

# DRIVEN TO SUE:

A RIDERS  
GUIDE  
TO THE  
CONGESTION  
PRICING  
LAWSUITS



# INTRODUCTION

New York's first-in-the-nation congestion pricing program has been decades in the making. The plan will cut gridlock in Manhattan and reduce traffic, save energy, and improve air quality across the region. Most notably for millions of public transit riders, congestion pricing will fund \$15 billion worth of improvements to New York City's subway and bus network, Metro-North and the Long Island Rail Road, major portions of which date to the 19th century. Modern, reliable signals on several subway lines, dozens of station elevators, and even the Second Avenue Subway extension to East Harlem, ride on the successful implementation of congestion pricing.

After a massive organizing campaign by thousands of transit riders backed by an unprecedented coalition of labor, business, housing, immigration, disability rights, environmental justice and other organizations, state leaders passed congestion pricing in 2019. Following a mandatory federal review, including years of exacting environmental studies and public comment periods, final approval came last year. New York's Metropolitan Transportation Authority (MTA) is now installing the infrastructure and preparing to implement congestion pricing.

With tolling set to begin later this year, cynical suburban and outer borough politicians, government union bosses who haven't ridden a train in decades, and NIMBY car owners with no regard for their transit-dependent neighbors are challenging the program in court. Their selfish lawsuits have already delayed and could derail the effort to raise billions to fix the subway and help New Yorkers, commuters, and visitors save billions more in time, fuel, public health and other costs lost to traffic congestion.

The main question in every congestion pricing case is whether federal officials obeyed the National Environmental Policy Act when considering the potential impacts of congestion pricing before giving the MTA the green light to start tolling cars and trucks driving in Manhattan south of 60th Street.

Each suit challenges the legitimacy of the environmental review process and asks a judge to order more studies. Since previous studies took years and produced thousands of pages of analysis, it's not clear what a future review would involve. Environmental review law was written because of massive projects that cannot be undone, like the Cross-Bronx Expressway, which uprooted thousands of families and tore entire communities apart. Applying it to congestion pricing, which is flexible and easily adapted to changing circumstances, is like trying to squeeze a square peg through a round hole.

The Riders Alliance reviewed the legal filings and assembled this ready reference to the litigants, notable lawyers involved in the suits, and the key issues they raise – along with brief replies drawn from a quick reading of the documents at the core of the cases.

# THE LAWSUITS AND LAWYERS

[While several cases are pending](#), this Riders Guide to the Congestion Pricing Lawsuits focuses on three big ones, State of New Jersey v. United States Department of Transportation, brought by Garden State Governor Phil Murphy; Michael Mulgrew as President of the United Federation of Teachers v. USDOT, brought with Staten Island Borough President Vito Fosella, and New Yorkers Against Congestion Pricing Tax v. USDOT, which includes several members of the New York City Council's conservative Common Sense Caucus.

The litigants hail from places as diverse as Rockland County, Queens Village, East River Coop, Staten Island and, of course, the palatial New Jersey governor's residence Drumthwacket. But they are united behind the wheel. They all drive – or are chauffeured. Not only don't they want to pay for the privilege of driving in the most congested and transit-connected part of North America, many of them are caught up in a larger, imagined culture war in which they are the aggrieved ones because millions more people want decongested streets, clean air, and public transit worthy of one of the wealthiest regions on earth.

In this context, it's not surprising that the cases have attracted high profile attorneys to what might otherwise seem an obscure legal issue. New Jersey Governor Murphy is represented in court by Randy Mastro, once a New York Deputy Mayor under Rudy Giuliani in the 1990s and now a leading anti-environmental lawyer representing, for example, the oil company Chevron in the Ecuadorian Amazon as well as landlords fighting New York City's green buildings law.

The MTA legal team is led by Robbie Kaplan, who won *US v. Windsor*, in which the Supreme Court sided with her client to invalidate the anti-gay Defense of Marriage Act, leading the way toward nationwide marriage equality. Kaplan now represents E. Jean Carroll, so far winning nearly \$90 million in judgements against Donald Trump for sexual assault and defamation.



Photo: King & Spalding



Photo: Kaplan Hecker & Fink LLP

# LITIGANT HIGHLIGHTS

**I.** The State of New Jersey: Governor Murphy, egged on by Congressman Josh Gottheimer, sued first, complaining that Jersey commuters, most of whom already take the train, shouldn't pay a cent more to reach Manhattan — and that if they do then New Jersey should get a share of the toll revenue.

- New Jersey is [first among US states](#) in toll revenue, with [more than one-third](#) of state tolls collected from nonresidents and a 3% toll hike slated for this year.
- The state long provided [no dedicated funding for NJ Transit](#), the nation's second busiest commuter railroad, which is [delayed five and six times more often than the LIRR and Metro-North](#) and faces a series of fare hikes – starting with a 15% increase on July 1.
- Governor Murphy plans to spend more than [\\$10 billion](#) from the toll revenue he controls, several billion of which are paid by New Yorkers, to widen the NJ Turnpike in Jersey City over local objections and dump more traffic into the Holland Tunnel and New York City.



Photo: Chris Pedota, NorthJersey.com-USA Today Network

**II.** United Federation of Teachers President Mulgrew, in a move that [infuriated](#) many of his members, sued to avenge his handful of fellow Staten Island teachers who drive to the Manhattan central business district and don't want to pay the new toll, as well as those who drive from New Jersey and teach outside the congestion zone but might hit some extra traffic on the George Washington Bridge.

- Years ago, in a [secret deal](#) with former New York Mayor Bill de Blasio, Mulgrew won an unprecedented expansion in parking placards, privileging his members' cars on streets in neighborhoods citywide.
- Of nine named plaintiffs, seven including Borough President Vito Fosella, live on Staten Island, from which a grand total of [151 teachers](#) commute to school anywhere in Manhattan, including outside the congestion zone.
- Since the case was filed, UFT has been joined by [18 elected officials](#), several of them state legislators who voted for the policy in 2019.



Photo: Staten Island Borough President Vito J. Fosella/Facebook

**III.** The [New Yorkers Against Congestion Pricing Tax](#) Coalition brings together longtime Queens civic leaders with conservative City Council members and a few Manhattan drivers from the congestion zone, all of whom happily pay every cost of car ownership and operation but draw a bright red line when it comes to supporting the public transit network that makes it at all possible for them to drive down Manhattan’s busy streets.

- Without any accompanying financial analysis, plaintiff funeral director Danny Buzzetta promises to “lose his business” as a result of congestion pricing.
- Second homeowner Rita Sue Siegel, whose “dual residency began in an effort to avoid health risks from the pandemic” already finds her “commute” from Cold Spring to Manhattan “a financial burden” because of the George Washington Bridge toll, which is very odd because both of her homes lie east of the Hudson River.
- While it is alleged that plaintiff City Council Member Kalman Yeger’s central Brooklyn “district is remote from mass transit,” in reality it contains 13 subway stations along 5 different lines.



Photo: Ben Brachfeld/amNewYork

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## THE ISSUES

### I. Congestion pricing will move New York toward transit equity

Everyone suing to stop congestion pricing is motivated by their desire to keep driving into the densest part of New York City, the most transit accessible part of North America, without paying for the privilege. Yet Manhattan-bound drivers’ numbers are few compared with millions of public transit riders, who already contribute billions of dollars in fares each year to the transit system that makes New York possible: 85% of regional commuters into the congestion zone ride public transit. For City residents, the figure is 92%, including 78% of commuters from Staten Island, which has no subway to Manhattan.

At the lowest incomes, the disparity is even more dramatic. **According to an analysis by the Community Service Society, for every low-income worker likely to pay the toll, 50 more low-income workers depend on public transit.** But that's not who files suit, so it's not what the litigation is about. It's about the small minority of overwhelmingly affluent people who want to keep driving at no additional cost. In the case of elected officials, the litigation comes on behalf of their comparatively wealthy constituents, at least four out of five of whose neighbors already ride public transit.

According to Census data, people who drive to work anywhere in New York City earn substantially more money than people who ride public transit; drivers earn an average of 30% more than subway riders and 60% more than bus riders. Given the unpredictability and cost of driving to and parking in Manhattan, the income gap by mode of transportation is wider for workers within the congestion zone than for people working in other parts of the city, which are easier to drive to and harder to reach by public transit.

Manhattan's Upper East Side is the number one neighborhood in the entire region from which commuters are the most likely to drive into the central business district and pay the toll. According to 2021 American Community Survey (US Census) data, the average income of Upper East Side (Manhattan Community Board 8) car commuters is \$261,038, more than twice as much as the average Upper East Side subway rider. That's a fact conveniently left out of court documents.

## **II.** Congestion pricing will advance environmental justice

Instead of talking about who really drives to work in the Manhattan central business district, the people suing to stop congestion pricing talk a lot about environmental justice. No matter that the grassroots New York City Environmental Justice Alliance, WE ACT for Environmental Justice, the New Jersey Environmental Justice Alliance, as well as the nation's oldest and largest environmental organizations like the Environmental Defense Fund, League of Conservation Voters, and Natural Resources Defense Council all strongly support congestion pricing.

**Congestion pricing's opponents have crowned themselves their own experts because they don't like what actual experts say about environmental justice and public health.**

In the worst case scenario, which was the required focus of the federal environmental review process, some car and truck drivers traveling to destinations outside the congestion zone will drive around it rather than through to avoid paying the charge. Because some drivers who once drove through the central business district may now divert to other routes, some roads elsewhere in the city and region may see some more traffic than they do today. Some of those roads travel through low-income neighborhoods and communities of color already disproportionately burdened by air pollution from cars and trucks, most notably the communities near the Cross-Bronx Expressway (Interstate 95).

Because of the very same conservative traffic modeling mandated by federal regulators, congestion pricing's opponents love to argue that vast numbers of people will be stuck with unaffordable commutes while at the same time traffic will remain at a standstill. They're arguing against both physics and economics. **The reality is that congestion pricing will persuade many drivers to cancel or combine trips throughout the region and into the zone. London, Stockholm and Singapore experienced 25% traffic reductions when they implemented congestion pricing.**

But just to be on the safe side, **MTA and the New York State and New York City Departments of Transportation have committed to spending more than \$200 million dollars to mitigate the possible harms of additional traffic in environmental justice communities that could result from the new toll.** Federal environmental law does not require mitigation at all, just a "hard look" at the likely consequences of a project or policy. But New York's program will go far above and beyond the bare minimum because it's the right thing to do..

As summarized in the recent Traffic Mobility Review Board [recommendations](#) for the implementation of congestion pricing, "the Program mitigates these potential effects with significant investment in clean-air measures, including improving electric-truck charging infrastructure, expanding NYC Department of Transportation's Clean Trucks program, installing air filtration units in schools near highways, renovating parks and greenspaces, installing roadside vegetation, and establishing an asthma center in the Bronx." (p. 31)

The opponents' legal papers object that the MTA hasn't yet said exactly where the mitigation measures will be implemented. But that's because the exact tolling scheme hasn't yet been determined. The deployment of mitigation measures will depend on where the tolls are most likely to cause problems in communities, to the extent that they do at all. What's certain is that the mitigation infrastructure will target environmental justice communities like the Bronx, Staten Island's North Shore, and Fort Lee and Newark, New Jersey.

### **III. After careful review, the US Environmental Protection Agency approved congestion pricing**

The Federal Highway Administration (FHWA), an agency within the US Department of Transportation, was the official "lead" agency in the environmental review of congestion pricing. FHWA led the process because it was charged with approving the program and, related to that, waiving the usual prohibition on tolling roads that have been built or maintained with federal funding. However FHWA was not the only federal agency to weigh in on the environmental impacts of congestion pricing.



With its unique expertise, the Environmental Protection Agency (EPA) followed the federal approval process closely and gave extensive comments on a draft of the environmental assessment prepared approximately one year into the review, in mid 2022. Per its charge, EPA expressed many concerns and requested substantial additional data about the program. **MTA, following the lead of its reviewers at FHWA, complied with EPA's requests, conducting additional analysis and, to be on the safe side, committing to spend more than \$200 million on measures to improve air quality in vulnerable areas that could receive additional air pollution because of the new toll.**

[EPA was satisfied with the additional research and mitigation measures.](#) The result was a successful collaboration among the federal agencies responsible for regulating New York's air and roads. But the very fact that EPA expressed initial concerns and requested additional information has been seized on in every lawsuit filed to argue that congestion pricing is going forward against the wishes of the nation's environmental agency. It's simply a lazy misreading of the record, as if stopping reading mid sentence to avoid finding out an inconvenient truth in plain sight at the end.

## **IV. The public engagement process has been comprehensive**

Everyone suing to stop congestion pricing wants to stop congestion pricing. While that seems obvious, it's not what the lawsuits are asking the courts to do. **If a judge finds that the federal environmental review was improperly done, they can order a new one; they can't just throw out the policy entirely.** The law of environmental review doesn't prescribe an outcome. A policy could be incredibly damaging to the environment – many are – and still go forward because the federal government dots its i's and crosses its t's.

With congestion pricing, the state legislature authorized the policy in 2019 in a budget signed by the governor. Governor Hochul can pull the plug but then she would be on the hook for filling a massive new hole in the MTA's capital budget. Because she wants to be remembered as the governor who fixed the subway, rather than the one who defunded it, she won't do that. Once the courts bless the environmental review, the system will go live.

Opponents will gripe that they didn't have their say. But they're not entitled to a veto. That's not how our representative government or environmental laws work. **There have been many opportunities to offer input and feedback on the environmental review itself and the specifics of congestion pricing implementation.** The popularity contest over the policy happened in the legislature in 2019. There's no state or federal law that says you can stop a toll you don't want to pay. In real life, the alternative to paying the congestion pricing toll will be to use public transportation instead of driving into the zone.

# SPOTLIGHT ON NEW JERSEY

New Jersey Governor Phil Murphy has unique claims about engagement in the process because he doesn't have a vote in New York's policymaking process. But the federal government made sure, throughout years of environmental review, that [MTA officials bent over backward to solicit New Jersey's input](#). By and large, however, New Jersey officials failed to show up. For whatever reason, over those years, they missed their official opportunity to weigh in, specifically on the contours of the environmental study. For sleeping at the wheel, they don't get a do-over.

- a. Six relevant public agencies, the New Jersey Department of Transportation, New Jersey Transit, New Jersey Turnpike Authority and North Jersey Transportation Planning Authority, along with the Port Authority of New York and New Jersey, whose catchment area includes major portions or the entirety of seven northern and central New Jersey counties, and the Delaware Valley Regional Planning Commission, whose catchment area includes four central and southern New Jersey counties, were all invited to participate in the environmental review process. (Environmental Assessment Table 18.1; p. 18-2)
- b. New Jersey residents were also invited to participate and kept abreast of the progress of the review, with a special emphasis, per Executive Order 12898, on communication to environmental justice populations in eight English language newspapers, 2 Spanish newspapers, and one Korean newspapers published in New Jersey, in addition to many other regional and national publications with readers in New Jersey. (p. 18-5)
- c. Of 19 early outreach virtual webinars held in Fall 2021, five were aimed at New Jersey residents, including three of nine environmental justice webinars. (Table 18.2; p. 18-6)
- d. On January 12, 2022, MTA met with the New Jersey Trucking Association. (p. 18-8)
- e. From August 10, 2022 through September 23, 2022, the draft Environmental Assessment was made available for viewing at the FHWA New Jersey Division Office in Trenton as well as at 14 public libraries in 14 different New Jersey counties as well as at the County Clerk's office in each of those New Jersey counties. (pp. 18-17 through 18-20)

# CONCLUSION

MTA spent years preparing thousands of pages of environmental studies of the potential impacts of congestion pricing. It received tens of thousands of pages worth of comments on those studies. MTA satisfied the exacting demands of Washington bureaucrats with no stake in the outcome of their review. As a result, MTA now has the all-important greenlight from the Biden administration to pursue congestion pricing, reducing traffic, energy use and air pollution, and raising funds for modern subway signals, accessible stations and more.

Congestion pricing's steadfast opponents have already delayed the program's implementation, [slowing essential upgrades](#) to the subway system, like new signaling on the perennially delayed A and C lines which serve low-income communities in three boroughs. They don't want to pay for basic public infrastructure that makes it possible for them to drive in Manhattan. Without public transportation moving the great majority of Manhattan-bound commuters, the streets would be utterly impassable to private cars, not to mention buses and emergency vehicles.

Selfishness and cynicism about the ability of our government to serve the public are [blocking improvements](#) to the transit system that makes New York possible. Rather than support a positive vision of a city that functions well and delivers services for all of us who need them, the plaintiffs are attempting to game the courts and weaponize environmental law, with all of its safeguards, against a transformative project with numerous, regionwide environmental benefits. In any climate, this would be outrageous. In our warming world of sweltering subway stations and flooding train tracks, it's unconscionable.