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

In the Matter of the Application of FRESH AIR FOR THE EASTSIDE, INC., Plaintiff-Respondent-Appellant, v. THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, WASTE MANAGEMENT OF NEW YORK, L.L.C., Defendants-Appellants-Respondents, and THE CITY OF NEW YORK, Defendant-Respondent.	**NOTICE OF MOTION** **Docket No. CA 23-00179**

PLEASE TAKE NOTICE that upon the annexed Affirmation of Ivonne Norman, Esq. affirmed April 5, 2024, and the accompanying proposed brief of *amici curiae*, and upon all papers, pleadings, and proceedings had herein, Green Amendments for the Generations and Delaware Riverkeeper Network will move this Court on April 22, 2024, or as soon thereafter as counsel may be heard, at the M. Dolores Denman Courthouse located at 50 East Avenue, Suite 200, Rochester, NY

14606, for an order granting them leave, pursuant to 22 NYCRR § 1250.4(f), to serve and file a brief of *amici curiae*, in support of affirmance.

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

Dated: April 5, 2024
New York, New York

Ivonne Norman, Esq.
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Counsel for Amici Curiae Green Amendments for the Generations and Delaware Riverkeeper Network

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

In the Matter of the Application of FRESH AIR FOR THE EASTSIDE, INC., Plaintiff-Respondent-Appellant, v. THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, WASTE MANAGEMENT OF NEW YORK, L.L.C., Defendants-Appellants-Respondents, and THE CITY OF NEW YORK, Defendant-Respondent.	**AFFIRMATION OF IVONNE NORMAN, ESQ. IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF OF *AMICI CURIAE*** **Docket No. CA 23-00179**

IVONNE NORMAN, **ESQ**. an attorney at law duly admitted before the courts of the State of New York, hereby affirms the following under penalty of perjury:

1. I am counsel for proposed *amici curiae* Green Amendments for the Generations and Delaware Riverkeeper Network. I am fully familiar with the facts and circumstances of this matter.

2. Proposed *amici* have an interest in the issues to be resolved in this litigation, as detailed in the proposed *amici curiae* brief, attached hereto as **Exhibit A**.

3. This Court has the discretion to accept an *amicus curiae* brief provided that the movant submits an affirmation supporting its interests with a proposed brief attached, the case concerns questions of important public interest, the *amici curiae's* participation will not substantially prejudice the rights of the parties, and the *amici curiae's* participation will invite the Court's attention to the law or arguments that might otherwise escape its consideration or otherwise be of special assistance to the Court. *See Kruger v. Bloomberg*, 1 Misc.3d 192 (Sup. Ct. New York Cnty. 2003).

4. Proposed *amicus* Green Amendments For The Generations ("GAFTG") is a 501(c)(3) education, advocacy, and legal action organization working nationwide to ensure every person and community across the United States is able to experience the health, quality of life, education, joy, and economic prosperity provided by a clean, safe, and healthy environment; to end environmental racism; and to help ensure that nature itself is able to thrive by constitutionally empowering all people to secure and enforce their inalienable human right to pure water, clean air, a stable climate, and healthy ecosystems and environments. GAFTG's work builds upon a legal victory achieved in 2013, in which Founder Maya K. van Rossum, in her role as the Delaware Riverkeeper, the Delaware

Riverkeeper Network organization, and seven municipalities working collaboratively, re-invigorated Pennsylvania's long-ignored constitutional environmental rights provision to defeat a devastatingly pro-fracking piece of legislation that was slated to give the industry expanded powers and unleash a new wave of fossil fuel fracking and all its devastating harms across the state. Following this achievement, van Rossum identified the unique characteristics of the Pennsylvania amendment that allowed for this stunning victory, determined that among the fifty U.S. states only Montana had a similar amendment, and founded GAFTG in order to help communities understand and pursue this powerful protection (what we now call a "Green Amendment") nationwide. Using the tools of education, community engagement, and legal expertise, GAFTG played a leading role in inspiring and securing the New York Green Amendment. Since its enactment in 2021, GAFTG has provided legal expertise in the appropriate and most effective use of the Green Amendment in the litigation and advocacy space. GAFTG is currently working with communities and government leaders in over twenty other states seeking to secure their own Green Amendment protections, as well as sharing legal expertise to inform and support advocacy and precedent-setting legal actions in Pennsylvania and Montana.

5. Proposed *amicus* Delaware Riverkeeper Network ("DRN") is a nonprofit organization established in 1988 to protect, preserve, and enhance the

Delaware River, its tributaries, and habitats. DRN has over 2,300 members who live in New York, and over 27,000 members who live, work, and recreate in the Delaware River Basin. DRN has also appeared before numerous Pennsylvania courts and administrative agencies to enforce Pennsylvania's Green Amendment—article I, section 27 of the Pennsylvania Constitution—and both Maya K. van Rossum, the Delaware Riverkeeper, and her legal team are recognized nationwide as experts on article I, section 27 jurisprudence. DRN has a special interest in New York's Green Amendment, as 2,390 square miles of the Delaware River watershed are located in this state.

6. GAFTG and DRN have an interest in ensuring that state constitutional provisions that meet the definition of a Green Amendment—like the provision at issue in this case—are properly interpreted by courts, including recognizing them to be a self-executing restraint on governmental power.

7. This case is of significant public interest because it is the first appellate case to interpret Article I, section 19 of the New York Constitution—New York's Green Amendment. This Court's ruling is likely to have a statewide impact and may even impact the interpretation of Green Amendments in other states.

8. *Amici's* proposed brief provides the Court with arguments that the parties to the action herein have not fully developed in their respective briefs. *Amici's* proposed brief includes important clarification and insight regarding the

self-executing nature of Pennsylvania's and Montana's Green Amendments, which might otherwise escape this Court's consideration.

9. Counsel for Plaintiffs, New York State, New York State Department of Environmental Conservation, Waste Management of New York and the City of New York have been informed by counsel of the proposed *amici's* intent to move this Court for leave to file an *amicus curiae* brief. Plaintiff-Appellant supports this motion, and as of the date of this filing, all other parties have stated that they either do not oppose, or do not take any position on this motion.

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

Dated: April 5, 2024
New York, New York

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Counsel for Amici Curiae Green Amendments for the Generations and Delaware Riverkeeper Network

Exhibit A

No. CA 23-00179

Supreme Court of the State of New York
Appellate Division – Fourth Department

FRESH AIR FOR THE EASTSIDE, INC.,
Plaintiff-Respondent-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-Respondents,

and

THE CITY OF NEW YORK,
Defendant-Respondent.

BRIEF OF *AMICI CURIAE GREEN AMENDMENTS FOR THE GENERATIONS AND DELAWARE RIVERKEEPER NETWORK IN SUPPORT OF PLAINTIFF-RESPONDENT-APPELLANT AND AFFIRMANCE*

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PRELIMINARY STATEMENT AND INTERESTS OF *AMICI CURIAE*[1]

Proposed *amici curiae* Green Amendments For The Generations ("GAFTG") and Delaware Riverkeeper Network ("DRN") respectfully submit this brief to inform the Court regarding judicial application and interpretation of constitutional environmental rights ("Green Amendments") in Pennsylvania and Montana. These constitutional provisions were cited in briefs by parties to this appeal in support of their arguments that New York State's Green Amendment cannot provide relief to Plaintiffs in this case. *Amici* lend their expertise to correct some fundamental confusions about Green Amendments generally, and about Pennsylvania and Montana constitutional law specifically.

GAFTG is a 501(c)(3) education, advocacy, and legal action organization working nationwide to ensure every person and community across the United States is able to experience the health, quality of life, education, joy, and economic prosperity provided by a clean, safe, and healthy environment; to end environmental racism; and to help ensure that nature itself is able to thrive by constitutionally empowering all people to secure and enforce their inalienable human right to pure water, clean air, a stable climate, and healthy ecosystems and environments. GAFTG's work builds upon a legal victory achieved in 2013, in which Founder

[1] No party counsel authored any portion of this brief, and no party, party counsel, or person other than *amici curiae* paid for this brief's preparation or submission. No party objected to the filing of this brief.

Maya K. van Rossum, in her role as the Delaware Riverkeeper, the Delaware Riverkeeper Network organization, and seven municipalities working collaboratively, re-invigorated Pennsylvania's long-ignored constitutional environmental rights provision to defeat a devastatingly pro-fracking piece of legislation that was slated to give the industry expanded powers and unleash a new wave of fossil fuel fracking and all its devastating harms across the state. Following this achievement, van Rossum identified the unique characteristics of the Pennsylvania amendment that allowed for this stunning victory, determined that among the fifty U.S. states only Montana had a similar amendment, and founded GAFTG in order to help communities understand and pursue this powerful protection (what we now call a "Green Amendment") nationwide. Using the tools of education, community engagement, and legal expertise, GAFTG played a leading role in inspiring and securing the New York Green Amendment. Since its enactment in 2021, GAFTG has provided legal expertise in the appropriate and most effective use of the Green Amendment in the litigation and advocacy space. GAFTG is currently working with communities and government leaders in over twenty other states seeking to secure their own Green Amendment protections, as well as sharing legal expertise to inform and support advocacy and precedent-setting legal actions in Pennsylvania and Montana.

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GAFTG and DRN have an interest in ensuring that state constitutional provisions that meet the definition of a Green Amendment—like the provision at issue in this case—are properly interpreted by courts, including recognizing them to be a self-executing restraint on governmental power.

Amici each provide an important perspective to this Honorable Court in its interpretation of New York's recently-adopted Green Amendment.

DISCUSSION

As the State of New York acknowledges in its brief, article I, section 19 of the New York Constitution was adopted with the understanding that it was modeled after other state constitutional provisions guaranteeing environmental rights to the people,

namely Pennsylvania's and Montana's. *See generally* NY State Assembly 202-A6279, 1st Sess., (N.Y. 2017) (referencing the NY Assembly Memorandum in Support of Legislation for Assembly Bill A6279). *See also Regular Session*, 202nd N.Y. State Sen. 147 (2021) (statement of Sen. Robert Jackson) ("New Yorkers will finally have the right to take legal action for a clean environment, because it will be in the State Constitution.").

Despite this clear legislative history, the intent of the people of New York when they overwhelmingly voted in favor of the Green Amendment's adoption, and the supporting case law from Pennsylvania and Montana, the State and Waste Management now disingenuously argue before this Court that New York's Green Amendment is fundamentally different from the provisions it was modeled after. The State argues that it may exercise its enforcement discretion without regard for the Green Amendment, and that it is free to permit environmental degradation that infringes on constitutionally-enumerated rights. Waste Management echoes these arguments, but goes even further and claims that the Green Amendment is not self-executing and that its language is not amenable to judicial interpretation. These arguments are both misguided and grounded in a misunderstanding of case law from Pennsylvania and Montana.

I. GREEN AMENDMENTS ARE SELF-EXECUTING AND ENFORCEABLE IN COURT

A Green Amendment is self-executing by definition. *See* van Rossum, *The Green Amendment* 270 (2d. ed. 2022). Placement in the constitution's declaration or bill of rights is a key feature of all three Green Amendments in the United States—these provisions are limitations on government power. If these provisions were not self-executing, then "limits on governmental power that required an exercise of legislative power for their execution could easily be frustrated by the legislature's refusal to do so." John C. Dernbach, et al., *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1178 (2015). To interpret a Green Amendment as merely hortatory would undermine its primary purpose. *See, e.g.*, Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 PUB. LAND L. REV. 219, 230 (1994) ("State constitutional environmental protection is a clear response to federal legislative and judicial failure to provide such protection.").

While all Green Amendments are not identical, and indeed Pennsylvania's and Montana's include additional language beyond the declaration of rights in New York's Green Amendment, in the following analysis *amici* will focus on the portions of Pennsylvania's and Montana's Green Amendments that are directly comparable

to New York's and demonstrate that New York's Green Amendment is self-executing and judicially enforceable.

A. Pennsylvania's Green Amendment is self-executing and excepted out of the powers of government.

Pennsylvania's Green Amendment was approved unanimously by both chambers of Pennsylvania's General Assembly, and then ratified by voters by a margin of four to one in 1971. *See Robinson Twp., Washington Cty. v. Commw.*, 83 A.3d 901, 961–62 (Pa. 2013) (plurality opinion). The language, placed deliberately in the Pennsylvania Constitution's Declaration of Rights, resoundingly enshrined Pennsylvanians' environmental rights:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27. Shortly after article I, section 27 was ratified, Pennsylvania's Commonwealth Court[2] unequivocally held that the environmental rights in that amendment were self-executing:

> The first phrase of Article I, to which Section 27 is a late addition, is a declaration, not of the hope that the Legislature will sanction the rights therein reserved to the

[2] The Commonwealth Court is a statewide court that exercises original jurisdiction over civil actions by or against the Commonwealth government, appellate jurisdiction over certain other cases involving the Commonwealth, and jurisdiction of appeals from state administrative agencies. *See* 42 PA. CONS. STAT. §§ 761–763; PA. CONST. art. V, § 4.

> people, but that such rights are thereby "recognized and unalterably established". Article I, Section 25 provides that the rights described in Article I should remain "inviolate". We find no more reason to hold that Section 27 needs legislative definition than that the peoples' freedoms of religion and speech should wait upon the pleasure of the General Assembly.

Commw. v. Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d 886, 892 (Pa. Commw. Ct. 1973) *aff'd on other grounds,* 311 A.2d 588 (Pa. 1973). Since 1973, no Pennsylvania court has disturbed that holding. *See Robinson Twp.*, 83 A.3d at 964 n.52 (clarifying that the Pennsylvania Supreme Court's 1973 *Gettysburg* decision did not alter the Commonwealth Court's conclusion that article I, section 27 was self-executing). *See also Pa. Env't Def. Found. v. Commw. (PEDF I)*, 108 A.3d 140, 158 (Pa. Commw. Ct. 2015) ("[O]ur decision in *Gettysburg Tower* that the Environmental Rights Amendment is self-executing remains binding precedent."), *rev'd in part on other grounds*, 161 A.3d 911 (Pa. 2017); Kury, *The Constitutional Question to Save the Planet* 60 (2021) ("Fortunately, Judge McPhail ruled that the amendment is self-executing and that ruling remains law today. . . . Legislation authorizing lawsuits under the U.S. Bill of Rights has never been needed, and I saw no need for legislative action to authorize a lawsuit under Article I, Section 27.").[3]

[3] Franklin L. Kury served in the Pennsylvania House of Representatives in the early 1970s and was the author of, and primary advocate for, Pennsylvania's Green Amendment.

Unfortunately, the self-executing power of Pennsylvania's Green Amendment was subsequently and erroneously shackled by the Commonwealth Court, when that court formulated a three-part test to gauge government compliance with article I, section 27:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *overruled in part by Pa. Env't Def. Found v. Commw. (PEDF II)*, 161 A.3d 911 (Pa. 2017). The *Payne* test remained the prevailing substantive interpretation of article I, section 27 for four decades, until 2013, when a plurality of the Pennsylvania Supreme Court deemed it "inappropriate to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with *statutory standards* enacted to advance Section 27 interests." *Robinson Twp.*, 83 A.3d at 967 (plurality opinion) (emphasis added).

The *Robinson Township* plurality faulted the *Payne* test for, among other things "assum[ing] that the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action." *Id*. Four years later, a

majority of the Pennsylvania Supreme Court agreed that the *Payne* test was "unrelated to the text of Section 27" and "strips the constitutional provision of its meaning." *Pa. Env't Def. Found. v. Commw. (PEDF II)*, 161 A.3d 911, 930 (Pa. 2017). The *Payne* test was formally rejected, and is no longer good law in Pennsylvania. Chief Justice Castille's opinion in *Robinson Township* and the Supreme Court's *PEDF II* provided two important interpretations of art. 1, sec. 27 that illustrate the amendment's self-executing power. First, compliance with statutes or regulations is not dispositive of compliance with art. 1, sec. 27's constitutional mandate. Second, judicial relief pursuant to art. 1, sec. 27 does not require enabling legislative action.

The Pennsylvania Green Amendment is self-executing primarily because it is explicitly "excepted out of the general powers of government" by virtue of its placement in the Pennsylvania Constitution's Declaration of Rights. *See* PA. CONST. art. I, § 25. Declaration of Rights placement is one of the hallmarks of a true self-executing Green Amendment. "The decision to affirm the people's environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law." *Robinson Twp.*, 83 A.3d at 962 (plurality opinion).

As explained by former Chief Justice Castille's groundbreaking plurality opinion in *Robinson Township*, "[a] legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon

citizens' rights or the government has failed in its trustee obligations, or upon both theories . . . ." *Id.* at 950 (plurality opinion).[4] The *Robinson Township* plurality reaffirmed that the Green Amendment is self-executing. It confirmed that the first clause of Pennsylvania's Green Amendment "is neither meaningless nor merely aspirational," indeed, the "corollary of the people's Section 27 reservation of right to an environment of quality is 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 952. Furthermore, because Section 27 is in the foundational document of government, "the constitutional obligation binds *all* government, state or local, concurrently." *Id. See also PEDF II*, 161 A.3d at 931 n.23 (noting that trustee obligations are vested in "all agencies and entities of the Commonwealth government, both statewide and local").

With regard to the first clause of Pennsylvania's Green Amendment, which is most linguistically similar to New York's Green Amendment, it "affirms a limitation on the state's power to act contrary" to the rights and, while exercise of those rights may be subject to regulation, that regulation is "'subordinate to the enjoyment of the right . . . [and] must be regulation purely, not destruction'; laws of the Commonwealth that unreasonably impair the right are unconstitutional." *Id.* at 951

[4] The reasoning in Chief Justice Castille's plurality opinion was later adopted by a majority of the Pennsylvania Supreme Court in *PEDF II*. *See Pa. Env't Def. Found. v. Commw.* (*PEDF VI*), 279 A.3d 1194, 1199 (Pa. 2022).

(plurality opinion). And "as with any constitutional challenge, the role of the judiciary when a proper and meritorious challenge is brought to court includes the obligation to vindicate Section 27 rights." *Id*. at 952 (plurality opinion). A majority of the Pennsylvania Supreme Court has held that "while the subject of the right may be amendable to regulation, any laws that unreasonably impair the right are unconstitutional." *PEDF II*, 161 A.3d at 931 (Pa. 2017) (citing *Robinson Twp.*, 83 A.3d at 951). *See also* John C. Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis*, *in* ENVIRONMENTAL LAW BEFORE THE COURTS (Springer forthcoming) (2023) ("This right, in other words, is a self-executing right against the government.").

Although the Pennsylvania Supreme Court has recently explicitly affirmed the self-executing nature of the Green Amendment's public trust clauses, *see PEDF II*, 161 A.3d at 937, the first environmental rights clause is self-executing as well, by virtue of being in the same section of the same article of the Pennsylvania Constitution. *See Pa. Env't Def. Found. v. Commw. (PEDF VI)*, 279 A.3d 1194, 1199 (Pa. 2022). *See also Pa. Env't Def. Found. v. Commw. (PEDF IV)*, 2020 WL 6193643 at *7 (Pa. Commw. Ct. Oct. 22, 2020) ("A cause of action arises under the Pennsylvania Constitution for the violation of rights guaranteed under Article I. No affirmative legislation is needed for a vindication of [article I] rights in the civil

courts.") (citations omitted) (citing *Erdman v. Mitchell*, 56 A. 327, 331 (Pa. 1903), *aff'd* 279 A.3d 1194 (Pa. 2022))).

B. Montana's Green Amendment is self-executing and state actions affecting the rights protected therein are subject to strict scrutiny

Montana's Green Amendment is comprised of two interrelated constitutional provisions. The first provision is located in article II of the Constitution of the State of Montana, which is that document's Declaration of Rights. Section 3, entitled "Inalienable rights," provides as follows:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing, and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

MONT. CONST. art. II, § 3. In Montana, "[t]he right to a clean and healthful environment is 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*, 481 P.3d 198, 217 (Mont. 2021) (citing *N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 288 P.3d 169, 174 (Mont. 2012)). This affirmative declaration of rights is the part of Montana's Green Amendment that is most similar to the language of New York's Green Amendment.

The second relevant provision, which was "intended by the constitution's framers to be interrelated and interdependent" with the first, *Mont. Env't Info. Ctr. v. Dep't of Env't Quality (MEIC)*, 988 P.2d 1236, 1246 (Mont. 1999), is included in article IX, which addresses Environment and Natural Resources. Section 1, labeled "Protection and improvement," requires that:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

MONT. CONST. art. IX, § 1. Although this provision provides additional self-executing requirements for the legislature, it does not alter the fact that the rights in article II, section 3 are fundamental, self-executing rights.

Montana's Green Amendment has been recognized as a "fundamental right" and the Montana Supreme Court has made clear that "any statute *or rule* which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *MEIC*, 988 P.2d at 1246. Importantly, this holding was based on

article II, section 3, which, like New York's article I, section 19, includes a stand-alone declaration of environmental rights.

In *Clark Fork*, the Supreme Court of Montana explained that to effect the fundamental right to a clean and healthful environment guaranteed by article II, section 3 of the Montana Constitution, article IX, section 1 of the Montana Constitution "expressly requires the state to maintain and improve a clean and healthful environment in Montana and for the Legislature to accordingly provide for the administration and enforcement of this duty by providing adequate remedies for the protection of the environmental life support system from degradation." *Clark Fork*, 481 P.3d at 218 (quoting MONT. CONST., art. IX, § 1) (cleaned up).

A failure to comply with this requirement "is a violation of the fundamental right to a clean and healthful environment." *Id.* As the Supreme Court of Montana has acknowledged,

> The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing; nor does the self-executing character of a constitutional provision necessarily preclude legislation for the better protection of the right secured, or legislation in furtherance of the purposes, or of the enforcement, of the provision."

Gen. Agric. Corp. v. Moore, 534 P.2d 859, 862 (Mont. 1975) (quoting 16 C.J.S. *Constitutional Law* § 48 (1956)). Thus, regardless of article IX, section 1's mandates, article II, section 3, which declares a fundamental right to a clean and

healthful environment, is a self-executing constitutional provision that binds all state actors.

To protect the fundamental right, Montana must take preventative action—the "Montana Constitution guarantees that certain environmental harms shall be prevented, and prevention depends on forethought." *Park Cnty. Env't Council v. Mont. Dept. of Env't Quality*, 477 P.3d 288, 306 (Mont. 2020). The Montana legislature has endeavored to comply with this affirmative duty in part through its Montana Environmental Policy Act ("MEPA"), MONT. CODE ANN. §§ 75-1-101–1002. The primary purposes of MEPA are to "provide for the adequate review of state actions in order to ensure that: (a) environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations; and (b) the public is informed of the anticipated impacts in Montana of potential state actions." *Id*. § 75-1-102(1).

Despite the enactment of this legislation, however, both the legislation itself and actions taken as a result of complying with this legislation remain subject to review for constitutionality in Montana courts because of the overriding effect of Montana's self-executing Green Amendment. Montana constitutional jurisprudence, much like federal constitutional jurisprudence, recognizes that when legislative action implicates *individual* constitutional rights, that legislative action is judicially reviewable. *See Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257,

260–61 (Mont. 2005). Ultimately, "while the legislature is free to pass laws implementing [self-executing] constitutional provisions, its interpretations and restrictions will not be elevated over the protections found within the Constitution." *City of Missoula v. Mountain Water Co.*, 419 P.3d 685, 691 (Mont. 2018) (quoting *In re Lacy*, 780 P.2d 186, 188 (Mont. 1989)) (cleaned up).

Like Pennsylvania's Green Amendment, the Montana Green Amendment binds the state government as a whole, not just the legislature. The Supreme Court of Montana has concluded that even Montana courts are bound by the Green Amendment. In *Cape-France Enterprises v. Estate of Peed*, private parties sought to enforce a contract that, in part, required one of the parties to drill a well for water in the vicinity of a plume of groundwater pollution. 29 P.3d 1011, 1013–14, 1016 (Mont. 2001). The court refused to enforce the contract "in the face of substantial evidence that [drilling a well] may cause significant degradation of uncontaminated aquifers and pose serious public health risks" because doing so would "involve the state itself in violating the public's Article II, Section 3 fundamental rights to a clean and healthful environment." *Id*. at 1017. Much like the U.S. Supreme Court's conclusion in *Shelly v. Kraemer*, wherein the Court refused to enforce a restrictive covenant that excluded the sale of property to members of non-white races, the inability to enforce the contract in *Cape-France* is because Montana's Green Amendment is a self-executing exception from governmental authority. *See Shelly*

v. Kraemer, 334 U.S. 1, 14 (1948) ("It is doubtless true that a State may act through different agencies,--either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth Amendment] extend to all action of the State . . . whether it be action by one of these agencies or by another.") (quoting *Virginia v. Rives*, 100 U.S. 313, 318 (1880))).

Montana's Green Amendment has a binding effect on administrative agency action as well. *See MEIC*, 988 P.2d at 1249 ("[T]he constitution applies to agency rules as well as to statutes."). In *Park County*, the Supreme Court of Montana reviewed a decision by a trial court to vacate a mining exploration license granted to Lucky Minerals, Inc. by the Montana Department of Environmental Quality ("MDEQ") on the basis that MDEQ failed to comply with MEPA by preparing an inadequate environmental assessment rather than a fuller environmental impact statement that would address wolverine and grizzly bear impacts as well as a robust water quality analysis. *See* 477 P.3d at 292–95. The trial court vacated the exploration license after finding that a provision in MEPA prohibiting equitable relief violated Montana's Green Amendment. *Id*. at 302.

On appeal, MDEQ declined to defend many arguments that its environmental assessment was inadequate, and agreed that a remand was warranted. *See, e.g.*, *id*. at 299, 300 (regarding road improvement impacts and mitigation plans). However,

Lucky Minerals, Inc. and MDEQ argued that the exploration license could not be vacated because of the MEPA provision that prohibited equitable relief. *Id*. at 302.

The Supreme Court of Montana held that the MEPA provision implicated Montana's Green Amendment by foreclosing the preventative government action necessary to safeguard environmental rights: "Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place." *Id*. at 304. This means that courts must retain the power to enjoin state action—such as an authorization by an administrative agency—that would otherwise result in a constitutional violation.

The Court also held that MEPA was created by the legislature "as a vehicle for pursuing its constitutional mandate" and that the provision preventing equitable relief negated the State's ability to anticipate and prevent environmental harm as required by the Green Amendment. *Id*. at 305–06. Because fundamental environmental rights were implicated, the MEPA provision could remain in effect only if it survived a strict scrutiny analysis, which the parties agreed it did not. *Id.* at 308. Because a lack of equitable remedies rendered MEPA meaningless, and hamstrung courts from preventing violations of environmental rights, the court declared the provision unconstitutional. *Id*. at 310.

If Montana's Green Amendment was not self-executing, then Montana's courts would have no authority to evaluate whether the MEPA provision in question

complied with the Constitution, nor would the *Park County* court conclude that *a reviewing court* must be able to grant equitable relief to prevent a constitutional violation by an administrative agency. If Montana's Green Amendment was not self-executing, the legislature would have unfettered discretion to enact statutes that define (and constrain) the extent of Montanans' right to a "clean and healthful environment." MONT. CONST. art. II, § 3.

II. GREEN AMENDMENTS BIND THE DISCRETION OF STATE AGENCIES, INCLUDING ENFORCEMENT DISCRETION

Because a Green Amendment, like other fundamental rights, limits the state's police power, an agency's prosecutorial discretion is limited by its constitutional obligations. While many state agencies are creatures of statute, and can only act within the bounds of their enabling legislation, constitutional provisions like the Green Amendment provide additional and overriding restrictions on the actions that agencies may take. Especially here, where the third party causing the environmental degradation is doing so only by permit from the government, the government lacks discretion to allow the permitted action to continue degrading the environment to an unconstitutional degree. And where the state's enforcement actions have failed to remedy the violation of constitutional rights, then the state has not yet complied with its constitutional duty.

In federal law, even if an agency action is wholly discretionary and otherwise unreviewable under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, a

"colorable constitutional claim" is typically reviewable absent a clear indication from Congress, as removal of such a claim from the judiciary's purview may itself be constitutionally suspect. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Johnson v. Robison*, 415 U.S. 361 (1974)). The same is true in New York. *See, e.g.*, *Tobin v. Ingraham*, 326 N.Y.S.2d 51, 54 (N.Y. App. Div. 1971) ("[T]he Courts do not judge administrative discretion and 'it is the settled policy of the courts not to review the exercise of discretion by public officials in the enforcement of State statutes in the absence of a clear violation of some constitutional mandate.'") (quoting *Gaynor v. Rockefeller*, 15 N.Y. 2d 120, 131 (N.Y. 1965))); *People v. Hammonds*, 768 N.Y.S.2d 166, 173 (N.Y. App. Div. 2003) ("[T]he Court is not willing to usurp law enforcement's discretion in the procedure they choose so long as the procedure has been held to be constitutional."). Whatever leeway the State has in choosing whether and how to enforce its laws, its choices cannot violate the constitutional mandate of the Green Amendment.

As an example, the Pennsylvania Public Utilities Commission ("Pa. P.U.C.") is a statewide agency that exercises specific authorities granted to it by statute. At issue in a recent Commonwealth Court decision was the Pa. P.U.C.'s adjudicatory decision pursuant to the Pennsylvania Municipalities Planning Code Section 619, 53 PA. CONS. STAT. § 10619, that a proposed gas reliability station was "reasonably necessary for the convenience or welfare of the public" and thus exempt from local

zoning requirements. *See Twp. of Marple v. Pa. Pub. Utilities Comm'n*, 294 A.3d 965, 968–70 (Pa. Commw. Ct. 2023). Appellate review of a Pa. P.U.C. order (or any other Commonwealth agency action) is "limited to: (1) determining whether a constitutional violation or error in procedure has occurred; (2) the decision is in accordance with the law; and (3) the necessary findings of fact are supported by substantial evidence." *PECO Energy Co. v. Pa. Pub. Utilities Comm'n*, 791 A.2d 1155, 1160 (Pa. 2002) (citing 2 PA. CONS. STAT. § 704).

Petitioners argued that the Pa. P.U.C. erred when it failed to consider environmental concerns and deemed them to be "outside the purview of Section 619 proceedings." *Twp. of Marple*, 294 A.3d at 973. The Commonwealth Court agreed, explaining that "[t]he source of the Commission's responsibility to conduct [an environmental impact] review in a Section 619 proceeding is not the [Municipalities Planning Code] itself or another statute; rather, it is article I, section 27 of the Pennsylvania Constitution . . . ." *Id*. at 974. The court held that in order to be constitutionally adequate, a Section 619 proceeding must involve "an appropriately thorough environmental review of a building siting proposal" and the Pa. P.U.C. must "factor[] the results into its ultimate determination regarding the reasonable necessity of the proposed siting." *Id*. The Pa. P.U.C.'s statutory authority was thus bound not only by statute, but also by Pennsylvania's Green Amendment.

Subsequent Pa. P.U.C. proceedings affirm that compliance with the Green Amendment is an independent legal obligation separate and apart from any enabling statute. *See, e.g.*, *Application of The York Water Company*, No. A-2023-3041284, 2024 WL 838480 at *8 (Pa. P.U.C. Feb. 22, 2024) (authorizing the extension of a water main to a residential service area afflicted with contaminated water in part because Pennsylvanians have a constitutional right to pure water); *Pa. Pub. Utilities Comm'n v. Philadelphia Gas Works*, No. C-2021-3029259, 2023 WL 8714853 at *143 (Pa. P.U.C. Nov. 9, 2023) ("The Commission 'and its adjudicatory decisions and regulations are subject to the [Green Amendment], which is consonant with the Supreme Court's statement in *PEDF* [II] that all agencies of the Commonwealth are bound by the [Green Amendment].'") (quoting *Twp. of Marple*, 294 A.3d at 974)). In a state with a Green Amendment, even where an agency or entity has discretion under a particular statute, the Green Amendment is still operative and governs the exercise of that discretion.

The Commonwealth Court of Pennsylvania, in an unpublished decision, recognized that Pennsylvania's Green Amendment includes a "mandatory, non-discretionary governmental duty" and that an allegation that the Pennsylvania Department of Environmental Protection ("PADEP") had been "sitting on its hands regarding enforcement and remediation efforts" at a contaminated site was sufficient

to support a mandamus claim. *Del. Riverkeeper Network v. Pa. Dep't of Env't Prot.*, No. 525 M.D. 2017, 2018 WL 3554639 at *5–6 (Pa. Commw. Ct. July 25, 2018).

The Pennsylvania Environmental Hearing Board ("EHB"), an adjudicative administrative agency that hears appeals of PADEP actions, has adopted a standard of review that an appellant must show PADEP's action was "unlawful, unreasonable, or not supported by our *de novo* review of the facts." *Gene Stocker v. Commw. of Pa., Dep't of Env't Prot.*, No. 2021-053-L, 2022 WL 17371201 at *7 (Pa. Env. Hrg. Bd. Nov. 18, 2022). Unlawful in this context means that PADEP "must have not acted in accordance with all applicable statutes, regulations, and case law, or not acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution." *Id*. Again, the Green Amendment operates as an independent source of law binding on the agency. The EHB has explained that "agencies' duties under Article I, Section 27 are not necessarily coextensive with or limited to ensuring compliance with applicable statutes and regulations . . . ." *Del. Riverkeeper Network v. Pa. Dep't of Env't Prot.*, Nos. 2021-108-L, 2021-109-L, 2022 WL 1200101 at *22 (Pa. Env. Hrg. Bd. Apr. 1, 2022).

A recent case in the Pennsylvania Commonwealth Court illustrates the effect that a Green Amendment may have even in the context of an applicable regulatory program. Petitioners had submitted a complaint to PADEP regarding possible contamination of their water supply by local oil and gas wells. *Glahn v. Dep't of*

Env't Prot., 298 A.3d 455, 458 (Pa. Commw. Ct. 2023). After not hearing from PADEP within the 45-day period prescribed by the Oil and Gas Act, 58 PA. CONS. STAT. § 3218(b), petitioners appealed to the EHB. *Glahn*, 298 A.3d at 459. The EHB dismissed the appeal on the basis that PADEP hadn't taken any action from which petitioners could appeal, and petitioners sought review of the dismissal in the Commonwealth Court. *Id.*

Although the court agreed that no appealable action had occurred, it opined in dicta that "[b]y failing to issue a decision within the 45-day period, the Department failed to uphold its statutory and constitutional duties to protect the public and the public natural resources from the potential harms from drilling activities." *Id.* at 462 n.11 (dictum). The court explained that PADEP's delay "impaired Petitioners' right to clean water," *id.*, and that the "proper recourse to address the Department's prolonged inaction is a mandamus action . . . ." *Id.* at 464 n.13 (dictum). Essentially, by failing to follow through on a complaint regarding an oil and gas well, PADEP ran afoul of the Green Amendment, which guaranteed to complainants a right to clean water.

Like Pennsylvania's Green Amendment, the New York Green Amendment guarantees the people a right to breathe clean air and to live in a healthful environment. Government inaction, or lackluster or inept enforcement in the face of

environmental degradation, especially where that degradation is caused by a government-regulated actor, may violate the constitution.

III. GREEN AMENDMENTS CONTAIN JUDICIALLY-ENFORCEABLE LANGUAGE

Green Amendments purposely and intentionally include language that is flexible, but clearly meaningful. Like all other provisions in both the federal and state constitutions, Green Amendments are interpreted through legislative, executive, *and* judicial action.

Pennsylvania's Green Amendment is judicially enforceable to the same extent as other enumerated rights in Pennsylvania's Constitution. The Pennsylvania Supreme Court has explained that "when reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself . . . ." *PEDF II*, 161 A.3d at 930. As the Commonwealth Court explained shortly after the Pennsylvania Green Amendment's ratification:

> the standard of Section 27 seems to us not to require legislative definition, however desirable such might be. Courts, which have attacked with gusto such indistinct concepts as due process, equal protection, unreasonable search and seizure, and cruel and unusual punishment, will surely not hesitate before such comparatively certain measures as clean air, pure water and natural, scenic, historic and esthetic values. The most uncertain of these, esthetic values, has been the subject of instant judicial recognition in the fields of planning and zoning.

Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d at 892.

As explained by the plurality in *Robinson Township*:

> Much as is the case with other Declaration of Rights provisions, Article I, Section 27 articulates principles of relatively broad application, whose development in practice often is left primarily to the judicial and legislative branches. Articulating judicial standards in the realm of constitutional rights may be a difficult task, as our developing jurisprudence vis-à-vis rights affirmed in the Pennsylvania Constitution well before environmental rights amply shows. The difficulty of the task, however, is not a ground upon which a court may or should abridge rights explicitly guaranteed in the Declaration of Rights.

83 A.3d at 949 (citations omitted) (plurality opinion). Courts are "well-equipped" to make factual determinations based on scientific evidence that the right to "clean air" or "pure water" has or has not been implicated, and can "issue reasoned decisions regarding constitutional compliance by the other branches of government." *Id*. at 953 (plurality opinion). Courts are also able to "fashion an appropriate remedy to vindicate the environmental rights at issue." *Id*. at 953.

Accordingly, the Commonwealth Court has developed a text-based method of evaluating constitutional compliance with the first clause of Pennsylvania Green Amendment: "Judicial review of the government's action requires an evidentiary hearing to determine, first, whether the values in the first clause of the Environmental Rights Amendment are implicated and, second, whether the governmental action

unreasonably impairs those values." *Frederick v. Allegheny Twp. Zoning Hrg. Bd.*, 196 A.3d 677, 695 (Pa. Commw. Ct. 2018). The Pennsylvania EHB uses the following similar standard derived from the first clause of Pennsylvania's Green Amendment and Pennsylvania Supreme Court jurisprudence to evaluate claims that PADEP's decision to issue a permit violated the constitution:

> [T]he proper approach in evaluating the Department's decision under the first part of Article I, Section 27, is, first, for the Board to ensure that the Department considered the environmental effects of its actions. The Department cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be. We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable.

Friends of Lackawanna v. Commw. of Pa., Dep't of Env't Prot., No. 2015-063-L, 2017 WL 5558489 at *21 (Pa. Env. Hrg. Bd. Nov. 8, 2017) (citations omitted). Compliance with the first clause of Pennsylvania's Green Amendment is by necessity a fact-based inquiry, and any reviewing court or administrative agency will have the benefit of the parties' interpretations and evidence.

Most recently, a trial court in Montana had the opportunity to interpret the language of Montana's article II, section 3 to conclude that climate was a part of the constitutionally-guaranteed right to "a clean and healthful environment.". In *Held v. State of Montana*, a group of youth plaintiffs sought declaratory and injunctive relief

against the state for, among other things, forbidding the state and its agents from considering the impacts of greenhouse gas (GHG) emissions or climate change in their environmental reviews," which they argued infringed upon their Green Amendment rights to an unconstitutional degree. No. CDV-2020-307, slip op. at 2 (Mont. Dist. Ct. Aug. 14, 2023).

The court agreed, deciding that the "right to a clean and healthful environment language in Montana's Constitution is 'forward-looking and preventative language'" that "prohibits environmental degradation that causes ill health or physical endangerment and unreasonable depletion or degradation of Montana's natural resources for this and future generations." *Id*. at 96–97. The court concluded that "[b]ased on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, climate is included in the 'clean and healthful environment'" protected by article II, section 3. *Id*. at 97–98. The Montana District Court was able to draw on multiple interpretive sources to reach this conclusion, while still basing the holding on the text of the Green Amendment itself. Like all other courts tasked with the role to "say what the law is," courts interpreting a Green Amendment "must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). To do so is not a usurpation of legislative or executive power, but is the function of the judicial branch.

Contrary to the assertions of some of the parties to this case, there is nothing uniquely inscrutable about the language of New York's Green Amendment that would warrant this Court departing from the path that Pennsylvania and Montana courts have embarked upon in guaranteeing the people's constitutional environmental rights. During consideration of the New York Green Amendment bill, Senator Jackson compared the "clean air and clean water" language of New York's Green Amendment to article XI, section 1 of the New York Constitution, which states that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." *See, e.g.*, *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 665 (N.Y. 1995). Senator Jackson pointed out that the New York Court of Appeals was able to interpret this language to require a "sound basic education" that consists of "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." *Id.* at 666.

In terms of resources devoted to the task of providing a sound basic education, the Court of Appeals determined that so long as the "physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation." *Id*. The court further explained

that the issue of compliance with this constitutional requirement may be determined "after discovery and the development of a factual record." *Id*. Essentially, the Court of Appeals was able to both derive meaning from the language of the Education Amendment, and acknowledge that additional evidence was necessary to determine compliance. These are tasks well within the authority and ability of the judiciary, and both Pennsylvania and Montana have done the same in applying their Green Amendments.

Just as the Court of Appeals rejected arguments that the education article was merely hortatory, so should this Court reject the State's and Waste Management's implicit and explicit claims that the Green Amendment is intractable and incapable of judicial interpretation or application.

CONCLUSION

This Court should reject any interpretation of New York's Green Amendment that denies or limits its self-executing nature, which would eliminate the judiciary's role in interpreting the Constitution and would allow state entities to act without consideration of the inalienable rights protected therein.

For the reasons set forth herein, this Court should affirm the decision below denying the State's motion to dismiss.

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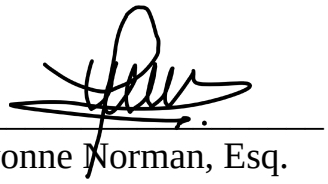
Dated: April 5, 2024
New York, New York

CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR 1250.8(f), I hereby certify that the foregoing brief was prepared on a word processor, using 14-point Times New Roman proportionally-spaced typeface, double-spaced, with 12-point single-spaced footnotes. The total number of words in the brief, inclusive of point headings and footnotes and exclusives of signature blocks and pages including the table of contents, table of citations, and this certificate of compliance, is 6,997.

Dated: April 5, 2024



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