

NEW YORK STATE SUPREME COURT  
COUNTY OF ERIE

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In the Matter of the Application of

WESTERN NEW YORK YOUTH CLIMATE COUNCIL,  
COALITION FOR ECONOMIC JUSTICE, AND  
CITIZENS FOR REGIONAL TRANSIT

**VERIFIED  
PETITION**

Petitioners,

For a Judgment Under Article 78 of the Civil  
Practice Law and Rules,

v.

Index No. \_\_\_\_\_

NEW YORK STATE DEPARTMENT OF  
TRANSPORTATION, MARIE THERESE  
DOMINGUEZ, in her Official Capacity as  
Commissioner of the New York State  
Department of Transportation,  
and STEPHANIE WINKELHAKE, P.E.,  
in her Official Capacity as New York State  
Department of Transportation Chief Engineer.

Respondents.

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Petitioners Western New York Youth Climate Council, Coalition  
of Economic Justice, and Citizens for Regional Transit, by their attorneys,  
allege as follows:

## Introduction

1. In 2019, the New York State Legislature passed a first-of-its-kind climate protection law. The Climate Leadership and Community Protection Act (“CLCPA”), signed into law in January of 2020, set New York State on a binding path to reduce carbon emissions by certain deadlines.

2. The CLCPA was an historic legislative achievement. It locked emission reductions into state law according to specified deadlines. These deadlines are rooted in the global scientific consensus on climate change, as established by the U.S. Global Change Research Program (USGCRP) and the Intergovernmental Panel on Climate Change (IPCC). CLCPA §1.2(a)(b).

3. Then-Governor Andrew Cuomo described the CLCPA in fitting historic terms, calling it “the most aggressive climate change program in the United States of America, period... [C]limate change is the issue of our lifetime, frankly. And the legacy we leave our children.”<sup>1</sup>

4. This case is brought by some of Western New York’s youngest citizens—the Western New York Youth Climate Council—who, together with fellow Petitioners the Coalition for Economic Justice and

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<sup>1</sup> *New York to Approve One of the World’s Most Ambitious Climate Plans*, June 18, 2019 (<https://www.nytimes.com/2019/06/18/nyregion/greenhouse-gases-ny.html>) (last visited May 24, 2024).

Citizens for Regional Transit, seek to enforce the mandates of the CLCPA and ensure a livable environment for themselves and for future generations.

5. Specifically, Petitioners seek to annul the approvals issued by Respondents New York State Department of Transportation (“NYSDOT”), Marie Therese Dominguez, in her official capacity as the Commissioner of the NYSDOT (the “Commissioner of NYSDOT”), and Stephanie Winkelhake, P.E., in her official capacity as the NYSDOT Chief Engineer. On February 16, 2024, Respondents issued the Determination of No Significant Effect-Negative Declaration (“DONSE-Negative Declaration”)<sup>2</sup> and the Final Design Report / Environmental Assessment (“FDR/EA”), by which they have decided to proceed with the NYS Route 33, Kensington Expressway Project PIN 5512.52 (“the Project”).

6. As explained below, Respondents have misrepresented the negative climate impact of the Project, have acted in violation of the CLCPA, and have failed to justify or mitigate their violations of the CLCPA.

7. By ignoring the historic aims of the CLCPA and opting for business as usual over the transformational changes required by law, Respondents have violated the CLCPA and state Constitution.

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<sup>2</sup> The DONSE-Negative Declaration and FDR-EA are publicly available at <https://kensingtonexpressway.dot.ny.gov/Documents.aspx> (last accessed June 12, 2024) and are hereby incorporated by reference.

## Parties

8. Petitioner Western New York Youth Climate Council (“WNYCC”) is an association comprised of young citizens of Buffalo and Western New York dedicated to bringing youth leadership to the forefront of the region’s climate justice movement through policy, direct action, and education to create a livable future for all of Western New York.

9. Members of the WNYCC have ranged in age from as young as 11 years old to 22-year-old college students. The WNYCC was formed because its members recognize that as young people, they are more likely to experience adverse effects of climate change, including adverse mental health consequences.

10. Indeed, as the United States’ Fifth National Climate Assessment describes, children born in recent years are more likely to experience climate-related adverse childhood events when compared to previous generations.<sup>3</sup>

11. The acute dangers climate change poses to young people have both physical and mental health consequences. “Concerns about a potentially uninhabitable world due to climate change can result in eco-

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<sup>3</sup> *Fifth National Climate Assessment*, Chapter 15, at 11 (<https://nca2023.globalchange.gov/chapter/15/>) (last accessed June 11, 2024).

anxiety. Nearly 60% of 1,000 surveyed US adolescents reported anxiety about climate change, and nearly half believe that ‘humanity is doomed.’ *Id.*

12. The WNYYCC was formed to focus on empowerment with the intent to reframe threats from climate change as opportunities to pursue solutions. The WNYYCC has engaged hundreds of children and youths across Western New York through strikes and campaigns, notably during September 2019 with a strike of over 1300 attendees. In October 2020, after a successful campaign brought by the WNYYCC, the Buffalo Common Council unanimously passed a resolution declaring a Climate Emergency.

13. For its work confronting the existential battle against climate change, WNYYCC has been recognized by the Erie County Legislature and the Buffalo Common Council, among others.

14. Individual WNYYCC members Valerie Juang, a graduate of City Honors School and current student at the University at Buffalo, Felix Hatton, an 11<sup>th</sup> grader at City Honors School (located a few blocks from the Kensington Expressway), and Student X,<sup>4</sup> a 9<sup>th</sup> grader at a Western New York High School, have already suffered anxiety and other mental health consequences due to climate change. As some of the youngest community

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<sup>4</sup> Due to privacy concerns, Student X, a minor, is proceeding without using their full name.

members of Western New York, they stand to suffer the consequences of governmental failure to reduce emissions more than the average citizen.

15. Petitioner Coalition of Economic Justice (“CEJ”) is a coalition of labor, faith, and community organizations and activists united in the promotion of economic justice for all through building strong, diverse, and sustainable communities.

16. CEJ is focused on the importance of environmental justice and equity, particularly at the intersection of climate change and transportation.

17. CEJ believes that transportation is a vital resource that intersects with many social justice issues including housing, racial justice, healthcare, food access, accessibility, climate and environmental justice, and economic justice. Reliable and accessible transit connects communities - regardless of race, income level, or physical ability- to necessary jobs, education, and activities.

18. To that end, CEJ has organized a collective of transit riders working for a more efficient, equitable, and responsive public transit system in the greater Buffalo area. CEJ has also engaged in mission-driven organizing to ensure the State of New York meets the goals of the CLCPA.

19. CEJ's members reside across Western New York, including many in East Buffalo in close proximity to the Kensington Expressway, a disadvantaged community under the CLCPA, as explained *infra*.

20. CEJ's members stand to be injured by the Respondents' violations of the CLCPA since "[c]limate change especially heightens the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination." CLCPA §1(7).

21. Petitioner Citizens for Regional Transit ("CRT") is a grassroots, member-supported organization committed to the improvement and expansion of public transportation for all citizens of Western New York.

22. Since before the passage of the CLCPA, CRT has advocated for transportation projects that reduce vehicle dependency and reduce greenhouse gas emissions.

23. CRT's members live throughout Western New York including in close proximity to the Kensington Expressway.

24. In November 2021, the Constitution of the State of New York was amended after more than 70% of voters voted to enshrine environmental rights into the constitution. Article I § 19 now guarantees that

“[e]ach person shall have a right to clean air and water, and a healthful environment.”

25. Petitioners herein bring this action as the Respondents’ violations of the CLCPA and failure to heed the science of climate change with this Project threaten their members’ right to a healthful environment.

### **The Global Scientific Consensus on Climate Change**

26. Created in 1988 by the World Meteorological Organization and United Nations Environment Programme , the Intergovernmental Panel on Climate Change (IPCC) provides, “a framework for governments, scientists and IPCC staff to work together to deliver the world's most authoritative scientific assessments on climate change.”<sup>5</sup> The IPCC currently has 195 member countries and publishes comprehensive reports on the causes, impacts, future risks, and mitigation options for climate change.

27. The IPCC’s findings constitute the global scientific consensus on the science of climate change. According to the IPCC’s latest Assessment Report published in 2023, “[h]uman activities, principally *through emissions of greenhouse gases, have unequivocally* caused global warming, with the

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<sup>5</sup> <https://www.ipcc.ch/about/structure/> (last accessed June 11, 2024).



global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020”.<sup>6</sup>

The severe effects of climate change have already impacted millions through extreme weather events, increased droughts, abnormally high temperatures, and countless other alarming effects. *Id.*, at 5.

28. Using the IPCC’s findings, the global community came together in 2015 at the United Nations Framework Convention on Climate Change, ultimately leading to the formation of the historic Paris Agreement in 2015.

29. The goal of the Paris Agreement is to keep global warming well below 2°C in comparison to pre-industrial levels, ideally pursuing below 1.5°C in warming.

30. The IPCC has established that in order for the goal of the Paris Agreement to be achieved, significant reductions in greenhouse gas (GHG) emissions must occur, including a complete reduction of human-caused (“anthropogenic”) GHG emissions (“net zero”) by 2050.

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<sup>6</sup> *Climate Change 2023 Synthesis Report, Summary for Policymakers*, at 4 ([https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC\\_AR6\\_SYR\\_SPM.pdf](https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf)) (emphasis added) (last accessed June 10, 2024).

### The Historic Enactment of the CLCPA

31. The Legislature passed the CLCPA in 2019. It went into effect on January 1, 2020.

32. The CLCPA is a codification of the global scientific consensus regarding the anthropogenic causes of climate change and how to ameliorate those changes. As the law's legislative findings explained:

Specifically, industrialized countries must reduce their greenhouse gas emissions by at least 80% below 1990 levels by 2050 in order to stabilize carbon dioxide equivalent concentrations at 450 parts per million--the level required to stay within the 2°C target. On December 12, 2015, one hundred ninety-five countries at the 21st Conference of the parties of the United Nations Framework Convention on Climate Change adopted an agreement addressing greenhouse gas emissions mitigation, adaptation, and finance starting in the year 2020, known as the Paris Agreement. The Paris Agreement was adopted on November 4, 2016, and is the largest concerted global effort to combat climate change to date.

CLCPA §1.2(a)(b).

33. Just as the Paris Agreement was an historic international treaty committed to solving the global climate crisis, the CLCPA was, and is, an historic state-level achievement and a crucial step toward solving this crisis.

34. The effects of climate change are being felt globally and locally. As the Legislature found in enacting the CLCPA, “[c]limate change is

adversely affecting economic well-being, public health, natural resources, and the environment of New York,” including through an increase in the frequency and severity of extreme weather events, such as storms, rising sea levels that exacerbate damage from storm surges and flooding, increased average temperatures, exacerbation of air pollution, and rising incidences of infectious disease and other negative health outcomes. CLCPA § 1(1).

35. To address these ongoing climate injuries and to avert much worse calamity, the CLCPA sets legally binding requirements: New York State *must reduce* greenhouse gas emissions by 40% below 1990 levels by 2030 and by 85% below 1990 levels by 2050. ECL § 75- 0107(1).

36. It bears emphasizing that these emissions reduction targets established by the CLCPA are not aspirational targets for New York State. They are reductions written into law that the state *is required* to achieve.

37. To implement the CLCPA, the Legislature directed every aspect of state government to carry out the goals of the law. The CLCPA “contemplates an unprecedented, all-of-government effort to ensure the state meets the law's aggressive, near-term emissions limits.” *Danskammer Energy, LLC v New York State Dept. of Env'tl. Conservation*, 76 Misc. 3d 196, 232 (Sup. Ct. 2022).

38. To that end, the CLCPA requires every state agency to consider whether *any agency decision or action* will be inconsistent with or interfere with the emissions reductions established by law:

In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities, and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law.

CLCPA § 7(2).

39. If a state agency's action or decision is inconsistent with the emissions reductions required by state law, the agency is required to issue "a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located." *Id.*

### **The CLCPA's Protections for Disadvantaged Communities**

40. Further, in enacting the CLCPA, the Legislature also found that "[c]limate change especially heightens the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination." *Id.* § 1(7).

41. The CLCPA defines “disadvantaged communities” as “communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate-income households.” ECL § 75-0101(5).

42. Section 7(3) of the CLCPA prohibits State agencies from making any administrative approval or decision that would disproportionately burden disadvantaged communities:

In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, . . . all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law.

CLCPA § 7(3).

43. Section 7(3) of the CLCPA also requires State agencies *to prioritize reductions of greenhouse gas emissions in disadvantaged communities. Id.*

44. Under the CLCPA, a new statewide entity called the Climate Justice Working Group is responsible for establishing criteria to identify disadvantaged communities. ECL § 75- 0111.

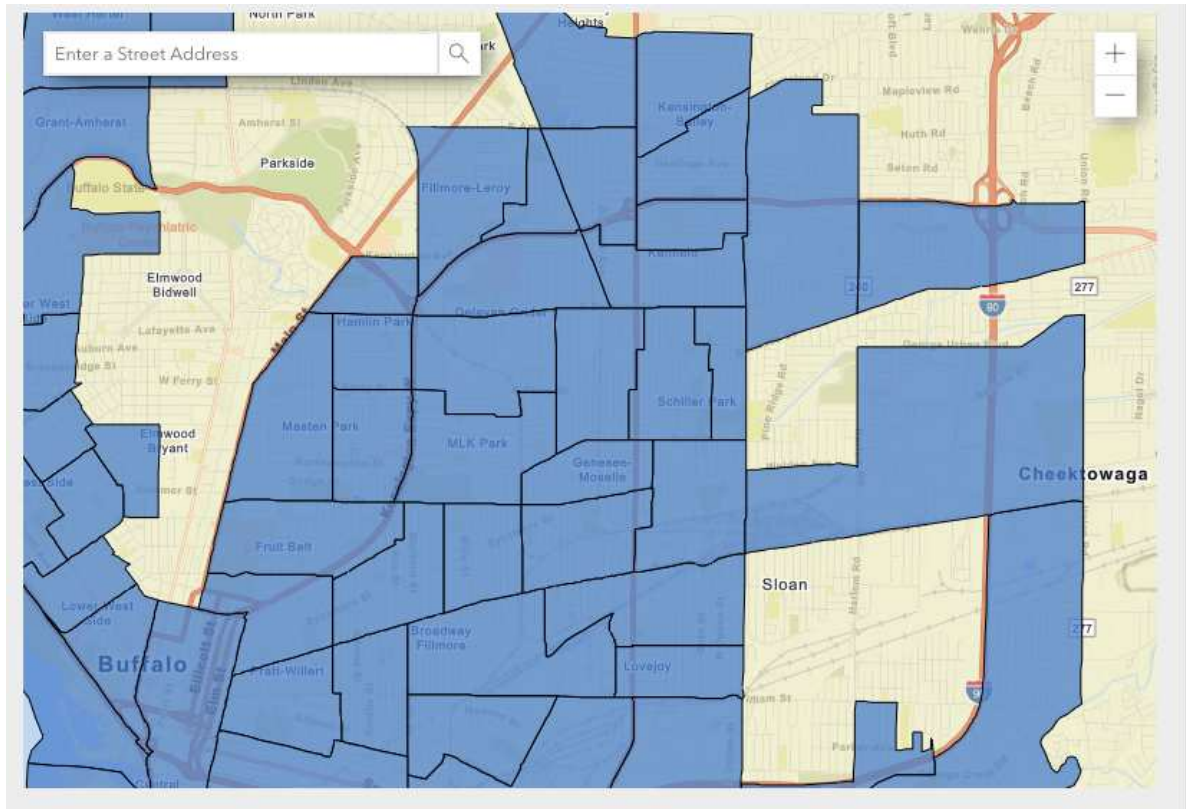
45. In March 2023, the Climate Justice Working Group issued final criteria to identify disadvantaged communities and the state created an

online map showing the geographical contours of disadvantaged communities.

The map is located at NYSERDA, Disadvantaged Communities,

<https://www.nyscerda.ny.gov/ny/Disadvantaged-Communities> (last visited

May 16, 2024) and shows the following:



46. Every inch of the Kensington Expressway in the Project area is located within disadvantaged communities as identified by the Climate Justice Working Group, and the Petitioners have members attending school and/or residing within or in proximity to these disadvantaged communities.

### The Climate Action Council and the Climate Scoping Plan

47. In order to provide the roadmap of *how* to actually achieve the emissions reductions that the CLCPA imposes on the state, the CLCPA also established the Climate Action Council, which consists of 22 members, including the Commissioners of every major state agency, including Respondent Dominguez, as well as members appointed by the Governor, the Speaker of the Assembly, the Temporary President of the Senate, the Minority Leader of the Assembly, and the Minority Leader of the Senate. ECL § 75-0103(1)(a)-(f).

48. The Climate Action Council was tasked with preparing a scoping plan which is required to outline “the recommendations for attaining the statewide greenhouse gas emissions limits in accordance with the schedule established in section 75-0107 of this article, and for the reduction of emissions beyond eighty-five percent, net zero emissions in all sectors of the economy.” ECL § 75-0103(11).

49. The scoping plan must “identify and make recommendations on regulatory measures and other State actions that will ensure the attainment of the statewide greenhouse gas emissions limits established pursuant to section 75-0107 of this article.” ECL § 75-0103(13).

50. The scoping plan is to include “[l]and-use and transportation planning measures aimed at reducing greenhouse gas emissions from motor vehicles.” ECL § 75-0103(13)(c).

51. The Climate Action Council issued the New York State Final Scoping Plan 2022<sup>7</sup> (“the Climate Scoping Plan” or “the Plan”) in December of 2022.

### **The Need to Reduce Greenhouse Gas Emissions from Transportation**

52. The Climate Action Council found that *transportation is the number one source of greenhouse gas emissions in New York State*, with private motor vehicle transportation being the biggest single source of transportation associated greenhouse gas emissions. *Climate Scoping Plan*, at 147.

53. As a result, the CLCPA mandates dramatic changes in the state’s transportation sector.

54. In the words of Governor Hochul, “New York is implementing the nation's most aggressive plan to reduce the greenhouse gas emissions affecting our climate and to reach our ambitious goals, *we must reduce*

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<sup>7</sup> The Climate Scoping Plan is publicly available at <https://climate.ny.gov/-/media/Project/Climate/Files/NYS-Climate-Action-Council-Final-Scoping-Plan-2022.pdf> (last visited June 10, 2024) and is incorporated herein by reference.



*emissions from the transportation sector, currently the largest source of the state's climate pollution*” (emphasis added).<sup>8</sup>

55. Similarly, while appearing before a joint session of the New York State Legislature in January of this year, Respondent Dominguez testified that “[a]t DOT, we are working aggressively to implement the goals of the Climate Leadership and Community Protection Act, and the scoping plan created by the Climate Action Council, where I serve as a voting member.”<sup>9</sup>

56. The Climate Scoping Plan explains that aggressive adoption of electric and zero emission vehicles will be integral to the achievement of the greenhouse gas reductions required by the CLCPA, but it will not be enough.

57. As the Plan instructs, “[a]n aggressive and implementable mix of policies will be required to accelerate GHG emission reductions to the level needed by 2030...[In addition to electric vehicle sales,] *a substantial portion*

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<sup>8</sup> <https://www.governor.ny.gov/news/advance-climate-week-2021-governor-hochul-announces-new-actions-make-new-yorks-transportation> (retrieved May 16, 2024).

<sup>9</sup> Testimony of Commissioner Marie Therese Dominguez New York State Department of Transportation Joint Legislative Budget Hearing on FY 2025 Budget, January 24, 2024 (<https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-01/nys-dot-24.pdf>) (retrieved May 24, 2024).

*of personal transportation in urbanized areas would be required to shift to public transportation and other low-carbon modes.” Id., at 10 (emphasis added).*

58. The Plan states that a *significant and immediate reduction in vehicle miles traveled (“VMT”)*<sup>10</sup> *in urbanized areas must be made* in order to achieve the necessary greenhouse emissions reductions: “New York will need to substantially reduce VMT while increasing access to public transportation.” *Id.*, 123.

59. The Plan is informed by intensive mathematical modeling that shows how the state’s greenhouse gas emissions will be reduced by incorporating the recommendations across all sectors of the state economy.

60. The Plan’s mathematical modeling demonstrates that statewide VMT reductions of a *minimum of 6%* will be required to meet the state’s greenhouse gas emissions reductions. In fact, a statewide reduction of 6% will only meet the required reductions if implemented alongside carbon capture technology which does not yet exist at the scale modeled in the Plan. Without that technology, the Plan’s mathematical modeling shows that the state must reduce VMT by 16%. *Plan*, 120-21; *Id.*, at Appendix G, 105-107.

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<sup>10</sup> VMT, vehicles miles traveled, is essentially a metric that quantifies how much people are driving.

### The Project's Violations of the CLCPA and Climate Scoping Plan

61. As discussed above, the CLCPA represents an unprecedented, all of government effort to reduce greenhouse gas emissions enough to stave off climate change's worst-case scenarios.

62. The Climate Scoping Plan reflects this urgency: “[t]ransformative, challenging, and potentially disruptive levels of effort are required across all sectors.” *Plan*, 120.

63. The Kensington Expressway Project would be the biggest single dollar investment in transportation in Western New York in history.

64. Yet the Project will accomplish nothing in the way of greenhouse gas emissions reductions and in fact makes greenhouse gas emissions associated with the Expressway considerably worse. The Project is, by its own projections, completely inconsistent with the greenhouse gas reductions required by the CLCPA and the VMT reductions recommended by the Climate Scoping Plan.

65. The Determination of No Significant Effect – Negative Declaration asserts that the:

Build Alternative will result in a net benefit with respect to greenhouse gas emissions on an annual basis. No adverse effects in regard to energy and greenhouse gas emissions. As documented in Section 4.10.5 of the

FDR/EA, the Project would be consistent with the Climate Leadership and Community Protection Act.

DONSE, at 9, § 4.10. This is arbitrary and capricious as it is a misstatement of the emissions calculations in the FDR/EA.

66. As explained in more detail below, what the NYSDOT fails to acknowledge, but what its own FDR/EA demonstrates, is that the Project will result in *a net increase in greenhouse gas emissions by 2030 and by 2050*.

67. Contrary to what the DONSE—Negative Declaration asserts, according to the FDR/EA itself, when accounting for the carbon emissions associated with construction (as Respondents are required to do), by 2050, the year by which the CLCPA 85% reduction in greenhouse gas emissions must be achieved, the Project will *have added 26,924 metric tons of carbon dioxide* to the atmosphere—the equivalent of burning more than three million gallons of gasoline.<sup>11</sup>

68. To sequester the amount of net carbon emissions that the Project will produce, *more than 445,000 trees would have to be planted and grown for ten years. Id.*

69. This stunning omission is not the NYSDOT's only violation of the CLCPA in this Project.

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<sup>11</sup> <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator>

70. The Final Design Report/Environmental Assessment PIN 5512.52 (“Expressway EA”) issued in January 2024 makes only a passing reference—in a footnote—to the State’s historic Climate Scoping Plan. *See* FDR/EA, at 269, n. 129.

71. The FDR/EA does not even acknowledge the specific transportation recommendations outlined in the Climate Scoping Plan, and it makes no attempt to explain how this project complies with those recommendations.

72. Instead, the FDR/EA asserts that the Project would be consistent with the CLCPA “by leading to a reduction in VMT and vehicular-related energy consumption” and by “meeting equity and inclusion objectives of the Act by reconnecting the community (which has been identified as a disadvantaged community under the CLCPA).” *Id.*

73. The FDR/EA specifically asserts that the project will reduce GHG emissions consistent with the CLCPA: “[w]hether using the EPA or NYSDEC’s GWP values, the Project would result in the same level of GHG reduction of CO<sub>2</sub>e of 0.04%.” *Id.*, at 267, 268.

74. The Executive Summary of the FDR/EA likewise champions the purported reduction of greenhouse gas emissions: “[d]ecrease of 0.04% regional vehicle miles traveled/greenhouse gas emissions/energy

consumption compared to No Build...Overall, Build Alternative would result in a net benefit with respect to greenhouse gas emissions on an annual basis. No adverse effects in regard to energy and greenhouse gas emissions.” *Id.*, *Table S-1: Summary of Effects, Mitigation, and Enhancements of the Build Alternative*, at ES-11.

75. This is an arbitrary and capricious conclusion.

76. First, the FDR/EA’s claims to reduce overall GHG emissions over the No Build Alternative are clearly misleading and disproven by the NYSDOT’s own math.

77. Second, as explained more infra, even if the Project supported an overall decrease in GHG emissions of 0.04%, that minuscule reduction is not consistent with the CLCPA and the state’s Climate Scoping Plan.

#### **The Numbers Contained in the FDR/EA**

78. With regard to VMT, the FDR/EA’s calculations show the VMT reduction of 0.04% will not be achieved within the next several decades. In 2027, versus a No-Build Alternative, VMT will not be reduced at all. In 2037, it will be reduced by 0.02%. It will only be in 2047 that VMT shows a reduction of 0.04%:

<b>Table 4.9-18: Regional VMT in the No Build and Build Alternative</b>			
<b>Analysis Year</b>	<b>Alternative</b>	<b>Annual VMT</b>	<b>% Difference</b>
<b>2027</b>	No Build	24,212,178	0.00%
	Build	24,211,186	
<b>2037</b>	No Build	24,265,438	-0.02%
	Build	24,260,473	
<b>2047</b>	No Build	24,318,309	-0.04%
	Build	24,309,759	

**Note:** Based on 2019 and 2047 VMT provided by GBNRTC (interim years interpolated)

FDR/EA, at 261. This is not an annual 0.04% VMT reduction which the FDR/EA repeatedly and misleadingly insists.

79. More significantly, even if credited at 0.04% per year, those minuscule VMT reductions do not—contrary to the FDR/EA’s assertion—result in a net decrease in carbon emissions over the life of the Project.

80. Deeper in the FDR/EA, the VMT reductions are translated to GHG emissions savings, in the amount of 650 metric tons per year:

<b>Table 4.10-3: Direct Operational CO<sub>2</sub>e Emissions (2047) – Metric Tons/Year</b>				
<b>GWP</b>	<b>No Build</b>	<b>Build</b>	<b>Reduction</b>	<b>Percent Change</b>
100-year	1,766,330	1,765,680	650	-0.04
20-year	1,766,430	1,775,780	650	-0.04

*Id.*, at 265.

81. Later, the FDR/EA acknowledges that the tunnel itself has energy operational energy costs, resulting in a significant decrease in these already meager emissions savings:

	<b>Savings from VMT reductions</b>	<b>Emissions from Tunnel Systems</b>	<b>Total Net Change</b>
<b>CO<sub>2</sub>e</b>	-650 (from Table 4-10-3)	354	-296

*Id.*, at 266.

82. Finally, the FDR/EA's calculations reveal that the short-term increase in GHG emissions due to the construction of the Project—*36,620 metric tons*—would dwarf the supposed net savings of 296 metric tons of carbon emissions:

	<b>Energy Use (mmBtu)</b>	<b>CO<sub>2</sub>e (metric tons)</b>
<b>Construction Equipment</b>	58,710	5,770
<b>Materials</b>	210,290	29,300
<b>Materials Transportation</b>	8,850	850
<b>Worker Transportation</b>	9,310	700
<b>Total</b>	287,160	36,620

*Id.*, 267.

83. In other words, from now through 2050, even if the Project is credited 296 metric tons of carbon emissions savings per year (something the FDR/EA's VMT projections do not actually support), that would only result



in a total of 7,696 metric tons of GHG emissions saved—a mere fraction of the 36,620 metric tons of greenhouse gases dumped into the atmosphere *and into CLCPA disadvantaged communities during construction.*

84. Thus the Project clearly causes significantly more GHG emissions when compared to the No-Build Alternative, completely contrary to the NYSDOT's baseless assertions of compliance with the CLCPA in the FDR/EA.

85. Even more troubling, that is not the whole story on the Project's violations of the CLCPA.

86. As discussed above, the VMT reductions championed in the FDR/EA are estimated to reach a maximum of a 0.04% percent reduction versus a no build alternative in the year 2047. *Id.*, at 268.

87. However, pursuant to the Climate Scoping Plan, the absolute minimum *statewide* VMT reduction required to meet the state's greenhouse gas emission reductions is 6%–150 *times* the level projected in the FDR/EA. More likely, a statewide VMT reduction of 16% will be required—400 *times* what the Project does.

88. Moreover, the VMT reduction numbers identified in the Climate Scoping Plan are statewide figures. In order to achieve those statewide

reductions, much more significant reductions in VMT will be required in urbanized areas.

89. The VMT reductions predicted in the FDR/EA—if they can even be called that—are plainly not consistent with emissions reductions required under the CLCPA as recommended in the Climate Scoping Plan.

90. Furthermore, the entirety of the Expressway lies within disadvantaged communities under the CLCPA. Although the project may arguably improve a 1200-meter section of those disadvantaged communities where the tunnel is constructed, it will do so at the expense of another section of the disadvantaged communities—pushing additional carbon emissions and co-pollutants into those already suffering communities, especially for those living by the ends of the tunnels who will inhale additional fumes.

91. Simply put, the Project fails to accomplish significant reductions in VMT as required by the CLCPA, and it fails to prioritize reduction of carbon emissions and co-pollutants in disadvantaged communities. On the contrary, it adds to overall GHG emissions even compared to the No-Build alternative.

92. The CLCPA marked a monumental legislative achievement. It positioned New York State to lead the nation by aggressively combatting the causes of climate change. As the bill's introducing memorandum declared:

The bill will put the state on a path to net zero emissions in all sectors of the economy and will enact the most aggressive emissions targets in the country, requiring one hundred percent carbon free electricity by the year 2040. While the federal government ignores the reality of climate change, New York is leading the way to protect our communities, our economy and our state.

New York Bill Jacket, 2019 S.B. 6599, Ch. 106, at 7.

93. The CLCPA requires aggressive action by the state's agencies to achieve its aims. Significant reduction of VMT in transportation has been identified by the Climate Scoping Plan as necessary to meet the aims of the CLCPA. Moreover, the prioritization of reductions of emissions in disadvantaged communities is required by the CLCPA.

94. The Project—the biggest infusion of transportation dollars in the history of the second biggest city in New York State—fails to accomplish any greenhouse gas emissions reductions and actually makes the State's emissions problem worse.

95. The Project's projected VMT reductions fail to meet the minimum required under the CLCPA by an order of magnitude of *one hundred and fifty*. Its purported improvements in disadvantaged communities come at the cost of merely dumping additional emissions and pollutants in other parts of those same communities, as well as increasing greenhouse gas emissions overall.

96. The CLCPA forbids this act of climate destruction.

97. The Project violates §§ 7(2) and 7(3) of the CLCPA and the Determination of No Significant Effect- Negative Declaration must be annulled.

**FIRST CAUSE OF ACTION**

98. Petitioners repeat and reallege the allegations of paragraphs 1 through 97 of this Petition, as if fully set forth herein.

99. In its Determination of No Significant Effect – Negative Declaration, NYSDOT determined that the Project will not have a significant effect on the environment based on, among other things, its determination that the Project will have no adverse effects on greenhouse gas emissions.

100. The determination regarding greenhouse gas emissions arbitrary and capricious because, contrary to the statements by NYSDOT in the DONSE—Negative Declaration, the net effect of the Project will be an increase in greenhouse gas emissions by the year 2050 according to the FDR/EA itself.

101. The addition of more than 26,000 metric tons of carbon dioxide into the atmosphere is inarguably an adverse effect of this Project.

102. The Determination of No Significant Effect – Negative Declaration is therefore arbitrary and capricious and must be annulled.

103. Under the State Environmental Quality Review Act, NYSDOT must file a Positive Declaration and commence the Environmental Impact Statement Process.

### **SECOND CAUSE OF ACTION**

104. Petitioners repeat and reallege the allegations of paragraphs 1 through 103 of this Petition, as if fully set forth herein.

105. CLCPA § 7(2) requires that, in considering and issuing permits, licenses, and other administrative approvals and decisions, “all state agencies [...] shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law,” and where they are inconsistent or interfere, “provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.”

106. As discussed above, the State’s Climate Scoping Plan instructs agencies on how to comply with the CLCPA and make the law’s required emissions reductions a reality.

107. The Project fails to implement the VMT reductions specifically outlined in the Climate Scoping Plan, and Respondents have neglected to provide any justification or mitigation plans for its failure to follow the Plan.

108. The CLCPA and its historic Climate Scoping Plan emphasizes the all-of-government effort to combat climate change and the fact that “[t]ransformative, challenging, and potentially disruptive levels of effort are required across all sectors” in order to meet the aims of the law. Plan, 120.

109. With the Project, Respondents have opted to ignore the aims of the CLCPA, the recommendations of the Climate Scoping Plan, and the accepted science of climate change, in favor of “business as usual.”

110. By wholesale ignoring the Climate Scoping Plan’s recommendations, Respondents have abused their discretion, and the DONSE-Negative Declaration is arbitrary and capricious, as well as contrary to law.

### **THIRD CAUSE OF ACTION**

111. Petitioners repeat and reallege the allegations of paragraphs 1 through 110 of this Petition, as if fully set forth herein.

112. Section 7(3) of the CLCPA prohibits State agencies from making any administrative approval or decision that would disproportionately burden disadvantaged communities:

In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, . . . all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law.

CLCPA § 7(3).

113. Section 7(3) of the CLCPA also requires State agencies to *prioritize reductions of greenhouse gas emission in disadvantaged communities. Id.*

114. As discussed above, the Kensington Expressway lies almost entirely within disadvantaged communities as defined under the CLCPA.

115. Nevertheless, the Project, which would amount to the largest infusion of dollars in a transportation project in the history of the City of Buffalo, would do nothing to alleviate greenhouse gas emissions and co-pollutants in these disadvantaged communities, and in fact, would make them considerably worse.

116. By ignoring the mandates of § 7(3) of the CLCPA to prioritize reduction of greenhouse gas emissions in disadvantaged communities, Respondents have abused their discretion and acted contrary to

law. The DONSE-Negative Declaration is arbitrary and capricious and must be annulled.

**FOURTH CAUSE OF ACTION**

117. Petitioners repeat and reallege the allegations of paragraphs 1 through 116 of this Petition, as if fully set forth herein

118. The Green Amendment is self-executing and provides a guarantee of clean air and a healthful environment to all New Yorkers.

119. The right to clean air and a healthful environment necessarily includes a right to be protected from the worst effects of climate change.

120. By failing to follow the recommendations of the Climate Scoping Plan, Respondents have violated Petitioners' members' right to clean air and a healthful environment, as they have hastened the warming of the atmosphere and thus invited further climate change related disasters and negative health effects.

121. The DONSE-Negative Declaration must be annulled as it is contrary to Petitioners' constitutional right to clean air and a healthful environment.



**WHEREFORE**, Petitioners respectfully request that this Court grant an Order and Judgment, pursuant to CPLR Article 78, SEQRA, the CLCPA, and Article I § 19 of the New York State Constitution: (1) vacating, annulling, and declaring illegal, invalid, null and/or void the Determination of No Significant Effect—Negative Declaration; (2) directing Respondents to proceed with the drafting an Environmental Impact Statement; (3) directing Respondents to proceed consistent with the CLCPA and the Green Amendment, including implementing the recommendations of the Climate Scoping Plan; and for such other and further relief as this Court deems just and proper, including Petitioners’ costs and disbursements, including reasonable attorneys’ fees as provided by law or rule based, *inter alia*, on Petitioners’ prosecution of this case for the benefit of the people, particularly the children and future children, of the State of New York.

DATED: Buffalo, New York  
June 11, 2024

**HAGERTY & BRADY**

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