SUPREME COURT OF THE
STATE OF NEW YORK
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,

-against-

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 Dept. of Environmental Conservation,…….Defendants-Respondents.

PLAINTIFFS-PETITIONERS' REPLY MEMORANDUM OF LAW IN SUPPORT OF A PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

Index No. 902673-20

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PRELIMINARY STATEMENT

This case is not about the costs and benefits of plastic bags or the merits or demerits of the Legislature's wish to regulate them. Rather, it is about whether the Legislature and, subsequently, an administrative agency, may do so by enacting statutes and promulgating regulations that conflict with each other and with prior law, are impermissibly vague, violate various constitutional guarantees and prohibitions, exceed the scope of the agency's rulemaking authority, endanger the public health, and impose arbitrarily and capriciously chosen requirements. They may not. Accordingly, for the reasons described briefly below and explained in more detail in the Argument section that follows, this Court should issue a permanent injunction and declaratory judgment to prevent the implementation and enforcement of the challenged statutory and regulatory scheme, which will inflict very real, grave, and widespread harms.

First, Plaintiffs-Petitioners have standing to bring this action and to seek the requested relief. The State's argument to the contrary occupies nearly half of the State's Answering Memorandum but finds no support in the law and is flatly contradicted by the Amended Petition's affidavits. Plaintiffs-Petitioners have adequately pled injury-in-fact and, when relevant, have pled facts and injuries satisfying the zone-of-interest requirement.

Second, the record evidence, arguments, and the statutory and regulatory texts establish the merits of Petitioners-Plaintiffs substantive claims. Injunctive and declaratory relief should be granted because the new statutory scheme prohibits the distribution of *any* plastic bags—including reusable ones—and thus conflicts with and frustrates existing New York law. Further, this conflict places retailers in the untenable position of being simultaneously required (by one statute) and forbidden (by another statute) to make reusable plastic bags available to customers. The new scheme thus violates fundamental constitutional and legal guarantees of fairness, notice, and due

process. In addition, because the new scheme is *internally* inconsistent, its requirements are sufficiently vague that a reasonable person cannot discern what is and isn't permitted, thus rendering the statute void. In addition, the new scheme violates constitutional anti-gifting restrictions by granting an economic boon to certain favored manufacturers but not to others, and by authorizing governmental purchases of the State's preferred product using governmental funds.

The proposed regulation fares no better. It is directly inconsistent with the statute and contains unauthorized agency policy-making, rendering it *ultra vires*. Further, the requirements it imposes are made from whole cloth: they are unrelated to the statutory requirements articulated by the Legislature; they are unsupported by any findings of fact, evidence, or testimony; and, perversely, they have an economically and environmentally *detrimental* effect. They are, in short, arbitrary and capricious.

Further demonstrating the irrational and harmful effect of the new scheme (and further demonstrating the need for declaratory and injunctive relief to preserve public health and safety) is the fact that, in the midst of the most perilous disease pandemic to sweep the State and the nation in decades, the new statutory scheme and regulation *forbid* the types of shopping bags that are least likely to harbor and transmit pathogens like the coronavirus and, instead, *require* the use and distribution of the types of bags that have been shown by scientific studies to harbor and transmit infectious diseases to their owners, family members, store clerks, and the public at large. The path chosen by the State is the antithesis of the furtherance of public health and safety.

Third, in the absence of the requested injunction and declaratory judgment, Plaintiffs-Petitioners will suffer irreparable harm. By being subject to conflicting laws, they, like thousands of retailers across New York, will be placed in the untenable position of choosing which law they must violate, risking penalties at every turn. Plaintiffs-Petitioners will be further harmed because

the available inventory and marketplace supply of "permitted" bags is insufficient to meet the demand and likely will remain insufficient to meet the demand for several years, meaning retailers will suffer loss of sales and customer goodwill as a result of the retailers' inability, due to no fault of their own, to provide compliant bags to their customers. Further, Plaintiff-Petitioner Poly-Pak will be irreparably harmed by its inability to provide one of its core product offerings to its core market, namely reusable plastic bags, made of recycled and recyclable material, to New York retailers. Although Poly-Pak's reusable bags meet the durability, strength, size, and format requirements of the new scheme, and although Poly-Pak's reusable bags are permissible in every jurisdiction in New York that currently has a plastic bag ordinance, Poly-Pak will be forced either to shut down the portion of its business providing bags to New York customers or to halt its production lines, retool and reformat its equipment, losing productivity and income all the while, and all to produce a product with a greater carbon footprint and no greater functional utility that the reusable plastic bags it already makes.

Fourth, the balance of equities decidedly favors granting a permanent injunction and issuance of a declaratory judgment. An order granting an injunction would preserve the health and safety of the public and avoid a chaotic and injurious implementation of an inconsistent, confusing, vague statute and regulation for which neither retailers nor customers are, or could reasonably be expected to be, prepared. Further, the issuance of such relief would place the responsibility for making policy judgments and correcting the conflicting, inconsistent, and unconstitutional requirements of the new scheme squarely back where it belongs—not in an administrative agency and not with this court, but in the Legislature.

BACKGROUND

I. The Bag Act, the Bag Regulation, and ECL Title 27.

Plaintiffs-Petitioners' prior memorandum of law explains in detail the enactment, promulgation, and contents of the statutes and regulations at issue in this proceeding, namely the Bag Waste Reduction Act, codified at ECL §§ 27-2801 to 27-2809 (the "Bag Act"); the regulations promulgated by Department of Environmental Conservation (the "DEC"), found at 6 NYCRR Part 351 (the "Bag Regulation"), which purport to implement the Bag Act; and the previously enacted Plastic Bag Reduction, Reuse and Recycling, codified at ECL §§ 27-2701 to -2713 (hereinafter referred to as "Title 27"). *See* Plaintiffs-Petitioners' Memo. of Law in Supp. of a Prelim. Inj. at 3–11 (filed March 20, 2020).

For the sake of efficiency and judicial economy, instead of repeating those explanations in full, Plaintiffs-Petitioners respectfully refer the Court to their prior filing, which they adopt and incorporate herein by reference.[1] The key aspects are summarized briefly as follows:

- The Bag Act unequivocally forbids retailers from distributing even reusable plastic bags to their customers. *See* ECL § 27-2803(1) (forbidding the distribution of "any plastic carryout bag . . . unless such bags are exempt bags"); ECL § 27-2801(2) (defining "plastic carryout bag" as "***any*** *plastic bag* other than an exempt bag that is provided to a customer") (emphasis added); ECL § 27-2801(1) (defining "exempt bag" by listing 11 specific types of bags exempted from the Bag Act's ban, but *not* listing reusable bags among them).

- The Bag Regulation—in contrast to the Bag Act it purports to implement—expressly *allows* retailers to distribute reusable plastic bags. *See* 6 NYCCR § 351-1.2(f) (enlarging the Bag's Act's list of permissible bags by redefining "exempt bags" to include "a reusable bag as that term is defined in this Part"); *see also* 6 NYCCR § 351-1.2(n) (defining "reusable bag" to include bags made of synthetic material, petroleum-based material, polypropylene, and other plastic resins).

[1] The parties' letter, dated May 7, 2020, which was signed and so-ordered by the Court, stated, "the Court can consider the previously filed papers, together with the parties' forthcoming submissions" when analyzing and ruling on the request for permanent injunctive and declaratory relief.

- The Bag Regulation imposes an extraordinary requirement on the most common type of reusable plastic bags, mandating they be made of plastic so thick that no American manufacturer currently provides such a product, and which is four times greater than the standard required by California and other states and municipalities. *See* 6 NYCCR § 351-1.2(g), (h), and (n)(1) (collectively permitting reusable bags made from flexible sheets of plastic resin only if such bags are made of material that is 10+ mils thick).[2] The DEC had no facts, evidence, or public commentary to support the imposition of this requirement.

- Prior New York law, namely Title 27, requires certain retailers to establish in-store programs capable of supplying customers with "reusable bags," which include "durable plastic bag[s.]" ECL §§ 27-2701(5), -2703(1), and -2705(5). The newly-enacted Bag Act, in contrast, forbids the distribution of such bags. Further illustrating the disconnect between prior law and the Bag Act, Title 27 expressly requires the State to *encourage* the reuse of plastic carryout bags and film plastic. *See id*. § 27-2709(1).

II. Procedural history.

Plaintiffs-Petitioners filed the instant proceeding two days after the DEC adopted the Bag Regulation and more than two weeks before the Bag Regulation was set to take effect. *See* Verified Petition (Feb. 28, 2020). The same day, the Court heard argument on Plaintiffs-Petitioners' request for a Temporary Restraining Order enjoining enforcement of the Bag Act and Bag Regulation. At the conclusion of the hearing, the State agreed not to enforce the Bag Act or Bag Regulation until April 1, 2020, and the parties agreed to a briefing schedule on the request for a preliminary injunction and declaratory relief. That agreement and the briefing schedule were memorialized in a letter signed and so-ordered by the Court.

The Plaintiffs-Petitioners subsequently amended their petition. *See* Amend. Verified Petition (March 13, 2020). The Amended Verified Petition, like the Verified Petition before it, is a hybrid action under Articles 30 and 78 seeking injunctive and declaratory relief because (1) the Bag Act is inconsistent with and in conflict with Title 27, (2) the Bag Act is void for vagueness,

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[2] A mil is a measurement equal to one-thousandth of an inch. For purposes of reference, a common single-use plastic shopping bag is 0.5 mils thick and a typical blue tarp found in most hardware stores is about 6 mils thick. For further purposes of comparison, a reusable plastic bag permitted under California's bag law must be 2.25 mils thick. *See* Cal. Public Resource Code § 42281.

(3) the Bag Act violates the anti-gifting clauses of the New York Constitution, (4) the Bag Regulation is *ultra vires*, and (5) the Bag Regulation contains requirements that are arbitrary and capricious. *See id*. ¶¶ 45–70.

On March 16, 2020, the parties agreed to an extension of the briefing schedule, which was memorialized in a letter signed and so-ordered by the Court. In that letter, the State extended its non-enforcement agreement and agreed not to enforce the Bag Act or Bag Regulation until May 15, 2020. The parties subsequently agreed to another extension of the briefing schedule in a letter signed and so-ordered by the Court on April 16, 2020, which also extended the State's non-enforcement agreement until June 15, 2020. Finally, on May 6, 2020, to relieve the Court of the need to decide first the preliminary injunction and then, later, the permanent injunction and declaratory relief, Plaintiffs-Petitioners agreed to convert their motion for a preliminary injunction into one for a permanent injunction, and the parties agreed to a new briefing schedule. The State further agreed it would not enforce the Bag Act or Bag Regulation prior to July 15, 2020, and only then after advising the Court and the parties of its intent 30 days prior to beginning enforcement. The schedule and agreement were memorialized in a letter signed and so-ordered on May 7, 2020.

III. The COVID-19 pandemic and its relevance to the claims asserted and the relief requested in this proceeding.

In Plaintiffs-Petitioners' Amended Verified Petition and their memorandum of law in support of a preliminary injunction, they noted the public health danger posed by the Bag Act's and Bag Regulation's prohibition of the more sanitary plastic bags in favor of the less sanitary, pathogen-harboring and -spreading woven and fabric bags. *See* Amend. Verified Petition ¶¶ 38–40 and the affidavit and authorities cited therein; *see also* Plaintiffs-Petitioners' Mem. of Law in Supp. of a Prelim. Inj. at 2, 7, 11–12, 28, 30 (filed March 20, 2020). The State argues that such

evidence and arguments should be disregarded for several reasons, *see* State's Answering Mem. at 5–6, each of which is rebutted below.

First, the State argues that the public health risk posed by fabric or woven bags in the midst of the COVID-19 pandemic was not raised to the DEC during the rulemaking process and thus should be disregarded by this Court. *See id*. at 5. As an initial matter, the State's premise is incorrect. Indeed, the State's own supporting affidavit concedes that at the public hearing on the then-pending Bag Regulation, a Poly-Pak executive testifying in opposition to the regulation stated that, in the absence of plastics, "disease would spread." *See* State's Answering Mem., Aff. of Kayla Monanye, ¶ 25 (quoting Admin. Rec. 3460).

Further, the State's attempt to prevent this Court from considering the dangers posed by reusable fabric bags in a pandemic depends on the imposition of an unrealistic and impossibly high standard of the State's own making. In essence, the State argues that because no one warned the DEC of the pandemic's heightened risks in advance of the pandemic, it's too late now to consider them at all. But that supposed standard is utterly impracticable. The general science establishing the pathogen-harboring and -transmitting characteristics of reusable bags has been known for years, but the significance of those characteristics and their potential lethality sprang to the fore only after the novel coronavirus overtook New York and then the nation. For the State now to argue that Plaintiffs-Petitioners should have known of that risk and raised it to the DEC during the rulemaking process purports to impose a duty of clairvoyance on them.[3] That is not the law.

[3] The public comment session regarding the proposed Bag Regulation was held on January 27, 2020. At that time, most Americans had not even heard of the novel coronavirus, and recognition of the scope and significance of the coming pandemic had not yet registered. As of January 21, for example, only one case had been reported in the nation, and as of January 24, national public health officials were declaring the risk was low, and no person-to-person transmission had been reported in the United States. *See* Hauk et al., *Four months in: A timeline of how COVID-19 has unfolded in the US*, USA TODAY, May 21, 2020, *available at* https://www.usatoday.com/in-depth/news/

In addition, the cases on which the State relies in its attempts to brush back the public health risks of the Bag Act and Bag Regulation are distinguishable. Both of the cases cited by the State—*Matter of Aponte v. Olatoye* and *Matter of Roggemann v. Bane*—involved *as-applied* challenges to an agency's decision denying specific individuals' request for agency action. In contrast, the instant proceeding is not an as-applied challenge to an agency application of a rule; it is a facial challenge to the validity and constitutionality of a statute and regulation. In such suits, the court may consider arguments and materials not presented to the agency in the course of its rulemaking process. *See*, *e.g.*, *Choe v. Axelrod*, 141 A.D.2d 235, 238 (App. Div. 3d Dept. 1988) ("Petitioner further maintains that the governing regulations are unconstitutionally vague . . . . Initially, we observe that petitioner's failure to raise this facial, constitutional challenge before the administrative agency does not preclude the argument.") (citations omitted); *Hamptons Hosp. & Med. Ctr., Inc. v. Moore*, 74 A.D.2d 30, 33 (App. Div. 2d Dept. 1980) (holding in an Article 78 proceeding that "[t]he doctrine of exhaustion of administrative remedies, however, is a flexible one; where the agency's action is challenged as unconstitutional or beyond its authority, or where resort to the remedy would be futile, it need not be followed" and noting that a "[c]hallenge to the authority of an agency has been specifically enumerated as an exception to the exhaustion doctrine") (citation omitted); *Dobbs Ferry Hosp. Ass'n v. Whalen*, 62 A.D.2d 999 (App. Div. 2d Dept. 1978) (holding the petitioner in the Article 78 proceeding "did not have to exhaust its administrative remedies by requesting a public hearing because the reason given for respondent's action . . . was patently erroneous as a matter of law").

Second, the State argues this Court should disregard the public health hazards posed by reusable bags because the hazard (according to the State) is not supported by "credible research."

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nation/2020/04/21/coronavirus-updates-how-covid-19-unfolded-u-s-timeline/2990956001/.

See State's Answering Mem. at 5–6. The sole support for the State's assertion is the affidavit of Anthony Dvarskas, an employee of the Attorney General. *See id*. But a reading of Dr. Dvarskas' affidavit reveals the State has reached too far. Indeed, his affidavit frankly concedes that a body of credible research *has* shown that reusable grocery bags harbor and transfer pathogens, but he quickly attempts to paper over these studies by picking at nits or by arguing the studies merely encourage the *washing* of reusable grocery bags. *See* State's Answering Mem., Aff. of Anthony Dvarskas, ¶¶ 5, 8–9, 11–17. Of course, the State and Dr. Dvarskas fail to mention that studies show few reusable bags are *ever* washed. *See*, *e.g*., Robert M. Kimmel, *Life Cycle Assessment of Grocery Bags in Common Use in the United States*, 118, 183, Clemson University Digital Press (2014).

Third, the State seeks to minimize the public health risk associated with unhygienic reusable fabric and woven bags by arguing that "no government agency has recommended a ban on reusable bags[.]" *See* State's Answering Mem. at 6. This is demonstrably incorrect. Multiple States and municipalities have forbidden the use of reusable bags during the pandemic, often at the urging or decision of public health agencies, including the following:

- New Hampshire;[4]
- Maine;[5]
- Massachusetts;[6]

[4] *See* Gov. Sununu, Emergency Order #10, March 21, 2020, *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-10.pdf) ("[T]o prevent the spread of COVID-19 through grocery sales . . . all grocery stores within the State of New Hampshire . . . shall transition to the exclusive use of store provided single use plastic or paper bags").

[5] *See* Steve Toloken, *Maine halts plastic bag ban as part of plan to mitigate coronavirus spread,* Plastics News (March 18, 2020), *available at* https://www.plasticsnews.com/news/maine-halts-plastic-bag-ban-part-plan-mitigate-coronavirus-spread.

[6] *See* Catherine Carlock, *Gov. Baker bans reusable bags at grocery stores, lifts local plastic bag bans*, Boston Business Journal (May 25, 2020) ("Massachusetts Gov. Charlie Baker has banned reusable bags and lifted local bans on plastic bags at grocery stores and pharmacies as part of his administration's latest steps to limit the spread of the coronavirus."), *available at* https://www.bizjournals.com/boston/news/2020/03/25/gov-baker-bans-reusable-bags-at-grocery-stores.html.

- California;[7]
- Oregon;[8]
- Illinois;[9]
- San Francisco and surrounding Bay Area cities;[10]
- Bellingham, WA;[11]
- Albuquerque, NM;[12] and
- Township of Stafford, NJ.[13]

In short, Plaintiffs-Petitioners' arguments and supporting evidence regarding the public health risk of the Bag Act and Bag Regulation are properly before this Court and provide a basis upon which to enjoin the Act and/or Regulation and to declare either or both of them unlawful endangerments of public health.

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[7] *See* Gov. Newsom, Exec. Order N-54-20 (April 22, 2020) at 1 and ¶ 12 (noting "it is critical to protect the public health and safety and minimize the risk of COVID-19 exposure for workers engaged in essential activities, such as those handling reusable grocery bags," and, accordingly, suspending the state's ban on single-use carryout bags), *available at* https://www.gov.ca.gov/wp-content/uploads/2020/04/N-54-20-COVID-19-text-4.22.20.pdf.

[8] *See* Gillian Flaccus, *Pandemic deals blow to plastic bag bans, plastic reduction*, Associated Press (April 8, 2020) ("Oregon suspended its brand-new ban on plastic bags this week."), *available at* https://apnews.com/b58cd897fb1275d8a4bdcb29528b4cce.

[9] *See* Jake Wittich, *Grocery stores advised to prohibit use of reusable bags during coronavirus pandemic*, Chicago Sun Times (March 28, 2020) ("Illinois grocery stores are being advised to prohibit shoppers from using reusable bags to protect their workers and other shoppers from contracting the coronavirus. The reusable bag measure was one of several new best practices that Gov. J.B. Pritzker announced during his Saturday briefing that were aimed at preventing the spread of the virus."), *available at* https://chicago.suntimes.com/coronavirus/2020/3/28/21198265/coronavirus-covid-19-grocery-stores-workers-shoppers.

[10] *See* City and County of Department of Public Health, San Francisco Order of the Health Officer (March 31, 2020) (requiring business to post a social distancing protocol that includes a requirement that forbids "customers to bring their own bags, mugs, and other reusable items from home"), *available at* https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf.

[11] Flaccus, note 7, *supra* ("[C]ities from Bellingham, Washington, to Albuquerque, New Mexico, have announced a hiatus on plastic bag bans as the coronavirus rages.").

[12] *Id.*

[13] *See* Proclamation of the Mayor of the Township of Stafford (March 17, 2020), *available at* https://www.staffordnj.gov/DocumentCenter/View/2607/Covid-19-Proclamation?bidId=.

LEGAL STANDARDS

Permanent Injunction. To be entitled to an injunction, generally, "a party must show that there was a violation of a right or threatened violation, that there is no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor. *Islamic Mission of Am., Inc. v. Mukbil Omar Ali*, 152 A.D.3d 573, 575 (N.Y. App. Div. 2017). "The enforcement of a statute may be enjoined where it is shown that the statute vests an unreasonable, wholly unrealistic and unlimited amount of discretion in an administrative official, or that it is unconstitutional or otherwise invalid, and that the enforcement thereof will present some actual or threatened irreparable injury to the complainant's rights, for which there is no adequate remedy at law." 67A N.Y. Jur. 2d Injunctions § 106 (collecting cases). Likewise, injunctive relief may "restrain the enforcement of administrative orders, rules, or regulations which are not authorized by statute, or which are unconstitutional or invade the complainant's constitutional rights and privileges." 67A N.Y. Jur. 2d Injunctions § 108 (collecting cases).

Declaratory Judgment. Challenges to the constitutionality of a statute or regulation are actions for a declaratory judgment. *Carney v. New York State Dep't of Motor Vehicles*, 133 A.D.3d 1150, 1151 (N.Y. App. Div. 2015), *aff'd sub nom. Acevedo v. New York State Dep't of Motor Vehicles*, 29 N.Y.3d 202 (2017). Statutes and regulation may be unconstitutional and declared such for a myriad of reasons including: vagueness or conflict with statute, decisional law, or public policy. *See*, *e.g.*, *DeCiutiis v. E. Meadow Union Free Sch. Dist. No. 3*, 87 A.D.2d 840, 841 (1982).

Article 78. Challenges to an agency's application of statute or regulation are subject to judicial review pursuant to CPLR § 7803. State agencies are prohibited from (1) violating lawful procedures, (2) acting pursuant to errors of law, or (3) acting arbitrarily and capriciously, or abusing discretion. CPLR § 7803. An agency's interpretation or views are entitled to weight and

deference only if they are not "irrational, unreasonable nor inconsistent with the governing statute" *Toys R Us v. Silva*, 89 N.Y.2d 411, 419 (1996). "Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight." *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980). "And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight." *Id.*

ARGUMENT

I. Plaintiffs-Petitioners have standing to bring their claims.

A sizeable portion of the State's Answering Memorandum is spent arguing that Plaintiffs-Petitioners lack standing. *See* State's Answering Mem. at 7–22. The State's argument fail for the reasons explained below.

A. The Bodega Association, Green Earth Grocery Store, and Frank Marte have adequately pled injury-in-fact.

The State argues the Bodega Association, its member store (the Green Earth Grocery Store), and its officer (and the proprietor of Green Earth Grocery Store) Frank Marte lack standing because Mr. Marte's affidavit supposedly fails adequately to allege injury-in-fact. *See* State's Answering Mem. at 9–11. But even a cursory review of Mr. Marte's affidavit reveals he specifically alleged personal, non-conjectural, imminent injuries to himself, to Green Earth, and, by extension, to the Bodega Association that would result from enforcement of the Bag Act and the Bag Regulation. He attests, for example, that "[i]mplementation and enforcement of the Bag Act and the Bag Regulation as currently drafted will cause widespread confusion on the part of . . . bodegas as Green Earth Grocery Store . . . in light of inconsistencies between the Bag Act and the Bag Regulation." *See* Amend. Verified Pet., Marte Affidavit ¶ 7. But this, apparently, is not enough

for the State, who insists Mr. Marte should have expressly stated that *he* was *personally* confused by the inconsistencies between the Act and the Regulation. *See* State's Answering Mem. at 9–10.

Mr. Marte further attests that "[a]vailable supplies of bags permitted under the Bag Act and Bag Regulation are in woefully short supply" and that "[p]roducers of paper bags have advised it will be many months and maybe years before the supply of paper bags can satisfy the demand. Amend. Verified Pet., Marte Affidavit ¶ 8. Yet again, the State is not satisfied, insisting Mr. Marte should have specified *how short* the supply, *how high* his own specific demand, and exactly *when*, *how*, and *which* specific producers told him the supply would lag for months and years. *See* State's Answering Mem. at 10.

Not even Mr. Marte's express attestation that "Green Earth Grocery Store . . . will be irreparably harmed" if forced to comply with the Bag Act and the Bag Regulation, *see* Amend. Verified Pet., Marte Affidavit ¶ 9, is enough for the State, which, notwithstanding this explicit assertion of injury to Green Earth, argues that "Mr. Marte asserts no injury whatsoever to Green Earth." *See* State's Answering Mem. at 10 and n.4 and Montanye Aff. ¶¶ 40–42 (speculating that perhaps Green Earth could find cardboard boxes to give its customers to carry home their goods, or perhaps Green Earth's customers could find their own supply of paper bags).

The applicable case law neither demands the degree of exacting detail desired by the State nor permits the State to speculate its way around Mr. Marte's expressly alleged injuries. *See Assoc. for a Better Long Island, Inc. v. N.Y. State Dept. of Env. Cons.*, 988 N.Y.S.2d 115, 119 (2014) (noting that New York's courts have "recognized that standing rules 'should not be heavy-handed,'" and "have been reluctant to apply these principles in an overly restrictive manner") (citation omitted); *see also Saratoga Lake Prot. & Improvement Dist. v. Dep't of Pub. Works of City of Saratoga Springs*, 809 N.Y.S.2d 874, 879 (Sup. Ct. 2006), *aff'd as modified sub nom.*

Saratoga Lake Prot. & Imp. Dist. v. Dep't of Pub. Works of City of Saratoga Springs, 46 A.D.3d 979 (2007) (finding standing where plaintiff alleged, at a minimum, "the challenged action will have adverse effects on the manner and methods by which it can accomplish [a] task."). In sum, Mr. Marte's affidavit alleges sufficiently imminent, concrete, and particularized injuries to satisfy the requirements of the law.

B. Mike Hassen has adequately pled injury-in-fact.

The State similarly gripes that Plaintiff-Petitioner Mike Hassen's affidavit lacks the degree of excruciating detail the State thinks necessary to allege an injury-in-fact. *See* State's Answering Mem. at 11–13. A perusal of Mr. Hassen's affidavit, however, rebuts the State's argument. He specifically asserts, for example, that his supermarkets are subject to and caught between the conflicting requirements of the Bag Act and Title 27. *See* Amend. Verified Pet., Hassen Affidavit ¶ 5. The State's response (subtly pivoting away from standing to the merits of Mr. Hassen's claim) brushes off this express and particularized assertion of imminent injury, arguing instead that the conflicting statutes can't constitute an injury-in-fact because there isn't *really* a conflict between them. *See* State's Answering Mem. at 12. The fact that the State disputes the merits of Mr. Hassen's legal claims, however, does not defeat his standing to assert them.[14] *See CPD N.Y. Energy Corp. v. Town of Poughkeepsie Planning Bd.*, 139 A.D.3d 942, 943 (N.Y. App. Div. 2016) (noting that standing is a "threshold determination" distinct from the merits of a particular dispute); *Cmty.*

[14] The State explains at some length its theory that the Bag Act and Title 27 can be read harmoniously or that the Bag Act yields to the conflicting requirements of Title 27. *See* State's Answering Mem. at 12–13. But that argument is out of place. The *merits* of a plaintiff's claims do not determine whether he has *standing* to assert them. Such an argument puts the cart before the horse. In any event, Plaintiffs-Petitioners have already rebutted the State's argument regarding the statutory conflict, which rebuttal they incorporate by reference herein and to which they respectfully refer the Court. *See* Plaintiffs-Petitioners' Mem. in Supp. of a Prelim. Inj. at 18–21 (filed March 20, 2020).

Pres. Corp. v. Miller, 5 Misc.3d 388, 392 (N.Y. Sup. Ct. 2004) ("The standing determination is made without regard to the merits of the case.") (citing *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 770 (N.Y. 1991)).

Mr. Hassen further avers that the Bag Act and Bag Regulation are inconsistent and he is unsure which to follow; that "the types of bags permitted under the Bag Act and Bag Regulation are difficult or impossible for my stores to obtain;" and that the "industry's supply of paper bags . . . is far outstripped by the demand for them, putting retailers such as myself at risk of being unable to comply with the Bag Act and Bag Regulation." Amend. Verified Pet., Hassen Affidavit ¶¶ 6–7. Yet again, even these specific, concrete, and particularized injuries are not enough to satisfy the State, which insists Mr. Hassen should explain *how* he knows these things; *from whom* he learned them; and *what exactly* he has done to attempt to find an adequate supply of compliant bags. *See* State's Answering Mem. at 11–12. Such exhaustive detail is not required by the doctrine of standing, and case law does support such a requirement. *See Assoc. for a Better Long Island, Inc*, 988 N.Y.S.2d at 119; *Saratoga Lake Prot. & Improvement Dist.*, 809 N.Y.S.2d at 879.

The State further faults Mr. Hassen for stating he is "at risk" of being unable to comply with the Bag Regulation. *See id*. at 11. But in the State's rush to paint this statement as indicative of a hypothetical, speculative, or conjectural injury, the State overlooks the fact that at the time Mr. Hassen signed his affidavit, the Bag Regulation had not yet gone into effect and, in light of the then-pending requests for a TRO and preliminary injunction, it was possible at that time that it might never go into effect. Accordingly, it was reasonable (and perfectly consistent with standing requirements) for Mr. Hassen, like any plaintiff asserting a pre-enforcement challenge to a statute or regulation, to state he was "at risk" of imminent injury upon enforcement of the scheme.

In sum, Mr. Hassen has alleged—and the State does not contest—that he owns supermarkets subject to the Bag Act, the Bag Regulation, and Title 27. He has alleged, in both his affidavit and in the Verified Petition, that the statutes and regulations are inconsistent with one another. This is sufficient adequately to allege injury-in-fact to establish standing. *Assoc. for a Better Long Island, Inc*, 988 N.Y.S.2d at 119; *Saratoga Lake Prot. & Improvement Dist.*, 809 N.Y.S.2d at 879.

C. Poly-Pak has adequately pled injury-in-fact.

The State returns again to its well-worn theme, arguing Plaintiff-Petitioner Poly-Pak has not alleged sufficient injury-in-fact because the affidavit of its Vice President, Ken Trottere, lacks "detail," "percentages," and "evidence." *See* State's Answering Mem. at 13–15. As explained in the preceding sections, however, the law does not require such exquisite detail, and the averments in Mr. Trottere's affidavit are sufficient adequately to plead injury-in-fact and to establish standing. He states, for example, that because Poly-Pak's reusable plastic bags are not 10 mils thick and thus cannot satisfy the DEC's arbitrarily chosen requirement, the effect of the Bag Regulation's implementation would be severe on Poly-Pak. *See* Amend. Verified Pet., Trottere Affidavit ¶¶ 6–8. The State, however, demands more, insisting these sworn allegations of injury are inadequate without also providing specific business metrics and financial information. *See* State's Answering Mem. at 14. The State cites no cases in support of its demand that injury-in-fact may be established only by assertion of specific sales percentages and dollar amounts—because that is not what the law requires. Rather, Poly-Pak, like the other Plaintiffs-Petitioners, has adequately alleged concrete, particularized, imminent injuries sufficient to establish injury-in-fact. *Assoc. for a Better Long Island, Inc*, 988 N.Y.S.2d at 119; *Saratoga Lake Prot. & Improvement Dist.*, 809 N.Y.S.2d at 879.

At bottom, the defect in the State's arguments regarding injury-in-fact is revealed by the fact that, under the State's desired construct, *no* party would *ever* have standing to assert a pre-enforcement or pre-effective-date challenge to a statute or regulation. The asserted harm would always, in the State's view, be uncertain, hypothetical, and conjectural. The State's view, however, is not reflected in the case law.

The error of the State's position is further illustrated by the fact that, in the State's view, *no one* has standing to challenge the Bag Act and Bag Regulation. *See* State's Answering Mem. at 15 (arguing the Bag Act and Bag Regulation apply equally (and exclusively) to all retailers, and thus because they are all situated similarly to one another, none of them has suffered any special damage distinct from the each other sufficient to establish standing). Such a result is disfavored, and should be rejected here as it has been in prior cases. *See*, *e.g*., *Assoc. for a Better Long Island, Inc.*, 988 N.Y.S.2d at 119 (noting New York's courts have "recognized that standing rules 'should not be heavy-handed,'" and "have been reluctant to apply these principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review"); *Burns v. Egan*, 492 N.Y.S.2d 666, 669 (1985) (holding plaintiffs had standing to challenge a statute because, "if plaintiffs are denied standing," it "would create an 'impenetrable barrier to any judicial scrutiny of [the] legislative action'") (citations omitted).

D. Plaintiffs-Petitioners have adequately alleged injuries within the supposed zone of interests.

The State argues at length that Plaintiffs-Petitioners also lack standing because they fail to assert claims that fall within the "zone of interests" that the challenged statutes seek to protect. *See* State's Answering Mem. at 16–22. At bottom, the State's argument is as follows: (i) a plaintiff has standing to challenge a government action only if his claim falls within the "zone of interest" of the relevant statute; (ii) the Bag Act was intended to protect the environment; (iii) thus only environmental injuries can convey standing to challenge the Bag Act and Bag Regulation; (iv) Plaintiffs-Petitioners have not alleged environmental injuries, and (v) therefore, they lack standing. *See id*. at 16–18.

The State's argument suffers from several flaws, any one of which is fatal to it. ***First***, even assuming the first three prongs of the State's argument were correct (which is not conceded), the State is incorrect when it asserts that the Plaintiffs-Petitioners have not alleged environmental injuries. Poly-Pak expressly alleged it will be injured by the implementation and enforcement of the Bag Ban by effectively being compelled to produce bags with a *greater* carbon footprint. *See* Amend. Verified Pet. ¶ 17; *see also id*., Trottere affidavit ¶¶ 4–5 (attesting to Poly-Pak's dedication to being environmentally friendly). Accordingly, even under the State's cramped view of the zone-of-interests requirement, Poly-Pak has standing to bring its claims.

Second, a party challenging a government action that violates constitutional safeguards or deprives him of a constitutional right need not show that his injury falls within the zone of interest of any statute. *See Orzechowski v. Perales*, 582 N.Y.S.2d 341, 345 and n.2 (1992) (noting the plaintiffs' standing "is predicated upon breach of their constitutional rights," "[t]herefore, the zone

of interest test analysis [] need not be addressed" because "[c]learly, the Orzechowskis have standing because they are claiming that they have been actually injured."). The State apparently concedes this, but insists a party asserting such claims must allege an injury protected by a constitutional guarantee. *See* State's Answering Mem. at 20 (citing *Matter of Lasalle Ambulance v. New York State Dept. of Health*, 245 A.D.2d 724, 725, lv denied 91 N.Y.2d 810 (1998)).

But Plaintiffs-Petitioners have done exactly that. For example, Mr. Hassen and Mr. Marte (and, by extension, Green Earth Grocery Store and the Bodega Association) specifically allege and claim they are subject to conflicting and vague laws and are thus deprived of the constitutional protections and guarantees of notice, due process, and fundamental fairness, and that the Bag Regulation is *ultra vires*, which implicates constitutional separation-of-powers requirements, the violation of which leaves them and their stores caught between a conflicting statute and regulation. *See* Amend. Verified Pet. ¶¶ 14, 16, 47, 53, 59–65. In addition, Mr. Hassen, Mr. Marte, and their stores will, under force of law, be complicit in the alleged violations of the constitution's anti-gifting clauses, exacting money from customers under governmental compulsion and remitting those funds to the government to spend at its favored bag manufacturers. *See generally id.* ¶¶ 54–58. Poly-Pak likewise identifies the constitutional guarantees that will be violated by the State's challenged actions and which will harm it. *See id.*[15] Accordingly, Plaintiffs-Petitioners have satisfied all that the law of standing requires of them. *See Orzechowski*, 582 N.Y.S.2d at 345 and

[15] In the middle of its stream of argument that Poly-Pak lacks standing, the State switches horses and argues the merits of the claim for violations of the Constitution's anti-gifting clauses. *See* State's Answering Mem. at 20–22. The State's merits argument is wrong (as will be discussed later in this memorandum), and, more to the point here, is distinct from and irrelevant to the question of Poly-Pak's standing. *See CPD N.Y. Energy Corp.*, 139 A.D.3d at 943 (noting that standing is a "threshold determination" distinct from the merits of a particular dispute); *Cmty. Pres. Corp.*, 5 Misc.3d at 392, 781 N.Y.S.2d at 607 ("The standing determination is made without regard to the merits of the case.").

n.2; *Burns*, 492 N.Y.S.2d at 669; *see also Atlas Van Lines, Inc. v. Tax Appeals Tribunal of State*, 123 A.D.3d 168, 174 (2014) (noting the harm caused by conflicting laws); *Mother Zion Tenant Ass'n v. Donovan*, 55 A.D.3d 333, 336 (2008) (same).

Third, even assuming *arguendo* that some of Plaintiffs-Petitioners assert some claims resting on bases other than or in in addition to the violations of constitutional guarantees set out above, the State's zone-of-interest argument still fails because the State attempts to impose a standard far more onerous than the law requires. A party challenging a governmental action that allegedly violated his statutory rights "must show [1] that the governmental action complained of will cause him injury in fact and [2] that the interest he advances is arguably within the zone of interest to be protected by statute." *Burns v. Egan*, 492 N.Y.S.2d 666, 669 (1985). "As to the second requirement, the class of persons entitled to judicial review of the validity of governmental action is broadly defined and standing should be denied ***only*** *where there is a clear legislative intent to negate judicial review or there is no injury in fact*." *Id.* (citations omitted) (emphasis added).

Here, there is no clear legislative intent to negate judicial review, and Plaintiffs-Petitioners have established by affidavit that they will suffer injuries-in-fact if the Bag Act and Bag Regulation are not enjoined or declared to be unlawful.[16] Accordingly, they have standing to assert their claims. *See id*. If the contrasting position taken by the State were correct—*i.e.*, if Plaintiffs-

[16] The State's argument that Poly-Pak's injury merely stems from increased competition is a red herring. *See* State's Answering Mem. at 18–20 (relying on *Matter of Troy Ambulance Serv. v. New York State Dept. of Health*, 260 A.D.2d 715, 716 (3d Dept. 1999)). While increased competition as a result of a lawful statute or rational regulation may not constitute an injury sufficient to confer standing, that is not the injury alleged in the Amended Verified Petition. Rather, as noted above, Poly-Pak alleges an environmental injury and the deprivation of constitutional safeguards and guarantees, a secondary result of which is economic hardship. *That* sort of allegation *is* adequate to confer standing. *See Orzechowski*, 582 N.Y.S.2d at 345 and n.2; *Burns*, 492 N.Y.S.2d at 669.

Petitioners lack standing because their injuries are not "environmental injuries" protected by the Bag Act—it would seem effectively to shield the Bag Act and Bag Regulation from *any* legal challenge.[17] This is not and should not be the law. *See id.* at 669 (analyzing the "zone of interest" requirement and finding the plaintiffs had standing to challenge a statute because, "if plaintiffs are denied standing," it "would create an 'impenetrable barrier to any judicial scrutiny of [the] legislative action'") (citations omitted); *see also Assoc. for a Better Long Island, Inc. v. N.Y. State Dept. of Env. Cons.*, 988 N.Y.S.2d 115, 119 (2014) (citations omitted) (noting that New York's courts have "recognized that standing rules 'should not be heavy-handed,'" and "have been reluctant to apply these principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review"). In sum, Plaintiffs-Petitioners have standing to assert their claims.

II. The Bag Act impermissibly conflicts with and is inconsistent with existing New York law.

As explained in Plaintiffs-Petitioners' prior memorandum and summarized briefly above, the Bag Act prohibits retailers from distributing *any* plastic bags (including reusable plastic ones, which constitute the great majority of reusable bags), while Title 27 of the Environmental Conservation Law permits, encourages, and even requires retailers to make such bags available to their customers. *Compare* ECL §§ 27-2801(1), -2801(2), and -2803(1)) *with* ECL §§ 27-2701, -2703, and -2705; *see also* Plaintiffs-Petitioners Mem. of Law in Supp. of a Prelim. Inj. at 4–7 and 10–11 (filed March 20, 2020).

[17] In the State's view, the sole entity within the zone of interest protected by the statute is the environment. Who then could sue to challenge such a statute or regulation if it were unconstitutional, ultra vires, arbitrary and capricious, or otherwise problematic? Not the environment, and presumably no one.

In opposition to this assertion, the State argues the conflicting statutes can be read in harmony with one another in light of the supposed savings clause found in the Bag Act. *See* State's Answering Mem. at 22–23. Plaintiffs-Petitioners have already rebutted that argument, and, in the interest of efficiency and judicial economy, respectfully refer the Court to that prior explanation and the authorities cited therein. *See* Plaintiffs-Petitioners Mem. of Law in Supp. of a Prelim. Inj. at 18–21 (filed March 20, 2020).

In short, when the Legislature intends to draft a savings clause, it knows well how to do so, and the Code is replete with examples of savings clauses with express, almost formulaic language stating a statute yields to and does not conflict with a prior statute. The Bag Act, however, does not contain such a clause. Rather, it contains language indicating that a person subject to both the Bag Act and Title 27 must comply with *both* of them. *See id*. The State may speculate that the Legislature *meant* to insert a savings clause, but that is not what the Legislature did, and this Court may not take a blue pencil to the statute. *See Lewis Family Farm, Inc. v. Adirondack Park Agency*, 22 Misc.3d 568, 581 (N.Y. Sup. Ct. 2008) ("[A] statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written[.]") (citing *Lawrence Const. Corp. v. State*, 293 N.Y. 634, 639 (Ct. App. 1944)); *Soares v. State*, 906409-18, 2020 WL 1146487, at *30 (N.Y. Sup. Ct. Jan. 28, 2020) (noting that "'[t]he doctrine of separation of governmental powers prevents a court from rewriting a legislative enactment,'" and citing with approval *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010), which noted that while the Court could in theory "blue pencil" enough of the statute to render it constitutional, "such editorial freedom . . . belongs to the Legislature, not the Judiciary").

Because the Bag Act and Title 27 conflict with one another and places Mr. Hassen and his supermarkets in the untenable position of being simultaneously required and forbidden to make reusable plastic bags available to customers, the Bag Act violates fundamental constitutional and legal guarantees of fairness, notice, and due process. This Court should enter a judgment declaring it, and should permanently enjoin the Bag Act's implementation or enforcement.

III. The Bag Act is unconstitutionally vague and, therefore, void.

As explained in Plaintiffs-Petitioners' prior memorandum and summarized briefly above, the Bag Act express terms simultaneously purport to forbid and to permit the distribution of durable, reusable, handled plastic bags. *Compare* ECL § 27-2803 *with* ECL § 27-2801(1) and (4) and ECL § 27-2805(7). Such internal inconsistencies and ambiguities render an ordinary and reasonable person unable to discern what the law requires, and it fails to give the officials and agencies tasked with enforcing it any clear standards for its enforcement. *People v. Pethick*, 21 Misc.3d 787, 789 (J. Ct. 2008); *see also People v. N.Y. Trap Rock Corp*., 456 N.Y.S.2d 711, 714 (1982). Plaintiffs-Petitioners have already rebutted the State's argument to the contrary, and, in the interest of efficiency and judicial economy, respectfully refer the Court to that prior explanation and the authorities cited therein. *See* Plaintiffs-Petitioners Mem. of Law in Supp. of a Prelim. Inj. at 21–23 (filed March 20, 2020).

Because the Bag Act is so vague as to deprive retailers and citizens of notice and due process protections, and to deprive State agencies and officials of clear standards for its enforcement, this Court should enter a judgment declaring it, and should permanently enjoin the Bag Act's implementation or enforcement.

IV. The Bag Act violates the anti-gift clauses of the New York Constitution.

As explained in Plaintiffs-Petitioners' prior memorandum and summarized briefly above, the Bag Act violates the provisions of the New York Constitution that prohibit the state from giving or loaning money or credit to any private corporation. *See* N.Y. Const., art. VII § 8 and art. VIII § 1.

Plaintiffs-Petitioners have already rebutted the State's argument to the contrary, and, in the interest of efficiency and judicial economy, respectfully refer the Court to that prior explanation and the authorities cited therein. *See* Plaintiffs-Petitioners Mem. of Law in Supp. of a Prelim. Inj. at 23–25 (filed March 20, 2020).[18] Because the Bag Act effectively bestows State funds and other benefits (albeit by laundering those funds through the intermediary of municipalities) on favored private individuals or corporations, but not on others, it violates the Constitution. This Court should enter a judgment declaring it, and should permanently enjoin the Bag Act's implementation or enforcement.

V. The Bag Regulation is *ultra vires*.

As explained in Plaintiffs-Petitioners' prior memorandum and summarized briefly above, the Bag Regulation is inconsistent with and goes beyond the Bag Act's requirements, purporting to permit what the Bag Act forbids (namely the distribution of reusable plastic bags) and purporting to impose requirements on certain plastic bags that are grossly excessive and unrelated to the statutory requirements actually articulated by the Legislature. *Compare* ECL §§ 27-2801(1), -2801(2), and -2803(1) (forbidding retailers to distribute any plastic bag other than "exempt bags," a term that does not include reusable plastic bags) *with* 6 NYCCR §§ 351-1.2(f), (g), (h), and (n) (purporting to

[18] The relative age of two cases cited in support of Petitioners-Plaintiffs' argument (cases from 1901 and 1922) does not diminish their authority. As this Court recently ruled, the meaning of constitutional provisions is to be determined by the understanding of those provisions closer in time to their adoption. *See White et al. v. Cuomo*, 62 Misc. 3d 877, 893, 87 N.Y.S. 805, 818 (Sup. Ct., Albany Cnty., NY, Hon. Gerald Connolly), aff'd as modified 181 A.D.3d 775 (2020).

expand the definition of "exempt bags" to include reusable plastic bags and to allow the distribution of such bags). Further, in promulgating this regulation that is inconsistent with and in excess of the Bag Act, the DEC engaged in an essentially legislative function, weighing competing policy and economic factors and making value judgments entailing difficult and complex choices between broad policy goals. *See* Plaintiffs-Petitioners Mem. of Law in Supp. of a Prelim. Inj. at 25–28 (filed March 20, 2020). Plaintiffs-Petitioners adopt and incorporate their prior arguments on this point, and further state that the State's attempts to defend the DEC's intrusion in the legislature's domain fail for the reasons set out below.

First, the DEC's actions in promulgating the challenged aspects of the Bag Regulation are functionally indistinguishable from those found to be *ultra vires* in *Boreali* and its progeny down to the Big Gulp case and beyond, and the Bag Regulation should meet the same fate as the regulations in those cases. *See*, *e.g*., *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987); *N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. C. Dept. of Health & Mental Hygiene*, 992 N.Y.S.2d 480, 488 (2014). The DEC did not, as the State claims, merely "fill up the details." *See* State's Answering Mem. at 30.[19] The Bag Regulation does not fill in any details; rather, it *contradicts* the clear language of the Bag Act. The latter prohibits the distribution of reusable plastic bags; the former purports to allow it.

Second, the State erroneously argues its sweeping, policy-based rulemaking was permissible because the DEC had "both general and specific authority" to promulgate the regulation implementing the Bag Act. *See id*. at 3; *see also id*. at 28. Not so. The specific authority the State relies on is found in *Title 27*, not in the Bag Act. *See id*. Accordingly, while the DEC *might* have

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[19] Notably, despite having previously denied any inconsistency between the Bag Act and Title 27, the State here admits it was necessary for the DEC to "clarify minor differences in the two statutes." *Id*.

specific authority to regulate broadly to implement Title 27, it lacks the specific authority needed to engage in the sort of broad policy-making rulemaking the DEC undertook in its effort to implement what it *thought* the Bag Act *should* have said. Generalized enabling language authorizing an agency to make reasonable rules and regulations is insufficient to support sweeping policy-based rule-making such as that found in the Bag Regulation. *Thrift Wash, Inc. v. O'Connell*, 11 Misc.2d 318, 322 (Sup. Ct. N.Y. County 1958); *see also Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987) (stating an administrative agency in cannot rely upon its own mandate "as a basis for engaging in inherently legislative activities" or promulgating rules "embodying its own assessment of what public policy ought to be").

Third, the State's argument that the DEC did not cross the line into impermissible policy making under the four-factor test in *Boreali* falls short. *See* State's Answering Mem. at 29–30. The four factors set out in *Boreali* are not "discrete, necessary conditions that define improper policy-making by an agency, nor [are they] criteria that should be rigidly applied in every case in which an agency is accused of crossing the line into legislative territory." *N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. C. Dept. of Health & Mental Hygiene*, 992 N.Y.S.2d 480, 488 (2014). Rather, they are "overlapping, closely related factors that, taken together, support the conclusion that an agency has crossed that line." A plaintiff need not establish *each* of the *Boreali* guideposts, and an agency may not defeat a claim under *Boreali* "merely by showing that one *Boreali* factor does not obtain." *Id*. The analysis "should center on the theme that 'it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends'" and "[t]he focus must be on whether the challenged regulation attempts to resolve difficult social problems in this manner." *Id*. "That task, policy-making, is reserved to the legislative branch." *Id*. (citations omitted).

The DEC promulgated a regulation that *contradicts* the Bag Act and permits what the Bag Act forbids. Further, this contradiction of the Legislature's decision, like the DEC's creation of its own, different definition for "reusable bags," reflects DEC's "own conclusions about the appropriate balance of trade-offs." *Boreali*, 71 N.Y.2d at 12. This sort of balancing of economic, social, and environmental factors invades the province of the Legislature and constitutes broad and impermissible agency policy-making. *See id*. By "acting solely on [its] own ideas of sound public policy," the DEC was "operating outside of its proper sphere of authority," and its actions were *ultra vires*. *Id*.

Fourth, contrary to the State's assertion, the Bag Regulation is not the product of the DEC's special technical expertise. In *Boreali*, the defendant pointed to scientific evidence pertaining to the health risks of environmental tobacco smoke in defending the action it was taking, but the Court nevertheless ruled that the agency exceeded its authority because no special health expertise was involved in the "*development of the regulations challenged*." *Id*. at 6, 14 (emphases added). So too here. Just like agency in *Boreali* drafted a "simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups," the DEC here promulgated a Regulation that permits and restricts the distribution of certain types of bags without serious regard for a particular type of bag's overall environmental impact or affect on public health and safety. Indeed, studies have shown that the type of bags preferred by DEC are *less* environmentally friendly and less hygienic. *See*, *e.g*., Robert M. Kimmel, *Life Cycle Assessment of Grocery Bags in Common Use in the United States*, Clemson University Digital Press, 118, 183 (2014) (noting the health risk and bacterial infestations common to reusable fabric bags); Sinclair *et al*., *The Spread of a Norovirus Surrogate via Reusable Grocery Bags in a Grocery Supermarket*, JOURNAL OF ENVIRONMENTAL HEALTH (June 2018) (finding reusable grocery bags are highly

likely to be contaminated with bacteria and viruses and are highly likely to transfer these pathogens to store employees, family members, and members of the public by contact with supermarket cashiers, supermarket check-out conveyors, grocery carts, the shoppers hands, and kitchen counters); UK Environment Agency, *Life cycle assessment of supermarket carrierbags: a review of the bags available in 2006* (July 25, 2011) (analyzing the resource expenditure for various types of bags and determining that polyethylene bags had the smallest per-use environmental impact, and fabric bags exhibited the highest and most severe environmental impact), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/291023/scho0711buan-e-e.pdf. In the DEC's environmental policy-making view, however, fabric and woven bags are preferable to polyethylene bags, regardless of the empirical evidence and regardless of the Legislature's views otherwise.

Because the DEC has engaged in legislative policy-making, promulgated a Regulation that contradicts the legislation it purports to implement, and establishes rules without reliance on any scientific or technical expertise, the promulgation of the Bag Regulation constitutes an *ultra vires*, invalid action in excess of the DEC's jurisdiction and authority. This Court should declare such and should permanently enjoin the Bag Regulation's implementation or enforcement.

VI. The Bag Regulation is arbitrary and capricious.

As explained in Plaintiffs-Petitioners' prior memorandum and summarized briefly above, the Bag Regulation purports to impose requirements on certain plastic bags that are grossly excessive, unrelated to the statutory requirements articulated by the Legislature, unsupported by the facts and evidence upon which the DEC purports to have relied, and, perversely, have an economically and environmentally detrimental effect. *See generally* Plaintiffs-Petitioners Mem. of Law in Supp. of a Prelim. Inj. at 29–31 (filed March 20, 2020). Plaintiffs-Petitioners respectfully refer the Court to

that prior filing, which it incorporates herein by reference, and further states that the State's arguments fail to save the Regulation for the following reaons.

First, the State claims the DEC "conducted extensive research" and "engaged in extensive public outreach" before settling on the "disputed 10+ mil thickness" that, according to the State, "is ubiquitous and widely accepted." *See* State's Answering Mem. at 31 (citing affidavit of David Vitale). But a review of Mr. Vitale's affidavit and the administrative record reveals anything but that. Most notably, both Mr. Vitale's affidavit and the other record evidence are devoid of a *single example of a plastic bag law or regulation from anywhere* that imposes the supposedly "ubiquitous and widely accepted standard" 10+ mil standard. Rather, the only thing established by the DEC's "extensive research" is that the industry uses the term "film plastic" to refer to any flexible sheet of plastic resin up to 10 mils thick. *See* Vitale Affidavit ¶ 17. But nothing in Mr. Vitale's affidavit establish that 10+ mil-thick bags even exist, much less are a common standard, much less are required by any jurisdiction. Further, the public comments and outreach did not support the 10+ mil requirement, nor did they reveal perspective "on both sides of the issue." *See* Vitale Affidavit ¶ 15. Rather, they reveal that everyone—both those supporting bag bans and those opposing them—*opposed* the 10+ mil bag requirement, albeit for differing reasons. *See id*. At most, the DEC's "extensive research" led it to hypothesize that, although apparently no one else had ever imposed a 10+ mil thick bag requirement, and although all the interested stakeholders opposed the idea, the DEC *hoped* that such a bag might minimize waste, despite the admitted evidence that the bags are more resource-intensive to make and that the public tends to discard reusable plastic bags. *See, e.g., id.* ¶ 18

This is not the sort of rational basis needed to uphold a regulation. *See N.Y State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991); CPLR § 7803(3); *Pell v. Bd. of Educ*., 34 N.Y.2d

222, 231 (1974); *Kelly v. Kaladjian*, 155 Misc.2d 652, 655 (Sup. Ct. N.Y. County 1992) (noting that agency rules and classifications will be invalidated unless they "bear some rational relationship to the goals sought to be achieved, and must otherwise be factually based").

Second, had the DEC done extensive research rather than cherry picking data to support its preferred policy-making outcome, it would have learned that the bags it favors (both the extraordinarily thick plastic bags and the fabric or woven bags) actually have a greater environmentally harmful impact. *See*, *e.g*, *Life cycle assessment of supermarket carrierbags*, *supra*; Ministry of Environment and Food of Denmark, *Life Cycle Assessment of grocery carrier bags* (February 2018) (noting plastic was less detrimental than cotton totes or paper bags when it comes to how their manufacturing affects climate change, ozone depletion, water use, air pollution and toxicity for humans), *available at* https://www2.mst.dk/Udgiv/publications/2018/02/978-87-93614-73-4.pdf.

Third, as discussed earlier in this memorandum, extensive research would have revealed that fabric or other woven reusable bags are known to harbor bacteria, contagions, and viruses, and are known to be rarely washed and usually kept in unsanitary condition. *See generally* Amend. Verified Pet. at Ex. F ¶¶ 5, 7; *see also* Sinclair *et al*., *The Spread of a Norovirus Surrogate via Reusable Grocery Bags in a Grocery Supermarket*, JOURNAL OF ENVIRONMENTAL HEALTH (June 2018); Robert M. Kimmel, *Life Cycle Assessment of Grocery Bags in Common Use in the United States*, Clemson University Digital Press, 118, 183 (2014) (noting that few reusable bags are ever washed and that most harbor large numbers of bacteria); Chaya Gurkov. *Concerns Mount That Plastic Bag Ban Could Help Spread Coronavirus*, KINGS COUNTY POLITICS (Feb. 25, 2020).

The State argues the Court may not consider these authorities in the Article 78 portion of the proceeding. *See* State's Answering Mem. at 32–33. Plaintiffs-Petitioners have already

responded to that argument earlier in this memorandum. But even assuming *arguendo* that the Court cannot consider them for their truth in the Article 78 portion of this proceeding (an assumption that is not conceded), the existence of these authorities, which were completely overlooked by the DEC during its allegedly "extensive research," illustrates the lack of depth of the DEC's research and the arbitrary, policy-based, outcome-driven approach to crafting the regulation. Further, in the Article 30 portion of this proceeding, they provide the Court with an additional, independent basis to enjoin the Bag Act and Bag Regulation in the interests of mitigating the public health risk they pose.

Because the Bag Regulation's 10+ mil thick requirement is arbitrary and capricious, this Court should enter a judgment declaring it, and should permanently enjoin the Bag Regulation's implementation or enforcement.

VII. In the absence of declaratory and permanent injunctive relief, Plaintiffs-Petitioners will be irreparably injured.

"Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient. *Di Fabio v. Omnipoint Communications, Inc*., 66 A.D.3d 635, 636–37 (2d Dept. 2009) (internal quotation marks and citations omitted). Further, a petitioner must "establish, inter alia, that irreparable harm will . . . be imminent, not remote or speculative." *White v. F.F Thompson Health Sys., Inc*., 75 A.D.3d 1075, 1077 (4th Dept. 2010) (internal quotation marks and citation omitted). Plaintiffs-Petitioners have met this test.

In the absence of declaratory and permanent injunctive relief, Plaintiffs-Petitioners will be irreparably harmed by being subject to conflicting statutes and regulations, vague requirements, impermissible and arbitrary regulatory requirements, and the other harms alleged in the Amended Verified Petition and discussed above. Such harms cannot be remedied by mere money damages. *Laker v. Assn. of Prop. Owners of Sleepy Hollow Lake, Inc*., 172 A.D.3d 1660, 1663 (3d Dept.

2019) (noting that, in the context of an Article 78/declaratory judgement proceeding, a change in policy that stopped an "income stream" was sufficient to establish "irreparable harm"); *see also generally* Plaintiffs-Petitioners Mem. of Law in Supp. of a Prelim. Inj. at 31–34 (filed March 20, 2020). The State makes no argument to the contrary. Accordingly, entry of declaratory and injunctive relief is warranted.

VIII. The balance of equities decidedly tips in Plaintiffs-Petitioners' favor.

Finally, the court must determine "whether a balance of the equities tips in [Petitioner's] favor." *Felix v. Brand Serv. Group LLC*, 101 A.D.3d 1724, 1726 (4th Dept. 2012). "Such a balancing involves an inquiry whether 'the irreparable injury to be sustained . . . is more burdensome [to the petitioner] than the harm caused to defendant through imposition of the injunction." *Id.* (citation omitted). In the instant suit, the equities decidedly tip in favor of Plaintiffs-Petitioners.

Plaintiffs-Petitioners have identified a number of imminent, irreparable injuries above. Further, the permanent injunction they seek would prevent the infliction of the injuries noted above, halt the implementation and enforcement of a statute and regulation that are so riddled with inconsistencies, conflicts, and errors as to leave neither Plaintiffs-Petitioners nor the State's enforcing entities with any clear sense of what is and isn't permitted and forbidden, and would place responsibility for fixing the statutory scheme back where it belongs—not with the DEC and not with this Court, but with the Legislature.

CONCLUSION

For the foregoing reasons, Plaintiffs-Petitioners respectfully request this Court grant the requested permanent injunction and declaratory relief to prevent irreparable harm by the enforcement and implementation of inconsistent, confusing, vague, unlawful, unconstitutional, ultra vires, and arbitrary and capricious statute and regulation.

Respectfully submitted,

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