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

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CHRISTOPER BURKE, CIARAN CANAVAN, JEAN CANAVAN, ANTHONY BADILLO, and SHARON CLEMONS, individually and on behalf of the approximately 52,000 signers of a Petition filed Pursuant to Sections 37 and 24 of the New York State Municipal Home Rule Law,

Petitioners

-against-

MICHAEL McSWEENEY as City Clerk of the City of New York and Clerk of the City Council of New York, and the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents

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PETITIONERS' MEMORANDUM OF LAW
Index No. 110779/2009

PETITIONERS' MEMORANDUM OF LAW SEEKING CERTIFICATION OF THE 9/11 PETITION

Petitioners submit this memorandum of law in response to the notice of motion for summary judgment brought by Respondent Michael McSweeney, City Clerk and Clerk of the City Council (hereinafter, "Respondent" or "Clerk"). As part of his motion, Respondent has submitted his own memorandum of law (Respondent's "memorandum," hereinafter) in opposition to Petitioners' verified amended petition seeking an order compelling him to certify their Petition proposing a referendum to amend the New York City Charter ("Petition" herein, see Exhibit A). The referendum would ask the voters of New York City to decide in the upcoming November 3, 2009 election whether or not the Charter should be amended by adding a local law that would create an independent, temporary New York City Commission (the

"Commission") to investigate the events of September 11, 2001 ("9/11"), as well as those events leading up to and succeeding 9/11.

The Petition, initially containing 52,000 signatures in 52 volumes,[1] was filed with the Clerk pursuant to sections 24 and 37 of the New York Municipal Home Rule Law ("MHRL"), to properly invoke state-created procedures for the revision of municipal charters, in order to achieve the purpose of investigating 9/11.

The Clerk determined that the Petition "does not comply with the requirements of law" and was "ineligible for submission to the BOE [Board of Elections]." The Clerk also found that the Petition's severability clause "cannot be employed to save the non-flawed portions of the Petition." (See Clerk's letter, Exhibit B, page 2, last paragraph and next to last paragraph, respectively.)

In contrast to the positions taken in the Clerk's letter and adopted as part of Respondent's memorandum, Petitioners first maintain that even though the federal government may have jurisdiction over an investigation into the events of 9/11 as well as the causes of those attacks, such federal jurisdiction is not exclusive, and has been compromised and abandoned in any event, and that New York City has jurisdiction as well via the MHRL. Second, the Petition includes a legitimate financing plan for the Commission as required by section 37 of the MHRL. Third, the Petition's method of designating commissioners does not conflict with state laws relating to the election or appointment of public officers and the residency of public officers, since no commissioner would be a public officer. And if commissioners will be deemed by the Court to be public officers, the offending Petition language could be excised pursuant to the

[1] On Friday, September 4, 2009, an additional 27,810 Petition signatures were submitted as a supplement to the 52,000 signatures initially presented. As of the preparing of this memorandum of law, the Clerk's action on these additional petition signatures was pending.

Petition's severability clause. Fourth, the Petition does not confer a range of law enforcement and prosecutorial powers on the Commission that exceed the boundaries of law. Fifth, the subject of this proposed amendment to the New York City Charter does not violate the existing Charter provision contained in MHRL section 37. And further, Respondent's allegation that the Petition "has been so poorly drafted as to be incapable of enforcement if adopted" is patently false. Finally, any part of the Petition that is deemed objectionable by the Court can be stricken through application of the Petition's severability clause which states that "If any provision of this law is held to be unconstitutional or invalid for any reason, the remaining provisions shall be in no manner affected thereby but shall remain in full force and effect." (Exhibit A, Petition ¶ 20).

Since the Clerk's determinations are flawed and erroneous as a matter of law, and without reasonable grounds in either law or fact, the Petition is appropriate for submission to the City's electorate.

BACKGROUND

On September 11, 2001, two wide-body aircraft struck the North Tower and the South Tower of the World Trade Center at approximately 8:46am EST[2] and 9:03am,[3] respectively, and the world changed forever. Both towers suffered rapid and total destruction. At 9:59am, the South Tower collapsed into its own footprint, and at 10:28am, the North Tower did the same.[4] At around 5:20pm, 7 World Trade Center, also known as the Solomon Brothers Building ("WTC 7," at times hereinafter), a building which was not struck by aircraft, collapsed into its own footprint as well.[5] Another plane is alleged to have hit the Pentagon at around 9:37am[6], and a

[2] http://www.ntsb.gov/info/Flight_%20Path_%20Study_AA11.pdf
[3] http://www.ntsb.gov/info/Flight_%20Path%20_Study_UA175.pdf
[4] http://www.washingtonpost.com/ac2/wp-dyn/A11614-2002Apr30?language=printer
[5] http://wtc.nist.gov/progress_report_june04/appendixl.pdf

fourth plane is alleged to have crashed in a field near Shanksville, Pennsylvania at around 10:03am.[7] At least 2,749 people died in the World Trade Center events that occurred on that tragic day,[8] including 1,127 from the five boroughs of New York City.[9]

Days later, reportedly acting on directions from the White House, the Environmental Protect Agency (EPA) falsely announced that the air at "Ground Zero" was safe to breathe.[10] Relying on the EPA assurances which they trusted to be true, New York City residents and workers returned to their homes and jobs in the World Trade Center area. Health officials say they are not yet able to pinpoint the number of casualties directly linked to Ground Zero exposure. Advocacy groups claim the death toll has already topped 800.[11]

After the horrific events of September 11, 2001, it took the federal government 442 days to establish the federal 9/11 Commission to investigate the attacks.[12] As Respondent has touched on (see Respondent's memorandum at page 8), by comparison, the Warren Commission was established to investigate the assassination of President John F. Kennedy seven days after his assassination,[13] and the first of nine investigations into Pearl Harbor (which lasted five and a half years) began two days after the attack.[14]

The federal government's delayed response in investigating 9/11 is explained in large part by the Bush Administration's unwillingness to investigate the attacks. On January 25, 2002, Vice President Dick Cheney asked Senate majority leader Tom Daschle to limit an upcoming

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[6] http://www.ntsb.gov/info/Flight_%20Path_%20Study_AA77.pdf
[7] http://www.ntsb.gov/info/Flight%20_Path_%20Study_UA93.pdf
[8] http://abcnews.go.com/WNT/story?id=525937&page=1
[9] http://www.nytimes.com/2002/04/19/nyregion/19VICT.html?scp=2&sq=4/19/02&st=cse
[10] http://www.nyenvirolaw.org/PDF/Newsday-8-28-03-DangerInTheDust.PDF
[11] http://www.cbsnews.com/stories/2009/09/10/national/main5300512.shtml
[12] http://www.9-11commission.gov/about/president.htm
[13] http://www.presidency.ucsb.edu/ws/index.php?pid=26032
[14] http://www.ibiblio.org/pha/pha/invest.html

congressional inquiry into intelligence failures. President Bush repeated the request to Daschle in a private meeting with congressional leaders on January 29, 2002.[15]

After tireless lobbying from the victims' families for fourteen straight months,[16] the federal 9/11 Commission was finally signed into existence on November 27, 2002.[17] From its outset, the Commission was compromised due to several factors:

- The Chairman of the federal 9/11 Commission was appointed by President Bush[18] on whose watch the 9/11 attacks occurred.
- The federal 9/11 Commission's Executive Director, Philip Zelikow, had been a member of the Bush transition team in the spring of 2001[19] and shortly after 9/11 was appointed to the President's Foreign Intelligence Advisory Board.[20] Zelikow also coauthored a book (*Germany Unified and Europe Transformed: A Study in Statecraft*) in the 1990's with National Security Advisor Condoleeza Rice.[21] As is documented by New York Times Reporter Philip Shenon in his book, *The Commission*, Zelikow spoke to Karl Rove as well as others in the White House on several occasions during the course of the investigation.[22] When information surfaced that Zelikow had participated in Bush administration briefings prior to 9/11 on the threat al Qaeda posed, the 9/11 Family Steering Committee called for Zelikow to resign from the Commission. "It is clear that [Zelikow] should never have been permitted to be a member of the commission, since it is the mandate of the commission to identify the

[15] http://archives.cnn.com/2002/ALLPOLITICS/01/29/inv.terror.probe/
[16] http://www.nowpublic.com/lorie_van_auken_july_22nd_2005
[17] http://www.9-11commission.gov/about/president.htm

[18] Public Law 107-306, Sec. 603; http://govinfo.library.unt.edu/911/about/107-306.htm
[19] http://abcnews.go.com/Blotter/story?id=4218157&page=1
[20] http://www.9-11commission.gov/about/bio_zelikow.htm
[21] http://www.amazon.com/Germany-Unified-Europe-Transformed-Statecraft/dp/0674353250
[22] *The Commission*, Philip Shenon, p.106-107, Hachette Book Group USA, 2008.

source of failures," the committee wrote. "It is now apparent why there has been so little effort to assign individual culpability. We now can see that trail would lead directly to the staff director himself."[23] The 9/11 families' request for his resignation was not honored.

- The federal 9/11 Commission was initially allocated only $3,000,000 to conduct its investigation into one the largest ever losses of life on U.S. soil.[24] This contrasts with the $6,200,000 spent during the six months when Independent Counsel Kenneth W. Starr investigated the President Bill Clinton/Monica Lewinsky affair.[25] Later, the Bush administration agreed to provide an additional $9 million for the Commission to complete the investigation, though this was $2 million short of what the Commission requested.[26] In comparison, to complete the Starr investigations, another $30 million was allocated over three years.[27]
- The federal 9/11 Commission was given a limited time-frame of eighteen months in which to complete its investigation and issue a final report.[28]

Throughout the course of its investigation, the federal 9/11 Commission encountered resistance from the White House on several fronts:

- President Bush and Vice President Cheney refused to testify publicly under oath. They finally made a deal with the Commission to testify on April 29, 2004, with

[23] http://www.govexec.com/dailyfed/0304/032204c1.htm
[24] Public Law 107-306, Sec. 611(a), http://govinfo.library.unt.edu/911/about/107-306.htm
[25] http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/counsel040199.htm
[26] http://www.absoluteastronomy.com/topics/9_slash_11_Commission
[27] http://www.cnn.com/ALLPOLITICS/1998/04/01/starr.costs/
[28] Public Law 107-306, Sec. 610(b); http://govinfo.library.unt.edu/911/about/107-306.htm

specific conditions:

- They would testify together,
- They would testify behind closed doors,
- They would not be under oath, and
- Their testimony would not be recorded electronically or transcribed.[29]

- The White House refused to grant full access to the Presidential Daily Briefs (PDBs) that would indicate what information about the impending attacks was conveyed to the President on what dates. The White House finally compromised by granting a limited number of federal 9/11 Commission members limited access to the PDBs with the condition that their notes would have to be censored by White House officials. Senator Max Cleland (who later resigned from the Commission) said, "If this decision stands, I as a member of the commission cannot look any American in the eye, especially family members of victims, and say the commission had full access… This investigation is now compromised. . . this isn't protection of national security."[30] One week later Cleland said of the Commission, "It is a national scandal."[31]
- The White House refused to grant the federal 9/11 Commission access to al Qaida suspects held at the Guantanamo Bay detention facility. As reported in Newsweek magazine, "Commission members note that they repeatedly pressed the Bush White House and CIA for direct access to the detainees, but the administration refused. So the commission forwarded questions to the CIA, whose interrogators posed them on the panel's behalf… Information from CIA interrogations of two of the three—KSM and Abu Zubaydah—is cited throughout two key chapters of the panel's report

[29] http://www.nytimes.com/2004/02/26/us/bush-to-limit-testimony-before-9-11-panel.html; http://www.msnbc.msn.com/id/4853524/#storyContinued; http://www.highbeam.com/doc/1P2-1530270.html;
[30] http://www.boston.com/news/nation/articles/2003/11/13/911_panel_to_get_access_to_withheld_data/
[31] http://dir.salon.com/story/news/feature/2003/11/21/cleland/index.html

focusing on the planning and execution of the attacks and on the history of Al Qaeda."[32]

Throughout the course of the investigation and afterward, several members of the federal 9/11 Commission made public statements denouncing the Central Intelligence Agency (CIA), the North American Aerospace Defense Command (NORAD) and the Federal Aviation Administration (FAA) for their failure to cooperate and/or apparent efforts to mislead the Commission:

- *NORAD's False Testimony On Its Failure to Intercept the Hijacked Aircraft.*

Representative Timothy Roemer: "We were extremely frustrated with the false statements we were getting," Roemer told CNN. "We were not sure of the intent, whether it was to deceive the commission or merely part of the fumbling bureaucracy."[33]

Governor Thomas Kean, Chairman of the federal 9/11 Commission: "We, to this day, don't know why NORAD told us what they told us… It was just so far from the truth."[34]

Kean and Representative Lee Hamilton, Vice Chairman, of the federal 9/11 Commission: "Fog of war could explain why some people were confused on the day of 9/11, but it could not explain why all of the after-action reports, accident investigations and public testimony by FAA and NORAD officials advanced an account of 9/11 that was untrue."[35]

- *CIA Destruction of Videotapes Documenting Interrogation of Al-Qaeda Operatives.*

Kean and Hamilton also stated that "the recent revelations that the C.I.A. destroyed videotaped interrogations of Qaeda operatives leads us to conclude that the agency failed to

[32] http://www.newsweek.com/id/189251/page/2
[33] http://www.cnn.com/2006/POLITICS/08/02/9-11panel.pentagon/index.html
[34] http://www.washingtonpost.com/wp-dyn/content/article/2006/08/01/AR2006080101300.html
[35] *Without Precedent*, Thomas Keane and Lee Hamilton, p. 259, Vintage Paperback, 2006.

respond to our lawful requests for information about the 9/11 plot. Those who knew about those videotapes — and did not tell us about them — obstructed our investigation."[36]

In 2009, revelations about "enhanced" interrogation techniques used at the Guantanamo Bay detention facility shed further doubt on the findings of the federal 9/11 Commission. According to a Newsweek investigation, "The commission appears to have ignored obvious clues throughout 2003 and 2004 that its account of the 9/11 plot and Al Qaeda's history relied heavily on information obtained from detainees who had been subjected to torture, or something not far from it… That has troubling implications for the credibility of the commission's final report. In intelligence circles, testimony obtained through torture is typically discredited; research shows that people will say anything under threat of intense physical pain. And yet it is a distinct possibility that Al Qaeda suspects who were the exclusive source of information for long passages of the commission's report may have been subjected to "enhanced" interrogation techniques, or at least threatened with them, *because* of the 9/11 Commission."[37] [Emphasis in the original.]

Two years after the federal 9/11 Commission issued its report, Kean and Hamilton published an inside account of their work in a book entitled *Without Precedent*, wherein they stated that "The Commission was set up to fail."[38]

According to Terrell E. Arnold, Former Deputy Director of the Office of Counter-Terrorism and Emergency Planning at the U.S. State Department, "They [the federal 9/11 Commission] have brought us no closer than we were on September 12, 2001 to resolving how it was executed and by what enemy. They tell us repeatedly that it was the work of al Qaida, but

[36] http://www.nytimes.com/2008/01/02/opinion/02kean.html
[37] http://www.newsweek.com/id/189251
[38] *Without Precedent,* Thomas Keane and Lee Hamilton, p. 14 *et seq*. and back cover, Vintage Paperback, 2006.

they have yet to show us the proofs. They told us the official version of what happened that day, but their story is laced with contradictions, and the facts visible on the ground at the time belie much of the official account."[39]

Bob Kerrey, another member of the federal 9/11 Commission, added, "It might take "a permanent 9/11 commission" to end the remaining mysteries of September 11 and called for "a permanent 9/11 Commission." [40]

Any new commission formed to investigate 9/11, be it permanent as Bob Kerrey called for, or temporary as proposed by the Petition at issue in this case, would be presented with challenges most formidable, including investigation of the following crucial areas which were left uncovered by the federal 9/11 Commission and by the National Institute of Standards and Technology (NIST), the federal agency tasked with investigating the collapse of the World Trade Center (WTC) buildings:

- Eye-witness accounts of explosions occurring before and during the collapse of the Twin Towers and WTC 7, provided by 118 firefighters[41] and others, including former NYC Corporation Counsel Michael Hess[42], and (now deceased) Barry Jennings, the Deputy Director of the Emergency Services Department of the New York City Housing Authority, who were trapped together in WTC 7 for approximately 90 minutes after witnessing an explosion inside the building.[43]

- The possible use of explosives and incendiaries in the destruction of the Twin Towers and WTC 7 – not tested for by NIST[44] – brought to light by a peer-reviewed scientific paper showing the presence of unreacted thermitic material incorporating nanotechnology in the WTC dust,[45] and other scientific reports by independent researchers[46] and the Federal Emergency Management Agency (FEMA)[47] showing

[39] http://www.rense.com/general77/vital.htm
[40] http://www.newsweek.com/id/189251/page/2
[41] http://journalof911studies.com/articles/Article_5_118Witnesses_WorldTradeCenter.pdf; http://www.forumeter.com/video/183014/EXPLOSIVE-TESTIMONY-MacQueen-NYFD-9-11-witnesses
[42] http://www.youtube.com/watch?v=BUfiLbXMa64
[43] http://www.wanttoknow.info/008/hessjenningswtc7explosiontvbroadcast; http://edwardrynearson.wordpress.com/2009/04/17/new-information-on-the-death-of-911-eyewitness-barry-jennings/
[44] http://wtc.nist.gov/pubs/factsheets/faqs_8_2006.htm
[45] http://www.bentham-open.org/pages/content.php?TOCPJ/2009/00000002/00000001/7TOCPJ.SGM
[46] http://journalof911studies.com/articles/WTCHighTemp2.pdf

metal temperatures well above what jet fuel could cause. NIST states that no steel was recovered from WTC 7,[48] despite the fact that Appendix C of the FEMA report documents such testing of WTC 7 steel and calls for further investigation.[49]

- Apparent foreknowledge of World Trade Center building collapses. A televised statement by former NYC Mayor Rudolph Giuliani indicating that he had received advance warning of the Twin Towers' collapse,[50] as well as documented statements from 60 firefighters who received advance warnings of WTC 7's collapse.[51] WTC leaseholder Larry Silverstein's alleged statement that WTC 7 would be "pulled," i.e., demolished intentionally.[52] BBC[53] and CNN[54] reports stating that WTC 7 had collapsed prior to its actual collapse, and video evidence of an explosion emanating from WTC 7 with people on the scene exhibiting foreknowledge that it was "about to blow up."[55]

- The alleged terrorists possible connections to U.S. intelligence agencies and the Defense Department as alleged by federally gagged FBI Whistleblower Sibel Edmonds in an August 8, 2009 deposition,[56] and Newsweek reports that the alleged hijackers may have trained at U.S. bases.[57]

- Transportation Secretary Norman Mineta's testimony indicating that Vice President Dick Cheney may possibly have issued a *de facto* "stand-down order" while in the Presidential Emergency Operations Center (PEOC), an order that if in fact was executed, did not prevent AA Flight 77 from hitting the Pentagon.[58] The commissioners did not question Mineta or Cheney (or the

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[47] http://wtc.nist.gov/media/AppendixC-fema403_apc.pdf

[48] http://www.nist.gov/public_affairs/factsheet/wtc_qa_082108.html, at Q&A, **"**Why didn't the investigators look at actual steel samples from WTC 7? Steel samples were removed from the site before the NIST investigation began."

[49] http://wtc.nist.gov/media/AppendixC-fema403_apc.pdf, (recommendation is at C.6).

[50] http://www.youtube.com/watch?v=6vCg8Fp8aw8
[51] http://journalof911studies.com/volume/200701/MacQueenWaitingforSeven.pdf, p.4
[52] http://www.youtube.com/watch?v=7WYdAJQV100

[53] http://www.youtube.com/watch?v=lW_JRe67v1g
[54] http://www.youtube.com/watch?v=N1LetB0z8_o
[55] http://www.youtube.com/watch?v=CwjmqkjwnvQ
[56] http://www.bradblog.com/?p=7374
[57] http://www.newsweek.com/id/75797
[58] http://www.youtube.com/watch?v=GO-9LQDFE2Y, transcription follows:
Mineta: "During the time that the airplane was coming in to the Pentagon, there was a young man who would come in and say to the Vice President, 'The plane is fifty miles out…The plane is thirty miles out.' And when it got down to 'The plane is 10 miles out,' the young man also said to the Vice President, 'Do the orders still stand?' And the Vice President turned and whipped his neck around and said, 'Of course the orders still stand. Have you heard anything to the contrary?' Well at the time I didn't know what all that meant…"
Vice Chairman Lee Hamilton: "The flight you're referring to is the…"

"young man" mentioned within footnote 58) about the nature of the order Cheney had given. The 9/11 Commission Report would later state that Cheney did not enter the PEOC until 9:58, twenty-on minutes after AA 77 allegedly hit the Pentagon.[59]

- Possible active concealment of evidence regarding the four aircraft reportedly hijacked on 9/11.[60]

Because of the federal 9/11 Commission's failure to investigate the matter completely, the Petition effort calling for a NYC Commission to investigate 9/11 that is at issue in the instant case, came into being. Initially 52,000 voter signatures were submitted to the Clerk, and later another 27,810 were submitted.

FACTS

On June 24, 2009, Ted Walter, the Executive Director of the New York City Coalition for Accountability Now ("NYCCAN") filed the Petition with the Clerk, proposing that the Charter of the City of New York (the "Charter" or "City Charter," at times hereinafter) be amended "to Create and Fund a NYC Independent Commission with Subpoena Power to Conduct a

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Mineta: "The flight that came into the Pentagon."

[59] The 9/11 Commission Report, p.40.

[60] http://www.physics911.net/georgenelson; According to Colonel George Nelson, Former U.S. Air Force Aircraft Investigator, "In all my years of direct and indirect participation, I never witnessed nor even heard of an aircraft loss, where the wreckage was accessible, that prevented investigators from finding enough hard evidence to positively identify the make, model, and specific registration number of the aircraft -- and in most cases the precise cause of the accident…The government alleges that four wide-body airliners crashed on the morning of September 11 2001, resulting in the deaths of more than 3,000 human beings, yet not one piece of hard aircraft evidence has been produced in an attempt to positively identify any of the four aircraft. On the contrary, it seems only that all potential evidence was deliberately kept hidden from public view."

Also see http://www.pnionline.com/dnblog/extra/archives/001139.html where it is reported that "Two men who worked extensively in the wreckage of the World Trade Center claim they helped federal agents find three of the four "black boxes" from the jetliners that struck the towers on 9/11 - contradicting the official account. Both the 9/11 Commission and federal authorities continue to insist that none of the four devices - a cockpit voice recorder (CVR) and flight data recorder (FDR) from the two planes - were ever found in the wreckage. But New York City firefighter Nicholas DeMasi has written in a recent book—self-published by several Ground Zero workers—that he escorted federal agents on an all-terrain vehicle in October 2001 and helped them locate three of the four… "It's extremely rare that we don't get the recorders back. I can't recall another domestic case in which we did not recover the recorders," Ted Lopatkiewicz, spokesman for the National Transportation Safety Board, told CBS News in 2002."

Comprehensive and Fact-Driven Investigation of All Relevant Aspects of the Tragic Events of September 11, 2001 And Issue a Report." (Exhibit A, Petition page 1 top, and center). Upon receipt of the Petition, the Clerk reviewed it for legal sufficiency by soliciting the opinion of counsel (i.e., the Corporation Counsel of the City of New York), and by seeking to determine whether the Petition contained a sufficient number valid signatures (30,000) to be submitted to the City Council.

By letter dated July 24, 2009 and addressed to the City Council, with a copy sent to Mr. Walter, the Clerk "certified" that the Petition contained not more than 26,003 valid signatures and did not comply with all requirements of law. (See Exhibit B, Clerk's letter.)

On July 29, 2009, Petitioners commenced the instant action by way of a "verified petition" and an order to show cause seeking the appointment of a referee to review the Clerk's determination as to the validity of the signatures. On July 29, 2009, Justice Sherry Klein Heitler granted Petitioners' order to show cause and on August 3, 2009, Justice Edward H. Lehner appointed Special Referee Louis Crespo to oversee the matter.

Pursuant to Referee Crespo's order, Petitioners commenced and eventually completed a "line-by-line" review of the signatures "invalidated" by the Clerk, at Board of Elections offices in Manhattan and Brooklyn. On August 27, 2009, Petitioners submitted a bill of particulars contending that a total of 7,166 signatures deemed invalid by the Clerk were in fact valid. Petitioners based this contention on the results of their Court ordered line-by-line review of the signatures that were deemed invalid by the Clerk during his review of the 52 Petition volumes.

On September 9, 2009—during the morning of the day when Referee Crespo was supposed to begin evaluating Petitioners' bill of particulars with his own line-by-line examination at the Board of Elections—Referee Crespo emailed the Clerk's legal representative

(Stephen Kitzinger) and cc'd Petitioners' attorney (Dennis P. McMahon), confirming that "the defendants [i.e, the Clerk and the Board of Elections] do not contest plaintiffs' [i.e., Petitioners'] petition to the extent they maintain they have collected sufficient [30,000] signatures. . . Accordingly, I will not be conducting a line-by-line." (See email printout, Exhibit C.)

The Clerk still took issue with the "legal insufficiency" of the Petition, and brought the instant motion for summary judgment, submitting his memorandum of law to which the instant document is responding.

ALTHOUGH DIRECT DEMOCRACY IS VERY LIMITED UNDER THE LAWS OF THE STATE OF NEW YORK, THE 9/11 PETITION QUALIFIES FOR THE EXCEPTIONAL TREATMENT AVAILABLE UNDER NEW YORK LAW.

In his memorandum at page 4, Respondent notes that "in contrast to the practices of some other states, local laws initiated by the electorate are not the norm in New York," and then goes on to cite New York case law for the overall proposition that "direct democracy in New York is the exception, not the rule."

It is respectfully submitted that the 9/11 Petition qualifies for this exceptional treatment because the Petition satisfies the basic requirements of the Municipal Home Rule Law, and also complies with New York's Constitution and substantive laws.

POINT I
THE PROPOSED LAW IS WITHIN THE JURISDICTION OF THE CITY OF NEW YORK.

Respondent claims that, "The investigation of a series of attacks on the United States is properly within the jurisdiction of the federal government, not a municipal one" (Respondent's memorandum, page 5), but cites no authority. Two sentences later, Respondent alleges (again

without citing authority) that "investigating the reasons for these [9/11] attacks, and for the events that transpired on that day, is a task for the federal government." [Footnote containing no cited authority, omitted.] From there, Respondent postulates that "It would be outside the City's jurisdiction to establish a local commission to investigate the roots of these events."

In support of his claim, at the top of page 6 of his memorandum, Respondent notes that "New York courts have held that the petition process may not be used to address matters that are not *primarily of local concern.*" [Emphasis added.] All of the case law cited by Respondent as support for this claim—involving petitions to: reduce school class sizes, establish of a municipal office to coordinate anti-Vietnam War efforts; amend the Charter relating to the Board of Education; set up a local office to establish a five-cent transit fare—is simply inapposite. None of these cases involved facts even remotely resembling the absolute horror, devastation, and incomprehensible tragedy of 9/11, and its continuing aftermath—all matters *primarily of local concern* to New York City residents and voters.

As authority for his position, Respondent (on page 7 of his memorandum) notes that "While it is true that the impact of September 11 has been much greater on New York City residents workers and businesses than on residents of other cities or states in this country, an investigation of the causes of the attacks on September 11 concerns matters entirely outside the scope of the New York City government. Congress *implied as much* when, in taking on the task of investigating the causes of the September 11 attacks, it authorized an independent national commission, the National Commission on Terrorist Attacks upon the United States ('the 9/11 Commission')." [Emphasis added.]

Respondent does not cite any authority indicating that any of these commissions—and certainly not the official federal 9/11 Commission— had to be established *to the exclusion* of

state or city commissions or other authority. That Congress "authorized an independent national commission" as Respondent says, neither addresses nor *implies* that an investigation of the causes of the attacks on 9/11 concerns matters entirely outside the scope of the New York City government. But even if Respondent's take that Congress "implied as much" were true, that would not be enough. The Tenth Amendment to the U.S. Constitution expressly provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." There is no exclusive power delegated to the United States by the Constitution to carry out an investigation into 9/11 or 9/11 type events occurring in U.S. cities. Nor does the Constitution prohibit the States from investigating attacks on the people of their cities. Thus, the people of the State of New York, as being among "the people" protected by the U.S. Constitution—and including "the people" of the City of New York—have the inherent Tenth Amendment right to conduct an investigation into the events surrounding the 9/11 mass murder of New York City residents, workers, and visitors. Further, through New York State's enactment of the MHLR § 37 et al., the voters of New York City can exercise this Constitutional right by voting on a petition, such as the Petition at issue here, that would create a Commission to investigate 9/11.

On pages 7 and 8 of his memorandum, Respondent adds that "The Senate Committee on Governmental Affairs, in reviewing legislation to establish the 9/11 Commission, remarked that 'events inflicting alarm, pain, and sorrow on the American populace' historically have warranted the establishment of national commissions. The report provides as examples national commissions created to investigate. . . the assassination of President John F. Kennedy," i.e., the Warren Commission. However, following issuance of the Warren Report, doubts grew about the accuracy and completeness of the Warren Commission's official findings. A local investigation

ensued, spearheaded by New Orleans District Attorney Jim Garrison (who later won election to a seat on the Louisiana's Court of Appeals for the Fourth Circuit, where he remained on the bench until just before his death at age 70). The Garrison investigation into the Kennedy assassination resulted in criminal charges being brought against one Clay Shaw.[61] "In 1969, Shaw was tried in a Louisiana State court on charges of having participated in a conspiracy to assassinate President John F. Kennedy. He was acquitted by a jury." *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). Thus, matters of "national concern" can be handled locally if there were crimes allegedly or obviously committed in a locality. In New Orleans, the alleged crime was participating in a conspiracy to assassinate President John F. Kennedy. In New York City, the most obvious crime was the horrific mass murder of New York City residents, workers, visitors and guests on 9/11.

On page 8 of his memorandum, Respondent says, "Most critically, investigating attacks on our nation of the nature and scope of the attacks of September 11 requires a response by the federal government." But when that federal response has been such a total and unmitigated disaster, the U.S. citizens most affected—including the citizens of New York City—have not only a right but a duty to demand a proper investigation.

In one breath, without citing any authority for his position, Respondent asserts, "Only the federal government has the authority and the capacity to execute an investigation into a matter inextricably related to national security and foreign policy." (Respondent's memorandum, page 8.) Then in the next breath, Respondent complains that "the Petition leaves no question that it contemplates the use of the Commission's subpoena power and additional authority to obtain testimony of political, military and intelligence figures from the United States as well as from

[61] See New York Times obituary on Jim Garrison, Thursday, October 22, 1992, section B page 12 of the New York edition. On line, see http://www.nytimes.com/1992/10/22/obituaries/jim-garrison-70-theorist-on-kennedy-death-dies.html.

foreign countries." How else to conduct an effective investigation but with subpoena power—the *sine qua non* of any investigative body?

Continuing on page 9 of his memorandum, Respondent flatly asserts that "The need to grant these far-reaching powers to a municipal body illustrates the problem with making this commission a local one." Does it? How? Respondent does not explain but instead follows up immediately with this *non sequitur*: "Proposing the establishment of an independent municipal commission to examine the roots of the attacks that occurred on September 11 is outside the jurisdiction of this City's government," without citing any authority.

Still on page 9 of his memorandum, Respondent asserts that "The Petition is also flawed in that it seeks an *advisory referendum* on the adequacy of the federal government's investigations into the causes of the attacks on September 11." [Emphasis added.] But where in the Petition is there any such language? Again, Respondent does not say, and could not truthfully say, since no such Petition language exists. So instead, Respondent resorts to the mere appearance of logic when he attempts to justify this point by saying, "The Petition indicates that it is creating the Commission not only to examine the events leading up to the attacks on September 11, but also to uncover 'any activities attempting to hide, cover up, impede or obstruct any investigation.' Petition, ¶ 2." Clearly, this language cited by Respondent does nothing to support the premise that the Petitioners here are seeking an "advisory referendum."

Respondent goes on to say that the Petitioners' mandate "instructs the Commission to research, assess, and report on the efficacy of the federal government's investigation into the attacks. *Matter of Silberman* makes clear that such an effort is not lawful. *Id.* at 959."

But *Matter of Silberman* at page 959 does not even address this issue. What *Matter of Silberman* at page 959 actually says is that what the petitioners there "really hope[d] to

accomplish is an opportunity to obtain a vote on the national administration's policy and its conduct of the war in Vietnam. All else would appear to be incidental." That is not at all the same type of situation at issue in the instant case. Petitioners here want to form "[a]n independent, temporary New York City commission . . . to conduct a comprehensive, fact driven investigation into the events that took place on 9/11." (Exhibit A, Petition ¶ 2).

Respondent continues, "Although the petition in that [*Matter of Silberman*] case called for the establishment of a municipal office, the Supreme Court found that petitioners were seeking an advisory referendum on the federal government's foreign policy in Vietnam. *Id*. at 959. The court held that the referendum process could not be used to enact an advisory resolution." In this instance, Respondent is arguing that because the court in *Matter of Kupferman v. Katz* found as a *factual* matter that the petitioners *there* were seeking an advisory resolution, that this somehow means that a finding must be made that the Petitioners' *here* are seeking an advisory resolution—despite the fact that, as Respondent himself freely admitted earlier, "The Petition [in the instant case] indicates that it is creating the Commission not only to examine the events leading up to the attacks on September 11, but also to uncover 'any activities attempting to hide, cover up, impede or obstruct any investigation.' Petition, ¶ 2." (See Respondent's memo at page 9.) Thus, Respondent's equating of the Petition's proposed establishment of a Commission with the seeking of an "advisory opinion," in an attempt to parlay the *factual* finding in *Matter of Kupferman v. Katz*, and in contrast to his own prior admissions, is unavailing and without merit.

Therefore, in sum, since Respondent has neither demonstrated that the Petition seeking to establish a Commission to investigate 9/11 exceeds the jurisdiction of the City of New York, nor

shown that the Petition is seeking an advisory referendum, the Petition should not be invalidated on either of these grounds.

POINT II
THE PETITION PROVIDES AN ADEQUATE FINANCING PLAN AS REQUIRED BY SECTION 37(11) OF THE MUNICIPAL HOME RULE LAW.

On page 10 of his memorandum, Respondent outlines reasons why he feels the Petition fails to meet the statutory requirements of MHRL § 37(11), which provides that initiative petitions requiring the expenditure of funds shall not become "effective unless there shall be submitted, as a part of such proposed local law, a plan to provide moneys and revenues sufficient to meet such proposed expenditures." Petitioners' plan identifies available sources from which needed revenues can be obtained. In addition to the significant seed money fund that has been raised, a world wide internet fund raising campaign is planned and pledges of matching fund contributions from several prominent affluent citizens have been secured. Specific contributions and pledges have also been made, and other fund raising events, such as celebrity parties, concerts and gatherings are identified. Most salient, is the fact that "[f]inancing shall be entirely drawn from private contributions" and that "[n]o public funds shall be requested or accepted" (Exhibit A, Petition ¶ 7).

It is because neither state nor local taxes need be imposed that all of the legal authority set forth in support of Respondent's contention that the petition's plan is insufficient, is inapposite. For example, in *Adams v. Cuevas*, 68 N.Y.2d 188, 192 (1986), the petitioner sought to compel the City Clerk of the City of New York to certify as valid an initiative petition to amend chapter 24 of the New York City Charter. The financing plan failed to come within the meaning of a "plan to provide moneys and revenues" because it left to the City Council the

responsibility of finding sources of revenue to fund the proposed $30,000,000 emergency shelter program for homeless families, and failed to specify new sources of revenue sufficient to meet the proposed expenditure. However, *Adams v. Cuevas* is in contrast to the situation here where "no public funds will be requested or accepted" to fund Petitioners' plan.

The *Adams v. Cuevas* court noted that MHRL §37 was enacted due to concern regarding Charter amendments involving substantial expenditures without sufficient consideration of the cost and the means for financing them. MHRL §37 was later amended to require that a financing plan be included in an initiative so that the electorate would be aware of the fiscal consequences of the proposal and could exercise their franchise intelligently.

Whereas in *Adams v. Cuevas* the increased costs were to be met by general budgetary procedures, here the Petition's plan does not require public funding. All expenditures are to be satisfied by private funds. Because no state or local taxes must be imposed to meet the plan's costs, the voters need not be accorded advance notice of the cost and what taxes they may be required to pay to meet that cost and to weigh the desirability of the program against the financial impact upon them as taxpayers. Moreover, unlike the *Adams v. Cuevas* petition, the Petition herein does not rely on projected savings from the elimination of existing programs.

In *Welty v. Heafy*, 200 Misc.1010 (1951), cited by Respondent on page 13 of his memorandum, the proposed local law provided for estimated expenditures for salary increases for employees and stated that the necessary funds would be raised by general taxation on real estate as far as permissible, and that any additional moneys required would be raised by taxes through enactment by the Common Council of local laws adopting permissive local taxes. The court said: "[t]he 'plan' for the raising of taxes need not be so specific as to require a tax or

group of taxes to be enacted." It is sufficient that discretion be granted to the local legislative body to raise by local law such taxes as those mentioned.

The *Welty* court's holding to not insist on much plan specificity regarding fund raising should serve to sanction Petitioners' plan to raise the requisite private funds regardless of whether it is considered specific and definite regarding source. Furthermore, since the plan will be funded with private contributions, the electorate need not be put on notice about fiscal consequences.

Among other things, the petition in *City of Syracuse v. Wright*, 4 Misc. 29 714 (1956), cited by Respondent on page 11 of his memorandum, provided for minimum salary schedules for certain designated members of the police and fire departments, a prohibition on the Common Council from reducing such salaries, and a revision of the 1957 budget and appropriation of additional funds therefor. The amount of increased expenditures required by this local law were to be obtained by increasing the general tax levy on real property. The court found that "the proposed plan to provide moneys and revenues sufficient to meet proposed expenditures by increasing the general tax levy on property to be sufficient, there being sufficient revenue available from all sources, including a tax levy on real property, to provide for all contemplated increases in expenditures for the year 1957, should the referendum be carried." As neither a general tax levy, nor a tax levy on real estate is being sought here, the *City of Syracuse* decision has no bearing on the matter at hand.

The initiative in *Schrader v. Cuevas*, 179 Misc.2d 11, 22 (1988), cited by Respondent on page 11, contemplated an increase in the moneys to be set aside for a voluntary system of campaign finance reform. The initiative specified that to the extent necessary, additional funds would be raised by reducing the amount of funds on a proportionate basis that would otherwise

be available in the general fund for each of the offices of the Mayor, Comptroller, Public Advocate, Borough Presidents and City Council. At issue therein was whether the petition's plan failed to give voters adequate notice of the effect that the adoption of the proposed local law would have on the City's existing campaign finance program. With respect to the sufficiency of information necessary to give voters an understanding of how the revenue necessary to implement the law would be generated, the court in *Schrader v. Cuevas* said that "[t]o 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." It was because of the plan's reliance on the redirection of appropriations that the court determined it too general to satisfy the requirement of MHRL §37(11). Also insufficient to satisfy the statute's requirements was the plan's reliance on general budgetary procedures to fund increased costs. These two matters are not at issue here.

In *Noonan v. O'Leary,* 284 A.D. 646, 133 N.Y.S.2d 167 (1954), relied on by Respondent on page 12 of his memorandum, a local law was proposed to amend the Charter of the City of Rochester to substitute a mayoralty form of government for the city-manager form. The plan provided that the elimination of the salaries of the city manager and his deputy would more than offset the increase in salaries of the mayor and vice mayor. Because the plan neither provided moneys nor indicated a source of funds, the court found that no one voting on the proposal could know, in case of its adoption, what additional taxes he might have to meet. Instead, voters would have been required to speculate as to which form of government would be most economical at some time in the future. Contrary to the facts therein, here the Petition's plan does not call for public funds. No taxes would have to be levied.

The revenue plan proposed in *Hardwick v. Kramer*, 200 Misc. 207 (1951), also relied on by Respondent on page 12, required that the Common Council raise money to increase the salaries of policemen and firemen from sources "authorized by law" and issue "budget notes as authorized by law." It was thus constituted by passing to the Common Council the entire problem of finding the necessary sources of revenue. As such, the local law was found to have failed to satisfy the requirement that the plan provide sufficient revenues to meet proposed expenses. Here, in contrast, given that no public funds would be requested or accepted to fund the Petition's plan, the *Hardwick* case is of no significant precedential value.

Thus, in none of the cases cited by Respondent is there a requirement to provide evidence in support of assertions of private fund raising efforts. Nor do any of the cases require that a plan set forth a legal mechanism to assure the transfer of privately-raised funds to the City.

With respect to the certainty of the ultimate amount of funds required for the completion of the Commission's work (see Respondent's memorandum at page 13), the lifetime of the Commission is fixed and the projected costs have been calculated on the basis of the experience of the previous official Commission. In contrast to what Respondent claims on page 14 of his memorandum, there is no misleading of the citizens or, in particular, of the number of registered voters—now totaling almost 80,000—who have signed the petition (see footnote 1, page 2, and related text). It is quite clear that if the necessary funds are not provided from the range of private sources and efforts set out in the Petition, then the effort will simply not go forward. Rather than being penalized for the attempt to make this Commission a totally privately sponsored effort by not drawing on already stretched public funds, this effort, largely inspired and motivated by the families of victims of the 9/11 tragedy, should be given the opportunity to seek answers to outstanding questions which have haunted them for the last eight years.

In fact, Petitioners respectfully suggest that if this Court rejects and denies such an effort by the registered voters of the City of New York to bring this question for a privately funded Commission to the voters through the process of initiative and referendum, it would constitute a violation of the equal protection rights of those citizens who as a group would be relegated to second class status compared with their fellow citizens who seek similar opportunities while relying on public funding.

POINT III
RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE COMMISSIONERS MUST BE CLASSIFIED AS PUBLIC OFFICERS, AND THUS HIS ALLEGATION THAT THE PETITION VIOLATES THE PUBLIC OFFICERS LAW IS UNFOUNDED.

On page 15 of his memorandum, Respondent claims that "The members of the Commission qualify as public officers," but nowhere cites any provision in the Petition that would establish Commission members as public officers. To be sure, no such citation is available because the Petition itself nowhere indicates any intention to have the commissioners qualify as public officers. Nevertheless, Respondent goes on to assert that "The Commissioners envisioned by the Petition [would] *undoubtedly* qualify as 'public officers' under New York common law." [Emphasis added.] Respondent then cites a superficially impressive string of authorities for his general and sweeping proposition, but never explains the facts involved in the cited authorities, what the holdings there were, or how the holdings or reasoning in those authorities might apply to the instant case.

On pages 15 and 16 of his memorandum, Respondent approaches specificity when he cites *Mayor v. Council*, 235 A.D.2d 230 (1st Dep't 1997), *lv. to app. denied,* 89 N.Y.2d 815 (1997) as primary support for his position that the commissioners would "undoubtedly" qualify

as public officers, while asserting that "The Commission's authority to issue subpoenas, which is critical to its function as an investigatory body, is *sufficient standing alone* to confer public officer status on the Commissioners." [Emphasis added.] In *Mayor v Council*, the Mayor of the City of New York brought an action against the City Council to challenge the validity of a law creating an independent police investigation and audit board. The Supreme Court declared that the challenged law was invalid. On appeal, the Appellate Division held that: (1) the challenged law was an impermissible infringement upon the mayor's sole power under the City Charter to appoint all officers not elected by people, and (2) an invalid portion of law was not severable. At no point did the Appellate Division discuss or even mention subpoena power. Thus, Respondent's reliance on *Mayor v Council* to support his claim that the Commission's authority to issue subpoenas is sufficient standing to confer public officer status on the commissioners, is misplaced.

Continuing on page 16 of his memorandum, as supplemental authority for his position that the Commission's authority to issue subpoenas is "sufficient standing alone" to confer public officer status on the commissioners, Respondent also cites *In re Christey v. Cochrane*, 211 N.Y. 333, 340-42, 344-45 (1914), *Ward Baking Co. et al v. W. Union Tel. Co.*, 205 A.D. 723, 731 (3d Dep't 1923); and 1977 N.Y. Op. (Inf.) Atty. Gen. 176 (1977). A reading of these authorities reveals that none of them support Respondent's broad claims.

In re Christey v. Cochrane involved the Veterans Civil Service Law (Cons. Laws, ch. 7, § 21) and the construction and application of that statute. The court held that the office of auditor of Buffalo was not a subordinate position within purview of said statute. The holding has nothing to do with subpoena power.

Ward Baking Co. et al v. W. Union Tel. Co. involved the delegation of power by the Governor to the Attorney General. There (unlike here), the Third Department was called on to address matters that did *not* affect the public peace, public safety and public justice (there, within the meaning of subdivision 8 of section 62 of the Executive Law) which, the Third Department held, did not allow the Attorney General to investigate a specific crime for the purpose of ascertaining whether a particular individual had committed that crime. Neither the holding nor the facts are applicable here, and thus do not offer support for Respondent's position that the Commission's authority to issue subpoenas is sufficient standing to confer public officer status on the commissioners.

And in 1977 N.Y. Op. (Inf.) Atty. Gen. 176 (1977), the Attorney General's ruling that a member of a board of visitors of a hospital in the Department of Mental Hygiene was an officer of the state for purposes of section 17 of the Public Officers Law (which provides for the indemnification of officers and employees of the state) is likewise unsupportive of Respondent's claim that the Commission's authority to issue subpoenas is sufficient standing alone to confer public officer status on the commissioners.

On page 16 of his memorandum, Respondent goes on to say that "the Petition grants the Commissioners other powers that would confer public officer status as well, such as the power to compel production of other evidence, *see* 1977 N.Y. Op. (Inf.) Atty. Gen. 176 (1977); to administer oaths, *see* 1997 N.Y. Op. Atty. Gen. 11 (1997); and the hearing of testimony, *see* 1965 N.Y. Op. (Inf.) Atty. Gen. 85 (1965)." But again Respondent fails to say *how* these authorities support his position, and a reading of them reveals that they do not.

Specifically, 1977 N.Y. Op. (Inf.) Atty. Gen. 176 (1977) (discussed above) does not involve the power to compel production of other evidence so as to confer public officer status, as Respondent represents.

Similarly, 1997 N.Y. Op. Atty. Gen. 11 (1997), does not involve the power to administer oaths as Respondent claims. Instead, what the Attorney General found there was that physicians and other health care personnel participating in a clinical program were employees within the meaning of section 17 of the Public Officers Law and, therefore they were eligible to receive defense and indemnification by the state. Thus, 1997 N.Y. Op. Atty. Gen. 11 (1997) also does not support Respondent's claim that the Petition grants the commissioners other powers that would confer public officer status as well, such as the power to administer oaths.

In 1965 N.Y. Op. (Inf.) Atty. Gen. 85 (1965), the Attorney General opined that members of a municipal urban renewal agency created by a special act of the Legislature pursuant to General Municipal Law, Art. XV-A, were public officers. Such facts are not involved here. And the taking of testimony was only one of a number of powers relied on by the Attorney General to bring the agency under the auspices of General Municipal Law § 554. The numerous other powers cited by the Attorney General include "perpetual succession, the power to appoint officers, agents and employees, prescribe their duties, fix their compensation and delegate to them such powers or duties as it may deem proper; the power to accept federal, state, municipal and other public funds; to borrow money and issue bonds and other obligations." *Id.*

Since Respondent's claim that *as a result of the foregoing*, "the members of the Commission fall *squarely* within the common law definition of public officers" (emphasis added) is not supported by the authorities he cites, his position on this matter warrants rejection.

A. Since the Commissioners Would Not Be Public Officers, They Need Not be Elected or Appointed.

On page 16 of his memorandum, Respondent notes that the State Constitution provides that officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law. Respondent also states that "local governments are empowered to amend and adopt local laws *not inconsistent with the provisions of this constitution or any general law*. N.Y. Const. art. IX, § 2(c)." (Respondent's emphasis). Similarly, Respondent notes, under the Municipal Home Rule Law, city governments may adopt and amend local laws *not inconsistent with the State Constitution or any general law*, including "the creation or discontinuance of departments of its government. N.Y. Mun. Home Rule Law § 10 (2008)." (Respondent's emphasis).

Continuing on page 17 of his memorandum, Respondent argues that "*Because* the proposed Commissioners qualify as 'officers' under New York common law, whose 'election or appointment is not provided for' by the State Constitution, they must be formally elected or appointed in order to serve in such a role. The method proposed by petitioners fails to meet the plain meaning of either 'election' or 'appointment' as those terms are used in the context of Article IX. Consequently, designation and appointment of individual commissioners by name by means of a ballot initiative would violate the State Constitution." [Emphasis added.] Here, since Respondent's arguments are based entirely on the proposition that "the proposed Commissioners qualify as 'officers' under New York common law," and Respondent has failed to show that the commissioners do qualify as public officers (as discussed above), Respondent has not

demonstrated that the designation and appointment of individual commissioners by name by means of a ballot initiative would violate the State Constitution.

On page 17 of his memorandum, Respondent says that "A petition that proposes a method of designating Commissioners that violates the State Constitution is not valid," and adds, "*See, e.g.*, *Sinawski v. Cuevas*, 133 Misc.2d at 76 (holding that a petition that proposed the removal of elected officials based upon the direct vote of the electorate was invalid because neither the Constitution nor statute authorized removal by the recall method)." However, this "elected official" case does not change the fact that Respondent has not shown that the Petition proposes a method of designating commissioners that violates the State Constitution. Hence, his pseudo *a fortiori* argument that the Petition is not valid, must fail.

In his very next sentence on page 17, Respondent proffers the following: "Furthermore, apart from any Constitutional issue, the practice of naming individuals to be members of the Commission is, in any event, improper and misleading in that the voters cannot know whether any of the individuals named would be willing and able to serve, or indeed, even be alive when the Commission is established." Inherent in the Petition language naming the commissioners (Exhibit A, Petition ¶ 3) is of course the presumption that the commissioners would have to be "alive when the Commission is established," as well as being willing and able to serve. New York City voters would certainly recognize that if a person is dead, unable, or unwilling to serve on the Commission, he would not do so.

B. As the Members of the Commission Would Not be Public Officers, They Need Not be Residents of New York City.

On page 18 of his memorandum, Respondent notes that "According to the N.Y. Public Officers Law, a local officer must be 'a citizen of the United States, a resident of the state, and . . . a resident of the political subdivision or municipal corporation of the state for which he shall be

chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised.' [citing] Pub. Off. Law § 3(1)." And yes, as Respondent further notes, Petitioners do anticipate that some commissioners will not live within City limits (see Exhibit A, Petition ¶ 12).

However, Respondent then argues that "*Because* Commissioners are local officers, any construction that permits their domicile outside New York City or New York State violates the Public Officers Law." [Emphasis added.] But again, since Respondent has *not shown* that the commissioners *are* local officers, his argument that the Petition is not valid b*ecause* commissioners are local officers, must fail here as well.

C. Petition's Severability Clause Can Be Invoked if the Court Deems the Commissioners to be Public Officers.

To the extent that the Court finds that the commissioners would be public officers, any Petition language that would be in conflict with that holding could be easily excised from the Petition, pursuant to the Petition's severability clause (Exhibit A, Petition ¶ 20), as discussed fully below at Point VI, which begins on page 46.

POINT IV
THE PETITION DOES NOT PURPORT TO GRANT THE COMMISSION POWERS THAT EXCEED THE AUTHORITY OF LOCAL GOVERNMENT, AND DOES NOT CONFLICT WITH STATE LAW.

Petitioners agree with Respondent's position that a proposal to amend the Charter must be consistent with state law, and within the scope of power conferred on the City by state law. However, Petitioners disagree with most of Respondent's other claims made in Point IV of his memorandum (at pages 19 (bottom) through page 23). Specifically, Petitioners maintain that the Petition does not create powers in the Commission that conflict with state and local law, and that

the Petition does not violate the state's Freedom of Information Law (FOIL) or Open Meetings Law. Also, the Petition language regarding the Commission's authority to "*seek* indictments…and *work with* existing prosecutorial agencies" (Exhibit A, Petition ¶ 14, emphasis added) is not an improper subject for local legislation, as Respondent alleges. With regard to the exercise of grand jury powers, Petitioners also disagree that the Petition language operates to give the Commission themselves any power to indict. And Petitioners submit that the granting of immunities and privileges to Commission members would be appropriate and proper.

In interpreting the language of the Petition, Respondent proceeds on the basis that the Petition is to be evaluated essentially as if it were a statute—see page 27 of Respondent's memorandum where Respondent states, "The standard used to determine whether a severability clause [at Petition ¶ 20, Exhibit A] can be applied is 'whether the legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether,'" citing *Greater New York Metropolitan Food Council, Inc. v. Giuliani,* 195 F.3d 100, 110 (2nd Cir. 1999). Petitioners agree with Respondent that this is the proper guideline to apply in the instant case, while submitting that the standard must be extended by way of analogy as there is no actual "statute" involved in the case at issue.

A. The Petition Does Not Conflict with FOIL or the Open Meetings Law.

On page 20 of his memorandum, Respondent notes correctly that the Petition gives the Commission "the power to maintain secrecy and confidentiality of testimony or other disclosures where appropriate" (Exhibit A, Petition ¶ 16). However, Respondent's claim that the Petition would violate the state's Freedom of Information Law (FOIL) ignores the crucial language in the Petition stating quite unequivocally that the Commission only has this power "where appropriate." There would be nothing more "appropriate" for the Commission to do than to

comply with existing law in all respects—and of course, the Commission would be duty-bound to do so, as a fair reading of the Petition would indicate. It is Respondent who turns the "where appropriate" language on its head and unfairly attributes to the Commission the unilateral subjective power to determine what is appropriate.

The Court of Appeals has held that "Where the language of a statute [here, the Petition] is susceptible of two constructions, courts will adopt that which avoids the injustice, hardship, constitutional doubts, or other objectionable results." *Kauffman & Sons Saddlery Co. v. Miller,* 298 N.Y. 38, 44 (1948); *see too* 1960 N.Y. Op. Atty. Gen. 22 (1960). Respondent's violation of this rule of statutory construction leads him to mistakenly read into the Petition, inconsistencies with FOIL's mandate and express purpose. No such inconsistencies result from a fair reading of the Petition.

Beginning on the bottom of page 20 of his memorandum of law and continuing on page 21, Respondent notes that FOIL (in Public Officers Law § 87(2)) provides exceptions to the general requirement of disclosure, although Respondent does not mention that there are in fact eleven major exceptions.[62] Respondent chooses to focus on just one exception, which permits

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[62] Public Officers Law § 87(2) provides that: Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

agencies to deny access to records in certain instances, such as when the records are compiled for law enforcement purposes and would, if disclosed, interfere with law enforcement investigations. Public Officers Law § 87(2)(e)(i). Assuming *arguendo* that Respondent is correct in his analysis and in concluding that "The Petition's assertion that the Commission is a law-enforcement agency, Petition, ¶ 10, [Exhibit A] and will be conducting investigations into the events that took place on September 11, does not suffice to have the Commission's activities covered by the exemption in § 87(2)(e)," all we seem to get from this is that one of the eleven exceptions does not apply to the Commission categorically. For after this conclusion, Respondent further concludes, "Thus, if this Commission were constituted, it could assert the law enforcement

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ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed could endanger the life or safety of any person;

(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;

iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or

(h) are examination questions or answers which are requested prior to the final administration of such questions.

(i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(j) [Deemed repealed Dec. 1, 2014, pursuant to L.1988, c. 746, § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(k) [Expires and deemed repealed Dec. 1, 2014, pursuant to L.2009, c. 19, § 10; L.2009, c. 20, § 24; L.2009, c. 21, § 22; L.2009, c. 22, § 22; L.2009, c. 23, § 9.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

exemption in specific instances depending on the nature of the records it assembled, but not simply as a categorical exemption as set forth in the Petition." But here again, Respondent is projecting onto the Commission a predisposition to *not* comply with existing law. A fairer reading would be to recognize that that the Commission *must comply with existing law*. "As a matter of statutory construction, all statutes are to be construed and applied in a manner most practicable for the purpose of accomplishing the objective of the statute." *Matter of Bishara,* 83 N.Y.S.2d 871, 873, 874 (N.Y. Sur. 1948). In contrast, Respondent is construing and applying the Petition language in a way that frustrates accomplishing the objective of the Petition which is to create a local 9/11 Commission that complies with existing law.

If the Court here finds that Respondent's reading of Petition ¶ 10 is warranted, Petition ¶ 10 could, in the Court's discretion, be amended to include the language, "To the extent otherwise permitted by law…" as an introduction; or in the alternative, the offensive language in Petition ¶ 10 could be excised entirely in accordance with the severability clause of Petition ¶ 20 (see discussion below at Point VI, beginning on page 46).

In the paragraph beginning at the bottom of page 21, in an apparent reference to the Petition ¶ 16 (see Exhibit A), Respondent notes that "The Petition also confers a right on the Commission to protects its activities, including its meetings, from public disclosure *as it deems fit."* It must be noted that the phrase "as it deems fit" is Respondent's own gloss. The Petition makes no such claim.

Having set up this straw man, Respondent goes on to say that "The conferral of this [nonexistent "as it deems fit"] right on the Commission to close its meetings 'where appropriate' conflicts with the state's Open Meetings Law." Here again, Respondent is unjustifiably attributing to the Commission a predisposition to act outside the law. A fairer reading of the

Petition's closed meetings "where appropriate" language would conclude that compliance with FOIL and the state's Public Officers Law is not only "appropriate" for the Commission, but mandatory. Adopting Respondent's approach here would violate the rule that "Not only must a court avoid a construction which would render a statute ineffective, it must accord to the statute a presumption of validity and constitutionality." *Klipp v. New York State Civil Service Commission,* 247 N.Y.S.2d 632, 636 (Sup. Ct. Suffolk Cty. 1964).

Respondent adds that "The state's Public Officers Law requires that every meeting, except for executive sessions, of a public body be open to the general public. Public Officers Law § 103. As a public body the Commission would generally be legally obligated to open its meetings, except for any executive sessions of the Commission, to the public." Agreed. However, then Respondent goes on to say, "This obligation conflicts with the Petition's stated intent 'to maintain secrecy and confidentiality of testimony. Petition, ¶ 16." Here, in fact, Respondent affirmatively deletes the language "where appropriate" from his own quote of Petition ¶ 16. What he should have said if he were quoting the Petition fairly and objectively, is that the Petition's stated intent is "to maintain secrecy and confidentiality of testimony or other disclosures *where appropriate*, Petition, ¶ 16." [Emphasis added.]" And paramount to satisfying the "where appropriate" language is the Commission's compliance with the Open Meetings Law, and other applicable law. Thus, Respondent's approach to statutory construction should be rejected in favor of following the Court of Appeals' guidance that "It is the duty of the courts to construe statutes reasonably and so as not to deprive citizens of important rights." *Pansa v. Damiano,* 14 N.Y.2d 356, 360 (1964).

In sum, Respondent's conclusion that "To the extent the Petition confers a power to close certain meetings when particular testimony is being delivered or when specific issues are being

discussed, the Open Meetings Law preempts and precludes this provision of the Petition, rendering it invalid," is based on Respondent's unfair construction of the Petition language, made in violation of basic rules of statutory construction. Respondent's conclusion is therefore untenable.

To the extent that the Court finds that language in Petition ¶ 16 is to be interpreted as Respondent alleges, and that the language is thus improper, that language can be appropriately excised from the Petition, pursuant to the Petition's severability clause (Exhibit A, Petition ¶ 20), as discussed fully below at Point VI, which begins on page 46, or modified to include clarifying language, e.g., "In accordance with the Open Meetings Law…"

B. The Petition Does Not Conflict with the Constitutional Right to Indictment by Grand Jury.

As Respondent notes on page 22 of his memorandum, the petition proposes to give the Commission "the right, to seek indictment in any relevant Court located in the City of New York, or elsewhere . . ." (Exhibit A, Petition ¶ 14). After providing a synopsis of grand jury law, Respondent concludes that "the Petition cannot grant the Commission the unilateral and discretionary power *to indict* in any court in this state." [Emphasis added.] The flaw with this analysis is that the Petition does not attempt to grant the Commission the unilateral and discretionary power *to indict* in any court in this state, as Respondent claims. Rather, Petition ¶ 14 grants the Commission the right only "to *seek* indictments. . . [and] to *work with* existing prosecutorial agencies." As he unfairly interpreted Petition language *vis-à-vis* FOIL and the Open Meetings Law (above at Point IV(A)), here Respondent is again misreading Petition language when he says that the Commission itself may exercise grand jury power. And here again, Respondent's interpretation is inconsistent with the Court of Appeals' rule that "Where the language of a statute is susceptible of two constructions, the courts will adopt that which

avoids injustice, hardship, constitutional doubts or other objectionable results." *Kauffman & Sons Saddlery Co. v. Miller,* 298 N.Y. 38, 44 (1948).

Respondent continues this same misreading of the remainder of Petition ¶ 14 when he equates the Commission's right "to *seek* the appointment of a special prosecutor under Section 701 of the New York County Law. Petition, ¶ 14" (emphasis added) with the Commission being able to *unilaterally appoint* a special prosecutor. Although "[a]s a matter of statutory construction, all statutes are to be construed and applied in a manner most practicable for the purpose of accomplishing the objective of the statute," *Matter of Bishara,* 83 N.Y.S.2d 871, 873, 874 (N.Y. Sur. 1948), Respondent's reading of the Petition again is designed to frustrate the objective of the Petition.

County Law § 701(1) does indeed specify the circumstances when a superior criminal court may appoint an attorney or a district attorney of another county to act as special district attorney, as Respondent notes. Agreed too that those circumstances are restricted to times when the district attorney or his or her assistants cannot attend a term of a court or are disqualified from acting in particular case. And yes, as Respondent states, County Law § 701 does not provide any authority for a commission such as this one to appoint a special prosecutor. However, Respondent is once more misinterpreting Petition language by reading into the Petition a right of the Commission *to itself appoint* a special prosecutor. By indicating that the Commission has a right "to *seek* the appointment of a special prosecutor," the Petition is not giving the Commission the power *to appoint* a special prosecutor. Instead, the Petition is merely attempting to indicate that the Commission can go through proper channels and authorities (via "work[ing] with" district attorney offices) to *request* that they appoint a special prosecutor. Instead of adopting Respondent's reading, the Court should be guided by the Court of Appeals'

directive that "Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results." *Kauffman & Sons Saddlery Co. v. Miller,* 298 N.Y. 38, 44 (1948)

To the extent that the Court finds that any of the Petition ¶ 14 language discussed in this Point IV(B) is to be interpreted as Respondent maintains, and that the language is thus improper, that language can be appropriately excised from the Petition, pursuant to the Petition's severability clause (Exhibit A, Petition ¶ 20), as discussed fully below at Point VI, which begins on page 46.

C. Petition's Conferral of Immunities on Commission Members is Proper.

As Respondent notes on page 23 of his memorandum, the Petition also gives the Commission "the same immunities, privileges and prosecutorial discretion granted under law to elected prosecutors" (Exhibit A, Petition ¶ 15). Petitioners agree, as Respondent notes, that the common-law immunity of prosecutors is well-established.

But Respondent goes on to claim that "there is no legal basis for the conferral of the same immunity possessed by prosecutors," while offering absolutely no legal authority for this position. Similarly, Respondent offers no legal authority for his pronouncement that the Commission "may not. . . receive a delegation of this nature." Since Respondent has provided no basis in law for these assertions, they should be rejected out of hand.

To the extent that the Court finds that any of the Petition ¶ 15 immunity language discussed in this Point IV(C) is to be interpreted as Respondent maintains, and that the language is thus improper, that language can be appropriately excised from the Petition, pursuant to the Petition's severability clause (Exhibit A, Petition ¶ 20), or the immunities language may be

modified in the Court's discretion, as discussed fully below at Point VI, which begins on page 46.

POINT V
THE PETITION'S SUBJECT MATTER IS A PROPER AMENDMENT OF THE CITY CHARTER.

On page 24 of his memorandum, Respondent notes that MHRL § 37(1) states that a petition for a popular referendum must propose a local law that either amends a City Charter or provides a new City Charter. He then goes on to say that "The Petition neither amends a Charter provision in substance nor provides for a new city charter." Petitioners disagree.

Authority for the initiative and referendum procedure is found in MHRL §37(1) which permits a referendum to be submitted to the electorate for adoption of "[a] local law amending a city charter (*however extensively*)." [Emphasis added.]

At issue in *Matter of Astwood v. Cohen*, 291 NY 484 (1944), which Respondent cites as authority for his position (on page 24 of his memorandum), was a proposed law which would have given a salary bonus to members of the Police and Fire Departments in the City of New York. To determine whether the proposed local law was in truth an amendment to the Charter or so far unrelated to the Charter as to be an amendment only in name, the court examined the proposed local law and its relation to the provisions of the Charter. There, the court struck down the proposed law, finding that the Charter was a "short form" document which contained the fundamental and organic law of the City of New York. As the statutes governing the operation of city government were to be found in the Administrative Code of the City of New York, the *Astwood* court held that the proposed local law neither altered, nor amended anything in the Charter, but rather related directly to provisions found in the Administrative Code.

However, the inclusion of the phrase "however extensively" in MHRL §37 undermined much of the *Astwood* decision. Then, *Matter of Warden (Newburgh Police Dept.)*, 300 NY 39 repudiated this "legislative/administrative" test. Irrelevant therefore is the issue of whether a proposed local law seeking to amend an existing Charter provision is legislative or administrative in nature. Undecided by *Warden*, is the question of whether an amendment to a short-form charter consisting of matter which is unrelated to existing Charter provisions may be adopted by initiation and referendum.

Matter of Cassese v. Katz, 26 AD2d 248, *aff'd* 18 NY2d 694, cited by Respondent on page 24 of his memorandum, concerned a referendum to establish a review board to investigate complaints of brutality committed by members of the police force of the City of New York. Given that the proposed amendment was held to affect the plenary power of the Police Commissioner to discipline members of the force, the proposed local law was found to be related to an existing Charter provision and was thus subject to amendment by the initiative and referendum procedure.

In *Adams v. Cuevas*, 133 Misc.2d 63 (1986), cited by Respondent on page 24 of his memorandum, the petitioner, individually and on behalf of an organization known as the Committee for New York's Future, sponsored an initiative to amend chapter 24 of the New York City Charter. The initiative required the City's Commissioner of Social Services to provide every homeless family with an enclosed separate sleeping area at a cost of $30 million to be funded by state revenues under Social Services Law § 91 or from the general fund or through increases in the resident income tax and the nonresident earnings tax. One of the issues therein was whether the initiative was a proper subject for an amendment to the Charter. The court

concluded that the homeless family initiative was not directly related to an existing provision of the Charter.

Unlike the situation in *Adams v. Cuevas*, and contrary to Respondent's contention, the creation of a temporary investigative Commission regarding the events leading up to and on 9/11, does in fact relate to the amendment of existing Charter provisions. One such example is Chapter 19-A, Section 498, which provides for an emergency Management Department which is designated to be "the lead agency in the coordination and facilitation of resources in incidents involving public safety and health, including incidents which may involve acts of *terrorism.***"** [Emphasis added.] The section specifically requires all other agencies to provide the Management Department with relevant information for use in future emergency planning. The proposed Commission, created as an amendment to Sec. 498, would clearly constitute an expanded Agency resource, though, on a temporary basis, for the development of emergency planning functions as a result of 9/11. And as a result of information gathered through its public hearings, the proposed Commission would be able to provide substantial information which would be of use also the Management Department in carrying out its functions.

The establishment of the Commission would also amend Chapter 34, Secs. 803 – 805. These sections provide the Department of Investigation with full powers and duties to study and investigate an issue or event which is in the best interests of the City, and publish "a written report or statement of findings." In the event that the investigation reveals criminal conduct, a copy of the report and findings can be forwarded to the appropriate prosecuting attorney. (Sec. 803) The evidence adduced must be taken under oath and compelled by subpoena where necessary (Sec. 805), a process identical to that to be used by the proposed Commission. Thus, the establishment of a temporary investigative Commission for a specific investigative purpose,

clearly amends and adds to the investigative functions of the Department of Investigation by creating a temporary adjunct which would collaborate and liaise to the existing Department. The details of this collaboration and liaison, in order to put flesh on the bones of the arrangement, would necessarily have to be worked out. Although such degree of detail is not to be appropriately included in a basic law document like the Charter, the amendment of Secs. 803 and 805 does temporarily extend the Department of Investigation's scope to include the proposed temporary Commission with a specific purpose.

Additionally, the Petition would amend Chapter 51, Sec. 1147, which preserves existing rights and remedies. By enabling the establishment of a Commission to focus on particular rights and remedies of the citizens affected by the 9/11 disaster, the Petition would provide specificity to the underlying purpose of Sec. 1147. Accordingly, it is the right of the victims' families, and the ill and dying First Responders, to have answers to the legion of unanswered questions concerning the attacks. Further, it is also only just and fair for those victims, when some or all of these answers are confirmed, to be able to take advantage of any available remedies which are preserved by Sec. 1147. In effect, what the Petition here does is amend by adding specificity to the general purpose of the section which explicitly reminds us that neither the Charter itself, nor any interpretation of its provisions, shall be used to "impair" the preservation and exercise of rights such as those referred to above, which are central to the instant case.

Petitioners respectfully submit that given the nature of the amendments set out above, and in particular because the Commission has a temporary fixed period of activity, it is not possible to draft specific language amending each of the relevant Charter sections. This, however, in no way detracts from the reality that in fact and law, the establishment of the temporary

Commission and its functions would constitute specific amendments to the relevant provisions. It is undeniable that the scope and functions of the affected City departments would be altered for the period of allotted time, and so clearly their status under the Charter would be amended.

The New York City Charter sets forth the powers of the Mayor, the Council, the Borough Presidents, the Comptroller, City agencies, boards and commissions in the context of a broad outline of New York City government. Because the Charter was intentionally drafted to be a broad structural document of the City government and the manner in which it is to operate, the question of relatedness should be broadly construed. When so considered, Petitioners' proposal for a local law to create a temporary Commission tasked with investigating a particular unprecedented event imbued with such significance to the citizens and voters of the City of New York, should be deemed related the City's Charter. That the detailed Administrative Code contains laws establishing temporary commissions to examine particular matters is irrelevant, according to the *Warden* case.

In *Matter of Juntikka v. Cuevas*, Index No. 116778 (Sup. Ct. N.Y. Co. 1996), cited by Respondent on pages 24 and 28 of his memorandum, petitioners sought a referendum to amend the New York City Charter to place a $100 limit on campaign contributions for candidates participating in the voluntary campaign finances reform system, and to increase the current matching grants to participating candidates under certain circumstances, as well as a referendum to amend the City Charter to establish a system of televised debates for certain candidates for City elective offices. Applying the *Admas v. Cuevas* test to determine whether an initiative petition is proper, the *Juntikka* court invalidated the petitioners' attempt to amend chapter 46. But contrary to the *Juntikka* case, the initiative sought herein is directly related to an existing provision of the Charter and does not expand the scope of the initiative and referendum

procedure. Nor is the Petition here inconsistent with state or federal law. Petitioners' plan would not restrict the budgetary authority of the City Council and Mayor by requiring that the budget contain specific appropriations and specific annual increases in a budget item, and it is not inconsistent with the authority granted the Mayor and Council in the budgetary process under existing Charter provisions.

In *Van Ness v. Cuevas,* Index No. 116570 (1997), cited by Respondent on page 25, the petitioners there proposed an amendment to the City Charter creating a Department of Animal Affairs, headed by a Commissioner of Animal Affairs, with a clearly delineated powers and obligations. Because the Charter Section 40 initiative was long and detailed and therefore exceeded the Charter's purpose of providing 'only the essentials of the organization of each department,' the Supreme Court upheld the City Clerk's determination of invalidity. However, unlike the proposed amendment in *Van Ness,* the Petitioners' plan herein does not contain a level of specificity unsuitable to the City's short-form charter. Instead, the Petition is a broad grant of power to establish a local commission, whose jurisdictional term would coincide with the fulfillment of its purpose. Neither state nor local law would be superseded.

There is also the argument, conveniently ignored by Respondent and the courts in prior proceedings (though in the latter instances it may well be that petitioners' counsel did not raise the argument), that a Charter, like a Constitution, may be amended through the inclusion of a provision which in whole or part goes beyond the scope of the existing provisions. This is self evident if one examines the Federal Constitution of the United States, or other State Constitutions. In fact, a municipal charter constitutes the basic law of the City much as the State or Federal Constitution is the basic law of those political entities. It is well established that such basic law documents may be amended by the alteration of their existing provisions or by means

of the inclusion of new provisions, and again, this is self evident in the readily observable practice. In the instant case, the Petition does indeed relate to the existing Charter sections, as set forth above. To the extent that the Petition contains new amendatory substance, it is respectfully submitted that this Court should not throw the baby out with the bath water by perfunctorily denying the legitimacy of the proposed amendments embodied in the Petition.

POINT VI
THE PETITION'S SEVERABILITY CLAUSE IS SUFFICIENT TO SAVE THE PROPOSED LAW FROM ANY INFIRMITIES IF THE COURT FINDS THAT INFIRMITIES ACTUALLY DO EXIST

As Respondent notes on page 27 of his memorandum, the Petition contains a severability clause. The severability clause provides that "If any provision of this law is held to be unconstitutional or invalid for any reason, the remaining provisions shall be in no manner affected thereby but shall remain in full force in effect." (Exhibit A, Petition ¶ 20). As Respondent recognizes, the severability clause is in place to ensure that any finding of invalidity regarding any particular provision(s) of the Petition will not affect the remainder of the proposed local law.

Respondent goes on to claim that "the extensive nature of the flaws in the Petition makes application of the severability clause impossible," and with this Petitioners disagree. Respondent continues on page 27 of his memorandum saying that the standard used to determine whether a severability clause can be applied is '"whether the legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether,'" citing *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100, 110 (2nd Cir. 1999) (citations omitted). Petitioners acknowledge that this is a proper standard to apply in the instant

case, while submitting that the standard must be extended by way of analogy as there is no actual "statute" or "legislature" involved in the case at issue.

Adapting that standard to the facts herein, the "statute" at issue here would be represented by the Petition itself. And just as the legislature is the drafter of the statutory language referred to in the standard above, the Petitioners here represent the interests of the (actual) drafters of the Petition language. Applying the rule of *Greater New York Metropolitan Food Council, Inc. v. Giuliani Id.,* if the Court here finds that there are "invalid parts" of the Petition, Petitioners most certainly would want the Court to enforce the Petition with the invalid parts exscinded, rather than having the Court reject the Petition altogether.

Continuing on page 27 of his memorandum, Respondent goes on to note that his legal objections to the Petition "are fundamental; for example, the entire proposal is not a proper amendment to the Charter and the investigation of the events leading up to, and on, September 11 is an activity more appropriate to the national government than the local one." Petitioners have refuted Respondent's Charter and jurisdictional claims in this memorandum at Point II and Point V, respectively, beginning on page 20 and page 40, respectively .

Respondent stretches the bounds of credulity when he goes on to say that "When considering a petition presenting *similar objections*, the Court of Appeals held that there was no need to attempt to implement the severability clause. *See, e.g.*, *Fossella v. Dinkins*, 66 N.Y. 2d at 167 where the Court said, "The resolution is manifestly invalid in a substantive respect, since the disposition and use of city land is at the *core of the controversy* . . . it would be inappropriate to submit the proposition to the electorate in a redacted and possibly confusing form' [citations omitted])." [Emphases added.] Although the *objections* in that case may have been *similar* to the objections here, as Respondent claims, the facts there are not at all similar to the facts here. As

Respondent notes (in the quote immediately above), *Fossella v. Dinkins* involved the disposition and use of city land and this is what formed "the core of the controversy." City land is not at the core of the controversy in the instant case, or even remotely involved. As noted immediately above, in *Fossella v. Dinkins,* the court held that "*Since* the disposition and use of city land [was] at the core of the controversy . . . it [was] inappropriate to submit the proposition to the electorate in a redacted and possibly confusing form." [Emphasis added.] However, since the disposition and use of city land is *not* at the core of the controversy here, the holding that followed in *Fossella v. Dinkins* (to not submit the proposition to the electorate) should not be mechanically applied here to the deprive New York City voters of their right to consider having a local 9/11 Commission.

Respondent claims that "It is not possible to implement this petition's severability clause because the invalid parts of this petition cannot be exscinded without eviscerating the petition in its entirety," but does not indicate what efforts, if any, were made before he apparently leaped to this conclusion, or why it would be so terribly impossible.

Respondent then goes on to say that consistent with this (assumptive) approach, courts have invalidated petitions notwithstanding that they contained severability clauses. True, but it does *not* follow (as Respondent would have us follow) that the Petition here must be thrown out in its entirety despite the severability clause. As Respondent freely admits on page 27 of his memorandum, courts have also found that local laws could be severed by applying a severability clause, as in *Greater New York Metropolitan Food Council, Inc. v. Giuliani,* 195 F.3d 100, 110 (2nd Cir. 1999), cited by Respondent. In that case, advertisers sued New York City, alleging that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted the City's "tombstone provision" in its "Youth Protection against Tobacco Advertising and Promotion Act," which

prohibited most outdoor, and some indoor, advertising of tobacco products within 1,000 feet of any school building, playground, child day care center, amusement arcade or youth center. The tombstone provision was codified as Article 17-A to Title 27, Chapter 1, subchapter 7, of the New York City Administrative Code §§ 27-508.1 to 27-508.6. In that case, the Second Circuit (applying New York law) found that the tombstone provision was indeed severable from the rest of Article 17-A, saying "That the City Council would have wished the bulk of Article 17-A to be upheld despite the invalidity of the tombstone provision seems beyond doubt. Severance of the tombstone provision would not, in our view, significantly interfere with the central thrust of Article 17-A-to limit cigarette advertising in areas where young people are likely to congregate. This conclusion is reinforced by the City Council's inclusion of an express severability clause indicating its general desire to salvage any valid portions of the ordinance in the event that another portion is adjudged invalid." The Second Circuit went on to cite *National Advertising Co. v. Town of Niagara,* 942 F.2d 145, 148 (2d Cir. 1991) (New York law) for the authority that "The preference for severance is particularly strong when the law contains a severability clause." This preference for severance should be applied to the Petition's severability clause here, because it is Petitioners' "general desire to salvage any valid portions of the ordinance in the event that another portion is adjudged invalid."

Since "[t]he preference for severance is particularly strong when [New York] law contains a severability clause," as indicated by the Second Circuit in *National Advertising Co. v. Town of Niagara*, *Id.,* Petitioners submit that, despite Respondent's baseless claim that "it would be a meaningless and fruitless exercise to attempt to sever the invalid provisions [of the Petition] so as to preserve the valid ones," Petition's severability clause can easily be implemented to excise any Petition language held to be improper, while preserving the integrity of the Petition.

For example, if the Court agrees with Respondent's position that the commissioners would be public officers (as discussed at Point III herein, beginning on page 25), the Petition language inconsistent with the Public Officer Law (e.g., the Petition ¶ 12 language regarding non-residency) could be excised in accordance with the Petition's severability clause; and, in the Court's discretion, language could be inserted in the Petition to provide that "The commissioners *must* comply with New York's Public Officer Law in order to serve on the Commission." Clearly, the Petitioners would want the Court to effectuate this type of result rather than throwing out the Petition in its entirety, and under New York law (see discussion of *National Advertising Co. v. Town of Niagara*, above), preserving the Petition as amended is the proper approach.

Similarly, as to Respondent's charge that Petition ¶ ¶ 10 and 16 conflict with FOIL and the Open Meetings Law, as discussed at Point IV(A) herein, beginning on page 32: if the Court agrees with Respondent, the offending language in Petition ¶ ¶ 10 and 16 also could be excised in accordance with the Petition's severability clause, which would have the effect of syncing the Petition language to existing law. Alternatively, the Court, in its discretion, could add language to the Petition clarifying that the law that the Petition would seek to create "must be applied subject to existing law [e.g., FOIL and the Open Meetings Law]."

With regard to the discussion of grand jury indictments discussed herein at Point IV(B), beginning at page 37, if the Court accepts Respondent's position with regard to Petition ¶ 14—which provides that "The Commission by majority vote shall have the right, to seek indictments in any relevant Court located in the City of New York, or elsewhere and, at its discretion to work with existing prosecutorial agencies or to seek the appointment of a special prosecutor under Section 701 of the New York County Law"—and finds that the language is improper, then Petition ¶ 14 can simply be excised in accordance with the Petition's severability clause.

Alternatively, the Court could amend the language in Petition ¶ 14 to read as follows: "The Commission by majority vote shall have the right to *recommend to existing prosecutorial agencies* that they *bring* indictments in any relevant Court located in the City of New York, or elsewhere and, at its discretion [delete "to"] work with existing prosecutorial agencies *and/*or *recommend that they* seek the appointment of a special prosecutor under Section 701 of the New York County Law…." (added language emphasized).

Another example of the ease in which the Petition's severability clause could be implemented pertains to Respondent's allegation discussed at Point IV(C) herein, beginning on page 39, that the conferral of immunities on Commission members is improper. The offending language (in Petition ¶ 15, Exhibit A) could be excised pursuant to the Petition's severability clause, or modified in the discretion of the Court. If the latter, language could be inserted to indicate that the immunity policy that would extend to the Commissioners would be the immunity policy that exists or has existed with respect to the Boards and Commissions currently or previously functioning in New York City. Or the policy could be modeled after the immunity granted commissioners of the federal 9/11 Commission. Or the commissioners could be covered by a capped-indemnity fund set aside from the contributions to be used solely for any necessary legal defense against civil actions, all in the Court's discretion.

CONCLUSION

As set forth herein, the Petition does comply with "all requirements of law" as it must pursuant to Section 37 of the Municipal Home Rule Law. Any of the alleged Petition language deficiencies discussed can be easily excised pursuant to the Petition's severability clause, or in the Court's discretion by adding clarifying language. Thus, Petitioners respectfully request that

the Court enter an order declaring the Petition valid and eligible for placement on the November 3, 2009 election ballot, and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 21, 2009

Dennis P. McMahon
Attorney for Petitioners