SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of RIDERS ALLIANCE, SIERRA CLUB, and NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE, Petitioners, For a Judgment Under Article 78 of the Civil Practice Law and Rules, -against- KATHY HOCHUL, as Governor of the State of New York, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, MARIE THERESE DOMINGUEZ, as Commissioner of the New York State Department of Transportation, METROPOLITAN TRANSPORTATION AUTHORITY, and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, Respondents.	Index No. 156711/2024 Hon. Arthur F. Engoron Oral Argument Requested

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

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PRELIMINARY STATEMENT

For months now, Governor Hochul has maintained a blockade of the Congestion Pricing Program. While the Program was set to begin delivering results for New Yorkers on June 30, hundreds of millions of dollars' worth of toll-collecting infrastructure instead sits idle and hundreds of thousands of vehicles sit caught in gridlocked Manhattan. With each passing day, the Metropolitan Transportation Authority's fiscal crisis deepens, and dangerous fumes emitted from New York City's congested traffic continue to accumulate unabated. The Governor has announced that nothing will change until the Legislature accedes to her demand for new legislation that is more to her liking than the policy decisions already enacted in law.

The State Respondents maintain that the Governor's action is not subject to judicial examination. First, they assert that because the Congestion Pricing Program is itself the result of complex policy choices and involves discretion in its implementation, no court may review the legality of the Governor's action to unilaterally block it. Second, they assert that as long as the Governor dangles the possibility that she may someday lift her blockade, any challenge is premature. In their view, there is no justiciable controversy unless and until the Governor declares congestion pricing dead. Finally, the State Respondents challenge Petitioners' specific claims based on theories that misread both the Petition and the precedents the State Respondents invoke. No court has endorsed the extreme arguments the State Respondents make here, and this Court should likewise reject the State Respondents' attempt to shield the Governor's lawless action from review.

BACKGROUND

New York City's traffic congestion is among the worst of any urban area in the United States, resulting in the emission of enormous quantities of toxic compounds and planet-heating gases from the vehicles crawling through the city's streets. Hazardous air pollution from vehicle traffic in New York City is estimated to cause over a thousand premature deaths each year, as well as many more asthma attacks, emergency department admissions, and missed days of work and school. Verified Petition ¶¶ 33–34, NYSCEF Doc. No. 1. Traffic congestion imposes significant health risks on New York City residents, particularly people with lung disease, older adults, and people who live and work in areas exposed to significant vehicle traffic. *Id.* ¶¶ 35–39. Along with toxic air pollutants, the vehicles clogging New York City emit greenhouse gases that contribute to the climate crisis. *Id.* ¶ 84.

Even as hundreds of thousands of New Yorkers are caught in the City's traffic, millions more rely on public transit for transportation every day. Ver. Pet. ¶ 41. But that system is in crisis due to chronic underinvestment that has rendered much of it unsafe, inaccessible, and plagued by frequent delays. *Id.* ¶¶ 40, 42–43.

The Legislature's 2019 Actions

Beginning in 2019, the Legislature undertook three related actions to improve New York City's air quality and transportation, address the threat of climate change, and safeguard New Yorkers' rights to a healthful environment against future political action. First, responding to a broad coalition of New Yorkers that advocated for better transit, less traffic, and cleaner air, the Legislature passed, and the Governor signed, the Traffic Mobility Act. The Act directed the Triborough Bridge and Tunnel Authority ("TBTA") to establish a program that would place a toll on vehicles entering Manhattan's Central Business District, to disincentivize driving, improve air quality, and raise at least $15 billion for the MTA's 2020–2024 capital program.

Vehicle and Traffic Law § 1704-a. The Traffic Mobility Act explicitly assigns the TBTA sole responsibility to set the start date and tolling rate of the Congestion Pricing Program. *Id.* §§ 1703(8), 1704-a(1) 1704-a(3), 1705.

Also in 2019, the Legislature passed, and the Governor signed, the landmark Climate Leadership and Community Protection Act ("CLCPA"). The CLCPA addresses the urgent threat of climate change by requiring the state to rapidly reduce emissions of greenhouse gases and co-pollutants. The CLCPA imposes detailed obligations on executive branch decisionmakers to ensure that their decisions support an all-of-government effort to achieve the law's mandatory emissions limits.

Finally, in the same year, the Legislature took the first step toward amending the New York Constitution to add a provision in the Bill of Rights that states: "Each person shall have the right to clean air and water, and a healthful environment." N.Y. Const. art. I, § 19. In November 2021, New York voters decided by supermajority to amend the Constitution to enshrine this Environmental Right in the Bill of Rights.

State and Federal Agencies Follow the Legislature's Mandate

From 2019 to 2024, numerous federal, state, and city agencies devoted substantial time and resources to develop, study, and prepare the Congestion Pricing Program for implementation. Ver. Pet. ¶¶ 64–68.

On March 27, 2024, the TBTA Board voted on the final approval of the toll rates, establishing a charge of "$15 during the day and $3.75 at night." Press Release, MTA, *MTA Board Adopts Central Business District Toll Rates* (Mar. 27, 2024).[1]

[1] https://new.mta.info/press-release/mta-board-adopts-central-business-district-toll-rates.

On April 26, 2024, the MTA announced that the Program would begin on June 30, 2024. Ver. Pet. ¶ 71.

The Governor Announces a Blockade of the Congestion Pricing Program

On June 5, 2024, Governor Hochul abruptly announced she would block the Congestion Pricing Program from going into effect. *Id*. ¶ 72. The Governor has explained that she "directed the MTA to indefinitely pause the program," MTD Ex. A at 2, NYSCEF Doc. No. 41, because she disagreed with the TBTA's final decisions about the Program's start date and tolling rate. She maintained that she would "tackle congestion in other ways," but rejected the TBTA's decision to begin the program on June 30, because "implementing the planned congestion pricing system risks too many unintended consequences for New Yorkers at this time." *Id.* at 4, 5. On June 21, the Governor announced that she specifically rejected the TBTA's final decision on tolling rates: "I will say right now $15 is not the right price." MTD Ex. B at 6, NYSCEF Doc. No. 42.

Although the Governor characterized her action as an "indefinite pause," her subsequent actions and statements make clear that she intends to prevent the Congestion Pricing Program from being implemented as set forth in existing law. As the Legislature provided no authority for the Governor to change the TBTA's decisions on timing and tolls, the Governor announced that she wanted the Legislature to change the law. In July, the Governor asserted, "Nothing can really happen until the Legislature is back." MTD Ex. D at 5, NYSCEF Doc. No. 44. After she failed to convince the Legislature to change the law in June, she announced that she should not be bound by the legislative judgment enacted in the Traffic Mobility Act because "the world has radically changed since congestion pricing was first initiated in 2019." *Id.*

In August, the Governor reiterated her decision that there would be no congestion pricing without a change in law: "The [L]egislature has to come back and find a solution." Press Release, Governor Kathy Hochul, *Governor Hochul Participates in Aspen Institute Fireside Chat*, at 14 (Aug. 2, 2024), attached to Ladin Affirmation as Exhibit A. Weeks later, the Governor confirmed that she would continue to hold the Congestion Pricing Program hostage until the Legislature agreed to enact new legislation more in line with the Governor's policy preferences: "We will be announcing this by the end of the year because the Legislature has to act on it," she said, speaking from the Democratic National Convention in Chicago. "It's more likely it will be announced by the end of the year, early next year as we get the Legislature on board." Nick Reisman, *Congestion Pricing Replacement Plan Could Come by Year's End, Hochul Says*, Politico (Aug. 19, 2024), attached to Ladin Affirmation as Exhibit B.

In short, the Governor has explained that the Congestion Pricing Program will be blocked unless and until she manages to "get the Legislature on board" and change the law. As the Governor explained, in her view she has essentially unlimited veto authority over the existing law: "So, pause is a pause until I say it's not a pause." Ladin Aff. Ex. A at 14.

The Governor's Decision Has Immediate Harmful Effects

Governor Hochul's sudden decision to block the Congestion Pricing Program harms New Yorkers by depriving them of cleaner air to breathe and reduced greenhouse gas emissions to address the threat of climate change. Without the Program, people living and working in the New York City metropolitan region are suffering from air pollution caused by an unnecessary 400,000 vehicle miles traveled each day. *See* Ver. Pet. ¶ 79. At the same time, vehicles caught in traffic are emitting thousands of tons of unnecessary greenhouse gases each month the Program is blocked, exacerbating climate change. *Id.* ¶ 84. All the while, the public transit system is starved

of needed funding, derailing longer-term MTA investments that are essential to achieving the reduction of traffic, air pollution, and climate-warming emissions in New York. *Id.* ¶¶ 82–83. As the State Comptroller reported just last week, "[t]he most critical aspect of state funding remains the $15 billion hole in the 2020-2024 capital program from the congestion pricing pause, which has produced additional pressure on investment choices for the system, and must be addressed prior to answering funding questions in the 2025-2029 capital program." Press Release, N.Y. State Comptroller, *DiNapoli Report Assesses MTA's Capital Needs and Funding Scenarios* (Sept. 12, 2024).[2]

Petitioners Riders Alliance, Sierra Club, and New York City Environmental Justice Alliance brought this challenge to safeguard their members' interest in a livable New York City, with clean air, functioning public transit, and a future less threatened by climate change. Petitioners' members include many New Yorkers who are directly affected by the Governor's block of the Congestion Pricing Program. Ver. Pet. ¶ 15. Among other harms, Petitioners' members suffer from degraded air quality around their homes, workplaces, and the outdoor areas they regularly use and enjoy. *Id.* These members include individuals like Barbara Moore, a seventy-two-year-old Riders Alliance member who lives on Canal Street. *Id.* ¶ 20. Ms. Moore enjoys walking and biking in Manhattan's Central Business District, but must curtail her outdoor activities when the air quality is poor due to her Chronic Obstructive Pulmonary Disease. *Id.* Even indoors, Ms. Moore faces special vulnerability to air pollution and is forced to run two large indoor air purifiers due to the degraded air quality in her neighborhood. *Id.* Similarly, Michelle M. Tokarczyk, a seventy-one-year-old Sierra Club member living in Chelsea, is under

[2] https://www.osc.ny.gov/press/releases/2024/09/dinapoli-report-assesses-mtas-capital-needs-and-funding-scenarios

medical instruction to avoid exerting herself outdoors when the air quality is impaired. *Id.* ¶ 22. She has been unable to ride her bicycle or take long walks outdoors due to the frequently elevated levels of air pollution near her home. *Id.*

ARGUMENT

I. THE GOVERNOR'S VIOLATION OF STATE LAW AND THE STATE CONSTITUTION PRESENTS A JUSTICIABLE QUESTION.

The State Respondents maintain that this case is not justiciable because it concerns "difficult policy decisions," Mem. Law Supp. Mot. Dismiss at 15, NYSCEF Doc. No. 38 ("MTD"), and would require the Court to determine "[h]ow to regulate congestion." *Id.* at 16. Not so. The Legislature already decided how congestion will be regulated. Instead, this case presents legal questions arising from a discrete action: the Governor's unilateral decision to block the Congestion Pricing Program weeks before the TBTA was scheduled to turn on the tolling infrastructure. The Court is called upon to decide whether the Governor's action violated the CLCPA and State Constitution. As the Court of Appeals has repeatedly confirmed, these types of legal claims are justiciable. Where petitioners "assert that the Legislature has mandated certain programs and that the executive branch has failed to deliver the services[,] [t]he appropriate forum to determine the respective rights and obligations of the parties is in the judicial branch." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 536 (1984).

This case therefore does not turn on policy questions about "how to regulate congestion" because those questions have already been decided either by the Legislature or by the TBTA in accordance with the Legislature's design. For example, the Legislature has determined that a tolling program is necessary to regulate congestion, Vehicle and Traffic Law § 1701, established the precise geographic scope of the tolling area, *id.* § 1704(2), and decided the minimum level of revenue to be collected, *id.* § 1704-a(1). The Legislature further decided that the TBTA—not the

Governor or the Department of Transportation—would be charged with the remaining policy and prioritization questions required to implement the program, including the specific tolling pricing, infrastructure, and timeline. *Id.* § 1704. In turn, the TBTA has followed the Legislature's directives by establishing and implementing the Congestion Pricing Program, which was set to begin months ago before the Governor's last-minute intervention.

The Court of Appeals has instructed that the political question doctrine does not apply where a legislative body has already "made the policy and political decisions and arranged its priorities in enacting" a law, and the petitioners ask only that the law be implemented. *Matter of Natural Resources Defense Council v. New York City Dep't of Sanitation*, 83 N.Y.2d 215, 221 (1994). In such cases, there is no risk that the Court will "become ensnarled in an attempt to weigh and select policies," because the only issue is the violation of a policy that has already been selected. *Klostermann*, 61 N.Y.2d at 536. Thus, in a directly analogous case where organizations and individuals sought to compel New York City's executive branch to implement a recycling program mandated by city law, the Court of Appeals rejected the argument that the case was nonjusticiable. As the Court explained, "Petitioners are not seeking any change in legislative policy or reordering of priorities; 'they ask only that the [recycling] program be effected in the manner that it was legislated.'" *NRDC*, 83 N.Y.2d at 221 (quoting *Klostermann*, 61 N.Y.2d at 537). Here too, Petitioners seek to have the Congestion Pricing Program effected, rather than unilaterally blocked by the Governor.

Time and again, courts have emphasized the critical distinction between claims challenging prioritization of different policy considerations, on the one hand, and claims seeking to effect choices already enacted in law or enshrined in the constitution. The State Respondents simply ignore the distinction, relying on cases involving the prioritization and management of

the state's prison facilities, New York City's ordering of its budget priorities to address a fiscal crisis, and the State's policy decisions with respect to the proper treatment and housing of persons suffering from mental illness. MTD at 15–16 (citing *Jones v. Beame*, 45 N.Y.2d 402 (1978) and *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233 (1984)). These cases have no application here, because the Legislature has already made binding policy choices. Where the Legislature has already selected a policy, a claim seeking its implementation "would not involve the courts in resolving political questions or making broad policy choices on complex societal and governmental issues, involving the ordering of priorities." *NRDC*, 83 N.Y.2d at 221.

The First Department recently reiterated this distinction in a case challenging numerous New York City and New York State educational policies on the grounds that the policies led to racially segregated schools in violation of state law and the State Constitution. Overturning a decision finding the challenge nonjusticiable, the Appellate Division explained that even though the challenge touched on policy decisions, it rested on statutory and constitutional claims and was therefore properly subject to judicial review "because it is 'the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution.'" *IntegrateNYC, Inc. v. State of New York*, 228 A.D.3d 152, 161 (1st Dep't 2024) (quoting *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 925 (2003)). The critical question is whether "a statutory or constitutional provision is at root of a dispute;" if that is the case, as here it is, "courts may offer the definitive resolution of these issues of law." *Id.* (quoting *James v. Board of Educ. of City of N.Y.*, 42 N.Y.2d 357, 365–66 (1977)).

The U.S. Supreme Court has likewise confirmed that claims involving statutes are inherently justiciable. The First Department has regularly drawn on the decisions of the U.S.

Supreme Court, beginning with *Baker v. Carr*, 369 U.S. 186 (1962), to determine the "contours" that distinguish merely "political cases" from the rare case involving a nonjusticiable political question. *People v. Ohrenstein*, 153 A.D.2d 342, 358 (1st Dep't 1989), *aff'd*, 77 N.Y.2d 38 (1990). In *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012), the Supreme Court explained that when a party seeks to effectuate a policy that has already been enacted into law, there is no danger of the judiciary replacing a "policy decision of the political branches with the courts' own unmoored determination of what [state] policy . . . should be." *Id.* Such claims "do[] not 'turn on standards that defy judicial application.'" *Id.* at 201 (quoting *Baker*, 369 U.S. at 211). Instead, judicial resolution requires only "careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute" and "familiar principles of constitutional interpretation." *Id.* This is a "familiar judicial exercise"; it is "what courts do." *Id.* at 196, 201.

Thus, despite the State Respondents' insistence that the legality of the Governor's block of congestion pricing must be debated "in the political realm," MTD at 16, the statutory and constitutional questions the Petition raises are reserved for the judiciary. As the Court of Appeals observed nearly fifty years ago, courts are "constantly asked to decide cases with obvious political overtones," but "[t]he mere existence of such overtones has not and will not serve to prevent this court from passing on questions of law which are presented to us." *Matter of Anderson v. Krupsak*, 40 N.Y.2d 397, 403–04 (1976). To refuse to decide legal questions due to their "political context," as the State Respondents now urge, "would only undermine the function of the judiciary as a coequal branch of government." *Id.* at 404.

II. THE GOVERNOR CANNOT AVOID JUDICIAL REVIEW BY CLAIMING THAT SHE MAY SOMEDAY STOP BLOCKING CONGESTION PRICING.

The State Respondents argue that Petitioners' claims are unripe because the Governor's decision to block the Congestion Pricing Program is merely a temporary step in an undefined but ongoing process. But there is no ongoing administrative process, just the Governor's hope of someday persuading the Legislature to enact a new law that is more to her liking. The Governor's directive to block the existing Program is final, binding, and inflicts injuries every day it is in effect. The possibility that the Governor might not block a different program based on as-yet nonexistent legislation does not make her decision any less ripe for review.

A. The Governor's Decision Is Final.

Governor Hochul's decision to block congestion pricing from going into effect is final and ripe for review. *See* CPLR 7801. To determine whether a government action is final and binding, "a pragmatic evaluation must be made of whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Matter of Gordon v. Rush*, 100 N.Y.2d 236, 242 (2003) (quoting *Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998)) (cleaned up). "There must [also] be a finding that the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Id.* (internal quotation marks omitted).

The Governor's decision here meets those criteria. First, she reached "a definitive position" to block congestion pricing when, in early June, she "directed the MTA to indefinitely pause the program." MTD Ex. A at 2. She has consistently made clear that she disagrees with the TBTA's final determination as to both the Program's start date and the toll, and stated that the

Legislature must change the law before she lifts her blockade. *See supra* pp. 4–5. This is a definitive position with respect to the law that presently exists.[3]

The State Respondents place enormous weight on the Governor's characterization of her June decision as applying "at this time," suggesting that this means that her action is merely an initial, temporary step in an ongoing administrative process. MTD at 17–18. But the Governor's decision bears no resemblance to an orderly, ongoing, multi-step administrative process. The Governor is the highest officer of the State. There is no one who must approve her directives before they take effect. There is no ongoing administrative "process" that will inevitably result in a final order, like the draft environmental impact statement required in SEQRA cases. Thus, this case is wholly unlike *Matter of Ranco Sand & Stone Corp. v. Vecchio*, 27 N.Y.3d 92 (2016). Nor does this case resemble *Matter of Putnam v. City of Watertown*, 213 A.D.2d 974 (4th Dep't 1995), regardless of the fact that both the Governor and the City of Watertown used the phrase "at this time." MTD at 18. In *Putnam*, the City explained by letter that it would not pay a firefighter benefits "at this time" because the firefighter had not yet applied, but advised that it could take further administrative steps to reach a substantive conclusion. The court held that the case was unripe both because the letter did not express a definitive position on the substance—the petitioner's "eligibility" for benefits—and because the petitioner failed to take advantage of the additional administrative steps available to him. 213 A.D.2d at 974. The decision thus

[3] *Mulgrew v. United States Department of Transportation*, 2024 WL 3251732 (S.D.N.Y. June 20, 2024) does not hold otherwise. The court acknowledged that that the Governor had not declared congestion pricing "permanently" cancelled, but did not opine on the reviewability of her decision to block the program. And the court's June decision could not have considered the Governor's July and August representations that she would block congestion pricing until the Legislature changed the law.

provides no support for the State Respondents' superficial argument that the mere use of "at this time" controls a decision's finality.

Second, the Governor's determination caused immediate and ongoing injury to New Yorkers, including Petitioners' members. Starting on June 30, 2024, and each day thereafter, the Governor's blocking of congestion pricing has deprived New Yorkers, including Petitioners' members, of cleaner air to breathe by allowing an additional 400,000 vehicle miles to be traveled in New York City each day. *See* Ver. Pet. ¶ 79. There is nothing speculative about these harms to Petitioners' members who have serious health conditions, like Barbara Moore and Michelle M. Tokarczyk, for whom the worse air quality caused by the Governor's decision limits their ability to leave their homes. *See id.* ¶¶ 20, 22; *see generally id.* ¶¶ 15–24.

The touchstone for the ripeness inquiry is a "pragmatic evaluation" of whether there is definitive position that causes injury. It is not a close question: the Governor has said there will be no Congestion Pricing Program until the law changes or her policy preferences change. New Yorkers have endured months of worse air quality and clogged streets, and the MTA's fiscal crisis deepens by the day. The law does not require that Governor Hochul pronounce the Program dead before a court may examine the legality of her action.

B. The Governor's Contention that She Might Someday Permit a Yet-to-Be-Determined Congestion Pricing Plan if the Law Changes or Her Policy Judgment Changes Does Not Make Her June Decision Nonreviewable.

That Governor Hochul has stated that she might someday allow a different congestion pricing program that charges a different toll, based on different legislation, is irrelevant to the ripeness inquiry. Finality does not require that the Governor commit to never changing her mind if the circumstances change. Nor can the Governor's expressed hope for some other yet-to-be-enacted solution to congestion constitute concrete "significant amelioration" when Petitioners are already suffering an ongoing injury.

First, an order is not rendered nonfinal merely because a decisionmaker announces a decision "at this time," while allowing that someday if the facts or law change, the decision may change as well. That a decisionmaker "possesse[s] the unexercised power to modify or reverse [a] decision on its own" is not "sufficient to render an otherwise final order nonfinal." *Matter of Abrams v. Pub. Serv. Comm'n*, 96 A.D.2d 701, 702 (3d Dep't 1983), *aff'd*, 61 N.Y.2d 718 (1984). The possibility that a decisionmaker might revisit a decision "based on 'new information' . . . is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 598 (2016) (citations omitted).

The State Respondents' contrary theory would lead to absurd results. If the Governor were to direct all water systems in the state to "temporarily pause" delivery of water to people's homes "at this time," yet said she planned to revisit the issue of water delivery at some point, would New Yorkers be barred from challenging that directive in court unless and until the Governor lifted her self-professed "indefinite pause" or declared it final? Of course not.[4]

Second, the State Respondents have not identified any concrete administrative action that could constitute "significant amelioration" of the ongoing injury giving rise to this dispute. The Governor's mere hope that she might someday convince the Legislature to create some new program that achieves the "objectives of congestion pricing," MTD at 20, does nothing to undo

[4] During the Covid-19 pandemic, former Governor Cuomo issued numerous directives he explicitly characterized as "temporary" and a "pause," including an Executive Order called "New York on PAUSE," followed by over 100 orders in a series called "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency." *See* Press Release, *Governor Cuomo Signs the 'New York State on PAUSE' Executive Order* (Mar. 20, 2020), https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order; 9 NYCRR 8.202.1–8.202.111. The use of those terms did not prevent judicial review of any of the dozens of challenges to the orders.

the injuries that Petitioners' members are suffering now. The Governor has already blocked the Program for months, depriving Petitioners of the air quality improvements the Legislature required and inflicting additional, potentially irreparable health harms with each passing day. These harms are not speculative; they are concrete. *See* Ver. Pet. ¶¶ 78–87. By contrast, the Governor's hope that she will (1) come up with a yet-to-be-determined plan that is equally effective, (2) succeed in persuading the Legislature to enact that plan, and (3) achieve the rapid implementation of her yet-to-be-devised solution is utterly fanciful. The Governor cannot defeat ripeness with pure speculation.[5]

In the end, the State Respondents' argument is not really about ripeness. The Governor's argument is not that her June decision is better suited for judicial review at a later time. Rather, the Governor argues that her decision—which had immediate impact and caused immediate harm—is unreviewable because she anticipates possibly supporting a *different* plan that would address similar goals as the plan she blocked. That argument has no legal support and would upend judicial review of government decisionmaking. For example, the denial of a permit for land use is final and ripe for review, even if the agency suggests that it might support a different proposal in a subsequent application.

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[5] The "amelioration" cases the State Respondents rely upon are inapposite. *See* MTD at 20. The cases were all decided before it could be known whether any harm would materialize; and, in two cases, the challenged decision was subject to additional administrative review. *See N.Y. State Inspection,* 64 N.Y.2d at 241 (harm speculative as it would result only if inmates placed in particular facility and placement not yet been determined); *Matter of Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188, 190–91 (3d Dep't 2012) (harm from guidance permitting snowmobile trails in certain areas might be prevented by further administrative action because specific trail locations had not been identified and identification would trigger additional review); *Matter of Troy Sand & Gravel Co. v. Town of Nassau*, 125 A.D.3d 1188, 1189–90 (3d Dep't 2015) (harm speculative and potentially prevented by further proceedings because a substantive review of zoning application would follow).

Indeed, the facts here make Petitioners' claims appropriate for review even if the Governor's decision were not final. Courts have recognized that judicial review is appropriate in certain circumstances, regardless of finality, such as when government actors use "unfair procedures in order to avoid a final decision," *East End Resources, LLC v. Town of Southold Planning Bd*., 135 A.D.3d 899, 901 (2d Dep't 2016), and when a "governmental entity acts beyond its statutory authority and causes injury." *Matter of Riverkeeper, Inc. v. Crotty*, 28 A.D.3d 957, 960 (3d Dep't 2006) (citation omitted). Both are applicable here. It would be unfair for the Governor to avoid finality simply by calling her directive temporary, and the Legislature did not authorize the Governor to decide when and if the Congestion Pricing Program would come into effect. Finally, to the extent there is any ambiguity about the Governor's position, she created the ambiguity herself by alternately characterizing her decision as "temporary" and saying that the Legislature had to change the law. "[T]he court[] should resolve any ambiguity created by the [the Governor] against [her] in order to reach a determination on the merits and not deny [Petitioners their] day in court." *Matter of Catskill Regional Off-Track Betting Corp. v. New York State Racing & Wagering Bd.,* 56 A.D.3d 1027 (3d Dep't 2008).

III. THE CLCPA AND ENVIRONMENTAL RIGHTS AMENDMENT CLAIMS DO NOT TURN ON THE AVAILABILITY OF MANDAMUS.

Although the State Respondents appear to direct their arguments on mandamus at both petitions, *see* MTD at 20–24, Petitioners Riders Alliance, Sierra Club, and NYC-EJA have not sought mandamus relief. As the Prayer for Relief states, these Petitioners request that the Court vacate the Governor's decision to block the Congestion Pricing Program, declare the Governor's action unlawful, and enjoin the Governor's illegal blockade. *See* Ver. Pet. at 27. In any event, the State Respondents' objection to one potential form of relief is an insufficient basis for dismissal of a petition. *See Ctr. for Indep. of the Disabled v. MTA*, 184 A.D.3d 197, 208 (1st Dep't 2020)

("By focusing only on one of the remedies that could be implicated by this action, defendants miss the greater import of plaintiffs' complaint.").

There is nothing inherent to either of Petitioners' claims that requires mandamus as the exclusive remedy. With respect to CLCPA claims, rather than ordering execution of a ministerial act, courts can vacate a non-compliant decision and require the decisionmaker on remand to "engage in an analysis pursuant to CLCPA § 7(2)," including "the environmental mitigation expressly contemplated in the CLCPA." *Matter of Clean Air Coalition of W. N.Y., Inc. v. New York State Pub. Serv. Comm'n*, 226 A.D.3d 108, 114 (3d Dep't 2024). And as to the Governor's violation of the Environmental Rights Amendment, the Court may order a range of remedies: the Court could vacate the Governor's decision, declare it unconstitutional, or enjoin the State Respondents from furthering the blockade. Each of these forms of relief is sufficient for the Court to reach the merits. *See IntegrateNYC*, 228 A.D.3d at 162 (justiciability does not require that a court be able to "grant the full panoply of injunctive relief sought by plaintiffs").

IV. THE STATE RESPONDENTS' ARGUMENTS FOR DISMISSING THE CLCPA CLAIM ARE MERITLESS.

A. The State Respondents Misunderstand CLCPA Standing.

The State Respondents' standing arguments are based on a fundamental misreading of the Petition and the CLCPA, and contradict the only appellate decision that addresses CLCPA standing. The State Respondents aver that the only injuries alleged in the Petition are a general interest in avoiding "climate change" and a general desire for "the government to follow the law." MTD at 25–26. In fact, the Petition is replete with descriptions of the particularized injuries from traffic emissions suffered by Petitioners' members. *See* Ver. Pet. ¶¶ 15–24 (describing risks faced by Petitioners' members due to air pollution).

The apparent basis for the State Respondents' theory is their failure to understand that the CLCPA addresses not only the emission of greenhouse gases, which cause climate change, but also the dangerous emission of "co-pollutants" that likewise result from the burning of fossil fuels and harm human health. The CLCPA defines co-pollutants as "hazardous air pollutants produced by greenhouse gas emissions sources," ECL 75-0101(3). Unlike greenhouse gases, co-pollutants cause local injuries because they are most harmful in the area surrounding emission sources. As described in the Petition and recognized in the Traffic Mobility Act, the air quality around Petitioners' members' homes and workplaces is significantly impaired by the pollution emitted from the tailpipes of hundreds of thousands of vehicles stuck in traffic in the absence of the Congestion Pricing Program. *See* Ver. Pet. ¶¶ 33–39, 79–82. These vehicles emit both the greenhouse gases that cause climate change and the "hazardous air pollutants" additionally addressed in the CLCPA.

The only appellate decision to evaluate CLCPA standing confirmed that increased exposure to hazardous air pollutants confers standing to maintain a CLCPA § 7(2) claim. In *Clean Air Coalition*, members of nonprofit organizations sought to vacate an agency decision that threatened to increase emissions from a power plant near their homes, and to "have the [agency] engage in an analysis pursuant to CLCPA § 7(2)." 226 A.D.3d at 114. The basis of the organization's standing was "the proximity of several of its members to the facility, noting the potential increase in emissions." *Id.* at 115. Rejecting the argument that the petitioners lacked standing to pursue a CLCPA § 7(2) claim, the Appellate Division explained that exposure to increased air pollution sufficed: "[B]y virtue of petitioners' members' proximity to the facilities,

the proposed increase in use of those facilities will affect them differently than other members of the public, thus conferring standing under the specific facts of this case." *Id.*[6]

This case is on all fours with *Clean Air Coalition*. Petitioners' members are not merely proximate to the area of increased emissions; they live and work directly inside Manhattan's Central Business District and in the areas selected for the Congestion Pricing Program's mitigation measures. *See* Ver. Pet. ¶¶ 15–24. Not only are Petitioners' members more exposed to the Program's effect on air quality than the general public, but many are specifically vulnerable to traffic fumes due to their age, medical conditions, and extensive time spent outdoors. *Id.* Petitioners' members seek to challenge a decision that increases pollution in a discrete area of New York City where they spend a majority of their time. They are not, contrary to the State Respondents' arguments, "alleging an indirect, collateral effect from the increased [traffic fumes] that will be experienced by the public at large, but rather a particularized harm that may also be inflicted upon others in the community." *Matter of Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 311 (2015); *see also, e.g.*, *Matter of Committee to Preserve Brighton Beach & Manhattan Beach v. Planning Comm'n of City of N.Y.* 259 A.D.2d 26, 31–32 (1st Dep't 1999) ("[S]ince three of the individual petitioners live in close proximity to the park, and one uses it regularly, it is obvious that many of the alleged injuries would affect the petitioners in a manner wholly distinct from that of the public at large.").

B. The Governor Cannot Avoid Her CLCPA Obligations Simply by Stating that She Might Someday Change Her Mind.

As described above, the Governor's decision to block the Congestion Pricing Program is final, and is not an "initial step" in an orderly, ongoing administrative process. *See supra* Section

[6] The State Respondents cite the decision yet fail to acknowledge—or even mention—its holding as to standing.

II. That the Governor does not rule out some other congestion policy, if the law changes or her view of New York's economy improves, does not place her final decision to block the Program beyond the reach of the CLCPA.

Moreover, the Governor's theory that she can indefinitely avoid accounting for the emissions consequences of her decision runs directly contrary to the Legislature's emphasis on the need for urgent action now. The CLCPA is intended to respond to a "currently existing, urgent problem that was worsening; not a developing or potential problem that might arise if appropriate action was not taken in the future." *Danskammer Energy, LLC v. New York State Dep't of Env't Conservation*, 76 Misc. 3d 196, 249 (Sup. Ct. Orange County 2022). The Governor's decision has already resulted in the emission of tens of thousands of tons of greenhouse gases that would have otherwise been avoided, along with hazardous co-pollutants that impair Petitioners' members' health and ability to use the outdoors on a daily basis. *See* Ver. Pet. ¶ 84. Every additional month of delay further jeopardizes the investments in emissions-reducing improvements that the MTA previously committed to make, because of long waitlists for electric buses and loss of federal matching opportunities. *See id.* ¶¶ 83, 86–87. The CLCPA does not authorize the Governor to indefinitely ignore those impacts.

V. THE STATE RESPONDENTS' ARGUMENTS FOR DISMISSING THE ENVIRONMENTAL RIGHT CLAIM ARE MERITLESS.

A. Constitutional Avoidance Is Not Grounds for Dismissing a Valid Claim.

The State Respondents argue that the Court should avoid ruling on the constitutional claim under the doctrine of constitutional avoidance, but this argument relies on the existence of a separate and valid ground to dismiss the Petition. *See* MTD at 29–30 (citing *Matter of Clara C. v. William L.*, 96 N.Y.2d 244, 250 (2001)). As described above, Respondents have failed to establish any entitlement to threshold dismissal of this action. There is thus no basis for

avoidance. Constitutional avoidance is not an independent basis to dismiss a constitutional claim; that the Environmental Rights provision was newly added to the State Constitution and few courts have ruled on it is not grounds for dismissal.

To the extent State Respondents argue that the constitutional claim should be dismissed because mandamus relief is not available, this argument fails because other remedies are available. *See supra* Section III. And even if only declaratory relief were available, the First Department has recently emphasized that courts should still determine a valid constitutional claim. *See IntegrateNYC*, 228 A.D.3d at 162. As the First Department explained, a judicial finding as to whether the State has violated the Constitution provides important guidance to the parties, legislators, and other stakeholders. *See id.* (citing *Campaign for Fiscal Equity,* 8 N.Y.3d at 27, which noted legislative "response to the Court's finding that the State violated the Education Article").

The State Respondents' reliance on a recent Fourth Department case, *Fresh Air for the Eastside v. State of New York*, is misplaced. There, the "only conduct" challenged under the Environmental Rights Amendment was the government's "failure to take enforcement actions" against a landfill. 229 A.D.3d 1217, 1219–20 (4th Dep't 2024). As is well-established, no justiciable claim will lie where a petitioner seeks to compel the government's enforcement actions, because "enforcement decisions are 'general[ly] unsuitab[le] for judicial review.'" *Id.* at 1219 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). That principle is unremarkable and inapplicable; Petitioners have not sought to challenge any enforcement decisions.

B. Petitioners' Environmental Right Claim Challenges the Governor's Affirmative Action that Violates the Right, Not Her Failure to Discharge an Affirmative Duty.

The State Respondents' argument that the Environmental Rights provision does not place affirmative obligations on the Governor to secure clean air or a healthful environment

misconstrues both the facts and the nature of Petitioners' constitutional claim. Petitioners challenge an affirmative act already taken by the Governor: her June 2024 decision to block the implementation of the Congestion Pricing Program just weeks before it was to go into effect. Petitioners seek to vacate the Governor's block of an existing environmental protection: the Traffic Mobility Act. Because Petitioners do not seek the creation of a new policy or ask the Court to impose an obligation to secure environmental improvements beyond those enacted in law, arguments that the Environmental Rights Amendment does not create affirmative obligations are beside the point. The Amendment, which was designed to guard against any future "attempt to roll back the good environmental progress that we have made," prevents the Governor from stripping New Yorkers of a duly enacted air quality improvement. Tr. of Assembly Debate on 2021 N.Y. Assembly Bill A1368 at 69 (Feb. 8, 2021) (statement of Assembly Member Jen Lunsford).

If the Environmental Rights Amendment does not extend to executive branch actions that impose worse air quality on Petitioners than the Legislature required, then it is not clear what, if anything, the constitutional right protects.[7]

CONCLUSION

The Court should deny the Motion to Dismiss. Should the Court do so, Petitioners respectfully submit that the State Respondents should not be afforded thirty days to prepare their answering papers. By the time of the return date for their motion, the State Respondents and their

[7] The State Respondents argue in a footnote that there can be no "rollback" because the Governor blocked the Congestion Pricing Program just before it was set to begin, rather than just after. MTD at 33 n.10. It is not apparent why this makes a constitutional difference. Petitioners' members have a right to the improved air quality that the Legislature found necessary and, but for the Governor's actions, would have begun on June 30. The Governor's decision to deprive Petitioners' members of this protection is the source of their injury, and the injury would be identical whether the Governor announced her decision on June 30 or June 5.

counsel will have had both Petitions for two months. The Petitions in large part recite uncontested facts that are a matter of public record. The significant delay the State Respondents propose is therefore unwarranted.

Dated: September 19, 2024
New York, NY

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing Memorandum of Law complies with the requirements of 22 NYCRR 202.8-b. The document was prepared on a computer using Microsoft Word and is 6,990 words long (excluding the caption, table of contents, table of authorities, signature blocks, and this certificate), as computed by Microsoft Word.

Dated: September 19, 2024
New York, NY

Dror Ladin