To be argued by:
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Supreme Court of the State of New York
Appellate Division – Fourth Department

FRESH AIR FOR THE EASTSIDE, INC.,
Plaintiff-Appellant,

v.

THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND WASTE MANAGEMENT OF NEW YORK, L.L.C.,
Defendants-Appellants,
THE CITY OF NEW YORK,
Defendant-Respondent.

No. CA 23-00179

BRIEF FOR APPELLANTS THE STATE OF NEW YORK AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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PRELIMINARY STATEMENT

In this plenary action, plaintiff Fresh Air for the Eastside, Inc. (FAFE), claims that air emissions and odors at the High Acres Landfill, which is operated by defendant Waste Management, Inc., violate its members' right to clean air and a healthful environment under New York's recently passed "Green Amendment," N.Y. Const. art. I, § 19. FAFE seeks to compel defendants New York State Department of Environmental Conservation (DEC), which has issued permits to Waste Management and taken enforcement action against it, and the State of New York (together, the State), to take additional enforcement action requiring Waste Management to either close the Landfill or modify its permits to impose specific additional conditions that FAFE alleges will help address air emissions and odors.

FAFE's complaint fails to state a cause of action and should have been dismissed by Supreme Court. Both forms of relief sought by FAFE—a declaratory judgment that DEC violated the Green Amendment and an order sounding in mandamus to compel DEC to close or impose new conditions on the Landfill—seek to compel DEC to take additional enforcement action against Waste Management. Both forms of relief

overlook DEC's discretion to decide whether and when to enforce the State's solid waste laws or the conditions of Waste Management's permits.

The Green Amendment was not intended to abrogate DEC's enforcement discretion. Although the Green Amendment establishes a constitutional right, constitutional rights generally require the government to ensure that *its* actions do not infringe those rights, rather than require the government to take action against third parties like Waste Management. And nothing in the text or legislative history of the Green Amendment, or in judicial interpretations of similar green amendments in other states, supports interpreting the Green Amendment to require the State to take action against a third party or to otherwise abrogate the State's enforcement discretion.

The order on appeal should be reversed and the complaint dismissed.

QUESTION PRESENTED

Does the Green Amendment, N.Y. Const. art. I, § 19, require the State to take action against the private operator of a landfill where that operator's conduct is alleged to deprive the plaintiff's members of their Green Amendment rights?

Supreme Court answered this question in the affirmative.

STATEMENT OF THE CASE

A. Legal Framework

1. Solid Waste Management under the Environmental Conservation Law

In article 27 of the Environmental Conservation Law (ECL), the Legislature tasked DEC with regulating solid waste management facilities, including landfills, in New York. A landfill must obtain a solid waste management facility permit issued by DEC. *See* ECL § 27-0707. If the facility was permitted before 2017, as was the High Acres Landfill, it must comply with the comprehensive DEC regulations in effect before 2017, including: (1) maintaining a waste control program; (2) conducting self-inspections; and (3) controlling dust, vectors (*e.g.*, pests), odors, and noise. *See* 6 NYCRR former §§ 360-1.14, 360-2.17. The facility must also comply with significant additional obligations, including requirements

for installing daily, intermediate, and final covers on the landfill and controlling gases emitted by decomposing material. *See id*. former §§ 360-2.3, -2.9, -2.11, -2.17. When Waste Management applied for its permit, it was required to describe how the Landfill's operation would be consistent with the solid waste management policy set forth in ECL § 27-0106, which prioritizes the reduction, reuse, and recovery of solid waste. *See* 6 NYCRR former § 360-1.9(d)(1), (3).

When a waste management facility violates the conditions of its permit, DEC "may revoke" the permit and "may" enjoin violations of the solid waste management law. ECL § 71-2703(1). DEC also "may issue, modify and revoke orders" regarding violations of that law and require a permittee to implement remedial measures and corrective actions. *Id.* § 71-2727. In its discretion, DEC may also determine that a landfill's emission of odors constitutes a nuisance and bring an enforcement action to abate the nuisance. *See* 6 NYCRR former § 360-1.14(m).

In 2017, DEC issued revised regulations for solid waste management facilities. *See* 6 NYCRR part 360. Except in specific circumstances, these regulations do not, by their terms, apply to facilities like the High Acres Landfill that were issued permits before 2017. *See*

6 NYCRR § 360.4. As part of its resolution of a notice of violation issued against it by DEC in 2018, DEC directed Waste Management to comply with certain operational requirements of the more stringent 2017 regulations. (R. 398-399.)

2. Air Emissions under the Clean Air Act and the Climate Law

When a landfill constitutes a "major source" of air emissions within the meaning of the federal Clean Air Act, it must obtain a permit under Title V of that Act, 42 U.S.C. §§ 7661–7661f. The federal Environmental Protection Agency (EPA) has granted DEC authority to implement and enforce the Title V permit program in New York. 66 Fed. Reg. 63,180 (December 5, 2001); *see also* 40 CFR part 70; ECL § 19-0311(1); 6 NYCRR subpart 201-6. Before DEC issues a Title V permit, EPA has the authority to review and object to the permit. *See* 6 NYCRR § 201-6.3(c).

A landfill's Title V permit contains requirements for monitoring, record-keeping, and reporting of air emissions to DEC. *See* 6 NYCRR § 201-6.4. A Title V permittee must certify compliance each year to DEC and obtain a renewal of the permit every five years. *See id.* § 201-6.4(e), (h). When a landfill violates its Title V air permit, DEC "may" enjoin

violations, ECL § 71-2103(1), and the permit "may be modified, suspended or revoked," 6 NYCRR § 621.13(a).

Greenhouse gas emissions from a landfill are also regulated by New York's Climate Leadership and Community Protection Act, ECL § 75-0101 through 75-0119. The Climate Act, which became effective in January 2020, requires New York to reduce greenhouse gas emissions to no more than 60 percent of 1990 levels of those emissions by 2030 and no more than 15 percent of those levels by 2050. ECL § 75-0107(1); *see also* 6 NYCRR part 496. When a state agency issues a permit or takes other action, an unconsolidated provision of the Climate Act requires the agency to consider whether the action is "inconsistent with or will interfere with the attainment" of those requirements. 2019 Laws of N.Y. Ch. 106 (S. 6599), § 7.

3. The Green Amendment

In November 2021, New Yorkers voted to adopt a new section 19 to Article I of the New York State Constitution. Commonly called the "Green Amendment," it provides: "Each person shall have a right to clean air and water, and to a healthful environment." The Assembly sponsor's memorandum for the bill that became the Green Amendment explained

that the bill was based on green amendments adopted by other states, including Pennsylvania, Hawai'i, Massachusetts and Montana. *See* NY Assembly Memorandum in Support of Legislation for Assembly Bill A6279, Apr. 24, 2017 (reproduced at R. 435). The amendment does not contain language that those other green amendments contain, however, either expressly requiring the state to enforce the amendment, *see, e.g.,* Pa. Const. art. I, § 27 (labeling Commonwealth a "trustee" of environmental resources and charging it with responsibility to "conserve and maintain them for the benefit of all the people"); Mont. Const. art. IX, § 1 (requiring State to "maintain and improve a clean and healthful environment" and Legislature to "provide for the administration and enforcement of this duty"), or expressly authorizing members of the public to enforce the amendment, *see* Haw. Const. art. XI, § 9 (providing "[a]ny person may enforce" the right to a clean environment "against any party, public or private, through appropriate legal proceedings"). The Green Amendment became effective on January 1, 2022. *See* N.Y. Const. art. XIX, § 1.

B. Factual Background

1. The Landfill

The High Acres Landfill ("Landfill"), owned and operated by Waste Management, straddles the border between the Town of Perinton in Monroe County and the Town of Macedon in Wayne County. The Landfill began accepting waste in 1971. DEC regulates the release of odors and air emissions from the Landfill under a solid waste management permit and a Title V air emissions permit, respectively. (R. 75-89 [solid waste permit]; R. 238-335 [air permit].)

The solid waste management permit, among other things, requires Waste Management to comply with the programs set forth in its DEC-approved operations and maintenance manual (O&M Manual) with respect to gas and odors, including requirements for collecting methane and other decomposition gases for combustion at the Landfill and monitoring for methane and hydrogen sulfide. (R. 138-139.) The Landfill also operates under an odor control plan that, among other things, requires daily overnight covers on areas of the Landfill that are receiving waste, low-permeability covers of at least 12 inches in thickness on areas of the Landfill that are not receiving waste but have not reached full

capacity, a gas collection system to contain gas emissions, and immediate disposal or covering of particularly odorous waste. (R. 110-111, 154-164.)

DEC renewed the Landfill's solid waste management permit in July 2013 and modified it in October 2013. (R. 75.) The October 2013 modification allowed Waste Management to construct and operate a rail facility to accept waste transported from New York City by rail. (R. 75.) The solid waste management permit expired July 8, 2023, but because Waste Management submitted a timely and sufficient application for a permit renewal (R. 75), it is authorized by the State Administrative Procedure Act (SAPA) § 401(2) to continue to accept solid waste under the expired permit. DEC's review of the permit renewal application remains ongoing.

The Landfill also operates under a Title V air emissions permit issued by DEC in December 2016. (R. 238.) In accordance with Title V, *see* 40 CFR §§ 60.753(d), 60.755(c), the air permit, as issued, requires Waste Management to take corrective action if surface emissions of methane meet or exceed 500 parts per million (ppm) above background levels, to monitor surface methane, and to verify that non-methane organic compounds emitted as a result of flaring (burning) landfill gases

are within thresholds established by EPA. (R. 284-285, 288-289.) Waste Management must monitor surface methane on a quarterly basis at specified places in the Landfill. (R. 284-285, 288-289.) If the monitor detects methane emissions of 500 ppm or greater, Waste Management must implement corrective actions that may include upgrading gas collection equipment or installing new wells or other devices (R. 284-285, 288-289), because mitigation is mandatory for such emissions, *see* 40 CFR § 60.755(c)(4) (requiring mitigation actions in response to a reading of 500 ppm or more). The air permit recognizes that emissions monitoring may be impossible if areas of the Landfill are covered with snow or ice for an entire quarter. (R. 291-292.)[1]

The air permit expired on December 1, 2021, but because Waste Management filed a timely and sufficient application for a renewal, it is authorized by SAPA § 401(2) to continue operations under the expired

[1] Subpart WWW of EPA's Part 60 air permitting regulations applies to municipal solid waste landfills that commenced construction, reconstruction, or modification between 1991 and 2014. The Landfill is subject to Subpart WWW because it commenced operations in areas that opened in 1994 and because it meets thresholds for certain regulated emissions and for its design capacity.

permit. (*See* R. 38.) DEC's review of the permit renewal application remains ongoing.

2. Monitoring and Enforcement by DEC

DEC may modify, suspend, or revoke the Landfill's solid waste management and air permits, and DEC may require Waste Management to correct, abate, or remediate any non-compliance with those permits. (R. 76, 78 [Solid Waste Management Permit]; R. 248 [Air Permit].) In winter 2018, after odors from the Landfill began affecting the local community, DEC issued a "Notice of Violation" that required Waste Management to implement several actions at the Landfill to abate odors, including replacing gas recovery wells; placing plastic "geomembrane" covers over certain areas to prevent odors from escaping; reducing the action level for emissions of methane from 500 ppm to 200 ppm; and conducting real-time monitoring of hydrogen sulfide, which has a distinct odor, near the neighborhoods most affected. (*See* R. 46-47; *see also* R. 336-338.) Waste Management incorporated these requirements into the Landfill's O&M Manual. (R. 173-209.) DEC also ordered Waste Management to temporarily close two areas of the Landfill—Cells 10 and 11—and cover those areas with an engineered soil cap or plastic cover

until Waste Management could demonstrate to DEC that odors are sufficiently resolved. (*See* R. 45; *see also* R. 336.)

DEC has also considered FAFE's recommendations for further action. For example, in July 2018, FAFE petitioned DEC under 6 NYCRR § 621.13(b) to modify Waste Management's solid waste management permit to require, among other things, permanently covering and closing the Landfill's Perinton side; reducing the final elevation of the Landfill's Macedon side; monitoring odor-causing gases when measures are taken to mitigate landfill odors; and reducing both the volume of municipal solid waste received by the Landfill by rail and the time waste is permitted to remain on rail cars before being placed at the Landfill. (R. 381-382, 384-385.) DEC provided a comprehensive response to that petition in March 2019 where it described the actions DEC was requiring Waste Management to take to mitigate odors at the Landfill. (R. 386-424.) Among other things, DEC described how it had confirmed the effectiveness of both the mandatory mitigation measures it imposed in its 2018 Notice of Violation and the actions taken by Waste Management to address those violations; sent environmental conservation officers and technical staff to the community during business and non-business hours

to independently monitor conditions near the Landfill and provide real-time support to concerned residents; and established a hotline for residents to report and document odor problems. (R. 386-424.)

In August 2021, FAFE wrote to DEC to make further requests regarding the Landfill and summarize the views expressed by FAFE's consultant during an April 2021 call with DEC. (R. 425-428.) After reviewing and considering the consultant's views, DEC responded to FAFE two weeks later that it would require Waste Management to revise sections of its operating plans to clarify Waste Management's obligations under the Landfill's permits. (R. 429-432.)

And DEC thereafter did so, directing Waste Management, among other things, to revise its O&M Manual to limit the time that rail waste remains on site before being placed in the Landfill and to clarify restrictions on the materials that Waste Management may use for daily cover; revise its odor control plan to clarify that, following remedial efforts that were completed in 2018, the primary source of off-site odor is waste rather than landfill gases; revise its surface emissions monitoring plan to require Waste Management to provide more detail when conditions render emissions monitoring unsafe or impractical; and revise

its design plan for the gas collection system to clarify Waste Management's obligations. (R. 429-432.)

C. This Proceeding and the Decision and Order Below.

FAFE commenced this action in January 2022, less than a month after the Green Amendment went into effect, against the State, Waste Management, and the City of New York. (R. 34-63.) According to the allegations in the complaint, which are assumed to be true at this stage of the action, Waste Management's operation of the Landfill is causing odors, greenhouse gases, and other emissions to be released into the surrounding community, adversely impacting FAFE's members. (R. 40-44, 57-59.) In particular, FAFE alleges that the Landfill regularly emits methane, a greenhouse gas, at levels exceeding its permit conditions and causing odors. (R. 47-49.) According to FAFE, these methane exceedances suggest that other gases, such as hazardous air pollutants and volatile organic compounds, are also being emitted. (R. 48-49.) FAFE asserts that these pollutants include compounds that smell of rotten eggs. (R. 41.)

FAFE asserts a single cause of action against all defendants, alleging that unspecified "acts and omissions" of the defendants, including the State, violate the Green Amendment. (R. 59-60.)

Specifically, FAFE claims that DEC is failing to take adequate enforcement action against Waste Management by allowing repeated permit and regulatory violations at the Landfill, delaying actions to drastically cut greenhouse gas emissions, and failing to cause Waste Management to control odors and emissions at the Landfill (R. 60-61).

As relief, FAFE seeks a declaration that defendants are violating the rights of its members under the Green Amendment. (R. 62.) FAFE also seeks an injunction—or, in effect, relief in the nature of mandamus to compel—"directing the immediate proper closure of the Landfill" or "directing Defendants to immediately abate the Odors and Fugitive Emissions" from the Landfill. (R. 62.) Beyond relief compelling closure or the enforcement of existing laws and permits, however, FAFE does not identify any other action as a remedy for its cause of action.

All defendants moved to dismiss the complaint. (R. 64-698.) The State moved to dismiss the claim against it on the grounds that the claim should have been brought under CPLR article 78, the claim was untimely to the extent that it challenged the Landfill's permits, and Supreme Court could not compel the State to exercise its enforcement discretion to take enforcement action against Waste Management. (R. 70-71.) In

response, FAFE clarified that it was not challenging DEC's issuance of permits to Waste Management, but was "seeking redress for actions, inactions and/or results that violate the Permits or which otherwise cause unclean air or an unhealthful environment." (R. 704.)

In an Amended Decision and Order entered December 21, 2022, Supreme Court (Ark, J.) granted the motions to dismiss submitted by Waste Management and New York City but denied the State's motion to dismiss. (R. 11-33.) Supreme Court ruled that DEC could be compelled pursuant to the Green Amendment to take further action with respect to the Landfill because DEC "lacks the discretion to violate the Constitution." (R. 26-27.) The court found that "[t]he Green Amendment is clear," and "there is no ambiguity in the plain language of the Green Amendment." (R. 26-27.) Supreme Court also found that the DEC actions that FAFE sought to compel were not limited to enforcement action (R. 26), but did not specify what those other actions were.[2]

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[2] Supreme Court also held that FAFE was not required to bring its action against the State under Article 78, that the action was timely commenced, and that FAFE did not fail to exhaust its administrative remedies. (R. 23-25.) The State does not challenge those aspects of the court's ruling on appeal.

ARGUMENT

FAFE LACKS A CLEAR LEGAL RIGHT TO COMPEL DEC TO TAKE ENFORCEMENT ACTION AGAINST WASTE MANAGEMENT

The core of FAFE's claim against the State is that the State violated the Green Amendment by "failing to enforce applicable laws, regulations, and permits" to prevent or reduce odors and emissions at the Landfill. (R. 35.) FAFE seeks both a declaration that the State's failure to enforce violated the Green Amendment, as well as an order compelling DEC to require Waste Management either to close the Landfill or to take the further measures it alleges are needed to abate odors and emissions. (R. 62.) Both forms of relief seek to compel DEC to take enforcement action against Waste Management, which a court cannot do. DEC has long had discretion to determine whether and how to enforce the laws, regulations, and permit conditions that apply to the Landfill. And nothing in the text or history of the Green Amendment suggests it was intended to curtail that longstanding enforcement discretion with respect to the management of solid waste or the regulation of clean air under its Title V authority. Accordingly, Supreme Court should have dismissed the complaint for failure to state a cause of action upon which relief can be

granted. That dismissal would not leave FAFE without any form of redress, however. To the contrary, FAFE may still participate in DEC's reviews of Waste Management's permit renewals, seek judicial review of any permits ultimately issued, petition DEC for changes to those permits, and seek judicial review of DEC's denial of any such petitions.

A. DEC Has Long Had Discretion to Decide Whether and How to Enforce the Laws, Regulations and Permit Conditions that Apply to the Landfill.

Executing the laws of the State involves "questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review." *Klosterman v. Cuomo*, 61 N.Y.2d 525, 535-36 (1984); *accord Matter of Abrams v. New York City Transit Auth.*, 39 N.Y.2d 990, 992 (1976). Accordingly, "the judiciary is loathe to interfere with the executive department of the government in the exercise of its official duties, unless some specific act or thing which the law requires to be done has been omitted." *Walsh v. La Guardia*, 269 N.Y. 437, 441-42 (1936) (quotation marks and citation omitted). A court may only "compel a governmental entity or officer to perform a ministerial duty" and may not "compel an act which involves an exercise of judgment or discretion." *Brusco v. Braun*, 84 N.Y.2d 674, 679 (1994) (citations omitted); *accord*

Matter of Cty. of Chemung v. Shah, 28 N.Y.3d 244, 266 (2016) (mandamus is available only to compel "an administrative act positively required to be done by a provision of law"). Whether a party seeks to compel an agency to act via a writ of mandamus in an article 78 proceeding or, as here, a declaratory judgment and order in a plenary action, courts "must be careful to avoid" granting relief that goes "beyond any mandatory directives of existing statutes and regulations and intrude[s] upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." *Klostermann*, 61 N.Y.2d at 541.

The limitation on a court's power to direct the actions of the executive branch has particular force where a party seeks to compel a regulatory agency to take enforcement action against a third party. An agency's enforcement decision is "general[ly] unsuitab[le] for judicial review" because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler v. Chaney,* 470 U.S. 821, 831 (1985); *see also United States v. Texas*, 599 U.S. 670, 679 (2023) ("[C]ourts generally lack meaningful standards for assessing the propriety of enforcement choices."). The responsibility for balancing these factors is "lodged in a

network of executive officials, administrative agencies and local legislative bodies." *Jones v. Beame*, 45 N.Y.2d 402, 407 (1978). Private parties, however well-intentioned, may not "interpose themselves and the courts" between these agencies and the difficult policy determinations they must make regarding whether and when to take regulatory action. *Id.*; *accord Matter of Abrams*, 39 N.Y.2d at 992.

As relevant here, the Legislature has delegated to DEC the authority to regulate "[t]he licensing and regulation of solid waste management facilities."[3] *Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 362 (1987). That delegation to DEC includes discretion over whether and when to close landfills and how to enforce permit conditions. *See* ECL § 71-2703(1) (DEC "may" revoke solid waste management permits and enjoin violations); *id.* § 71-2727(3) (DEC "may" issue orders requiring solid waste management permittees to implement corrective actions and remedial measures); *id.* § 71-2103(1) (DEC "may" enjoin

[3] When he signed this law, the Governor recognized the "increasing gravity of the solid waste problem" posed by "mushrooming" quantities of solid waste in the State. Governor's Memorandum, L. 1973, Ch. 399, N.Y.S. Legislative Annual, at 150.

violations of Title V air permits); 6 NYCRR § 621.13(a) (DEC "may" modify or revoke Title V air permits).

DEC has exercised its delegated statutory authority to issue a solid waste permit to Waste Management. (R. 75-89; *see also supra* at 8-9). That permit allows Waste Management to operate the Landfill pursuant to the requirements in its permits and O&M Manual with respect to gas and odors. *See id*. DEC has similarly exercised its EPA-delegated statutory authority to issue a Title V air permit to regulate the Landfill's air emissions. (R. 238-335; *see also supra* at 9-10.) And DEC took action in response to complaints from local residents in 2018 regarding an odor problem and subsequent recommendations from FAFE: DEC issued a notice of violation and required Waste Management to undertake operational changes at the Landfill to address odors (R. 336-338); and DEC accepted some of the recommendations from FAFE and its technical consultant and explained why it declined to follow others. (R. 386-424.)

FAFE seeks to compel DEC to take additional enforcement action against Waste Management in the form of either closing the Landfill or imposing additional measures to control gases and odors, relief that seeks to impermissibly second-guess DEC's decisions about whether and how

to exercise its enforcement discretion. *See The Alliance to End Chickens as Kaporos v. N.Y.C. Police Dep't*, 152 A.D.3d 113, 118 (1st Dep't 2017) (public policy prohibits courts "from instructing public officials on how to act under circumstances in which judgment and discretion are necessarily required in the fair administration of their duties"), *aff'd* 32 N.Y.3d 1091 (2018), *cert. denied,* 139 S. Ct. 2651 (2019); *Community Action against Lead Poisoning v. Lyons,* 43 A.D.2d 201, 202-03 (3d Dep't 1974) (county health department cannot be compelled to enforce laws and regulations relating to the prevention of lead poisoning), *aff'd*, 36 N.Y.2d 686 (1975).

To be sure, there is a narrow exception to the non-reviewability of enforcement decisions where an agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *See Heckler*, 470 U.S. at 833 n. 4 (citation and internal quotation mark omitted). That exception does not apply here, however. Far from abdicating its statutory responsibilities, DEC has instead taken the multiple enforcement actions described above that include both the initial imposition of requirements on the permits issued, as well as follow-up enforcement action. *See supra* at 11-14.

B. The Green Amendment Does Not Abrogate DEC's Enforcement Discretion or Require the State to Take Action Against Third Parties.

Supreme Court ruled that the Green Amendment overrides the State's enforcement discretion because the Amendment requires the State to "ensure that its citizens have the right to clean air and a healthful environment," and "[c]omplying with the Constitution is not optional for a state agency, and is thus nondiscretionary and ministerial." (R. 16). The establishment of a constitutional right, however, does not impose a concomitant duty on the State to take action against third parties to enforce that right in the absence of language imposing that duty. And nothing in the language of the Green Amendment, in its legislative history, or in the judicial interpretations of similar constitutional amendments in other States suggests the Green Amendment was intended to authorize litigants to compel the State to take enforcement action against third parties.

1. Neither the language nor history of the Green Amendment requires the State to take enforcement action against Waste Management.

The language of the Green Amendment establishes an individual right but does not command the State to take action against third parties.

In full, the Green Amendment provides: "Each person shall have a right to clean air and water, and to a healthful environment." N.Y. Const. art. I § 19. Supreme Court stated that the State has a "nondiscretionary and ministerial" duty to comply with the Constitution, (R. 27)—which is of course true—but that nondiscretionary duty does not include a duty to take enforcement action against Waste Management or other third parties.

The nondiscretionary duty imposed by the Green Amendment requires the State to ensure that *its* executive and legislative actions do not infringe on that right. The same is typically true of constitutional amendments, including the First Amendment; "the State and Federal constitutional guarantees of freedom of speech protect the individual against action by governmental authorities, not by private persons." *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 500, 502 (1985) (citations omitted). Similarly, the federal Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Like other amendments that establish constitutional rights, the Green Amendment requires the State to ensure that its actions do not violate

the rights established by the Amendment. It does not require the State to take enforcement action against third parties.

Nothing in the legislative history of the Green Amendment suggests it was intended to abrogate the enforcement discretion granted to DEC by the Environmental Conservation Law, at least when DEC has not adopted a general policy abdicating its statutory responsibilities, *see Heckler*, 470 U.S. at 833 n. 4.

To the contrary, according to Assembly Member Englebright, one of the bill's sponsors, the Green Amendment "does not change [] any of the existing laws of the State." (R. 451-452.) Assembly Member and co-sponsor Glick similarly stated that the Green Amendment "does not change the law." (R. 462.) And when an Assembly Member representing a district that contained landfills receiving solid waste from New York City expressed concern that the Green Amendment would allow citizens to bring a lawsuit to shut down the landfills, leaving nowhere for solid waste from New York City to go, Englebright assured him that it would still be up to DEC to come up with a solution to the problem of the safe and environmentally sound disposal of solid waste. (R. 465-469.) Even the representative from the district where the Landfill is located (herself

a co-sponsor of the bill) expressed her understanding that the Green Amendment would not "convey upon the citizenry any additional rights" but would instead ensure that future legislative bodies could not "roll back the good environmental progress" that the State had made. (R. 484-485; *accord* R. 476 [Green Amendment will "put an onus on the Legislature to deliver to the residents of this State"].)

Although some opponents of the Green Amendment voiced fear that it would transfer regulatory authority from the Legislative and Executive branches to the Judiciary (*e.g.* R. 442-443), there is no evidence that anyone who voted *for* the amendment intended that result. *See NLRB v. Fruit and Vegetables Packers and Warehousemen, Local 760*, 377 U.S. 58, 66 (1964) (cautioning against interpreting statute based on statements of its opponents, who "in their zeal to defeat a bill . . . tend to overstate its reach"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) (legislative intent should be gleaned from statements of sponsors, not "fears and doubts of the opposition").

Moreover, the broad language of the Green Amendment stands in marked contrast to language in other provisions of the New York Constitution that mandate action by the State. For example, the

constitutional provision creating a right to a sound education imposes an obligation on the State directly: "*The legislature shall provide* for the maintenance and support of a system of free common schools." N.Y. Const. art. XI, § 1 (emphasis added). The same is true of the constitutional provision for the aid, care and support of the needy: "The aid, care and support of the needy are public concerns and *shall be provided by the state* . . . in such manner and by such means, as the legislature may from time to time determine." *Id*. art. XVII, § 1 (emphasis added); *see also id*. art. XVII, § 3 ("The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state . . . in such manner, and by such means as the legislature shall from time to time determine.").[4]

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[4] In contrast, New York's civil rights clause expressly applies to action by private entities as well as the State: "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or *by any firm, corporation, or institution*, or by the state or any agency or subdivision of the state." N.Y. Const. art. I, § 11 (emphasis added). However, even that clause does not, standing alone, require the State to take action against third parties because it is not self-executing and instead requires enabling legislation. *See Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 531 (1949).

Yet even the constitutional provisions that impose duties on the State directly do not mandate that the State take enforcement action against third parties. Instead, they require the State to provide services to individuals. *See Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 315-316 (1995). And courts have been careful not to interfere with the State's discretion to determine *how* to meet these affirmative constitutional mandates. *See, e.g., Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28-29 (2006).

Supreme Court also mistakenly reasoned that "[u]tilizing its enforcement authority is just one of the ways the State could respond to the constitutional violation, but it is not the sole option it has." (R. 26.) Neither Supreme Court nor FAFE indicated *what* other actions, beyond enforcement of existing laws and permits, are available to DEC to regulate the activities of Waste Management at the Landfill. Indeed, the very gravamen of FAFE's claim is that DEC is failing to take adequate enforcement action against Waste Management. (*See* R. 35 [the State "failed to enforce applicable laws, regulations and permits applicable to the Landfill"]; R. 60 [the "failure of the State to properly exercise its enforcement powers" is contributing to climate change]; R. 61 ["The State

has failed to use its enforcement powers to cause (Waste Management) to control the Odors and Fugitive Emissions at the Landfill"].) The complaint is replete with allegations that DEC failed to enforce various provisions of the ECL, Climate Law, implementing regulations, and Waste Management's permits. (R. 46, 53-56, 60.) And selecting from among multiple enforcement options to respond to a problem as persistent as the disposal of solid waste is necessarily a discretionary and not a ministerial action. *See Heckler*, 470 U.S. at 835 (statute authorizing agency to enforce its substantive prohibitions through injunctions, criminal sanctions, and seizure of offending articles commits "complete discretion to [agency] to decide how and when [enforcement] should be exercised").

Finally, the same concerns that lead courts to refrain from reviewing enforcement decisions made by the executive branch are present here. DEC currently oversees over 11,500 air, water, solid waste, and mining permits (*see* R. 745), as well as other sources of environmental harm. By necessity, DEC must prioritize its enforcement efforts based on "the ever-shifting public-safety and public-welfare needs" of the State, *Texas v. United States,* 599 U.S. at 680. If plaintiffs

can sue DEC to compel additional enforcement action against Waste Management, plaintiffs and courts, not DEC, will make decisions regarding how to prioritize DEC's enforcement resources, and they will do so, as here, based on the facts of individual lawsuits rather than on an informed assessment of enforcement needs across New York.

2. Other States' Green Amendments have not been interpreted to require action against third parties.

Courts have interpreted comparable language in other States' green amendments (which served as models for New York's amendment) to prohibit States from taking actions that infringe those rights, not to compel States to take actions against third parties.

Pennsylvania's green amendment provides a right much like New York's; under Pennsylvania's green amendment, "[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. Pennsylvania's amendment, however, additionally makes the State the trustee of the State's natural resources which "shall conserve and maintain them for the benefit of all the people." *Id.*

The Pennsylvania Supreme Court determined that the first clause of that amendment (the environmental rights provision) "affirms a

limitation on the state's power to act contrary to this right." *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 646 (2013). The amendment imposes "an obligation on the government's behalf to *refrain from unduly infringing upon or violating the right*, including by legislative enactment or executive action." *Id.* at 647 (emphasis added); *see also Pa. Envtl. Def. Found. v. Commonwealth*, 640 Pa. 55, 88 (2017) (describing first provision as placing "a limitation on state's power to act contrary to this right"). New York's Green Amendment imposes that same constraint on the State.

Only the second provision of Pennsylvania's green amendment mandates state action. That provision states: "As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, *because of the state's failure to restrain the actions of private parties*," *Robinson Twp.*, 623 Pa. at 656 (emphasis added). New York's Green Amendment includes no comparable language requiring the State to take action against private parties.

Even then, the express directive in the second provision of Pennsylvania's green amendment imposes only a limited mandate on the State. In *Funk v. Wolf*, 144 A.3d 228 (Pa. Commonwealth Ct. 2016), *aff'd* 638 Pa. 726 (2017), petitioners sought to compel the State to create a comprehensive plan to address climate change. The court reasoned that the question posed by that request was not whether Pennsylvania's green amendment imposed mandatory duties in the general sense, but rather whether the amendment provided petitioners with a clear right to the performance of the specific acts for which the petitioners requested a writ, and whether the performance of such acts by the State was mandatory in nature. *Id.* at 248. The court concluded that there was no such clear right because the amendment did not "disturb the legislative scheme" and Pennsylvania's legislation did not provide that right. *Id.* at 250. Likewise, New York's Green Amendment should not be interpreted to impose a mandatory duty on DEC to take action against third parties.

Montana's green amendment similarly imposes an obligation directly on the State. It provides that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations," Mont. Const. art. IX, § 1t. The Montana

Supreme Court has thus stated that the amendment establishes "a fundamental right *which government action may not infringe* except as permissible under strict constitutional scrutiny." *Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation*, 403 Mont. 225, 264 (2021) (emphasis added). *Clark Fork Coal* concluded that Montana's environmental review of water-use permits did not violate that right, *id.* at 274, but other decisions have found that state action did, *see, e.g., Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 402 Mont. 168, 204 (2020) (finding statutory provisions regarding environmental review unconstitutional and vacating a permit based on them); *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 296 Mont. 207, 231 (1999) (finding statutory provision regarding environmental review unconstitutional as applied). None of these cases, however, held that Montana's green amendment *mandated* Montana to take action against alleged polluters. There is thus no reason to interpret New York's Green Amendment—which includes no language mandating state action at all—to compel DEC to take additional enforcement action against Waste Management.

CONCLUSION

For these reasons, this Court should reverse Supreme Court's judgment and dismiss this action as against the State.

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December 22, 2023

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