

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, and
THE BODEGA AND SMALL BUSINESS
ASSOCIATION,

Plaintiffs-Petitioners,

for a judgment pursuant to Articles 30 and 78
of the Civil Practice Law and Rules,

-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 SEGOS in his official capacity of
Commissioner of the New York State
Department of Environmental Conservation,

Defendants-Respondents.

Index No. 02673-20

VERIFIED ARTICLE 78 AND
DECLARATORY JUDGMENT PETITION

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Plaintiffs-Petitioners, by and through undersigned counsel, respectfully allege as follows:

PRELIMINARY STATEMENT

1. This case is not about the merits or demerits of single-use plastic shopping bags or the Legislature's desire to ban the use of such bags in New York. Rather, this case is about whether the Legislature, in an effort to eliminate such bags and to promote instead the use of reusable bags, may enact statutes (a) that conflict with other state laws, thus placing retailers in the untenable position of choosing which state law they must violate, (b) that—whether by design or inadvertence—are so vague as to deprive retailers of any clear guidance regarding what is permissible and what is punishable, and (c) that bestow a windfall on the makers of some, but not all, reusable shopping bags. This case is also about whether the Department of Environmental

Conservation, in an effort to effectuate such statutes, may promulgate regulations that exceed (or even conflict with) those statutes' requirements and which impose entirely new requirements devised by the agency that are devoid of any factual support, unrelated to Legislature's intended goal, and lack any sound or rational basis.

2. In 2019, 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, and, confusingly, seems both to encourage and simultaneously to forbid the use and distribution of reusable plastic bags. while allowing the use and distribution of reusable fabric bags. *See* S. 1508-C (attached hereto as **Exhibit A**) at Part H (hereinafter "the Bag Act").¹ The Bag Act's prohibitions become effective on March 1, 2020.

3. Further, although the Bag Act does not itself authorize the Department of Environmental Conservation ("DEC") to promulgate regulations for its implementation, the DEC proceeded to do so. The regulations it promulgated—6 NYCRR Part 351 ("the Bag Regulation") (attached hereto as **Exhibit B**)²—exceed and contradict the terms of the Bag Act by expanding the list of exceptions to the ban (*i.e.*, expanding the list of permitted plastic bags) and by authorizing the use and distribution of reusable plastic bags that are at least 10 mils thick—a standard that (a) is more than 400% greater than California's analogous requirement, (b) upon information and belief was not supported by any testimony or agency fact finding, and (c) imposes a requirement that cannot currently be provided by a single American manufacturer of reusable bags.

¹ Also available at <https://legislation.nysenate.gov/pdf/bills/2019/S1508C> (last visited February 26, 2020).

² Also available at https://www.dec.ny.gov/docs/materials_minerals_pdf/part351rvsdexptrmsfinal.pdf (last visited February 26, 2020).

4. For these reasons, and as explained more fully below, the Bag Act and the Bag Regulation should be declared inconsistent with existing law, void for vagueness, unconstitutional, *ultra vires*, and/or arbitrary and capricious, and their implementation and enforcement should be preliminarily and, later, permanently enjoined.

PARTIES

5. Plaintiff-Petitioner Poly-Pak Industries, Inc. ("Poly-Pak") is a family-owned, New York corporation with a manufacturing facility in Melville, New York that employs 210 New Yorkers in the production of plastic envelopes, heavy duty reusable plastic bags, and plastic film for agricultural applications. Poly-Pak is dedicated to being an environmentally friendly company and, in keeping with that goal, manufactures products that both contain recycled material and are themselves recyclable. Poly-Pak manufactures reusable plastic bags that meet and surpass the strength and durability requirements in New York and in every other American jurisdiction with reusable bag restrictions. The bags are not, however, 10 mils thick and thus are prohibited under DEC's arbitrary and capricious Bag Regulation.

6. Plaintiff-Petitioner Green Earth Food Corporation ("Green Earth") is a New York corporation operating a corner market—the Green Earth Grocery Store—at the intersection of Grand Concourse and East 171st Street in the Bronx. Green Earth currently distributes carryout plastic shopping bags to its customers at the point of sale. As a "person required to collect tax," Green Earth will be subject to the duties and prohibitions purportedly imposed by the Bag Act and the Bag Regulation.

7. Plaintiff-Petitioner Francisco "Frank" Marte is a resident of the Bronx, Bronx County, New York, and is a citizen and taxpayer of the State of New York. He is the owner and operator of Green Earth and an officer of The Bodega Association USA, Inc.

8. Plaintiff-Petitioner the Bodega and Small Business Association, f/k/a The Bodega Association USA, Inc. (the "Bodega Association"), is a New York corporation and trade association of local retailers and bodegas—small corner stores or markets that typically sell groceries, wine, and sundries; are often owned and operated by individuals who speak English as a second language, if at all; and are often located in non-English-speaking neighborhoods of large cities. The Bodega Association represents 5,000 stores in New York alone, which collectively employ 25,000 people and serve approximately 2.5 million New Yorkers every week. These bodegas are popular spots for New Yorkers to purchase a variety of grocery staples, dry goods, and household items. In many New York City neighborhoods, these businesses are the only convenient outlet for local residents to purchase their groceries and other daily necessities. As "person[s] required to collect tax," the bodegas that form the Bodega Association's membership will be subject to the duties and prohibitions purportedly imposed by the Bag Act and the Bag Regulation.

9. Defendant-Respondent the State of New York is a sovereign governmental entity constitutionally authorized to enact and enforce, through its legislature, executive, and government agencies, laws and regulations subject to the restrictions and limitations of the New York and United States Constitutions and other applicable law.

10. Defendant-Respondent Hon. Andrew Cuomo is the duly elected and serving Governor of the State of New York, with his principal offices located in the City and County of Albany.

11. Defendant-Respondent the New York State Department of Environmental Conservation ("DEC") is an agency of the State of New York established by statute in 1970 and continuing in operation by the authority of New York Environmental Conservation Law § 3-0101. Pursuant to New York Environmental Conservation Law § 3-0301, the DEC is statutorily

authorized, by and through its commissioner, to “carry out the environmental policy of the state,” to “[e]ncourage recycling and reuse of products to conserve resources and reduce waste products,” to “[a]dopt, amend or repeal environmental standards, criteria and those rules and regulations having the force and effect of standards and criteria to carry out the purposes and provisions of this act,” and to “[a]dopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of this chapter.”

12. Defendant-Respondent Basil Seggos is the Commissioner of the New York State Department of Environmental Conservation. Commissioner Seggos is a gubernatorial appointee who holds office at the pleasure of the Governor. *See* N.Y. Envir. Conser. Law § 3-0103. As noted in the preceding paragraph, Commissioner Seggos is statutorily authorized to carry out the State’s environmental policy by, among other things, adopting or amending regulations to carry out the purposes and provisions of the State’s environmental laws. *See id.* § 3-0301.

HARMS TO PLAINTIFFS-PETITIONERS

13. If required to comply with the Bag Act and Bag Regulation, Plaintiffs-Petitioners or their members will be irreparably harmed by being subject to conflicting laws—namely, the Bag Act, which prohibits them from making reusable plastic bags available to customers, and the Plastic Bag Reduction, Reuse and Recycling Act, which requires them to make such reusable bags available to customers. In the absence of injunctive and declaratory relief, Plaintiffs-Petitioners, like hundreds of retailers across New York, will be placed in the untenable position of being simultaneously required and forbidden to make such bags available.

14. If required to comply with the Bag Act and Bag Regulation, Plaintiffs-Petitioners such as Green Earth and other members of the Bodega Association will be irreparably harmed by the loss of sales and customer goodwill as a result of the retailers’ inability to provide compliant

bags to their customers. Because the Bag Act and Bag Regulation forbid distribution of carryout plastic shopping bags and effectively forbid the distribution of reusable plastic shopping bags, and because available inventories of paper or reusable cloth bags are insufficient to meet the demand, Green Earth and the bodegas represented by the Bodega Association will be unable to provide customers with any method of carrying their purchases home.

15. Further, due to the Bag Act's vagueness, Plaintiffs-Petitioners Green Earth, its proprietor, Mr. Marte, and other members of the Bodega Association will be irreparably harmed by being forced to speculate what types of reusable bags they may distribute, risking inadvertently violating the Bag Act or the Bag Regulation and being punished with a civil penalty of \$250 to \$500 per violation.

16. If the Bag Act and Bag Regulation are enforced, 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. Despite the fact that Poly-Pak's reusable bags meet the durability, strength, size, and format requirements of the Bag Act and Regulation, and despite the fact that Poly-Pak's reusable bags are permissible in every other jurisdiction in the nation with similar plastic bag regulations, Poly-Pak will be forced to halt its production lines, retool and reformat its equipment, and develop and distribute new 10-mil-thick bags, 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.

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction to decide this Petition pursuant to New York Civil Practice Law and Rules ("CPLR") § 7803 because the rule adopted by Defendant-

Respondent DEC is a final determination made in violation of lawful procedure, affected by an error of law, and is arbitrary and capricious. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001.

18. This Court has personal jurisdiction over the Defendants-Respondents pursuant to CPLR §§ 301 and 307 and service of process accomplished in accordance therewith.

19. Venue lies in Albany County pursuant to CPLR §§ 506(b) and 7804(b). The seat of government of Defendant-Respondent the State of New York is located in Albany County, as are the offices of the DEC, Governor Cuomo, and Commissioner Seggos.

BACKGROUND

I. The Legislature enacted, and the Governor signed, a vague and internally-inconsistent Bill prohibiting the use and distribution of certain plastic bags.

20. On March 31, 2019, the New York Senate and New York Assembly passed a budget bill that, among other things, prohibits the use and distribution of certain plastic bags. *See Exhibit A (S. 1508-C)* at 8–13. Specifically, Part H of the Bill amends Article 27 of the Environmental Conservation Law by enacting a new Title 28—the “New York state bag waste reduction act”—that consists of sections 27-2801 to 27-2809. *Id.* The Bill was signed by Governor Cuomo on April 12, 2019.

21. The operative portion of the Bag Act states: “No person required to collect tax shall distribute any plastic carryout bags to its customers unless such bags are exempt bags as defined in subdivision one of section 27-2801 of this title.” *Id.* at 9 (Bag Act § 27-2803(1)).

22. “Plastic carryout bag” is defined as “*any plastic bag, other than an exempt bag, that is provided to a customer by a person required to collect tax to be used by the customer to carry tangible personal property, regardless of whether such person required to collect tax sells any tangible personal property or service to the customer, and regardless of whether any tangible*

personal property or service sold is exempt from tax under article twenty-eight of the tax law.” *Id.* at 8 (Bag Act § 27-2801(2) (emphasis added)).

23. “Exempt bag” is defined by listing 11 enumerated categories of plastic bags that are exempt from the Bag Act’s ban:

“Exempt bag” means a bag: (a) used solely to contain or wrap uncooked meat, fish, or poultry; (b) bags used by a customer solely to package bulk items such as fruits, vegetables, grains, or candy; (c) bags used solely to contain food sliced or prepared to order; (d) bags used solely to contain a newspaper for delivery to a subscriber; (e) bags sold in bulk to a consumer at the point of sale; (f) trash bags; (g) food storage bags; (h) garment bags; (i) bags prepackaged for sale to a customer; (j) plastic carryout bags provided by a restaurant, tavern or similar food service establishment, as defined in the state sanitary code, to carryout or deliver food; or (k) bags provided by a pharmacy to carry prescription drugs.

Id. at 8 (Bag Act § 27-2801(1)).

24. The Bag Act’s definition of “reusable bag” includes durable, reusable plastic bags with handles, but the Act does not include reusable bags among the types of bags that are exempted from the Act’s prohibition. *See id.* at 9 (Bag Act § 27-2801(4) (defining “reusable bag” as a bag “made of cloth or other machine washable fabric that has handles” or “a durable bag with handles that is specifically designed and manufactured for multiple reuse”); *id.* at 8 (Bag Act § 27-2801(1)) (listing the types of bags exempt from the prohibition, but not including “reusable bags” in the list).

25. Accordingly, under the plain and express terms of the Bag Act, retailers are forbidden from providing reusable plastic bags to their customers, and are permitted only to distribute fabric or cloth reusable bags. *See id.* at 8–9 (Code §§ 27-2801(1), -2801(2), and -2803(1) (collectively prohibiting the distribution of “any plastic bag” other than an “exempt bag,” and not including reusable plastic bags among the bags exempted from the prohibition) (emphasis added)).

26. Confusingly, however, other portions of the Bag Act authorize and require the distribution of such bags. *See id.* at 11 (Bag Act § 27-2805(7) (requiring a portion of the money generated by \$0.05-per-paper-bag “fees” imposed by some local ordinances be spent “purchasing and distributing reusable bags”). The Act is, at minimum, vague.

27. Accordingly, the Bag Act’s express terms seem simultaneously to forbid and require the distribution of durable, reusable, handled plastic bags. *Compare id.* at 9 (Bag Act § 27-2803) *with id.* at 8–9 (Bag Act § 27-2801(1) and (4)) and *id.* at 11 (Bag Act § 27-2805(7)).

28. “Violations” of the Bag Act’s requirements—whatever they may be—are punishable by a civil penalty of \$250, which increases to \$500 per violation for subsequent violations. *Id.* at 11 (Bag Act § 27-2807(1)).

29. Compounding the confusion inherent in the Bag Act (which, as explained below, is exacerbated by the inconsistent regulation subsequently promulgated by the DEC) and the chaos that will result from its implementation, neither the State nor its agencies or officers have made any effort to reach out in multilingual fashion to explain the Bag Act’s requirements, prohibitions, and penalties to the Spanish, Arabic, and Korean-speaking retailers that comprise a sizeable percentage of the 13,000 small grocery stores in New York City alone.

II. The DEC promulgated Regulations inconsistent with the Bag Act and which impose requirements unsupported by factual findings and unrelated to the goals of the Bag Act.

30. Although the Bag Act does not itself authorize the DEC to promulgate regulations implementing the Act, the DEC proceeded to do so. *See* Exhibit B (6 NYCRR Part 351).

31. Notably, the Bag Regulation enlarges upon the Bag Act’s list of “exempt bags” by adding a new category of permissible bags that is not present in the Bag Act’s enumerated list, namely reusable bags. *Compare* Exhibit A at 8 (Bag Act § 27-2801(1)) *with* Exhibit B at 4

(NYCCR § 351-1.2(f) (“‘Exempt bag’ means a bag that is . . . a reusable bag as that term is defined in this Part.”)). The Bag Regulation thus purports to permit what the Bag Act forbids.

32. Further, the Bag Regulation contorts the Bag Act’s definition of “reusable bag” to the point of being unrecognizable. While the Bag Act defines a reusable bag as one “made of cloth or other machine washable fabric that has handles; *or . . . a durable bag with handles* that is specifically designed and manufactured for multiple reuse,” *see* Exhibit A at 9 (Bag Act § 27-2801(4)) (emphasis added), the Bag Regulation defines a reusable bag much more restrictively:

(n) ‘Reusable bag’ means a bag that:

(1) is either made of:

(i) cloth or other machine washable fabric; or

(ii) *other non-film plastic washable material*; and

(2) has at least one strap or handle that does not stretch and is fastened to the bag in such a manner that it allows the bag to meet the strength and durability standards in paragraphs 351-1.2(n)(3) and (4);

(3) has a minimum lifespan of 125 uses, with a use equal to the ability to carry a minimum of 22 pounds over a distance of at least 175 feet; and

(4) has a minimum fabric weight of 80 grams per square meter (GSM) or equivalent for bags made of any non-film plastic of natural, synthetic, petroleum based, or non-petroleum-based origin, including woven or nonwoven polypropylene (PP), polyethylene-terephthalate (PET), cotton, jute, or canvas.

Ex. B at 6 (NYCCR § 351-1.2(n)) (emphasis added). “Film plastic” and “film plastic bag” are elsewhere defined as a bag made from “a flexible sheet of . . . plastic resin or other material . . . less than 10 mils in thickness.” *Id.* at 4 (NYCCR § 351-1.2(g) and (h)).

33. Taken together, the Bag Regulation’s definitions of “film plastic,” “film plastic bag,” and “reusable bag” permit the use and distribution of reusable bags made of cloth, fabric, polypropylene, polyethylene-terephthalate, cotton, jute, or canvas, but not from the most

commonly used material for such bags—polyethylene—unless the polyethylene bag is more than 10 mils thick.³

34. Upon information and belief, the DEC had no factual basis, evidence, or public commentary to support its decision to impose a 10+ mil requirement on all polyethylene bags. To the contrary, the administrative record reveals the DEC was aware that this arbitrary and capriciously chosen requirement was grossly excessive, unnecessary to implement the Legislature's enactment, and economically and environmentally counterproductive.

35. Specifically, the DEC's published summary of its assessment and response to the public comments on Part 351 acknowledges the public raised these issues, but, rather than respond to them or articulate any reasonable basis for its requirement, the DEC simply ignores the comment or provides a non-responsive or non sequitur response:

Commenters also raised concerns regarding the requirement for low density polyethylene (LDPE) or high density polyethylene (HDPE) reusable bags to have a minimum thickness of 10 mils. Many comments indicated that this requirement would contribute to the plastic waste stream and plastic should be banned from all bag manufacturing. Other comments raised the concern that bags of this thickness would not be able to be manufactured, or that the cost of their production would burden stores and consumers. After evaluation, the Department firmly believes that the use of the industry-based definition for when a material is no longer a film plastic is an important element, among others, in defining reusable bags. . . .

Commenters raised several issues including that an 80 GSM requirement was too stringent, that a 2.25 mil bag is a durable bag, and that the Department should only approve a bag of equivalent material strength and durability following a public comment period. The Department's research has indicated that the 80 GSM standard is the typical requirement for reusable bags in similar laws across the

³ 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.

country. Accordingly, the Department retained that requirement as originally proposed.

See DEC's Summary of Assessment of Public Comment, available at https://www.dec.ny.gov/docs/materials_minerals_pdf/p351sumassessmentpubcomfml.pdf (last visited February 25, 2020).

Conspicuously absent from DEC's reasoning and response? Any factual basis or even an articulable reason why the 10+ mil requirement was necessary or even helpful to effectuate the Bag Act or to accomplish the broader aim of the State's Environmental Conservation Laws.

III. The Bag Act and Bag Regulations conflict with prior New York law and place retailers in an untenable position.

36. The confusion and inconsistencies created by the enactment and promulgation of the Bag Act and Bag Regulation are exacerbated and further illustrated by the fact that they conflict with prior New York law, namely Title 27 governing Plastic Bag Reduction, Reuse and Recycling. See Envir. Conser. Law §§ 27-2701 to -2713.

37. Specifically, Title 27 requires certain retailers to establish in-store programs capable of supplying customers with "reusable bags," which include "*durable plastic bag[s]* with handles that [are] specifically designed and manufactured for multiple reuse." *Id.* §§ 27-2701(5), -2703(1), and -2705(5).

38. Accordingly, retailers subject to both Title 27 and the Bag Act are caught between inconsistent and conflicting laws. The former requires them to make reusable plastic bags available to customers; the latter forbids it.

39. Further illustrating the disconnect between existing law and the DEC's new Bag Regulation, Title 27 expressly requires the DEC to *encourage* the reuse of plastic carryout bags and film plastic. See *id.* § 27-2709(1) ("The department shall develop educational materials to

encourage the . . . reuse . . . of plastic carryout bags and film plastic . . .”). The newly-promulgated Bag Regulation, in contrast, effectively forbids the use of reusable plastic bags.⁴

FOR A FIRST CAUSE OF ACTION
Request for Relief under Article 30 of the
CPLR—the Bag Act conflicts with existing law

40. Plaintiffs-Petitioners repeat, incorporate and reallege the foregoing allegations as if more fully set forth at length herein.

41. By forbidding what is required by N.Y. Envir. Conser. Law §§ 27-2701, -2703, and -2705, the Bag Act frustrates the purposes of those statutes, stands as an obstacle to the accomplishment of their purposes, and places retailers in the untenable position of being caught between conflicting laws, unsure which they must follow and which they must violate.

42. Such inconsistent and conflicting statutes violate fundamental requirements of fairness, notice, due process, and other constitutional and procedural safeguards, and impose an irreparable harm on retailers caught between them.

43. Because the Bag Act is inconsistent with and in conflict with existing law, this Court should declare its implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and should enjoin its implementation and enforcement pursuant to CPLR 3001, 6311, and/or 6313, respectively.

FOR A SECOND CAUSE OF ACTION
Request for Declaratory Relief under Article 30
of the CPLR—the Bag Act is void for vagueness

44. Plaintiffs-Petitioners repeat, incorporate and reallege the foregoing allegations as if more fully set forth at length herein.

⁴ Unlike the Bag Act, Title 27 expressly authorizes the DEC to promulgate regulations to implement its provisions. *See id.* § 27-2711.

45. As explained above, the Bag Act's express terms appear simultaneously to forbid and to permit the distribution of durable, reusable, handled plastic bags.

46. Such internal inconsistencies and ambiguities render an ordinary and reasonable person unable to discern what the law does and does not allow or to determine whether his or her contemplated conduct is forbidden by the statute.

47. Further, these internal inconsistencies and ambiguities deprive the officials and agencies tasked with enforcing the Bag Act of any clear standards for its enforcement, a situation that lends itself to potentially subjective, inconsistent, or conflicting enforcement.

48. 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, it is unlawfully and/or unconstitutionally void for vagueness, and this Court should declare its implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and should enjoin its implementation and enforcement pursuant to CPLR 3001, 6311, and/or 6313, respectively.

FOR A THIRD CAUSE OF ACTION

**Request for Declaratory Relief under Article 30 of the CPLR—the Bag Act
violates the Constitution of the State of New York, art. VII § 8 and art. VIII § 1**

49. Plaintiffs-Petitioners repeat, incorporate and reallege the foregoing allegations as if more fully set forth at length herein.

50. The New York Constitution prohibits the State from bestowing a special benefit or business advantage on private corporations. *See* N.Y. Const., art. VII § 8.

51. The Bag Act violates this stricture by granting a boon to manufacturers of cloth, fabric, and paper bags, while denying similar treatment to makers of reusable plastic bags. *See*

generally *Fox v. The Mohawk and Hudson River Humane Society*, 165 N.Y. 517 (1901); *People v. Ohrenstein*, 139 Misc.2d 909, 930-31 (Sup. Ct. N.Y. County 1988).

52. The Bag Act further violates this stricture by permitting local governments to impose a \$0.05 per bag tax on the sale 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 of reusable bags from sources of the municipalities' choosing. *See* Ex. A at 9-11 (Bag Act § 27-2805).

53. Because the Bag Act is an unconstitutional legislative exaction of money from private citizens by compelling them to purchase items from only certain, favored manufacturers, and because it bestows state and local government money on the purchase of particular favored reusable bags, this Court should declare its implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and should enjoin its implementation and enforcement pursuant to CPLR 3001, 6311, and/or 6313, respectively.

FOR A FOURTH CAUSE OF ACTION
Request for Relief under Article 78 of the
CPLR—the Bag Regulation is *ultra vires*

54. Plaintiffs-Petitioners repeat, incorporate and reallege the foregoing allegations as if more fully set forth at length herein.

55. As explained 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 use and 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.

56. 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.

57. No statute, regulation, or other authority permits the DEC to go beyond its administrative role and engage in the unprecedented act of policy-making at issue here, nor is there any support that an administrative agency can bypass the legislature and create policy based on what it thinks the Legislature *really* meant to say.

58. 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 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”).

59. Because the DEC has engaged in legislative policy-making without a proper statutory basis, its promulgation of the Bag Regulation constitutes an ultra vires, invalid action in excess of its jurisdiction and authority.

60. Because the DEC does not have the authority to promulgate and enforce the Bag Regulation, this Court should declare its implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and should enjoin its implementation and enforcement pursuant to CPLR 7803, 7805, and 7806.

FOR A FIFTH CAUSE OF ACTION
Request for Relief under Article 78 of the CPLR—the
Bag Regulation is arbitrary and capricious

61. Plaintiffs-Petitioners repeat, incorporate and reallege the foregoing allegations as if more fully set forth at length herein.

62. As explained 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, apparently unsupported by any findings of fact, evidence, or testimony, and, perversely, have an economically and environmentally detrimental effect.

63. An administrative regulation will be upheld only if it has a rational basis and is not unreasonable, arbitrary or capricious. The arbitrary or capricious standard inquires to whether a particular action is a foundation in fact. Agency action is arbitrary when it is without sound basis in reason or taken without regard to the facts.

64. The DEC's requirement that reusable plastic bags made of polyethylene be at least 10 mils thick lacks any foundation in fact, is without sound basis, was imposed despite and without substantively responding to public comments pointing out the excessive and baseless nature of the requirement.

65. Because the Bag Regulations' requirements pertaining to polyethylene bags are arbitrary and capricious, this Court should declare its implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and should enjoin its implementation and enforcement pursuant to CPLR 7803, 7805, and 7806.

PRIOR APPLICATION

66. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Plaintiffs-Petitioners request that this Court enter an Order:

(a) Declaring the Bag Act to be inconsistent with, in conflict with, standing as an obstacle to, and/or frustrating the purpose of existing New York law, and thus temporarily

restraining, preliminarily enjoining, and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing it;

(b) Declaring the Bag Act void for vagueness and thus temporarily restraining, preliminarily enjoining, and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing it;

(c) Declaring the Bag Act to be violative of Article VII, section 8 of the Constitution of the State of New York and thus temporarily restraining, preliminarily enjoining, and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing it;

(d) Declaring the Bag Regulation to be unlawfully *ultra vires* and thus temporarily restraining, preliminarily enjoining, and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing it;

(e) Declaring the requirements purportedly imposed on reusable plastic bags by the Bag Regulation to be arbitrary and capricious and thus temporarily restraining, preliminarily, enjoining, and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing those requirements or the Bag Regulation itself;

(f) Awarding Plaintiffs-Petitioners costs and disbursements against Defendants-Respondents pursuant to CPLR § 8101; and

(g) Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

[SIGNATURE PAGE ATTACHED]

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**Applications for admission pro hac vice forthcoming*