To be Submitted by:
JAMES D. FEATHERSTONHAUGH

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New York Supreme Court

Appellate Division – First Department

NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE; THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION; SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; THE NATIONAL RESTAURANT ASSOCIATION; THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE; and THE AMERICAN BEVERAGE ASSOCIATION,

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SUP COURT APP. DIV.
FIRST DEPT.

Petitioners-Respondents,

For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules,

– against –

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE NEW YORK CITY BOARD OF HEALTH; and DR. THOMAS FARLEY, in his Official Capacity as Commissioner of New York City Department of Health and Mental Hygiene,

Respondents-Appellants.

BRIEF OF *AMICI CURIAE* THE BUSINESS COUNCIL OF NEW YORK STATE, INC., THE BODEGA ASSOCIATION OF THE UNITED STATES, THE NEW YORK CITY HOSPITALITY ALLIANCE, THE NATIONAL SUPERMARKET ASSOCIATION and THE FOOD INDUSTRY ALLIANCE OF NEW YORK STATE, INC., IN SUPPORT OF PETITIONERS-RESPONDENTS

FEATHERSTONHAUGH, WILEY & CLYNE, LLP
Attorneys for Amici Curiae
99 Pine Street, Suite 207
Albany, New York 12207
(518) 436-0786
jdf@fwc-law.com

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STATEMENT OF INTEREST OF AMICI CURIAE

The *Amici Curiae* are leading business organizations and associations committed to doing business within the City of New York and across New York State. Each *Amici Curiae* has an interest in a uniform pattern of regulation among local governments of the State. The *Amici Curiae* seek participation in this appeal in support of the Petitioners-Respondents (hereinafter "Respondents") efforts to have the lower court's decision affirmed.

The Business Council of New York State, Inc. ("Business Council"), is a statewide organization dedicated to advancing the interest of both large and small businesses. As set forth on its website, the Business Council works for a healthier business climate, economic growth, and jobs.[1] Business Council members are directly affected by the proposal of section 81.53 of the New York City Health Code.

The Bodega Association of the United States, ("The Bodega Association") was founded in 1996 and strongly opposes the Soda Ban. Currently 2,800 bodegas and neighborhood groceries within New York City are members. The Bodega Association's mission is to provide support to Bodega owners within New York City (the "City"). Bodegas are at the heart

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[1] Available at www.bcnys.org/aboutus.htm

of many neighborhoods within the City and beverage sales often count for up to 25% of a Bodega's daily revenue. The Bodega Association recognizes the need to make healthy choices about diet and exercise and believes that such choices are encouraged by education rather than by the inconsistent regulations of the size of some, but not all, beverages.

The New York City Hospitality Alliance, ("The Hospitality Alliance") was launched with over 300 founding members in 2012.[2] The mission of the Hospitality Alliance is to assist small business in navigating the complicated regulations within the City. The Hospitality Alliance is strongly opposed to the Soda Ban and advocates for a cultural change with the NYC Department of Health which will lead to an agency that is more responsive to the unique challenges facing the industry. It is the first association ever formed in New York City representing all facets of the restaurant, bar, lounge, destination hotels and major industry suppliers. Through the support and involvement of its members, The Hospitality Alliance is committed to advancing an agenda focused on opportunity, economic investment and job creation. Advocating on behalf of its members at all levels of government, The Hospitality Alliance supports pro-growth public policy, encourages investment in and promotion of NYC's hospitality industry, and evaluates

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[2] Available at http://www.thenycalliance.org/

the development, implementation and fairness of relevant government regulations. Id.

The National Supermarket Association, ("The NSA") was founded in 1989 by Hispanic entrepreneurs and has close to 400 members. The largest footprint is in New York City with over 200 stores. The NSA is primarily a trade association that represents the interests of independent supermarket owners in New York City. While most supermarkets are not subject to the Soda Ban, given the widespread shortage of neighborhood grocery stores and supermarkets currently existing within the city, the NSA seeks to join as *Amicus Curiae* to highlight the unique ability of grocery stores, in underserved communities, to offer affordable fresh food and beverage choices which may help reduce the high rates of diet-related diseases, including heart disease, diabetes and obesity. However the NSA is opposed to the Soda Ban given its numerous loopholes, inconsistent applicability and harmful precedent for future similar actions by local health boards throughout the State which will cause other *Amici* to suffer economic loss and injury.

The Food Industry Alliance of New York State, ("FIA") is the only statewide trade association that represents the full spectrum of the grocery

industry including wholesalers, independent markets, and co-operatives.[3] FIA was first incorporated in 1934 as the New York Association of Retail Grocers, Inc. The FIA has over 850 members which operate over 10,000 store locations. Many FIA members have on-premises eating facilities and prepare significant amounts of prepared ready-to-eat food. The mission of the FIA is to advance and protect the interests of its members in state and local legislative and regulatory activities by promoting positive relationships among its members and various levels of government. *Id.* The members of the FIA will be negatively impacted by the Soda Ban because it will apply to some, but not all businesses that sell certain beverages within the city.

[3] Available at http://www.fiany.com/

PRELIMINARY STATEMENT

This case is not about an obesity epidemic. As Justice Tingling recognized in his decision, this case is about the Board of Health's unlawful attempt to limit or ban a legal item under the guise of "controlling a chronic disease." R.33. The purpose of this brief is to identify for the Court the actual and potential far-reaching impacts that the New York City Soda Ban will have on business enterprises throughout the State of New York including members of the *Amicus Curiae* organizations that seek participation in this appeal.

On March 11, 2012 Justice Milton A. Tingling of the New York State Supreme Court, New York County, struck down the Soda Ban due to its violation of the Separation of Powers doctrine as articulated in the seminal case of Boreali v. Axelrod, 71 N.Y.2d 1 (1987); R.41-42. The *Amici* also agree with the lower court's determination that The Soda Ban is arbitrary and capricious due to the uneven enforcement, the loopholes which effectively defeat the stated purpose of the Soda Ban, and the fact it applies to some but not all of the food establishments in the City. R.40.

The attempted enactment of §81.53 of the New York City Health Code is an assault on the fundamental concept of separation of powers and an attempt to undercut the role of New York State Legislature and the

Department of Agriculture & Markets. As such the *Amici Curiae* ask this Court to protect them from the ambition, however well intended, of the Executive branch of New York City government. Collectively, the *Amici Curiae* represent over 5,000 businesses in the State of New York, many of which do business in the City of New York and within the jurisdiction of §81.53 and will be seriously harmed by its impact. The *Amici Curiae* submit to the Court that if a container size regulation is to be lawfully enacted, it should be undertaken by the State Legislature through the Department of Agriculture & Markets and not by an independently appointed Local Board of Health, serving at the pleasure of Mayor Bloomberg.

Moreover, the arguments proffered by Mayor Bloomberg and the NYC Department of Health, if accepted by this Court, would create an incongruous situation where each local board of health throughout the various counties and cities of New York State would have the ability to regulate the container size of an otherwise lawful product. Such an outcome would have a drastically negative impact on business throughout the State of New York.

STATEMENT OF FACTS

This appeal was taken on March 12, 2013, (R.4) just one day after Judge Tingling's decision which permanently restrained the Appellants-Respondents from implementing or enforcing section 81.53 of the New York City Health Code, as purportedly amended by the Department of Health in September 2012, and declared section 81.53 to be invalid. R.41-42.

On May 30, 2012, Mayor Michael Bloomberg announced a proposal to prohibit some of New York City's Food Service Establishments ("FSEs") including restaurants, delis, fast food franchises, movie theaters, stadiums and street vendors from selling certain sweetened beverages in any cup or container able to contain more than 16 fluid ounces. R.62. Despite well documented opposition by the *Amici Curiae* and other opponents during the public referendum period, (R.49.) the proposal was adopted by the Mayor's appointees on the Board of Health substantially without change, on September 13, 2012. R.66.

What has become obvious to the *Amici* and the business community as a whole, is that the harmful economic impact of the Soda Ban is the type of regulation that should be undertaken by a legislative body and not by the New York City Board of Health and Mayor Bloomberg's Administration. The Board of Health has never justified the absurd prohibition against the

sale of beverages in the industry standardized 500 ml bottle (16.9 ounces), or weighed the economic or health consequences of the .9 ounce difference. The Board of Health has conveniently ignored the fact that the legislative branch of State and City governments repeatedly rejected proposals that deal with the same or similar subject matter. Yet, what is most feared by the *Amici* is the dangerous precedent that the Soda Ban would establish for future regulation within the City and State. If upheld, the *Amici* could potentially be subject to regulations that would strangle businesses into monitoring widely different portion limits on nearly all aspects of the food and beverage industry, under the disguise of monitoring public health.

Many of the *Amici* depend on beverage sales to support other product lines. The possibility of losing customer loyalty, and decreased foot traffic will lead to diminished profits which could potentially plague certain *Amici* for years to come. Other *Amici* whose members are not subject to the Ban are concerned that this type of patch-quilt regulation raises costs throughout the industry, is antithetical to a market economy, and serves as precedent that could potentially severely hamper their own businesses. Other possible lasting direct and indirect harmful impacts are as follows.

a) **Loss of Revenue Due to a Competitive Disadvantage**

Many *Amici* members subject to the Ban are located adjacent or close to other stores (such as grocery stores, supermarkets, or 7-Elevens) that will be exempt from the Soda Ban. R.1668. This obvious loophole was recognized by the lower court decision as set forth below:

> "Petitioners also point out the exceptions to enforcement of the Rule whereby certain food service establishment are exempt from complying with this Rule. The effect would be a person is unable to buy a drink larger than 16 oz. at one establishment but may be able to put it at another establishment that may be located right next door. Furthermore no restrictions exist on refills further defeating the Rule's stated purpose." R 15-16.

As highlighted by the Respondents brief, the so-called "Big Gulp Soda Ban" would not actually cover the Big Gulp sold at the popular 7-Eleven franchises. R.21. Yet, street vendors and other *Amici* members in close proximity or adjacent to 7-Eleven's would be banned from selling beverages less than half the size of the Big Gulp. Other *Amici* would struggle to adjust to the Soda Ban that would allow a pitcher of Soda to be sold legally only if alcohol is added. Id. These absurdities demonstrate the Soda Ban's inability to accomplish its alleged purpose of improving public health. What is even more appalling to the *Amici* subject to the Ban is that they will not only lose beverage sales to those competitors, but also sales of other products that consumers typically purchase alongside their beverages,

such as food, groceries, or toiletries. R.1668. These harmful effects will snowball into other injuries that can easily cause distributors who have preset distribution routes to also lose revenue and business to distributors serving establishments not covered by the Soda Ban. R.1699-1700.

b) **Loss of Customer Goodwill**

The Soda Ban will cause customers to shop elsewhere. Competitors not regulated by the Soda Ban are sure to advertise for their patronage. R.1688-1689. Once customer loyalty is lost, it will be difficult to get back. The damage will be particularly severe for restaurants that are forced to disavow promotions and coupons involving beverages made unlawful by the Soda Ban. R.1684.

c) **Retooling / Redesign Expenses**

Beverage producers, distributors and bottlers, and cup manufacturers will be forced to spend substantial time and resources retooling their facilities to comply with the unjustified 16-ounce limit if the Soda Ban is upheld. R.1672-1673. Many food service establishments and other *Amici* members will have to reconfigure the floor layouts of their restaurants and redesign packaging. R.1678-1680,1683,1690. Furthermore, programmed beverage dispensers would need to be replaced or reprogrammed at significant cost. R.1708-1710.

d) **Loss of Inventory**

If the Soda Ban is enforced, thousands of businesses around the City will be forced to discard glassware, bottles, and cups that will be rendered unlawful. R.1678,1683. Many of the *Amici* buy such inventory in bulk. R.1689. The imminent enforcement of the Soda Ban will result in substantial loss and waste as businesses are forced to discard inventory regardless of their prior financial investment. The same can be said with regard to wasted menus and signage. Id.

e) **Disposal of and Facility Redesign for 16 Ounce Cups**

The Soda Ban will also cause significant injury to manufacturers and suppliers of cups by requiring an overhaul of 16-ounce cup manufacturing. R.1694-1695. Cups labeled "16 ounces technically hold more than 16 ounces if filled to the brim. At full capacity, these cups can range from 16.1 to 18 ounces. R.1964. Because the Soda Ban prohibits cups that are "able to contain more than 16 fluid ounces," all of these practical-16-ounce cups will be rendered illegal by the Soda Ban and need to be discarded and replaced by newly designed and manufactured flush-fill 16-ounce cups. R.1695.[4] In addition to being a waste for businesses that rely on these cups, manufacturers will also lose tremendous amounts of revenue because they

[4] While the City now takes the position that 17-ounce cups will be permitted (R1718), the Soda Ban as written bans the use of any cup that contains more than 16 ounces.

will be need to overhaul their production lines-which will take several months and be forced to sell smaller (12- and 14-ounce) cups and lids in the interim, cutting revenues and risking the loss of customers. R.1674-1675.

f) **Loss of Jobs**

Producers of beverages that have historically been available only in sizes exceeding 16 ounces might decide not to repackage their products in smaller bottles for sale only in New York City. R.1673. Additional *Amici* members and establishments such as bodegas, delis and movie theaters that historically have sold large quantities of such beverages would no longer be able do so. R.682-685. For example, because the Soda Ban would prohibit a deli from adding sweetener to a prepared beverage before delivering it to a consumer, the deli would have to reconfigure its floor space to include a self-service station where the consumer could add his or her own sweetener to the beverage. R.677-681. Such reconfigurations would reduce floor space available for other uses and sales. Jobs related to warehousing, distributing, merchandising, and hauling such products to the retail market will also be lost. R.1703-1704.

g) **Marketing Redesign Expenses**

If the Soda Ban is upheld, food service establishments will be forced to redesign their marketing message. Many dining or take-out experiences

traditionally involve the availability of 2-liter beverages for sharing by a family only available in sizes above 20 ounces, or coupons for either of the above. R.1684. Businesses will be forced to develop new marketing strategies in order to try and attract and retain these customers.

ARGUMENT

POINT I

THE NEW YORK STATE LEGISLATURE THROUGH THE DEPARTMENT OF AGRICULTURE & MARKETS IS THE MORE APPROPRIATE AUTHORITY TO REGULATE THE CONTAINER SIZE OF AN OTHERWISE LEGAL SUBSTANCE.

This Court should not ignore the potentially devastating impact of Mayor Bloomberg's Soda Ban on businesses within New York City and across New York State. It is indisputable that compliance with the Soda Ban as proposed will be difficult and expensive for businesses that are already struggling to navigate through the existing, complex governmental laws, rules, and regulations. The Soda Ban will also create a different set of rules for certain business in New York City, which will undoubtedly create additional costs for manufacturers, distributors and retailers, costs that will be ultimately borne by the consumer.

Given the pieced together application of the Soda Ban, any such type of regulation is more appropriately within the province of the State Legislature and the Department of Agriculture & Markets, which has been delegated the power to oversee local health departments and other local agencies in the attempt to prevent the production, manufacture, sale of unwholesome food. Agric. & Mkts. Law, Section 16(24). The Agriculture

and Markets Law establishes the State Legislature's general plan for protecting the public health through the proper policing of various food and beverage products that reach the public. People v. Blue Ribbon Ice Cream Co., 1 Misc. 2d 453 (Magis. Ct. 1956). Municipalities and other local governments are authorized to enact other regulations relating to food and beverages. Town Law, Section 130(13); Village Law section 4-412(1)(a).

Pursuant to New York Agriculture & Markets Law, the Commissioner has the power to "execute and carry into effect the laws of the state and the rules of the department, relative to ... the production, processing, transportation, storage, marketing and distributing of food; enforce and carry into effect the provisions of the laws of the state relative to weights and measures." N.Y. Agric. & Mkts. Law § 16 (McKinney). Under Section 18.5 of the N.Y. Agric. & Mkts. Law, "the Commissioner may enact, amend and repeal necessary rules which shall: ... Establish uniform tolerances or amounts of reasonable variation for containers of food and provide uniform regulations for carrying out the provisions of this chapter in relation to such containers." N.Y. Agric. & Mkts. Law § 16 (McKinney).

Accordingly, it is more appropriate for the New York State Legislature, through the Department of Agriculture and Markets, to regulate the container size of legal products on a statewide basis, as opposed to the

local Soda Ban adopted by the New York City Department of Health that only applies to certain food service establishments in New York City because of a Memorandum of Understanding entered into by the New York City Department of Health and the Department of Agriculture & Markets. R.67. Thus, the Board of Health concedes that the Soda Ban is a matter of state concern which is subject to regulation the Department of Agriculture and Markets, acting under the guidance of the legislature. *See*, Appellants brief at p.29 (the New York City Health Department is without legal authority to regulate businesses which it does not have authority over in accordance with this MOU).

Similar principles were applied by the court in New York State Food Merchants' Ass'n v. Grant, 63 Misc. 2d 550, 552 (Sup. Ct. 1970). In that case, the court invalidated a local unit pricing law adopted by the Department of Consumer Affairs of the City of New York. The court held that:

> The suggested programs for consumer protection can only be effectuated by the initiation of new legislation by the city within the scope and meaning of existing State laws, and not by the medium of administrative fiat. Id. at 552.

POINT II

THERE ARE NUMEROUS LOCAL BOARDS OF HEALTH ACROSS NEW YORK STATE STRUCTURED NO DIFFERENTLY THAN THE NEW YORK CITY BOARD AND IF EACH BOARD PASSED ITS OWN CONTAINER SIZE REGULATION, BUSINESSES WOULD SUFFER SUBSTANTIAL HARM.

Under State law, county and municipal boards of health may adopt rules not inconsistent with state health law "for the security of life and health" within each respective jurisdiction. N.Y. Pub. Health Law, §347. It is the role of this Court to review on appeal if the Local Board of Health regulations pursuant to "security of life and health" delegation of power conforms to State Constitution requirements. NY Const, Article III, §1; Boreali at 10; Leonard v. Dutchess County Dept. of Health, 104 F.Supp.2d 258 (2000).

There are numerous other Local Boards of Health with similar authority to adopt rules "for the security of life and health." For example, The Erie County Charter establishes the powers and duties of the County's officers and agencies. The Erie County Charter §504 may adopt rules "relating to health," Erie Cnty. Charter §504. It should be noted that Buffalo, the second largest city in the State, is located within Erie County. The Dutchess County Charter §703 states that the board may adopt rules "as may affect public health" and "consider any matters . . . relating to the

preservation and improvement of public health." Dutchess Cnty. Charter § 703. The Chemung County. Charter §603 allows its Board of Health to adopt rules "for the security of life and health" and "take appropriate action to preserve and improve the health." Chemung Cnty. Charter §603; *See also*, Tompkins Cnty. Charter §C-9.04 (same); Putnam Cnty. Charter § 10.06 (rules "as may affect public health"); Rensselaer Cnty. Charter § 8.02 (same); Suffolk Cnty. Charter §C9-4 (rules "affecting public health"); Westchester Cnty. Charter §149.21 (same); Nassau Cnty. Charter §§901-03 (board's rulemaking powers are coextensive with state law grant, i.e., "for the security of life and health" under N.Y. Pub. Health Law §347).

At least three federal decisions in the Second Circuit that have interpreted New York law have struck down similar regulations because county boards of health exceeded the powers vested in them by the Public Health Law and State Constitution. Justiana v. Niagara Cnty. Dep't of Health, 45 F.Supp. 2d 236, 242 (W.D.N.Y. 1999); Nassau Bowling Proprietors Ass'n v. County of Nassau, 965 F.Supp. 376 (E.D.N.Y.1997). In Dutchess/Putnam Restaurant Ass'n v. Putnam County Dep't of Health, the Court struck down the County Board of Health's rules and regulations because the Board created its own comprehensive set of rules without the benefit of legislative guidance. 178 F. Supp. 2d 396, 404 (S.D.N.Y. 2001).

This Court should do the same and thereby recognize the harmful effects of the Soda Ban on the *Amici Curiae.*

Given the significant number of other jurisdictions with Local Boards of Health similar to the New York City Board of Health, one can not help but question how the Appellant can rationalize the New York City Board of Health as a "[non]-typical administrative agency...with legislative authority empowered to issue substantive rules and standards." (Appellants brief at p.3). If each separate Local Board of Health were to issue similar yet different Soda Ban legislation, the effect would be chaos, higher prices for consumers, and uneven enforcement of regulations across different jurisdictions. All of which are inconsistent with a uniform pattern of regulation to create a healthier business climate by stimulating economic growth.

This Court should recognize that the economic and social impacts upon businesses and the *Amici* fall more properly within the scope of legislative activity rather than the purview of the Board of Health. The Court should affirm the Lower Court's decision because the New York City Board of Health stretched its powers beyond its delegation by establishing public policy.

CONCLUSION

In the Federalist Papers, No. 51, James Madison, writing under the pseudonym "Publius" analyzes the importance of the separation of powers between the various branches of government as follows:

> The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others. The provision for defense must in this, as in other cases, be made commencement to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the Constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependency on the people is, no doubt the primary control on the government; but experience has taught man-kind the necessity of auxiliary precautions.

For the reasons hereinbefore set forth, this Court should affirm the decision of the Supreme Court should be affirmed because §81.53 of the New York City Health Code is a violation of the separation of powers

doctrine and is arbitrary and capricious.

Dated: April 24, 2013
Albany, New York

Respectfully Submitted,
Featherstonhaugh, Wiley & Clyne, LLP
Attorneys for *Amicus Curiae*

By: ______________________

James D. Featherstonhaugh
Office and P.O. Address
99 Pine Street
Albany, NY 12207
Tel. No. (518) 436-0786
Email: jdf@fwc-law.com

TO: James E. Brandt
LATHAM & WATKINS LLP
885 Third Avenue
New York, NY 10022
Tel: (212) 906-1200

Richard P. Bress, pro hac motion pending
William K. Rawson, pro hac motion pending
Sean P. Krispinsky, pro hac motion pending
555 Eleventh Street, NW – Suite 1000
Washington, DC 20004
Tel: (202) 637-2200

Counsel for Plaintiff-Petitioner
The American Beverage Association

James W. Quinn
Salvatore A. Romanello
Gregory Silbert
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000

Counsel for Plaintiff-Petitioner
The National Restaurant Association

Evan H. Krinick
Barry I. Levy
RIVKIN RADLER, LLP
926 RXR Plaza
Uniondale, NY 11556-0926
Tel: (516) 357-3483

Counsel for Plaintiff-Petitioner
Soft Drink and Brewery Workers Union,
Local 812, International Brotherhood of Teamsters

Steven F. Molo
Ben Quarmby
MOLOLAMKEN LLP
540 Madison Avenue
New York, NY 10022
Tel: (212) 607-8170

Counsel for Plaintiffs-Petitioners
New York Statewide Coalition of Hispanic
Chambers of Commerce and The New York
Korean-American Grocers Association

Matthew N. Greller
MATTHEW N. GRELLER, ESQ., LLC
75 Clinton Avenue
Milburn, NJ 07041
Tel: (917) 345-0005

Counsel for Plaintiff-Petitioner
The National Association of Theatre Owners
Of New York State

Mark W. Muschenheim
MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
Tel: (212) 442-0573

Counsel for Defendants-Respondents

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Respectfully Submitted,

Featherstonhaugh, Wiley & Clyne, LLP
Attorneys for *Amicus Curiae*

By:
James D. Featherstonhaugh
Office and P.O. Address
99 Pine Street
Albany, NY 12207
Tel. No. (518) 436-0786
Email: jdf@fwc-law.com