SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

SENECA LAKE GUARDIAN, Petitioner-Appellant, -against- THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and COUNTY LINE MRF, LLC, Respondents-Appellees.	Case No. CV-23-0838 To be argued by: Hillary Aidun Time requested: 10 minutes

BRIEF FOR PETITIONER-APPELLANT

EARTHJUSTICE
Hillary Aidun
Susan Kraham
48 Wall Street, 15th Floor
New York, NY 10005
212-284-8040
haidun@earthjustice.org

Attorneys for Petitioner-Appellant

October 27, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page number(s)

STATUTES & REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Seneca Lake Guardian appeals the dismissal on standing grounds of its Article 78 action seeking to vacate a permit for a proposed solid waste processing facility. The petition alleges that the New York State Department of Environmental Conservation ("DEC") unlawfully granted the permit even though the applicant had not verified, as required by DEC regulations, that it could properly dispose of leachate, or the liquid waste that will be produced at the proposed facility. Because Seneca Lake Guardian members will be harmed by the unlawful and improper disposal of this leachate, the organization has standing to challenge DEC's action.

Supreme Court committed reversible error when it ignored binding precedent and fundamental procedural rules providing that, in resolving a motion to dismiss, the court must accept the facts alleged as true and draw all inferences in favor of the non-movant. Supreme Court instead shifted the burden to Seneca Lake Guardian to prove its allegations at this stage. Supreme Court further erred by concluding that Seneca Lake Guardian's harm is too generalized to confer standing, contrary to Court of Appeals precedent holding that precisely the type of injury that Seneca Lake Guardian faces is sufficient to establish standing. The decision below runs afoul of the Court of Appeals' admonition that standing rules should not be heavy-handed or shield agency actions from judicial review. This

court should reverse Supreme Court's determination that Seneca Lake Guardian lacks standing.

QUESTION PRESENTED AND ANSWER OF THE TRIAL COURT

Question: Did Seneca Lake Guardian bear the burden of proving its allegations in order to survive a motion to dismiss on standing grounds?

Answer: Supreme Court incorrectly answered, "Yes."

LEGAL BACKGROUND

While this appeal presents a narrow procedural question, some background is required on the regulatory framework for waste management.

DEC regulates waste management in New York State. *See* ECL Article 27. No solid waste management facility may be constructed in New York without a permit from DEC. ECL § 27-0707(1). A permit application for a new waste processing facility must include a plan for disposing of any waste produced at the facility, including "leachate," or liquid waste. *See* 6 NYCRR §§ 360.2(b)(167), 360.16(c)(4).

An applicant for a solid waste management permit must demonstrate that any leachate will be properly handled and discarded either onsite or at another authorized facility. Specifically, the applicant must provide "the method and location used for disposal of the leachate" as well as "authorized locations where wastes, including residues, are transported when they leave the facility and what

arrangements exist or will exist (contracts, etc.) that verify receiving entities will accept the waste." *Id*. §§ 360.16(c)(4)(ii)(e), 360.16(c)(4)(c). Solid waste processing facilities can send their leachate to wastewater treatment plants, which remove some pollutants from the leachate and then discharge the remaining liquid waste into a water body.

FACTUAL BACKGROUND

Petitioner-Appellant Seneca Lake Guardian is a nonprofit organization whose mission is to preserve and protect the health of the Finger Lakes, including Cayuga Lake, and the surrounding environment. Verified Pet. ¶ 5, R014. Seneca Lake Guardian has members who use Cayuga Lake for fishing, swimming, and kayaking; who live at the lake; and who draw their drinking water from beach wells on the lake or from the municipal water facility connected to the lake. *Id.* ¶¶ 6–8, R014–R016.

In March 2021, Respondent County Line MRF, LLC ("County Line") applied to DEC for a permit to operate a waste management facility in the Town of Cayuta, New York. *See* County Line's Revised Permit Application, R080–R195. The permit application stated that a company called Clean Earth Septic Service LLC would transport County Line's leachate to "Tompkins County Water Treatment." R103. The following month, Seneca Lake Guardian submitted

comments urging DEC to reject the application. Seneca Lake Guardian Comments, R205–R214.

In those comments, Seneca Lake Guardian expressed concern that County Line's leachate would contain PFAS, a group of chemicals commonly found in wastewater leachate that are hazardous to human health and can contaminate drinking water. R209–R210. Called "forever chemicals" because they persist in the environment, PFAS have been linked to a variety of adverse effects on human urinary, immune, reproductive, and nervous systems, as well as cancer and low birth weight. *See* R209; *see also, e.g.*, PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638, 18,643 (Mar. 29, 2023). As Seneca Lake Guardian explained to DEC, leachate from waste is a major pathway for PFAS discharge into drinking water. R207. The comments further explained that the types of waste that County Line plans to accept, such as municipal solid waste and construction and demolition debris, are known to contain PFAS. *Id*.; *see also* Verified Pet. ¶¶ 52, 53, R021.

Seneca Lake Guardian's comments also pointed out that "Tompkins County Water Treatment," where County Line said it would send its leachate, is not a facility that exists. R209. Although Clean Earth Septic Service had a permit to transport waste to a different wastewater treatment plant, the Ithaca Area Wastewater Treatment Facility ("Ithaca Facility") on Cayuga Lake, the Ithaca

Facility is not equipped to remove PFAS from wastewater. R209–R210. Seneca Lake Guardian asked DEC to reject the permit because County Line had failed to identify a facility that was authorized to accept its leachate as required by DEC's waste management regulations. R208 (citing 6 NYCRR § 360.16(c)(4)).

County Line subsequently submitted information to DEC stating that it would send its leachate to the Ithaca Facility, or if the Ithaca Facility were closed, then to the "nearest acceptable alternative" such as the Chemung County Wastewater treatment plant. Updated Statement by County Line, R239. DEC granted County Line's permit on June 15, 2022 and issued a response to public comments at the same time. County Line Permit, R033; DEC Responses to Comments, R273–R277. In its response, DEC stated that County Line's leachate would be "taken to Ithaca Area Wastewater Treatment, or the Chemung County Wastewater treatment plant should the Ithaca Area plant be closed." R274. In September 2022, the Chairperson of the Joint Committee of the Ithaca Facility told the *Ithaca Voice* that County Line had never reached out about its permit application or sought approval to send its leachate to the Ithaca Facility. R242. That month, a DEC water engineer confirmed with the Ithaca Facility that County Line had never sought authorization to send its leachate there. R246. The DEC water engineer acknowledged the concern that County Line's leachate might

contain PFAS, noting to the Ithaca Facility that "PFAS is a challenging issue right now." *Id*.

PROCEDURAL BACKGROUND

Seneca Lake Guardian filed a Verified Petition and Complaint in Tompkins County Supreme Court on October 13, 2022. R011. On February 24, 2023, DEC and County Line moved to dismiss the action for lack of standing. R284–R285, R286–R287. Supreme Court granted the Motions to Dismiss on March 24, 2023. R003–R009.

On May 10, 2023, Seneca Lake Guardian filed a Notice of Appeal in Tompkins County Supreme Court and a copy of the Notice of Appeal with this Court. R001. This appeal followed.

STANDARD OF REVIEW

"Where an appeal arises from a motion to dismiss, the complaint 'is to be afforded a liberal construction.'" *Maddicks v. Big City Props., LLC*, 34 N.Y.3d 116, 123 (2019) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994)). This Court has explained that it will "accept the facts as alleged as true, and accord plaintiffs the benefit of every possible favorable inference." *Id*. (citation omitted). Courts may consider "[o]nly affidavits submitted by petitioner and exhibits attached to the petition . . . on such a preanswer motion." *Matter of Green Harbour Homeowners'*

Assn., Inc. v. Town of Lake George Planning Bd., 1 A.D.3d 744, 745 (3d Dept 2003) (citation omitted).

ARGUMENT

This case presents a simple procedural question: Did Seneca Lake Guardian bear the burden of establishing its factual allegations in order to survive a motion to dismiss for lack of standing? The answer is no.

In its petition, Seneca Lake Guardian alleged that by granting the County Line permit, DEC allowed County Line to send its contaminated leachate to the Ithaca Facility, and that as a result, members who use Cayuga Lake for drinking water and recreation will be harmed by PFAS in the leachate. Seneca Lake Guardian has shown "a concrete interest in the matter the agency is regulating, and a concrete injury from the agency's failure to follow procedure." *Matter of Ass'n for a Better Long Is., Inc. v. N.Y. State Dept. of Envtl. Conservation*, 23 N.Y.3d 1, 7 (2014). Nothing more is required to demonstrate standing.

Although Supreme Court was required to accept the facts alleged as true and draw inferences in Seneca Lake Guardian's favor, s*ee Maddicks*, 34 N.Y.3d at 123, it determined that Seneca Lake Guardian had failed to "establish" these allegations, concluded that the harm alleged was too speculative to confer standing, and granted Respondents' Motions to Dismiss. Order Below at 3–4, R007–R008. The decision below runs afoul of fundamental procedural principles as well as the

Court of Appeals' instruction that "standing rules 'should not be heavy-handed.'" *Ass'n for a Better Long Is.*, 23 N.Y.3d at 6 (quoting *Matter of Sun-Brite Car Wash v. Bd. of Zoning & Appeals of Town of N. Hempstead*, 69 N.Y.2d 406, 413 (1987)).

Moreover, an affirmance would insulate DEC's action from judicial review due to the short statute of limitations under Article 78, "a result that is contrary to the public interest." *Id.*, 23 N.Y.3d at 8. Under Supreme Court's reasoning, Seneca Lake Guardian would have had to wait until the County Line facility was operating in order to gather evidence before bringing this action, which would have taken far longer than the four months allotted for filing an Article 78 action. *See* CPLR 217(1).

Supreme Court further erred by concluding that, assuming Seneca Lake Guardian's allegations are true, the organization's harm is too generalized to confer standing because everyone who uses Cayuga Lake would be injured by PFAS contamination. The Court of Appeals has expressly rejected this restrictive conception of standing. *Matter of Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 310–311 (2015). For these reasons, the order below must be reversed.

I. SENECA LAKE GUARDIAN HAS STANDING BECAUSE ITS INJURY IS REASONABLY CERTAIN

In issuing the County Line permit, DEC authorized County Line to send PFAS-laden leachate to a facility that discharges wastewater into Cayuga Lake and

is not equipped to remove PFAS from wastewater. Seneca Lake Guardian members draw drinking water directly from beach wells on Cayuga Lake, drink water from the municipal water system connected to the lake, and use the lake for fishing, kayaking, and other recreational activities. Verified Petition ¶¶ 5–8, R014–R016. Because they will be injured by an addition of PFAS to Cayuga Lake, Seneca Lake Guardian has standing to challenge DEC's decision to issue the County Line permit.

In cases involving environmental harm, an organization can establish standing by alleging that the agency action will harm the organization's members "in their use and enjoyment of natural resources." *Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 304–05 (2009) (quoting *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 775 (1991)). Organizational members must show that the harm is "at least reasonably certain to occur." *Matter of Safety-Kleen Sys., Inc. v. New York State Dept. of Envtl. Conservation*, 206 A.D.3d 1332, 1333 (3d Dept 2002) (quoting *Matter of Developmental Disabilities Inst., Inc. v. New York State Off. for People with Dev. Disabilities*, 200 A.D.3d 1273, 1275 (3d Dept 2021)). Seneca Lake Guardian easily meets these requirements.

DEC's decision to issue the County Line permit will harm Seneca Lake Guardian members in their use and enjoyment of Cayuga Lake. County Line's

leachate will likely contain PFAS, a group of chemicals that is harmful to human health. Before DEC finalized the County Line permit, Seneca Lake Guardian submitted comments explaining that leachate from waste is a major pathway for PFAS discharge into drinking water and that the types of waste that County Line plans to accept—such as municipal solid waste and construction and demolition debris—are known to contain PFAS. Seneca Lake Guardian Comments at 3, R207; *see also* Verified Pet. ¶¶ 52, 53, R021. DEC was aware that County Line's leachate could contain PFAS. *See* September 2022 Email from DEC to Ithaca Facility, R246 (discussing County Line's plan to send leachate to the Ithaca Facility and noting that "PFAS is a challenging issue right now"). In granting the County Line permit, however, DEC blessed the company's proposal to send leachate to the Ithaca Facility, which is not equipped to remove PFAS from wastewater. *See id*.; County Line Update to DEC, R239; DEC Response to Comments at 3, R274; Verified Pet. ¶¶ 55, 61, R021–R022.

As Seneca Lake Guardian has explained to DEC, and as DEC has recognized, the leachate generated at the County Line facility is likely to contain PFAS. Seneca Lake Guardian members will be injured if PFAS is discharged into Cayuga Lake, which they use to obtain drinking water, kayak, fish, and engage in other recreational activities. This harm is "at least reasonably certain to occur," and

therefore sufficient to confer standing on Seneca Lake Guardian. *Matter of Safety-Kleen Sys.,* 206 A.D.3d at 1333.

II. SENECA LAKE GUARDIAN'S ALLEGATIONS ARE SUFFICIENT TO ESTABLISH STANDING

In ruling on a motion to dismiss, a court must deem the facts alleged as true. *See Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 484 (2009) (citation omitted). Supreme Court committed reversible error by instead holding Seneca Lake Guardian responsible for proving those facts. The court below incorrectly determined that Seneca Lake Guardian was obligated to "establish" or "provide evidence" showing that its factual allegations were true. Order Below at 3, R007. Supreme Court's dismissal rests on the erroneous assumption that Seneca Lake Guardian bore the burden of establishing its allegations at this stage and conflicts with binding precedent and basic procedural principles.

In concluding that Seneca Lake Guardian lacks standing, Supreme Court applied an improper evidentiary standard. When resolving a motion to dismiss, a court will accept the facts as alleged and construe the petition in the petitioner's favor. *See Walton*, 13 N.Y.3d at 484 ("In reviewing a motion to dismiss, 'the court will accept the facts as alleged in the complaint as true, and accord plaintiffs the benefit of every possible inference.'" (quoting *Nonnon v. City of New York*, 9

N.Y.3d 825, 827 (2007))). Accordingly, this Court has instructed that in determining whether a petitioner has standing, a judge must assume that the petitioner's allegations are true. *See Matter of Village of Woodbury v. Seggos*, 154 A.D.3d 1256, 1258 (3d Dept 2017) ("[W]e will 'deem the allegations in the petition/complaint to be true and construe them in the light most favorable to the petitioners' in assessing whether a sufficiently precise injury has been articulated." (quoting *Matter of Town of Amsterdam v. Amsterdam Indus. Dev. Agency*, 95 A.D.3d 1539, 1541 n.3 (3d Dept 2012)); *see also Matter of Parisella v. Town of Fishkill*, 209 A.D.2d 850, 851 (3d Dept 1994) ("[O]n a motion to dismiss a petition upon an objection in point of law, all of the allegations contained in the petition are deemed to be true.").

Supreme Court violated these "basic principles of procedural law." *Maddicks*, 34 N.Y.3d at 123. Supreme Court granted Respondents' Motions to Dismiss on the grounds that Seneca Lake Guardian's harm was too speculative because the organization had not proven key facts in this case, including that the Ithaca Facility would accept County Line's leachate and that PFAS would be discharged into Cayuga Lake. R007. But Seneca Lake Guardian does not carry the burden of establishing those allegations in order to survive threshold dismissal. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005) ("Whether a plaintiff can ultimately establish its allegations is not part of the calculus in

determining a motion to dismiss."); *see also Matter of Town of Coeymans v. City of Albany*, 284 A.D.2d 830, 833–34 (3d Dept 2001) (finding that petitioners established standing by creating a "presumption" that they would be adversely affected).

Supreme Court also expressed doubt that any PFAS discharged into Cayuga Lake would be "detectable" to Seneca Lake Guardian members, based on its own back-of-the-envelope calculation using facts outside the record. R007. Such factual conclusions are impermissible at this stage. *Matter of Gerard P. v. Paula P.*, 186 A.D.3d 934, 938 (3d Dept 2020) (reversing decision in which court below "improperly made factual findings" in resolving a motion to dismiss); *Marston v. General Elec. Co.*, 121 A.D.3d 1457, 1459 (3d Dept 2014) ("Supreme Court properly declined to make factual determinations in the context of this CPLR 3211 motion."). To the extent that inferences are drawn, they must be drawn in Seneca Lake Guardian's favor. *Walton*, 13 N.Y.3d at 484.

Nor is Seneca Lake Guardian's standing vitiated because the Ithaca Facility has not agreed to accept County Line's leachate. The fact that the Ithaca Facility is not equipped to handle leachate containing PFAS is at the heart of this action, and Respondents' regulatory violation cannot shield them from judicial review. County Line told DEC that it would send its leachate to the Ithaca Facility. R239. DEC told the public that County Line would send its leachate to the Ithaca Facility.

R274. Both have said that the leachate will go to the Ithaca Facility, unless the Ithaca Facility is "closed." R239, R274.

"Accepting the allegations in the petition as true and construing them in the light most favorable to petitioners," Seneca Lake Guardian's injury is at least "reasonably certain to occur and, therefore, cannot be considered speculative." *Matter of Lawyers for Children v. New York State Off. of Children & Family Servs.*, 218 A.D.3d 913, 915 (3d Dept 2023) (citations omitted); *see also id*. at 915 n.1 (determining that organizations providing counsel to foster children had standing to challenge a new program that could block access to potential clients, even though the alleged injury was contingent on the actions of third-party agencies that had not occurred). County Line's permit allows for PFAS-laden leachate to go to the Ithaca Facility and will pose a threat to Seneca Lake Guardian members unless and until it is vacated. While a member of the Ithaca Facility's Joint Committee has said that the facility might not accept the leachate, the Ithaca Facility is not bound by that statement and could decide to accept the leachate at any time. *See* R243–R244. Thus far, County Line has not made a request and the Ithaca Facility has not made a decision to reject or accept the leachate. *See* R242, R246. Respondents cannot hide behind what the Ithaca Facility might or might not do, and more importantly, Seneca Lake Guardian cannot count on the Ithaca Facility to protect its members from injury caused by Respondents' actions. *See,*

e.g., *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 223–24 (2003) (finding that a city agency's declaration "resulted in actual concrete injury to petitioners because the declaration essentially gave the developer the ability to proceed with the project," even though DEC could have later blocked the project by denying an air permit).

In determining whether Seneca Lake Guardian has standing, Supreme Court was required to deem the facts alleged as true. *See Village of Woodbury*, 154 A.D.3d at 1258. Instead, Supreme Court viewed the petition "in the light most favorable to defendant—an approach antithetical to the governing standard of review on this motion to dismiss." *Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236, 242–43 (2021).

III. AN AFFIRMANCE WOULD IMPERMISSIBLY SHIELD DEC FROM JUDICIAL REVIEW

Supreme Court's decision must be reversed because it allows DEC to evade judicial review of the permit. In order to establish standing, Supreme Court would require Seneca Lake Guardian to show that County Line's leachate contains PFAS and that the Ithaca Facility will accept the leachate. If the organization had waited for the County Line facility to begin operating in order to prove these facts, the four-month statute of limitations for filing an Article 78 action would have passed. *See* CPLR 217(1). Supreme Court's conception of standing would preclude any party from challenging the County Line permit, and therefore cannot stand.

The Court of Appeals has directed that "standing rules" must not be applied "in an overly restrictive manner" that will "completely shield a particular action from judicial review." *Ass'n for a Better Long Is..,* 23 N.Y.3d at 6. However, under Supreme Court's reasoning, no party would have standing to challenge DEC's action because the County Line facility is not yet producing leachate.

In concluding that Seneca Lake Guardian lacks standing, Supreme Court reasoned that the organization "cannot provide evidence showing the presence of PFAS in the wastewater produced by County Line, because the [waste] recovery facility is not yet operating." R007. As this Court has recognized, however, "where the parties seeking to challenge administrative rulemaking are subject to the relatively short statute of limitations set forth in CPLR 217, the precise particulars of the asserted injury may not be ascertainable within the time restraint of the statute of limitations." *Lawyers for Children*, 218 A.D.3d at 913 (quoting *Matter of New York Propane Gas Assn. v. New York State Dept. of State,* 17 A.D.3d 915, 916 (3d Dept 2005)).

Given the short time period in which an aggrieved party can file an Article 78 action, if Seneca Lake Guardian had waited for the facility to start operating in order to show that the leachate contained PFAS, the organization would have missed the opportunity to challenge the permit—and no other party would be able to do so, either. A conclusion that Seneca Lake Guardian lacks "standing in this

case would have the effect of insulating" DEC's action from judicial review, "a result that is contrary to the public interest." *Ass'n for a Better Long Is.*, 23 N.Y.3d at 8; *see also id.* (concluding that petitioner had standing because otherwise, "[g]iven the compressed four-month statute of limitations . . . , we would be erecting an 'impenetrable barrier' to any review of this facet of the administrative action") (citations omitted). Because Supreme Court's "factual scenario on what constitutes an injury-in-fact would result in no one having the ability to challenge the" permit, it must be rejected. *Matter of Stevens v. New York State Div. of Criminal Justice Servs.*, 206 A.D.3d 88, 100 (1st Dept 2022).

IV. SENECA LAKE GUARDIAN ALLEGES PARTICULARIZED INJURY-IN-FACT

Finally, Supreme Court incorrectly concluded that if Seneca Lake Guardian's allegations are true, the alleged harm is too generalized to confer standing because everyone who uses Cayuga Lake would be injured. R007–R008. However, binding precedent provides that to support standing, an injury must simply be distinct from that suffered by the public at large—not from the petitioner's neighbors or other members of the petitioner's community. *Painted Post*, 26 N.Y.3d at 310–11.

Relying on a thirty-year-old decision that is no longer good law, Supreme Court incorrectly held that "allegations that a person's use of a public body of

water as a source of potable water and for recreational purposes will be impaired 'are merely generalized claims of harm no different in kind or degree from the public at large, which are insufficient for standing purposes.'" Order Below at 3–4, R007–R008 (quoting *Matter of Schulz v. Warren County Bd. of Supervisors*, 206 A.D.2d 672, 674 (3d Dept 1994)). While a petitioner's injury must be "distinct from that suffered by the general public," *Matter of Townsend v. Spitzer*, 69 A.D.3d 1026, 1027 (3d Dept 2010), Supreme Court employed a narrow conception of the "general public" that the Court of Appeals has roundly rejected. To show injury sufficient to confer standing, "[t]he harm that is alleged must be specific to the individuals who allege it, and must be 'different in kind or degree from the public at large,' but it need not be unique." *Painted Post*, 26 N.Y.3d at 310–11 (quoting *Society of Plastics*, 77 N.Y.2d at 778).

In *Painted Post*, the petitioner challenged his town's environmental review of a proposed water loading station and alleged that trains carrying the water would cause noise and disturb him at night. 26 N.Y.3d at 310. In a decision that was later reversed, the Appellate Division concluded that the petitioner lacked standing because everyone living in the town would suffer the same injury. *Id*. The Court of Appeals disagreed, holding that the court below had applied an "overly restrictive analysis of the requirement to show harm 'different from that of the public at large'

[in] reasoning that because other Village residents also lived along the train line, [the petitioner] did not suffer noise impacts different from his neighbors." *Id*.

Painted Post clarified that "the public at large" refers to the public in general—not the public living in a petitioner's community. *Id*. at 311 ("[A] particularized harm . . . may also be inflicted upon others in the community who live near the tracks."). The Court of Appeals made clear that "standing is not to be denied simply because many people suffer the same injury." *Id*. at 311 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973)); *see also id*. ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." (quoting *SCRAP*, 412 U.S. at 688)).

Seneca Lake Guardian members will be harmed if PFAS is discharged into their drinking water source and impairs their ability to enjoy Cayuga Lake. Their harm is not diminished simply because others who drink from or otherwise use Cayuga Lake are also injured.[1] In concluding otherwise, Supreme Court relied on case law that predates *Painted Post* and ignored binding precedent. *See* R008

[1] While not required under *Painted Post*, at least one Seneca Lake Guardian member actually would suffer injury distinct from that of other community members because he obtains his drinking water directly from a beach well, "essentially a hole in the ground," rather than from the public drinking water system that draws water from Cayuga Lake. *See* Lavine Aff. ¶¶ 13–14, R053.

(citing *Schulz*, 206 A.D.2d at 674, and *Matter of Clean Water Advocates of N.Y. v. New York State Dept. of Envtl. Conservation*, 103 A.D.3d 1006, 1008-–09 (3d Dept 2013)).

CONCLUSION

For the foregoing reasons the Court should reverse the decision below.

Dated: October 27, 2023
New York, NY

Respectfully submitted,

EARTHJUSTICE

By: Hillary Aidun

Hillary Aidun
Susan Kraham
48 Wall Street, 15th Floor
New York, NY 10005
212-284-8040
haidun@earthjustice.org

Attorneys for Petitioner-Appellant

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 4,432.

Dated: October 27, 2023
New York, NY

/s/ Hillary Aidun
Hillary Aidun