

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

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

Plaintiffs-Petitioners,)

v.)

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

Defendants-Respondents.)

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

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

**BRIEF OF PROPOSED *AMICI CURIAE* WE ACT FOR ENVIRONMENTAL JUSTICE,
BEYOND PLASTICS, AND CLEAN AND HEALTHY NEW YORK IN SUPPORT OF
NEITHER PARTY**

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STATEMENT OF INTEREST

Amici organizations are advocates for healthy communities and thriving environments in New York State and beyond. Together, *amici* represent a broad range of groups impacted by the lifecycle harms of plastic distribution, use, and disposal. Accordingly, these groups recognize the importance of reducing plastic carryout bag use.

WE ACT for Environmental Justice, or WE ACT, is a 501(c)(3) not-for-profit corporation comprised of approximately 500 dues-paying members. Located in New York City, WE ACT has both action members who live and work in Northern Manhattan and work on organization campaigns, and vision members located across the country who contribute service hours. Founded in March 1988, WE ACT's mission is to build healthy communities by ensuring that people of color and low-income individuals participate meaningfully in the creation of sound and fair environmental health and protection policies and practices. WE ACT seeks to appear as an *amicus curiae* because communities of color are more exposed to toxic chemicals, including the chemical additives used in plastic and plastic bags, than the general population, and significantly reducing use of plastic bags in New York (as the Legislature sought to do when it adopted the Bag Waste Reduction Act), will lead to healthier communities.

BEYOND PLASTICS is a nationwide project focused on ending plastic pollution through multiple approaches, including policymaking, public education, and media campaigns. Founder Judith Enck served as the Regional Administrator of the U.S. Environmental Protection Agency overseeing New York State, among other jurisdictions. Beyond Plastics educates the public about the ecological and health risks of plastic bags and other plastic products and educated New Yorkers in preparation for the March 1, 2020 effective date of the New York State

plastic bag ban. Ms. Enck also provided public testimony at New York Department of Environmental Conservation's January 2020 hearing on the proposed regulations for the bag ban.

CLEAN AND HEALTHY NEW YORK is a 501(c)(3) not-for-profit corporation whose purpose is to advance broad policy and market changes to promote safer chemicals, a sustainable economy, and a healthier world. To advance its mission, Clean and Healthy New York has advocated for the phase out of specific chemicals found in plastics, including bisphenol A, phthalates, and flame retardants. Clean and Healthy New York's additional plastics work includes extensive advocacy on toxic chemicals in children's products and child-care programs. Clean and Healthy New York also provided public testimony at New York Department of Environmental Conservation's January 2020 hearing on the proposed regulations for the bag ban.

PRELIMINARY STATEMENT

The Bag Waste Reduction Act (“Bag Waste Act” or “Title 28”) provides significant benefits for the health of New York’s residents and for New York’s environment by banning distribution of “any plastic carryout bags” with certain enumerated exemptions. Environmental Conservation Law (“ECL”) § 27-2803. *Amici* strongly support implementation of this law as it was written by the New York State Legislature (the “Legislature”) without delay. Unfortunately, neither Plaintiffs-Petitioners Poly-Pak Industries, Inc., Green Earth Food Corp, Francisco Marte, Mike Hassen, and the Bodega and Small Business Association (together, “Poly-Pak”) nor Defendants-Respondents the New York State Department of Environmental Conservation (“DEC”) correctly interpret the plain meaning of the Bag Waste Act. With the goal of laying out the proper reading of the legislative language, *Amici* submit this brief.

Amici agree with and support DEC’s Memorandum of Law in Opposition to Motion for a Preliminary Injunction (“DEC Opp. Br.”) and Answering Memorandum of Law to the extent they argue that the Bag Waste Act does not conflict with the Plastic Bag Reduction, Reuse and Recycling Act (“Bag Recycling Act” or “Title 27”), does not violate the New York Constitution, and is lawful on its face.¹ In addition, *Amici* disagree with Poly-Pak’s contention in its Amended Verified Article 78 Petition and Declaratory Judgment Petition, Memorandum of Law in Support of a Temporary Restraining Order and Preliminary Injunction in Favor of Plaintiffs-Petitioners, and Memorandum of Law in Support of a Preliminary Injunction that the implementing regulations are ultra vires or arbitrary and capricious in their entirety. However, *Amici* do not agree with DEC’s contention that its implementing regulations are legal in their entirety. Rather,

¹ Because *Amici* agree with DEC that the Bag Waste Act is constitutional, and these arguments are well-addressed by DEC, *Amici* do not address this issue here. *Amici* also do not address Poly-Pak’s standing or its assertion of irreparable harm.

Amici assert that DEC's regulations create a loophole that allows the distribution of *thick* plastic carryout bags in defiance of the Legislature's clear directive that vendors are prohibited from distributing "any plastic carryout bags" other than those specifically enumerated. ECL § 27-2803 (emphasis added).

The illegal loophole in DEC's regulations arises out of three subsections: *First*, DEC's regulations exempt "reusable bags" from the plastic bag ban, 6 NYCRR § 351-1.2(f)(11), even though this is not among the Act's enumerated exemptions, and the Legislature specifically rejected the idea of giving DEC discretion to expand the limited set of exemptions written into the law. *Second*, DEC's regulations amend the statutory definition of "reusable bag" to include bags made of "non-film plastic washable material," *id.* § 351-1.2(n)(1)(ii), which, by definition, can include plastic so long as it is at least "10 mils in thickness," *id.* § 351-1.2(g). Together, these provisions allow vendors to continue to distribute thick plastic bags, whereas the Legislature called for a ban on the distribution of "any plastic carryout bags," other than those specifically exempted, and specifically chose not to define reusable bags as including plastic bags.

DEC justifies its regulations by characterizing the Bag Waste Act as designed to prohibit only "single-use" plastic carry-out bags. *See* DEC Opp. Br. at 9; Answering Affidavit of David Vitale at ¶¶ 7, 16. However, the term "single use" appears nowhere in the Bag Waste Act.² Indeed, the fact that the Legislature banned "any plastic carryout bags" except those specifically

² As the legislative history recounted in the Affidavit of David Vitale indicates, prior to promulgation, DEC met with several groups regarding a ban on "single-use plastic bags." *See* Vitale Aff. ¶ 9. In addition, the New York State Plastic Bag Task Force focused on "single-use 'film plastic' bags." *Id.* ¶ 16. However, the Legislature deliberately did not use the "single-use" language in the text of the law, which is evidence that it did not intend the ban to be limited to single-use plastic bags.

exempted is clear evidence that the ban extends to *all* plastic bags, regardless of thickness or capacity to be re-used.

For these reasons, *Amici* ask the Court to uphold the Bag Waste Act and implementing regulations, with the exception of the regulatory provisions that create a loophole in the legislative prohibition on the distribution of “any” non-exempt plastic carryout bags, namely 6 NYCRR § 351-1.2(f)(11), which adds an exemption for “reusable bags,” and *id.* § 351-1.2(n)(1)(ii), which defines “reusable bags” to include some plastic carryout bags.

FACTUAL BACKGROUND

Plastic bags harm human health and the environment throughout their lifecycle. The harms begin at production. Like nearly all plastic produced today, plastic bags are derived from fossil fuels.³ Fossil fuel extraction, refining, and plastic production all contribute to the release of toxic chemicals that are directly tied to adverse health impacts. Chemicals such as 1,3-butadiene, toluene, propylene, and benzene are among the most toxic pollutants released in high volumes from plastic production.⁴ Exposure to these compounds is associated with adverse health outcomes ranging from skin and lung irritation to blood cancers.⁵ Ethane cracking, a process used to generate low-density and high-density polyethylene plastic bags, contributes to the release of additional toxic air pollutants like carbon monoxide, lead, particulate matter, and volatile organic compounds.⁶

³ Center for International Environmental Law, *Plastic & Health: The Hidden Costs of a Plastic Planet* at 6 (Feb. 2019), <https://www.ciel.org/wp-content/uploads/2019/02/Plastic-and-Health-The-Hidden-Costs-of-a-Plastic-Planet-February-2019.pdf> (“Plastic and Health Report”).

⁴ *Id.* at 18–20.

⁵ *Id.*

⁶ *Id.* at 19.

Chemical additives are often introduced during the plastic manufacturing process to make the product easier to use. These additives can enhance the durability and malleability of the plastic product, in addition to reducing static and flammability.⁷ Common additives like BPA, phthalates, and brominated flame retardants are associated with a range of serious health effects including disruption of the human endocrine (hormone) system, which is linked to a variety of health problems including cancer, birth defects, and reduced fertility.⁸ A recent study of 34 commonly used plastic products found that a majority of the products contained chemicals that induced toxicity in laboratory tests.⁹ A similar independent study of 26 common plastic products found that nearly half of the products contained chemicals that induced immobility in exposed animals.¹⁰ Since most of the additives present in plastics are not bound to their base plastic fibers, they “can be released at all stages of the plastics’ life-cycle,” including during and

⁷ John N. Hahladakis et al., *An Overview of Chemical Additives Present in Plastics: Migration, Release, Fate and Environmental Impact During Their Use, Disposal, and Recycling*, 344 J. Hazardous Materials 179– 199, 184 (Feb. 2018), <https://www.ncbi.nlm.nih.gov/pubmed/29035713>; Tamara S. Galloway, *Micro- and Nano-plastics and Human Health*, *Marine Anthropogenic Litter* 343–366, 347 (June 2015), https://link.springer.com/chapter/10.1007/978-3-319-16510-3_13.

⁸ Plastic and Health Report at 2, note 3 *supra*; Ecology Center, *Adverse Health Effects of Plastics*, <https://ecologycenter.org/factsheets/adverse-health-effects-of-plastics/> (last visited May 14, 2020); Kevin Loria, *Most Plastic Products Contain Potentially Toxic Chemicals, Study Reveals*, *Consumer Reports* (Oct. 2, 2019), <https://www.consumerreports.org/toxic-chemicals-substances/most-plastic-products-contain-potentially-toxic-chemicals/>; Lisa Zimmermann et al., *Benchmarking the in Vitro Toxicity and Chemical Composition of Plastic Consumer Products*, 53 *Envtl. Sci. & Tech.* 11,467– 11,477 (2019), <https://pubs.acs.org/doi/pdf/10.1021/acs.est.9b02293>; Hahladakis et al., note 7 *supra*.

⁹ Zimmerman et al., note 8 *supra*.

¹⁰ Delilah Lithner et al., *Comparative Acute Toxicity of Leachates from Plastic Products Made of Polypropylene, Polyethylene, PVC, Acrylonitrile-butadiene-styrene, and Epoxy to Daphnia Magna*, 19 *Envtl. Sci. & Pollution Research Inst.* 1763– 1772 (June 2012), <https://www.ncbi.nlm.nih.gov/pubmed/?term=comparative+acute+toxicity+of+leachates+lithner>.

following use.¹¹ Factors like temperature, contact time, and storage conditions can influence the migration of additives to the surface of plastics during use and potentially increase exposure risk.¹² Due to their widespread use, plastic additives are present in the blood of most people.¹³

Toxicity issues persist at disposal and take varied forms. Once released into the environment, plastics begin to breakdown through a process known as photo-degradation. This process makes plastics brittle and vulnerable to physical decomposition by wind, wave action, and other environmental abrasions.¹⁴ Over time, these processes lead to the fragmentation of plastics into tiny particles, often referred to as micro- and nano-plastics.¹⁵ During the degradation of plastics into micro- and nano-plastics, new surface areas are exposed, resulting in the slow and consistent leaching of dangerous additives.¹⁶ In addition, persistent organic pollutants (“POPs”) in the environment, including known or likely carcinogens like PCBs,¹⁷ PAHs,¹⁸ and PFAS,¹⁹

¹¹ Zimmermann et al. at 11,467, note 8 *supra*.

¹² Hahladakis et al. at 191, note 7 *supra*.

¹³ Antonia M. Calafat et al., *Exposure of the U.S. Population to Bisphenol A and 4-tertiary-Octylphenol: 2003– 2004*, 116 *Envtl. Health Perspectives* 39– 44 (Jan. 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2199288/>; Centers for Disease Control & Prevention, *Final Report on Human Exposure to Environmental Chemicals* (Feb. 2015), https://www.cdc.gov/biomonitoring/pdf/FourthReport_UpdatedTables_Feb2015.pdf.

¹⁴ Stephanie L. Wright & Frank J. Kelly, *Plastic and Human Health: A Micro Issue?*, 51 *Envtl. Sci. & Tech.*, 6634–6647 (May 2017), <https://www.ncbi.nlm.nih.gov/pubmed/28531345>.

¹⁵ *Id.*; Galloway at 344, note 7 *supra*.

¹⁶ Plastic and Health Report at 2, note 3 *supra*.

¹⁷ See Agency for Toxic Substances & Disease Registry (“ATSDR”), *Polychlorinated Biphenyls (PCBs)* (Mar. 2011), <https://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=26>.

¹⁸ See ATSDR, *Polycyclic Aromatic Hydrocarbons (PAHs)* (Mar. 2011), <https://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=25>.

¹⁹ See ATSDR, *Per- and Polyfluoroalkyl Substances (PFAS) and Your Health: What Are the Health Effects?* (Jan. 2020), <https://www.atsdr.cdc.gov/pfas/health-effects.html>.

readily adhere to microplastics, which act as reservoirs for these toxic pollutants.²⁰ Microplastics have been detected in seafood, processed food and beverages, and even household dust, indicating contamination of food, air, and water systems.²¹ If inhaled or ingested by humans, microplastics can accumulate and exert chemical toxicity via leaching of toxic additives and adsorbed persistent pollutants.²² Since plastics take hundreds, if not thousands, of years to biodegrade, plastic pollution can continually harm humans and the environment for centuries.

Recycling plastic does not solve the end-of-life concerns.²³ In 2015, less than ten percent of plastic waste in the United States was recycled.²⁴ Furthermore, plastic recycling facilities produce toxic air pollution and put workers at an increased risk of chronic health effects like cancer.²⁵ Indeed, even recycled plastics are ultimately incinerated or sent to landfills.²⁶ Incinerating plastics “releases dangerous substances such as heavy metals, [POPs], and other toxics into the air” that harm communities often already overburdened by heavily polluting industries.²⁷ The harms of incineration are widespread, since waste disposed of in New York is

²⁰ Marta Llorca et al., *Adsorption of Perfluoroalkyl Substances on Microplastics Under Environmental Conditions*, 235 *Envtl. Pollution* 680–691 (Apr. 2018), <https://www.ncbi.nlm.nih.gov/pubmed/29339337>.

²¹ Wright & Kelly at 6634, note 14 *supra*.

²² *Id.*

²³ John Hite, *We Can't Recycle Our Way Out of the Plastic Pollution Problem*, Conservation Law Foundation (Apr. 24, 2019), <https://www.clf.org/blog/cant-recycle-out-of-plastic-pollution-problem-guide/>.

²⁴ Plastic and Health Report at 7, note 3 *supra*.

²⁵ Zhigui He, *Pollution Characteristics and Health Risk Assessment of Volatile Organic Compounds Emitted from Different Plastic Solid Waste Recycling Workshops*, 77 *Env't Int'l.*, 85–94 (Feb. 2015), <https://www.ncbi.nlm.nih.gov/pubmed/25667057>.

²⁶ See Hite, note 23 *supra*.

²⁷ GAIA, *Burning Plastic: Incineration Causes Air Pollution, Dioxin Emissions, Cost Overruns*, <https://www.no-burn.org/burning-plastic-incineration-causes-air-pollution-dioxin-emissions-cost-overruns/> (last visited May 14, 2020). Of note, the problem of plastic waste is not affecting just New Yorkers. In 2019, the Covanta Essex incinerator in Newark, New Jersey burned nearly

incinerated in the ten municipal solid waste facilities across the state, such as the Wheelabrator Hudson Falls facility, or can be sent to incinerators in New Jersey and Pennsylvania.²⁸ Further, the ash produced from incineration creates a new waste disposal problem, and one that can expand the cycle of toxic exposure.²⁹ Off-gasses from landfills can also exacerbate climate change and air pollution.³⁰ While these toxicity concerns are an issue regardless of bag thickness, all other factors holding equal, thick plastic bags can have *more* of an impact than thinner plastic bags because of the increased use of fossil fuels in their production and the increased opportunity for toxic exposure. *See* R0004–R0005 (New York State Plastic Bag Task Force Report).

In New York, where 23 billion plastic bags are used annually, the scale of the problem is particularly significant. *Id.* R0027. In its attempt to combat this problem, the New York Legislature reviewed the New York State Plastic Bag Task Force Report (“Task Force Report”) which identified what programs other local and state governments have implemented. *Id.* R0003. The report chronicled how local governments across the country have attempted to address the panoply of issues caused by plastic bags through policies including plastic bag fees, bans, and education programs. *Id.* The report revealed that some policies turned out to be less effective than initially anticipated. For example, multiple cities have found that banning thinner plastic bags while allowing continued use of thicker plastic bags results in stores “simply purchas[ing] thicker plastic bags.” *Id.* R0013. This shift to thicker plastic bags meant that the underlying

400,000 tons of New York City’s residential trash. Sally Goldenberg & Danielle Muoio, *How de Blasio Bombed in His Attempt to Fix New York’s Garbage Crisis*, Politico (Jan. 6, 2020), <https://www.politico.com/news/2020/01/06/bloomberg-de-blasio-new-york-garbage-088805>. The Newark incinerator, located in an environmental justice community, is just one mile from a school. *Id.*

²⁸ DEC, *Map of Active Municipal Waste Combustion Facilities*, <https://www.dec.ny.gov/chemical/67804.html> (last visited May 14, 2020).

²⁹ Plastic and Health Report at 46–47, note 3 *supra*.

³⁰ *Id.* at 2.

plastic bag concerns were not solved; indeed, the use of thicker plastic resulted in the disposal of more plastic, meaning more concerns about the end-of-life toxicity of plastic. *Id.* R0023. The New York State Legislature decided to avoid this problem by banning “any plastic carryout bags,” regardless of thickness. ECL § 27-2803.

LEGAL FRAMEWORK

A. The At-Store Recycling and Reusable Bag Provisions of Title 27

In 2008, the New York State Legislature passed the Bag Recycling Act, or Title 27, to address the “significant environmental impacts” of the worldwide production, use, and disposal of plastic bags, including “the use of over 12 million barrels of oil,” “the deaths of thousands of marine animals through ingestion and entanglement,” the “billions of bags [that] end up as litter each year,” and the breakdown of plastic bags into “smaller and smaller toxic bits that contaminate soil and waterways and enter into the food web when animals accidentally ingest those materials.” Bag Recycling Act, ECL § 27-2701 (2008 McKinney’s Sess. Law News of N.Y., Ch. 641 (A. 11725) § 2). The Bag Recycling Act sought to address the harms of plastic bags in two main ways.

First, Title 27 requires stores that provide plastic carryout bags to customers and that have either (a) more than 10,000 square feet of retail space, or (b) are part of retail chains of five or more stores each with over 5,000 square feet of retail space (collectively, “larger stores”) to establish “at-store recycling program[s]” through which used plastic carryout bags could be returned to the store to be collected and transported for recycling. ECL §§ 27-2701, 27-2705. The Legislature later amended Title 27 to require larger stores to collect “film plastic,” such as newspaper and dry-cleaning bags, in addition to plastic carryout bags. Bag Recycling Act,

ECL § 27-2701 (as amended by 2014 McKinney’s Sess. Law News of N.Y. Ch. 481 (A. 191-B) § 1(2)).

Second, Title 27 requires larger stores to permit customers to use reusable bags instead of plastic carryout bags or paper bags, and to make reusable bags available for purchase. ECL § 27-2705(5). Title 27 defines “reusable bag” as “(a) a bag made of cloth or other machine washable fabric that has handles; or (b) a durable plastic bag with handles that is specifically designed and manufactured for multiple reuse.” *Id.* § 27-2701(5).

Though the recycling program mandated by Title 27 was a laudable starting point from which to address the plastic problem, it proved insufficient to meet the Legislature’s goals of plastic bag reduction. In January 2018, the New York Plastic Bag Task Force—co-chaired by representatives from the Assembly, Senate, and DEC—found that the Title 27 recycling program was plagued with various compliance issues and failed to change consumers’ habits of using and improperly disposing plastic carryout bags. R0008–R0009 (New York State Plastic Bag Task Force Report). The Task Force recommended various legislative options to better address the plastic bag reduction goals, including a plastic bag ban. *Id.* R0021–R0025.

B. The Plastic Bag Ban of Title 28

In 2019, following the direction of the Task Force Report, Governor Cuomo’s proposed budget included a plastic bag ban (“Initial Ban Bill”).³¹ This Initial Ban Bill would have amended Title 27 to add a new section that would prohibit “providing plastic carryout bags to customers . . . except as otherwise provided by [DEC] pursuant to regulations.” Initial Ban Bill at Part H § 27-2708. The Initial Ban Bill then specified that the prohibition would not apply to an

³¹ FY 2020 New York State Executive Budget: Transportation, Economic Development, and Environmental Conservation Article VII Legislation at Part H § 27-2708 (2019), <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ted-artvii.pdf>.

enumerated list of certain uses of plastic bags and allowed DEC to exempt “any other bag . . . in regulations.” *Id.* This bill would have left the reusable bag provisions of Title 27 untouched. *Id.*

However, after deliberations, the Legislature rejected various provisions of the Initial Ban Bill, including the idea of incorporating the statewide plastic bag ban provisions into Title 27. Instead, the Legislature passed the Bag Waste Act, rejecting some of the proposed language in the Initial Ban, and codifying the plastic carryout bag ban as a new Title 28 of the Environmental Conservation Law. Bag Waste Act, S. B. 1508-C (A. 2008-C) Pt. H (N.Y. 2019).

Title 28 prohibits any vendor of goods subject to New York State sales tax—including both the larger stores subject to Title 27 and smaller stores with no such plastic bag recycling requirement—from “distribut[ing] any plastic carryout bags to its customers unless such bags are exempt bags as defined in [Title 28].” ECL §§ 27-2801, 27-2803(1). Title 28 includes a savings clause to ensure that larger stores continue to implement at-store plastic recycling programs required by Title 27, even though these stores are now prohibited from distributing plastic bags by Title 28. *Id.* § 27-2803(3) (“Nothing in this section shall be deemed to exempt the provisions set forth in title 27 of this article relating to at store recycling.”).

The Bag Waste Act also allows municipalities to impose a five-cent fee on the use of paper bags and directs the municipality to use 40 percent of the funds collected from this fee to “purchas[e] and distribut[e] reusable bags, with priority given to low- and fixed-income communities.” *Id.* § 27-2805(7).

As passed by the Legislature and signed into law, Title 28 contains a number of notable differences from the Initial Ban Bill. *First*, the Legislature specifically rejected the discretion that the Initial Ban Bill gave to DEC to adopt exemptions beyond the ones enumerated by the Legislature by means of regulations. *Compare* ECL § 27-2801(1) *with* Initial Ban Bill § 27-2708.

Second, the Legislature chose not to adopt Title 27’s definition of “reusable bag” for the purposes of the municipal reusable bag distribution program, as the Initial Ban Bill had proposed. Instead, Title 28 has its own definition of “reusable bag” that is nearly the same as Title 27’s but with one conspicuous difference: Title 28’s definition strikes the word “plastic” from the definition of reusable bag. *See* ECL § 27-2801(4) (defining reusable bag as “a durable [plastic] bag with handles that is specifically designed and manufactured for multiple reuse.”).

C. DEC’s Regulations to Implement Titles 27 and 28

In November 2019, DEC proposed Title 28 implementing regulations that would have reinserted into the regulatory structure many provisions of the Initial Ban Bill that were struck by the Legislature, such as the exemption for thick plastic “reusable bag[s]” and a provision granting DEC discretion to grant case-by-case exemptions for other plastic bags. R0107–R0109 (Proposed Express Terms §§ 351-1.2(f)(11), (12)). New York State legislators, the undersigned *Amici*, and other groups submitted comments to DEC noting that DEC had no authority under Title 28 to promulgate these additional exemptions, and that DEC’s own Task Force Report found that similar thickness thresholds in plastic bag bans in other jurisdictions “failed to reduce the number of single-use bags used” because “stores simply purchased thicker plastic bags.” R1451 (Earthjustice Comments at 13 (citing New York State Plastic Bag Task Force Report at 13)); *see also* R1456 (Letter from N.Y. Assemblyman Steven Engelbright et al. to DEC Commissioner Basil Seggos at 1 (Jan. 31, 2020)) (“As other jurisdictions have already learned, specifying any minimum thickness only sets a new production target for manufacturers, thereby allowing large volumes of plastics to continue to pollute the environment.”). As part of the same rulemaking, DEC proposed implementing regulations for Title 27. R0106–R0118 (Proposed Express Terms).

On February 26, 2020, DEC promulgated its final rule to implement Titles 27 and 28. (“Final Rule”). While DEC’s Final Rule removed the case-by-case exemption for other plastic bags, it retained the exemption for thick “reusable” plastic bags. Specifically, the Final Rule prohibits the distribution of “any plastic carryout bag to . . . customers unless the bag is an exempt bag,” 6 NYCRR § 351-2.1(a), and adds to the Legislature’s enumerated list of exempt bags a new exemption for “reusable bag[s],” *id.* § 351-1.2(f)(11), whose definition includes bags made of “non-film plastic washable material,” *id.* § 351-1.2(n)(1)(ii). “Film plastic,” in turn, is defined as “a flexible sheet or sheets of . . . plastic resin . . . less than 10 mils in thickness.” *Id.* § 351-1.2(g). Thus, under DEC’s regulations, any plastic carryout bag *thicker* than 10 mils is considered “non-film plastic” and is therefore exempt from the plastic carryout bag ban as a “reusable bag.”

On February 28, 2020, two days before the Bag Waste Act was to take effect, Poly-Pak filed its challenge to both Title 28 and the Final Rule, arguing, among other claims, that DEC’s regulations go beyond the Agency’s statutory authority. *See* Pet. ¶¶ 54–60; Pet’rs’ MOL at 14. Poly-Pak’s filings indicate that, in response to the Final Rule’s loophole allowing distribution of plastic carryout bags so long as they are at least 10 mil, the company would retool its equipment to increase the thickness of the plastic bags it produces. *See* Am. Pet. ¶¶ 5, 16; Pet’rs’ Am. MOL at 2–3, 17. Thus, as warned in the Task Force Report and comments on the Proposed Rule, the effect of the Final Rule’s “reusable bag” loophole appears to be the replacement of thin plastic carryout bags with thick plastic carryout bags, undermining the Legislature’s goal of reducing—not thickening—plastic carryout bags in the State.

ARGUMENT

This Court should uphold most of the Bag Waste Act and DEC's implementing regulations, but it must set aside those portions of the regulations that create a loophole for plastic "reusable bags." This loophole contradicts the language, purpose, and structure of the Bag Waste Act, is not necessary to harmonize the provisions of Titles 27 and 28, and is contrary to the evidence before DEC.

I. DEC's Regulatory Exemption for Reusable Bags and Definition of Reusable Bags, Which Together Allow the Distribution of Thick Plastic Bags, Are Invalid.

This case can and should be resolved using basic principles of administrative law and statutory construction. As a starting point, regulations implementing Titles 27 and 28 cannot contravene the language, intent, and framework of these statutes. New York courts recognize that "as the clearest indicator of legislative intent is the statutory text, the starting point . . . must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583 (1998). When the issue "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 NY2d 451, 458 (1980) (concluding that "[a]nd, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight").

A. DEC Violated the Purpose and Structure of the Bag Waste Act by Adopting a Reusable Bag Exemption.

The language of the Bag Waste Act is clear and unambiguous: the legislature banned the distribution of "any plastic carryout bags" with certain limited, enumerated exemptions set forth

by the Legislature. *See* ECL § 27-2803 (noting that exempt bags are those defined by the Legislature in the Bag Waste Act). DEC’s regulations unlawfully add “reusable bag” to the Bag Waste Act’s enumerated list of exempt bags in violation of the text, structure, and purpose of the statute.

DEC has no authority to expand the Bag Waste Act’s enumerated list of 11 exemptions to the prohibition on plastic carryout bags. *Id.* § 27-2801(1). It is a basic rule of statutory construction that where a legislature “explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980); *see also Raynor v. Landmark Chrysler*, 18 NY3d 48, 67 (2011) (“[w]here a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.”); *In re Herring*, 133 AD 293, 295 (2d Dept 1909) (adding an enumerated list is forbidden where the legislature “in express words provided exceptions to a general rule, [as] such provisions are to be deemed exclusive and to forbid the creating of any further exceptions by implications.”).

This conclusion is buttressed by the legislative history, which shows that the Legislature chose not to adopt language in the Initial Ban Bill, which read: “Beginning March first . . . providing plastic carryout bags to customers is prohibited *except as otherwise provided by the department pursuant to regulations.*” Initial Ban Bill § 27-2708 (emphasis added). The Legislature’s decision not to provide DEC with discretionary authority to issue additional exemptions reflects legislative intent to limit DEC’s ability to expand on the enumerated exemptions set forth in Title 28. *See* ECL § 27-2801(1).

In the Summary of Assessment of Public Comments, DEC states that the regulations provide “clarifying examples” for the exemptions included in the Act. But nothing within the Act signals a need for clarification, or further examples, beyond what is specifically described within the 11 exemptions. And while DEC’s regulations include a “reusable bag” exemption, reusable bags do *not* appear in the statute’s list of exempt bags, so there is no statutory “reusable bag” exemption for DEC to clarify. In short, adding in the “reusable bag” does not clarify a pre-existing exemption, it creates an entirely new one.

B. In Contravention of the Bag Waste Act, DEC Impermissibly Broadens the Definition of “Reusable Bag” to Allow Distribution of Thick Plastic Bags.

The combination of DEC’s reusable bag exemption (6 NYCRR § 351-1.2(f)(11)) with portions of DEC’s definition of reusable bag (*id.* §§ 351-1.2(n)(1)(ii), (4)) undermines the clear purpose of the Bag Waste Act because it creates a major loophole exempting thick plastic bags from a broad ban on “any plastic carryout bags.” This is not allowed, as doing so impermissibly rewrites the statute and amounts to a forbidden agency public policy determination. *See Hines v. LaGuardia*, 293 NY 207, 216 (1944) (holding that agencies “may not thwart a statute [with clear] purposes.”); *Boreali v. Axelrod*, 71 NY2d 1, 14 (1987) (holding that an agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations).

According to the Bag Waste Act, a reusable bag is 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.” ECL § 27-2801(4). By contrast, under DEC’s definition of reusable bag:

(n) ‘Reusable bag’ means a bag that . . .

(1) is either made of: (i) cloth or machine washable fabric; or (ii) other *non-film plastic* washable material; 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

6 NYCRR §§ 351-1.2(n)(1), (4) (emphasis added). The italicized language expressly defines reusable bags to include bags made of plastic that is not “film plastic,” which DEC’s regulations define as “plastic resin or other material (not including a paper carryout bag), less than 10 mils in thickness” *Id.* § 351-1.2(g). Thus, non-film plastic—as DEC defines reusable bags—means plastic measuring over 10 mils in thickness.³²

DEC’s definition of reusable bag conflicts with—rather than clarifies—the Act’s language and intent. The Bag Waste Act prohibits distribution of plastic carryout bags unless *exempted* by the Legislature, ECL § 27-2803, and the Legislature did *not* exempt plastic reusable bags from this prohibition. And the Bag Waste Act *does not* include plastic—of any thickness—within its definition of reusable bag.

The legislative history provides further support for the conclusion that the Legislature did not intend the term “reusable bags”—a term that appears in Article 28 only in the context of the municipal program to provide reusable bags to residents—to include plastic bags. The Initial Ban Bill used the same definition of “reusable bag” as appears in Title 27:

- (a) a bag made of cloth or other machine washable fabric that has handles; or
- (b) a durable *plastic* bag with handles that is specifically designed and manufactured for multiple reuse.

³² Notably, the Act does not mention the term “film plastic” at all—the statute bans all plastic carryout bags, regardless of thickness.

Initial Ban Bill; ECL § 27-2701(5) (emphasis added). However, as adopted by the Legislature, the Bag Waste Act eliminates the word “plastic.” *Id.* § 27-2801(4)(b) (providing, in relevant part, that a reusable bag is “a durable bag with handles . . .”). The Legislature’s purposeful creation of a new definition of reusable bag in Title 28 that excludes the word “plastic” indicates legislative intent that plastic bags cannot be considered reusable bags. *See Raynor*, 18 NY3d at 67 (“As the clearest indicator of legislative intent is the statutory text . . . [and] the plain meaning thereof.”) (citations omitted).³³

DEC’s definition of reusable bag, when read together with the new exemption for reusable bags, directly undermines the Legislature’s purpose by creating a loophole allowing distribution of thick plastic bags. These thick plastic bags will end up strewn throughout cities and landscapes, or as waste in landfills and incinerators where they will harm community health and the environment. As a result, DEC’s exemption for reusable bags, and its reusable bag definition, directly undermine the Legislature’s purpose in enacting the Bag Waste Act. This amounts to an impermissible public policy determination. As noted in *Boreali v. Axelrod*, an agency impermissibly steps into the role of the Legislature when it goes beyond “fill[ing] in the details” of a statute and instead creates something entirely new. 71 NY2d at 14 (1987). Accordingly, DEC’s definition cannot stand.

³³ Indeed, in the Bag Waste Act the Legislature also amended the Alcohol Beverage and Control Law to allow certain liquor licensees to sell “reusable bags as defined in [Title 28]”—*not* Title 27—without losing their liquor license, showing how the Legislature intended the definition of Title 28, and not Title 27, to control for the sale of reusable bags going forward. N.Y. Alco. Bev. Cont. Law § 63(4).

C. The Reusable Bag Provisions of Titles 27 and 28 Can Be Reconciled Without Ambiguity.

Poly-Pak incorrectly argues that the reusable bag provisions of Title 27 are irreconcilable with the plastic carryout bag ban of the Bag Waste Act, or Title 28. *See* Pet’rs’ Am. MOL at 11. When the potential for a conflict between statutes arises, “whenever possible, a reviewing court should adopt a construction that permits a reasonable field of operation for each statute.” *Iazzetti v. City of New York*, 94 NY2d 183, 189 (1999). When provisions relate to the same subject matter, “[i]t is especially important that . . . [they] ‘be read together and applied harmoniously and consistently.’” *Id.* (quoting *Alweis v. Evans*, 69 NY2d 199, 204 (1987)).

Title 28 prohibits stores from “distribut[ing]” plastic carryout bags, ECL § 27-2803(1), and the statutory structure makes clear that “distribute” means to provide free of charge: for example, Title 28 provides that 40 percent of paper-bag fee funds must be used by municipalities to “purchas[e] and *distribut[e]* reusable bags, with priority given to low- and fixed-income communities,” and does not suggest that municipalities may charge low- and fixed-income communities for these bags. *Id.* § 27-2805(7) (emphasis added). Title 27, meanwhile, requires larger stores to make reusable bags “available . . . for purchase,” and allows stores subject to Title 27 to sell plastic reusable bags to meet this requirement. *Id.* § 27-2705(5). But Title 27 imposes no requirement that larger stores *must* freely *distribute* plastic reusable bags. Thus, no conflict exists between the two statutes: a larger store that sells any type of reusable bag but does not freely distribute any plastic bag—including any reusable plastic bag—satisfies both statutes. To the extent that DEC’s regulations suggest that stores may still freely distribute plastic reusable bags because the regulations require stores to make all reusable bags—including plastic bags—“available to customers within the store for purchase *or at no charge*,” *see*

6 NYCRR § 351-2.2(a)(1) (emphasis added), those regulations are inconsistent with the statute and are therefore invalid.

And even if the Court were to broadly read Title 28's term "distribution" to cover *both* free distribution and sale, nothing in Title 27 requires the sale of *plastic* reusable bags specifically, since larger stores can still comply with both statutes by making "cloth or other machine washable fabric" bags—but not plastic bags—available for purchase. *See* ECL § 27-2701(5). Thus, "a reasonable field of operation" exists for the two provisions to apply "harmoniously and consistently." *Iazzetti*, 94 NY2d at 189; *see also Corrigan v. N.Y. State Office of Children & Family Servs.*, 28 NY3d 636, 643 (2017) (quoting *Matter of Dutchess Cty. Dep't of Soc. Servs. v. Day*, 96 NY2d 149, 153 (2001)) ("[C]ourts must harmonize the various provisions of related statutes and construe them in a way that renders them internally compatible").

Moreover, even assuming that the two provisions are irreconcilable—which they are not—it is the later-enacted Title 28 that would repeal the conflicting provisions of the earlier-enacted Title 27, and not the other way around, as Poly-Pak would have it. *See Hastings v. Byllesby & Co.*, 293 NY 413, 419 (1944) ("[I]nconsistent provisions contained in earlier statutes . . . would be repealed by necessary implication where the provisions in the earlier statutes cover the same field as the later statute and there is no room for reconciliation."). And while DEC suggests that the operative definition of "reusable bag" remains the old Title 27 definition and not the purposefully amended Title 28 definition because of the savings clause in Title 28, *see* DEC Opp. Br. at 19–20, DEC Answering MOL at 22–23, that savings clause applies only to "the provisions set forth in title 27 of this article *relating to at store recycling*," and not to the Title 27 provisions regarding reusable bags or their sale.

ECL § 27-2803(3) (emphasis added). To the extent a conflict exists between the reusable bag provisions of Title 27 and Title 28, the provisions of Title 28 govern because the Legislature chose *not* to include the reusable-bag provisions of Title 27 under the savings clause, and any remaining ambiguity about the scope of the savings clause is resolved by the Legislature’s purposeful deletion of the word “plastic” from Title 28’s definition of “reusable bag” and direction that liquor licensees may sell reusable bags *as defined in Title 28*, not Title 27. *See* note 33, section I.B. *supra*.

II. DEC’s Carve-Out for Thick Plastic Bags, Created by Its Reusable Bag Exemption and Definition, Is Arbitrary and Capricious.

Even if this Court determines that the legality of DEC’s loophole created by the reusable bag exemption and definition is not one of pure statutory interpretation, those regulations fail for being arbitrary and capricious. *KSLM-Columbus Apartments, Inc. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 5 NY3d 303, 312 (2005) (holding that when the issue is not one of statutory construction, courts defer to the agency unless the agency’s action is arbitrary and capricious).

Evidence in DEC’s rulemaking record shows that consumers provided with 10 mil bags may use them as single-use plastics, similar to their thinner counterparts. Plastic bag bans in other states have demonstrated this principle. The Task Force Report prepared for the Act highlights the failure of plastic bag thickness requirements in Chicago and Honolulu:

The success of Chicago’s fee came after they repealed their plastic bag ban in late 2016, which had been in effect for 16 months. Their original plastic bag ordinance was specific to banning plastic bags of a certain thickness, so stores simply purchased thicker plastic bags and the original ordinance failed to reduce the number of single-use bags used. For the same reason, the City of Honolulu, Hawaii switched from a ban on plastic bags to a fee on plastic bags.

R0013 (New York State Plastic Bag Task Force Report) (citations omitted). Faced with this evidence, the Legislature wisely chose *not* to include a thickness-based exemption to the plastic bag ban. DEC, however, redefined reusable bag to include thick plastic, 6 NYCRR §§ 351-1.2(n)(1), (4), despite the evidence before the agency indicating that thicker plastic is likely to end up as waste. DEC's action in contravention of record evidence renders its carve-out for thick plastic bags arbitrary and capricious. *N.Y. State Ass'n of Counties v. Axelrod*, 78 NY2d 158, 167–68 (1991) (finding an agency action unlawful because it lacked record evidence for support).

III. The COVID-19 crisis does not provide grounds to invalidate the Bag Waste Act.

Nothing about the COVID-19 crisis warrants invalidating the Bag Waste Act or regulations. Poly-Pak attempts to suggest otherwise, but its attempt fails to account for New York State's executive authority to adapt to a crisis, authority that could be used to respond to the COVID-19 crisis if evidence showed that doing so would be prudent.

Poly-Pak would have this Court believe that the COVID-19 crisis is relevant to this case. *See* Pet'rs' Am. MOL at 11 (claiming that COVID-19 “demonstrate[s] the impracticability—and indeed, the danger—of the Bag Act[] and Bag Regulation[]”); *see also id.* (“Specifically, the type of bags DEC prefers and permits—namely, fabric or other woven reusable bags—are known to harbor bacteria, contagions, and viruses”). Poly-Pak's injection of the pandemic into this case is a distraction at best. New York State law already instills the executive branch with sufficient power to temporarily suspend any laws necessary to cope with a public health crisis. *See* N.Y. Executive Law § 29-a (providing that the Governor can, while under a state of emergency, temporarily suspend any state or local laws, orders, or regulations “if compliance with such provisions would prevent, hinder, or delay action necessary” to cope with the disaster).

In response to COVID-19, Governor Cuomo has invoked this authority, declaring a state of emergency for New York on March 7, 2020³⁴ and updating that order to respond to changing circumstances.³⁵

Even if this Court were to entertain that the COVID-19 crisis is a relevant and permissible part of this case, scientific evidence does not demonstrate that reusable bags transmit viruses any more so than plastic bags.³⁶ Moreover, evidence shows that viruses generally persist *longer* on non-porous surfaces, such as plastic, than on porous surfaces of some reusable bags.³⁷ As the affidavit for Dr. Dvarkas effectively demonstrates, nothing in Poly-Pak's Amended Petition, the Sinclair Affidavit, or related scientific literature supports the claim that reusable bags enhance or increase the transmission of diseases any more so than plastic bags.³⁸

In sum, current science does not support a suspension of the Bag Waste Act and its Regulations in response to the COVID-19 crisis, but should New York State make the public policy determination that a temporary suspension may be necessary in the future, it can do so. This Court ought not to step into this policy determination, as Poly-Pak seems to suggest.

³⁴ See Exec. Order (Cuomo) No. 202, "Declaring a Disaster Emergency in the State of New York," (Mar. 7, 2020) <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>.

³⁵ See, e.g., Exec. Order (Cuomo) No. 202.24, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," (Apr. 25, 2020) <https://www.governor.ny.gov/news/no-20224-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

³⁶ Aff. of Anthony Dvarkas ¶ 19; see also *id.* ¶ 5 ("No scientific evidence supports enhanced or increased transmission of disease from reusable bags versus plastic bags.").

³⁷ *Id.* ¶ 19; see also Neeltje van Doremalen et al., *Aerosol and Surface Stability of SARS- CoV- 2 as Compared with SARS- CoV- 1*, *New England J. Med.* (Apr. 16, 2020) <https://www.nejm.org/doi/full/10.1056/NEJMc2004973> (finding the virus "more stable on plastic and stainless steel than on copper and cardboard").

³⁸ Aff. of Anthony Dvarkas ¶ 21.

CONCLUSION

For the foregoing reasons, *Amici* request that the Court consider Poly-Pak's Amended Verified Article 78 and Declaratory Judgment Petition and Motion for Preliminary Injunction in light of the plain language, intent, and framework of Titles 27 and 28 of the Environmental Conservation Law, as discussed above. Based on the clear statutory language and legislative intent, we urge the Court to uphold the Bag Waste Act and implementing regulations, with the exception of the regulatory provisions that create a loophole in the statutory prohibition on the distribution of "any plastic carryout bags," namely 6 NYCRR § 351-1.2(f)(11), which adds an exemption for "reusable bags," and 6 NYCRR § 351-1.2(n)(1)(ii), which defines "reusable bags" to include some plastic carryout bags.

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Respectfully submitted,

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