarly amorphous. Like cleanliness, healthfulness is "subjective" (*Clevenger v Welch Foods, Inc.*, 342 FRD 446, 459 [CD Cal 2022], *permission for interlocutory appeal denied*, 2022 US App LEXIS 33817 [9th Cir, Dec. 8, 2022, No. 22-80110]; *see also Fusco v Uber Techs., Inc.*, 2018 US Dist LEXIS 126428, at *21 [ED Pa, July 27, 2018, No. 2:17-cv-00036-MSG] [explaining that the concept of "safety" is "subjective" and "a matter of opinion"]). Accordingly, "health[ful]ness is difficult, if not impossible, to measure concretely" (*Yumul v Smart Balance, Inc.*, 733 F Supp 2d 1117, 1129 [CD Cal 2010]; *see Delacruz v Cytosport, Inc.*, 2012 US Dist LEXIS 51094, at *17 [CD Cal, Apr. 11, 2012, No. 4:11-cv-03532-CW] [observing that "the term 'healthy' is difficult to define"]).

Determining objectively whether air is "clean" and the environment is "healthful" is no more manageable by the Judiciary than determining whether a person is "safe" or "happy." As recognized by the numerous individual-rights decisions discussed above (*supra* 21-25), absent legislative guidance, those inquiries devolve into political policymaking. Such highly abstract terms do not supply a sufficient rule for objective judicial interpretation and enforcement.

Recall the non-self-executing New York bank-debt provision: "The stockholders of every corporation and joint stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind" (1894 NY Const, art VIII, § 7; 1846 NY Const, art VIII, § 7). The Court of Appeals found that provision to be "couched in general terms" (*Aaron*, 268 NY at 264), such that "statutes were necessary to define" its meaning, including defining the term "stockholder" (*Weinsier*, 278 NY at 426). Likewise, the ERA supplies no rudders to assist a court in determining whether air qualifies as "clean" and whether the environment qualifies as "healthful."

The ERA's Assembly sponsor, Steve Englebright of Suffolk County, recognized the infinite variation inherent in the provision's abstract terms. When pressed to explain the meaning of the ERA's "right to clean air ... and a healthful environment," Assemblyman Englebright responded as if the right has no objective meaning at all: "'[A] clean and healthful environment' is something that each of us would know when we experience it" (R659). Assemblyman Keith Brown, a proponent of the ERA also representing Suffolk County, offered a blunter

characterization. "It is too vague and it's unclear as to enforcement, and it's too open-ended," he observed (R475).

Assemblymen Englebright and Brown were hardly alone in recognizing the inherent subjectivity of the ERA's language. In the 1970s, several other states, including Pennsylvania, Illinois, Montana, and Massachusetts, adopted similarly worded constitutional ERAs of their own. Courts interpreting those ERAs have consistently found the provisions linguistically lacking the sort of objective enforcement standards on which the Judiciary must rely. Their rulings, summarized below, are persuasive authority that the New York State Constitution's ERA, too, is devoid of a sufficient rule for judicial enforcement (*see e.g. People v Weaver*, 12 NY3d 433, 446 [2009] [using sister-state rulings to interpret New York's constitutional search-and-seizure provision]; *SHAD Alliance v Smith Haven Mall*, 66 NY2d 496, 501 [1985] [using sister-state rulings to interpret New York's constitutional free speech provision]; *cf. People v Okongwu*, 71 AD3d 1393, 1395 [4th Dept 2010] [using federal court interpretation of Sixth Amendment right to counsel to interpret New York's constitutional counterpart]).

Pennsylvania. The Pennsylvania ERA, enacted in 1971, provides that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" (Pa Const, art I, § 27). The Pennsylvania Supreme Court has characterized Pennsylvania's ERA as consisting entirely of "broad and flexible terms" (*Robinson Township v Pennsylvania*, 83 A3d 901, 963 [Pa 2013, plurality op.]). In large part because "'clean air,' 'pure water' and 'the natural, scenic, historic and esthetic values of the environment,' have not been defined," the amendment gives "no advance warning" of what impacts on air quality, water quality, and the environment would constitute infringement (*Pennsylvania v National Gettysburg Battlefield Tower*, 311 A2d 588, 593 [Pa 1973, plurality op.]).

The Pennsylvania Supreme Court has found that "the drafters of the constitutional provision anticipated" that "the legislative and executive branches [would] take[] the initiative in adding substance to the rights guaranteed" in the amendment (*Robinson Township*, 83 AD3d at 969 [plurality op.]). That court has not squarely decided whether the above-quoted portion of that state's ERA is self-executing, however,

calling the question "difficult terrain" (*Payne v Kassab*, 361 A2d 263, 272 [Pa 1976]).[4]

A federal appellate court determined that the Pennsylvania ERA is "too vague and indeterminate to create a federally cognizable property interest" protectible by the Due Process Clause of the United States Constitution's Fourteenth Amendment (*Delaware Riverkeeper Network v Federal Energy Regulatory Commn.*, 895 F3d 102, 109 [DC Cir 2018]). The provision falls short of even that relatively low bar because it "articulates only broad and relative principles" relative to air, water, and the environment (*id.*). It needs, but does not supply, "further guidance on what constitutes sufficiently clean air, sufficiently pure water, and sufficient preservation of natural, scenic, historic and aesthetic environmental values" (*id.*).

Illinois. Illinois courts have found similar shortcomings with respect to that state constitution's ERA, adopted in 1970 (Ill Const,

[4] The Pennsylvania Supreme Court recently declared a *different* portion of that state's ERA self-executing (*Pennsylvania Envtl. Def. Found. v Pennsylvania*, 161 A3d 911, 937 [Pa 2017]). That portion of the amendment provides that Pennsylvania's natural resources are "the common property of all the people" and directs the state to "conserve and maintain them for the benefit of all the people" (Pa Const, art I, § 27).

art XI, § 2). The Illinois ERA provides that "[e]ach person has the right to a healthful environment" (*id.*). But what that right entails is unknowable from the text. The Illinois intermediate appellate court has called it "vague, aspirational, and subject to policy-driven debate" (*Illinois Rd. & Transp. Builders Assn. v County of Cook*, 183 NE3d 948, 961 [Ill Ct App 2021], *rev'd on other grounds*, 204 NE3d 189 [Ill 2022]).

The Illinois Supreme Court has not decided whether that state's ERA is self-executing. But its decision in *Glisson v City of Marion* (720 NE2d 1034 [Ill 1999]) confirms that the text of the amendment would provide no help in that regard. In *Glisson*, both parties assumed that the amendment was self-executing but argued over its substantive meaning: "Plaintiff contends that 'healthful environment' includes the health of the least brook lamprey and the Indiana crayfish. In contrast, defendants argue that the term 'healthful environment' is limited to an environment conducive to human health" (*id.* at 1042). The court resolved the argument entirely on the basis of the Illinois ERA's unusually rich and formal drafting history—a robust record that resulted, in part, from the amendment's having originated at a constitutional convention (*id.* at 1042-1045). As the court appropriately recognized, "[w]hat article XI

means by the term 'healthful environment' is not clear from the language" (*id.* at 1042).

Montana. The Montana State Constitution also contains an ERA (Mont Const, art II, § 3). Adopted in 1972, Montana's ERA provides that "[a]ll persons are born free and have certain inalienable rights," which "include the right to a clean and healthful environment" (*id.*).

The Montana Supreme Court has gone out of its way to avoid deciding whether the Montana ERA is self-executing. In *Sunburst School District No. 2 v Texaco, Inc.*, "[t]he parties fully briefed this question," and the court "expressly framed the issues to be presented at oral argument to include whether 'the right to a clean and healthful environment is self-executing'" (165 P3d 1079, 1093 [Mont 2007]). Yet, the court ultimately "resolve[d] the case without resort to determining whether Article II, § 3 is self-executing" (*id.*). That sort of jurisprudential about-face is not indicative of a readily derivable rule sufficient to enable objective enforcement.

Like the Illinois Supreme Court has done with the Illinois ERA, the Montana Supreme Court has on occasion *assumed* the Montana ERA to be self-executing—but has found the text entirely unhelpful in choosing

between competing substantive interpretations. For example, in *Montana Environmental Information Center v Montana Department of Environmental Quality*, the Montana Supreme Court arrived at a decision interpreting certain substantive features of the Montana ERA "based on the eloquent record of the Montana Constitutional Convention" at which the provision was developed (988 P2d 1236, 1249 [Mont 1999]). The court did not purport to find a sufficient rule for enforcement in the provision's text.

According to Professor John Horwich, a leading academic authority on the Montana State Constitution, there is no such rule to be found: "Under the traditional analysis, the terms 'clean and healthful environment' ... would be deemed so vague as to defy judicial construction" (John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 Mont L Rev 323, 340 [1996]). "The analysis would impute from the vagueness of these terms a desire on the part of those adopting the provision for legislation to flesh out the substance," Horwich stated (*id.*).

Massachusetts. Massachusetts has an ERA, as well, which was enacted in 1972 (Mass Const, art XCVII). It provides that "[t]he people

shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment" (*id.*) The amendment itself recognizes that legislative guidance may be required, inasmuch as it further provides that the state legislature "shall have the power to enact legislation necessary ... to protect such rights" (*id.*) The Massachusetts Supreme Judicial Court has not determined whether legislation is in fact necessary for that purpose, but the court has suggested that the text alone likely does not supply a sufficient rule for judicial enforcement, noting the Massachusetts ERA's "relatively imprecise language" (*Mahajan v Massachusetts Dept. of Envtl. Protection*, 984 NE2d 821, 829 [Mass 2013]).

The foregoing interpretations of the Pennsylvania, Illinois, Montana, and Massachusetts ERAs are even more probative than ordinary persuasive authority because of the strong evidence that the framers of New York's ERA actually were aware of them. The New York sponsor memoranda all referenced "[s]everal other states" with ERAs, identifying Pennsylvania, Montana, and Massachusetts by name and

reciting a desire to "follow those models" (R676,686).[5] The Illinois ERA was likewise identified as a model amendment at a meeting of the Senate Judiciary Committee (NY St Senate Judiciary Comm, *Meeting – February 11, 2019*, https://www.nysenate.gov/calendar/meetings/judiciary/february-11-2019/judiciary-meeting at 06:55-07:10 [statement of Sen. Hoylman]). Further, Assemblyman Englebright had been "following" the litigation activity in those other jurisdictions and had even "called the National Conference of State Legislatures" for assistance in that regard (R472). This evidence negates the notion that the framers intended phraseology appropriately criticized for indefiniteness when used in other states to somehow "supply a sufficient rule by means of which the right given may be enjoyed and protected" (*Sweeley*, 12 Misc 174 at 179) when used in New York.

Hawaii. That notion becomes even more implausible in light of the evidence, in the form of sponsor memoranda and floor statements, that

[5] The record contains the Senate memoranda. The identically worded Assembly memoranda are available at http://public.leginfo.state.ny.us/navigate by searching for bills A02064 (2019-2020 session) and A01368 (2021-2022 session).

the framers also were familiar with the ERA adopted by Hawaii in 1978 (*see* R676,686).

The Hawaii ERA provides, in relevant part, that "[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources" (Haw Const, art XI, § 9). The Hawaii ERA thus expressly delineates, within its four corners and by reference to environmental laws enacted by the state's legislature, the substantive scope of the right conferred. Unsurprisingly, when the matter was put to the Hawaii Supreme Court, the Hawaii ERA was found to be self-executing (*County of Hawaii v Ala Loop Homeowners*, 235 P3d 1103, 1125 [Haw 2010]).

The Hawaii ERA thus illustrates a principle that any jurisdiction wishing to enact a self-executing ERA can readily follow: Define key substantive terms within the four corners of the provision itself. That the framers of New York's ERA took the polar opposite approach of inserting facially nebulous terms—despite being aware of Hawaii's example—reinforces that they did not intend the provision to be self-executing.

3. Court Enforcement Of The ERA Would Violate Fundamental Principles Of Judicial Restraint

The notion that New York courts may proceed immediately with interpreting and enforcing the ERA, without legislative definition and guidance, is further contraindicated by two fundamental principles of judicial restraint. The first principle is the constitutional doctrine of separation of powers, under which "each department"—legislative, executive, and judicial—"should be free from interference, in the discharge of its peculiar duties, by either of the others" (*Matter of Maron v Silver*, 14 NY3d 230, 258 [2010], quoting *Matter of County of Oneida v Berle*, 49 NY2d 515, 522 [1980]). The second principle is the prudential rule of justiciability, under which courts endeavor to avoid performing functions where "other branches of government are far more suited to the task" (*Jones v Beame*, 45 NY2d 402, 409 [1978]). The framers could not have intended the ERA to be self-executing, because self-execution of its vague language would run roughshod over both of these venerable limitations on judicial power.

"The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with

performing particular functions" (*Matter of Maron*, 14 NY3d at 258). "The Constitution's aim 'is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers,' thereby ensuring 'an even balance of power among the three'" (*id.*, quoting *People ex rel. Burby v Howland*, 155 NY 270, 282 [1898] [alteration marks omitted]). Generally, "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," *i.e.*, the Legislature and the Executive (*New York State Inspection, Security & Law Enforcement Employees Dist. Council 82 v Cuomo*, 64 NY2d 233, 240 [1984]). The precise division of responsibility between the Legislature and the Executive in addressing such issues is not always easy to discern; some tasks assigned to the Legislature may be delegated to administrative agencies, while others may not (*see Matter of Boreali v Axelrod*, 71 NY2d 1, 11 [1987] [identifying "coalescing circumstances" that must be analyzed in order to determine the propriety of a legislative delegation of power to an administrative agency]). But the salient point here is that no such task is properly a judicial endeavor.

The Constitution commits to the Legislature the "complex societal and governmental issues" (*New York State Inspection, Security & Law Enforcement Employees*, 64 NY2d at 240) of air and environmental pollution control. It provides that "[t]he policy of the state shall be to conserve and protect its natural resources" and assigns to "[t]he legislature" the task of "implementing this policy" (NY Const, art XIV, § 4). Specifically, the Constitution makes it the Legislature's express duty to "include adequate provision for the abatement of air and water pollution, and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources" (*id.*). The Constitution also declares that "[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as *the legislature* shall from time to time determine" (*id.*, art XVII, § 3 [emphasis added]).

The ERA did not change that division of labor. The ERA conveys no express intent to repeal or modify other provisions of the Constitution so as to reassign from the Legislature to the Judiciary the responsibility to

provide for pollution control or to establish the means by which the State may address public health. Further, "[t]he doctrine of repeal by implication is heavily disfavored in the law" (*Ball v State of New York*, 41 NY2d 617, 622 [1977]; *accord Knapp v Monroe County Civil Serv. Commn.*, 77 AD2d 817, 818 [4th Dept 1980], *lv denied*, 51 NY2d 708 [1980]), and there is no basis to apply that doctrine here. The Attorney General, pursuant to her constitutional duty to render opinions on proposed amendments (NY Const, art XIX, § 1), determined during the enactment process that the ERA does not effect any repeal or modification explicitly or implicitly: Apart from amending article I, "the proposed amendment will have no further effect upon other provisions of the Constitution" (NY St Atty Gen, Op re: Senate Bill S02072 [Mar. 10, 2020]; NY St Atty Gen, Op re: Assembly Bill A02064 [Feb. 4, 2019]). Accordingly, the responsibility to provide for pollution control and the responsibility to establish the means by which the State may address public health remain wholly with the Legislature.

Thus, as relevant here, it is the province of the Legislature to define what makes air "clean," as well as what makes the environment "healthful," as the ERA uses those terms. And rightfully so, because those

determinations hinge on "[a]cquiring data and applying expert advice" tailored to the task of "selecting among competing and [potentially] equally meritorious approaches"—hallmarks of legislative work (*Klostermann v Cuomo*, 61 NY2d 525, 536 [1984]). The cleanliness and healthfulness inquiries are the farthest things from "judicially manageable questions" (*Jones*, 45 NY2d at 408; *see Matter of Montano v County Legislature of County of Suffolk*, 70 AD3d 203, 211 [2d Dept 2009]).

For one vivid example, consider what it takes for the United States Environmental Protection Agency, exercising authority delegated by the United States Congress pursuant to the federal Clean Air Act, to develop air quality standards. The EPA is tasked with determining, on a pollutant-by-pollutant basis, air quality standards "the attainment and maintenance of which in the judgment of the Administrator, based on [certain air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health" (42 USC § 7409 [b] [1]). The process for developing these "national ambient air quality standards"—sometimes called NAAQS—starts with a comprehensive review of the relevant scientific literature. The literature is summarized and

conclusions are presented in a document called the "integrated science assessment" (*see e.g.* US EPA, *Integrated Science Assessment for Oxides of Nitrogen – Health Criteria* [Jan. 2016], https://downloads.regulations.gov/EPA-HQ-OAR-2013-0146-0118/content.pdf). Agency staff produce a "risk and exposure assessment" discussing quantitative and qualitive estimates of risks to human health and welfare associated with current ambient levels of the pollutant (*see e.g.* US EPA, *Review of the Primary National Ambient Air Quality Standards for Nitrogen Dioxide: Risk and Exposure Assessment Planning Document* [May 2015], https://downloads.regulations.gov/EPA-HQ-OAR-2013-0146-0117/content.pdf). The third document—the "policy assessment"—uses the aforementioned analyses to set forth and justify a variety of options for the administrator to consider regarding whether and how to modify the extant NAAQS (*see e.g.* US EPA, *Policy Assessment for the Review of the Primary National Ambient Air Quality Standards for Oxides of Nitrogen* [Apr. 2017], https://downloads.regulations.gov/EPA-HQ-OAR-2013-0146-0120/content.pdf). Each of these three documents is released for public comment and peer review by the Clean Air Scientific Advisory Committee, a sub-committee of EPA's Science Advisory Board. Once all

three documents are final, they are given to the EPA's administrator to use in selecting proposed NAAQS, which is released through the Federal Register for public comment (*see e.g.* 82 Fed Reg 34792 [2017]). Following the close of the comment period, the administrator considers the comments received, makes changes to the proposed NAAQS, if warranted, and issues the final NAAQS as a published federal rule (*see e.g.* 83 Fed Reg 17226 [2018]).

The final rules themselves offer a candid glimpse into the type of discretionary, judgment-infused decisionmaking involved in the standard-setting process. As explained in the 2018 final rule retaining the NAAQS for nitrogen dioxide that had been issued in 2010, the undertaking "is largely a public health policy judgment" (83 Fed Reg at 17230). "Inherent in the Administrator's conclusions are public health policy judgments based on his consideration of the available scientific evidence and analyses" (*id.* at 17273). "These public health policy judgments include judgments related to the appropriate degree of public health protection that should be afforded against risk of respiratory morbidity in at-risk populations, such as the potential for worsened respiratory effects in people with asthma, as well as judgments related

to the appropriate weight to be given to various aspects of the evidence and quantitative analyses, including how to weigh their associated uncertainties" (*id.*).

The promulgation of NAAQS is "an essentially legislative task," albeit one delegated by Congress to the EPA (*Mississippi v United States EPA*, 744 F3d 1334, 1335 [DC Cir 2013] [quoting *National Lime Assn. v United States EPA*, 627 F2d 416, 431 n 48 (DC Cir 1980)], *cert denied sub nom.*, *Utility Air Regulatory Grp. v United States EPA*, 574 US 814 [2014]). Determining what standards are requisite to protect the public health with an adequate margin of safety is a task "governed by policy-driven approaches to uncertain science" (*id.* at 1343). By parity of reasoning, so too is the similarly open-ended determination of what it means for air to be "clean" and the environment "healthful." In sum, evaluating whether particular activities infringe an as-of-yet undefined right to "clean air ... and a healthful environment" is a task that the political branches "are better suited to perform" than is the Judiciary (*Klostermann*, 61 NY2d at 535).

That inquiry is at least equally political, if not more so, in the particular context of assessing the impacts upon air and the environment

caused by solid waste disposal. At the outset, determining whether and to what extent a solid waste disposal activity could be said to infringe the right to "clear air … and a healthful environment" would call for the full panoply of complex scientific and public-health judgments discussed above—judgments usually entrusted to the Legislature in the first instance. On top of that, however, the inquiry also would require judgments generally reserved for the Legislature itself—and not properly delegated to the Executive (let alone the Judiciary)—inasmuch as they invariably implicate "the province of the people's elected representatives ... to resolve difficult social problems by making choices among competing ends," *i.e.*, sensitive, fraught trade-offs that transcend disputes about scientific theories and principles (*Matter of New York Statewide Coalition of Hispanic Chambers v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 697 [2014], quoting *Matter of Boreali*, 71 NY2d at 13).

Perhaps most notably, when it comes to solid waste disposal, determining the scope of any one person's "right to clean air … and a healthful environment" will require weighing that person's environmental interests against the environmental interests of others, including the important public interest in ensuring that all waste is

disposed of. This is because *all* means of solid waste disposal affect the environment, and different means impact different people in different ways. For any given quantity of solid waste, disposing of it in a way that avoids impacting the air and environment of one community almost always requires potential impacts to the air and environment of another. Moreover, those respective effects are not always able to be quantified, aggregated, and compared in order to arrive at a "better" or "best" solution; regularly, it boils down to an apples-and-oranges situation. Indeed, the State's solid waste hierarchy (ECL § 27-0106) reflects this reality, eschewing a rigid prescription for solid waste disposal and instead accommodating choices between and among various waste disposal alternatives based upon "environmental, geographic, demographic, economic and other circumstances" (NYSDEC, *Policy DSH-SW-05-01 Solid Waste Management Policy Guidance*, https://www.dec.ny.gov/regulations/8749.html). The bottom-line is that, except perhaps in rare cases, any one person's "right to clean air … and a healthful environment" cannot be determined without balancing the degree to which it should yield to the corresponding rights possessed by others.

The present case is illustrative in this regard. Plaintiff takes the City of New York to task for sending solid waste to High Acres for landfilling and criticizes High Acres for accepting it, complaining that the odors the waste allegedly produces are offensive to those of plaintiff's members who live near the facility (*see* R61). However, were New York City to dispose of the waste within its borders, by landfilling or otherwise, City residents potentially could claim to be affected. Thus, determining what is meant by the ERA's "right to clean air … and a healthful environment" would require determining whose interests take priority and to what extent—not a matter suited for resolution by the Judiciary in the first instance.

4. The ERA's Drafting History Suggests An Intent That The Legislature Define The Substance Of The Nebulous Right Conferred

The drafting history of the ERA is limited—at least as compared to the thorough drafting histories often generated in connection with provisions (unlike the ERA) that are formulated at constitutional conventions. In particular, the New York ERA's drafting history is quite unlike the robust historical records produced in connection with ERAs enacted by certain other states (*cf. Montana Envtl. Info. Ctr.*, 988 P2d at

1249 [Montana]; *Glisson*, 720 NE2d at 1042-1045 [Illinois]). The circumscribed nature of the New York ERA's drafting history extends to the question whether the New York ERA is self-executing. The memoranda, reports, and hearing and debate transcripts in the historical record do not specifically mention "self-execution" once.

However—and consistent with the textual, structural, and doctrinal evidence of intent discussed in detail above (*supra* 25-48)—in floor statements, Assemblyman Englebright described the ERA in terms strongly indicative of non-self-execution. He repeatedly characterized the amendment as a "frame" for a "painting" consisting of substantive environmental protections to be provided by the Legislature and (with appropriately delegated authority) by administrative agencies like DEC.

- "[I]f you want to think of all of the environmental protections that each of the units of government, including ourselves, might be able to provide as the composition of a painting, [the amendment] is the frame for that painting" (R653).

- "[T]his Constitutional Amendment is the frame for a collage of State agencies and institutions that are all supposed to be working in the same direction to protect the health and well-being of our citizens" (R450).

- "This amendment is not intended to speak to any particular measure, rather it is intended to … provide a frame around all of the many units of government, including us, that are

supposed to be acting in concert with one another to protect the air and water and environment of the State" (R495-496).

- "The Legislature's role is continuing and important, and the responsibility is something that is maintained and necessary. What [the amendment] does, however, is frame the expectations of the actions of the Legislature and the other units of government so that they are all acting in concert with one another toward the goal of protecting the air and water and land and environmental resources of the state for the people" (R499).

These statements by Assemblyman Englebright suggest that the ERA does not supply definitions for "clean" air and a "healthful" environment: such definitions are to be supplied by the political branches. That is the textbook definition of non-self-execution.

Some of Assemblyman Englebright's other floor statements are likewise indicative of an intent for the amendment not to be self-executing. For example, he characterized the amendment as stating a "general premise" and conveying an "expression of optimism" (447,461).[6] It contains "no specific ... rules" (R662). The promulgation of such rules "is the role of the Legislature" (R662). Returning to the painting

[6] Similarly, in debate held during the 2017-2018 legislative session, Assemblyman Englebright said that the environmental rights amendment "is very clearly a - a very general premise" (R439). In that session, the Assembly passed the amendment via concurrent resolution, but the Senate did not.

metaphor, Assemblyman Englebright stated that the rules are the substantive "composition"; the amendment itself is simply the "frame" (R662).

Assemblyman Englebright said that the ERA "puts the onus really on us," referring to himself and his legislative colleagues (R465). Assemblyman Chris Burdick of Westchester County, who voted for the amendment, echoed that sentiment. He said that the amendment "will put an onus on the Legislature to deliver to the residents of this State" (R476). "*We* should be held accountable," he said (R476 [emphasis added]). "*We* should be accountable to everyone in the State for providing this basic human right" (R476 [emphasis added]).

* * * * *

Text, structure, doctrine, and history demonstrate that the ERA is not self-executing. The framers intended for the Legislature to explain what the "right to clean air … and a healthful environment" entails before the right can be enforced in litigation.

II.

THE ERA RESTRAINS ONLY CONDUCT UNDERTAKEN BY THE GOVERNMENT AND THEREFORE DOES NOT AUTHORIZE JUDICIAL INTERFERENCE WITH WASTE MANAGEMENT'S PRIVATE OPERATION OF THE HIGH ACRES LANDFILL

Even assuming that the ERA is presently capable of judicial enforcement—which, as shown above, it emphatically is not—Supreme Court erred by refusing to dismiss plaintiff's claim seeking to enforce the ERA against Waste Management directly.[7] Plaintiff's complaint fails to state a cause of action against Waste Management because the ERA applies only to governmental action. It does not constrain, and cannot properly be used to constrain, the company's operation of the High Acres Landfill—a private activity. Thus, the amendment neither provides a legal basis for plaintiff's claim as against Waste Management nor does it authorize the relief plaintiff seeks directly against the company: a declaratory judgment that Waste Management is violating the ERA "by causing the Odors and Fugitive Emissions and the emissions of [greenhouse gases] into the atmosphere, furthering the cumulative

[7] The extent to which plaintiff's claim seeks to enforce the ERA against Waste Management *indirectly*—by requiring the State to take enforcement action against Waste Management—is discussed separately below (*infra* 58-69).

impact of climate change," as well as an injunction ordering "the immediate proper closure of the Landfill," or alternatively "immediate[] abate[ment of] the Odors and Fugitive Emissions in the Community," by "at a minimum, installing a permanent cover as defined in the 6 NYCRR Part 360 regulations on all the side slopes of the Landfill Cells 1-11 not being actively landfilled in Perinton, and [performing] daily [surface emission] monitoring of the entire surface of the Landfill" (R62).

A. The ERA Restrains Only "State Action": Activities Carried Out By The Government

In general, the New York State Constitution "is a document defining and limiting the powers of State government" (*SHAD Alliance*, 66 NY2d at 504). Absent express language to the contrary, the provisions that confer individual rights "protect individual liberty by limiting the plenary power of the State over its citizens" (*id.* at 503). In particular, they "protect the individual against action by governmental authorities, not by private persons" (*id.* at 502).

This requirement of "state action"—which encompasses conduct of the State itself and other governmental subdivisions, including municipalities—is no mere formality. It is a "fundamental concept concerning the reach of constitutionally guaranteed individual rights"

that is "deeply rooted in constitutional tradition" and "at the foundation of the very nature of a constitutional democracy" (*SHAD Alliance*, 66 NY2d at 503). The requirement serves as "a crucial foundation for ... separation of powers" within New York state government (*id.*). It is the role of the Legislature to "settle conflicting interests among citizens" (*id.*). And because this role is assigned to the Legislature, the interest balancing can be recalibrated over time with relative ease, if needed, through the ordinary legislative process. In the absence of a state-action requirement, courts, interpreting individual-rights provisions of the Constitution in cases between private parties, would be settling conflicting societal interests (*id.*). Because courts would be doing so on "a constitutional basis," the outcomes would be "beyond legislative reach" (*id.*).

For the individual-rights provisions of the New York State Constitution, state action is a firm prerequisite. The ERA is no different. Unlike, for example, the anti-discrimination clause of article I, § 11, the ERA contains no express language purporting to constrain private activity. Thus, the ERA restrains only state action. Indeed, Supreme Court appears to have recognized as much (R22-23).

B. Waste Management's Operation Of The Landfill Is Not "State Action"

Nor did Supreme Court deny that Waste Management's operation of the High Acres Landfill is private action—*not* state action for purposes of the New York State Constitution. And again, rightfully so. Waste Management is a private corporation, and it alone operates the landfill. As to the activities of Waste Management that plaintiff says violate the ERA, the state-action requirement is not satisfied.

When it comes to state action, "the test is not simply State involvement, but rather significant State involvement" (*SHAD Alliance*, 66 NY2d at 505). "The factors to be considered in determining whether it has been shown include: 'the source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person'" (*id.*, quoting *Sharrock v Dell Buick-Cadillac, Inc.*, 45 NY2d 152, 158 [1978]) "[S]atisfaction of one of these criteria may not necessarily be determinative to a finding of State action" (*id.*)

The requirement of state action for purposes of the New York State Constitution is, in certain respects, "more flexible" than its federal counterpart (*Sharrock*, 45 NY2d at 160). However, the respective analyses are highly correlated; the aforementioned multi-factor analysis is linguistically identical to, and was directly derived from, the corresponding federal inquiry (*see SHAD Alliance*, 66 NY2d at 505). Thus, courts assessing the presence of state action for purposes of the New York State Constitution routinely and appropriately draw guidance from federal analysis (*see e.g. Downs v Town of Guilderland*, 70 AD3d 1228, 1231-1232 [3d Dept 2010] [interpreting the New York State Constitution's Free Speech Clause]; *Manshul Constr. Corp. v New York City Sch. Constr. Auth.*, 192 AD2d 659, 660 [2d Dept 1993] [interpreting the New York State Constitution's Equal Protection Clause]).

As case law interpreting the United States Constitution explains, the state-action inquiry boils down to whether conduct undertaken by a private party is "'fairly attributable' to the state" (*Williams v Maddi*, 306 AD2d 852, 853 [4th Dept 2003] [quoting *American Mfrs. Mutual Ins. Co. v Sullivan*, 526 US 40, 50 (1999)], *lv denied*, 100 NY2d 516 [2003], *cert denied*, 541 US 960 [2004]). "[T]he fact that [the private party] is

regulated by the state ... is, without more, woefully insufficient to impute state action" (*id.* [alteration marks omitted]). Even "extensive state regulation" does not suffice (*Cranley v National Life Ins. Co.*, 318 F3d 105, 112 [2d Cir 2003], quoting *Jackson v Metropolitan Edison Co.*, 419 US 345, 353 [1974]). Nor does a regulator's "approval or acquiescence" of the conduct (*id.*, quoting *American Mfrs. Mutual Ins.*, 526 US at 52). The state must "put its own weight on the side of the [private entity's] practice by ordering it," or at least "provide[] 'significant encouragement, either overt or covert,'" for the practice (*Tancredi v Metropolitan Life Ins. Co.*, 316 F3d 308, 313 [2d Cir 2003] [first quoting *Jackson*, 419 US at 357; second quoting *Brentwood Academy v Tennessee Secondary Sch. Athletic Assn.*, 531 US 288, 296 (2001)], *cert denied*, 539 US 942 [2003]; *accord Montalvo v Consolidated Edison Co.*, 92 AD2d 389, 394 [1st Dept 1983], *aff'd on op. below*, 61 NY2d 810 [1984]).

Plaintiff's complaint does not plausibly plead the governmental control or influence necessary to render Waste Management's operation of the High Acres Landfill state action. And Supreme Court did not state otherwise. But the court evidently failed to appreciate the logical conclusion that inevitably follows: Because the New York State

Constitution requires state action, plaintiff failed to state a cause of action against Waste Management. The complaint should be dismissed as against Waste Management—not just in form but also in substance—because no relief properly can be awarded directly against the company.

III.

THE ERA DOES NOT AUTHORIZE RELIEF AGAINST WASTE MANAGEMENT INDIRECTLY, BECAUSE IT CANNOT PROPERLY BE USED TO COMPEL THE STATE AND DEC TO TAKE ENFORCEMENT ACTION

Plaintiff additionally failed to state a cause of action that would entitle it to the injunctive relief sought against the State and DEC: an order directing the State and DEC to effectuate "the immediate proper closure of the Landfill," or alternatively "to immediately abate the Odors and Fugitive Emissions in the Community" by "at a minimum, installing a permanent cover as defined in the 6 NYCRR Part 360 regulations on all the side slopes of the Landfill Cells 1-11 not being actively landfilled in Perinton, and [performing] daily [surface emission] monitoring of the entire surface of the Landfill" (R62). The allegations in plaintiff's complaint fall far short of the demanding showing that must be made in order to state an entitlement to compel administrative action.

A. Plaintiff's Request For Injunctive Relief Is Tantamount To A Demand For Mandamus: An Extraordinary Remedy That Requires A Correspondingly Extraordinary Showing

Plaintiff does not describe with perfect clarity the injunction it seeks against the State or DEC. Conceivably, it could be an order directing the State and DEC themselves to physically implement the aforementioned closure or mitigation measures. Or it could be an order directing the State and DEC to order Waste Management to do so—for instance, by modifying or revoking Waste Management's permits. Either way, plaintiff's request for injunctive relief boils down to a demand for court-ordered action by the Executive—in sum and substance, a demand for a writ of mandamus pursuant to CPLR 7803 (1). Thus, as a formal matter, plaintiff's request for injunctive relief against the State and DEC should be converted to a CPLR article 78 proceeding (*see EMP of Cadillac, LLC v Assessor of Spring Valley*, 15 AD3d 336, 338 [2d Dept 2005]). But whether or not it is so converted, the strict standards governing mandamus relief apply (*see e.g. Town of Webster v Village of Webster*, 280 AD2d 931, 933 [4th Dept 2001]).

The remedy of mandamus "is considered extraordinary because the judiciary is loathe to interfere with the executive department's exercise

of its official duties" (*Matter of County of Chemung v Shah*, 28 NY3d 244, 266 [2016]; *accord Flower City Nursing Home, Inc. v Reed*, 55 AD2d 826, 826 [4th Dept 1976]). Consequently, a writ of mandamus "is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], quoting *Matter of County of Chemung*, 28 NY3d at 266).

"Mandamus is used to enforce an administrative act positively required to be done by a provision of law" (*Matter of County of Chemung*, 28 NY3d at 266, quoting *Matter of Walsh v LaGuardia*, 269 NY 437, 441 [1936]). For mandamus to lie, "there must exist a ... nondiscretionary duty on the part of the administrative agency [or official] to grant that relief" (*Matter of Eck v Mayor of Vill. of Attica*, 28 AD3d 1195, 1196 [4th Dept 2006], quoting *Matter of Anonymous v Commissioner of Health of the State of New York*, 21 AD3d 841, 842 [1st Dept 2005]; *accord Alliance to End Chickens as Kaporos*, 32 NY3d at 1093). "[M]andamus to compel may not force the performance of a discretionary act," *i.e.*, an act the agency is authorized, but not compelled, to perform (*Matter of Eck*, 28 AD3d at 1196, quoting *Matter of Anonymous*, 21 AD3d at 842).

Further, even in the context of non-discretionary duties, the scope of mandamus relief is highly circumscribed. While a writ of mandamus "may ... issue to compel a public officer [or agency] to execute a legal duty," the writ "may not direct how the officer [or agency] shall perform that duty" (*Alliance to End Chickens as Kaporos*, 32 NY3d at 1093, quoting *Klostermann*, 61 NY2d at 540 [alteration marks omitted]). In other words, the way in which the duty is executed is still a matter committed to the officer or agency's discretion; the writ cannot properly be used "to compel a particular outcome" (*id.*).

Moreover, a party seeking mandamus to compel the Executive to perform a given task must establish that its "right thereto is clear and unequivocal" (*Flower City Nursing Home*, 55 AD2d at 826). For example, mandamus should not issue where the relief requested "depends upon the construction of a statute, framed in such ambiguous language as to render its interpretation difficult" (*People ex rel. Dolan v Lane*, 55 NY 217, 219 [1873]). In that context, "the absence of a clear and unequivocal expression of intent from the Legislature" to impose the claimed duty is fatal to a mandamus claim (*Harper v Angiolillo*, 89 NY2d 761, 767 [1997]). The same level of clarity is required of other legal documents (*see*

Silverman v Lobel, 163 AD2d 62, 63 [1st Dept 1990] [denying mandamus to compel performance under a contract where the record "reveals an obvious dispute" as to whether the contract remained valid]).

In the language of federal mandamus precedent, which employs a substantially similar standard, "open questions" regarding relevant sources of law "are the antithesis of the 'clear and indisputable' right needed for mandamus relief" (*Matter of Al-Nashiri*, 791 F3d 71, 85-86 [DC Cir 2015]). Mandamus is appropriately denied "if a petitioner's argument, though 'packing substantial force,' is not clearly mandated by [legal] authority or case law" (*Illinois v Ferriero*, 60 F4th 704, 714 [DC Cir 2023], quoting *Matter of Al Baluchi*, 952 F3d 363, 369 [DC Cir 2020]).

B. Mandamus Is Inappropriate Because Plaintiff Has No Clear Legal Right To Compel The State And DEC To Take The Requested Action Against Waste Management

Plaintiff fails to state a cause of action for the mandamus relief sought against the State and DEC, because the allegations set forth in the complaint do not remotely establish a "clear and unequivocal" right (*Flower City Nursing Home*, 55 AD2d at 826) to compel those entities to close or modify the operation of the High Acres Landfill or to order Waste Management to do so. Plaintiff's complaint falls short for two separate

reasons. First, on the merits, the complaint does not set forth a clear and unequivocal infringement of its members' "right to clean air, … and a healthful environment" under the ERA. And second, even assuming an indisputable infringement of the right set forth in the ERA, the ERA would not clearly and unequivocally require the State and DEC to take enforcement action in order to remedy the violation. The ERA certainly would not clearly and unequivocally require government regulators to take the highly specific enforcement actions plaintiff requests regarding the operation of the High Acres Landfill.

1. Plaintiff's Allegations Of Odors And Emissions Supposedly Emanating From The High Acres Landfill Do Not State A Clear Infringement Of Any Right Conferred By The ERA

In the first place, mandamus relief is not available because the ERA is too vague and open-ended for the courts to say that plaintiff's complaint alleges a clear and unequivocal violation by any party. The underlying legal premise of plaintiff's claim is the assertion that odors and emissions supposedly emanating from the High Acres Landfill are infringing plaintiff's members' "right to clean air ... and a healthful environment" (*see* R40,60). As explained in detail above (*supra* 25-37),

that right is too textually nebulous for judicial interpretation. Its very substance is the antithesis of clear and unequivocal.

This reason alone demonstrates that relief in the nature of mandamus is inappropriate. It therefore justifies dismissal of plaintiff's cause of action as against the State and DEC for injunctive relief.

2. Even Assuming An ERA Violation, Plaintiff Has No Clear Entitlement To State And DEC Action Against Waste Management And The High Acres Landfill

Additionally, mandamus is inappropriate even if the odors and emissions supposedly emanating from the High Acres Landfill could be said to infringe plaintiff's members' "right to clean air … and a healthful environment." Plaintiff does not have a clear and unequivocal right to compel the State and DEC to take enforcement action against Waste Management, because the ERA does not clearly and unequivocally impose upon the State and DEC a duty to act at all, much less a duty to take the very specific actions requested in the complaint.

The ERA was adopted against the backdrop of administrative agency discretion: the longstanding tradition in which the State of New York and its administrative agencies are authorized, but not required, to take enforcement action against violations of laws within their purview

(*see generally Heckler v Chaney*, 470 US 821, 831 [1985] [explaining that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion … attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement"]). Generally, in the environmental context, the question whether and when to take enforcement action in response to such a violation involves "judgments that DEC possesses the discretion and expertise to make" (*Matter of Natural Resources Def. Council, Inc. v New York State Dept. of Envtl. Conservation*, 25 NY3d 373, 397 [2015]; *accord Matter of Kerness v Berle*, 85 AD2d 695, 696 [2d Dept 1981], *aff'd on op. below*, 57 NY2d 1042 [1982]). The statutes and permits referenced by plaintiff in this case reflect this longstanding tradition of DEC enforcement discretion. For example, the Solid Waste Hierarchy (ECL § 27-0106 [3]) serves to "guide"—not to predetermine—"decisions of the department" with respect to solid waste management. Further, DEC "may" modify, suspend, or revoke a permit in response to a violation by the permittee (ECL § 70-0115 [1]), and "may" enjoin violations of

applicable rules and statutes (ECL § 71-2727), but the agency is not required to do so.

Consistent with the venerable tradition of administrative enforcement discretion, the ERA does not purport to impose an affirmative obligation on the State or DEC to mitigate activity that interferes with persons' "right to clean air ... and a healthful environment." By electing not to impose affirmative governmental obligations, the framers chose to go a different direction than some of the ERAs of other states with which they were familiar. For example, the Pennsylvania ERA provides that "[a]s trustee of [Pennsylvania's natural] resources, the Commonwealth shall conserve and maintain them for the benefit of all the people" (Pa Const, art I, § 27). And the Montana ERA provides that "[t]he state ... shall maintain and improve a clean and healthful environment in Montana for present and future generations" (Mont Const, art IX, § 1 [1]). New York's ERA contains no such language.

Accordingly, there is no legitimate basis for attributing to the framers of the New York ERA an intent to override the longstanding tradition of administrative agency discretion and impose an affirmative duty on the State and DEC to take action against each and every (alleged)

ERA infringement. Indeed, Supreme Court seemingly recognized as much. The court observed that "[u]tilizing its enforcement authority is just one of the ways the State could respond to [an alleged] constitutional violation, but is not the sole option it has" (R26).

Certainly, nothing in the ERA compels the State and DEC to exercise enforcement authority to impose the specialized measures plaintiff requests in the complaint: "clos[ing] of the Landfill," or alternatively "installing a permanent cover as defined in the 6 NYCRR Part 360 regulations on all the side slopes of the Landfill Cells 1-11 not being actively landfilled in Perinton" coupled with "[performing] daily [surface emission] monitoring of the entire surface of the Landfill" (R62). After all, even if the State and DEC arguably could be ordered in general terms to address an alleged ERA violation, a writ of mandamus "may not direct *how* [those entities] shall perform that duty" (*Alliance to End Chickens as Kaporos*, 32 NY3d at 1093 [emphasis added]).

In sum, there is an "absence of a clear and unequivocal expression of intent" (*Harper*, 89 NY2d at 767) by the ERA's framers *either* to render unconstitutional the alleged landfill odors and emissions *or* to require the

State and DEC to take affirmative action to redress them, much less via the particular form of granular micromanagement plaintiff seeks.

C. Mandamus Should Be Denied For The Additional Reason That Plaintiff Failed To Exhaust Administrative Remedies

In general, a party who objects to an administrative agency's course of conduct must exhaust available remedies provided by the agency before challenging the conduct in court (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). The exhaustion requirement applies when a party seeks relief in the nature of mandamus to compel (*see e.g. Matter of DiBlasio v Novello*, 28 AD3d 339, 342 [1st Dept 2006]), including mandamus on the ground that agency action is supposedly required by the Constitution (*Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544, 549 [1st Dept 2007]).

Plaintiff did not allege that it had exhausted administrative remedies before filing this action. And there were remedies available. For example, DEC regulations allow interested parties to petition for modification, suspension, or revocation of DEC-issued permits based upon "a material change in … applicable law or regulations since the issuance of the existing permit" (6 NYCRR 621.13 [a] [4]). After the ERA became part of the New York State Constitution, plaintiff could have filed

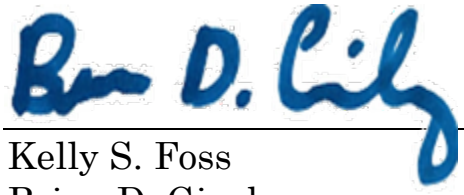
such a petition seeking modification, suspension, or revocation of Waste Management's permits for the High Acres Landfill. Within such an administrative challenge, plaintiff could have argued that the permits are no longer fully appropriate in light of the ERA. DEC would have faced the same problem posed by the ERA's inherent vagueness, but the lack of an administrative record compounds that problem. Had plaintiff brought an administrative challenge, DEC would have had an opportunity "to prepare a record reflective of its expertise and judgment" (*Watergate II Apts.*, 46 NY2d at 57), and if plaintiff remained dissatisfied after DEC's review and opted to file a lawsuit, the court would then have the benefit of that record. However, plaintiff opted not to give DEC that opportunity—a choice which should preclude resort to the court system.

CONCLUSION

Supreme Court's December 20, 2022 decision and order should be reversed and plaintiff's complaint dismissed in its entirety.

December 22, 2023

Respectfully submitted,



Kelly S. Foss
Brian D. Ginsberg
Steven P. Nonkes
Laura W. Smalley
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
bginsberg@harrisbeach.com

Attorneys for Defendant-Appellant-Respondent Waste Management of New York, L.L.C.

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