

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

GREEN EDUCATION AND LEGAL FUND, LIGHTS OUT NORLITE,
BRADFORD BLAUHUT, DEBORAH KINDLEY, MARK BELOKOPITSKY,
AND KAREN ROBINSON,
Plaintiffs-Petitioners-Appellants,

v

THE STATE OF NEW YORK, NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Plaintiffs-Respondents-Respondents.

**BRIEF OF AMICI CURIAE DELAWARE RIVERKEEPER
NETWORK AND GREEN AMENDMENTS FOR THE GENERATIONS
IN SUPPORT OF PLAINTIFFS-PETITIONERS-APPELLANTS AND
REVERSAL**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT AND INTERESTS OF <i>AMICI CURIAE</i>	1
DISCUSSION	3
I. New York’s Green Amendment is a self-executing constitutional provision that protects a combination of positive and negative rights.	5
II. Green Amendments bind the discretion of state agencies, including enforcement discretion.....	16
III. Green Amendment claims based on government inaction are justiciable....	21
IV. Green Amendment violations due to government inaction are remediable.	27
CONCLUSION.....	30
CERTIFICATE OF COMPLIANCE	31

TABLE OF AUTHORITIES

Cases

<i>Application of The York Water Co.</i> , No. A-2023-3041284, 2024 WL 838480 [Pa PUC Feb 22, 2024]	18
<i>Cape-France Enter v Estate of Peed</i> , 29 P3d 1011 [Mont 2001].....	26
<i>Chan v US Dep’t of Transp.</i> , US Dist Ct, SD NY, 23 Civ 10365, Liman, J., 2024..	5
<i>Commwonwealth v Nat’l Gettysburg Battlefield Tower, Inc</i> , 302 A2d 886 [Pa Commw Ct 1973], aff’d, 311 A2d 588 [Pa 1973].....	13
<i>Del Riverkeeper Network v Dep’t of Env’t Prot.</i> , Nos. 2021-108-L, 2021-109-L, 2022 WL 1200101 [Pa Env Hrg Bd Apr 1, 2022].....	19
<i>Del Riverkeeper Network v Pa Dep’t of Env’t Prot</i> , No. 525 M.D. 2017, 2018 WL 3554639 [Pa Commw Ct July 25, 2018]	18
<i>Fresh Air for the Eastside, Inc v State</i> , 229 AD3d 1217 [4th Dept 2024]	21, 22
<i>Friends of Fort Greene Park v. NY City Parks & Rec Dep’t</i> , — NYS3d — , 2025 NY Slip Op 25151 [Sup Ct, New York County 2025].....	9, 10, 11, 12
<i>Gene Stocker v Commonwealth</i> , No. 2021-053-L, 2022 WL 17371201 [Pa Env Hrg Bd Nov 18, 2022].....	19
<i>Glahn v Dep’t of Env’t Prot</i> , 298 A3d 455 [Pa Commw Ct 2023]	19, 20, 26
<i>Klostermann v Cuomo</i> , 61 NY2d 525 [1984].....	21, 22, 27, 28
<i>Korn v Gulotta</i> , 72 NY2d 363 [1988].....	22
<i>Marte v City of NY</i> , 2023 NY Slip Op 31198(U) [Sup Ct, New York County 2023]	4
<i>Pa Env’t Def Found v Commonwealth (PEDF I)</i> , 108 A3d 140 [Pa Commw Ct 2015], rev’d in part, 161 A3d 911 [Pa. 2017].....	14
<i>Pa Env’t Def Found v Commonwealth (PEDF II)</i> , 161 A3d 911 [Pa 2017].....	15

<i>Pa Pub Utilities Comm’n v Philadelphia Gas Works</i> , No. C-2021-3029259, 2023 WL 8714853 [Pa PUC Nov 9, 2023].....	18
<i>Payne v Kassab</i> , 312 A2d 86 [Pa Commw Ct 1973], overruled in part by <i>Pa Env’t Def Found v Commonwealth (PEDF II)</i> , 161 A3d 911 [Pa 2017].....	15
<i>PECO Energy Co v Pa Pub Utilities Comm’n</i> , 791 A2d 1155 [Pa 2002].....	17
<i>People v Hammonds</i> , 1 Misc3d 880 (Sup Ct, Westchester County 2003).....	23
<i>Robinson Twp v Commonwealth</i> , 83 A3d 901 [Pa 2013], plurality opinion 7, 12, 14, 15	
<i>Seneca Lake Guardian, Inc. v Seneca Meadows, In.</i> , — NYS3d — , 2025 NY Slip Op 25116 [Sup Ct, Albany County 2025]	4
<i>Streeter v NY City Dep’t of Env’t Prot</i> , 213 NYS3d 865 [Sup Ct, Kings County 2024]	4
<i>Swanick v Erie Cty Leg</i> , 103 AD2d 1036 [4th Dept 1984]	27
<i>Tobin v Ingraham</i> , 67 Misc2d 990 [Sup Ct, Monroe County 1971]	23
<i>Twp of Marple v Pa Pub Utilities Comm’n</i> , 294 A3d 965 [Pa Commw Ct. 2023] 17, 26	
<i>Webster v Doe</i> , 486 US 592 [1988]	23
<i>Yick Wo v. Hopkins</i> , 118 US 356 [1886]	25
Statutes	
42 Pa Cons Stat §§ 761-763.....	16
5 USC § 500 <i>et seq</i>	28
53 Pa Cons Stat § 10619	20
58 Pa Cons Stat § 3218 [b]	25
Clean Air Act § 116 [42 U.S.C. § 7416].....	10
CPLR 103 [c]	34
CPLR 3001.....	33

ECL 27-0913 [3]	36
ECL Article 8	11
Federal Water Pollution Control Act § 570 [33 U.S.C. § 1370]	10

Other Authorities

Franklin L. Kury, <i>The Constitutional Question to Save the Planet</i> [2021]	14
Jeffrey Omar Usman, <i>Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions</i> , 73 Alb L Rev 1459 [2010]	passim
John C. Dernbach, et al., <i>Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications</i> , 67 Rutgers U. L. Rev. 1169 (2015).....	7
John C. Dernbach, <i>The Value of Constitutional Environmental Rights and Public Trusts</i> , 41 Pace Env't L Rev 153 [2024]	4
Luis José Torres Asencio, <i>Greening Constitutions: A Case for Judicial Enforcement of Constitutional Rights to Environmental Protection</i> , 52 Rev Juridica U Inter PR 277 [2018].....	29
Maya K. van Rossum, <i>The Green Amendment: The People's Fight for a Clean, Safe, and Healthy Environment</i> [2d ed. 2022]	5, 6
NY State Bar Assoc Env't & Energy L Section, <i>Report and Recommendations Concerning Environmental Aspects of the New York State Constitution</i> , 38 Pace L Rev 183 [2017].....	10
Robert F. Williams & Lawrence Friedman, <i>The Law of American State Constitutions</i> [2d ed. 2023].....	6, 9, 23, 24
Tammy Wyatt-Shaw, <i>The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something"</i> , 15 Pub. Land L. Rev. 219 (1994).....	7

Regulations

Mayoral Executive Order #91, as amended by Title 62, §§ 5-01, <i>et seq.</i> of the Rules of the City of New York	9
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Constitutional Provisions

NY Const art XIV	12
NY Const, art I, § 19	3
NY Const, art IV, § 3	34
Pa Const, art I, § 27	16
Pa Const, art V, § 4	16

PRELIMINARY STATEMENT AND INTERESTS OF *AMICI CURIAE*¹

Proposed *amici curiae* Delaware Riverkeeper Network (“DRN”) and Green Amendments for The Generations (“GAFTG”) respectfully submit this brief regarding judicial application and interpretation of a certain type of constitutional environmental right defined as a “Green Amendment.” The New York Constitution’s Article I, Section 19 meets this definition.

DRN is a nonprofit organization established in 1988 to protect, preserve, and enhance the Delaware River, its tributaries, and habitats. DRN has over 1,900 members who live in New York, and over 29,000 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.

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 has objected to the filing of this brief.

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-fossil fuel 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 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 litigation and advocacy spaces. GAFTG is currently working with communities and government leaders in over thirty 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, New York, and Montana.

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 recognition of its self-executing restraint on governmental power that is enforceable through litigation.

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

DISCUSSION

New York’s Green Amendment, article I, section 19 of the New York Constitution, guarantees: “Each person shall have a right to clean air and water, and a healthful environment.” This case presents an opportunity for the Third Judicial Department of the Supreme Court, Appellate Division, to acknowledge and affirm the role of the judiciary in interpreting and enforcing this fundamental constitutional right. “Constitutional environmental rights . . . are meaningful only to the extent that

courts are willing to enforce them based on their text. Otherwise, they are almost entirely aspirational.” (John C. Dernbach, *The Value of Constitutional Environmental Rights and Public Trusts*, 41 Pace Env’t L Rev 153, 160 [2024].)

New York courts are currently risking a tragic constitutional error—extinguishing the intent of the people who consciously adopted a constitutional tool to vindicate their environmental rights through legal action when necessary. Recent decisions suggest an eagerness by some judges to minimize the significance of the Green Amendment. (See, e.g., *Seneca Lake Guardian, Inc. v Seneca Meadows, Inc.*, — NYS3d — , 2025 NY Slip Op 25116, *17 [Sup Ct, Albany County 2025] [denying relief where plaintiff sought declaratory judgment that would “compel ‘an act in respect to which the [administrative agency] may exercise judgment or discretion’” (alteration in original), quoting *Fresh Air for the Eastside, Inc v State*, 229 AD3d 1217, 1220 [4th Dept 2024] [hereinafter *FAFE*]]; *Streeter v NY City Dep’t of Env’t Prot*, 213 NYS3d 865, 870 [Sup Ct, Kings County 2024] [finding that the Green Amendment does not alter the government’s obligations under existing laws but rather it “address[es] the issue of standing in environmental cases and require[s] municipal agencies to take appropriate action regarding the amendment’s impact on their decision-making processes”]; *Marte v City of NY*, 2023 NY Slip Op 31198(U), *4-6 [Sup Ct, New York County 2023], [suggesting that the Green Amendment may not be judicially enforceable].) Even federal courts are prematurely declaring that

Article I, Section 19 does not provide “a self-executing substantive right that imposes environmental standards above and beyond the state’s preexisting—and robust—environmental regulatory regime.” (*Chan v US Dep’t of Transp.*, US Dist Ct, SD NY, 23 Civ 10365, Liman, J., 2024.)

Amici urge this Court to consider the history of state constitutional environmental rights provisions in general, and New York’s Green Amendment in particular, and to authoritatively interpret article I, section 19 as a self-executing provision that may be enforced in court when government fails to act in the face of environmental threats that violate constitutional rights.

I. New York’s Green Amendment is a self-executing constitutional provision that protects a combination of positive and negative rights.

A “Green Amendment” is a term of art defined as a constitutional provision that declares an individual right to specifically-identified environmental values, is enshrined in the Declaration of Rights, is self-executing, and encompasses both affirmative duties and prohibitions on certain government action. (*See* Maya K. van Rossum, *The Green Amendment: The People’s Fight for a Clean, Safe, and Healthy Environment* at 268-272 [2d ed. 2022].) Article I, Section 19 meets this definition, and not by accident. Green Amendments for the Generations was a leading part of the grassroots movement to adopt this constitutional amendment. (*See id.* at 63, 230-231, 262-263; *see also* Affirmation in Support of Motion for Leave to File a Brief *Amici Curiae* at ¶ 5.)

Those who voted to include the Green Amendment in the New York Constitution understood that they were changing the way the State would make decisions about the environment, both through its own actions and through its regulatory powers. Voters understood the role that constitutional protection plays when they adopted the Green Amendment. Having seen the eroding effect of industry lobbyists on environmental regulation, engaged communities and voters throughout the State chose to eradicate the state's ability to give polluters a "free pass." (See Robert F. Williams & Lawrence Friedman, *The Law of American State Constitutions* at 52 [2d ed. 2023] ["State constitutional rights provisions, by contrast to the federal guarantees we think of as protecting *minority* and unpopular people, sometimes actually provide *majoritarian* protections."].) The Green Amendment counterbalances the outsized influence held by a minority of polluters in favor of protecting the environment, which affects all people in New York.

Voters chose a constitutional provision that was like other states' self-executing Green Amendments that demonstrated their enforceability; they were not adopting an unenforceable policy statement. (See *id.* at 12 ["[P]roper understanding and interpretation of state constitutions must take account of the history of state constitutional provisions [and] the possibility that they were modeled on other states' provisions."].) The only other states with provisions that meet the definition of a Green Amendment are Pennsylvania and Montana. (van Rossum at 12.) New York's

amendment was developed, advanced and adopted in the wake of a significant legal decision out of Pennsylvania that clarified the value of language that met the Green Amendment definition. (See *Robinson Twp v Commonwealth*, 83 A3d 901 [Pa 2013], plurality opinion.)

Placement in the constitution's declaration or bill of rights is a key feature of all three Green Amendments—these provisions are excepted out of 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 undermines 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.”].)

Green Amendments encompass both positive and negative rights— “[w]hereas affirmative or positive rights are essentially ‘private entitlements to protection by the state,’ negative rights are ‘protections against the aggressive state.’” (Jeffrey Omar Usman, *Good Enough for Government Work: The*

Interpretation of Positive Constitutional Rights in State Constitutions, 73 Alb L Rev 1459, 1462 [2010], quoting Cass R. Sunstein, *Designing Democracy: What Constitutions Do* at 222 [2001].) The government itself must not infringe upon the rights protected by the Green Amendment, nor can it allow infringement through inadequate regulation.

Whether characterized as “positive” or “negative,” these rights are always *limitations* on the state. Without the Green Amendment, the New York legislature’s power to regulate environmental issues is plenary, and the executive’s enforcement discretion is virtually beyond review. With the Green Amendment, however, neither environmental regulation nor enforcement discretion are allowed to result in an unconstitutional infringement. A rough analogue is the familiar cooperative federalism framework that federal environmental statutes create—states may continue to exercise their authority to control air and water pollution, but federal laws and regulations provide a protective “floor” rather than a limiting “ceiling.” (See, e.g., Federal Water Pollution Control Act § 570 [33 U.S.C. § 1370] [prohibiting pollution control measures that are “less stringent” than federal measures]; Clean Air Act § 116 [42 U.S.C. § 7416], [same].) In other words, the Green Amendment does not empower the State to do anything it was previously prohibited from doing, but rather adds a new restraint on legislative, executive, and judicial discretion.

A constitutionally competent government applies this limitation during its decision-making processes, but the self-executing nature of a Green Amendment further ensures that the limitation will not be casually disregarded. Self-executing means that an individual can enforce their right in the courts: “entrenching a provision . . . in the state constitution . . . removes the matter from legislative discretion and, as a consequence, moves issues of interpretation to the courts.” (*See Williams* at 47.)

Recently, the Supreme Court of New York County clarified the self-executing role of New York’s Green Amendment in judicial review of agency action. In *Friends of Fort Greene Park v New York City Parks and Recreation Department* (— NYS3d — , 2025 NY Slip Op 25151 at *6 [Sup Ct, New York County 2025]), petitioners challenged the environmental review processes supporting a decision to renovate and re-design a portion of Fort Greene Park in Brooklyn. Petitioners claimed that the renovation violated: the State Environmental Quality Review Act (“SEQRA”) (ECL Article 8); the City Environmental Quality Review (“CEQR”) (Mayoral Executive Order #91, as amended by Title 62, §§ 5-01, *et seq.* of the Rules of the City of New York); and the Green Amendment. (*Fort Greene*, slip op at *6). After determining that the Parks Department complied with SEQRA and CEQR, the court turned to petitioner’s Green Amendment claim alleging the removal of 78

mature trees from the park violated petitioners’ rights to clean air, clean water, and a healthful environment. (*Id.* at *32.)

The court first examined the legislative history of the Green Amendment, noting the record was “muddled or vague” in its predictions of future enforcement. (*Id.* at *37, quoting Katrina Fischer Kuh, Nicholas A. Robinson, & Scott Fein, *New York’s Constitutional Guarantee of Environmental Rights*, 2 NYUJ Legis & Pub Pol’y 361, 384 [2024].) However, the court found compelling that the Green Amendment was spurred by the New York State Bar Association’s 2017 examination of the extant Conservation Article, (NY Const art XIV), which was not self-executing and relied on legislative action. (*Fort Greene*, slip op at *38; *see also* NY State Bar Assoc Env’t & Energy L Section, *Report and Recommendations Concerning Environmental Aspects of the New York State Constitution*, 38 Pace L Rev 183 [2017].) The Bar Association task force recommended amending the constitution to include a self-executing environmental right to address emerging contaminants, cumulative environmental burdens, and intergenerational ecological crises such as climate change. (*See id.* at 188-193.)

An early version of the Green Amendment was proposed in the legislature shortly thereafter. As the bill evolved over the next couple of years before its passage in 2021, the people of New York’s eagerness to amend their constitution intensified due to additional environmental crises caused by climate change, the urgent need to

address previously undiscovered contaminants, and the national movement for racial and environmental justice. (*See Fort Greene*, slip op at *39-40.) Based on this history, and a review of the case law to date, the *Fort Greene* court concluded that “the Green Amendment is self-executing without further legislation, and . . . creates a cause of action against government actors.” (*Id.* at *47.)

Concerning the appropriate standard of review, the court noted that “deference to state agency action bearing on positive—and thus self-executing—rights is an improper deferral to agency constitutional interpretation.” (*Id.* at *49, quoting Olivia Schrager, Note, *State Administrative Constitutionalism and Environmental Rights: Judicial Review and New York’s Green Amendment*, 50 Colum J Env’t L 175, 182 [2025].) Ultimately, the court adopted a test evaluating alleged violations of the Green Amendment using intermediate scrutiny, at least where the state is improving the environment, even if some degradation may occur. (*See id.* at *51 [“[I]f there is a constitutional violation, can the government show that the plan is justified by an important interest that is substantially related and proportionate to action the government has taken[?]”].)²

² *Amici* do not support the use of an intermediate-scrutiny test for the fundamental rights enshrined in the Green Amendment. However, the *Fort Greene* court’s discussion of the self-executing and justiciable nature of the amendment is well-supported.

Having found that the plan to remove trees did not violate petitioners' rights to clean air or a healthy environment, an assessment of the respondents' justification for doing so was not necessary. (*Id.* at *52-53.) Ultimately, the court explained:

“The Green Amendment is a great dream realized. It exists to challenge laws, activities, or proposed actions that pose significant threats to the environment. It serves as a backstop in the event federal laws and agencies fail to offer protections. And, it is apparent that it provides an independent cause of action that may be applicable to the government's failures to protect New Yorkers from contaminated drinking water, polluted air, pollutants, extreme weather and climate change events.”

(*Id.* at *54.) Contrary to the public park renovation plan in the *Fort Greene* case, the government's environmental failures are more often due to decisions *not* to act on threats—decisions that, before the Green Amendment, were typically within the discretion of the legislative and executive branches. If this Court follows the reasoning of the Fourth Department in *FAFE* and holds that the Green Amendment cannot compel government action when rights are violated, then the self-executing nature of the amendment would be undermined and the people's dream in constitutionalizing their rights would be eviscerated.

The story of Pennsylvania's Green Amendment provides a cautionary tale. It was approved unanimously by both chambers of Pennsylvania's General Assembly and then ratified by voters in 1971 by a margin of four to one. (*See Robinson*, 83 A3d at 961-962, plurality opinion.) The language, placed deliberately in the

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 ratification, Pennsylvania’s Commonwealth Court³ 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 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 “inviolable”. 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.”

(*Commonwealth v Nat’l Gettysburg Battlefield Tower, Inc*, 302 A2d 886, 892 [Pa Commw Ct 1973], *aff’d* on other grounds, 311 A2d 588 [Pa 1973].) Since 1973, no Pennsylvania court has disturbed that holding. (See *Robinson Twp.*, 83 A3d at 964

³ 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.)

n.52, [clarifying that the Pennsylvania Supreme Court’s 1973 *Gettysburg* decision did not alter the conclusion that article I, section 27 was self-executing]; *see also Pa Env’t Def Found v Commonwealth (PEDF I)*, 108 A3d 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 A3d 911 [Pa. 2017]; Franklin L. Kury, *The Constitutional Question to Save the Planet* at 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.”].)⁴

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 that heavily relied on existing law 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

⁴ 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.

derived therefrom that to proceed further would be an abuse of discretion?”

(*Payne v Kassab*, 312 A2d 86, 94 [Pa Commw Ct 1973], overruled in part by *Pa Env’t Def Found v Commonwealth (PEDF II)*, 161 A3d 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 A3d at 967, plurality opinion) (emphasis added).

The *Robinson Township* plurality faulted the *Payne* test for “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 “strip[ped] the constitutional provision of its meaning.” (*PEDF II*, 161 A3d at 930.) The *Payne* test was formally rejected and is no longer good law in Pennsylvania.

The history of Pennsylvania’s Green Amendment illustrates the danger of relying on pre-amendment notions of legislative and executive discretion. Relying on existing statutes to determine whether an agency action is constitutional renders the Green Amendment a nullity. Whether by denying its self-executing nature or

through imposition of a multi-part test that strays from the plain language of the amendment and denies it strict scrutiny review, this Court should avoid any holding in this case that would effectively erase New York's Green Amendment.

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 likewise limited. 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 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's scope of discretion does not include allowing the permitted action to degrade the environment to an unconstitutional degree. And where the state's enforcement actions fail to remedy the violation of constitutional rights, then the state has yet to comply with its constitutional duty.

As an example, the Pennsylvania Public Utilities Commission ("Pa PUC") is a statewide agency that exercises specific authorities granted to it by statute. At issue in a recent Commonwealth Court decision was the Pa PUC'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 A3d 965, 968-970 [Pa Commw Ct. 2023].) Appellate review of a Pa PUC 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 A2d 1155, 1160 [Pa 2002], citing 2 Pa Cons Stat § 704.)

Petitioners argued the Pa PUC erred when it failed to consider environmental concerns and deemed them to be “outside the purview of Section 619 proceedings.” (*Twp. of Marple*, 294 A3d 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 PUC must “factor[] the results into its ultimate determination.” (*Id.*) The Pa PUC’s statutory authority was thus bound not only by statute, but also by Pennsylvania’s Green Amendment.

Subsequent Pa PUC 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 Co.*, No. A-2023-3041284, 2024 WL 838480 at *8 [Pa PUC 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 PUC 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 A3d at 974].) 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 (“PAEHB”), 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 Commonwealth*, 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 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 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 A3d 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 A3d 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. Even if a statute read in

isolation would allow insufficient action, the Green Amendment operates independently to require government protection of constitutional rights.

III. Green Amendment claims based on government inaction are justiciable.

It is within the authority of this Court to articulate what executive behavior violates Appellants' environmental rights—whether that behavior is action or inaction—to declare it unconstitutional, and to fashion a remedy that respects the authority and discretion of the executive agency. Doing so does not intrude on prosecutorial discretion because that discretion is firmly bound by constitutional limits.

Although “[g]enerally, the manner by which the State addresses complex societal and governmental issues” such as environmental laws and their enforcement “is a subject left to the discretion of the legislative and executive branches,” the “appropriate forum to determine the respective rights and obligations of . . . parties is in the judicial branch.” (*Klostermann v Cuomo*, 61 NY2d 525, 536 [1984].) An agency’s enforcement discretion involves “a complicated balancing of a number of factors which are peculiarly within its expertise,” (*FAFE*, 229 AD3d at 1219), but that balancing does not include the decision whether to comply with the constitution, and constitutional compliance is peculiarly within the expertise of the courts.

The Court of Appeals has made clear that simply because an agency’s discretion involves “the expenditure of funds and a concomitant allocation of

resources,” that discretion is not shielded from judicial review—such a “defense is particularly unconvincing when uttered in response to a claim that existing conditions violate an individual’s constitutional rights.” (*Klostermann*, 61 NY2d at 536-537; *see also Korn v Gulotta*, 72 NY2d 363, 369 [1988] [explaining that the budgetary process, which is subject to the executive and legislative branches’ discretion, is not “per se always beyond the realm of judicial consideration” and that the “court will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the two other branches of the government.”, quoting *Saxton v Carey*, 44 NY2d 545, 551 [1978]].)

In *FAFE*, the Fourth Department, rather than recognizing its own role in interpreting and enforcing New York’s Constitution, relied on a U.S. Supreme Court case exploring the limits of the federal Administrative Procedure Act’s judicial review provision to conclude that it is institutionally incapable of declaring that DEC’s inaction resulted in a constitutional violation. (*See FAFE*, 229 AD3d at 1219, citing *Heckler v Chaney*, 470 US 821, 833 n.4 [1985].) *Heckler* is simply not on point with an action seeking to enforce constitutional rights. Even if it was, the U.S. Supreme Court explicitly declined to address the question of whether “the agency’s refusal to institute proceedings violated any constitutional rights” (*Heckler*, 470 US at 838.)

In federal law, even if an agency action is wholly discretionary and otherwise unreviewable under the Administrative Procedure Act (5 USC § 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 US 592 [1988], citing *Johnson v Robison*, 415 US 361 [1974].) The same is true in New York. (*See, e.g., Tobin v Ingraham*, 67 Misc2d 990, 993 [Sup Ct, Monroe County 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 NY2d 120, 131 [1965]]; *People v Hammonds*, 1 Misc3d 880, 887 (Sup Ct, Westchester County 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 the case law develops around New York’s Green Amendment, courts should not succumb to the “extraordinarily strong undertow” of federal precedent and should instead use the intent of the people of New York as a touchstone for interpretation. (*See Usman* at 1493; *see also Williams* at 39 [“[State constitutions]

are not miniature versions of the federal Constitution, nor are they clones of it.”].) This is particularly true because, unlike the Federal government of limited powers, State governments have plenary powers limited only by their own constitution and the Fourteenth Amendment of the Federal Constitution. “State constitutions, in addition to a variety of policy-based provisions, often contain positive or affirmative rights, or even mandates, while federal constitutional rights are negative in nature.” (*Id.* at 43.) In discussing the effect of positive constitutional rights like the Green Amendment on the otherwise plenary discretion of state legislators, Judge Usman explains:

“The existence of a positive constitutional right ‘should . . . be understood as constraining the legislature’s otherwise unfettered discretion to choose from among competing policy alternatives.’ Although the right is likely only defined in general terms, ‘it creates “an environment of constraint, of . . . ideals to be fulfilled” that cabins the legislature’s discretion to choose only those means that will actually carry out, or at least help carry out, the constitutional end.’ The legislature retains the ability to ‘choose the means to carry out a constitutional goal, but it cannot claim to meet its constitutional duty if the means chosen evade, undermine, or fail to carry out the prescribed end. The relevant question is thus consequential in focus—asking whether the legislature’s approach furthers or effectuates the constitutional right at issue.’”

(Usman at 1522, quoting Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 Fordham L Rev 1403, 1414, 1415 [1999]). This limitation applies with equal force to DEC’s prosecutorial discretion—DEC may choose the means of

enforcing New York's environmental laws so long as the result is not a violation of environmental rights.

Despite the limited applicability of federal precedent in this situation, the relationship between constitutional mandates and government discretion is similar enough in the state and federal contexts to be illustrative. The U.S. Supreme Court has pinpointed the unworkability of executive discretion unbound by constitutional restraints. In *Yick Wo v Hopkins*, the Court declared that the application of an ordinance allowing the city of San Francisco to prosecute laundry operators who lacked authorization to do business within the city to be unconstitutional because the authorization process conferred unlimited discretion on the board of supervisors, who withheld authorization in a discriminatory manner against Chinese nationals. (See 118 US 356, 373-374 [1886].) Although the law was facially constitutional, the discretion it provided resulted in unconstitutional discrimination, which the Court had the power to restrain. (*Id.*) Thus, American constitutional jurisprudence provides a firm foundation upon which courts may declare the exercise of discretion, even prosecutorial discretion, to be unconstitutional.

“Judicial decision-making regarding affirmative rights immerses courts more deeply within the affairs of the executive and legislative branches.” (Usman at 1495.) This is because “positive rights, like their negative rights counterparts, invite judicial interpretation.” (*Id.* at 1519.) Treating environmental rights as uniquely

nonjusticiable, “as matters purely of politics despite their constitutionalization, is to effectively read these provisions out of state constitutions or at least to eliminate the role of a tripartite system of checks and balances with regard to these constitutional rights.” (*Id.* at 1520.)

As stated previously, Green Amendments can be considered both positive and negative rights in that they require the government to act affirmatively in some circumstances, and to refrain from acting in others. (*Compare Twp of Marple*, 294 A3d at 974 [holding that an agency is required by the constitution to “complete[] an appropriately thorough environmental review” of its proposed action prior to reaching a decision], and *Glahn*, 298 A3d at 462 n.11 [finding that the Department of Environmental Protection’s failure to respond to a water supply contamination complaint “impaired Petitioners’ right to clean water” (dictum)], with *Cape-France Enter v Estate of Peed*, 29 P3d 1011, 1017 [Mont 2001] [refusing to mandate specific performance of a contract that would result in pollution because it “would involve the state itself in violating the public’s . . . fundamental rights to a clean and healthful environment”].) Courts are institutionally capable of determining what executive and legislative conduct or dereliction violates the Green Amendment, even when the government has wide discretion or must consider other factors. Accordingly, claims that an agency’s failure to act in a circumstance where that failure resulted in an infringement upon environmental rights are justiciable.

IV. Green Amendment violations due to government inaction are remediable.

Courts have the power to define constitutional obligations and instruct government respondents through issuance of a declaratory judgment. New York’s rules allow the Supreme Court to “render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy *whether or not further relief is or could be claimed.*” (CPLR 3001). Regardless of the availability of mandamus relief in this case, a declaratory judgment is appropriate. “While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function.” (*Klostermann*, 61 NY2d at 538, quoting *Fidelity Nat. Bank v Swope*, 274 US 123, 132 [1927]).⁵

This is especially true where the judgment is against the executive branch of the state, whose duty it is to “take care that the laws are faithfully executed.” (NY Const, art IV, § 3; *see also Klostermann*, 61 NY2d at 538 [“A judgment is sometimes regarded as properly enforceable through the executive departments instead of

⁵ Where mandamus relief is not the appropriate resolution for an otherwise-justiciable constitutional issue, the proper procedural remedy is converting the Article 78 proceeding into a declaratory judgment action, rather than converting a declaratory action into an Article 78 proceeding and dismissing the case, as the court below and the Fourth Department in *FAFE* did. (CPLR 103 [c]; *see also Swanick v Erie Cty Leg*, 103 AD2d 1036, 1037 [4th Dept 1984].)

through an award of execution by this Court, where the effect of the judgment is to establish the duty of the department to enforce it.”, quoting *Old Colony Trust Co v Comm’r of Internal Rev*, 279 US 716, 725 [1929]].) If a court concludes government inaction is resulting in a violation of environmental rights, it can render a declaratory judgment to that effect and the relevant government defendant must respond accordingly.

Mandamus is appropriate here, however, because compliance with the constitution is mandatory. “The general principle is that mandamus will lie against an administrative officer only to compel him to perform a legal duty, and not to direct how he shall perform that duty.” (*Klostermann*, 61 NY2d at 540, quoting *People ex rel Schau v McWilliams*, 185 NY 92, 100 [1906].) In this case, “to 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.” (*Id.* at 541.)

While mandamus is often used to compel performance of “ministerial” duties, it also compels performance of duties that may involve the exercise of discretion in circumstances where failure to act is *not* within the agency’s discretion. In other words, the relevant question is whether it is within DEC’s discretion to allow Norlite to continue operating with a government-issued permit where those permitted operations are violating petitioners’ constitutionally protected environmental rights.

Most states, including New York, have robust regulatory schemes for environmental protection, and courts may rely on existing statutes or agency rules in crafting the appropriate remedy for a constitutional injury. Particularly in this case, an existing statute provides guidance as to how to address a constitutional violation, so the question of remedy is not an intractable one. (See Luis José Torres Asencio, *Greening Constitutions: A Case for Judicial Enforcement of Constitutional Rights to Environmental Protection*, 52 Rev Juridica U Inter PR 277, 319 [2018] [“[I]nitially, judges should look to existing statutes and regulations for substantive guidance when asked to define the content of constitutional rights to environmental protection.”].)

Where a third party’s permitted activity results in unconstitutional levels of environmental degradation, statutory authority exists to “deny, suspend, revoke, or modify any permit”—DEC may be ordered to take appropriate action pursuant to this law to abate the constitutional violation. (ECL 27-0913 [3]). Suspension or revocation of the permit would require the offending pollution to cease, or modification of the permit could include parameters and limitations that would allow Norlite to operate without violating environmental rights. A court enforcing the Green Amendment need only identify the DEC action or inaction that is currently resulting in a constitutional violation, and to provide injunctive relief by requiring

DEC to cease the offending activity or to take action within its preexisting authority to remedy the violation.

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 or fail to act without respecting the inalienable rights protected therein. For the reasons set forth above, this Court should reverse the decision below granting the State's motion to dismiss.

Respectfully submitted,

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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 6,908.

Dated: August 18, 2025

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CERTIFICATE OF SERVICE

I, Kacy C. Manahan, hereby certify that true and correct copies of the foregoing Amicus Brief were served upon the following in accordance with 22 NYCRR 850.4 [d] [1] via first-class mail on the date below:

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