SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: IAS PART 50

In the Matter of the Application of Dilsia PENA, Noreen CONNELL, Hazel N. DUKES, Leonie HAIMSON and Randi WEINGARTEN, individually and on behalf of the approximately 71,135 signers of the Petition Filed Pursuant to Section 37 of the New York State Municipal Home Rule Law, Petitioners, -against- VICTOR ROBLES, as City Clerk of the City of New York and Clerk of the City Council of New York, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, Respondents.	Index No. 111177/05 (Stone, J.)

AFFIDAVIT IN SUPPORT OF MOTION TO APPEAR AS AMICUS CURIAE AND APPLICATION OF CITIZENS UNION OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS & BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONS

Heller Ehrman LLP
Attorneys for Amicus Curiae
7 Times Square
New York, NY 10036-6524
(212) 832-8300

To:

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

.....

Attorney(s) for

Sir: -- Please take notice

☐ NOTICE OF ENTRY

that the within is a (*certified*) true copy of a duly entered in the office of the clerk of the within named court on , 2006

☐ NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for settlement to the HON. Name of Judge one of the judges of the within named court, at Name of Court on , 2006 at M.

Dated,

Yours, etc.

Heller Ehrman LLP
Attorney(s) for Amicus Curiae
7 Times Square
New York, NY 10036-6524
(212) 832-8300

To:

Attorney(s) for

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

----------X
:

In the Matter of the Application of Dilsia PENA, Noreen CONNELL, Hazel N. DUKES, Leonie HAIMSON and Randi WEINGARTEN, individually and on behalf of the approximately 71,135 signers of the Petition Filed Pursuant to Section 37 of the New York State Municipal Home Rule Law,

Petitioners,

-against-

VICTOR ROBLES, as City Clerk of the City of New York and Clerk of the City Council of New York, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents.

Index No. 111177/05
(Stone, J.)

AFFIDAVIT IN SUPPORT OF MOTION TO APPEAR AS AMICUS CURIAE

----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

DICK DADEY, being duly sworn, deposes and says:

1. I am the Executive Director of Citizens Union of the City of New York ("Citizens Union"). I respectfully make this affidavit in support of the instant motion for leave to appear as amicus curiae in this proceeding and in that capacity to submit the brief attached as Exhibit A.

2. As set forth in more detail below, the amicus curiae, Citizens Union, is a membership organization representing the citizens of the City of New York and is devoted to working to ensure that local and state government values its citizens,

addresses critical issues, and operates in a fair, open and fiscally sound manner. It has special knowledge and expertise in matters relating to voting procedures, City Charter revisions and home rule for New York City, issues that are relevant to this proceeding.

3. The issues that are before this Court are clearly of critical importance to the Citizens Union, which has served as a watchdog for the public interest and an advocate for good government since 1897. Citizens Union has an interest in this proceeding because of its longstanding commitment to ensuring responsible governance, particularly in the realm of voting and election procedures.

4. Given the substantial interest that the Citizens Union has in this proceeding and the implications that any ruling will have on the organization, Citizens Union seeks amicus curiae status to brief the significant matters at issue in the litigation.

Sworn to before me this
23rd day of March, 2006

Notary Public

DICK DADEY

RINA I. RAMOS, Notary Public
State of New York No. 01RA6002465
Qualified in Queens County
Certified in Queens County
Commission Expires Feb. 9, 2010

NY 601922 v1
(99992.0401)

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 50

----------X
:

In the Matter of the Application of Dilsia PENA, Noreen CONNELL, Hazel N. DUKES, Leonie HAIMSON and Randi WEINGARTEN, individually and on behalf of the approximately 71,135 signers of the Petition Filed Pursuant to Section 37 of the New York State Municipal Home Rule Law,

Petitioners,

Index No. 111177/05
(Stone, J.)

-against-

VICTOR ROBLES, as City Clerk of the City of New York and Clerk of the City Council of New York, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents.

----------X

APPLICATION OF CITIZENS UNION OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS & BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Warrington S. Parker, III
(admitted only in California)
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94102
(415) 772-6000

Katherine D. Johnson
HELLER EHRMAN LLP
7 Times Square
New York, NY 10036
(212) 832-8300

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NY 601888 v1
(99992.0401)

INTRODUCTION

States are not required to provide its citizens with the power of initiative but, once they have done so, any exercise of that power is governed by the First Amendment. And as here, when individuals propose changes to local laws through state-adopted initiative and referendum processes, they are engaged in core political speech, which is heavily protected by the First Amendment.

In this case, the political speech at issue is Petitioner's proposed amendment to the Charter of the City of New York ("Charter") that has as its objective the dedication of New York City ("City") funds to reduce class sizes in City schools. The First Amendment issue arises as a result of the City's overly cramped reading of the requirements necessary to place the proposal on the general election ballot in November 2006.

Petitioners followed all the proper procedures under the Municipal Home Rule Law ("MHRL") for proposing amendment of the Charter. Their petition and proposed amendment complied with all legal requirements concerning form and content. The language of the proposal is sufficiently clear to communicate to voters the nature and substance of what they are being asked to vote upon. The proposal also adequately identifies appropriate funds to finance the initiative and represents a proper subject of amendment to the section of the Charter dealing with the executive expense budget.

Thus, Respondent's additional requirements—that the Petition be drafted more clearly, that it provide information beyond that which is required by law—implicate First Amendment rights. Put more directly, they violate the First Amendment rights of Petitioners. They are unduly burdensome on Petitioners' use of the initiative process to exercise political speech and association.

In this regard, Respondents' additional standards for the proposal are inconsistent with the mandate that the Petition be liberally construed. Moreover, Respondents' proffered reasons for excluding the amendment from the ballot are insufficient to justify the restriction on Petitioners' speech and association rights which would result from that exclusion. The reasons pass muster under neither a strict scrutiny nor a rational basis analysis.

For these reasons, Citizens Union of the City of New York ("Citizens Union") submits this brief for the limited purpose of addressing First Amendment concerns raised by respondent City Clerk Victor Robles' failure to certify the legality of a petition ("Petition") proposing amendment of section 103(a)(1) of the City Charter to provide for the appropriation of funds to reduce class sizes in City public schools. In short, the City Clerk's refusal to certify the Petition and the City Council's failure to place the proposed amendment on the ballot unlawfully restrict Petitioners' political speech and association rights that are entitled to the fullest protection under the First Amendment to the U.S. Constitution. Accordingly, this Court should grant Petitioners' request that the Board of Elections be ordered to place the proposed Charter amendment on the ballot and should deny Respondents' cross-motion to dismiss the Amended Verified Petition.

BACKGROUND

The material facts are not in dispute. *See* Am. Ver. Pet. ¶¶ 1-38; Mem. Supp. Cross-Mot. to Dismiss ("Resp. Br.") Resp. Br. at 2 n.2. The initiative and referendum process is set forth in section 37 of the MHRL, which provides for the adoption of city charter amendments or for the adoption of new city charters as initiated by petition. N.Y. Mun. Home Rule ("MHRL") § 37 (McKinney 2005). The process for amending the Charter begins by filing with the City Clerk a petition carrying at least 30,000 signatures

of qualified electors or ten percent of the total who voted in the previous gubernatorial election, whichever is less. MHRL § 37(2). Petitioners satisfied this requirement on July 8, 2005, by submitting to City Clerk Victor Robles ("Clerk") the Petition which contained a sufficient number of qualifying signatures. *See* Am. Ver. Pet. ¶¶ 8, 17, Ex. B; Resp. Br. at 5-6, 7 n.8.

The Petition sets forth a proposed amendment to the Charter to provide for the appropriation of a portion of funds to reduce class sizes in public schools to make City school class size comparable to class sizes in the remainder of New York State ("State"). *See* Am. Ver. Pet. ¶ 7, Ex. A; Resp. Br. at 2-3 n.3. As stated in the Petition, the appropriated funds would come from monies to the City as provided by the State pursuant to a final judgment in *Campaign for Fiscal Equity v. State of New York* ("*CFE*") 100 N.Y.2d 893 (N.Y. 2003). *See* Am. Ver. Pet. ¶ 7, Ex. A; Resp. Br. at 2-3 n.3. The proposed Charter amendment is set forth in full in the Petition.[1] *See* MHRL § 37(2); Am. Ver. Pet. ¶ 7, Ex. A; Resp. Br. at 2-3 n.3.

---

[1] The Petition states, in relevant part, that under Chapter 6 (Expense Budget), section 103(a) ("Contents of the executive expense budget"), language will be added that would require the Mayor to appropriate

> An amount, to be certified by the comptroller, to be exclusively spent by the City School District of the City of New York to achieve a number of pupils per class in grades K through12 that is comparable to the number of pupils per class in general and special education classes respectively in New York State exclusive of New York City, said amount having been allocated from the funds apportioned by the State of New York for the City School District of the City of New York for the purpose of providing the opportunity for a sound basic education pursuant to the final judgment in *Campaign for Fiscal Equity v. State of New York*, provided that said allocation is no less than twenty-five (25%) percent of said funds in any fiscal year.

Am. Ver. Pet. ¶ 7, Ex. A; Resp. Br. at 2-3 n.3.

On August 5, 2005, the Clerk transmitted the proposed amendment to the City Council, which had two months from the submission date (July 8, 2005) to adopt the amendment or to place it on the General Election ballot.[2] *See* MHRL § 37(5)-(7); Am. Ver. Pet. ¶ 9, 16; Resp. Br. at 5-6 n.7, Ex. 3. At that time, the Clerk advised the City Council that the proposed amendment could not be placed on the ballot in the general election in November 2005 because the Mayor's charter revision commission had submitted a timely proposal for an amendment, which had the effect under MHRL section 36(5)(e) of preempting Petitioners' proposal for that election ballot. *See* Am. Ver. Pet. ¶¶ 19-20; Resp. Br. at 5. The Clerk further informed the City Council that the Petition constituted an unauthorized advisory referendum that was not legally valid due to faulty drafting, exclusive jurisdiction of the Department of Education to handle matters relating to education, and failure to include an adequate financial plan to satisfy Petitioners' class size objectives.[3] The Clerk stated that his views were based on an opinion he sought from Corporation Counsel regarding the legality of the proposed ballot question. *See* Am. Ver. Pet. ¶ 23-24; Resp. Br. at 4-6. Pursuant to MHRL section 37(7), when the City Council failed to either adopt the proposal or submit it to the Board of Elections to be placed on the next general election ballot, on September 8, 2005,

---

[2] In their Amended Verified Petition, Petitioners identify certain procedural irregularities after the Clerk received the Petition, including that the Clerk, who is vested under the MHRL with the authority and duty to determine whether a petition is legally valid, abdicated such responsibility by relying on Corporation Counsel to determine soundness of the Petition. *See* MHRL § 24; Am. Ver. Pet. ¶¶ 18-19, 23, 42-44. We do not take a position on this contention or any other alleged irregularity (see, e.g., Am. Ver. Pet. ¶¶ 34-38) except to note that, assuming their veracity, they may reflect Respondents' disregard of the liberal construction of the MHRL to which Petitioners were entitled.

[3] This memorandum does not address Respondents' argument that the topic of the Petition lies within the sole jurisdiction of the Department of Education because it is discussed at length in Petitioners' papers.

Petitioners submitted a second petition with additional signatures to place the amendment on the November 8, 2005 ballot. *See* MHRL § 37(7); Am. Ver. Pet. ¶¶ 10-13; Resp. Br. 6. Pursuant to MHRL section 37(5), Petitioners, who satisfied each step of the process for submitting a legally valid proposed Charter amendment, brought this action seeking an order directing the Clerk to certify the Petition as legally valid and the Board of Elections to place the proposed Charter amendment on the ballot in the general election to be held on November 7, 2006. *See* Am. Ver. Pet. ¶ 80; Resp. Br. at 6.

ARGUMENT

I. STRICT SCRUTINY IS THE APPROPRIATE STANDARD TO REVIEW RESPONDENTS' EXCLUSION OF PETITIONERS' PROPOSED AMENDMENT.

A. The Regulation Does Not Concern Technical Requirements of Ballot Access, Which Would Subject it to Lower-Level Scrutiny.

Cities and states clearly are empowered to regulate the manner and conduct of the initiative process, as well as election processes generally. Courts have typically deferred to states and cities when the regulations touch on matters such as procedural or administrative aspects of elections or voter-initiatives. *See, e.g., Weingarten v. Robles*, 766 N.Y.S. 2d 417, 418-19 (N.Y. App. Div. 2003). In *Weingarten*, for example, the First Department concluded that the preemption provision of the MHRL, which permits a proposal from a mayoral charter revision commission to "bump" from the ballot in a given year a voter-initiated petition, was not unconstitutional. *Id.* The *Weingarten* court rejected the lower court's application of strict scrutiny because it found that petitioners did not establish "that an enactment of the Legislature, which is presumed to be valid, is unconstitutional." *Id.* at 418. The court concluded that the challenged statutory provision concerned "technical requirements" that created "a ballot hierarchy for referenda

involving local legislation," not substantive standards for placing a proposed amendment on the ballot, and as such applied the rational basis test, not strict scrutiny. *Id.* at 418-19.

The case at bar differs from *Weingarten* in the significant respect that Petitioners are not challenging the effect of a procedural rule but, instead, legitimately object to Respondents' arbitrary determination that the proposed amendment does not meet the standards to appear on the ballot, without specifying what such standards require. The restrictions imposed on Petitioners pose questions that go to the heart of the Petition itself, not the means in which it was circulated or whether it is entitled to reach the ballot before other pending proposals. As such, "[i]t is a regulation of pure speech," and thereby is subject to exacting, or strict, scrutiny. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

B. Petitioners Were Engaged in Core Political Speech Which Receives the Highest Level of Protection by the Courts.

While states and cities are permitted to implement regulations of elections "if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process," courts have recognized that some regulations do more than just regulate the procedural or mechanical aspects of elections and initiatives, and may in fact impinge on and remove the right of citizens to express their political views through the voter initiative process. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428 (1992)). Under such circumstances, courts consistently invoke a high level of scrutiny to review restrictions on petition-related speech and association in recognition that the initiative process involves "core political speech," which is securely protected by the First Amendment to the U.S. Constitution. *Meyer v. Grant*, 486 U.S. 414, 422 (1988). *Accord Buckley v. American*

Constit. Law Found. ("*ACLF*"), 525 U.S. 182, 192 & n. 12 (1999) (applying strict scrutiny to strike down statutes regulating initiative-petition circulation and noting "[o]ur decision is entirely in keeping with the now-settled approach that state regulations imposing severe burdens on speech must be narrowly tailored to serve a compelling state interest"); *McIntyre*, 514 U.S. at 344 (1995) (finding prohibition against distribution of anonymous campaign literature was regulation of core political speech, subject to strict scrutiny, rather than regulation of mechanics of electoral process).

The strict standard of review that courts use to weigh restrictions on direct democracy is based on the Court's recognition that petition circulation is an exercise of a fundamental aspect of voting and associational rights: the expression of desire for political change. *ACLF*, 525 U.S. at 186. Thus, in *Meyer v. Grant*, the Supreme Court unanimously held that First Amendment protection is "at its zenith" when applied to petition circulation. 486 U.S. at 422. In light of the importance of direct democracy, the *Meyer* Court invoked strict scrutiny to strike down Colorado's prohibition of payment for the circulation of ballot-initiative petitions. Petition circulation is "core political speech" because it involves "interactive communication concerning political change." *Id.* at 422. This deference to the initiative process applies equally to petition circulation as to placement on the ballot of a proposed amendment.

The *Meyer* Court found that Colorado's prohibition restricted political expression in two ways. First, it limited the number of people communicating the proposed change, the amount of time they would communicate about the proposed change and, therefore, it would limit the size of the audience they would reach. *Id.* at 422-24 (discussing time-consuming and tiresome nature of petition circulation and noting that remuneration

provides incentive so that more people are willing to do the work). Second, the prohibition against payment of petition circulators made it less likely that petitioners would be able to gather an adequate number of signatures to place the matter on the ballot, thus "limiting their ability to make the matter the focus of statewide discussion." *Id.* at 423.

Following the Supreme Court, in *Lerman v. Board of Elections*, the Second Circuit Court of Appeals applied strict scrutiny to review the constitutionality of a requirement that a certain number of signers to a candidate petition be from the same district as the would-be candidate. 232 F.3d 135, 146 (2d Cir. 2000),
In striking down the requirement, the Second Circuit analogized the candidate's petition to the circulation of an initiative petition, and noted that the Supreme Court found in *ACLF* that such petitioning was an exercise of political association, and accordingly applied strict scrutiny to strike a requirement that initiative petition circulators be registered to vote. As the Second Circuit noted, "petition circulation bears an intimate relationship to the right to political or expressive association." *Lerman*, 232 F.3d at 146. Although not every state election law or regulatory action that imposes some burden upon the right to vote and attendant First and Fourteenth Amendment associational rights is subject to strict scrutiny but "even the smallest restriction may be regarded as severe if it burdens 'core political speech' by inhibiting communication with voters about proposed political change." *Green Party of New York v. Weiner*, 216 F.Supp. 2d 176, 187 (S.D.N.Y. 2002) (citing *ACLF*, 525 U.S. at 192 n.12).

In determining the level of scrutiny to apply, the Second Circuit has cautioned that, "in those cases in which the regulation clearly and directly restricts core political

speech, as opposed to the mechanics of the electoral process, . . . restrictions on core political speech so plainly impose a severe burden that application of strict scrutiny clearly will be necessary." *Lerman*, 232 F.3d at 146 (citations and internal quotation marks omitted). In *Lerman*, the Second Circuit found that the "petition circulation activity . . . , while part of the ballot access process, clearly constituted core political speech subject to exacting scrutiny." It reasoned that petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.*

In light of the above, Respondents are simply incorrect when they suggest that First Amendment protections are circumscribed because, unlike other states, local laws initiated by the electorate "are not the norm" in New York State. *See* Resp. Br. at 9. In fact, Respondents' proposition that the Court should grant the regulation in question any greater leniency because initiative authority is State-granted runs directly contrary to Supreme Court precedents which long ago established such fact as utterly irrelevant to the analysis. *See Meyer*, 486 U.S. at 420, 424-25 (noting that "[h]aving decided to confer the right [of initiative], the State was obligated to do so in a manner consistent with the Constitution . . . .")

Respondents further confuse matters by contending that the initiative and referendum process is "strictly controlled and prescribed by the State Constitution and statute." Resp. Br. at 9. First, as noted, the source of authority is irrelevant for First Amendment purposes. Second, Petitioners grant that, in New York, initiative and referenda come from the MHRL and Article IX of New York's Constitution, but those very sources of authority direct that the relevant provisions be construed liberally, not, as

Respondents contend, "strictly controlled and prescribed." Resp. Br. at 9; NY Constit. Art. IX §2(a) (the legislature shall provide for the creation and organization of local governments "in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution."); MHRL § 51 ("This chapter shall be liberally construed."); *Roth v. Cuevas*, 150 Misc. 2d 238, 244, *aff'd* 82 N.Y.2d 791 (1993); *Caruso v. City of New York*, 136 Misc. 2d 892, 897 (Sup. Ct. 1987), *aff'd* 74 N.Y.2d 854 (N.Y. 1989) (the statute mandates that its provisions "be liberally construed to effect their purposes."); *Volentine v. Weldon*, 56 Misc. 2d 55, 59 (N.Y. Sup. Ct. 1967) (same). We concede and agree, however, with Respondents' statement that a petition must comport with State law or be declared invalid. Conversely, where as here the Petition satisfies all relevant laws and requirements, it should be declared legally valid by the City Clerk.

II. THE INITIATIVE MEETS ALL LEGAL REQUIREMENTS.

A. The Language of the Petition is Sufficiently Clear.

1. The Petition was carefully drafted to ensure that voters understand its meaning and implication.

The language of the Petition is sufficiently clear, in its current form, for voters to understand its meaning and implication. The proposed amendment states in no uncertain terms that it would require the Mayor to dedicate at least 25% of funds provided to the New York City School District pursuant to the final judgment in *Campaign for Fiscal Equity v. State of New York* for the purpose of reducing class size in City schools.

The Petition answers the questions:

- Who must act (the Mayor to determine amounts, terms and conditions of the appropriation);

- What change the amendment would make (the addition in the executive expense budget of "an amount . . . to be exclusively spent by the [City School District] to achieve a number of pupils per class in grades K through 12 that is comparable to the number of pupils per class . . . in New York State . . . .");

- Where the funds would come from ("from the funds apportioned by the State of New York for the City School District of the City of New York . . . pursuant to the final judgment in *Campaign for Fiscal Equity v. State of New York* . . . .");

- When it would become effective ("This subsection shall become effective at the beginning of the fiscal year for which a city budget is prepared and adopted after the adoption of this amendment . . . .");

- Why the change is being proposed ("for the purpose of providing the opportunity for a sound basic education . . . .");

- How much is needed to fund the proposal (at least 25% of the *CFE* funds).

Nothing more is required of the Petition.

In fact, the Petition easily surpasses minimum standards. It supplies sufficient information "to prevent concealment and surprise to the members of the Legislature and to the public at large . . . ." *In re Mitrione*, 14 A.D.2d 716, 717 (N.Y. App. Div. 1961). Consistent with the preference of allowing communication of proposed changes to the Charter, the standard of clarity for proposals is not unduly high. *See, e.g., id.* ("It was suggested . . . that the [language at issue] might be considered to constitute unfair or inaccurate propaganda, but such is not a legal barrier to the electorate's right to consider and appraise the proposal upon its merits.").

Where courts have held that a proposed amendment cannot be presented to voters due to lack of clarity of the language of the proposal, the drafting problems, in addition to flaws unrelated to the writing, rendered the initiative "incapable of enforcement if adopted." *Sinawski v. Cuevas*, 133 Misc.2d 72, 76 (N.Y. Sup. Ct. 1986), *aff'd* 123 A.D.2d 548. Unlike the Petition here, other rejected proposals have failed to set forth the

basic information (the who, what, when, where, why, how). *See Sinawski*, 133 Misc. 2d at 77 (among other deficiencies, proposed recall petition failed to specify minimum number of signatures necessary to place a recall question on the ballot).

2. Voters will become familiar with the proposal through its publicity.

Both the Petition and the problems it addresses are certain to receive significantly greater media coverage by the November 2006 general election. In accordance with the MHRL, the legislative body (here, the City Council) must ensure that the public receive notice of the proposed amendment and that the proposal receive publication and publicity adequate to inform voters about what they will be called to vote upon. *See* MHRL § 37(9). The *Mitrione* court pointed to this provision in concluding that concerns of voter confusion about the contents of the petition were groundless. 14 A.D.2d at 716. Here, Petitioners propose an innovative solution to a problem experienced in many urban areas; accordingly, it can be expected that the proposal will generate substantial attention both locally and beyond the City's borders. *See Council for Owner Occupied Hous. v. Koch*, 462 N.Y.S.2d 762, 764 (N.Y. Sup. Ct. 1983) (citing *Sonmax, Inc. v. City of New York*, 401 N.Y.S.2d 173 (N.Y. 1977)).

In light of the already-clearly drafted proposal and the opportunity for the public to gain a better understanding of the proposal through the required publication and publicity of it, Respondents' contention that the proposed amendment must be kept off the ballot to avoid voter confusion is simply without merit.

B. The Funding Source is Adequately Identified and Meets the Requirements of State Law.

The MHRL requires that, for a petition that requires the expenditure of money to be sufficient, it must include "a plan to provide moneys and revenues sufficient to meet

such proposed expenditures." MHRL § 37(11). Respondents stretch logic to have this Court conclude that the Petition's straight-forward statement of the funding source and plan is insufficient because it does not state a specific amount of money needed to achieve the desired number of pupils per class or specify that the proposed funding source is sufficient to achieve its objective and may be effected by the outcome of the *CFE* litigation.

Respondents point to no requirement that the Petition state precisely how much money is needed to achieve its goals. Indeed, the Petition does not suggest, nor would a reasonable person conclude, that allocation of the funds would guarantee the reduction of City's class sizes to that of other schools in the State. Class size varies year to year, as does the amount needed to seat students in a classroom. The amount the Mayor would select to fund the initiative therefore may vary from one budget cycle to the next. The language of the proposal explains that the Mayor sets the terms and conditions of the appropriation, which would be certified by the comptroller, and that such amount will be not less than 25% of the dedicated *CFE* funds in any fiscal year. *See* Am. Ver. Pet. ¶ 7, Ex. A.

Respondents' contention that voters would have to understand the substance of the *CFE* litigation, the meaning of the final judgment referred to in the Petition and the relationships among the City, State and Department of Education is misplaced. The substance of the *CFE* litigation has no bearing on the application of the funds, when they are available, to the purpose of reducing class size in City schools.

In the *CFE* litigation, the New York Court of Appeals found that the State had unconstitutionally failed to provide City school students with a sound basic education.

CFE, 100 N.Y.2d 893. While the amount needed to rectify that failure is still in dispute, there can be no real dispute that the money (whatever amount it ultimately will be) will be under the control of the City's municipal government to improve City education. It now is also beyond dispute that a significant deficiency in City schools is the large number of students per teacher. *See id.*, 100 N.Y. 2d at 913-14.

The amount of money owed to the City is effectively the only remaining dispute in the *CFE* litigation. *See CFE*, Index No. 111070193 (N.Y. App. Div. March 23, 2006). Whatever the outcome of that dispute, the *CFE* litigation should not result in any prohibition against use of the funds to reducing City class sizes. It is therefore unnecessary to explain the current status of the *CFE* litigation. At worst (and certainly unrealistically) it could be determined that the City is not entitled to any *CFE* funds, in which case there would be nothing for the Mayor to apportion under the proposed amendment. This most unlikely outcome, however, has no role in a voter decision to either agree with the need and manner of apportioning funds for decreased class sizes or to disagree and vote against the proposal. To include extraneous information about the *CFE* litigation would be more likely to add confusion than offer anything useful to voters.

III. RESPONDENTS' REFUSAL TO CERTIFY THE PETITION VIOLATES PETITIONERS' FIRST AMENDMENT RIGHTS UNDER ANY STANDARD.

Strict scrutiny applies because Petitioners are not challenging restrictions on the process of petitioning itself. Respondents' refusal to place Petitioners' amendment on the ballot clearly limits Petitioners' ability to bring their proposal to the attention of the electorate. In this way, under the standard articulated in *Meyer*, Respondents have

limited Petitioners' core political speech. 486 U.S. at 423. Even though there is limited case law answering challenges to restrictions that go just to ballot access and not petition circulation, the analysis cannot be different: where restrictions silence the communication (as they do here), whether it is in the act of circulation or by placement of the initiative on the ballot, strict scrutiny applies. The restrictions therefore are subject to strict scrutiny.

This must be so. If restrictions on anonymous distribution of campaign literature (*McIntyre,* 514 U.S. 334), requirements that petitioners be identified (*ACLF*, 525 U.S. 182), and even payment of petition circulators (*Meyer*, 486 U.S. 414) are considered invalid interactive speech restrictions, a regulation that requires an unspecified level of clarity of a proposed amendment could only also be considered a restriction on interactive speech. Respondents' restrictions at issue here are much more akin to the restrictions in *McIntyre*, *ACLF*, and *Meyer*, than in cases where a standard less exacting than strict scrutiny was applied to analyze the restriction. *See, e.g.*, *Anderson v. Celebrezze,* 460 U.S. 780 (1983) (early filing deadline for independent candidates); *Timmons,* 520 U.S. 351 (prohibition against candidates appearing on ballot for two or more political parties); *Burdick*, 504 U.S. 428 (prohibition on write-in voting). Notably, in cases involving petition-circulation, the Supreme Court relies on strict scrutiny whereas those concerning other aspects of voting and elections generally may result in strict scrutiny or a lesser standard, depending on the facts.

Given that the strict scrutiny standard applies because Petitioners challenge restrictions on their core political speech, the inquiry that must be satisfied is this: can Respondents carry their burden of proving that the restriction imposed is narrowly tailored to serve a compelling state interest. *ACLF*, 525 U.S. at 192 & n.12. Petitioners

submit that they cannot. *See Meyer*, 486 U.S. at 425 (calling the burden the state must overcome "well-nigh insurmountable.").

Respondents' regulation of Petitioners' activity sweeps very broadly; it results in the surprising determination that a Petition that spells out precisely what it proposes fails for vagueness. Respondents' assertion that the proposal is open to different possible interpretations does not save them. As shown above, the Petition is clear on its face. While any imaginative reader could find in the most straightforward language some miniscule possibility of a different or unique interpretation, Petitioners are not required to anticipate every possible interpretation and address each of them. Instead, their obligation is to provide a proposal that is not so fatally flawed in its drafting that it would be non-enforceable if passed. *See, e.g.*, *Sinawski*, 133 Misc. 2d at 77 (finding that the proposal as drafted would be incapable of enforcement). Petitioners have succeeded in doing just that. Thus, any restriction strikes not at ensuring some procedural regularity. It strikes at First Amendment rights.

Even if the Petition could have been more artfully drafted (which is not conceded), it is unclear what standard would be satisfactory to Respondents to place the proposal on the ballot. Such unfettered decision-making relating to core political speech is itself a violation of the First Amendment. In this regard, the Respondents' "rules" "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Marchi v. Board of Cooperative Educ. Servs.*, 173 F.3d 469, 480 (2d Cir. 1999) (same);

Vega v. Miller, 273 F.3d 460, 474-75 (2d Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002). Since "'basic First Amendment freedoms' are at stake, the '[v]agueness is particularly problematic.'" *Chatin v. Coombe*, 186 F.3d 82, 86 (2d Cir. 1999) (quoting *Grayned*, 408 U.S. at 109); *Kolender*, 461 U.S. at 358; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (statutes that implicate First Amendment rights are always subject to "more stringent" vagueness analysis).

Even were strict scrutiny not to apply, Respondents' actions cannot pass constitutional muster. When one considers "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," as well as the "precise interests put forward . . . as justifications for the burden," and, finally, "the extent to which these interests make it necessary to burden the plaintiff's rights," Respondents' actions still fail. *Anderson*, 460 U.S. at 789.

As discussed, the magnitude of the injury here is as great as it can be: the City Clerk's declaration that the Petition was legally invalid completely closes off Petitioners' access to the ballot. The burden thus could not be more absolute. Although Respondents concededly have an interest in ensuring that voters understand what it is they are being called to vote upon, the restriction here is unnecessary because the Petition is already sufficiently clear, particularly given that any doubts about its clarity must be resolved in favor of the proposal appearing on the ballot in order to satisfy requirements of the MHRL. In sum, the restriction Respondents impose (exclusion of the ballot) does not resolve the interest they contend to forward (informed voting). *See Anderson*, 460 U.S. at 796-98 (rejecting restrictions where means do not accomplish stated interest).

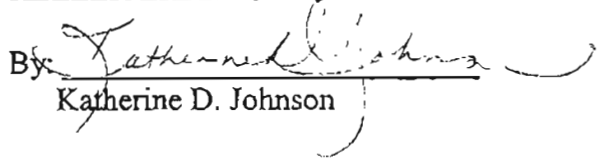
Moreover, the proposed amendment does not have to answer every possible question voters may have about it. It merely needs to convey the basic information to inform voters of its substance and not mislead them. *See In re Mitrione*, 14 A.D.2d at 717. Thus, Respondents have not chosen the least restrictive means of ensuring an informed electorate. *See Anderson*, 460 U.S. at 806 (least restrictive means must be used). This is particularly so because courts have long recognized that voters become informed of issues and proposals through publicity. *See Anderson*, 460 U.S. at 797 ("Our cases reflect a great[] faith in the ability of individual voters to inform themselves about campaign issues."); *In re Mitrione*, 14 A.d.2d at 716; *Council for Owner Occupied Hous. v. Koch*, 462 N.Y.S.2d 762.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in greater detail in Petitioners' papers, Citizens Union of New York respectfully requests that this Court grant the relief Petitioners seek.

New York, New York
March 23, 2006

HELLER EHRMAN LLP

By: 
Katherine D. Johnson

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: IAS PART 50

In the Matter of the Application of Dilsia PENA, Noreen CONNELL, Hazel N. DUKES, Leonie HAIMSON and Randi WEINGARTEN, individually and on behalf of the approximately 71,135 signers of the Petition Filed Pursuant to Section 37 of the New York State Municipal Home Rule Law, Petitioners, -against- VICTOR ROBLES, as City Clerk of the City of New York and Clerk of the City Council of New York, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, Respondents.	Index No. 111177/05 (Stone, J.)

STIPULATION AND ORDER

Heller Ehrman LLP
Attorneys for Amicus Curiae
7 Times Square
New York, NY 10036-6524
(212) 832-8300

To:

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

.....
Attorney(s) for

Sir: -- Please take notice

☐ NOTICE OF ENTRY

that the within is a *(certified)* true copy of a duly entered in the office of the clerk of the within named court on , 2006

☐ NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for settlement to the HON. Name of Judge one of the judges of the within named court, at Name of Court on , 2006 at M.

Dated,

Yours, etc.

Heller Ehrman LLP
Attorney(s) for Amicus Curiae
7 Times Square
New York, NY 10036-6524
(212) 832-8300

To:

Attorney(s) for

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

----------X
:

In the Matter of the Application of Dilsia PENA, Noreen CONNELL, Hazel N. DUKES, Leonie HAIMSON and Randi WEINGARTEN, individually and on behalf of the approximately 71,135 signers of the Petition Filed Pursuant to Section 37 of the New York State Municipal Home Rule Law,

Petitioners,

-against-

VICTOR ROBLES, as City Clerk of the City of New York and Clerk of the City Council of New York, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents.

Index No. 111177/05
(Stone, J.)

STIPULATION AND ORDER

----------X

STIPULATION AND ORDER

WHEREAS, proposed amicus curiae Citizens Union of the City of New York ("Citizens Union") has submitted its Motion for Leave to Appear as Amicus Curiae, thereby causing no delay or prejudice to the parties to this litigation; and

WHEREAS, the proposed amicus curiae has special interest in the City Charter revision and the initiative process, which pertain to matters before the Court in this proceeding; and

WHEREAS the proposed amicus curiae represents that it will limit its submission to issues pertaining to what it argues are the First Amendment dimensions of that revision and initiative process; and

WHEREAS, all parties to the litigation consent to this application to appear as

amicus curiae;

IT IS HEREBY STIPULATED AND AGREED THAT Citizens Union should be and hereby is permitted to appear as amicus curiae in this proceeding and will be permitted to file a memorandum of law, served upon respondents no later than March 23, 2006, limited to the above-mentioned issues, in support of the relief sought by Petitioners.

This Stipulation may be executed by the parties by way of facsimile, and by counterpart signatures, which when so executed and delivered should be deemed an original but when taken together shall be one and the same instrument.

New York, New York
March 23, 2006

HELLER EHRMAN LLP

By _____
Katherine D. Johnson
7 Times Square
New York, New York 10036-6524
(212) 832-8300

THE LAW FIRM OF JERRY H. GOLDFEDER

By _____
Jerry H. Goldfeder
225 Broadway
New York, New York 10007
(212) 962-4600

STROOCK & STROOCK & LAVAN LLP

By _____
Alan M. Klinger
180 Maiden Lane
New York, New York 10038
(212) 806-5400

MICHAEL A. CORDOZO
Corporation Counsel of the City of New York

By _____
Jonathan Pines
Assistant Corporation Counsel
100 Church Street, Room 2-178
New York, New York 10007
(212) 788-0933

NY 601909 v1
(99992.0401)

amicus curiae;

IT IS HEREBY STIPULATED AND AGREED THAT Citizens Union should be and hereby is permitted to appear as amicus curiae in this proceeding and will be permitted to file a memorandum of law, served upon respondents no later than March 23, 2006, limited to the above-mentioned issues, in support of the relief sought by Petitioners.

This Stipulation may be executed by the parties by way of facsimile, and by counterpart signatures, which when so executed and delivered should be deemed an original but when taken together shall be one and the same instrument.

New York, New York
March 23, 2006

HELLER EHRMAN LLP

By _____
Katherine D. Johnson
7 Times Square
New York, New York 10036-6524
(212) 832-8300

THE LAW FIRM OF JERRY H. GOLDFEDER

By _____
Jerry H. Goldfeder
225 Broadway
New York, New York 10007
(212) 962-4600

STROOCK & STROOCK & LAVAN LLP

By _____
Alan M. Klinger
180 Maiden Lane
New York, New York 10038
(212) 806-5400

amicus curiae;

IT IS HEREBY STIPULATED AND AGREED THAT Citizens Union should be and hereby is permitted to appear as amicus curiae in this proceeding and will be permitted to file a memorandum of law, served upon respondents no later than March 23, 2006, limited to the above-mentioned issues, in support of the relief sought by Petitioners.

This Stipulation may be executed by the parties by way of facsimile, and by counterpart signatures, which when so executed and delivered should be deemed an original but when taken together shall be one and the same instrument.

New York, New York
March 23, 2006

HELLER EHRMAN LLP

By _____
Katherine D. Johnson
7 Times Square
New York, New York 10036-6524
(212) 832-8300

THE LAW FIRM OF JERRY H. GOLDFEDER

By _____
Jerry H. Goldfeder
225 Broadway
New York, New York 10007
(212) 962-4600

STROOCK & STROOCK & LAVAN LLP

By _____
Alan M. Klinger
180 Maiden Lane
New York, New York 10038
(212) 806-5400

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York

By _____

Jonathan Pines
Assistant Corporation Counsel
100 Church Street, Room 2-178
New York, New York 10007
(212) 788-0933

NY 600318 v2
(99992.0401)