SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

In the Matter of the Application of: PARTNERSHIP FOR THE PUBLIC GOOD, INC., HOUSING OPPORTUNITIES MADE EQUAL, INC., PEOPLE UNITED FOR SUSTAINABLE HOUSING, INC., CENTER FOR ELDER LAW & JUSTICE, INC., DOROTHY OATMEYER, KRYSTAL CRUZ, DENITA ADAMS, and VICTORIA RING, on behalf of themselves and of all others similarly situated, Petitioners-Plaintiffs, v. CITY OF BUFFALO, BYRON BROWN, MAYOR OF THE CITY OF BUFFALO, in his Official Capacity, and CATHERINE AMDUR, COMMISSIONER OF PERMIT AND INSPECTION SERVICES FOR THE CITY OF BUFFALO, in her Official Capacity, Respondents-Defendants, For a Judgment Pursuant to § 3001 and Articles 9 and 78 of the Civil Practice Law and Rules.	809862/2024 Hon. Michael Siragusa Part 29

PETITIONERS-PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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Petitioners respectfully submit this memorandum in opposition to Respondents' motion to dismiss.

PRELIMINARY STATEMENT

In 2020, Buffalo's Common Council passed the Proactive Rental Inspection Law ("PRI Law") to address the decades-old public health crisis of childhood lead poisoning, along with other dangerous housing conditions plaguing the rental market. Under the PRI Law, no one- or two-family, non-owner-occupied residence may be rented without a "rental dwelling unit registration," Buffalo Code § 264-16(A), and a "certificate of rental compliance," *id.* § 264-20. To obtain both the rental dwelling unit registration and the certificate of rental compliance ("CRC"), the owner must submit a "written application" on a "form furnished by the Commissioner." *Id.* §§ 264-18, 264-24. The "Commissioner shall make an inspection of the rental dwelling unit that is the subject of an application for a license issued pursuant to this chapter to determine whether or not such rental dwelling unit is in substantial compliance with this chapter and all other applicable housing and building codes." *Id.* § 264-8(A). In order to receive a certificate of rental compliance, the unit "must pass an exterior and interior residential unit inspection conducted by the Department." *Id.* § 264-22(A)(4).

The clear purpose of the PRI Law is to ensure that every covered residence receives and passes inspection, and receives both a rental dwelling unit registration and a certificate of rental compliance, *before* rental to a tenant. The Mayor himself publicly acknowledged that purpose and praised the law precisely because it would achieve it:

> Renters will no longer have to deal with potential lead contamination after moving in when they are more vulnerable to landlord inflexibility. With this legislation, landlords are forced to deal with this issue before they're able to legally rent a unit.

(Verified Petition ¶ 13 (hereinafter, "VP") (citing Mayor Byron W. Brown, *Why Buffalo Pushed Safe and Affordable Housing in the Middle of a Pandemic*, National League of Cities (Dec. 4, 2020).)

Four years later, Respondents concede that they have not implemented the PRI Law. Respondents have not even promulgated a form by which owners can apply for a certificate of rental compliance. By now, under the PRI Law's nondiscretionary requirements, Respondents should have inspected all 36,000 units in the Buffalo Rental Registry at least once and sometimes twice and should have issued up to 36,000 certificates of rental compliance. Respondents have conducted fewer than 5,000 inspections and issued fewer than 500 CRCs. Because Respondents abdicated their duties, Petitioners and class members rented units that are not fit for human habitation, which would not have been on the market had Respondents followed the PRI Law, and they have suffered lead poisoning and other health hazards that the Law was designed to prevent.

Respondents' response to the Petition confirms their steadfast refusal to perform the mandatory duties the PRI Law imposed on them. Having no discernible intention to bring themselves into compliance, Respondents argue that they have "prosecutorial discretion" to ignore the Law's mandatory language. Respondents' absurd argument that mandamus would enforce the PRI Law *against them* and therefore violate their "prosecutorial discretion" to choose to violate it is supported by no authority but does exemplify their cavalier indifference towards the Law and the lead-poisoned children of Buffalo.

Given the mandatory language of the PRI Law and Respondents' conceded violation of the duties that the Law imposes, mandamus to compel is clearly appropriate, and Respondents' motion to dismiss the Article 78 proceeding should be denied. The Petition also states a claim under the Green Amendment to New York's State Constitution. Constitutional

amendments are presumptively self-executing, and the Green Amendment is no different, and was understood that way by the voters who ratified it. Petitioners allege that Respondents violated the duties imposed on them by the PRI Law, causing Petitioners and other class members to be exposed to unhealthy environmental conditions such as lead contamination. This is entirely different from the allegations against the City of New York in *Fresh Air for the Eastside*, 229 A.D.3d 1217 (4th Dep't 2024), where the Plaintiffs did not allege direct responsibility by the City for the harm that was being suffered when the private operator engaged in wrongdoing. Respondents here violated express legal duties imposed on them for the specific purpose of protecting Petitioners from unclean air and water and other unhealthful environmental conditions; and, by continuing to register and thereby make available for rent toxic units that have not been inspected, in violation of the PRI Law, Respondents have affirmatively harmed Petitioners. That is enough to plead a violation of the Green Amendment.

STANDARD OF REVIEW

The question for the Court on a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) is whether, reviewing the "four corners" of the pleading and drawing all reasonable inferences in favor of the plaintiff, the Complaint alleges facts that, if proved, would establish the elements of any legally cognizable cause of action. *Meese* v. *Miller*, 79 A.D.2d 237, 244 (4th Dep't 1981). Pleadings must be given a liberal construction, and dismissal is merited only if the court determines that the facts as alleged fit no cognizable legal theory. *Sassi v. Mobile Live Support Servs., Inc.*, 37 N.Y.3d 236, 239 (2021); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Schwaner v. Collins*, 17 A.D.3d 1068, 1069 (4th Dep't 2005) (applying standard to Article 78 proceedings). All facts alleged in the pleadings should be deemed as true, and Petitioners should be accorded the benefit of all possible inferences. *EBC I*

v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005); *Housing Opportunities Made Equal v. Dasa Properties LLC*, 217 A.D.3d 1528, 1529 (4th Dep't 2023).

At the pleading stage, the court's role is to review only the sufficiency of the pleading. *Tax Equity Now N.Y. LLC v. City of New York*, 42 N.Y.3d 1, 25 (2024). "Whether [Petitioners] can ultimately establish [their] allegations is not part of the calculus in determining a motion to dismiss." *Carlson v. American Int'l Grp., Inc.*, 30 N.Y.3d 288, 289 (2017).

ARGUMENT

I. PETITIONERS APPROPRIATELY SEEK MANDAMUS TO COMPEL.

Whether mandamus to compel is appropriate depends on "the nature of the duty sought to be commanded" and whether it is "mandatory, nondiscretionary action." *Hamptons Hosp. & Med. Ctr. v. Moore,* 52 N.Y.2d 88, 97 (1981). Action is discretionary if it "involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result." *N.Y. Civ. Liberties Union v. State of New York*, 4 N.Y.3d 175, 184 (2005). If the performance of an act is itself nondiscretionary, mandamus to compel is appropriate even if discretion may be exercised in deciding how to perform it. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 540 (1984) (Mandamus functions to "compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so."). When legislation establishes a standard of conduct that executive officers must meet unless or until the legislative body changes it, the courts can compel performance of the statutory obligation. *Nat'l Res. Def. Council v. N.Y.C. Dep't of Sanitation*, 83 N.Y.2d 215, 220 (1994) (hereinafter, "*NRDC*").

A. The PRI Law Imposes Mandatory, Nondiscretionary Duties.

The Petition clearly alleges the mandatory, nondiscretionary duties imposed on Respondents by the PRI Law: namely, to inspect every unit that is the subject of an application

for a rental dwelling unit registration or a certificate of rental compliance, to furnish a form by which a landlord may apply for a certificate of rental compliance, and to deny a certificate of rental compliance to every unit that does not pass inspection.

As the Petition alleges, the Common Council specifically amended the Buffalo Code in 2020 to remove discretion from the Commissioner, changing what had been a permissive inspection regime into a mandatory one. Prior to 2020, the rental registry law provided that, after including a property in the rental registry, the Commissioner "may make an inspection" for certain code violations. Buffalo Code § 264-14(A) (2019) (NYSCEF No. 40). The Common Council specifically amended this discretionary inspection provision in 2020, providing instead that: "The Commissioner *shall* make an inspection of the rental dwelling unit that is the subject of an application for a license issued pursuant to this chapter . . . ." Buffalo Code § 264-8(A) (emphasis added); *accord* Buffalo Code § 264-24(A) (CRC applications "shall" be made on "form furnished by the Commissioner" and form "shall" include certain information as well as an "affidavit of compliance").

A legislature's use of the verb "shall" indicates that it has imposed a mandatory duty. *NRDC*, 83 N.Y.2d at 220 ("The use of the verb 'shall' throughout the pertinent provisions illustrates the mandatory nature of the duties contained therein. The clear import of the words used is one of duty, not discretion."). The Common Council specifically eliminated the Commissioner's discretion by providing that she "shall" inspect units seeking to be included in the rental registry and "shall" furnish a form for applications for certificates of rental compliance. Buffalo Code §§ 264-8(A), 264-24(A). There is no question that these duties are mandatory and nondiscretionary.

Because Petitioners seek merely to compel Respondents to perform these mandatory and nondiscretionary duties, mandamus to compel is appropriate. Just as in *National*

Resources Defense Council, where the Court of Appeals addressed a similar proceeding seeking to compel New York City to comply with a recycling program enacted by its City Council, "[t]he [Common] Council made the policy and political decisions and arranged its priorities in enacting [the PRI Law]. Petitioners are not seeking any change in legislative policy or reordering of priorities; they ask only that the [] program be effected in the manner that it was legislated." 83 N.Y.2d at 221 (internal quotation marks and citation omitted).

Respondents argue that the PRI Law requires only triennial inspections in connection with the application for and issuance of "certificates of rental compliance" and does not require inspections of units seeking annual inclusion in the Buffalo Rental Registry. (Mem. in Supp. of MTD 7 & n.3.) Although irrelevant since Respondents have not conducted triennial inspections either, that is also wrong. As Respondents note, the PRI Law requires that an inspection be conducted in connection with any "application" for a "license," and "licenses are represented by certificates." (*Id.* (citing Buffalo Code §§ 264-8, 264-2).) Respondents assert that the PRI Law eliminated the requirement to issue certificates evidencing rental registration, leaving CRCs as the only "certificates" referred to by this section. (*Id.* (citing Buffalo Code § 264-16(A).) That is not true. The PRI Law expressly imposes on Respondents the duty to issue certificates of rental unit registration and repeatedly references those certificates and their issuance. *See* Buffalo Code §§ 264-13(B)(6) (Commissioner required to report to Common Council regarding "number of unique rental registration unit certificates issued by the Department"), 264-15(A) (no fee may be charged "for issuance of a rental dwelling unit registration certificate for new dwellings"); 264-18(D) ("The Department shall issue a rental unit registration certificate to an owner who" applies and meets other requirements.).

In their effort to avoid the consequences of their undisputed and indisputable failure to fulfill the requirements of the PRI Law, Respondents argue that the frequency with

which they conduct inspections is a matter of "discretion and allocation of resources and priorities" and so cannot properly form the basis for a mandamus to compel proceeding. (Mem. in Supp. of MTD 7-10.) But the mandatory language of the PRI Law itself refutes Respondents' position. Indeed, Respondents *agree* that the PRI Law imposes requirements with respect to the frequency of inspections. They describe the PRI Law as "requiring that the 36,000 rental units in 1-family and 2-family dwellings have interior and exterior inspections every 3 years" and concede that nevertheless, they have inspected only 4,827 units after more than three years. (Amdur Affirm. Ex., at 1, 3 (NYSCEF No. 38).) Notwithstanding their failure to conduct inspections, Respondents have continued to include properties in the rental registry, allowing Petitioners and class members to rent dangerous, uninspected units.

B. The Petition Alleges an Abdication of Duty, Not Merely a Missed Deadline.

Respondents argue that the Petition challenges only the timing of inspections and that this is merely a matter of missed deadlines, which is not an appropriate subject for mandamus. (Mem. in Supp. of MTD 7-8.) That argument misunderstands the gravamen of the Petition. The PRI Law requires inspections to be conducted before a rental unit may receive a rental dwelling unit registration and a CRC, and therefore before it can be rented to any tenant. The fact that rental registry certificates must be renewed annually and CRCs last three years places constraints on how often inspections must occur, but the law clearly mandates that every unit "must pass" inspection before a landlord may offer it to the public for rent. Buffalo Code § 264-22(A)(4). The duty Respondents are violating is not just a duty to conduct inspections within one year or three years, it is a duty to ensure that no unit is registered without first being inspected and no unit receives a CRC unless it actually passes inspection.

Contrary to the PRI Law's clear direction that no unit may be rented to the public without prior inspection, Respondent has registered nearly 32,000 uninspected units, leading to the lead

exposure, pest exposure, and other horrors recounted by the named Petitioners in their affirmations.

C. Petitioners Do Not Seek to Affect Respondents' Exercise of any Discretion Reserved to Them by the PRI Law.

Respondents argue that the Petition seeks to invade their discretion concerning "code enforcement" (Mem. in Supp. of MTD 8-9) and the "allocation of resources" (*id.* at 10). That is not so. Petitioners do not request an order of mandamus as to any matter over which the Common Council has preserved the Commissioner's discretion. For example, Petitioners do not seek to command Respondents to reach any particular result with respect to any inspection or application for a rental registration unit certificate or a CRC, nor to require Respondents to carry out inspections in a particular way, nor to furnish a CRC application in a particular format.

Respondents argue that "[i]n essence, the petition seeks to compel the Commissioner to take enforcement action against herself." (Mem. in Supp. of MTD 8.) Nonsense; Petitioners seek no such thing. Rather, Petitioners seek an order requiring Respondents to carry out their mandatory duties under the PRI Law. Enforcing these duties does not tread on any legitimate exercise of discretion by Respondents. *See Klostermann*, 61 N.Y.2d at 541 ("[T]o the extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties. The activity that the courts must be careful to avoid is the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches.").

Respondents' argument that the Petition seeks to interfere with prosecutorial discretion smacks of desperation. Respondents concede that Petitioners do not seek to influence the

enforcement of any housing code against any landlord (Mem. in Supp. of MTD 9), and so that this case is totally unlike either of the cases that Respondents cite in support of their argument: In *Fresh Air for the Eastside, Inc. v. State of New York*, 229 A.D.3d 1217 (4th Dep't 2024), the Fourth Department held that it could not order the State of New York to "take enforcement action against" a specific private company because that would interfere with the State's prosecutorial discretion, and in *Alliance to End Chickens as Kaporos v. N.Y.C. Police Dep't*, 32 N.Y.3d 1091, 1092-93 (2018), the Court of Appeals held that it could not order the New York City police or health departments to enforce animal cruelty laws against specific alleged violators because that would interfere with their prosecutorial discretion.

Respondents' argument goes too far. "Prosecutorial discretion" does not provide Respondents carte blanche to violate laws they prefer not to follow. If it did, that would be the end of mandamus to compel as a device to enforce government compliance with mandatory legal duties. Respondents may have discretion to determine whether or how to take enforcement action against a particular landlord after an inspection or complaint, but they may not opt out of inspecting rental units that the PRI Law's mandatory proactive inspection provisions require them to inspect. The mandatory language of the PRI Law itself makes that clear.

Community Action against Lead Poisoning v. Lyons, 43 A.D.2d 201 (3d Dep't 1974), *reversing* 72 Misc. 2d 662 (Sup. Ct. Albany County 1973), does not suggest otherwise. Respondents cite *Lyons* for the proposition that the Court cannot order them to "enforce the law against themselves" (Mem. in Supp. of MTD 9), but it stands for no such proposition. In *Lyons*, the petitioners sought an expansive court order requiring inspections of all dwelling units within certain neighborhoods for lead paint as well as other broad relief. Precisely because no such law as the PRI Law existed, the petitioners relied on a hodgepodge of statutory and regulatory authorities that allowed but did not require state officials to designate areas as high risk for lead

poisoning based on consideration of certain criteria and allowed them to conduct inspections of dwelling units in designated high-risk areas. 43 A.D.2d at 202, 203; 72 Misc. 2d at 666-67. The Third Department declined to act essentially as a legislature and dictate what official action executive officials would take with respect to lead poisoning absent a "specific act or thing which the law requires to be done [that] has been omitted." 43 A.D.2d at 202. No such issue arises here, because the Common Council has already dictated a course of action to the executive officials of the City of Buffalo, requiring "specific acts or things" which Respondents have not done. The Court need not create a PRI Law itself, as the petitioners in *Lyons* sought to have the court do there, because the Common Council has already created it.

As to Respondents' argument that the Petition would interfere with their discretion as to how to allocate resources, the fact that an order of mandamus might require Respondents to reallocate resources to comply with the order is, to quote the Court of Appeals, "irrelevant." *Klostermann*, 61 N.Y.2d at 536-37 (addressing funding of programs for released mental patients, Court held that the fact that "any adjudication in support of [Petitioners] will necessarily require the expenditure of funds and a concomitant allocation of resources" is "irrelevant").

Lack of resources or the need to reallocate them to comply with the law is simply not a defense to a mandamus to compel proceeding. As the Court of Appeals noted with respect to the funding of shelter allowances for recipients of public assistance in *Jiggets v. Grinker*, 75 N.Y.2d 411, 421 (1990), "[m]anifestly, the Legislature may or may not appropriate funds necessary to fund these obligations, but the Commissioner does not discharge this statutory duty unless he complies with the mandate contained" in the statute. *See also NRDC*, 83 N.Y.2d at 222 (lack of funding in the budget neither renders mandamus to compel nonjusticiable nor constitutes implied repeal of the statutory obligation, citing and following *Klostermann*, 61 N.Y.2d at 536-37).

Thus, the Court plainly has the authority, and the duty, to direct compliance with the PRI Law notwithstanding that this will inevitably require the expenditure of resources by the City. *See N.Y. Pub. Int. Res. Group v. Dinkins*, 83 N.Y.2d 377, 387 (1994) (lower court did not abuse its discretion in ordering New York City Mayor and City Council to include funds for program in next enacted budget).

D. Petitioners' Mandamus to Compel Claim with Respect to CRC Applications Is Ripe.

Respondents argue that a mandamus to compel proceeding cannot proceed with respect to their violation of their legal duty under Buffalo Code § 264-24(A) to furnish a CRC application form because Petitioners did not specifically refer to this provision in their pre-suit demand letter. (Mem. in Supp. of MTD 10-11.) Respondents are wrong for two reasons. First, the issue is now ripe because demand to comply with this provision of the PRI Law was included in the Petition, and Respondents rejected the demand by moving to dismiss. Second, the demand letter adequately preserved the issue.

The only case that Respondents cite in support of their argument explicitly rejects Respondents' position. *Hoffman* v. *N.Y. State Ind. Redistricting Comm'n*, 41 N.Y. 3d 341, 365 (2023) (cited by Mem. in Supp. of MTD 11). As the Court of Appeals explained, although a mandamus to compel proceeding does not become ripe until there has been a demand and a refusal, "the filing of a petition and the answer thereto is one way to establish a 'demand' and a 'refusal' for the purposes of a mandamus proceeding . . . ." *Id.* The Court of Appeals held that where the respondents "moved under CPLR 3211(a)(5) and (7) to dismiss" this "constitute[ed] a refusal"; the Court accordingly proceeded to address the merits of the petition and affirmed an order granting mandamus to compel. *Id.* at 365, 370-71. The same applies here: Respondents

have refused to comply with Buffalo Code § 264-24(A) by moving to dismiss the Petition which demanded compliance.

But in any event, the pre-suit letter's demand that Respondents fulfill their inspection obligations under the PRI Law fully encompassed the promulgation of a CRC application form. The pre-suit letter demanded that the Commissioner "enforce[] the inspection requirements of the [PRI] law" and went on to note that Respondents had issued CRCs to only 156 of the 36,000 units required to obtain them and that it was for that reason "clear that the Commissioner is failing to perform the non-discretionary duties enjoined upon her by law." (Lipsitz Affirm., NYSCEF No. 3, Ex. 5, NYSCEF No. 8, at 1, 2.) Under the PRI Law, the first step in the process of issuing a CRC is for a landlord to apply for one on a "form furnished by the Commissioner." Buffalo Code § 264-24. Because the demand letter explicitly referred to Respondents' failure to issue CRCs, this issue was necessarily encompassed in the pre-suit letter and rejected by Respondents' rejection letter.

II. PETITIONERS' GREEN AMENDMENT CLAIM SHOULD NOT BE DISMISSED.

Contrary to Respondents' arguments, the Green Amendment is self-executing and provides Petitioners with a private right of action against Respondents. Petitioners have stated a cause of action under the Green Amendment by clearly and amply alleging that Respondents' improper actions have deprived them of their right to clean air and a healthful environment.

A. The Plain Language of the Green Amendment Shows That It Is Self-Executing.

Constitutional amendments are presumptively self-executing. *Brown v. State of New York*, 89 N.Y.2d 186 (1996). In construing a constitutional amendment, the Court must "look for the intention of the People and give to the language used its ordinary meaning." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022). When construing statutes, "[i]f the words chosen have a

definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts have no right to add or take away from that meaning." *People v. Robinson*, 95 N.Y.2d 179, 192 (2000) (quoting *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998)). Because the People had only the text and not the legislative history with them in the voting booth when they chose to ratify the amendment, this is especially true when the Court construes the language of a constitutional amendment:

> If the guiding principle of statutory interpretation is to give effect to the plain language, especially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State. These guiding principles do not allow for interstitial and interpretative gloss by the courts or by the other Branches themselves that substantially alters the specified law-making regimen.

King v. Cuomo, 81 N.Y.2d 247, 253-254 (1993) (internal citations omitted).

The language of the Green Amendment is definite and direct. It provides, in its entirety, that "[e]ach person shall have a right to clean air and water, and a healthful environment." It contains none of the kind of limiting language that has been found to rebut the presumption of self-execution. *See, e.g., People v. Carroll*, 3 N.Y.2d 686, 691 (1958) (amendment containing language "in the manner to be prescribed by law" was "probably not self executing" whereas identical amendment not containing that language was self-executing); *see also People v. Correa*, 15 N.Y.3d 213, 223-24 (2010) (noting that lower courts had ruled Article VI, § 19(a)'s conferral of power to supreme court to transfer actions or proceedings originating or pending in another court "as may be provided by law" not self-executing, but not deciding whether it was).

Respondents argue that the Green Amendment should be held not self-executing for three reasons: it does not expressly state that the public can file lawsuits to enforce it, like some other states' Green amendments did (Mem. in Supp. of MTD 4); it uses undefined broad terms such as

"clean air," "clean water," and "healthful environment" (*id.* at 5); and the legislative history in the Assembly and Senate includes statements during floor debates to the effect that no new private right of action would be created by the Amendment (*id.* at 5-6). None of Respondents' arguments rebuts the presumptively self-executing nature of the Amendment.

First, the fact that the Amendment does not expressly confer upon the public the right to sue to enforce it, as do amendments in some other states, is irrelevant precisely because of the presumptively self-executing nature of constitutional amendments in *this* State. Respondents' argument is exactly backwards: because the Amendment is silent on whether it can be enforced in court, that means it can be. Constitutional amendments in New York are *presumptively* self-executing. Special language rebutting the presumption must be present to support a conclusion that the Amendment cannot be directly enforced in court.

Second, the fact that a constitutional amendment contains broad language is part and parcel of its being a constitutional amendment. Courts regularly decide upon the meaning of broad terms such as "cruel and unusual" or "equal protection," and New York courts have consistently rejected the position that constitutional amendments using these broad words were unenforceable without legislative elaboration. Indeed, "clean" and "healthful" are far more comprehensible than much of the language that courts routinely imbue with meaning. *See*, *e.g.*, *Brown*, 89 N.Y.2d at 186 ("Manifestly, article I, § 12 of the State Constitution and that part of section 11 relating to equal protection are self-executing. They define judicially enforceable rights and provide citizens with a basis for judicial relief against the State if those rights are violated."); *Boggs v. State of New York*, 51 Misc. 3d 376, 379 (Ct. Cl. 2015) ("cruel and unusual punishment" prohibition in article I, section 5 is self-executing); *see also Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 931 (2003) (enforcing Article XI, § 1's direction that "[t]he legislature shall provide for the maintenance and support of free common schools").

Finally, because the language of the Amendment is unambiguous, Respondents' suggestion that the Court reach into the legislative record is entirely inappropriate. The voters who ratified the amendment did not ratify stray snippets of floor debates in the Assembly and Senate, they ratified the Green Amendment, which on its face is self-executing and contains nothing that would rebut the presumption of self-execution. Though Respondents wish to evade the consequences of their violation of Petitioners' constitutional rights, "[c]ourts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent practice and usage of those charged with implementing the laws." *King*, 81 N.Y.2d at 253-54 (internal citations omitted). Moreover, the legislative history is by no means as unequivocal as Respondents' cherry-picked snippets would suggest and contains at least as many statements evidencing an understanding that the Amendment could be enforced through a private right of action.[1] Should the Court consider it, this history is certainly not sufficient to rebut the presumption of self-execution.

For these reasons, the Court should reject Respondents' arguments that the Green Amendment is not self-executing.

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[1] *E.g.*, *Fresh Air for the Eastside, Inc. v. State of New York*, Index No. E2022000699 (Sup. Ct. Monroe County), NYSCEF No. 37, at 51-52 (Assemblymember Goodell, Apr. 24, 2018) ("this would give a Constitutional right to every individual to bring a private right of action against their local government . . . or against their city . . . ."), 41 (Assemblymember Palmesano, Feb. 8, 2021) ("This will certainly create a private right of action for individuals to . . . file for lawsuits . . . ."); NYSCEF No. 70, at 147:2-4 (Sen. Jackson, Jan. 12, 2021) ("New Yorkers will finally have the right to take legal action for a clean environment, because it will be in the State Constitution."). The sponsor, Steve Englebright, upon whose statements Respondents rely so heavily, expressly stated that he did not know whether the Amendment would create a private right of action and that he "will leave that for the lawyers to determine." *Id.*, NYSCEF No. 38, at 40 (Assemblymember Englebright, Feb. 8, 2021) (answering question, "if someone feels under this legislation, this Constitutional Amendment, if their Constitutional rights are being violated, they would have the right to bring suit as an individual, correct?" by stating that, "Just like I am a geologist not a lawyer, I will leave that for the lawyers to determine.").

B. Petitioners Allege That Respondents Engaged in Improper Actions That Violated the Green Amendment.

In reliance on a recent Fourth Department decision, Respondents wrongly argue that Petitioners have failed to state a cause of action under the Green Amendment because their complaint does not allege any improper action by the City. (Mem. in Supp. of MTD 4 (citing *Fresh Air*).) Even a cursory examination of the Verified Petition shows that Petitioners have more than adequately pled facts regarding the improper actions taken by Respondents that have violated Petitioners' and the proposed class members' constitutional right to clean air and a healthful environment. Respondents' improper actions include not just their failure to perform the clear, mandatory duties that are the subject of Petitioners' mandamus claim, but also their affirmative steps to authorize the rental of dwelling units that are not fit for habitation. (VP ¶¶ 87, 91, 96, 102-103.)

The PRI Law requires Respondents to inspect all dwelling units covered by the Law for health and safety violations, including lead paint hazards and other building code violations, before the units may receive a dwelling unit registration or a CRC. (VP ¶¶ 46-47.) No unit with active lead paint and other health and safety hazards may be included in the Rental Registry or obtain a CRC, and no unit may be lawfully rented without receiving a certificate evidencing registration in the Rental Registry and a certificate of rental compliance. (VP ¶¶ 39, 43, 56-58.) Despite these provisions, though, in the four years that the PRI Law has been in effect, Respondents have registered approximately 36,000 rental units even though they have inspected only 4,827 units and issued only 458 CRCs. (VP ¶¶ 61-65; Amdur Affirm. Ex., at 3 (NYSCEF No. 38).) In other words, Respondents have authorized approximately 35,500 units to be rented without first ensuring that the units are free of lead paint and other hazards. (VP ¶ 70.) These constitute the vast bulk of all apartments that Petitioners and class members could possibly rent.

Petitioners allege that Respondents' improper actions have forced them to live in rental units with unhealthy interior and exterior environments. Petitioners' and class members' homes are permeated with flaking and peeling lead paint that is poisoning their family members and causing irreversible health consequences. (VP ¶¶ 85-86, 90, 99.) Their homes contain dangerous mechanical and structural defects that lead to pest infestations and crumbling roofs, ceilings, and floors; allow mold to proliferate and sewage to collect; release poisonous carbon monoxide; permit cold air and water to penetrate into living spaces; and create high risks of electrical fires. (VP ¶¶ 85-86, 89, 95, 100.) Petitioners further allege that Respondents' registration of dwelling units that have not been inspected and have not received certificates of rental compliance has led to such an overall degradation of Buffalo's rental housing stock that Petitioners cannot find any housing that meets basic habitability and health standards. (VP ¶¶ 87, 93, 97.)

Respondents argue that this Court should not impose liability on Respondents for the failure of landlords to maintain healthy housing. However, Petitioners allege that Respondents' failure to enforce, implement, and comply with the provisions of the PRI Law is the single most important reason why "it is difficult, if not impossible, to escape the lead contaminated environments where they live." (Glick Aff., NYSCEF No. 22, ¶ 11.) Therefore, while private landlords rented units to Petitioners and other class members that contained lead paint and other hazardous conditions, they could do so only because of the improper and unlawful conduct of Respondents alleged in the Petition.

For four years Respondents continued to maintain properties in the rental registry, renewing their annual registrations several times, without ever inspecting them, in direct violation of the PRI Law, with the result that properties with lead paint and other environmental hazards were rented to and sickened Petitioners and class members, which is exactly the

recognized harm that the PRI Law was designed to prevent. Respondents' conduct is therefore both a cause-in-fact and a proximate cause of the lead exposure and other environmental harms that Petitioners and other class members have suffered. *Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016) (where other actors' behavior also contributed to the result, proximate cause asks whether the result was "a normal or foreseeable consequence of" the defendant's conduct); *Monahan v. Weichert*, 82 A.D.2d 102, 106 (4th Dep't 1981) ("cause in fact" requires that defendant's conduct have been a "substantial factor in producing the resultant injury"); *Thompson v. Korn*, 48 A.D.3d 1007, 1008 (4th Dep't 1975) (behavior of multiple actors may all be proximate cause of single injury).

Petitioners do not seek to enforce the Green Amendment against any private party or hold Respondents responsible for the conduct of any private party. Respondents chose to register rental units containing lead hazards and other toxic conditions in violation of the PRI Law, thus sanctioning, facilitating, and encouraging the rental of dangerous properties. It is thus Respondents who violated the Green Amendment by exposing Petitioners and other class members to lead paint and other environmental hazards. This is entirely unlike the conduct of the City of New York alleged in *Fresh Air*, which consisted of retaining a private facility across the State to handle its garbage, and not in violating any duty owed to the people of Monroe County who were exposed to the garbage as the result of actions of a private landfill operator. Because the residents would have been exposed to garbage no matter whose it was, the City of New York's action in sending its garbage did not cause the environmental harm that the residents suffered. *Fresh Air for the Eastside, Inc. v. State of New York*, 2022 N.Y. Misc. LEXIS 8394, at *21-22 (Sup. Ct. Monroe County Dec. 20, 2022). Respondents here, in contrast, violated the PRI Law by continuing unlawfully to register uninspected properties which, had they been inspected as required, could not have been rented to tenants and thus would not have exposed tenants to

unhealthful environmental conditions. Respondents behaved wrongfully and that wrongful conduct caused the environmental harms that Petitioners allege.

Because Petitioners seek to require Respondents to perform their own legal duties and not to have Respondents enforce the legal duties of others, the *Fresh Air* court's holding that it could only compel the bringing of enforcement proceedings under the Green Amendment where a defendant had "consciously and expressly adopted [a] general policy that is so extreme as to amount to an abdication of its statutory responsibilities" is not pertinent here. 229 A.D.3d at 1219. Even if that were the standard that applied to Petitioners' very different claim, though, the Petition clearly alleges facts that meet that burden. By allowing more than 98% of covered dwelling units to be rented without first ensuring their basic habitability, Respondents have entirely thwarted the stated purpose of the PRI Law to achieve the complete remediation of lead-based paint hazards, the correction and prevention of unsafe and unhealthy housing conditions, and the restriction and revocation of rental privileges to property owners who fail to maintain safe and healthy housing. (VP ¶ 12.) Respondents have abdicated their statutory responsibilities, and in so doing have violated Petitioners' and class members' rights to "clean air and water, and a healthful environment."

CONCLUSION

For the foregoing reasons, the Court should deny Respondents' motion to dismiss in its entirety.

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CERTIFICATION

Pursuant to 22 N.Y.C.R.R. § 202.8-b(c), I certify that the word count of the foregoing Memorandum, excluding portions entitled to be excluded pursuant to 22 N.Y.C.R.R. § 202.8-b(b), is 5949, according to the word processing system used to prepare the document.

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Buffalo, New York

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