NEW YORK STATE OF OPPORTUNITY.
Board on Electric Generation Siting and the Environment

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July 28, 2021

Via Digital Copy Portal
Hon. Mark W. Bennett
Clerk of the Court
Supreme Court Appellate Division, Fourth Department
M. Dolores Denman Courthouse
50 East Avenue
Rochester, New York 14604

Re: *Coalition of Concerned Citizens v. New York State Bd. on Elec. Generation Siting & the Envt.*, Docket No. OP 20-1405

Dear Mr. Bennett,

I write on behalf of Respondent New York State Board on Electric Generation and the Environment (Siting Board) in response to the July 22, 2021 post-briefing submission of Petitioners Coalition of Concerned Citizens *et ano.* (Coalition) in the above-referenced original special proceeding. That submission includes two recent United States Supreme Court decisions that the Coalition purports to be supplemental authority in support of its unpreserved First Amendment cause of action.

While the Siting Board does not object to the Coalition's submission, its contents and arguments are not relevant to this case. The Court should recognize that even if the Coalition had preserved for judicial review its First Amendment claim, its post-briefing submission does not remediate its failure to have stated a cause of action in the first instance. Nothing in either of the two recent Supreme Court decisions resolves these fatal flaws.

No court has ever held that the First Amendment is implicated where – as is the case here – it is alleged that the practices of religious adherents will be affected

by governmental approval of activities proposed to take place on other persons' properties. Conversely, as the Supreme Court recognized in *Lyng v. Northwest Indian Cemetery Protective Assn.*,[1] there is no First Amendment cause of action unless the government is affirmatively (1) coercing individuals to violate their religious beliefs or (2) targeting religious conduct or beliefs.

Importantly, neither of the Supreme Court opinions that the Coalition submits as supplemental authority changes the pre-existing jurisprudence so as to entitle the Coalition to bring a First Amendment claim on behalf of the Swartzentruber Amish. In *Mast v. Fillmore County*,[2] the government demanded – under threat of penalty – that Amish citizens install septic systems on their own properties in violation of their religious beliefs. In *Fulton v. City of Philadelphia*,[3] the government affirmatively burdened a foster care agency's religious beliefs by forcing it to either curtail its mission or approve relationships inconsistent with its beliefs. Here, by contrast, the Siting Board has not required the Swartzentruber Amish to locate wind energy turbines on their own properties. Nor has it demanded, either conditionally or unconditionally, that they cease or limit any of their religious practices or beliefs. The *Mast* and *Fulton* cases, therefore, are inapposite to the circumstances of the instant special proceeding.

The *Mast* case, moreover, is also inapplicable because it did not concern a First Amendment claim. The plaintiffs in that case had claimed that the government violated the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA). In any event, the Coalition did not raise a RLUIPA claim in either its petition or its briefs. To the extent it is belatedly attempting to set forth a RLUIPA claim, this Court should not hear it.

Thank you for your consideration.

Respectfully,

/s/John C. Graham

John C. Graham
Assistant Counsel

cc: Counsel to parties

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[1] 485 U.S. 439 (1988).
[2] 141 S.Ct. 2430 (July 2, 2021).
[3] 141 S.Ct. 1868 (June 17, 2021).