The Dax Law Firm, P.C.

54 State Street, Suite 805
Albany, New York 12207
www.daxlawfirm.com

Telephone: (518) 432-1002
Facsimile: (518) 432-1028

John W. Dax

William F. McLaughlin*
**Also Admitted in Massachusetts & District of Columbia*

July 27, 2021

Digital Portal

Mark W. Bennett, Clerk of the Court
Supreme Court of the State of New York
Appellate Division, Fourth Judicial Department
50 East Avenue, Suite 200
Rochester, New York 14604

Re: Docket No. OP 20-01405

Coalition of Concerned Citizens and Dennis Gaffin, as its President v. New York State Board on Electric Generation Siting and the Environment, Alle-Catt Wind Energy LLC
Appellate Division, Fourth Department

Dear Mr. Bennett:

Please accept this letter on behalf of Respondent Alle-Catt Wind Energy LLC (ACWE) in response to Mr. Abraham's letter dated July 23, 2021, providing additional argument in support of the petition of Coalition of Concerned Citizens (Coalition). Mr. Abraham's letter supplements the Coalition's briefs with additional argument thinly veiled as an offer to provide supplemental authority not available during briefing. Mr. Abraham has used two recently issued decisions by the United States Supreme Court (Supreme Court) as a means to further refine the Coalition's arguments in ways never presented to the New York State Board on Electric Generation Siting and the Environment (Siting Board) and therefore not properly before this Court pursuant to Public Service Law § 170.

The two new Supreme Court decisions, in fact, undermine the Coalition's arguments putatively made on behalf of Amish residents, who the Coalition has claimed are unable to represent their own interests. In *Fulton v City of Phila., Pennsylvania*, 141 S Ct 1868 (2021), the Court held that the City's refusal to renew its contract with a Catholic foster care agency, unless the agency agreed to certify same-sex couples as eligible to adopt children, violated the foster care agency's First Amendment rights because it would require the agency to act contrary to its beliefs by operation of a system that was not generally and neutrally applicable. In *Mast v Fillmore County, Minnesota,* 141 S Ct 2430 (2021), the Court found the enforcement of a requirement to install modern septic systems against Amish residents violated the First Amendment rights of the Amish petitioner. These decisions follow the line of cases discussed in the briefs, including *Wisconsin v. Yoder*, 406 US 205 (1972) and *Sherbert v Verner*, 374 US 398 (1963) in which

observant religious practitioners were directed to take actions or were prohibited from taking actions which would require them to act contrary to their religious beliefs.

The Siting Board orders under review do no such thing. No member of the Amish community has been directed by the Siting Board to do or refrain from doing anything. The Coalition's argument can be reduced to the idea that New York State must implement its renewable energy policies in a manner that proactively advances religious practices of the Swartzentruber Amish. Such claim runs afoul of the Establishment Clause of the First Amendment.

The Amish have the unquestionable right to practice their religion but not at the expense of their neighbors' rights to use their private property lawfully. This principle was underscored by the Supreme Court in *Wisconsin v. Yoder*, 406 US 205, 224 (1972):

> A way of life that is odd or even erratic *but interferes with no rights or interests of others* is not to be condemned because it is different.

(Emphasis supplied). As the Court held in *Bowen v. Roy*, 476 US 693 (1986) (upholding a requirement that parents seeking welfare benefits for their children obtain a Social Security Number for their children),

> the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.

(476 US at 700).

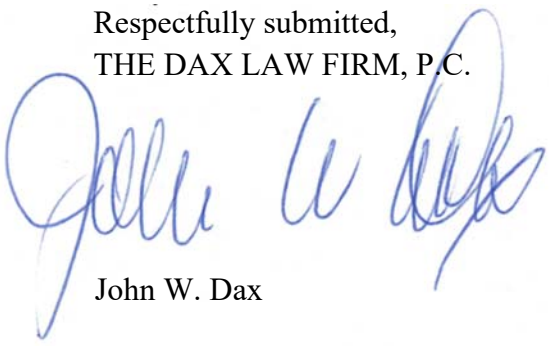
The Coalition's argument that the Siting Board granted an "individualized exception" from setbacks also fails. In a newly minted argument not presented to the Siting Board the Coalition argues that a condition imposed by the Siting Board restricting the proximity of wind turbines to State Forest land constitutes the kind of "individualized exception" that requires strict scrutiny be applied to the Siting Board's decision not to grant a turbine setback specifically designed to protect Amish neighbors.

First, the analysis is inapt. No "individualized exception" of the sort at issue in *Sherbert v Verner* was created. The question the Hearing Examiners and Siting Board addressed was whether and how to apply local law setback requirements to State Forest land. Applicable local laws require a setback of 1.1 times turbine height from the property lines of non-project-participating landowners. ACWE sought a reduced setback in the case of State Forest lands because no residences were at issue. The Hearing Examiners recommended, and the Siting Board agreed, to enforce the local law setback at the State Forest property lines. The Siting Board also converted the 1.1 times turbine height into a minimum setback, although that step had no practical effect since it was unnecessary. (R. 358:31-35, pdf page 189; R. 399:14-21) Second, by imposing a

condition limiting turbine proximity to State Forest land the Siting Board simply exercised its authority to protect the recreational and environmental values supported by State Forests. The Siting Board has no parallel authority to advance religions by creating specifically designed limitations on the private property rights of others.

For the reasons expressed here, assuming that the Coalition has standing to raise First Amendment claims unique to the Amish and that the new arguments have been properly preserved, the arguments urged by the Coalition should be rejected.

Respectfully submitted,
THE DAX LAW FIRM, P.C.



John W. Dax

JWD:lmd
Enclosures
cc: Via Electronic Mail and U.S. Postal Service First Class

Attorney for Petitioners Coalition of Concerned Citizens

LAW OFFICE OF GARY A. ABRAHAM
Gary A. Abraham, Esq.
4939 Conlan Road
Great Valley, New York 14741

NYS Attorney General

NYS Office of the Attorney General
The Capitol
Albany, New York 12224-0341

New York State Board on Electric Generation Siting and the Environment

John C. Graham, Esq., Office of Counsel
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223