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

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In the Matter of the Application of

NEW YORK CITY COALITION FOR ACCOUNTABILITY NOW, INC., VALERIE LUCZNIKOWSKA, AND DONAL BUTTERFIELD

Petitioners,

-against-

MICHAEL MCSWEENEY, CITY CLERK OF THE CITY OF NEW YORK,

Respondent,

for an order, pursuant to Article 16 of the Election Law And Municipal Home Rule Law 24 and 37, to compel Respondent to certify that the Petition conforms with all requirements of law.

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Index #: 100814/14

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Petitioners move for summary judgment requesting that the court conclude as a matter of law that the Verified Petition in the instant matter was properly filed and served and further that the referendum petition filed by Petitioners with the Respondent complies with all requirement of law.

PROCEDURAL BACKGROUND

On July 3, 2014, Petitioner New York Coalition for Accountability Now ("NYCCAN") filed a petition pursuant to NY Mun. Home Rule § 37. Sixty volumes, containing some 67,000 signatures, were submitted and clocked in by the Respondent City Clerk. Clerk's reports were prepared determining the validity of the signatures submitted, according to documents provided by the Respondents, on July 25, 2014. Thirty two days after filing the petition and ten days after the signatures were reviewed, the Respondent issued a letter on August 4, 2014, claiming that the

petition did not comply with law for various reasons, and delivered it to the Petitioners attorney that day at approximately 5:30 p.m. (letter is attached as Exhibit "A"). Less than 48 hours later, On August 6 Petitioners brought the within proceeding.

Justice Edmead signed the Order to Show Cause directing that the papers be served on Respondent and directing the parties to return to court on August 14, 2014. The papers were duly served and the parties appeared before Justice Wooten, who referred the matter for all purposes to Referee Crespo. On the first return date the Respondent served Petitioners with an "Affirmation of Stephen Kitzinger In Response to the Order to Show Cause Dated August 7, 2014." (Attached as Exhibit "B") Within the Affirmation, the Respondent requested "the this court enter an Order dismissing the instant special proceeding with prejudice or, in the event that the Court determines that the Verified Petition was sufficient, establish a schedule for further proceedings." Ex. B at ¶ 36.

LEGAL CONTEXT FOR PROCEDURES

NY Mun. Home Rule § 37 contains the provisions allowing for qualified electors within a city municipality to amend their city charter by citizen initiated referendum. Section 37(2) provides that the lesser of 10% of the total number of votes case in the last election for governor, or 30,000 signers, may submit a petition to the city clerk to place a referendum to amend the city charter on the ballot. It prescribes the manner in which the proposed referendum must be presented on the petition. Section 37(3). It requires that within 30 days the city clerk shall transmit a certificate of compliance of non-compliance with all requirements of law to the legislative body and the person who filed the petition. Section 37(5). It also provides that the city clerk shall make the petition and notations as to the validity or invalidity of individual signatures available as "a matter of public record in his office." Id. No provision is made for

making the petition and notations available in copy or electronically so that a petitioner (or anyone else) can compare the city clerk's findings to the voting records contained at the board of elections.

The provision further provides that "[a] finding by the city clerk that the petition does not comply with all the requirement of law may be contested in a proceeding in the supreme court." Id. NY Mun. Home Rule § 24 prescribes the timing and manner in which such case may be brought to supreme court.

> "If within five days after the last day to file such certificate a written objection to the determination of the clerk be filed with supreme court, or any justice thereof, of a judicial district in which such local government or any part thereof is located, such court or justice shall determine any question arising thereunder and make such order as justice may require. Such proceeding shall be heard and determined in the manner prescribed by section 16-116 of the election law."

NY Elec Law §16-116 provides that "A special proceeding …shall be heard upon a verified petition and such oral or written proof as may be offered, … and shall be summarily determined."

I. THE VERIFIED PETITION SUFFICIENTLY PUT RESPONDENT ON NOTICE OF PETITIONERS' CLAIMS

A. Neither The Municipal Home Rule Law Nor NY Elec. Law Section 16-116 Contemplate that a Petitioner Challenging a City Clerk's Certificate of Non-Compliance Serve and File a Bill of Particulars Contemporaneous with the Verified Petition

Respondent seeks to dismiss the within Verified Petition brought pursuant to the Municipal Home Rule Law, based on the authority of Lacorte v. Cytryn, 109 A.D.3d 544 (2nd Dep't. 2013) *aff'd* 21 N.Y. 3d 1022 (2013),"a proceeding pursuant to Election Law § 16-102…" Id. at 544. We respectfully submit that the Respondent must fail.

To state the obvious, Petitioners referendum petition was not a candidate designating or nominating petition, as is regulated in § 16-102. This is a matter pursuant to the Municipal Home Rule Law. Petitioners are challenging findings made by the Respondent City Clerk under the Municipal Home Rule Law. As stated above, Mun. Home Rule § 24 directs that a proceeding against the City Clerk objecting to a certificate of non-compliance "shall be heard and determined in the manner prescribed by section 16-116 of the election law." Section 116 provides that this is a "special proceeding" that "shall be heard upon a verified petition and such oral or written proof as may be offered." Petitioners have successfully brought this case pursuant to that section of the election law. Neither § 16-102 nor the 11 other sections of Article 16 of the election law apply to this matter. Only N.Y. Elec Law § 16-116 applies.

The legal and practical context of candidate petitions in Lacorte v. Cytryn, and the cases it relies on are simply inapplicable to the municipal home rule context. The differences are legion and material.

B. The Candidate designating and nominating petition context of Lacorte and the Municipal Home Rule Context Here are Incomparable

1. Number of Signatures Required

The difference in the number of signatures needed between a candidate running for office and a citizen initiative referendum is staggering. For example, the number of valid signatures a candidate for Governor of the State of New York needs to qualify for the ballot is 15,000 (NY Elec Law §§ 136 and 142). To run as an independent for congress, the candidate needs 3,500 valid signatures to qualify for the general election ballot. N.Y. Elec Law § 136. State senate candidates need 3,000 and Assembly candidates, 1,500. Id. By contrast, in the City of New York to place a referendum question on the general election ballot, the petitioners must collect

30,000 signatures. Indeed, the number of signatures that Respondent claims to be invalid is 37,688.

37,688 signatures is just not a number contemplated in Lacorte. In that case the candidate was attempting to qualify for the ballot for the Democratic primary for Rockland County Executive, and needed 2,000 valid signatures to achieve the ballot. NY Elec Law §6-136(d). The number of invalidated signatures the candidate needed to review was 2,374. See exh. "C" page 2. In the Jennings case, cited to in Lacorte, the candidate was seeking a place on the Democratic primary ballot for State Senate, and needed 1,500 valid signatures. Petitioners submit that the election law case of Lacorte requiring the review of a small fraction of the signatures required in a municipal home rule referendum petition requiring 30,000 valid signatures prior to filing a verified petition is so factually different that it is wholly irrelevant even by analogy.

2. Accessibility of Necessary Records to Review Validity Determinations

The state and local boards of election, by law, make all records necessary to review determinations of the validity or invalidity of signatures on candidate petitions in a timely manner. Boards of Election make rules about the filing and dispositions related to candidate petitions and objections thereto (NY Elec Law § 6-154(2)) to maximize availability to opposing parties in short amounts of time. The New York City Board of Elections propounds rules each election season in relation to making petitions, specifications of objections, Board of Elections worksheets, and voter registration databases available to effectuate the ability of petitioners and objectors to review the Board's determinations of the validity of individual signatures.

In the Board's latest adopted rules for this year's primary elections (attached as Exh. "D"), for example, the Board provides "The Commissioners of the Board… shall control the

requisition, examination and copying of any document filed with the Board in order to assure that candidates, objectors or potential objectors and their representatives have an equal and fair opportunity to examine or copy such documents consistent with the needs of the Board to process petitions and specifications of objections." Exh. D at ¶ F1. Once the borough office has prepared the report to the Commissioners, the original specifications of objections with the line by line rulings of the clerks will be made available for examination or copying by the objector, candidate or representative…" Exh. D at ¶I4.

Furthermore, each board of elections is required to maintain a "central file voter registration record" that must be kept at the main office and every branch office of a Board of Elections. NY Elec Law § 5-500(1). The central file voter registration record contains copious information about the voter, including his or her signature, much of it relevant to the review of the validity or invalidity of a petition signature. NY Elec. Law § 5-500(4).[1] By law and as a matter of practice, the central file is made available for public inspection by computers at the main offices and branches of the boards of elections. NY Elec. Law § 5-500(1). In the Lacorte case, the candidate had these instruments at his disposal, guaranteed by rule and law, to review

[1] In addition, there shall be spaces for the following entries, all of which shall precede the space for the voter's signature: a. Serial number assigned to voter and county of registration; b. The voter's surname, given name and initials of other names; c. The date of registration; d. The residence address at which the voter claims to reside and post office address, if not the same; and the number or designation of the room, apartment or floor occupied by the voter if he does not claim the entire building as his residence; e. The assembly district or ward and the election district in which such residence address is located; f. The length of the voter's residence in the county or city calculated to the time of the next general election; g. Whether the voter has previously voted or registered to vote and, if so, the approximate year in which he last voted or registered and his name and address at the time; h. His date of birth; i. A space for the applicant to indicate whether or not he is a citizen of the United States; j. The gender of the voter (optional); k. The telephone number of the applicant (optional); l. Whether the voter was challenged; m. A space for the applicant to indicate his choice of party enrollment, with a clear alternative provided for the applicant to decline to affiliate with any party.1n. On the face of each registration record there also shall be spaces appropriately entitled, for entering information about the cancellation of registration, the date of such cancellation and the reason therefor, and the signature of the two members or employees of the board, representing different political parties by whom the cancellation was recorded; o. A space for "remarks" regarding other facts required by this chapter to be recorded or appropriate to identify the voter.
N.Y. Elec. Law § 5-500

the far more limited number of signatures prior to filing a Verified Petition with the court. Here, Petitioners have no such opportunity.

Mun. Home Rule §37(5) provides the entire regulatory framework for the review of the city clerk's determinations of the validity of signatures. It states in relevant part:

> If he [the city clerk] shall certify that there is an insufficient number of valid signatures, he shall make available to the legislative body a statement as to the number of signatures found to be invalid and the reasons for such invalidity, and shall make the same information available to the person by whom the petition was filed and make it, together with the petition and his notations of rulings thereon or relative thereto, a matter of public record in his office.

There is no requirement that the city clerk transport any of the records to a board of elections where the records can be used in conjunction with the central file voter registration record to review the determinations of invalidity made by the city clerk. Indeed, the Respondent City Clerk advised Petitioners and the court that it could not by law allow these records to be transported from its office, even in the context of a court case, and have appealed this court's ruling to release the documentation.

The original petition and the original notations are critical, because some reasons for a signature being determined invalid demand exactitude in comparing originals to information on file, including illegible addresses, illegible signatures, illegible dates, the alteration of a date or a signature, and the signature being printed. In the petition here, 1,697 were deemed invalid for these reasons, and we had no ability, for example, to compare the original signature to the signature on file at the Board of elections to determine its "legibility" or whether it was a printed, rather than actual signature.

Furthermore, there is no provision that the persons who submitted the petition get any type of priority to review the city clerk's rulings, as it is a matter of "public record". The

Election law and rules of the Board of Elections make clear this priority to facilitate the quick review demanded by the short statute of limitations on such matters.

3. The Time Frame Between the First Notice of Signatures Being Allegedly Invalid and the Statute of Limitations to File in Supreme Court is Shorter in a Municipal Home Rule Case

In election law cases, specifications of objections are required to be filed and served by, at the latest, 9 days after the designating or nominating petition is filed. NY Elec. Law §6-154. From that point, the candidate is on notice as to the signatures that his or her opponent is objecting to, and can begin the process of reviewing the objected to signatures to determine if they really are invalid or not.

Candidates who are ruled off the ballot by a board of elections may bring a Verified Petition in supreme court challenging the ruling within three days of such ruling. NY Elec. Law §16-102(2). For example, in the Lacorte case, the candidate Dagan Lacorte was required to file his designating petition between July 8 and July 11, 2013. NY Elec. Law §6-158(1). He filed on July 11. *See* exh. C page 2. Specifications of objections were required to be filed and served no later than July 22. The board of election ruled on his petition on July 25 (id.) and from that point, Mr. Lacorte had three days to bring a validating petition. At the very least, Mr. Lacorte had seven full days to review 3,337 specifications filed against him prior to the statutory deadline to challenge the Rockland County Board of Elections decision in court.

In New York City, where the number of signatures needed for most local elections are higher than other jurisdictions, the time between first notice of alleged invalid signatures and when the statute of limitations runs to file a petition to challenge a board of elections ruling a candidate off the ballot is even longer. Attached is this year's independent nominating petition

calendar for the New York City Board of Elections. The last date that specifications of objections can be filed is between August 21 and August 28. (Attached as Exh. "E" the petition calendar published by the NYC Board of Elections.) The Board of Elections hearing to determine the validity of the nominating petitions is September 4, 2014. If a candidate is ruled off the ballot by the Board, their statutory deadline for filing an action in supreme court to challenge the ruling is September 8. This year, candidates filing nominating petitions in New York City will have at least 11 and up to 18 days to review alleged invalid signatures prior to the statute of limitations running.

By contrast, Petitioners had just five days under the municipal home rule law to challenge the City Clerk upon its first notice that 37,688 signatures were alleged to be invalid. Mun. Home Rule §37(5).

C. The Pleading Gives Sufficient Notice to Respondent

"A petition in a special proceeding must notify the opponent of the nature of the claim and frame the issues." McMillan v. Commissioners of Elections of City of New York, 41 Misc. 3d 1207 (Sup. Ct., J. Wooten 2013). *See also* Trust v. Kummerfeld, 153 F. App'x 761, 763 (2d Cir. 2005) and NY C.P.L.R. 402 (McKinney) n. 1. In the McMillan case, decided by Justice Wooten and argued for Respondents by Corporation Counsel for the City of New York more than a month after the Lacorte decision, the court noted that the bill of particulars was filed pursuant to a court order and not with the original verified petition days after the Verified Petition was filed.

The petitioner here did not receive a "clerk's report" that breaks down the numbers and reasons for invalidating the signatures as is the case in election law cases. It received, as mandated by the municipal home rule law, a letter that stated the number of alleged invalid

signatures and the reasons for their invalidity.[2] There is no breakdown by numbers and indeed, the list of reasons is incomplete. It is this document, that was appended as an exhibit to the complaint and therefore incorporated, that the Petitioners challenge. It is the only actionable document Petitioners received and were bound to receive. The Petitioners have notified the court and Respondent to the "series of transactions or occurrences" intended to be proved, to wit, the number of invalidated signatures is overstated and the reasons given therefor are wrong.

Furthermore, the municipal home rule law directs that the court "shall determine any question arising thereunder and make such order as justice may require." Mun. Home Rule § 24(1). No such language exists in Article 16 of the election law. We respectfully submit that justice requires that this court allow the case to proceed. As the court in McMillan noted, "the Court is constrained not to ignore the drastic disenfranchisement of the [federal constitutional] right to vote of the 10,253 people who exercised their right to vote by signing an independent nominating petition." McMillan at 1207. Here, over 67,000 people signed a petition to put a referendum on the ballot, and by Petitioners count well over the necessary 30,000 are registered voters of the City of New York. Justice demands that the question be put to the voters, lest their expression, association and speech rights be compromised.

D. Petitioners Pled that an Otherwise Valid Signature Remains Valid if the Signer has Truly Stated his Current Residence and that the Respondent's Determinations of Invalidity Where Such Address was not the "Address of Record" was Erroneous

Mun. Home Rule § 24(1) provides that the "… signatures to each sheet shall be signed and authenticated in the manner provided by the election law for the signing and authentication of nominating petitions so far as applicable." In determining the validity of a nominating petition, the court in Curley v. Zacek, 22 A.D.3d 954, 956-57 (3rd dep't 2005) determined

[2] The letter fails to list all of the reasons for signatures being invalid.

> Respondents' remaining contentions do not warrant extended discussion. As noted previously, Election Law § 6–140(1)(b) does not require that the residence address of the subscribing witness match the address on file for that witness with the Board, and our prior decisions make clear that the fact that the address appearing on a voter's registration record differs from the address provided by that voter on the petition he or she signed does not provide a basis for invalidating the signature at issue (see Matter of Bray v. Marsolais, 21 A.D.3d 1143, 1146, 801 N.Y.S.2d 84, 87 [2005]; Matter of Robelotto v. Burch, 242 A.D.2d 397, 397–398, 661 N.Y.S.2d 104 [1997]).

Nominating petition requirements in Election Law § 6–140(1), requires that the signer state that "…my present place of residence is truly stated opposite my signature hereto…" [Empahsis added.] The petition here exactly tracked this required language. (*See* exh. F.) An individual's qualification to vote is unaffected by a change of address within the jurisdiction of the board of elections with which the voter is registered, regardless of whether the board of elections receives advance notice of the change. Robelotto v. Burch, 242 A.D.2d 397 (3rd Dep't. 1997) *citing* NY Election Law § 5–208[1].

Here, Respondent wrongfully claimed that 4,153 signatures were invalid because the voter was at the "wrong address". *See* exh. H. They did not claim that the person who signed the petition was not a registered voter, as they did in 28,404 instances. Id. Indeed, the Respondent noted on almost every "wrong address" that the signer was a registered voter in the jurisdiction by indicating the signers' registered voter serial number. Each registered voter is assigned a unique serial number by the Board of Elections. NY Elec Law § 5-500(4). Yet, despite acknowledging the signer's status as a registered voter, the Respondent wrongfully and unlawfully declared the signatures invalid because they did not match the address of record.

Moreover, the Respondent seriously exceeded his authority in claiming that these signatures were invalid. The City Clerk is not an objector; rather he is an impartial arbiter of the

validity of a petition with limited authority to declare signatures invalid. In the absence of an objector, the review of the petition by the Respondent was limited to a review of its legal sufficiency. In Cavallaro v. Schimel, 194 Misc. 2d 788, (Sup. Ct., Nassau Cty., 2003), the court, relying on Court of Appeals cases, held that the Respondent (the Town Clerk of North Hempstead) was limited to determining if the signers were qualified voters in the Town of North Hempstead and if a qualified voter signed the petition twice. Though that case analyzed NY Town Law § 81, the provision is identical in all material ways to Mun. Home Rule §§ 24 and 37.[3] Specifically, both laws require that the petition be subscribed and authenticated in the manner provided by the election law for authenticating nominating petitions, and that it must be signed by qualified electors of the town or city.

The Respondent here clearly invalidated signatures by qualified electors who did not sign the petition twice. Besides the 4,153 "wrong addresses", the Respondent invalidated non-duplicate signatures of qualified electors (in other words, valid signatures) by invalidating for "alteration of date/signature" (646 signatures), the date being incomplete (15), the signature "printed" or not "handwritten" (1008), that the witness identification statement did not include

[3] *Compare* N.Y. Town Law § 81: "Such petition shall be subscribed and authenticated, in the manner provided by the election law for the authentication of nominating petitions, by electors of the town qualified to vote upon a proposition to raise and expend money, in number equal to at least five per centum of the total votes cast for governor in said town at the last general election held for the election of state officers, but such number shall not be less than one hundred in a town of the first class nor less than twenty-five in a town of the second class…" to

N.Y. Mun. Home Rule Law § 24: "The petition may be made upon separate sheets, and the signatures to each sheet shall be signed and authenticated in the manner provided by the election law for the signing and authentication of nominating petitions so far as applicable." And N.Y. Mun. Home Rule Law § 37(3) Qualified electors of a city, in number equal to at least ten per centum of the total number of valid votes cast for governor in such city at the last gubernatorial election, or to thirty thousand, whichever is less, may file in the office of the city clerk a petition for the submission to the electors of the city of such a proposed local law to be set forth in full in the petition. Qualified electors shall be deemed for this purpose to be voters of the city who were registered and qualified to vote in such city at the last general election preceding the filing of the petition.

N.Y. Mun. Home Rule Law § 37 (McKinney)

N.Y. Mun. Home Rule Law § 24 (McKinney)

the county or that the subscribing witness' address did not include the borough, though the witness's actual address is apparent from what is written (918), and that the number of signatures or name of the subscribing witness is omitted (74). These findings, among others, far exceed the respondent's jurisdiction, which was to determine if the signers were qualified voters at the last election in the City of New York and that they did not sign more than once. In doing so, the Respondent City Clerk acted as an objector to the petition, which exceeds his jurisdiction and mandate under the municipal home rule law.

We respectfully submit that Respondent must fail in seeking to dismiss this Verified Petition – and in the process invalidate the petition signed by 67,000 citizens. This is not a candidate petition, it is a petition brought and regulated by the municipal home rule law. The legal context of such a petition is totally distinguishable from the candidate petition context and therefore the cases ruling on candidate petitions are inapplicable and wholly inapposite. As determined by law and practice, the number of signatures to be determined in a candidate petition case are fractionally smaller than a municipal home rule petition. The time frame to determine the validity of signatures by the candidate is greater prior to the statute of limitations running in a candidate petition case than a municipal home rule case. And further, the legal scheme to make the necessary documents available quickly and conveniently is designed to enable a candidate to quickly review alleged invalid signatures. No such scheme exists in the municipal home rule law and no city clerk rules exist on the matter.

Finally, in any case, the Petitioner pled that the Respondent had no authority to invalidate any of the signatures of registered voters for not listing an address that matched the signer's "address of record" (among others). This one pled issue alone is enough to reverse the Respondent's erroneous finding that the referendum petition did not contain enough valid

signatures. For all the foregoing reasons Petitioners respectfully request that the court reverse respondent's finding that not enough valid signatures were submitted and declare the petition valid.

II. THE PETITION GIVES VOTERS FULL NOTICE OF THE PURPOSE AND EFFECT OF THE PROPOSED AMENDMENT

The Municipal Home Rule Law contains just one section in connection with how the language of the proposed local law shall be presented on a referendum petition. It provides:

> Such local law shall set forth the new matter to be added to the charter either in italics or underlined and the matter to be deleted therefrom either in brackets or with lines drawn through it, and after adoption the matter so set forth in italics or underlined may be set forth in the charter in ordinary type, and the matter in brackets or with lines through it may be omitted; but failure so to set forth any provision of the charter which is in fact superseded shall not invalidate the amendment or new charter or any portion thereof.

N.Y. Mun. Home Rule Law § 37(3). There is no provision for additional explanatory language.

Here, the case of Schrader v. Cuevas, 179 Misc. 2d 11 (Sup. Ct., NY Cty., 1998) aff'd, 254 A.D.2d 128, (1st Dep't. 1998) is instructive. Respondent City Clerk claimed that the Petitioners local campaign finance initiative should be struck from the ballot because, Respondent city clerk claimed, it failed to inform signers that it would have changed the campaign finance scheme from a "50% public funding program to an 80% or more public funding program." It continues:

> While one might argue that it might also have been preferable to have included a sentence that adoption would require a change in the current law concerning the cap on total contributions permitted to be raised in order to qualify for public funding, I do not find such omission to be fatal. To require the volume of specific and sometimes minute information respondent would impose upon such an initiative in respect of its effect on existing law would do violence to the very referendum process itself, making it a right in name only. One could hardly abide by all of the notice requirements respondent would impose in this particular case

> without running afoul of the distinctions between the Charter and legislative acts. The plain language of the proposal adequately informs the exceedingly aware electorate of this City of the import of the proposal.

Schrader at 21-22.

Petitioners proposal certainly "adequately informs the electorate of the import of the proposal." It defines the term "Collapse" as an incident occurring "on or after September 11, 2001." ¶ 2(e). It requires the investigation of all such collapses since that time. ¶¶ 3 and 2(e). And it specifically exempts 1 and 2 World Trade Center. ¶2(k). Should the proposal pass, one immediate effect would be the first investigation of the collapse of World Trade Center 7 led by a City agency. Another immediate effect would be to put stakeholders in high-rise structures in the city on notice that a collapse would be investigated by the City. The language of the proposal clearly informs voters that the collapse of high-rise structures– other than 1 and 2 World Trade Center – since September 11, 2001 will be investigated. Voters would clearly understand the meaning of that date, and there would be no other reason to place a retroactive date in the proposed law if it was not meant to investigate a collapse on that date.

The language of the proposed law is very clear. It was explained in a clear and straight forward manner to signers of the petition, and Respondents offer no evidence to suggest otherwise. We therefore respectfully request that the court reverse the Respondent's finding and declare that the petition provided clear notice to signers and the proposed law would give clear notice to voters of its purpose and effect.

III. THE LAW DEFINES "CONSTRUCTION PERMITS" ADEQUATELY AND WITH EXACTITUDE

The term "construction permits" is defined in the proposed law as follows: "Construction Permits' shall mean all permits encompassed in the term 'Construction Permits' as used in The

City of New York Comprehensive Annual Financial Report of the Comptroller for the Fiscal Year Ended June 30, 2013." Exh F ¶2f. The term "construction permits" is used only once in the entire 397 page report. It is reported as one particular type of revenue source generated by the Department of Buildings and has its own unique budget line of 810/00251. *See* exh. H at page 217 (for the full report, see http://comptroller.nyc.gov/wp-content/uploads/documents/CAFR2013.pdf).

There is simply no ambiguity or inadequacy in the proposed law's definition, it is defined by the fees that are included in the revenue stream the budget line reports. Those fees derive from the schedule of fees listed in Chapter 28 of the administrative code of the City, otherwise known as the Construction Code. NYC Ad. Code § 28-112.2. It is within the exclusive jurisdiction of the Commissioner of the Department of Buildings (with small exceptions, not relevant here) to enforce Chapter 28 of the Administrative code. New York City, N.Y., Code § 28-103.1. *See also* New York City, N.Y., Code § 28-101.3 (defining "the Code").

We therefore submit that the term "construction permit" as defined in the proposed local law is adequate and proper.

IV. THE PROPOSED CHARTER AMENDMENT IS IN TRUTH AND IN FACT AN AMENDMENT TO THE CITY CHARTER, AND NOT "MERELY ADVISORY"

The standard established by the courts to determine whether a proposed referendum is not advisory is whether "it is in truth and fact an amendment to the City Charter." Matter of Fossella v. Dinkins, 130 Misc. 2d 52, 59 (Sup. Ct. Richmond Cty. 1985) *citing* Astwood v. Cohen, 291 N.Y. 484 (1944). It is clear that this referendum, if passed by the voters, would in truth and in fact meaningfully amend the city charter to extend the Department of Buildings existing investigatory authority to high-rise collapses.

In concluding that this petition is advisory, Respondent refers to a petition filed with his office five years ago. Specifically, Respondent said that the petition filed in 2009 was invalid in part because it "…did not deal exclusively with municipal matters but rather encompassed matters of state, national and even international concern. Because the earlier petition sought to reinvestigate the events of September 11, 2001, it was found to be merely advisory and therefore unauthorized." [citations omitted.] *See* exh. A page 2.

In relevant part, this court stated as to the 2009 petition that "the petition process is not to be used to address matters that are not primarily of local concern. A city has no power to adopt a local law which is inconsistent with a state statute or attempts to legislate in an area where the legislature has preempted local regulation by assuming full regulatory responsibility or which seeks to enact a local law that involves matters outside the jurisdiction of the city. [citations omitted.]" Burke v. Bd. Of Elections, Index No. 110779/09 slip op. at 10-11 (Sup. Ct. N.Y. Cty. 2009) (Crespo, Special Ref.) confirmed, Burke v. McSweeney, Index No. 110779/09 (Sup. Ct. N.Y. Cty. 2009). *See* attached exh. I.

This petition clearly addresses a matter primarily of local concern falling under the jurisdiction of the City, to wit, authorizing a New York City agency to investigate the collapse of high-rise structures located within New York City. Exh. F ¶2k. It further limits the jurisdiction to New York City by defining the term "Collapse" as one in which New York City conducted rescue operations or debris removal at the site of the collapse. Exh F ¶2e. It expressly limits the Department of Building's ("DOB") proposed powers to the city, and expressly prohibits the DOB's subpoena power from extending beyond public officials of New York City, and prohibits any entry or inspection of structures located outside of New York City. Exh. F ¶4. Even

assuming *arguendo*, that some activity may fall outside the jurisdiction of the city, the courts have held "that the law may incidentally embrace activities beyond the city limits does not render it unreasonable as a matter of law…" Ass'n of Home Appliance Manufacturers v. City of New York, 13 CIV. 07888 LGS, 2014 WL 3732905 at 7 (S.D.N.Y. 2014) *citing* Bakalar v. Lazar, 336 N.Y.S.2d 695, 698–99 (Sup.Ct. N.Y. Cty. 1972) (holding that City rules governing taxicab rides to destinations outside of the city are not invalid merely because they "incidentally embrace" activities outside of the city).

Furthermore, it prohibits the DOB from using the powers granted by the proposal that run afoul of any state or federal law or regulation, or any judicial decision. Exh. F ¶2m and 4. The Respondent claims in his letter that incidents occurring within the boundaries of New York City that become matters of a statewide, national or international concern prevent New York City authorities from conducting activities pursuant to its police and public safety powers. In this contention they must fail, since as a practical matter it would divest New York City of its jurisdiction over most public safety and policing matters. For example, most major weapons and narcotics arrests take on statewide, national and even international dimensions due to their ease of transportability. Surely we would not divest NYPD from addressing large scale illegal narcotics and weapons operations in the City of New York. However, if the federal government determines to prevent local investigations of an incident and does so through appropriate legal procedure, the proposed local law does not interfere with that mechanism. The local investigation ceases in such an instance.

The constitutional home rule provision confers broad police power upon local government relating to the welfare of its citizens. New York State Club Ass'n, Inc. v. City of New York, 69 N.Y.2d 211, 217, aff'd, 487 U.S. 1 (1988). "Every local government, as provided

in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects… (12) The government, protection, order, conduct, safety, health and well-being of persons or property therein." Mun. Home Rule § 10(1)(ii)(a)(12). *See also* N.Y. Const. art. IX, § 2.

This grant of authority includes the ability of a municipality to enact local laws regarding the "protection, order, conduct, safety, health and well-being of persons or property" within its borders. Anonymous v. City of Rochester, 13 N.Y.3d 35, 51, (2009).

However, the ability for a municipality to enact a law within its police power is circumscribed to laws that are not inconsistent with state and constitutional law. "First, under the doctrine of conflict preemption, a 'local government ... may not exercise its police power by adopting a local law inconsistent with constitutional or general law'. Second, under the doctrine of field preemption, a municipality 'may not exercise its police power when the Legislature has restricted such an exercise by preempting the area of regulation.'" Id. at 51-52.

Here, there is no conflict or field preemption of the proposed local law. There is no state law that provides that the state shall (exclusively or otherwise) investigate building collapses. In addition, the state does not occupy the field of investigation of building collapses or even more broadly, of building regulation at all. The only state law relating to the safety of structures is the "The Uniform Fire Prevention and Building Code" NY Exec Law § 371 *et seq.* However, it merely sets minimum standards for all localities within the state to follow and does not perform inspections or any other type of activities to ensure compliance. Indeed, local governments are responsible for enforcing the code. NY Exec. Law § 381. Moreover, New York City is

exempted from the code.[4] A review of the law of other jurisdictions indicates that no other laws on any level of government either conflicts with the proposed local law or seeks to occupy the field of regulation.

Referee Crespo also stated (in relevant part) that "the proposed law grants extraordinary powers to the Commission that literally turns it from a local authority to a State or Federal commission. But, such authority cannot emanate from the local level." Further, "the proposed law mandates the Commission to investigate, assess, and report on 'any activities attempting to hide, cover up, impede or obstruct any investigation'… which is akin to reporting on the efficacy of the governments investigations of the attacks…. Establishing the Commission to execute such a mandate is merely advisory." Burke at 12. None of this can be said of the petition herein. It is a law that would require local government to investigate a high-rise collapse with the city. It does not seek to investigate, assess and report on the performance of federal, state or local government.

The proposed local law seeks to cause the DOB to investigate all covered high-rise collapses in the future, and one such collapse in the past, the collapse of WTC 7 on September 11, 2001. The DOB is an agency of the City of New York, and is therefore particularly well suited to understand and investigate high-rise collapses in the city, and to use the knowledge gleaned from its own investigations to better perform its inspection and other safety related functions.

[4] The Uniform Fire Prevention and Building Code (Uniform Code) took effect on January 1, 1984, prescribing statewide minimum standards for building construction and fire prevention. The Uniform Code is applicable in all municipalities of the state except the City of New York, which is permitted to retain its own code. http://www.dos.ny.gov/DCEA/About_DCEA.html

V. THE FINANCING PLAN, WHICH IS TAILORED TO FUND A REGULATION IN RELATION TO THE PAYEE'S OCCUPATION, IS A FEE, NOT A TAX, AND THEREFORE THE CITY OF NEW YORK CAN IMPOSE IT WITHOUT STATE APPROVAL

Mun. Home Rule § 37(11) requires that financing plans be included in citizen initiated referenda "so that the electorate would be aware of the fiscal consequences of the proposal and could exercise their franchise intelligently… To meet statutory requirements, a financing plan must identify available sources from which the needed new revenues can be obtained." Adams v. Cuevas, 68 N.Y.2d 188, 192 (1986). The financing plan included in the within proposed local law clearly meets the standard. *See* Exh. F ¶6. It sets forth a clearly identified source of revenue – a .9% surcharge on construction permit fees -- and spells out the plan in detail so that the electorate would understand the fiscal consequences of the plan.

Respondent makes the self-defeating argument that Petitioners' surcharge on construction permit fees to fund the proposed local law cannot be imposed by the City because, it is actually a tax that requires state approval. Nevertheless, since the funding mechanism is sufficiently related to the activity the local law seeks to regulate, it is a fee and not a tax and thus not subject to state approval.

The distinction between whether the proposed surcharge is a "fee" or a "tax" is critical because under the New York State Constitution and Municipal Home Rule Law, a tax may not be assessed by a municipality without state approval, while "the municipal power to regulate a business, occupation or activity embraces and implies the power to license as a mode of regulation and to impose a license fee sufficient in amount to cover the cost of regulation." Matter of Torsoe Bros. Constr. Corp. v. Board of Trustees of Inc. Vil. of Monroe, 49 A.D.2d 461, 464 (2d Dep't. 1975).

To distinguish between a fee and a tax, courts in New York have looked towards the legislative intent of the local law. Am. Sugar Ref. Co. of New York v. Waterfront Comm'n of New York Harbor, 55 N.Y.2d 11 (1982). *See also* Jason Burge, Note, Rethinking Fees and Taxes in Light of the New York Health Care Security Act, 61 N.Y.U. Ann. Surv. AM. L. 679, 699. "A license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefited or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally (Head Money Cases, 112 U.S. 580, 595–596 (1884) [other citations omitted]."The Court of Appeals looks to the legislative intent of the law to determine whether it is meant to regulate the industry. If so, it is a fee. "The benefits to the industry… are made clear both by the Compact's legislative findings and by its legislative history. Those findings and that history are persuasive evidence of a legislative intent to correct the evils referred to by a program the cost of which was to be related to gross payroll payments because the new waterfront program would in major part redound to the benefit of employers." Am. Sugar Ref. Co. of New York v. Waterfront Comm'n of New York Harbor, 55 N.Y.2d 11, 26-27, (1982). *See also* Colonial Life Ins. Co. of Am. V. Curiale, 205 A.D.2d 58 (3rd Dep't. 1994) ("If the enactment intended to regulate rather than generate revenue it is not a tax.") and Radio Common Carriers of New York, Inc. v. State, 158 Misc. 2d 695, 698, (Sup. Ct. N.Y. Cty. 1993) ("Whether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services…. A tax is defined as a levy made for the purpose of raising revenue for a general governmental purpose; a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation.")

Fees may be imposed to support agencies which regulate the parties against whom the fees are assessed. "One legitimate purpose of fees is to make an agency self-sustaining so that its operations are paid for by those who use that agency rather than by the public at large through general tax revenues." Homestead Funding Corp. v State Banking Dept., 95 AD3d 1410, 1411 [3d Dept 2012]. In Homestead the Court considered a fee imposed by the State Banking Department on regulated banks, to support the Department's annual budget. The Court found that "[t]he annual general assessments here were a fee, not a tax, because the purpose of the assessments was to recover the Department's expenses related to regulating banks from the banks that are regulated, not to raise revenue for the support of government generally." Id. [internal citations omitted]. In addition, in Salvador v State, 205 AD2d 194, 196 [3d Dep't. 1994], the plaintiffs were owners of private land on Lake George who were charged annual fees which went towards supporting the Lake George Park Commission. Id. Plaintiff argued the fees were an impermissible tax, in part because they "do not use any 'unique resources of Lake George park.'" The Court rejected that argument, holding that "[t]he fees imposed are not a lien or a tax since they are not imposed to generate revenue or to offset the cost of governmental functions generally, but are user fees imposed to reimburse the costs of government services. Salvador v State, 205 AD2d 194, 200-01 [3d Dept 1994].

In addition to courts examining the legislative intent by determining whether the regulated industry is paying for expenses related to regulation of their industry, courts will look to the proportionality of the revenues generated and money spent on the regulation. If the revenues generated from the fees do not significantly exceed the money spent on the regulation, the assessment is more likely to be considered a fee. The amount of a regulatory fee "cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and

enforcement." Health Servs. Med. Corp. of Cent. New York, Inc. v. Chassin, 175 Misc. 2d 621, (Sup. Ct. Onondoga Cty. 1998) *aff'd*, 259 A.D.2d 1053, (3rd Dept. 1999) *Citing* Torsoe Bros. Constr. Corp. at 465.

In Am. Indep. Paper Mills Supply Co., Inc. v. Cnty. of Westchester, 65 A.D.3d 1173 (2nd Dep't. 2009), plaintiff contested waste transfer station fees that funded the Westchester County Solid Waste Commission. Plaintiff contended "that the transfer station fees are used to fund the Commission's general operations, and that this violates the rule that a license fee cannot be 'greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement,". The court denied this reasoning, explaining

> [t]he fact, however, that a transfer station fee may be used to fund the Commission's general operations does not automatically render the fee an unconstitutional tax. *In American Sugar Ref. Co. of N.Y. v. Waterfront Commn. of N.Y. Harbor*, 55 N.Y.2d 11, 26–27, the Court of Appeals explained that "[a] license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefitted or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally." Here, as evidenced by Laws of Westchester County § 826–a.101(b), the Solid Waste Law was enacted to eradicate the influence of organized crime on the solid waste hauling industry. Additionally, the cost of such regulation is imposed on the business benefitted or controlled by such regulation. Additionally, Laws of Westchester County § 826–a.202(2)(b) authorizes the Commission to "set such fees to fund the Commission, its staff, salaries, fringe benefits and all of the Commission's other costs and expenses." Any fees obtained are used only to fund oversight of the solid waste industry, and not for the support of government generally. Such funding methods by both municipalities and the state have previously been deemed to be fees as opposed to taxes (see *City of Buffalo v. Stevenson*, 207 N.Y. 258, 262–263, 100 N.E. 798; *American Assn. of Bioanalysts v. Axelrod*, 106 A.D.2d 53, 55).

Id. at 1175-1176.

In Howitt Enterprises Sweden, Inc. v Monroe County Water Auth., 52 AD3d 1233 (4th Dep't. 2008) the Court approved a fee on home owners to cover the costs of fire protection services. "Contrary to petitioners' contention, the charge is not impermissibly imposed 'for revenue purposes or to offset the cost of general governmental functions'. Rather, the record establishes that the charge is properly exacted to cover the cost of private fire protection services from property owners who derive a benefit therefrom." Id.

As in Am. Indep. Paper Mills Supply Co., Inc. and Howitt Enterprises Sweden, Inc., the proposed local law here clearly fits the criteria as a permissible fee to implement the city's police power. The intent of the revenue is clear, to fund the investigation of high-rise collapses. It is undisputed that the fees are being exacted from members of an industry to regulate said industry – construction. Since the level of funding is tied directly to the particular need the proposed law addresses, and the fee automatically ends when the need is met, it cannot be said that the revenue exceeds the expenses related to the regulation. Finally, the proposed law requires that the revenue gained remain in a fund controlled by the DOB. It cannot go to the City's general treasury, and it cannot be used for any other purpose. *See* Exh. F ¶6.

VI. THE FINANCING PLAN ESTALISHES A SPECIAL REVENUE FUND FROM WHICH EXPENDITURES ARE NOT BUDGETED ANNUALLY, AND THEREFORE IS NOT SUBJECT TO THE REQUIREMENTS OF THE NEW YORK STATE FINANCIAL EMERGENCY ACT FOR THE CITY OF NEW YORK

The New York State Financial Emergency Act for the City of New York § 8(1) (FEA) requires the City's budget to be balanced in accordance with generally accepted accounting principles (GAAP). It provides:

> For the fiscal year ending June thirtieth, nineteen hundred and eighty-nine, and for each fiscal year thereafter, the budgets covering all expenditures other than capital items of each of the

> covered organizations shall be prepared and balanced so that the results thereof would not show a deficit when reported in accordance with generally accepted accounting principles.

Whereas most municipalities in the United States are permitted to rollover unexpended funds from previous fiscal years to be used in the current fiscal year, all expenditures in the City's budget, aside from specifically exempted funds, are required to be funded from current year revenues to avoid deficit spending. Respondent argues that the Financing Plan violates FEA because it provides for unexpended funds to be rolled over into future years to be used by the DOB on an as-needed basis.

The balanced-budget requirement of the FEA, however, extends only to expenditures included in the budgets of covered organizations. Under the proposed Financing Plan, the City would not be required to budget expenditures from the High-Rise Safety Fund because such expenditures would not be anticipated at the start of any given fiscal year as the collapse of high-rise structures cannot be anticipated. Under the requirements of GAAP for governmental fund reporting that municipalities are bound to follow, the fund balance of the High-Rise Safety Fund would be reported in the Comptroller's Comprehensive Annual Financial Report together with the City's other special revenues funds; however, expenditures from the High-Rise Safety Fund would be unanticipated and emergency in nature, and thus not included in the DOB's annual budget.

VII. ASSUMING *ARGUENDO* THAT THE CITY CANNOT MAINTAIN A SPECIAL REVENUE FUND NOT SUBJECT TO THE REQUIREMENTS OF THE FEA, THE PROVISION IS SEVERABLE FROM THE REST OF THE LOCAL LAW

Where the drafters of the legislation include a severability provision courts must assume their intent was to preserve the law if possible. Dalton v Pataki, 11 AD3d 62, 101 [3d Dept 2004] *aff'd as modified*, 5 NY3d 243, 835 NE2d 1180 [2005] ["the inclusion of the severability clause indicates that the Legislature would have wished the statute enforced with the invalid

portion severed"]. Here, the 67,000 signatories declared that they wished to place this local law on the ballot even if a "provision, sub-provision, sentence, clause, phrase, or other portion of the local law is for any reason deemed to be unconstitutional or invalid…" Exh. F ¶8.

Even where some portion of a law is unacceptable, the remainder of the law should stand if it can be severed from the offending portion. The governing principles behind severability were explained by Judge Cardozo in a decision of our Court of Appeals as follows:

> Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. The principal of division is not a principle of form. It is a principle of function. The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch, instead of at the roots.

People ex rel. Alpha Portland Cement Co. v Knapp, 230 NY 48, 60 [1920].

The Court must review the law and reconstruct it in the manner the drafters would have if they had foreseen the unacceptable portions of the original law.

> We are to discern, as best we can, what form this legislation would have taken if the Legislature had foreseen the Supreme Court's decision. The answer requires first an examination of the statute and its legislative history to determine the legislative intent and what the purposes of the new law were, and second, an evaluation of the courses of action available to the court in light of that history to decide which measure would have been enacted if partial invalidity of the statute had been foreseen.

Westinghouse Elec. Corp. v Tully, 63 NY2d 191, 196 [1984].

The 67,000 signers of the petition expressed their intent that high-rise collapses be investigated by their Department of Buildings. They expressed their intent that the investigations be paid for through a temporary .9% surcharge on construction permit fees. Assuming *arguendo* that such a funding plan would run afoul of the Financial Emergency Act of 1975, the practical

and common sense course of action available to the court would be to sever the offending portions of the law and to amend it to provide for the imposition of a temporary .9% surcharge on construction permit fees when and for as long as an investigation is being conducted. The amended language of the law would read: "Financing Plan Under New York Municipal Home Rule Law Section 37 Paragraph 11. Moneys sufficient to meet the expenditures necessary for the implementation of the Act, which are estimated to be approximately $1.0 million (one million dollars) per year when an Investigation is being conducted, shall be obtained by adding a surcharge of .9% to all fees required to be paid in connection with applications for all Construction Permits to the Department, which surcharge (i) shall take effect when the Department commences an Investigation, and (ii) shall cease to be in effect when the Department has completed such Investigation and published a report detailing and analyzing the results of such Investigation." Such a solution would reflect the intent of the signers to the petition and fulfill the court's duty to honor it. To strike the referendum from the ballot based on such a minor and easily curable technicality would serve to very nearly abrogate the people's right of referendum.

As Judge Cardozo further pointed out:

> Laws are not to be sacrificed by courts on the assumption that legislation is the play of whim and fancy… Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert. When all the world can see shat sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as judges to what we must perceive as men.

People ex rel. Alpha Portland Cement Co. v Knapp, 230 NY 48, 62-63 [1920].

For all the foregoing reasons, we respectfully request that the court rule that the Verified Petition herein not be dismissed, that Respondent's certificate of non-compliance was erroneous and further that the referendum petition complies with all laws.

Dated: Brooklyn, NY
August 27, 2014

Respectfully submitted,

/S/

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Leo Glickman
Stoll, Glickman & Bellina, LLP
475 Atlantic Ave., 3rd Floor
Brooklyn, NY 11217
(718) 852-3710