STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

POLY-PAK INDUSTRIES, INC., GREEN EARTH FOOD CORP., d/b/a Green Earth Grocery Store, FRANCISCO MARTE, MIKE HASSEN and THE BODEGA AND SMALL BUSINESS ASSOCIATION

Plaintiffs-Petitioners,

-v-

THE STATE OF NEW YORK, HON. ANDREW CUOMO, as Governor of the State of New York, the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and BASIL SEGGOS in his official capacity of Commissioner of the New York State Department of Environmental Conservation,

Defendants-Respondents.

Hon. Gerald W. Connolly, A.J.S.C.

Index No. 902673-20
RJI. 01-20-ST0929

DEFENDANTS-RESPONDENTS' ANSWERING MEMORANDUM OF LAW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

LEGAL FRAMEWORK 1

A. The Bag Waste Reduction Act 1

B. The Plastic Bag Reduction, Reuse and Recycling Act 2

C. The Part 351 Regulations 3

BACKGROUND 4

A. Procedural Background 4

B. Film Plastic Bags Are Not Inherently Safer Than Reusable Bags 5

ARGUMENT 6

A. Legal Standard 6

1. Article 78 Proceedings 6

2. Permanent Injunction 7

I 7

PETITIONERS LACK STANDING 7

A. No Petitioner Has Pleaded Injury-in-Fact 9

1. The Bodega Association, Green Earth, and Frank Marte 9

2. Mike Hassen 11

3. Poly-Pak 13

B. No Petitioner Has Pleaded Injury-in-Fact Within the Statute's Zone of Interests 16

1. The Bodega Association, Green Earth and Mike Hassen 18

2. Poly-Pak 18

II 22

THE BAG WASTE ACT DOES NOT CONFLICT WITH THE BAG RECYCLING ACT 22

III 24

THE BAG ACT IS NOT UNCONSTITUTIONALLY VAGUE 24

IV 25

THE BAG ACT DOES NOT VIOLATE THE ANTI-GIFT CLAUSES 25

V 28

THE BAG REGULATION IS NEITHER ULTRA VIRES NOR ARBITRARY 28

A. The Department's Actions Were Not *Ultra Vires* 28

B. The 10 Mil Requirement for Reusable Plastic Bags is Not Arbitrary 31

C. Petitioners' Expert Affidavit Cannot be Considered in the Article 78 Portion of this Hybrid Proceeding Because it was not Presented to DEC before Issuance of 6 NYCRR Part 351 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

CASES

Aldrich v Pattison,
107 AD2d 258 (2d Dept 1985) 7

Bordeleau v State of New York,
18 NY3d 305 (2011) 26

Boreali v Axelrod,
71 NY2d 1 (1987) 29, 30

Burns v Egan,
117 AD2d 38 (3d Dept 1986) 8

Consumers Union of U.S., Inc. v State of New York,
5 NY3d 327 (2005) 22

Flacke v Onondaga Landfill Sys.,
69 NY2d 355 (1987) 7

Fox v Mohawk & Hudson Riv. Humane Socy.,
165 NY 517 (1901) 21, 27

Garcia v New York City Dept. of Health & Mental Hygiene,
31 NY3d 601 (2018) 28, 29, 31

Kuppersmith v Dowling,
93 NY2d 90 (1999) 32

Laker v Association of Prop. Owners of Sleepy Hollow Lake, Inc.,
172 AD3d 1660 (3d Dept 2019) 15

Lancaster Dev., Inc. v McDonald,
112 AD3d 1260 (3d Dept 2013) 11

Lavalle v Hayden,
98 NY2d 155 (2002) 28

Matter of 10 E. Realty, LLC v Incorporated Vil. of Val. Stream,
12 NY3d 212 (2009) 20

Matter of Abrams v New York City Tr. Auth.,
48 AD2d 69 (1st Dept 1975).....8

Matter of Acevedo v New York State Dept. of Motor Vehs.,
29 NY3d 202 (2017) ..... passim

Matter of Aponte v Olatoye,
30 NY3d 693 (2018) 5, 7, 33

Matter of Associated Gen. Contrs. of Am., N.Y. State Ch. v Roberts,
122 AD2d 406 (3d Dept 1986) 11

Matter of Brunswick Smart Growth, Inc. v Town of Brunswick,
73 AD3d 1267 (3d Dept 2010) 10

Matter of Colella v Board of Assessors of County of Nassau,
95 NY2d 401 (2000) 15, 16, 17

Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health,
85 NY2d 326 (1995) 31, 32

Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation,
71 NY2d 186 (1988) 13, 23

Matter of County of Monroe v Kaladjian,
83 NY2d 185 (1994) 6

Matter of Fichera v New York State Dept. of Envtl. Conservation,
159 AD3d 1493 (4th Dept 2018) 33

Matter of Fleischer v New York State Liq. Auth.,
103 AD3d 581 (1st Dept 2013) 8

Matter of Gym Door Repairs, Inc. v New York City Dept. of Educ.,
112 AD3d 1198 (3d Dept 2013) 11, 12

Matter of Johnson v Goord,
290 AD2d 844 (3d Dept 2002) 32

Matter of Kaplan v Lipkins,
36 Misc 2d 868 (Sup Ct Queens County, 1962), *aff'd*, 19 AD2d 723 (2d Dept 1963) 32

Matter of Kelly v Safir,
96 NY2d 32 (2001) 33

Matter of Kindred v Monroe County,
119 AD3d 1347 (4th Dept 2014) 10, 15

Matter of Lasalle Ambulance v New York State Dept. of Health,
245 AD2d 724 (3d Dept 1997) *lv denied* 91 NY2d 810 (1998) 8, 18, 20

Matter of Mental Hygiene Legal Serv. v Daniels,
33 NY3d 44 (2019) 8

Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency,
76 NY2d 428 (1990) 18

Matter of New York Propane Gas Assn. v New York Dept. of State,
17 AD3d 915 (3d Dept 2005) 18, 19, 20

Matter of Pachuki v Walters,
56 AD2d 677 (3d Dept 1977), *lv denied*, 42 NY2d 808 (1977) 32

Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,
34 NY2d 222 (1974) 6

Matter of Protect The Adirondacks! Inc. v Adirondack Park Agency,
121 AD3d 63 (3d Dept 2014) 7

Matter of Roggemann v Bane,
223 AD2d 854 (3d Dept 1996) 5, 7, 33

Matter of Rose v Albany County Dist. Attorney's Off.,
111 AD3d 1123 (3d Dept 2013) 33

Matter of Smith v Town of Mendon,
4 NY3d 1 (2004) 22

Matter of Troy Ambulance Serv. v New York State Dept. of Health,
260 AD2d 715 (3d Dept 1999) 18, 19

Matter of Village of Canajoharie v Planning Bd. of Town of Florida,
63 AD3d 1498 (3d Dept 2009) 10

Matter of Worley v Kosnick,
121 AD2d 826 (3d Dept 1986) 7

New York State Assn. of Nurse Anesthetists v Novello,
2 NY3d 207 (2004) 8, 10

People v Ohrenstein,
139 Misc 2d 909 (Sup Ct, New York County 1988) 21, 27

Roberts v Health & Hosps. Corp.,
87 AD3d 311 (1st Dept 2011).....8, 9, 16

Rudder v Pataki,
93 NY2d 273 (1999) 10, 16

Saratoga County Chamber of Commerce v Pataki,
275 AD2d 145 (3d Dept 2000) 9

Schultz v State of New York,
84 NY2d 231 (1994) 26

Society of Plastics Indus. v County of Suffolk,
77 NY2d 761 (1991) ..... passim

Stanklus v County of Montgomery,
86 AD2d 908 (3d Dept 1982) 7

State of New York v Della Villa,
186 Misc 2d 490 (Sup Ct, Schenectady County 2000) 24, 28

Tilcon N.Y., Inc. v Town of New Windsor,
172 AD3d 942 (2d Dept 2019) 8, 22

CONSTITUTIONAL PROVISIONS

NY Constitution
art VII § 8 ..... passim
art VII § 8(1) 25, 27, 28
art VIII § 1 .....5, 20, 26, 27

LEGISLATIVE MATERIALS

L.2008, c.641 § 2 3

STATE STATUTES

ECL
§ 1-0101 ..... 3, 28
§ 3-0301 28
§ 3-0301(1)(b) 28
§ 3-0301(2) 3
§ 27-2701(5) ..... passim
§ 27-2701(6) 3
§ 27-2701 - § 27-2713 1
§ 27-2705(5) 3, 30
§ 27-2711 ..... 3, 28
§ 27-2801 5
§ 27-2801(1) 2
§ 27-2801(4) 2, 6, 12, 23
§ 27-2803(1) 2, 30
§ 27-2803(3) 13, 23
§ 27-2805 27
§ 27-2805(1) 2, 21
§ 27-2805(4) 2
§ 27-2805(7) 2, 22, 26, 27
§ 27-2807(1) 2
§ 71-2728 3

STATE REGULATIONS

6 NYCRR
part 351 ..... passim
§ 351-1.1(a) 3
§ 351-1.2(g) 4
§ 351-1.2(h) 4
§ 351-1.2(m) 4
§ 351-1.2(n)(1) 3, 6
§ 351-1.2(n)(2) 3, 6
§ 351-1.2(n)(3) 3, 4, 6
§ 351-1.2(n)(4) 3, 4, 6
§ 351-1.2(o)(1) 4
§ 351-1.2(o)(2) 4
§ 351-2.1(a) 3
§ 351-2.2 4
§ 351-2.4 14

MISCELLANEOUS AUTHORITIES

Merriam-Webster, https://www.merriam-webster.com/dictionary/mil 4

PRELIMINARY STATEMENT

New Yorkers use 23 billion plastic bags annually, for an average of only 12 minutes each, yet the environmental impacts of plastic bags persist for years. Plastic bags do not biodegrade, they litter land, trees, and waterways, are harmful to marine habitats and wildlife, and are costly to manage. To stem the destructive tide of plastic bags, in 2009 the New York State Legislature enacted the Plastic Bag Reduction, Reuse and Recycling Act (Bag Recycling Act), which, in relevant part, requires stores over a certain size to have in-store collection bins for plastic carryout bags for recycling and requires reusable bags to be made available for purchase. *See* ECL §§ 27-2701–27-2713. The Legislature expanded that law in 2015 to include other film plastic. It has now taken the next step by banning the distribution of plastic carryout bags by most retailers and authorizing local governments to adopt a 5-cent fee for paper carryout bags through passage of the Bag Waste Reduction Act.

As set forth below, petitioners have not carried the burden of establishing that any of them has standing. No petitioner has established both a direct, non-speculative injury and an injury that falls within the statute's zone of interests. Likewise, petitioners have not established that they are entitled to a permanent injunction. Nor does any claim have merit. For these reasons, the petition should be dismissed.

LEGAL FRAMEWORK

A. The Bag Waste Reduction Act

The Bag Waste Reduction Act (Bag Waste Act) banned plastic carryout bags provided to consumers by certain retailers to significantly reduce waste and pollution. *See* R0089–R0088 (*FY* 2020 Memo in Support, Part H). Signed by respondent Governor Andrew Cuomo on April 12, 2019 and codified as Title 28 of Article 27 of the Environmental Conservation Law, it took effect on March 1, 2020.

Pursuant to the Bag Waste Act, a retailer required to collect New York State sales tax is no longer permitted to provide plastic carryout bags to customers. *See* ECL § 27-2803(1). Certain plastic bags are exempt, including but not limited to, bags used to wrap meat, fish, poultry and bulk items, such as fruits and vegetables; bags for sliced or prepared foods; trash bags; and carryout bags used by restaurants and pharmacies. *See* ECL § 27-2801(1). A bag is "reusable bag" if it is "(a) made of cloth or other machine washable fabric that has handles; or (b) a durable bag with handles that is specifically designed and manufactured for multiple reuse." *See* ECL § 27-2801(4). Vendors who distribute plastic carryout bags or who prevent a person from using a bag brought for carrying out goods, can be liable, after a warning, for a penalty of two hundred fifty dollars and five hundred dollars for any subsequent violation. *See* ECL § 27-2807(1).

The Bag Waste Act also authorizes any city or county to adopt a local law imposing a 5-cent fee on each paper carryout bag provided to customers. *See* ECL § 27-2805(1). The fee must be reported and paid to the commissioner of taxation and finance; then transferred to the comptroller. *See* ECL § 27-2805(4) and (7). Counties and cities may use up to forty percent of the fee "for the purpose of purchasing and distributing reusable bags with priority given to low- and fixed-income communities." *See* ECL § 27-2805(7). Additional funds are to be deposited in the Environmental Protection Fund. *Id*. At least three municipalities have already enacted such laws, including New York City. *See* May 12, 2020 Affidavit of David Vitale (Vitale Aff) ¶ 36.

B. The Plastic Bag Reduction, Reuse and Recycling Act

The Legislature started addressing plastic bag pollution more than a decade ago. The Bag Recycling Act was enacted in 2008, codified as Title 27 of Article 27 of the ECL, and took effect on January 1, 2009. The legislative findings note the significant environmental impacts of plastic bag production, the intent of the Legislature to encourage the use of reusable bags, and its desire

to reduce the use of plastic carryout bags. L.2008, c.641 § 2 (Legislative Findings). The Act applies to larger stores: those with more than 10,000 square feet, or that are part of a chain with five or more stores of at least 5,000 square feet must provide, among other things, for the collection of plastic carryout bags and film plastic (non-rigid plastic packaging such as dry-cleaning bags) for recycling; they must also make reusable bags available to customers for purchase. *See* ECL §§ 27-2701(6); 27-2705(5). The Bag Recycling Act authorized DEC to promulgate regulations (ECL § 27-2711) and provided for penalties for violations of the act. *See* ECL § 71-2728.

C. The Part 351 Regulations

In tandem with the enactment of the Bag Waste Act, and to implement both the new law and the existing Bag Recycling Act, DEC promulgated regulations that became effective on March 14, 2020. *See* 6 NYCRR Part 351 (Part 351). DEC developed the regulations to clarify terms and ensure that Titles 27 and 28 were implemented in a consistent, effective and efficient manner. The Department acted under both general and specific authority. *See* ECL § 3-0301(2) (empowering DEC to adopt regulations as may be necessary to protect natural resources and the environment and carry out environmental policy of the state as set forth in ECL § 1-0101); ECL § 27-2711 ("The department is authorized to promulgate any rules and regulations necessary to implement the provisions of this title.").

The challenged Part 351 regulations prohibit the distribution of plastic carryout bags (6 NYCRR § 351-2.1[a]), define permissible "reusable" bags, and direct the recycling of plastic carryout bags and film plastic by certain stores. *See* 6 NYCRR § 351-1.1(a). As relevant here, Part 351 defines "reusable bag" as a bag that "(1) is either made of: (i) cloth or other machine washable fabric; or (ii) other non-film plastic washable material" and that includes specifications for handles and durability. *See* 6 NYCRR §§ 351-1.2(n)(1)–(4). A reusable bag must have a

minimum fabric weight of 80 grams per square meter (GSM) or be made of non-film plastic at least 10 mil[1] thick; plastic bags thinner than 10 mil are defined as "film plastic," distribution of which is prohibited. *See* 6 NYCRR §§ 351-1.2(g) and (h) (definition of film plastic); *see also* § 351-1.2(m) (definition of "plastic carryout bag"). A reusable bag must also meet other durability standards, including a lifespan of at least 125 uses and the ability to carry at least 22 lbs. at least 175 feet. *See* 6 NYCRR §§ 351-1.2(n)(3)–(4).

The regulations reiterate that certain stores must make "reusable" bags available for sale (6 NYCRR § 351-2.2). A "store" is a retail establishment that, among other things, "has over 10,000 square feet of retail space" or "is part of a chain . . . [that] operates five or more units of over 5,000 square feet of retail space in New York State under common ownership and management." *See* 6 NYCRR §§ 351-1.2(o)(1)–(2).

BACKGROUND

A. Procedural Background

The Bag Waste Act took effect on March 1, 2020. Regulations implementing the goals of the two statutes were set to take effect on March 14, 2020. On the last business day before the Act was to take effect, plaintiffs-petitioners (petitioners) filed a petition seeking a temporary restraining order[2] and preliminary injunction[3] that would thwart the will of the Legislature by

[1] A "mil" is a unit of length equal to $^{1}/_{1000}$ inch, typically used in measuring thickness. *See* Vitale Aff ¶ 15 and n.3 (citing Merriam-Webster, https://www.merriam-webster.com/dictionary/mil).
[2] Albany County Supreme Court (Mackey, J.) heard argument on the temporary restraining order on February 28, 2020. *See* May 8, 2020 Affirmation of Loretta Simon (Simon Aff.) Ex. A (Transcript). The State defendant-respondents (respondents) consented on the record to take no enforcement action pursuant to the Bag Waste Act until April 1, 2020. The parties agreed to, and the Court ordered, a briefing schedule for petitioners' request for a preliminary injunction. Both dates were later modified by agreement in subsequent letter-orders. *See* Simon Aff. ¶¶ 4- 9, Exhibits. B-D & G.
[3] Petitioners now seek only a permanent injunction. *See* Simon Aff. ¶ 9, Ex. H.

enjoining implementation of the Bag Waste Act and related regulations. *See* ECL § 27-2801 and 6 NYCRR Part 351.

This hybrid proceeding claims that: (1) the Bag Waste Act and the Bag Recycling Act conflict because their definitions of "reusable bag" differ, making retailers unsure which law to follow and violating fairness, notice and due process; (2) the Bag Waste Act is "unconstitutionally void for vagueness;" (3) the Bag Waste Act violates article VII, § 8 and article VIII, § 1 of the NY Constitution by bestowing a special benefit on private corporations that manufacture cloth, fabric and paper bags, and by permitting local governments to charge a 5-cent fee for paper bags, part of which can be spent on the purchase of reusable bags; (4) the regulations implementing both acts, 6 NYCRR Part 351, are *ultra vires*; and (5) are arbitrary and capricious because they require reusable plastic bags to be 10 "mil" thick. *See* Amended Petition (Am. Pet.) ¶¶ 47, 52, 57, 64, 68.

The other facts of this matter are set forth in detail in the accompanying affidavits of DEC's David Vitale and Kayla Montanye.

B. Film Plastic Bags Are Not Inherently Safer Than Reusable Bags

Capitalizing on the COVID-19 pandemic, petitioners assert that reusable bags pose a risk to public health that is not posed by film plastic bags. *See* Am. Pet. ¶¶ 38-40. Notably, however, this claim was not raised before the Department, *Matter of Aponte v Olatoye*, 30 NY3d 693, 700 (2018), and should be disregarded on that ground alone, *Matter of Roggemann v Bane*, 223 AD2d 854, 856-57 (3d Dept 1996). Moreover, as set forth in Point I, no petitioner has alleged a direct injury from the alleged health threat.

Even if the claim had been made to the Department during a comment period, and even if petitioners had standing to raise the claim, the notion is unsupported by credible research. As set forth in the accompanying affidavit of Anthony Dvarskas, Ph.D., the conclusion of the studies

discussed in the affidavit of Ryan Sinclair, Ph.D., including Dr. Sinclair's *own* study, is that reusable bags should be washed regularly to prevent cross-contamination. *See* May 13, 2020 Affidavit of Anthony Dvarskas, Ph.D. (Dvarskas Aff) ¶¶ 5, 11–16. Both the statute and the challenged regulations promote washing reusable bags. *See* ECL § 27-2801(4) (reusable bag must be washable); 6 NYCRR § 351-1.2(n)(1)–(4) (same); *see also* ECL § 27-2701(5) (2009 statute). As Dr. Dvarskas also notes, grocery stores can ask customers who bring their own bags to pack them themselves, satisfying any potential health risks posed to store employees by even unwashed reusable bags. *See* Dvarskas Aff. ¶ 16. Dr. Sinclair does not even imply that reusable bags pose a risk to others shopping in a store, which would be unlikely. *Id*. ¶¶ 16-17. Indeed, no government agency has recommended a ban on reusable bags, instead recommending only common-sense precautions including washing the bags and frequent hand washing. Petitioners have cited no credible scientific support, or government mandates, for their attempt to stoke public fear.

ARGUMENT

A. Legal Standard

1. Article 78 Proceedings

Petitioners' non-constitutional claims must be reviewed to determine whether respondents' actions had a rational basis, or whether they were "without sound basis in reason and . . . [taken] without regard to the facts." *See Matter of County of Monroe v Kaladjian*, 83 NY2d 185, 189 (1994)*; see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). Where a proceeding seeks judicial review of an administrative action, particularly in an environmental matter involving an agency's expertise and judgment, a court may not substitute its judgment for that of the agency and, unless it is arbitrary and capricious, the determination must be upheld if

there is a rational basis. *See Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 362-363 (1987) (upholding DEC determination on landfill closure, noting legislative delegation of authority to DEC for regulation of landfills). "[T]he fact that a different conclusion could have been reasonably reached is not sufficient ground to set aside the determination." *See Matter of Protect The Adirondacks! Inc. v Adirondack Park Agency*, 121 AD3d 63, 70 (3d Dept 2014) (affirming Adirondack Park Agency permit for conceptual approval of a development project to be located on private land in the park). Courts give considerable latitude to agencies for the exercise of discretion, particularly for the assessment of environmental consequences of a project "which frequently involves technical and scientific issues more properly entrusted to the expertise of an agency, rather than to a court of general jurisdiction." *Aldrich v Pattison*, 107 AD2d 258, 267–269 (2d Dept 1985). A petitioner may not raise new issues in an article 78 proceeding that were not raised before the administrative body. *See Aponte*, 30 NY3d 693; *see also Roggemann,* 223 AD2d at 856–57.

2. Permanent Injunction

Injunctive relief, a "drastic remedy," does not lie where other remedies are inadequate or in the absence of irreparable injury. *See Matter of Worley v Kosnick*, 121 AD2d 826, 828 (3d Dept 1986) (denying permanent injunction where there was no proof of irreparable injury and "no allegations in the petition concerning the inadequacy of other remedies"); *see also Stanklus v County of Montgomery*, 86 AD2d 908 (3d Dept 1982) (irreparable injury and lack of legal remedy are prerequisites).

I

PETITIONERS LACK STANDING

A plaintiff seeking to challenge governmental action must establish its standing. Because only one affected by State action can challenge it, *Matter of Acevedo v New York State Dept. of*

Motor Vehs., 29 NY3d 202, 218 (2017), a plaintiff must show "injury in fact." Only an injury that is "more than conjectural" can help confer standing. *Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318 (1st Dept 2011), quoting *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 (2004). Regardless of how a claim is pleaded, as a statutory or constitutional violation, a petitioner must show injury. *See Novello*, 2 NY3d at 211; *Burns v Egan*, 117 AD2d 38, 43 (3d Dept 1986).

Additionally, "a party must show that the injury suffered is personal to the party, i.e., 'distinct from that of the general public.'" *Roberts*, 87 AD3d at 318 (citation omitted). "[A] petitioner making a general attack on legislative or administrative action or inaction must demonstrate special damages distinct from that suffered by the public at large." *See Matter of Abrams v New York City Tr. Auth.*, 48 AD2d 69, 70 (1st Dept 1975). A petitioner who has no more interest or right at stake than other citizens lacks standing. *See Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 (1991). Nor, generally, can a petitioner sue to enforce the rights of third parties. *See Matter of Fleischer v New York State Liq. Auth.*, 103 AD3d 581, 583 (1st Dept 2013).

A second prong of the test requires that the injury "'fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.'" *See Roberts*, 87 AD3d at 318 (*quoting Novello*, 2 NY3d at 211); *see also Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 (2019); *Society of Plastics*, 77 NY2d at 773; *Tilcon N.Y., Inc. v Town of New Windsor*, 172 AD3d 942, 945 (2d Dept 2019). That a claim may be pleaded as arising under the Constitution does not relieve petitioner of its burden to show that its claimed injury falls within the zone of interests of the relevant constitutional protection. *Compare* Poly-Pak Reply MOL at 15 *with Novello*, 2 NY3d at 211; *Matter of Lasalle Ambulance*

v New York State Dept. of Health, 245 AD2d 724, 724 (3d Dept 1997) (in addition to injury in fact, petitioner must show "that the interest or injury asserted falls within the zone of interest to be protected by the statute *or constitutional provision*") (emphasis added); *Saratoga County Chamber of Commerce v Pataki*, 275 AD2d 145, 154 (3d Dept 2000).

Finally, at least one petitioner must have standing to allege each claim raised. *See Matter of Acevedo*, 29 NY3d at 218 (because each petitioner had standing to challenge a different section of the challenged regulations, "[c]ollectively . . . petitioners have standing to challenge the most salient provisions of the Regulations implicated by these appeals"). In every instance, the petitioner bears the burden of establishing its standing to bring any claim it advances. *See Society of Plastics*, 77 NY2d at 769. "Here," as in *Roberts*, "petitioners fail to satisfy both the 'injury in fact' and 'zone of interests' prongs of the test to establish standing." 87 AD3d at 319.

A. No Petitioner Has Pleaded Injury-in-Fact

With their amended petition, petitioners included for the first time several affidavits that they claim establish injury-in-fact. They do not.

1. The Bodega Association, Green Earth, and Frank Marte

The Bodega Association, one of its members (Green Earth) and Frank Marte, who owns Green Earth and serves as an officer of the Bodega Association, assert that they will be injured by the alleged inconsistency between the Bag Waste Act and the Bag Recycling Act. They claim broadly, and vaguely, that "some retailers" have been unable to obtain paper bags to distribute to customers, that some producers of paper bags have predicted a long-term shortage, and they point to a general inability to obtain any kind of product to give to the bodegas' customers. *See* Marte Aff. ¶¶ 8-9. This vague and conclusory assertion of harm does not establish injury to Green Earth; without injury to Green Earth, neither Marte nor the Bodega Association has standing.

To establish standing, an organizational plaintiff like the Bodega Association must show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members. *See Novello*, 2 NY3d at 211. The Bodega Association's standing depends upon the standing of its member, Green Earth. Further, the Bodega Association may complain only of harm flowing from a statute or regulation to which it is subject. The Bodega Association does not claim to be subject to the Bag Recycling Act, and thus cannot raise any challenge premised on a conflict between that law and the Bag Waste Act, or on any alleged favoritism of certain manufacturers. The Bodega Association may not pursue the first or third cause of action.

Mr. Marte asserts no injury whatsoever to Green Earth. *See* Marte Aff. He describes no occasion on which he was unable to obtain bags for his store. Likewise, he does not say that he was told by paper bag producers that they had no inventory for him. His vague statements about some manufacturers and some retailers do not even *suggest* injury to Green Earth.[4] Although injuries need not be quantified, they must be more than conjectural or speculative. *See Novello*, 2 NY3d at 211–213; *Matter of Kindred v Monroe County*, 119 AD3d 1347, 1347 (4th Dept 2014); *Matter of Brunswick Smart Growth, Inc. v Town of Brunswick*, 73 AD3d 1267, 1268–1269 (3d Dept 2010); *Matter of Village of Canajoharie v Planning Bd. of Town of Florida*, 63 AD3d

[4] Moreover, Mr. Marte does not describe any communication from his customers suggesting that the statute is causing them distress. It is possible, indeed likely, that they are adjusting to the need to bring their own bags. *See* Montanye Aff. ¶¶ 40-42. Absent injury to Green Earth's customers, there can be no injury to the bodegas. Notably, no consumer--group or individual--has joined this lawsuit. The harm the Bodega Association forecasts is the sort of "'tenuous' and 'ephemeral' harm [that] is insufficient to trigger judicial intervention." *See Rudder v Pataki*, 93 NY2d 273, 279 (1999) (organization representing social workers lacked standing to challenge requirement that certain jobs be held by social workers with advanced degree because there was no proof of injury to individual social workers even though as a group their employment prospects were diminished).

1498, 1501–1502 (3d Dept 2009). The Bodega Association's claim that it may be punished because of its own misinterpretation of the relationship between the Bag Waste Act and the Bag Recycling Act also cannot create standing. As the Department has explained, the two statutes are not inconsistent and when read together, allow reusable bags of cloth, or other machine washable fabric, with handles, as well as durable plastic with handles designed and manufactured for multiple reuse. *See* ECL §§ 27-2701(5); 27-2801(4). Petitioners cannot manufacture standing by feigning confusion.

Petitioners disagree with the Legislature's policy choice. But simple disagreement with a legislative policy choice does not grant standing. *See Matter of Gym Door Repairs, Inc. v New York City Dept. of Educ.*, 112 AD3d 1198, 1199 (3d Dept 2013) ("We agree with Supreme Court that petitioners are essentially asserting a general challenge to respondents' administration of the relevant statute and regulation."); *Matter of Associated Gen. Contrs. of Am., N.Y. State Ch. v Roberts*, 122 AD2d 406, 407 (3d Dept 1986)." Having failed to establish any injury to Green Earth, the Bodega Association's claim to standing also fails. *See Lancaster Dev., Inc. v McDonald*, 112 AD3d 1260, 1263 (3d Dept 2013).

2. Mike Hassen

Petitioner Mike Hassen owns and operates six supermarkets in New York that he claims are subject to both the Bag Waste Act and the Bag Recycling Act. *See* Am. Pet. ¶ 9. Like Mr. Marte, Mr. Hassen avers in broad terms that "industry's supply is far outstripped by the demand for [paper bags]." *See* Hassen Aff. ¶ 7. He does not, however, describe how he knows that demand exceeds supply: he does not say that he has been unable to obtain paper bags or even that he has had to go outside his normal supply chain. Instead, Mr. Hassen says merely that he and other retailers are "*at risk* of being unable to comply with the Bag Act and Bag regulation and potential local ordinances." *Id.* He speculates that it might take "years before the supply of

paper bags can 'catch up.'" *Id.* Mr. Hassen also does not elaborate on his claim that the supply chain of all other reusable bags is foreign and backlogged. *Id.* These general statements may or may not be true, but even if true they do not establish harm to Mr. Hassen's six New York stores. *See Gym Door Repairs, Inc.*, 112 AD3d at 1199 (the "asserted injuries are too speculative and conjectural to satisfy the injury-in-fact requirement").

As the only petitioner arguably subject to both the Bag Waste Act and the Bag Recycling Act, Mike Hassen claims standing to raise the first cause of action (that the Bag Waste Act conflicts with the Bag Recycling Act). *See* Am. Pet. ¶¶ 43-48.[5] Mr. Hassen allegedly fears that he will have to speculate as to what type of reusable bags his supermarkets may sell, risking enforcement pursuant to the two statutes or the regulations. *See* Hassen Aff. ¶ 9. Mr. Hassen's fears are manufactured: the language of the two statutes, read together, allow reusable bags to be made of fabric, cloth or other machine washable fabric *or* durable plastic. *See* ECL §§ 27-2701(5); 27-2801(4); Montanye Aff. ¶¶ 40–43. No more clarity is required. And to the extent anyone is confused, DEC promulgated regulations intended to clarify the meaning of terms like durability. *See* 6 NYCRR Part 351.

While the Bag Waste Act definition of a reusable bag omits the word "plastic," a reusable plastic bag may still be offered for sale pursuant to the Bag Recycling Act (*See* ECL § 27-

[5] As petitioners apparently concede, Green Earth is not subject to the Bag Recycling Act because of its size and ownership structure. *See* Reply MOL at 17 (arguing only that Mike Hassen has standing to raise conflict of laws claim). Because only a regulation or statute to which a petitioner is subject can inflict compensable injury, the company lacks standing to challenge any regulation or statute to which it is not subject. *See Matter of Acevedo,* 29 NY3d at 218 (drivers had standing to challenge only the portion of the challenged law or regulations that applied to them); *id.* (Plainly, petitioners will not incur any harm—let alone any direct or immediate harm—as a result of those provisions of the Regulations that are not applicable to their respective relicensing applications").

2701[5]), because the Bag Waste Act specifies "Nothing in this section shall be deemed to exempt the provisions set forth in title 27 relating to at store recycling." *See* ECL § 27-2803(3). Further, the challenged regulations make clear how the two statutes work together. *See* 6 NYCRR Part 351; *see also Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation*, 71 NY2d 186, 189, 195 (1988) (DEC acted within its statutory authority in promulgating a petroleum bulk storage code, where two statutes did not revoke DEC's otherwise broad power to regulate in that area). The *Consolidated Edison* court noted that "Repeal or modification of legislation by implication is not favored in the law." *Id.* at 195. Here, the Bag Waste Act specified that the provisions of the Bag Recycling Act (title 27) remain in effect; and it did not repeal the earlier definition of reusable bags.

Generally, a statute is not deemed impliedly modified by a later enactment "unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted." *Id.* at 195 (citations omitted). "These principles apply with particular force to statutes relating to the same subject matter, which must be read together and applied harmoniously and consistently" (citations omitted). *Id.* at 195. As in *Consolidated Edison*, the Bag Waste Act and the Bag Recycling Act relate to the same subject matter and are not in such conflict that they cannot both be given effect, that is: reusable bags can include durable plastic bags. Mr. Hassen has failed to plead any injury flowing from the supposed conflict between the statutes.

3. Poly-Pak

Poly-Pak also lacks standing. Poly-Pak makes plastic products, including plastic bags that it admits are not "reusable" within the meaning of the challenged regulations. *See* Am. Pet. ¶ 5. To carry its burden of showing harm that is more than conjectural, the company proffers the affidavit of its Vice President of Sales and Marketing, Ken Trottere, who claims only that Poly-

Pak "will be irreparably harmed by its inability to provide one of its core product offerings to . . . an important market . . . New York retailers." *Id.* ¶ 17.

Because an alleged injury must derive from a statute or regulation to which the petitioner is subject, Poly-Pak may not raise any statutory challenge to the Bag Waste Act or the regulation.[6] The company is not at risk of enforcement. It cannot raise a conflict of laws question (first cause of action), vagueness claim (second cause of action), claim that the Department exceeded its authority in enacting the regulation (fourth cause of action), or a challenge based on alleged irrationality or arbitrariness (fifth cause of action). The only injury that Poly-Pak, which is not subject to the challenged regulatory scheme, could conceivably incur is that the Legislature is unconstitutionally favoring other manufacturers of bags (third cause of action). But Poly-Pak has failed to plead injury-in-fact.

Broadly, like Mr. Hassen, Mr. Trottere does not establish actual harm. He offers no detail about reduced sales or the percentage of the company's business that would be impacted by the ban. *See* Am. Pet. Ex. C (Trottere Aff.). He does not explain what percentage of Poly-Pak's overall sales is to New York retailers or what percentage of those sales are from film plastic bags. Mr. Trottere describes no loss in business as retailers prepared for the ban, no inquiries from concerned retailers, no evidence of any impact at all. And although he claims that the company's very future is at risk, he describes no steps it has taken to comply with the new law and regulation. Instead he merely opines that compliance might not be possible and, in any event, would be too expensive. *See* Trottere Aff. ¶ 8. Poly-Pak's vague, general and conclusory claim that the ban's impacts may be "severe" and "potentially" threatening is insufficient to establish

[6] Although Poly-Pak is subject to 6 NYCRR § 351-2.4, that regulation implements the 2009 Bag Recycling Act, which is not challenged here.

standing. *Compare Laker v Association of Prop. Owners of Sleepy Hollow Lake, Inc.*, 172 AD3d 1660 (3d Dept 2019) (affirming grant of preliminary injunction upon showing of specific harm likely to flow from ban on short term rentals by homeowners' association); *Matter of Kindred,* 119 AD3d at 1348. As set forth below, Poly-Pak also cannot establish that its alleged injuries fall within the protection of the constitutional provisions to which the company cites.

None of the petitioners has alleged specific, nonconjectural harms. None has explained that its business has been hurt by the Bag Waste Act, that it has attempted to comply, or even that it has a reasonable expectation of impending harm based on experiences it has had in trying to comply with the challenged statute. Indeed, neither the Bodega Association nor Mr. Hassen explains how they, as opposed to their customers, will be harmed by the Bag Act's prohibition on the distribution of disposable film plastic bags. They imply that they will lose sales and customer goodwill because of the Act, citing no evidence, anecdotal or other, that customers will, in fact, blame retailers for any inconvenience. Even if they had, petitioners have not even tried to plead that they will suffer "special damage, difference in kind and degree from the community generally." *See Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 410 (2000). But because all New York retailers are similarly situated—unable to distribute disposable film plastic bags—it is hard to understand how they will be injured by the State's effort to reduce environmental harm. *Id.* (adverse real property tax impact is "an injury indistinguishable from that incurred by all other Nassau County real property owners"). Nor do the retailers account for the fact that thousands, perhaps millions, of New Yorkers have already adjusted their behavior and carry reusable bags to the store. Nothing in the petitioners' affidavits shows harm, or special harm, to the association, its members, Mr. Hassen, or Poly-Pak.

Similarly, the petitioners vaguely claim that reusable bags pose a public health risk. They do not specify to whom. No store employee is a petitioner, nor do petitioners assert that any petitioner is at risk from bagging groceries. Petitioners have asserted no direct injury from reusable bags. Further, stores can protect their employees from any potential harm by taking the simple measure of asking customers to bag their own groceries in their reusable bags. *See* Dvarskas Aff. ¶ 16.

"Without an allegation of injury-in-fact, plaintiffs' assertions are little more than an attempt to legislate through the courts." *Rudder*, 93 NY2d at 280 ("Grievances generalized to the degree that they become broad policy complaints . . . are best left to the elected branches.") The petition should be dismissed because the petitioners have not pleaded specific, non-tenuous injuries-in-fact.

B. No Petitioner Has Pleaded Injury-in-Fact Within the Statute's Zone of Interests

Even if petitioners had pleaded actual injuries from the Bag Waste Act or the accompanying regulations, they have not satisfied the second part of the standing test. The "'zone of interests' test permits the court to ascertain the petitioner's status without reaching the merits of the litigation. It also ensures that a group or individual 'whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes.'" *Roberts*, 87 AD3d at 318–19 (*quoting Society of Plastics Indus.*, 77 NY2d at 774).

To challenge government action, the alleged injury-in-fact must fall within the concerns, or zone of interests, "sought to be promoted or protected by the statutory provision under which the agency has acted." *Matter of Colella*, 95 NY2d 401, 409–410. Applying *Society of Plastics Indus.*, the Court of Appeals again found a petitioner's asserted injuries unrelated to the aims of the relevant statute. In *Colella*, neighbors of a religious corporation sought to challenge its real

property tax exemption. They claimed that the religious corporation lost its entitlement to the exemption because it had allegedly violated a village zoning ordinance and failed to obtain authority to conduct activities in New York in violation of the Business Corporation Law and the Not-for-Profit-Corporation Law. The neighbors' injury, the small increase in their taxes resulting from the religious corporation's exemption from paying real property taxes, was insufficient to confer general taxpayer standing or "special damage, different in kind and degree from the community generally." *Id.* at 410. It also was not within the zone of interests of the real property tax law section pursuant to which the tax exemption was granted. *Id.* Further, said the Court, compliance with the corporation laws petitioners cited was also "not within the zone of interest of" the real property tax law. *Id.* Petitioners cannot satisfy the second prong of the standing test either.

The Legislature intended its passage of the Bag Waste Act to address "the overwhelming amount of plastic waste." *See* Simon Aff., Ex. E (March 31, 2019 Assembly debate at 41 [Assemblymember Helene Weinstein]). The Legislature acted on the recommendation of a State task force "because plastic's really bad for the environment. There are billions of plastic bags that end up—that are nonbiodegradable that end up in our atmosphere, inside marine animals, in the ocean, on our beaches and on our streets." *See* Simon Aff. Ex. F (March 31, 2019 Senate debate at 2281 [State Senate Sponsor Sen. Todd Kaminsky]); Montanye Aff. ¶¶ 7–9. In other words, much like the zone of interests protected by the State Environmental Quality Review Act, the Bag Waste Act is intended to protect the environment. Only injury-in-fact that is environmental in nature can satisfy the zone of interest test and help confer standing. *See, e.g., Society of Plastics Indus.* 77 NY2d at 769 (only environmental injuries fall within SEQRA's

zone of interests); *Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428 (1990) (same).

1. The Bodega Association, Green Earth and Mike Hassen

The retailers do not claim that anything in the Bag Waste Act or the challenged regulations suggests an intention to protect the corporate goodwill allegedly bestowed upon them by their customers. None of their asserted injuries falls within the concerns that motivated the Legislature when it passed the Bag Waste Act.

2. Poly-Pak

Nor does Poly-Pak claim that the profits of plastic bag manufacturers motivated or concerned the Legislature. Poly-Pak, too, has failed to identify injury-in-fact within the zone of interests of the Bag Waste Act or the challenged regulations and it therefore lacks standing. *Matter of Troy Ambulance Serv. v New York State Dept. of Health*, 260 AD2d 715, 716 (3d Dept 1999) (competitor lacked standing because "the explicit purpose of Public Health Law article 30 is to protect the public health, safety and welfare and 'not to shield ambulance services from competition'") (*quoting Matter of Lasalle Ambulance v New York State Dept. of Health*, 245 AD2d 724, 725, *lv denied* 91 NY2d 810 [1998]).

Matter of New York Propane Gas Assn. v New York Dept. of State is instructive. In that case a trade association representing several companies "engaged in the storage, delivery and handling of liquefied petroleum gas" challenged an updated building code that restricted the indoor use and storage of products handled by the companies. 17 AD3d 915, 915 (3d Dept 2005). The court found that even though one company had established injury, it lacked standing because that injury did not fall within the zone of interests of the statute pursuant to which the Department of State had acted. The Court observed that the "statutory scheme [was] silent on economic costs that may be incurred by purveyors of flammable materials," and noted that it was

to be expected that compliance with the new code "would necessarily impose some economic harm on entities such as [petitioner]." *Id.* at 918. The Court also rejected the company's claim that it was injured by the challenged building code to the extent that it "place[d the company] at a competitive disadvantage because other gases are less stringently regulated than [liquefied petroleum gas] under the UFC." *Id.* The Court concluded that the alleged economic injuries did not "fall within the zone of interests sought to be promoted or protected by the" challenged scheme. *Id.* The same is true here: Poly-Pak's economic interest is not within the Act's zone of interests.

In an effort to evade the zone of interests requirement, Poly-Pak claims that its alleged injury "is not increased competition" but rather the threat of being shut out of a market, having to lay off employees, retool its facilities and shut down production lines. Poly-Pak Reply MOL at 16 & n.7. Even if Poly-Pak had adduced any evidence that such injuries were occurring or were likely, which it did not, its alleged injuries are still economic in nature. Just like the petitioner ambulance company in *Troy Ambulance,* what Mr. Trottere—the company's Vice President of Sales and Marketing—describes are all consequences of competition. *See* Trottere Aff. ¶¶ 7–8 (retooling the company's equipment to make compliant plastic bags, if possible, would be "extraordinarily costly," threatening employment and the company's viability). In *Troy Ambulance,* a competitor argued that it had standing to challenge the license issued by the State to another ambulance provider. The petitioner argued that its alleged injury was not competitive but instead employment-based: it claimed it was trying to preserve employment opportunities for ambulance staff. *See* Trottere Aff. ¶ 7 (Bag Act could imperil the company and endanger its employees). The Third Department described that argument as a "distinction without a difference." 260 AD2d at 717. As in *New York Propane Gas Assn.*, Poly-Pak's interest in

protecting its way of doing business is simply not an interest protected by the challenged statutory scheme. 17 AD3d at 918.

Second, even if it were subject to the Bag Waste Act, which it is not, and even if its alleged harms were more than conjectural, which they are not, Poly-Pak has identified no injury-in-fact protected by the New York Constitution. A petitioner making a constitutional claim must also allege an injury that is "protected by the statute or constitutional guarantee." *See Matter of Lasalle Ambulance*, 245 AD2d at 724 (citing *Society of Plastics Indus.*, 77 NY2d at 773).

Poly-Pak identifies two injuries to its competitive interests that the company claims are protected by the New York Constitution. In violation of NY Constitution, article VII, § 8, and article VIII, § 1, petitioners say the statute and regulations: (1) "grant . . . a boon to manufacturers of cloth, fabric, and paper bags, while denying similar treatment to makers of reusable plastic bags;" and (2) "permit . . . local governments to impose a $0.05 per bag tax on the sale [of] paper bags, which moneys are remitted to the state, which, in turn, returns a portion of them to municipalities to be spent on the purchase reusable bags from sources of the municipalities' choosing." Am. Pet. ¶¶ 56-57. In sum, Poly-Pak says, the Bag Waste Act constitutes an unconstitutional exaction of money from private citizens by compelling them to purchase items from only certain, favored manufacturers, while bestowing state and local government money on the purchase of particular favored reusable bags. Am. Pet. ¶ 58.

"The Gift or Loan Clause provides that '[n]o county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking' (NY Const, art VIII, § 1)." *Matter of 10 E. Realty, LLC v Incorporated Vil. of Val. Stream*, 12 NY3d 212, 215 (2009). A similar proscription forbids the State from giving or loaning money "to or in aid of any private corporation or association, or

private undertaking." NY Constitution article VII, § 8. Petitioners have not pleaded, and could not show, that the Bag Waste Act is a gift of money or aid to any private entity or undertaking. Instead, petitioners claim that some amorphous group of manufacturers—those who make fabric or paper bags—is favored by the challenged legislation. *See* Am. Pet. ¶ 56. Nothing suggests that the New York State Legislature cannot ban a particular material, film plastic in this case, for a specific use, disposable bags, without running afoul of the Constitution's anti-gift clauses.

The cases upon which petitioners rely are inapposite. In *People v Ohrenstein*, 139 Misc 2d 909, 931 (Sup Ct, New York County 1988), the question was whether elected officials could constitutionally use public funds to pay campaign staff, rather than staff for their Senate offices. In *Fox v Mohawk & Hudson Riv. Humane Socy.*, 165 NY 517 (1901), the Court of Appeals found unconstitutional the challenged law, which required dog owners to pay a fee to a private humane society for use in caring for abandoned animals as well as "for its own purposes." 165 NY at 520. Like the appellate division, the Court concluded that the law improperly exacted money from one citizen, appropriating it to another for its private use. The Court observed that "a very different question" might have been presented if the statute prescribed action intended to effectuate the statute's purpose: animal relief. *Id.* at 526.

Plainly there is no criminal impropriety at issue here, as there was in *Ohrenstein*. The statute does not authorize payment of public funds for nefarious purposes. Nor, as in *Fox,* does the challenged statute (1) exact money, (2) for distribution to a "private corporation or association, or private undertaking" for (3) private, discretionary purposes. First, the Bag Waste Act exacts nothing. The statute simply authorizes municipalities to adopt local laws that impose a 5-cent fee on any paper bag provided to a customer. *See* ECL § 27-2805(1). No municipality is

compelled to adopt such an ordinance; it is optional. Nor is a nickel fee "exacted" from any customer.[7] Customers are free to decline paper bags and use their own bags, plastic or otherwise.

Second, the law does not direct the payment of the nickel fee to any private corporation, association or undertaking. To the contrary, and third, the statute provides that it will be used by counties and cities "for the purpose of purchasing and distributing reusable bags with priority given to low-and fixed-income communities" with any overage deposited in the state Environmental Protection Fund. ECL § 27-2805(7). Neither *Fox* nor *Ohrenstein* advances petitioners' cause.

No party has established that it has or will suffer a non-speculative injury. Nor has any party demonstrated that its interest is within the zone of interests of the challenged regulatory scheme. "[E]ven the fact that 'an issue may be one of vital public concern does not entitle a party to standing.'" *See Tilcon N. Y., Inc.*, 172 AD3d at 945. Because petitioners have not carried the heavy burden of showing their standing, the Court should deny the petition.

II

THE BAG WASTE ACT DOES NOT CONFLICT WITH THE BAG RECYCLING ACT

Petitioners allege that there is a conflict of laws between the Bag Waste Act and the Bag Recycling Act definitions of "reusable bag" because, they opine, the former forbids plastic reusable bags, and the latter allows them. *See* Am. Pet. ¶¶ 42–43; 46. Petitioners are mistaken. Read together, the statutes allow both plastic and non-plastic reusable bags. In addition, the Bag Waste Act is clear that it does not pre-empt the Bag Recycling Act, and therefore the statutes

[7] New York courts recognize "exactions" only as "'land-use decisions conditioning approval of development on the *dedication of property to public use.*'" *Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 354 (2005) *(quoting Matter of Smith v Town of Mendon*, 4 NY3d 1, 10 [2004]). The Court declined the invitation of a dissenting justice to apply exactions analysis outside the context of real property. 5 NY3d at 355 & n.22.

must be harmonized to allow both types of bags. Accordingly, operators of certain large stores and chain stores, must make reusable bags available for sale made of fabric, cloth or other machine washable fabric or durable plastic. *See* ECL §§ 27-2701(5); 27-2801(4).

While the Bag Waste Act definition of a reusable bag omits the word "plastic," a reusable *plastic* bag may still be offered for sale pursuant to the Bag Recycling Act (*See* ECL § 27-2701[5]). Because the Bag Waste Act specifies "Nothing in this section shall be deemed to exempt the provisions set forth in title 27 relating to at store recycling" (s*ee* ECL § 27-2803[3]), petitioners cannot presume that the legislature modified the earlier statute; rather, the two statutes must be harmonized. *See Consolidated Edison*, 71 NY2d at 189,195 (finding the State Department of Environmental Conservation [DEC] acted within its statutory authority in promulgating a petroleum bulk storage code, where two statutes did not revoke DEC's otherwise broad power to regulate in that area). The *Consolidated Edison* court noted that "Repeal or modification of legislation by implication is not favored in the law." *Id.* at 195. Here, the Bag Waste Act specified that the provisions of the Bag Recycling Act (title 27) remain in effect; and it did not repeal the earlier definition of reusable bags.

> Generally, a statute is not deemed impliedly modified by a later enactment "unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted" (citations omitted) "These principles apply with particular force to statutes relating to the same subject matter, which must be read together and applied harmoniously and consistently" (citations omitted).

Id. at 195. The statutes at issue here, as in *Consolidated Edison*, relate to the same subject matter and are not in such conflict that they cannot both be given effect, that is: reusable bags can include durable plastic bags.

III

THE BAG ACT IS NOT UNCONSTITUTIONALLY VAGUE

Petitioners allege that the Bag Waste Act is unconstitutionally vague and deprives retailers of notice and due process and is therefore void. *See* Am. Pet. ¶ 53. Notably, petitioners cite no caselaw in support of their position. *See* undated Mem. of Law in Supp. of a Temporary Restraining Order and Preliminary Inj. in Favor of Plaintiffs-Petitioners (Pets. MOL) at 12.

A mere claim that a statute is unconstitutionally vague does not establish a cause of action. In a case involving DEC solid waste law and regulations, it was alleged that certain definitions were so vague that they should be declared unconstitutional because they deprived the defendants of the "appropriate notice of the proscribed conduct." *See State of New York v Della Villa*, 186 Misc 2d 490, 499 (Sup Ct, Schenectady County 2000). The court found defendants' argument unpersuasive, noting:

> It is beyond question that when the constitutionality of a statute or regulation is raised several presumptions arise. The first is the presumption of validity; the second is that the burden of demonstrating unconstitutionality is with the challenge; and the third is that, where possible, the Court will uphold the statute's or regulation's constitutionality (citations omitted).

Id. at 499.

The *Della Villa* defendants argued that neither the statute nor the regulations in question defined the term "environment" and the term "disposed of" and, as a result, were so vague and over broad they should be declared unconstitutional. *Id.* The *Della Villa* court rejected the argument that the statute and regulations were unconstitutional. The Court found that defendants failed to show that the DEC regulations at issue were "so vague or overbroad as to have denied these Defendants appropriate notice of the proscribed conduct…" *Id.* As *in Della Villa*, petitioners' broad assertion of unconstitutional vagueness fails to show how they were denied

appropriate notice of proscribed conduct required by the Bag Waste Act. As previously stated, stores under 10,000 square feet (and chain stores with fewer than 5,000 square feet) are not even required to make reusable bags available for sale, so claims that they are unsure whether their "conduct is forbidden by the statute" are of no matter. *See* Am. Pet. ¶ 51. There is no proscribed conduct required of manufacturers, like petitioner Poly-Pak, pursuant to the Bag Waste Act, as it applies to retail stores. Accordingly, petitioners' claim that the statute is void for vagueness is without support in fact or law and petitioners have failed to meet their heavy burden of proof.

IV

THE BAG ACT DOES NOT VIOLATE THE ANTI-GIFT CLAUSES

Next, petitioners seek a declaration that the Bag Waste Act violates New York Constitution article VII, § 8, which prohibits use of state funds to aid a private undertaking or entity. *See* NY Const, art VII § 8. Specifically, the petition alleges that the Bag Waste Act violates the constitution by "granting a boon to manufacturers of cloth, fabric, and paper bags, while denying similar treatment to makers of reusable plastic bags" and by permitting local governments to charge 5 cents on the sale of paper bags. *See* Am. Pet. ¶¶ 56–57. Petitioners have failed to state a cause of action.

> The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to in aid of any individual, or public or private corporation or association or private undertaking . . .

NY Const, art VII, § 8(1).

The Bag Waste Act does not authorize money or loans to any private corporation or association, nor does the petition allege that it does. Rather, petitioners allege that it is unconstitutional to allow a municipality to use a portion of the five cents collected for the purchase of reusable bags, because "it bestows state and local government money on the

purchase of particular favored reusable bags." *See* Am. Pet. ¶ 58. Accordingly, their claim is wholly without merit. The 5-cent fee is not given to a private corporation. It is given, in part, to a municipality for the purchase and distribution of reusable bags to low-income communities, and for deposit in the environmental protection fund. *See* ECL § 27-2805(7).

Petitioners bear a heavy burden to show that a statute is unconstitutional. Legislative enactments "enjoy a strong presumption of constitutionality . . . we give deference to public funding programs essential to addressing the problems of modern life, unless such programs are 'patently illegal.'" (citation omitted). *See Schultz v State of New York*, 84 NY2d 231, 241 (1994). The Bag Waste Act is a legislative response to the overuse of plastics, a well-known problem of modern life.

Furthermore, "unconstitutionality must be proven beyond a reasonable doubt." *See Bordeleau v State of New York*, 18 NY3d 305, 313 (2011). In *Bordeleau*, taxpayers challenged, among other things, the constitutionality, pursuant to article VII, § 8,[8] of appropriations to the State Department of Agriculture and Markets for use by not-for-profits to promote New York-grown agriculture products. *Id.* at 317. The *Bordeleau* Court found that plaintiff's burden was "exceedingly strong" because they challenged "public expenditures designed in the public interest." *Id.* at 313. The Court dismissed the claim and found that the constitutional prohibition against gifting or loaning of money of the State was valid where it had a predominant public purpose. *Id.* at 317.

Here, as in *Bordeleau*, the Bag Waste Act has a predominant public purpose, that is, to reduce the use of plastic bags that pollute our lands, waterways and wildlife. Furthermore, the

[8] The *Bordeleau* court held that the same standard applied to challenges pursuant to article VII, § 8 and those pursuant to article VIII, § 1. 18 NY3d at 318.

Bag Waste Act directs that a portion of the 5-cent fee collected be used "for the purpose of purchasing and distributing reusable bags, with priority given to low-income communities" and any remaining amounts of money are to be deposited in the environmental protection fund. *See* ECL § 27-2805(7). These provisions are consistent with article VII, § 8 of the constitution which provides "nothing in this constitution shall prevent the legislature from providing aid, care and support of the needy directly or through subdivisions of the state . . ." *See* NY Const, art VII, § 8(1).

Petitioners cite two cases in support of their claim in the third cause of action involving article VII, § 8, and article VIII, § 1 of the NY Constitution. The first involved a constitutional challenge to a dog licensing statute that required payment of a fee by dog owners to a humane society. *See Fox*, 165 NY 517. There, the court ruled that the payment to a private society violated art VII of the constitution. *Id.* at 522. *Fox v Mohawk* is unavailing because the Bag Waste Act does not authorize payment to a private entity for any license, rather, as previously stated, it authorizes local governments to charge a 5-cent fee on paper bags. *See* ECL § 27-2805.

In further support of their constitutional claim petitioners cite a case challenging state funds used to pay salaries for state employees to work on partisan political campaigns. That court held that the expenditures were an unconstitutional private application of public funds. *See Ohrenstein*, 139 Misc 2d at 935. Again, petitioners do not assert a payment of funds to a private entity, nor could they do so. Instead, they argue that the Bag Waste Act definition of reusable bags is an unconstitutional "special benefit" to manufacturers of cloth, fabric and paper bags. *See* Petitioners' undated Memorandum of Law at 13; *see also* Pet. ¶ 50. Neither *Fox v Mohawk* nor *People v Ohrenstein* support petitioners' interpretation of article VII, § 8 of the Constitution, which applies to "money" of the state given or loaned to a private entity; not legislation

authorizing local governments to charge fees related to a public purpose. *See* NY Const, art VII, § 8 (1). Once again, petitioners have failed to meet their heavy burden -- beyond a reasonable doubt -- that the Bag Waste Act violates the constitution. *See Lavalle v Hayden*, 98 NY2d 155, 161 (2002) (plaintiffs must demonstrate constitutionality beyond a reasonable doubt); *see also Della Villa*, 186 Misc 2d at 499. Because the Bag Waste Act has a predominant public purpose and is in the public interest, petitioners again fail to meet their heavy burden of proof.

V

THE BAG REGULATION IS NEITHER ULTRA VIRES NOR ARBITRARY

Petitioners also challenge the Department's newly-promulgated regulations, 6 NYCRR Part 351, which took effect on March 14, 2020.

A. The Department's Actions Were Not *Ultra Vires*

Petitioners first suggest that the Department's actions were *ultra vires* because the Department lacked express authorization to promulgate regulations pursuant to the Bag Waste Act and exceeded whatever authority it may have had by improperly making policy. *See* Am. Pet. ¶ 64.

First, the Bag Recycling Act expressly authorized the promulgation of regulations. *See* ECL § 27-2711. Part 351 sets forth requirements for both the Bag Recycling Act and the Bag Waste Act. Second, there is no requirement that a statute specifically authorize the promulgation of regulations. In addition to the express authority granted by ECL § 27-2711, the Department properly acted pursuant to its general authority, set forth in ECL § 1-0101 and ECL § 3-0301. Section 3-0301 authorizes the Commissioner to protect and enhance the State's natural resources by, among other things, "promulgating any rule or regulation, standard or criterion." *See* ECL § 3-0301(1)(b). "A regulatory agency 'is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.'" *Garcia v New York City*

Dept. of Health & Mental Hygiene, 31 NY3d 601, 608–09 (2018) (*quoting Matter of Acevedo*, 29 NY3d at 221). To the extent petitioners seek to argue that the Department exceeded its authority by acting without express statutory authority, there is no merit to the claim.

Petitioners argue that the Department overstepped its authority by engaging in "sweeping policy-based rule-making." *See* Pets. MOL at 14. Generally, an agency can adopt regulations that "go beyond the text of [its enabling] legislation provided they are not inconsistent with the statutory language or its underlying purposes." *See Garcia*, 31 NY3d at 609.

In *Boreali v Axelrod*, 71 NY2d 1 (1987), the Court of Appeals identified four "coalescing circumstances" to guide an inquiry into whether an agency crossed the "line between administrative rule-making and legislative policy-making." 71 NY21 at 11. As relevant here, the questions are whether the Department: (1) made value judgments entailing difficult, complex choices between broad policy goals; (2) merely filled in details of a broad legislative policy or wrote on a clean slate, creating its own comprehensive rules; (3) reacted to the Legislature's failure to enact laws on the issue; and (4) employed special technical expertise in the field.

The *Boreali* Court reviewed regulations promulgated by the Department of Health's Public Health Council to govern tobacco smoking in public areas. 71 NY2d at 6. The Council took action following unsuccessful efforts over four decades by the Legislature to reach consensus "on the goals and methods that should govern in resolving a society-wide health problem;" the Council acted under the general grant of authority in its enabling statute. *Id.* at 7, *Id.* at 13. The Council "constructed a regulatory scheme," in the process balancing health concerns, costs, and privacy interests, absent "any legislative guidelines at all." *Id.* at 12.

DEC's regulations at issue here are fully supported. The amended petition argues that "the Legislature enacted and the Governor signed a budget bill that, among other things,

prohibits the use and distribution of certain plastic bags but permits the use and distribution of others." *See* Am. Pet. ¶ 2. Here, distribution of plastic carryout bags is banned by the Bag Waste Act, unless they are exempt bags. *See* ECL § 27-2803(1). The Bag Waste Act precludes those required to collect tax from distributing certain plastic carryout bags to its customers, and authorizes customers to bring their own bags. It further defines terms, including "reusable bags," exempts "11 enumerated categories of plastic bags," Am. Pet. ¶ 24, and preempts local laws. Pursuant to the Bag Recycling Act, large stores must offer reusable bags for sale (*see* ECL § 27-2705[5]); and such reusable bags may include "a durable plastic bag with handles that is specifically designed and manufactured for multiple reuse." *See* ECL § 27-2701(5).

Unlike the regulations that were the subject of *Boreali,* the Department did not write "on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." 71 NY2d at 13. Rather, it promulgated regulations intended to "fill up the details," *id.* at 10, and clarify minor differences in two statutes. Toward that end, the Department sought to provide clarity and certainty to the regulated community *See* Vitale Aff. ¶ 12. Here, it is the Legislature, not the Department or the Governor, that has made broad policy judgments and identified the path: the banning of plastic carryout bags as one more step to addressing a broad societal problem.

And to the extent that regulations are the product of broad agency authority, broad deference should be given to the agency's judgment. In *Garcia,* the Court of Appeals concluded that the New York City Department of Health did not exceed its authority when it mandated flu vaccines for children attending certain programs, even though influenza was not a disease enumerated in the enabling statute. After concluding that two *Boreali* factors strongly favored the Health Department and the remaining two did not weigh against it, the Court observed that

"the factors enumerated in *Boreali* are not designed to second-guess agency regulations that properly fall within the agency's purview." 31 NY3d at 616. Instead, a court is to evaluate whether the agency "usurped the legislature's power by regulating in an area in which it has not been delegated rulemaking authority." *Id.* DEC's regulatory authority is soundly based in authority granted by the legislature.

B. The 10 Mil Requirement for Reusable Plastic Bags is Not Arbitrary

Petitioners claim that the Department acted arbitrarily in requiring in regulation that polyethylene plastic bags must be at least 10 mils thick to be considered "reusable." *See* Am. Pet. ¶¶ 69–70; Pets. MOL at 15.

Petitioners speculate that the Department's requirement is "apparently unsupported by any findings of fact, evidence or testimony." Am. Pet. ¶ 67. As set forth in the affidavit of David Vitale, the Department's Director of its Division of Materials Management, and a licensed professional engineer, the Department conducted extensive research before adopting an industry-standard definition of "film plastic." *See* Vitale Aff. ¶¶ 14–20. The Department also engaged in extensive public outreach, meeting with elected representatives, environmental groups, manufacturers of film plastic, and the regulated community before it drafted, and then adjusted its regulations. *Id.* ¶¶ 9–12; *see also* Montanye Aff. ¶¶ 19–33. The disputed 10 mil thickness is ubiquitous and widely accepted. Vitale Aff. ¶¶ 16–17.

By contrast, petitioners adduce *no* evidence to support their claim that the requirement is baseless or that it will "have an economically and environmentally detrimental effect." *See* Am. Pet. ¶ 67. Judicial review of an administrative regulation is to determine whether it has "'a rational basis and is not unreasonable, arbitrary or capricious.'" *See Matter of Acevedo*, 29 NY3d at 226–227 (*quoting Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331 [1995]). "To meet this 'limiting' standard, petitioners must show that

the Regulations are 'so lacking in reason' that they are 'essentially arbitrary.' *Id.* (*quoting Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]). Petitioners have made no such showing. Additionally, deference is accorded agencies in the rule-making process, where, as here, it is within the area of the agency's expertise: "An administrative agency's exercise of rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise." *See Consolation Nursing Home*, 85 NY2d at 331.

Furthermore, petitioners' allegation that DEC had no factual evidence to support the 10 mil requirement is based "Upon information and belief." *See* Am. Pet. ¶ 36. A petition based on information and belief, rather than outright allegations of wrongdoing, cannot be sustained. *See Matter of Pachuki v Walters*, 56 AD2d 677, 678 (3d Dept 1977), *lv denied*, 42 NY2d 808 (1977); *Matter of Kaplan v Lipkins*, 36 Misc 2d 868, 869 (Sup Ct Queens County, 1962), *aff'd*, 19 AD2d 723 (2d Dept 1963). Conclusory and generalized statements, unsupported by specific allegations do not meet the requirement, and may result in dismissal of the petition. *See Matter of Johnson v Goord*, 290 AD2d 844 (3d Dept 2002). Thus, allegations in the petition, particularly allegations regarding scientific matters, based upon information and belief, must be disregarded.

C. Petitioners' Expert Affidavit Cannot be Considered in the Article 78 Portion of this Hybrid Proceeding Because it was not Presented to DEC before Issuance of 6 NYCRR Part 351

Petitioners also now claim that DEC's actions are arbitrary and capricious for failure to consider the health implications of reusable bags in a pandemic that struck a year after passage of the statute, and after the regulations were adopted. *See* Am. Pet. ¶¶ 38–39. To bolster this untimely claim, they also submitted an expert affidavit on the alleged health implications of reusable bags. *See* Sinclair Aff. Petitioners did not submit the expert affidavit to DEC during the administrative proceeding, nor did they raise the issue of public health implications of reusable bags in comments to DEC during the public comment period preceding adoption of the

regulations and therefore cannot raise them now. Petitioners cannot raise an issue in an article 78 proceeding that was not raised in the administrative proceeding. *See Aponte*, 30 NY3d at 700 (concurring op.); *see also Roggemann*, 223 AD2d at 856-57 (exhaustion of remedies doctrine precludes petitioner from raising an issue not presented to the administrative agency). Judicial review of administrative determinations is limited to the record before the agency and courts will not entertain issues that have not been raised in the administrative proceeding. Specifically, in a CPLR Article 78 proceeding "review of an administrative determination is limited to the facts and record adduced before the agency." *See Matter of Kelly v Safir*, 96 NY2d 32, 39 (2001) (internal quotation marks omitted); *see also Matter of Rose v Albany County Dist. Attorney's Off.*, 111 AD3d 1123, 1124 (3d Dept 2013); *see also Matter of Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1497 (4th Dept 2018) (upholding DEC's issuance of a negative declaration for mining project and finding that "petitioners impermissibly rely on documents and reports that were generated well after the DEC made its determination"). Accordingly, the expert affidavit of Sinclair, submitted well after DEC made its determination, cannot be considered. Moreover, even if petitioners had given the Department the opportunity to examine their claims, they have not adduced credible evidence of a health risk. *See generally* Dvarskas Aff.

CONCLUSION

For these reasons, and those set forth in respondents' affidavits, answer and record, and respondents' prior submissions to this Court, this hybrid proceeding should be dismissed in its entirety.

Dated: May 15, 2020
Albany, New York

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