

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of

VAPOR TECHNOLOGY ASSOCIATION, BENEVOLENT  
ELIQUIDS INC., and PERFECTION VAPES, INC.,

Petitioners,

against

ANDREW M. CUOMO, Governor of the State of New York,  
NEW YORK STATE DEPARTMENT OF HEALTH,  
HOWARD ZUCKER, M.D., Commissioner of  
New York State Department of Health, THE PUBLIC  
HEALTH AND HEALTH PLANNING COUNCIL,  
and NEW YORK STATE POLICE,

Index No. 906514-19

**ORAL ARGUMENT  
REQUESTED**

Respondents.

For a Judgment Under Article 78 of the Civil Practice Law  
And Rules in the Nature of ANNULMENT, DECLARATORY  
JUDGMENT AND PRELIMINARY AND PERMANENT  
INJUNCTIVE RELIEF.

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**MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO FILE  
AMICI CURAE BRIEF IN SUPPORT OF RESPONDENTS**

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Petitioners Vapor Technology Association (“VTA”), Benevolent ELiquids, Inc. (“Benevolent ELiquids”), and Perfection Vapes, Inc. (“Perfection Vapes” and together with VTA and Benevolent ELiquids, collectively, “Petitioners”), by and through their undersigned counsel, Thompson Hine LLP, respectfully submit this memorandum of law in opposition to the Motion for Leave to File Amici Curiae Brief in Support of Respondents (“Amici Motion”), dated October 11, 2019. For the reasons stated below, Petitioners respectfully request that the Amici Motion be denied in its entirety.

### **PRELIMINARY STATEMENT**

On September 25, 2019, Petitioners filed their application, made by Notice of Petition and Petition dated September 24, 2019, with a return date of October 25, 2019, and by Order to Show Cause, for an Order and Judgment declaring void Respondents’ enactment of an amendment to Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”) to add a new Subpart 9-3, titled “Prohibition on the Sale of Electronic Liquids with Characterizing Flavors” (the “Emergency Rule”), and seeking temporary, preliminary, and permanent injunctive relief preventing Respondents from enforcing the Emergency Rule. [Dkt. Nos. 1, 19, 23.] On September 30, 2019, Petitioners and Respondents appeared before this Court on the Order to Show Cause, at which time the Court denied Petitioners’ application for a temporary restraining order and set October 18, 2019, as the return date for Petitioners’ motion for preliminary injunction. [Dkt. No. 32.] Subsequently, on October 3, 2019, following Petitioners’ motion, the Appellate Division, Third Judicial Department, issued a decision and order granting Petitioners a temporary restraining order pending the determination on Petitioners’ application for a preliminary injunction. [Dkt. No. 35.] Pursuant to the Order to Show Cause entered by this Court, on October 10, 2019, Respondents filed their opposition to

Petitioners' application for a preliminary injunction, and on October 16, 2019, Petitioners filed their reply.

Without contacting Petitioners to seek permission, the proposed Amici filed their Amici Motion on Friday, October 11, 2019, at 8:51 p.m., i.e., less than one week before the return date of Petitioners' application for a preliminary injunction. Despite not proceeding by order to show cause, proposed Amici set the return date of the Amici Motion for October 18, 2019. Because Monday, October 14, 2019, was a holiday (Columbus Day), this left Petitioners with two business days to respond to the Amici Motion – at the same time that Petitioners were responding to Respondents' opposition to the preliminary injunction application.

## ARGUMENT

### **I. LEGAL STANDARD**

“[T]here is no right to file an amicus brief” in the Supreme Court. *Price v. N.Y.C. Bd. of Educ.*, 16 Misc. 3d 543, 553, 837 N.Y.S.2d 507, 516 (Sup. Ct. N.Y. Cnty. 2007), *aff'd*, 51 A.D.3d 277, 855 N.Y.S.2d 530 (1st Dep't 2008). “Because no such additional submission is as of right, a court must be free to reject or accept such a submission at its discretion, and in exercising such discretion, may adopt its own general rules to govern amici if it wishes.”<sup>1</sup> *Id.*; *Spota v. Cnty. of Suffolk*, No. 04268/2012, 2012 N.Y. Misc. LEXIS 4633, at \*12 (Sup. Ct. Suffolk Cnty. Sept. 25, 2010), *appeal dismissed by, in part, aff'd by, in part*, 110 A.D.3d 785, 973 N.Y.S.2d 657 (2d Dep't 2013).

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<sup>1</sup> “The Court of Appeals is the only court that has promulgated a rule specifying the standard for granting a motion for amicus curiae status.” *Kruger v. Bloomberg*, 1 Misc. 3d 192, 197, 768 N.Y.S.2d 76, 82 (Sup. Ct. N.Y. Cnty. 2003) (citing 22 NYCRR 500.11(e)). Additionally, both the Second and Fourth Departments have promulgated procedural rules pertaining to the filing of amicus briefs. *Id.* at 197-98 (quoting 22 NYCRR 670.11(a) (Second Dep't) and 22 NYCRR 1000.13(k) (Fourth Dep't)). Each of these rules has been synthesized in the criteria in *Kruger*, set forth above.

Nevertheless, in *Kruger v. Bloomberg*, the court identified the following criteria as relevant to “evaluating . . . amicus curiae status”:

- 1) whether the movant seeking amicus curiae status moves by order to show cause[,] the preferable procedure . . . ;
- 2) whether the affidavit/affirmation in support indicates the movant’s interest in the issues to be briefed and sets forth the issues, with a proposed brief attached;
- 3) whether the affidavit/affirmation in support indicates:
  - a. a showing that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; or
  - b. that movant would invite the court’s attention to the law or arguments which might otherwise escape its consideration; or
  - c. that its amicus curiae brief would otherwise be of special assistance to the court; and
- 4) whether the amicus curiae application or status would substantially prejudice the rights of the parties, including delaying the original action/proceeding; and
- 5) whether the case concerns questions of important public interest.

1 Misc. 3d at 198. Courts routinely apply the *Kruger* factors in determining whether to grant a motion by amici to file a brief. *See, e.g., Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450, 454, 940 N.Y.S.2d 458, 462 (Sup. Ct. Tompkins Cnty. 2012) (applying *Kruger* factors to proposed amici to an Article 78 proceedings); *Steglich v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, No. 104300/11, 2011 N.Y. Misc. LEXIS 3044, \*19-20 (Sup. Ct. N.Y. Cnty. May 20, 2011).

**A. The Amici Motion Is Procedurally Defective.**

The Amici Motion was required to be set with the same return date as the Petition – October 25, 2019. CPLR 406 (“Motions in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time.”) But proposed

Amici instead improperly noticed the Amici Motion with a return date of October 18, 2019, a full week before the return date of the Petition. Had proposed Amici wished to set an earlier return date, they should have proceeded by order to show cause, which is the preferred method for seeking amicus status. *Kruger*, 1 Misc. 3d at 198 (discussing that proceeding by order to show cause is the “preferable procedure” for a motion for leave to file an amicus brief). Instead, proposed Amici are improperly seeking an earlier return date – contrary to CPLR 406 – without proceeding by order to show cause.<sup>2</sup> For this reason alone, the Amici Motion is procedurally defective and should be denied. *See Anschutz*, 35 Misc. 3d at 453 n.3 (denying motions for leave to file amicus brief filed “only days” prior to the scheduled return date) (citing 22 NYCRR 500.23(a)(1)(iii) (illustrating that Court of Appeals routinely denies untimely filed motions for leave to file amicus briefs)).

**B. Proposed Amici Fail to Satisfy the *Kruger* Criteria and The Amici Motion Should Be Denied.**

The proposed Amici fail to satisfy several of the *Kruger* criteria, including the key criteria focused on whether Amici’s proposed brief would assist the Court in analyzing the *legal* issues at stake in this proceeding. Instead, proposed Amici wish to drown the Court in additional purported studies and data – i.e., facts – to support Respondents. That is fundamentally not the purpose of an amicus brief and permitting the filing of such papers at such a late date before the return date of the Petition would severely prejudice Petitioners.

**1. The Amicus Motion Improperly Raises Factual Issues And Does Not Assist the Court In Analyzing the Legal Issues In This Case.**

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<sup>2</sup> Even putting aside the requirements of CPLR 406, the notice of motion is further procedurally defective because it was noticed only *seven* days before the return date, instead of the eight days required by CPLR 2214.

Proposed Amici describe themselves, and by extension the “assistance” they can provide to the Court in this case, as “possess[ing] invaluable expertise on issues relating to youth usage of tobacco products, as well as experience developing, and advocating for, policies to curb tobacco use, particularly among young people in New York.” Affirmation of Christopher K. Leung in Support of Motion for Leave to Filed Amici Curiae Brief in Support of Respondents (“Leung Aff.”), ¶ 30. This representation underscores the precise reason why the Amici Motion should be denied: Proposed Amici do not have an interest in this case and cannot assist the Court in understanding the *legal* issues involved.

To be sure, the legal issue in this case is not whether teens should be able to use vapor products. That is *not* what this case is about, and Petitioners have never contended that it is. Similarly, this case is *not* about the health effects of teen (or even adult) use of vapor products. What this case *is* about is whether Respondents unconstitutionally exceeded their authority in enacting the Emergency Rule. See *Boreali v. Axelrod*, 71 N.Y.2d 1, 8, 523 N.Y.S.2d 464, 467 (1987) (“[W]e stress that this case presents no question concerning the wisdom of the challenged regulations, the propriety of the procedures by which they were adopted or the right of government in general to promulgate restrictions on the use of tobacco in public places. The degree of scientific support for the regulations and their unquestionable value in protecting those who choose not to smoke are, likewise, not pertinent except as background information.”). In other words, using the language of the *Boreali* case, the legal issue here is whether the Emergency Rule was validly and constitutionally enacted, with the science and data supporting the Emergency Rule only relevant as general background information.<sup>3</sup>

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<sup>3</sup> The science and data supporting the Emergency Rule are legally relevant only to the extent Respondents relied on it in determining that there was an emergency need for the rule and that it was rationally grounded in fact. As explained in Petitioner’s memoranda of law in support of the



But proposed Amici, through their proposed brief, seek to advise the Court on just that – the background information underlying the Emergency Rule. Indeed, the proposed Amici’s proposed brief is filled with dense factual claims and citations to scientific studies and other data. Regardless of whether that factual information may be helpful to understand why Respondents took action, it does not, in any way, address the legal question of whether Respondents exceeded their constitutional and statutory authority.

Courts entertaining motions for leave to file an amicus brief have admonished potential amici that the purpose of an amicus brief is to assist the court in analyzing the legal questions presented – not to inject additional facts into the existing record. As the court in *Price* succinctly explained: “[T]he proper function of an amicus is to advise the court of the law . . . [;] the inclusion of factual material is almost always improper. Factual material submitted to the court by an amicus should not be subject to less scrutiny and contravention by opposing parties than factual material submitted by a party. Unless the court makes the amicus a party, such is impossible when factual material is submitted by an amicus.” 16 Misc. 3d at 553; *see also Spota*, 2012 N.Y. Misc. LEXIS 4633, at \*12 (“[A]n amicus brief is confined to issues of law, not fact.”).

The Amici Motion should be denied for this further reason, as proposed Amici, by their own representation, can provide no assistance to this Court on the legal issue of whether Respondents acted within their statutory and constitutional authority, which they did not. The only purpose served by the Amici Motion is to provide further factual support for the underlying purpose of the Emergency Rule – an issue that is not currently before this Court.

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Petition and the preliminary injunction, the data do *not* support Respondents’ actions in these regards.

**2. Permitting the Proposed Amici to File Their Proposed Brief Would Substantially Prejudice Petitioners and Would Significantly Delay Resolution of This Proceeding.**

The Amici Motion should also be denied because Petitioners will be prejudiced if the proposed amici brief is accepted by the Court, not least because such would result in the submission of unscrutinized factual assertions. Proposed Amici are not a party to this case, even if their motion is granted, and therefore Petitioners will be unable to fully and adequately respond to the new facts and documents cited in the proposed brief. *See Price*, 16 Misc. 3d at 553. The proposed amici brief appears to contain numerous new, and many seemingly unrelated or irrelevant, factual claims.<sup>4</sup> To prevent the Court from being distracted or confused by information unrelated to the issues currently before it, as well as to provide countervailing facts and authority, Petitioners would in essence have to respond to two parties – the Respondents and proposed Amici, despite the fact that proposed Amici have not moved to intervene and are not proper parties before this Court.

Moreover, Petitioners cannot appropriately address each and every new, uncorroborated and/or irrelevant claim in proposed Amici's proposed brief due to the untimely nature of the filing. Proposed Amici filed their brief at 8:51 p.m. on the Friday before a holiday weekend, and well after the Court set the date for the preliminary injunction hearing weeks ago and after Respondents had already filed their Opposition. By filing when they did, proposed Amici knew Petitioners would have only two working days to review, analyze, and respond to the amicus brief, while simultaneously needing to respond to Respondents' Opposition to the Motion for

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<sup>4</sup> Other information is duplicative of Respondents' Opposition and the Affidavit of Deputy Commissioner Hutton, which further underscores that proposed Amici are not necessary to assist the Court in analyzing the issues in this case because the parties are fully capable of doing, and have done, so. *See Kruger*, 1 Misc. 3d at 198 (noting one of the criteria to permit an amicus brief is whether "the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency") (quoting 22 NYCRR 500.11(e)).

Preliminary Injunction that was due on the same day. Again, proposed Amici are forcing Petitioners to address and rebut the facts, claims and arguments of both Respondents and proposed Amici – despite proposed Amici not actually being a party to the case. Proposed Amici have provided no justification for their last minute filing. This matter had already been pending for more than two weeks at the time proposed Amici filed their Motion, including proceedings before the Appellate Division that received substantial media attention. Instead of timely filing the Amici Motion with their proposed brief, proposed Amici delayed until just one week before the return date on the preliminary injunction and set the same as the return date for the Amici Motion.

Acceptance and consideration of the proposed amicus brief will substantially prejudice Petitioners as proposed Amici will be able to submit additional unrebutted, uncontested, and overall improper factual evidence – solely to the benefit of Respondents. Furthermore, because of proposed Amici’s untimely and delayed filing, Petitioners now have to bear the substantial, and already prejudicial, burden of having to respond to proposed Amici in short order while at the same time responding to Respondents. Petitioners should not be further prejudiced by having to be subjected to proposed Amici’s improper, and largely irrelevant, proposed brief. Accordingly, the motion for leave to file the amicus brief should be denied for this additional reason.

### **CONCLUSION**

WHEREFORE, Petitioners respectfully request that this Court deny the Amicus Motion, and not consider the proposed brief submitted therewith, as being procedurally improper and for the additional reasons stated above.

Dated: New York, New York  
October 16, 2019

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