EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE NATIONAL WASTE & RECYCLING ASSOCIATION et al.

Petitioners - Plaintiffs,

For Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules, and Declaratory Judgment

-against-

THE CITY OF NEW YORK et al.

Respondents - Defendants.

Index No. 101686/2018

MEMORANDUM OF LAW OF THE NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE, O.U.T.R.A.G.E., INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 813, AND CLEANUP NORTH BROOKLYN AS PROPOSED AMICI CURIAE IN OPPOSITION TO THE VERIFIED PETITION AND IN SUPPORT OF THE MOTION TO DISMISS THE COMPLAINT

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I. PRELIMINARY STATEMENT

For decades, the vast majority of New York City's garbage has been trucked to the four overburdened districts identified in Local Law 152. Of 59 community districts ("CDs" or "districts") in the City,[1] just four house 26 of the City's 38 private transfer stations, and together currently process "73% of the City's average daily throughput."[2] *Amici* represent members of communities residing and working in these overburdened districts in North Brooklyn, South Bronx, and Southeast Queens, neighborhoods known as "environmental justice communities" because they are communities of color and low-income communities that bear a disproportionate share of polluting facilities and corresponding public health impacts.[3] In the decades since private waste transfer stations infiltrated these neighborhoods,[4] the many garbage trucks barreling through the streets and the smells, fumes and noises from transfer stations themselves have had serious detrimental impacts on residents.

This Memorandum of Law is respectfully submitted on behalf of *amici curiae* New York City Environmental Justice Alliance ("NYC-EJA"), Organization United for Trash Reduction and Garbage Equity ("O.U.T.R.A.G.E."), International Brotherhood of Teamsters Local 813

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1. *Community Portal*, NYC.GOV, https://www1.nyc.gov/site/planning/community/community-portal.page (last visited Mar. 15, 2019 4:13 PM).

2. COMMITTEE REPORT FOR INT. NO. 157-C, NEW YORK CITY COUNCIL COMMITTEE ON SANITATION AND SOLID WASTE MANAGEMENT 4 (July 17, 2018), https://legistar.council.nyc.gov/View.ashx?M=F&ID=6367801&GUID=D59673C8-4F56-4DE7-9173-AEDFE3412691.

3. The New York State Department of Environmental Conservation defines "potential environmental justice community" as "a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies." *See Commissioner Policy 29, Environmental Justice and Permitting*, DEC.NY.GOC https://www.dec.ny.gov/regulations/36951.html.

4. Melissa Iachan, Out with the Trash, In with the New: Challenges and Solutions in New York City's Solid Waste Management System, 30 ENV. L. IN N.Y. 23, 24 (Feb. 2019).

("Local 813"), and Cleanup North Brooklyn ("CNB" and collectively, the "*amici*"), who all represent members of communities who have endured the detrimental impacts of overburdening of waste facilities, in opposition to the petition and complaint submitted by the National Waste & Recycling Association, City Recycling Corp., Empire Recycling Services, LLC, Hi-Tech Resource Recovery, Inc., Metropolitan Transfer Station, Inc., Rafael Batista, and William Mackie (the "Petitioners-Plaintiffs") seeking a declaration that Local Law 152 is invalid, and in support of the Respondent-Defendants' Motion to Dismiss the Complaint.

The *amici*, together with their neighbors, have advocated for years to reduce the harmful impacts of private waste transfer stations on their lives. Local Law 152 is the result of their tireless efforts.

Local Law 152 was passed overwhelmingly by the New York City Council and signed into law by Mayor Bill de Blasio in response to decades of community and advocate outcry over dangerous streets and serious air pollution from the many trucks heading the transfer stations in their neighborhoods, and to follow through the plan that was first legislated in 2006 with the passage of the Solid Waste Management Plan for New York City (the "SWMP"). In passing Local Law 152, the City Council and Mayor enacted a reasonable response to serious public health and safety concerns. Local Law 152 is the result of years of negotiations between government, advocates, the waste industry, and other stakeholders, and represents the City of New York finally taking a step to keep a promise initially made in the SWMP: to process waste more equitably. Local Law 152 does so by reducing permitted capacity at facilities in the districts that for decades have each processed anywhere between 15 and 45% of the City's waste. This is part of the SWMP's long-term vision to mitigate the inequity, pollution and public health impacts from years of sending more than three-quarters of the City's garbage—and hundreds of

diesel trucks each day—to just three neighborhoods where residents are predominantly people of color.

Amici and their communities have advocated for reforms to the waste system, and specifically for capacity reduction as prescribed by Local Law 152, since before the passage of the SWMP in 2006. The Court should not disturb the democratic process that has resulted in Local Law 152's passage, responding to years of communities' valid public health concerns, advocacy, study, environmental review, negotiations, public hearings, and plans approved by both the City and the State—simply because a few industry actors claim that the process was somehow rushed or flawed.

Amici submit this brief in support and defense of Local Law 152, which promises to finally bring some relief to their communities that, for too long, have borne much more than their fair share of New York City's trash.

II. THE SWMP SPECIFICALLY AUTHORIZES THE COUNCIL TO PASS LEGISLATION TO REDUCE PERMITTED WASTE TRANSFER CAPACITY

When the New York City Council passed the SWMP in 2006, it ratified a plan designed to address the deep inequities in how solid waste is processed in the largest and densest city in the United States. For over two decades, New York City communities have demanded more equitable solid waste management. When Fresh Kills landfill closed, the City saw a proliferation of private truck-based transfer stations sited in communities of color and low-income communities. These facilities compounded the problems of communities already disproportionately exposed to industrial pollution. *See* Affidavit of Eddie Bautista ("Bautista Aff."), attached here as Exhibit 1, at ¶¶ 11-12. One of the cornerstone proposals in the SWMP was the retrofitting of Marine Transfer Stations ("MTS's"), sited around the City, to be used as less truck-intensive and more equitably sited facilities to process the City's garbage, which

would in turn reduce reliance on the truck-based transfer stations sited in the overburdened neighborhoods. The SWMP envisions that as these MTS's open in more equitable locations, the private facilities clustered together in environmental justice communities will not have to process as much waste, and thus reducing their permitted capacity would be both feasible and desired in order to reduce the number of trucks in these communities, as well as the harsh effects of the clustering of these facilities on the residents. Throughout the SWMP, there is an acknowledgement of the problems truck traffic brings to the communities hosting the disproportionate number of transfer stations: "because only one of the City's 19 private Putrescible Transfer Stations exports waste by means other than transfer trailer, the export of waste—not just its collection—creates truck traffic." Solid Waste Management Plan 4-2 (2006), Petitioners-Plaintiffs' Exhibit U to the Complaint, hereinafter "SWMP"; "Developing this [marine transfer station] for transfer of a portion of Manhattan-generated Commercial Waste would more equitably distribute the impacts of Commercial Waste transfer among the City's boroughs [and] reduce the volume of transfer trailer truck traffic in the City…" SWMP 4.3.1.1.

A. The SWMP Is Predicated Upon Reducing Capacity in Overburdened Districts to Advance Equity

The language of the 2006 SWMP makes clear that this blueprint for how the City was to handle its waste moving forward was designed with equity as a paramount principle. The introduction to Chapter 4 of the SWMP, which is the chapter on commercial waste management, explicitly states:

> "This SWMP sets forth several new initiatives with regard to Commercial Waste management that aim to accomplish the following objectives: Strengthen the regulations pertaining to the siting of new transfer stations and to disallow a net increase in capacity in those CDs that already have the greatest number of such facilities; Hold privately owned waste transfer stations to higher operations standards, thereby reducing the impacts of these facilities; . . . Identify the best means of reducing putrescible

> transfer station capacity in the two or three communities with the greatest concentration of transfer stations as the Converted [Marine Transfer Stations] become operational; and Reduce the impacts on those communities that are along truck routes leading to transfer stations by evaluating routing options." SWMP 4.4.1.

1. The SWMP's Legislative History Makes Clear It Intended to Reduce Permitted Capacity in Overburdened Districts

Even before the SWMP was passed by the City Council in 2006, communities had been organizing and pushing against the ever-increasing amount of garbage being trucked into their backyards after Fresh Kills closed in the mid-1990s. A turning point came in 2006, when Mayor Michael Bloomberg's administration hired Eddie Bautista as Director of City Legislative Affairs. Bautista came from the world of community organizing and environmental justice, serving previously as Director of Community Planning and Organizing at New York Lawyers for the Public Interest. Bautista Aff. at ¶ 4. This commitment to environmental justice is documented in *The Battle for Gotham: New York in the Shadow of Robert Moses and Jane Jacobs*,

> "[A] long-term solid-waste management plan proposed by Mayor Bloomberg and adopted by the New York City Council in 2006…revolutioniz[ed] garbage removal for the city. This plan had been championed by environmental justice advocates for a decade…Mayor Bloomberg not only agreed to the environmental justice coalition's longtime proposals [with the SWMP] but also brought into the administration one of the leaders of the fight. Eddie Bautista was the lead organizer for the Organization of Waterfront Neighborhoods before he was appointed director of the Mayor's Office of City Legislative Affairs to oversee the Bloomberg administration's local legislative agenda."[5]

As Bautista puts it, "My role was largely based on getting the Solid Waste Management Plan passed by the Council—that's what I got brought in for, though it was never quite said, but it was clear that this solid waste management plan would be one of the first things that would

5. Roberta Brandes Gratz, *The Battle for Gotham: New York in the Shadow of Robert Moses and Jane Jacobs* [xxxvii-xxxviii] (2010).

happen in 2006." Bautista Aff. ¶ 22. The Bloomberg administration brought in an environmental justice organizer to assist in getting the equity-focused SWMP through the City Council because "the Mayor was clear, he wanted this plan because of environmental justice and equity, back in 2001 and 2002, his own framing of the waste plan was as an equity, environmental justice, and public health goal." *Id.* ¶ 24.

And in fact, during the hearing on the Draft Solid Waste Management Plan in June 2006, the Chair of the Sanitation Committee unequivocally named "[r]eduction of transfer station permit and capacity in overburdened communities" as one of the Council's "guiding principles" in the drafting and passage of the SWMP. *See* Transcript of Hearing on the Draft SWMP, N.Y. City Council Comm. On Sanitation and Solid Waste Mgmt. (June 25, 2006), *at* 9.7-19, hereinafter "SWMP Hearing." He went on to say that he knew "too well the ramifications of the failures of the City's refusal to grapple with its garbage. . .Noxious odors, dust, truck traffic with its concomitant road congestion and toxic emissions, the breaking of a community's morale and civic pride, are just some of the sins the City continues to visit on a few unfortunate districts. . ." *Id.*

The then-Commissioner of DSNY was equally direct about the SWMP's goal to engender equity; in his testimony at the hearing on the Draft SWMP, Commissioner Doherty said, "Two critical objectives of the proposed plan are to more equitably distribute transfer station facilities throughout the five boroughs, and reduce the current reliance on long-haul tractor trailers for the transport of the City's waste." *Id.* at 13.10-15. Commissioner Doherty said that the most important aspect of the SWMP was that "approval of this plan will bring relief to the communities in this City that are now burdened by the City's interim waste management system." *Id.* at 18.19-22. Both the administration and the Council were equally clear that the

SWMP was designed to reduce the burden of the waste processing system on the disproportionately affected CDs processing most of the City's waste. Therefore, it should not have been a surprise to Petitioners-Plaintiffs that, albeit a decade later, the City finally followed through with its clearly-stated intention to reduce capacity in these CDs. This robust legislative history illustrates that capacity reduction in overburdened districts was central to the overarching equity goals of the SWMP in its formation and passage.

2. Section 4.4.4 of the SWMP Specifically Enables the Council to Pass Waste Equity Legislation Reducing Capacity in Overburdened Districts

Because the SWMP specifically mandates passage of legislation reducing capacity, any argument that Local Law 152 was somehow in contravention of the SWMP—or requires modification of the SWMP—must fail. As the SWMP sets forth, "The reopening of the MTS's will have the effect of creating significant new putrescible[6] capacity for the City in areas that do not have large numbers of transfer stations. DSNY proposes to explore ways to reduce the daily permitted putrescible capacity in the communities with the greatest concentration of transfer stations as new putrescible transfer station capacity becomes available under the City's new long-term waste export plan." SWMP 4.4.4.

As to *how* these reductions in capacity should happen, the SWMP proposes specific criteria that DSNY could use when determining whether to reduce permitted capacity, but regardless of those efforts, the Plan specifically prescribes that, "[w]ithin three months of the Council's adoption of the SWMP, DSNY, in cooperation with the Council, will commence negotiations with representatives of the solid waste management industry to seek voluntary reductions in permitted transfer station capacity. **Should these negotiations fail to result in**

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6. Putrescible waste is waste that is liable to decay or become putrid (i.e. rotten).

agreed-upon capacity reductions by April 1, 2007, DSNY will work with the Council to draft legislation to accomplish reductions in permitted transfer station capacity." *Id.* at 4.4.4. (emphasis added).

As the Chair of the Sanitation Committee who presided over the hearings and voted to pass the SWMP stated, "The Council has presented certain modification[s] and proposals that are in line with its guiding principles, and believe are essential to make this plan one that will have a positive impact on the lives of our citizens. [One of these proposals is] . . [r]eduction of transfer station permit and capacity in overburdened communities as the MTSs become operational." SWMP Hearing Transcript at 10.13-18, 11.2-9. Contrary to what Petitioners-Plaintiffs would have the Court believe, not only is Local Law 152 entirely within the parameters of the SWMP, but the SWMP actually explicitly directs City Council to pass legislation reducing capacity in the overburdened CDs if DSNY had not been able to negotiate those reductions by April of 2007.[7] Any characterization that Local Law 152 is in contravention of the SWMP is disingenuous at best, and Petitioners-Plaintiffs' claims as such must fail.

B. State Law Does Not Preempt Local Law 152, Which Falls Within the City's Police Powers

New York State's Solid Waste Management Act ("SWMA") explicitly grants authority to municipalities to enact supplementary local sanitation and solid waste regulation, and neither the New York Constitution Article 9 §2(C) nor the New York Municipal Home Rule Law prevent the City from enacting Local Law 152. Local regulations are only preempted by state law when

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7. Petitioners-Plaintiffs' rely heavily on the fact that Local Law 152 reduces permitted capacity by more than 6,000 tons per day in each CD, which was the target for voluntary negotiated reductions set forth in the SWMP. This argument misinterprets the terms of the SWMP, and conveniently ignores the specific mandates of the plan. It provides that DSNY would work with the industry to seek voluntary capacity reductions of up to 6,000 tons per day in the affected districts, **but if these negotiations fail to reduce the capacity in the CDs,** the City Council may then legislate to reduce capacity. No limit on the Council's own authority to mandate specific capacity reduction amounts were contemplated in the SWMP. *See* SWMP 4.4.4.

the State Legislature establishes "an unmistakable desire to avoid the possibility that the local legislation will not be on all fours with that of the State." *People v. N.Y. Trap Rock Corp.*, 57 N.Y.2d 371, 378 (1982). In passing the SWMA and approving the SWMP, New York State indicated no such desire to preclude local legislation. Rather, the Legislature has consistently encouraged the City to regulate local sanitation and solid waste in accordance with municipalities' traditional police powers over such matters.

The SWMA unambiguously grants primary responsibility for waste management to localities such as New York City: "the basic responsibility for the planning and operation of solid waste management facilities remains with local governments, and the state provides necessary guidance and assistance." N.Y. ECL § 27-0106(2). Even before the SWMA was passed in 1988, New York courts consistently interpreted the ECL to encourage rather than preempt local waste regulation. *See Town of Concord v. Duwe*, 4 N.Y.3d 870, 872–73 (2005) ("local laws governing municipal solid waste management broader than—but consistent with—the state legislation are explicitly permitted by the Environmental Conservation Law"); *see also Monroe-Livingston Sanitary Landfill, Inc. v. Caledonia*, 51 N.Y.2d 679, 683–84 (1980) (holding that Article 27 "speaks specifically, not of the preclusion, but rather the inclusion of local government in the planning and control of problems endemic to waste management"). The SWMA itself explicitly acknowledges that primary responsibility over solid waste management facilities remains with local governments, providing "continuing assurance that the State has not preempted local legislation of issues related to municipal solid waste management." *Matter of MVM Constr., LLC v. Westchester County Solid Waste Commn.,* 81 N.Y.S.3d 67, 71, 162 A.D.3d 1036 (N.Y. App. Div. 2018). As long as local regulations meet "the minimum applicable requirements set forth in any rule or regulation promulgated pursuant to [the SWMA]," courts

will uphold them. ECL §27-0711; *see Syracuse Haulers Waste Removal, Inc. v. Madison County Dept. of Solid Waste and Sanitation*, 995 N.Y.S.2d 820, 822, 122 A.D.3d 969 (N.Y. App. Div. 2014) ("pursuant to ECL 27-0711, local laws governing municipal solid waste management and recycling that are stricter than the state legislation, but not inconsistent with it, are explicitly permitted").

When the State approved New York City's current SWMP in 2006, it effectively endorsed the City's solid waste management strategy and authorized reasonable efforts to achieve the SWMP's stated goals. As discussed above, the State-approved SWMP clearly set forth the City's intent to reduce permitted capacity at transfer stations in overburdened districts, through legislation if necessary. SWMP 4.4.4. Since the State has unquestionably granted authority to municipalities to pass local waste legislation, and it approved the City's SWMP calling for reductions in permitted capacity through local legislation, Petitioners-Plaintiffs' preemption claim must fail.

The SWMA did not alter the longstanding consensus that local regulation of the waste industry is central to a municipality's police powers and will be struck down by courts only when the State Legislature has definitively withdrawn such powers by "evidenc[ing] a desire that its regulations should pre-empt the possibility of varying local regulations." *People v. Cook,* 34 N.Y.2d 100, 109 (1974). Courts have consistently and regularly held that regulation of the waste industry is a "classic example" of municipal police powers reserved to local governments. *See*, *e.g.*, *Sanitation Recycling Indus., Inc. v. City of New York*, 928 F. Supp. 407, 410 (S.D.N.Y. 1996), aff'd, 107 F.3d 985 (2d Cir. 1997) ("Control over the regulation of garbage collection is a classic example of municipal police powers reserved to the state and local governments. Courts have upheld the authority of local governments to control garbage collection in countless

cases"); *City of Rochester v. Gutberlett*, 211 N.Y. 309, 312-16, 105 N.E. 548, 549–50 (N.Y. 1914) ("It is conceded that garbage … will constitute a menace to public health. Because [it is] a menace to public health, [it is] subject to the control of the municipality"); *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306, 319 (1905) (holding, on the topic of municipal ordinances for the disposal of garbage, that "it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community"). The Court should not disturb the City's exercise of its police powers when it enacted Local Law 152.

III. LOCAL LAW 152 AND THE COMMERCIAL WASTE ZONES PLAN ARE INDEPENDENT ACTIONS FOR WHICH SEPARATE ENVIRONMENTAL REVIEW IS PROPER

Petitioners-Plaintiffs wholly mischaracterize two distinct waste policies in claiming under SEQRA that the City improperly segmented its review of Local Law 152 and the yet-to-be-finalized Commercial Waste Zones Plan ("CWZ Plan").[8] SEQRA anti-segmentation regulations are meant to prevent an agency from artificially splitting "a project with potentially significant environmental effects . . . into two or more smaller projects, each falling below the threshold requiring full-blown review." *Ass'n for Cmty. Reform Now ("Acorn") v. Bloomberg*, 13 Misc. 3d 1209(A) at *9 (N.Y. Sup. Ct. 2006), aff'd sub nom. *Ass'n for Cmty. Reform Now v. Bloomberg*, 52 A.D.3d 426 (N.Y. App. Div. 2008). In determining the significant impacts of actions under review, the "lead agency must consider . . . other simultaneous or subsequent actions which are: (i) included in any long-range plan of which the action under consideration is a part; (ii) likely to

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8. *See* Verified Petition and Complaint, ¶ 3, 135–44; For a description of the CWZ Plan, *see Commercial Waste Zones Implementation*, N.Y. CITY DEP'T OF SANITATION, https://www1.nyc.gov/assets/dsny/site/resources/reports/commercial-waste-zones-plan.

be undertaken as a result thereof; or (iii) dependent thereon." 6 NYCRR § 617.7(c)(2). An analysis of Local Law 152 and the CWZ Plan demonstrates that they are neither part of a unified long-range plan, nor are they interdependent or linked, and thus they do not meet the criteria for single review under the regulations.

While Local Law 152 and the CWZ Plan will both benefit the City's polluted and overburdened neighborhoods, each policy will do so independently, by regulating different sectors of the waste industry pursuant to separate city initiatives. The capacity reductions in Local Law 152, first envisioned in the 2006 SWMP, are targeted to addressing the clustering of waste transfer stations in four community districts. The CWZ Plan was not part of the vision of the 2006 SWMP; instead, it developed nearly a decade later, from Mayor Bill de Blasio's 2015 OneNYC plan, and primarily seeks to create a more efficient system for commercial waste collection citywide. The CWZ Plan does not directly address disposal of waste in overburdened districts. Because Local Law 152 and the CWZ Plan are not interdependent parts of a common plan, Petitioners-Plaintiffs cannot credibly make an improper segmentation claim.

Local Law 152 and the CWZ Plan were developed pursuant to different city initiatives rather than as part of a single long-range plan. Capacity reduction at waste transfer stations in overburdened communities was identified as a critical waste management problem prior to 2006 when the City's SWMP was in development. Indeed, the SWMP itself envisioned the capacity reductions enacted through Local Law 152. *See supra*, Section II. A. Initial formulations of the Waste Equity Law were introduced as early as 2013.[9] Conversely, the 2006 SWMP did not address the primary target of the CWZ Plan: the inefficient, overlapping routes of multiple commercial waste collection companies throughout the city in an open-market collection system.

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9. *See* Intro 1170 of 2013.

The CWZ Plan was developed in response to the 2015 *One New York: The Plan for a Strong and Just City* (OneNYC), and the City did not commit to pursuing Commercial Waste Zones until it had completed an independent study of the benefits of such a plan in 2016.[10] In contrast to Local Law 152's targeted focus on local capacity reduction at specific transfer stations, the CWZ Plan targets a separate sector, commercial waste hauling, and seeks to "create a safe and efficient collection system that provides high quality, low cost service while advancing the City's zero waste goals."[11] The different origin, scale and scope of the two plans indicates separate environmental review is proper. *See Williamsburg Community Preservation Coalition ex rel. Cole v. Council of City of New York,* 35 Misc.3d 1223(A) at *6 (N.Y. Sup. Ct. 2012) ("nothing in SEQRA or CEQR requires the City to aggregate possible future zoning changes when evaluating a discrete, small-scale zoning change").

The mere fact that Local Law 152 and the CWZ Plan both address waste equity issues in the City's overburdened neighborhoods, which Petitioners-Plaintiffs rely on heavily, does nothing to support an improper segmentation claim. Two actions that share a "generally stated government policy to protect the region from [certain threats]" are properly reviewed separately when the actions are not part of a single identifiable plan. *Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven*, 80 N.Y.2d 500, 514-15, 606 N.E.2d 1373, 1379 (N.Y. 1992). While Local Law 152 and the CWZ Plan may both advance environmental justice issues related to waste, by relying on this fact, Petitioners-Plaintiffs incorrectly "equate[] the notion of a general governmental policy of protecting a particular region with the idea of a governmental

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10. *See Private Carter Study,* N.Y. CITY DEP'T OF SANITATION (last visited Mar 31, 2019), https://www1.nyc.gov/assets/dsny/site/resources/reports/private-carter-studyhttps://www1.nyc.gov/assets/dsny/site/resources/reports/private-carter-study.

11. CWZ Implementation plan at 5.

plan." *Id.* at 1378. Similar policy goals do not suffice to bind two otherwise unrelated projects together as a common plan requiring the same environmental review.[12]

Nor can Local Law 152 and the CWZ Plan be conceived of as interdependent, since one does not result from or rely on the other. Local Law 152 will take effect as intended regardless of the ultimate implementation of the CWZ Plan; similarly, if Local Law 152 had not been enacted, it would not have barred the CWZ Plan from being successfully implemented. As such, the projects have "independent utility." *See Flax v. Ash*, 142 Misc. 2d 828, 833 (N.Y. Sup. Ct. 1988) ("[T]he proper test of interdependence [for analyzing segmentation] is independent utility") (citing *Fritiofson v. Alexander*, 772 F.2d 1225, 1242 (5th Cir. 1985).

Notably, New York courts have repeatedly held that separate projects regulating the City's waste are properly reviewed individually. *See Ass'n for Cmty. Reform,* 13 Misc. 3d 1209(A) at *9 (finding that the City did not improperly segment environmental review of the proposed SWMP when reviewing the impacts of construction and use of planned MTSs separately from the SWMP's transportation and disposal components); *see also Matter of Golden v. New York City Dep't of Sanitation,* Sup. Ct., Kings County, June 25, 1999, Goldberg, J., index No. 42723/98 at 28, https://www.dec.ny.gov/docs/legal_protection_pdf/fingerlakes00051.pdf (finding the environmental assessment of DSNY's proposed contract with a waste transfer site was not improperly segmented from review of other City action to reduce landfill waste). The *Ass'n for Cmty. Reform Now* and *Golden* courts held that the City properly segmented the environmental review of various actions related to the City's waste management, reasoning that

12. Further, Local Law 152 and the CWZ Plan are not related closely enough to fall under NYSDEC's articulation of a common plan. To guide determination of whether a common plan exists, NYCDEC's handbook asks, "Will the initial phase direct the development of subsequent phases [of an overall plan] or will it preclude or limit the consideration of alternatives in subsequent phases?" New York Department of Environmental Conservation SEQR Handbook at 60 (4th ed. 2019).

if all such regulation needed to be reviewed concurrently, the City could not effectively regulate its waste. *See Flax,* 142 Misc. 2d at 834 ("Rome was not built in a day. If its builders had to submit simultaneous applications and avoid geographical segmentation, it never would have been built"). As such, there is no need to revisit or disturb the environmental review that was conducted for Local Law 152, as it was conducted properly independent of any analysis of CWZ.

IV. PETITIONERS-PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE 14TH AMENDMENT

In enacting Local Law 152, the City acted rationally to address the public health and safety implications of the clustering of polluting waste transfer stations in certain communities. *Amici* can attest to the existence and impacts of this longstanding problem, and have sought government action through years of advocacy and testimony at public hearings. Petitioners-Plaintiffs utterly fail to establish a Fourteenth Amendment substantive due process violation,[13] which requires them to show both (1) that they have an interest protected by the Fourteenth Amendment, and (2) that the statute, ordinance, or regulation in question is not rationally related to a legitimate government interest. *Winston v. City of Syracuse*, 887 F.3d 553, 566 (2d Cir. 2018).[14]

Petitioners-Plaintiffs can point to no violations of constitutionally protected or fundamental rights, and therefore the challenge is subject to rational-basis review. *Molinari v.*

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13. Because Petitioners-Plaintiffs fail to state a claim for violation of their Fourteenth Amendment substantive due process rights, they likewise cannot bring a claim under 42 U.S.C. § 1983. *See infra*, Section IV.B.

14. As the Court stated in *Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617, 627 (NY 2004) a state court presented with a substantive due process challenge must look to federal precedent: "Drawing on federal precedents, we set out the two-part test for substantive due process violations. First, claimants must establish a cognizable property interest, meaning a vested property interest, or "more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction" (*Town of Orangetown v. Magee*, 88 N.Y.2d 41, 52, 643 N.Y.S.2d 21, 665 N.E.2d 1061 [internal quotation marks omitted]). Second, claimants must show that the governmental action was wholly without legal justification (*id*. at 53, 643 N.Y.S.2d 21, 665 N.E.2d 1061).

Bloomberg, 564 F.3d 587, 606 (2d Cir. 2009). Under rational basis review, Petitioners-Plaintiffs must plausibly allege that the rules and laws enacted by the Defendants were "not rationally related to a legitimate government interest." *Tanov v. INS*, 443 F.3d 195, 201 (2d Cir. 2006*); see Beatie v. City of N.Y.*, 123 F.3d 707, 711 (2d Cir. 1997) ("Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if rationally related to a legitimate state interest.") (internal quotation marks omitted). Rational-basis review of a statute or policy "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Winston v. City of Syracuse*, 887 F.3d 553, 560 (2d Cir. 2018) (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993)). Not only have Plaintiffs-Petitioners failed to set forth a protected interest here, [15] but they fail to meet their significant burden of showing that Local Law 152 is not rationally related to a legitimate legislative purpose or state interest.

A. The City Council of New York furthered important health and safety government interests in enacting Local Law 152.

Amici in this case are all too familiar with the public health hazards this legislation aims to curtail: the air pollution, street safety issues, and odors and irritants arising from the many diesel trucks dumping at multiple polluting waste transfer stations clustered in certain communities. The City clearly has a legitimate interest in protecting residents from these negative health and safety impacts. "A legitimate governmental purpose is, of course, one which furthers the public health, safety, morals or general welfare." *N.Y. Coal. of Recycling Enters. v. City of N.Y.*, 598 N.Y.S.2d 649, 653–56 (Sup. Ct. 1992) (finding that a local law increasing permit fees, penalties, and DSNY's regulatory authority over the siting of waste transfer stations

15. As set forth below, a person does not have a protected due process property interest in a possible future business license or permit. *Spinellis v. City of New York*, 579 F.3d 160 (2d Cir. 2009).

is "[c]learly. . . a police measure directed at improving the health and safety and general welfare of the public") (citing *French Investing Co. v. City of N.Y.*, 39 N.Y.2d 587, 596, *appeal dismissed and cert denied* 429 U.S. 990); *see also Steel Institute of New York v. City of New York*, 832 F. Supp. 2d 310, 336–37 (S.D.N.Y. 2011), *aff'd*, 716 F.3d 31 (2d Cir. 2013) (finding provisions of the City's Building Code requiring certification, permitting, and inspection of cranes and derricks so as to prevent injury to persons or buildings to be rationally related to a legitimate government interest as their "sole purpose" was to "protect the public welfare on an issue of unique local concern").

1. The Community Districts targeted in Local Law 152 experience high levels of truck traffic, pollution, and asthma.

Addressing the public health and safety impacts of the disproportionate amount of waste being trucked into and out of the four community districts is unquestionably a legitimate governmental concern. The traffic and air pollution from the many garbage trucks barreling through neighborhoods where *amici*'s members live, and the noxious smells and loud noises from transfer stations themselves, have had serious detrimental impacts on residents. Transfer stations in these communities are predominately land-based, truck-intensive facilities.[16] Many of these facilities operate in the open air or with doors wide open, emitting noxious smells, dust, and toxic fumes into the neighborhoods in which they are sited.[17] These pollutants comingle with the emissions of fine particulate matter (PM 2.5) from the diesel engines of hundreds of trucks dumping and picking up garbage at the transfer stations each day.[18]

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16. *Id.*

17. *Id.*

18. *Id.*

A 2018 study conducted by North Brooklyn community advocates from El Puente de Williamsburg, a member of *amicus* NYC-EJA, in conjunction with the New School's Tischman Environmental and Design Center, found that the air around four parks/playgrounds in North Brooklyn contains the harmful air pollutant PM 2.5 at rates four to six times higher than the maximum referenced in national air quality standards.[19] The participants in the study counted trucks traveling through the neighborhood and found that an average 218 trucks per hour pass by or idle beside the parks and playgrounds.[20] A similar study conducted only a few years earlier found that the amount of particulate matter in the air at an intersection in North Brooklyn increased by 355% when transfer stations were operating, compared with when they were closed.[21]

The disproportionate air pollution affecting low-income communities and communities of color in New York City mirrors similar inequities across the country.[22] Health inequities follow

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19. Hearing on Int. No. 157-C Before New York City Council Comm. on Sanitation and Solid Waste Mgmt., 2018 Leg., at 63 (statement of Leslie Velasquez, El Puente de Williamsburg), Respondents-Defendants Exhibit G, H. For the full report, *see*, Ivan J. Ramirez et al., *TEDC Project Report: Fighting for Urban Environmental Health Equity in Southside Williamsburg, Brooklyn: A Pilot Study*, NEW SCHOOL (2018), https://www.researchgate.net/publication/323628133.

20. Hearing on Int. No. 157-C Before New York City Council Comm. on Sanitation and Solid Waste Mgmt., 2018 Leg., at 63 (statement of Leslie Velasquez, El Puente de Williamsburg). For the full report, *see*, Ivan J. Ramirez et al., *TEDC Project Report: Fighting for Urban Environmental Health Equity in Southside Williamsburg, Brooklyn: A Pilot Study*, NEW SCHOOL (2018), https://www.researchgate.net/publication/323628133.

21. Erin Durkin, *More Waste Trucks Clogging the Streets in Williamsburg and Greenpoint, Study Finds*, N.Y. DAILY NEWS (Nov. 16, 2011, 6:30 PM), https://www.nydailynews.com/new-york/brooklyn/waste-trucks-clogging-streets-williamsburg-greenpoint-study-finds-article-1.978738.

22. *See, e.g.*, *'Not fair': Blacks, Hispanics breath more pollution than they make*, ASSOCIATED PRESS (Mar. 12, 2019 12:40 PM), https://nypost.com/2019/03/12/not-fair-blacks-hispanics-breathe-more-pollution-than-they-make/; *See also*, Doyle Rice, *Study finds a race gap in air pollution—whites largely cause it; blacks and Hispanics breath it*, USA TODAY (Mar. 11, 2019 3:57 PM), https://www.usatoday.com/story/news/nation/2019/03/11/air-pollution-inequality-minorities-breathe-air-polluted-whites/3130783002/ (reporting on a recent scientific study finding that "black and Hispanic Americans bear a 'pollution burden'" as they are exposed to 56% and 63% more air pollution than they cause, respectively, while Non-Hispanic white Americans are exposed to 17% less air pollution than they cause). For the full study, *see* Christopher W. Tessum et al., *Inequity in consumption of goods and services adds to racial-ethnic*

the same lines. In New York City, neighborhoods where truck-based transfer stations are clustered also experience higher rates of asthma and respiratory illnesses. In Williamsburg-Bushwick, residents ages 5 to 17 years old visited emergency health services for asthma at a rate of 327.2 visits per 10,000 residents in 2016, compared to a rate of only 215.3 visits per 10,000 residents city-wide.[23] This health discrepancy between residents of the overburdened communities and other City residents is similarly stark among adults age 18 years and older. Adults in Williamsburg-Bushwick, in Brooklyn Community District 1, visited emergency health services for asthma in 2016 at more than twice the city-wide rate.[24] In the Hunts Point and Mott Haven neighborhoods in Bronx Community Districts 1 and 2, residents of all ages visited emergency health services due to asthma at a rate of 591.8 per 10,000 residents in 2014.[25] This is nearly three times the national rate of emergency department visits due to asthma in 2014: 202.4 per 10,000 residents.[26]

Testifying before the City Council during a public hearing on the bill that became Local Law 152, pediatrician and environmental health specialist Dr. Geoffrey (Cappy) Collins, MD, MPH, described the impact of trucks driving through the neighborhood of East Harlem, where he serves families, on their way to and from waste transfer stations in the South Bronx:

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disparities in air pollution exposure, PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. OF AM., Mar. 2019, https://www.pnas.org/content/pnas/early/2019/03/05/1818859116.full.pdf.

23. ASTHMA AND THE ENVIRONMENT IN WILLIAMSBURG-BUSHWICK, NYC HEALTH, http://a816-dohbesp.nyc.gov/IndicatorPublic/Report/ServerSideReport.aspx?reportid=78&geotypeid=3&geoentityid=211&boroughid=2 (last visited Mar. 6, 2019).

24. *Id*. (indicating that adult residents of Williamsburg-Bushwick visited emergency health services for asthma at a rate of 206.8 visits per 10,000 residents in 2016, while the city-wide rate was merely 99.1 visits per 10,000 residents).

25. Jeremy Hindsdale, *By the Numbers: Air Quality and Pollution in New York City*, Columbia University Earth Institute (June 6, 2016), https://blogs.ei.columbia.edu/2016/06/06/air-quality-pollution-new-york-city/.

26. *National Hospital Ambulatory Medical Care Survey: 2014 Emergency Department Summary Tables,* CDC, Table 12, https://www.cdc.gov/nchs/data/nhamcs/web_tables/2014_ed_web_tables.pdf.

"The parents I work with are doing what they can to preserve the health of their children. Asthma is a big problem. With higher rates in East Harlem than almost anywhere in the country. Parents can take care of doctors' appointments, keeping up with medications, that's within their power. They cannot control the garbage trucks idling on the streets, crisscrossing the streets and barreling up the avenues as they haul thousands of tons of waste per day through their neighborhood on route to disposal sites and other impoverished neighborhoods in the South Bronx. Combustion exhaust contains hydrocarbons, soot, ozone, and carcinogenic chemicals like benzine. It makes asthma worse. I can't prescribe a medication for this and families can't protect themselves from the polluted air they breathe. We need help and help is at hand. As a community of New Yorkers, we can make the air better through legislation. Limiting the maximum capacity at our waste transfer stations is a first step towards clean air." [27]

2. Community members advocated publicly for years for the Council to address waste transfer facility clustering in low income communities and communities of color.

Local Law 152 was passed in response to consistent advocacy from people and groups in communities affected by the clustering of waste transfer stations. Legislatures responding to constituent needs is the bedrock of our electoral democracy, and here it provides a rational basis sufficient to withstand Petitioners-Plaintiffs' substantive due process challenge. Since before the passage of the SWMP in 2006, community organizations such as *amici* NYC-EJA, O.U.T.R.A.G.E. and others have been organizing, lobbying, protesting and advocating to demand more equity in the way waste is processed in New York City. The passage of the SWMP in 2006 promised the imminent reduction of trash being trucked into their neighborhoods, bringing hope to these communities. During the June, 2006, hearing before the Committee on Sanitation and Solid Waste on the proposed SWMP, advocates testified that the coalition known as the Organization of Waterfront Neighborhoods, or "OWN," "has been engaged in the garbage

27. Hearing on Int. No. 157-C Before New York City Council Comm. on Sanitation and Solid Waste Mgmt., 2018 Leg., at 98–99 (statement of Cappy Collins).

equity struggle for over ten years and we're really thrilled to be here today and to see this day as the solid waste management plan seems to be moving forward, and that OWN communities may finally get relief from the 80 percent of the garbage—of the City's garbage that passes through the land-based transfer stations in the outer boroughs." *See* Testimony of Veronica Eady, Senior Staff Attorney, New York Lawyers for the Public Interest, SWMP Hearing Transcript at 167.14-25; 167.1-4. As Jae Watkins, then the Environmental Justice Program coordinator for UPROSE (a member of *amicus* NYC-EJA), stated, "Our priority for the SWMP are to ensure real capacity reduction in over-burned [sic] communities; to include the MTS facilities at West 59th Street and East 91st Street in Manhattan, and to pass this plan with these essential elements, immediately." *Id*. at 166.14-15; 167.1-4.

Ten years later, however, no real progress had been made. The *amici*, their members, and neighbors realized that without intensified organizing and action, the promises the City made in the SWMP might never come true. These communities—many of which had earlier organized against related efforts by the City to install incinerators in their communities or for the passage of an earlier law related to siting of new waste facilities—activated and began calling on the Council to follow through on the pledge made in the SWMP to pass legislation if DSNY failed to reduce the permitted capacity in the overburdened communities. As Bautista, who had just left his post as Director of City Legislative Affairs for Mayor Bloomberg in 2010, put it,

> "In 2010, I left the Mayor's office to join NYC-EJA. The City Council Speaker, Christine Quinn, had been there for the SWMP negotiations and understood that there was unfinished business from it regarding the capacity reductions. So the Council started making noise, with the Council Member from North Brooklyn, Diana Reyna, leading. . .when it became clear that what was coming from DSNY wasn't enough, she said, 'Well, according to the Solid Waste Management Plan, we have the right to legislate real reductions if we're unsatisfied with what the Sanitation Department came up with.' That is what led to the first of three

> different waste equity bills for mandatory reductions in capacity." Bautista Aff. ¶ 28.

The City Council's multi-year efforts to pass waste equity legislation into law are well documented.[28] Petitioners-Plaintiffs themselves review the long legislative history dating back to the introduction of Council Member Diana Reyna's first capacity reduction bill in 2011, followed by Intro 495 of 2014, and finally Intro 157 of 2018. *See* Verified Petition and Complaint at pp. 13-24. Continued pressure and advocacy from *amici* and their partners drove the legislative efforts. In the Bronx, in December of 2016, dozens of community members gathered in freezing temperatures to urge their City Council member to support the bill.[29] A year and a half later, residents of Southeast Queens gathered to demonstrate their support for reducing the waste capacity in their district. A faith leader told the press he was there to make sure their Council Member knew the community cared about the issue of waste equity.[30]

At hearings for each of the three versions of the bill that became Local Law 152, dozens of community members lined up to ask the Council to take action on their behalf. A North Brooklyn resident and representative of *amicus* O.U.T.R.A.G.E. testified before the Council calling the clustering of waste transfer stations and truck traffic in his community "an environmental tragedy."[31] Another North Brooklyn community member testified on behalf of

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28. Petitioners-Plaintiffs cite to the numerous City Council hearings on the three versions of the bill that eventually became Local Law 152—Intro 1170 of 2013; Intro 495 of 2014; and Intro 157 of 2018.

29. Joe Hirsch, "Bronxites to City: Slash our Trash," MOTT HAVEN HERALD, Jan. 2, 2017, *available at* https://www.motthavenherald.com/2017/01/02/bronxites-to-city-slash-our-trash/.

30. Joe Cronin, *Waste Equity Activists Rally at Miller's Office*, QUEENS PRESS (May 4, 2018), http://queenspress.com/waste-equity-activists-rally-at-millers-office; *see also* Naeisha Rose, *Waste equity debate rages on in St. Albans*, QUEENS NEWS AND COMMUNITY (May 15, 2018 12:00 AM), https://qns.com/story/2018/05/15/waste-equity-debate-rages-on-in-st-albans/.

31. Hearing on Int. No. 157-C Before New York City Council Comm. on Sanitation and Solid Waste Mgmt., 2018 Leg., at 101 (statement of Rolando Guzman).

amicus O.U.T.R.A.G.E. that "communities of color, poor immigrants, have been living cheek and jowl with these problems for decades."[32] The President of *amicus* Cleanup North Brooklyn testified that the smells emitted from the transfer stations and trucks in North Brooklyn are so bad that "families can't open their windows" and "kids living nearby can't go outside and play."[33] She stated that "capping the amount of waste for overburdened neighborhoods . . . will significantly improve the severe environmental harms" that the North Brooklyn communities have "been dealing with for over 20 years."[34] Members of labor organizations raised their voices to join the chorus as well, since many members of organized labor both live and work in environmental justice communities, including members of the locals who represent private *and* public sanitation workers, the International Brotherhood of Teamsters Joint Council 16. A representative of Local 813, who represents private sanitation workers and is an *amicus* in this case, testified that "The Teamsters care about the environment and the justice because our members do not just work in these communities but they live there too. Our kids deserve a better future."[35]

The testimony from the hearing on the final bill that became Local Law 152 delivered a powerful message from residents of North Brooklyn, the South Bronx, and Southeast Queens that the clustering of waste facilities in their backyards had negatively impacted their lives for far

32. Hearing on Int. No. 157-C Before New York City Council Comm. on Sanitation and Solid Waste Mgmt., 2018 Leg., at 120 (statement of Eric Bruzaitis, O.U.T.R.A.G.E.).

33. Hearing on Int. No. 157-C Before New York City Council Comm. on Sanitation and Solid Waste Mgmt., 2018 Leg., at 67 (statement of Jen Chantrtanapichate).

34. *Id*.

35. *Id*. at 92.

too long, and they demanded that the City Council take action. Teg Sethi, member of *amicus* Cleanup North Brooklyn and resident of Bushwick, said,

> "Thirty years ago, a waste transfer station was sited within a block from hundreds of families and businesses. Three times this community organized and fought to no avail, ignored by two different administrations and ten years ago, the station was taken over by the worst of the worst of operators and the community has suffered the consequences. For the first time in decades, change is stirring in our neighborhood…"[36]

As Danny Peralta, who runs THE POINT Community Development Corporation in Hunts Point in the South Bronx, a member of *amicus* NYC-EJA, stated, "We are one of the most environmentally overburdened districts in the community in all of New York City. The biggest contributors obviously to this is the pollution that comes from the waste industry. . . . we feel like Intro 157 is long overdue."[37]

B. Petitioners-Plaintiffs have not surmounted the presumption of rationality here.

Petitioners-Plaintiffs have failed to meet their burden of alleging that reducing permitted capacity of land-based solid waste transfer stations in the designated districts through Local Law 152 is not rationally related to the goals of improving public health or safety. The rational basis standard provides a presumption of rationality so deferential that, generally, once courts determine that a law was enacted to further a legitimate government interest, they are satisfied that the law is rationally related to that interest. *See e.g.*, *N.Y. Coal. of Recycling Enters. v. City of N.Y.*, 598 N.Y.S.2d 649, 656 (Sup. Ct. 1992) (finding that "Local Law 40, which was enacted to enhance the existing regulatory structure for waste transfer stations, is a police measure

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36. Hearing on Int. No. 157-C Before New York City Council Comm. on Sanitation and Solid Waste Mgmt., 2018 Leg., at 64 (Statement of Teg Sethi).

37. Hearing on Int. No. 157-C Before New York City Council Comm. on Sanitation and Solid Waste Mgmt., 2018 Leg., at 108-109 (Statement of Danny Peralta).

directed at improving the health and safety and general welfare of the public" and "[a]s such, it is reasonably related to a legitimate governmental objective and comports with due process"). This is so because where there is no fundamental right at stake, as here, the burden is on "those who attack the law to demonstrate that there is no rational connection between the challenged [law] and the promotion of public health safety or welfare." *Beatie v. City of N.Y.*, 123 F.3d 707, 712 (2d Cir. 1997) (citing *Kelley v. Johnson,* 425 U.S. 238, 247 (1976)). Where that burden is not met, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *See Nassau & Suffolk Cty. Taxi Owners Ass'n, Inc. v. State*, 336 F. Supp. 3d 50, 80 (E.D.N.Y. 2018) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)); *see also*, *Beatie*, 123 F.3d at 712 ("The Constitutional presumption in this area of the law is that the democratic process will, in time, remedy improvident legislative choices and that judicial intervention is therefore generally unwarranted.").

The reduction of permitted capacity is targeted squarely at reducing the amount of garbage and truck traffic traveling to facilities in neighborhoods where members of *amici* organizations live and work. Local Law 152 also includes incentives for the export of waste that may still be going to the overburdened districts by rail or barge rather than by truck, further reducing truck traffic and air pollution. Petitioners-Plaintiffs are unable to demonstrate that there "is no rational connection between the challenged [law] and the promotion of public health safety or welfare" and so fail to meet their burden. *Beatie*, 123 F.3d at 712.

C. Petitioners-Plaintiffs Have Neither Entitlement, Nor Vested Property Rights to Future Permit Renewals

For Petitioners-Plaintiffs to state a claim under 42 U.S.C. § 1983, they must allege they were denied a constitutional or federal statutory right, and that the deprivation of this right

occurred under color of state law. *See* 42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42, 48 (1988). Here, Petitioners-Plaintiffs invoke § 1983's "procedure for redress" to pursue their substantive due process claims. *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993). In order to state a claim for violation of their substantive due process rights, Petitioners-Plaintiffs must first assert a "legitimate claim of entitlement" to be granted relief under § 1983. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The issue of entitlement turns on "whether the interest claimed by the plaintiff qualifies as 'property' within the meaning of the constitution." *Sullivan v. Town of Salem*, 805 F.2d 81, 84 (2d Cir. 1986); s*ee also Bd. of Regents*, 408 U.S. at 577 ("To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). Where, as here, a City agency "is vested with broad discretion to grant or deny a license application" parties seeking such a license are "foreclose[d] . . . from showing an entitlement to one" because there is simply no "protected property interest in a benefit." *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 995 (2d Cir.1997). "[P]roperty interests do not arise in benefits that are wholly discretionary." *Daxor Corp. v. State Dep't of Health*, 90 N.Y.2d 89, 98 (1997). "Because the issuance of a license is an exercise of discretion, there is no property interest in the renewal of an expired license." *Testwell, Inc. v. New York City Dep't of Bldgs.*, 913 N.Y.S.2d 53, 58 (2010) (citing *Daxor Corp,*, 90 N.Y.2d at 97–98 (1997)). Petitioners-Plaintiffs assert that Local Law 152 "deprives Company Petitioners of their constitutionally protected rights . . . in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution," Verified Petition and Complaint ¶ 200, but fail to articulate any "legitimate claim of entitlement." *Bd. of Regents*, 408 U.S. at 577.

Petitioners-Plaintiffs attempt to claim entitlement to renewal of the permits they currently hold upon the same terms, without reductions in permitted capacity. *See* Verified Petition and Complaint ¶¶ 201-203. However, as Petitioners-Plaintiffs' permits may only be renewed at DSNY's discretion, and Local Law 152 will not affect Petitioners-Plaintiffs' permits unless or until they are in fact being considered for renewal, *see* Respondents-Defendants' Exhibit A, Petitioners-Plaintiffs have demonstrated a mere "unilateral expectation" and have failed to put forth a "legitimate claim of entitlement." *Bd. of Regents*, 408 U.S. at 577; *see also*, *N.Y. Coal. of Recycling Enters. v. City of N.Y.*, 598 N.Y.S.2d 649, 656 (Sup. Ct. 1992) ("The Constitution does not guarantee citizens the unrestricted privilege of conducting or engaging in business as they please.").

Petitioners-Plaintiffs have known since the inception of this permitting system that the permits are subject to annual renewal at DSNY's discretion. Here, as in *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 995 (2d Cir.1997), DSNY has broad discretion as to whether to grant or renew these permits, and courts have consistently found that such discretion precludes a permit recipient's entitlement to future renewal of their permit. *See Big Apple Food Vendors' Ass'n v. City of N.Y.*, 168 Misc. 2d 483, 488 (Supt. Ct. 1995), *aff'd*, 228 A.D.2d 282 (N.Y. App. Div. 1996) (finding plaintiffs permit-holders had no property interest and dismissing plaintiffs' due process claims where City enacted a law prohibiting holders of food vending permits from renewing more than one such permit).

Petitioners-Plaintiffs likewise cannot claim that their incurred debt and invested capital were in reliance on a sincere expectation that their permits would be renewed in a manner that maintains their permitted capacity. Petitioners-Plaintiffs claim that due to their purported reliance, they have vested rights in future renewal of permits maintaining their current permitted

capacity. Verified Petition and Complaint at 57.[38] Yet, Petitioners-Plaintiffs have been on notice that the City intended to reduce permitted capacity for facilities in overburdened community districts since at least the introduction of the bill that became the 2006 SWMP. Representatives of at least two of the Petitioners-Plaintiffs publicly expressed their concerns about eventual capacity reduction in 2006. *See* Jennifer Grzeskowiak, *City Waste Overhaul*, WASTE360 (Aug. 1, 2006), https://www.waste360.com/mag/waste_city_waste_overhaul.

> "Thomas Toscano, CFO and CLO for Mr. T Carting, which has both transfer station and carting operations in New York, says he is worried about whether his transfer station capacity, currently about 10,000 tons per month, will be reduced. To direct waste to the marine transfer stations, the city has said it will reduce capacity at other privately owned stations. Biderman says that a provision requires negotiations between private transfer station owners and the city to reduce the private capacity. If those negotiations are not successful, the city may pass a separate law mandating the reduction of private sector transportation capacity, although that scenario is likely years away."

For property interests in a permit to vest under state law, the municipality must have "'engendered a clear expectation of continued enjoyment' of the permit sufficient to constitute a protectable property interest." *Bower Assoc.,* 2 N.Y.3d at 627 (2004) (quoting *Magee*, 88 N.Y.2d at 52); *see also Cohen v. Spain*, 42 N.Y.S.2d 498, 499–500 (Kings County Sup. Ct. 1942) ("The mere issuance of the original license or its renewal … did not confer upon him a vested right successful to insist that his future applications for renewal be governed only by the identical

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38. Petitioners-Plaintiffs cite to *Niagara Recycling v. Town of Niagara*, 83 A.D.2d 316 (4th Dep't 1981), to argue that Petitioners-Plaintiffs' rights to their current permitted capacity is comparable to the *Niagara* plaintiffs' rights in those DEC and EPA permits. However, that case is completely distinguishable in that the law being challenged in *Niagara Recycling* **retroactively** entirely invalidated permits without notice. In the instant circumstance, Local Law 152 provides at minimum fourteen months of notice to all permit holders, and rather than invalidating any permits, simply reduces the maximum capacity to some permits at the time of renewal.

provisions of law which were in effect at either of the above times.").[39] Petitioners-Plaintiffs cannot meet this standard because they have been aware of ongoing plans to reduce permitted capacity for facilities in overburdened community districts since at least the introduction of the bill that became the 2006 SWMP.

For these reasons, Petitioners-Plaintiffs have neither a protected property interest nor vested rights in future renewal of the permits they currently hold, maintaining their current capacity allowances. Therefore, Petitioners-Plaintiffs cannot state a claim under 42 U.S.C. § 1983 and so are not entitled to relief afford under 42 U.S.C. § 1988.

D. Petitioners-Plaintiffs Likewise Fail to State a Cause of Action for Unconstitutional Vagueness

Petitioners-Plaintiffs also fail to meet the high standard necessary to establish that Local Law 152 must be voided for vagueness. The Supreme Court has provided two manners in which plaintiffs can claim that a statute or rule is unconstitutionally vague: (1) "a law violates due process if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits;" and (2) "a law is unconstitutionally vague if it authorizes or even encourages arbitrary and discriminatory enforcement." *Thibodeau v. Portuondo*, 486 F.3d 61, 65-66 (2d Cir. 2007) (internal quotation marks and citations omitted). "The degree of vagueness tolerated in a statute varies with its type: economic regulations are subject to a relaxed vagueness test, laws with criminal penalties to a stricter one, and laws that might infringe constitutional rights to the strictest of all." *VIP of Berlin, L.L.C. v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (citing *Rubin v. Garvin*, 544 F.3d 461, 467 (2d Cir. 2008)).

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39. The only case which Petitioners-Plaintiffs cite as evidence of a vested right in a permit *renewal*, *Morillo v. City of N.Y.*, does not discuss vested rights at all. 178 A.D.2d 7 (1st Dep't 1992).

As established above, no constitutional rights are infringed by Local Law 152. Likewise, there are no criminal penalties imposed by Local Law 152. Therefore, Local Law 152 is subject to a "relaxed vagueness test," which requires Petitioners-Plaintiffs to show that "no standard of conduct is specified at all." *United States v. Schneiderman*, 968 F.2d 1567 (2d Cir. 1992). *See also Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489 (1982) ("economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.")[40]

To succeed on a facial challenge void for vagueness, "the challenger must establish that **no set of circumstances** exists under which the [law] would be valid." *United State v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). Petitioners-Plaintiffs simply fail to do so here. Petitioners-Plaintiffs should have no uncertainty as to whether their next permits will have reduced capacity, as Local Law 152 is clear about its effective date, which CDs are affected, and the amount of mandated reductions.

Statutes are not required to be meticulously specific, since "language is necessarily marked by a degree of imprecision." *Thibodeau*, 486 F.3d *at* 66 (2d Cir.2007) (quoting *Grayned v. City of Rockford*, 408 U.S. 104 (1972)) Plaintiffs-Petitioners' claims of uncertainty about when a CD may no longer be defined as "overconcentrated" or "overburdened" is insufficient to

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40. The Petitioners-Plaintiffs regularly interface with DSNY and other regulators, and have had ample opportunity to engage in the development of Local Law 152 throughout its long and rich legislative history. Furthermore, the administrative process is still ongoing, and as DSNY promulgates rules for the implementation of Local Law 152, Petitioners-Plaintiffs will have additional opportunity to clarify whatever uncertainties they continue to maintain they possess in regards to the law.

meet the standard of vagueness, since Local Law 152 makes very clear which CDs are covered by its terms at the time the law goes into effect. Future uncertainty does not convert a statute that is specific about its current terms into an impermissibly vague one. This "doctrine 'does not require impossible standards of specificity which would unduly weaken and inhibit a regulating authority . . .especially in a field where flexibility and adaptation of the legislative policy to varying conditions is the essence of the program'." *Gurnsey v. Sampson*, 151 A.D.3d 1929 (N.Y. App. Div. 2017) (quoting *Slocum v. Berman*, 81 A.D.2d 1014 (N.Y. App. Div. 1981).

Likewise, Petitioners-Plaintiffs cannot make a valid vagueness argument by claiming that the definition of "recycled" as defined in the New York City Administrative Code Section 16-303 is insufficient for them to understand what "recycled" means in Local Law 152. *See* Verified Petition and Complaint at p. 63. "Challengers for vagueness must show 'that the statutory language is so indefinite that they could not have reasonably understood them.'" *Doe v. State of New York,* 595 NY.S.2d 592 (N.Y. App. Div. 1993) (quoting *State of New York v. Rutkowski*, 44 N.Y.2d 989, 991 (N.Y. 1978). As in *Burke v. Denison*, 218 A.D. 2d 894 (N.Y. App. Div. 1995), where the term "take out/carry out restaurant" was challenged on vagueness grounds but upheld by the court, here, the term "recycling" or "recycled" is understood within the industry, and the plaintiffs themselves are well-positioned to have a "reasonable degree of certainty as to their meaning." *Id.* Petitioners-Plaintiffs should use their "special expertise" in waste management law to understand the meaning of recycling—not every word must be defined separately in each act. *See Allies Boulevard Bookstore, Inc. v. Cohen*, 90 A.D.2d 935 (N.Y. App. Div. 1982) (holding that although a term was undefined in a zoning ordinance, parties should rely upon commonsense understanding of the term as well as special expertise in administration of zoning laws, and such interpretation must be respected). The fact that the term being challenged is in

fact defined and codified elsewhere in the applicable statutory code further undercuts Petitioners-Plaintiffs' attempt to argue that the term "recycling" or "recycled" in Local Law 152 is too vague for them to understand.

Finally, any assertion that Local Law 152 creates a circumstance where there is dangerous potential for discriminatory enforcement is founded on a misunderstanding of the legal standard, and further misrepresents Local Law 152's purpose and effects. The vagueness doctrine is designed to protect against vague penal statutes where unfettered discretion is placed in the hands of police. *See People v. Berck*, 32 N.Y.2d. 562 (1973). Local Law 152 is not a penal statute, but rather an economic regulation, as previously established. No criminal penalty is considered by this local law, and DSNY's role will not be one of an "ad hoc administrat[or]" as Petitioners-Plaintiffs allege. *See* Opp. p. 62. Rather, the permitted capacity reductions in Local Law 152 apply equally to all facilities within the affected CDs, and will be implemented as per the clear terms of the statute after October 1, 2019. DSNY will have its ordinary discretion as it promulgates rules to assist in the implementation of the Local Law, as it does with every law it is tasked with implementing. The standards by which DSNY defines "recycling" or "recycled" will not change as its definition is already codified, in the Administrative Code, and the Local Law gives general notice of what is required, which is sufficient for the purposes of the vagueness doctrine. *See Slocum v. Berman*, 81 A.D.2d 1014, 1015 (N.Y. App. Div. 1981) (regulations containing waiver for health and safety concerns were "neither vague nor subjective because the health and safety needs. . .would not vary with subjective interpretations of the observer. . .the regulations give general notice of what is required.")

V. CONCLUSION

With the passage of Local Law 152, the City of New York finally followed through with its commitment to communities who have, for decades, had to endure the effects of hundreds of diesel garbage trucks coming to their neighborhoods each day carrying more than three quarters of the City's waste. Perhaps Bautista, Executive Director of *amicus* NYC-EJA put it best:

> "Local Law 152 ensures fair share and waste equity in a way that no policy ever has before. It also incentivizes better waste handling practices; it incentivizes the switch from truck to rail, which will go a long way to reducing truck fumes and air pollution in our communities. It incentivizes organics recycling. It incentivizes a better system that means being better neighbors to communities. We have some truck reduction, but almost as importantly, we have all these different kinds of incentives to push the industry in a better direction than it has ever been going in. So from multiple public policy and public health perspectives, folks in these communities see Local Law 152 as a victory, and see it as a victory they've been owed for a long time." Bautista Aff. ¶ 40.

Petitioners-Plaintiffs fail to state any valid claim that Local Law 152 should be declared void or overturned. *Amici* and their neighbors respectfully urge the Court not to disturb the democratic process which led the City to finally pass this law and keep the promises it made to these communities more than a decade earlier—that finally they could breathe easier, walk and bicycle more safely, and worry less about their children's respiratory health conditions.

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