SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW; GERALD BENJAMIN; LIZ KRUEGER; DANIEL L. SQUADRON; MAUREEN KOETZ; BRIAN KAVANAGH; and DON LEE,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK STATE BOARD OF ELECTIONS,

Respondent.

Index No. 03279-16

Assigned to Justice

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO(s):

STATE CASES

FEDERAL CASES

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

BOARD OF ELECTIONS OPINIONS

OTHER AUTHORITIES

Petitioners The Brennan Center for Justice at NYU School of Law ("the Brennan Center"), Gerald Benjamin, Liz Krueger, Daniel L. Squadron, Maureen Koetz, Brian Kavanagh, and Don Lee (collectively, "Petitioners"), by and through their attorneys Emery Celli Brinckerhoff & Abady LLP ("ECBA") and the Brennan Center, submit this memorandum of law in support of their motion for final judgment pursuant to Article 78 of the New York Civil Practice Law and Rules.[1]

PRELIMINARY STATEMENT

On April 5, 2016, the New York Board of Elections ("Board") voted to allow limited liability companies ("LLCs") to evade the campaign contribution limits that the New York Legislature established through the Election Law. Rejecting a proposal that would have subjected LLCs to the same contribution limits as partnerships or corporations, the Board voted to treat LLCs as *individuals*, permitting this type of artificial business entity—and only this type—to contribute to political campaigns at a vastly higher level than any other business form. The Board's decision was arbitrary, capricious, and legally erroneous.

More than 40 years ago, the Legislature enacted a comprehensive campaign finance scheme designed to prevent corruption, preserve the confidence of citizens in their government, and maintain a fair election system. At its core were three principles: *first*, that monetary and in-kind contributions to candidates and political committees would be limited in amount; *second*, that corporations, which are creatures of state law, would be allowed to contribute less money to political candidates and committees than would individuals; and, *third*, that the identities of contributors to political campaigns would be transparent and fully disclosed to the public.

[1] This brief does not purport to convey the position of NYU School of Law.

In 1996, the Board interpreted state law in a manner that gravely undermined each of these principles. *See* N.Y. Bd. of Elections Formal Op. 1996 #1 (Jan. 30, 1996) (the "1996 Opinion"), Ex. 7.[2] The LLC Loophole, created by the Board's 1996 Opinion, grants LLCs and their owners a unique privilege among artificial business entities: The LLC Loophole allows LLCs to be *treated like individuals*, permitting them to contribute to political candidates and party committees at far greater levels than their corporate and partnership peers, and to hide the identities of the individuals behind the LLCs. To cite just one example, the LLC Loophole permits LLCs to contribute to just a single candidate in a statewide race (a primary and general election) more than *twelve times* what corporations may give overall in any one year: $65,100 per candidate per election cycle for LLCs, versus $5,000 per year for corporations. And, because LLCs contribute in their own names, rather than in the names of their members, who need not be disclosed, the goal of transparency is frustrated.

Wealthy individuals and businesses have exploited the LLC Loophole to flout contribution limits altogether, especially in recent years. In a particularly egregious example, one wealthy contributor used 27 different LLCs to contribute $4.3 million to political committees in the state over a two-year period.[3] Plainly, no one would tolerate the same individual *voting* 27 times. Likewise, we ought not tolerate a system that, in contravention of the Legislature's intent, permits one individual to evade the corporate contribution limits and contribute in the name of 27 different business entities. Indeed, the LLC Loophole was at the center of the political

[2] Numbered exhibits are attached to the Affirmation of Elizabeth S. Saylor ("Saylor Affirm."), dated June 13, 2016.

[3] Bill Mahoney, *State's Largest Campaign Donor a Client of Silver's Second Firm*, Politico New York, Dec. 30, 2014, available at http://www.capitalnewyork.com/article/albany/2014/12/8559323/states-largest-campaign-donor-client-silvers-second-firm.

scandals that recently rocked Albany: the corruption trials of Dean Skelos and Sheldon Silver. *See infra* Facts IV. This is not what the Legislature intended.

The Board-created LLC Loophole thwarts the Legislature's intent to comprehensively limit and require full disclosure of contributions, making a mockery of the state's campaign finance laws. As explained below, the Board has offered no defensible rationale for this absurd choice.

The Board was faced with an opportunity to fix this problem once and for all, on April 5, 2016.[4] But in a 2-2 vote ("the April 2016 Decision"), the Board refused to rescind its 1996 Opinion and close the LLC Loophole. This lawsuit—brought by the Brennan Center, former, current, and prospective elected officials, and voters negatively affected by the LLC Loophole—challenges the Board's decision as arbitrary, erroneous, and contrary to law.

The Board's April 2016 Decision and the 1996 Opinion on which it was premised are arbitrary and capricious and reflect grave legal errors under both the Election and LLC Laws. *First*, the Board's decision violates the purpose and spirit of the Election Law, by facilitating massive circumvention of the Election Law's framework of contribution limits and disclosure requirements. Avoiding such circumvention is precisely why the Legislature created strict contribution limits for the other artificial business entities (*e.g.*, corporations and partnerships) that LLCs most closely resemble. *Second*, the Board failed to adequately examine the full text of

[4] Last year, April 16, 2015, the Board voted on a motion to rescind the 1996 Opinion and close the LLC Loophole, though the Board did not vote on a specific rule or opinion to replace the 1996 Opinion. After that motion was rejected on a 2-2 vote, many of the Petitioners brought a hybrid Article 78/Declaratory Judgment suit challenging the Board's vote as arbitrary, capricious, and contrary to law. That prior Article 78 petition was denied, in large part because the Court deemed the April 2015 vote a ministerial act and held a challenge to the underlying 1996 Opinion was untimely. Petitioners disagree with the Court's finding that the April 2015 vote was ministerial.

The April 2016 Decision—in which the Board voted on and rejected a specific opinion that would have established specific new rules for LLC contributions—could not be considered ministerial under any definition. *See infra* Facts V. A challenge to the Board's April 2016 decision is timely. *See infra* Argument VI.

the statutory definition of an LLC, ignoring a key portion of the statutory definition that states that LLCs should be treated as unincorporated organizations that are not partnerships or trusts "*unless the context otherwise requires*." N.Y. Ltd. Liab. Co. Law § 102(m) (emphasis added). The statutory language strongly supports a reading that LLCs should not be treated like individuals in most instances—and courts have interpreted that language to so hold. *Finally*, the Board's decision failed to consider the fundamental nature of LLCs and how they are treated by other agencies—an examination that would have revealed that, in the absence of explicit statutory direction, LLCs are typically treated like corporations or partnerships, including by the very federal agency whose approach the Board originally relied on in its 1996 Opinion.

At a time when New York government is in crisis thanks to a series of high-profile corruption scandals, the Board has opted to double down on a deeply flawed administrative interpretation that enables frequent and harmful circumvention of the law. This Court should invalidate the Board's arbitrary, capricious, and legally erroneous April 2016 Decision and close the LLC Loophole.

FACTS

I. THE LEGISLATURE LIMITS CAMPAIGN CONTRIBUTIONS FROM BUSINESS ENTITIES AND IMPLEMENTS DISCLOSURE REQUIREMENTS

New York law provides for a comprehensive system of limits and disclosure requirements for contributions to candidates, party committees, and PACs. *See* N.Y. Elec. Law §§ 14-102, 14-104, 14-114, 14-116. As part of this scheme, New York has restricted corporate contributions to political campaigns for well over a century in order to guard against corruption and to preserve the confidence of citizens in their government. From the early 1900s until the 1970s, corporations were banned entirely from contributing to political campaigns. In 1974, as part of comprehensive reform legislation that created individual contribution limits, the corporate

ban was replaced with a $5,000 overall limit (today part of Election Law § 14-116), significantly less than the limits for individuals in most races (currently $44,000 for general election contributions and up to $21,100 for primary contributions for statewide office). *See* 1974 N.Y. Laws 1612-15; N.Y. Bd. of Elections 2015 Contribution Limits.[5] The Governor's approval memorandum explained that a central purpose of the reform law was to "restrict unduly large contributions to any one campaign." Gov. Malcolm Wilson's Mem. on Approving Law, Bill Jacket, 1974 N.Y. Laws ch. 304, Ex. 2 at 1.

The replacement of the corporate ban with a modest contribution limit was part of the Legislature's efforts to increase transparency in campaign financing. The legislative declaration attached to the 1974 bill explained that the Legislature sought to "further mandate full and complete disclosure of campaign financing and practices, and to maintain confidence in and full participation in the political process of our state to the end that the government of this state be and remain ever responsive to the needs and dictates of its residents in the highest and noblest traditions of a free society." 1974 N.Y. Laws 1602, Ex. 3. According to the Senate sponsor, the Legislature lifted the corporate ban in favor of a $5,000 limit "to 'put what's going on under the table over the table.'" Judith Bender, *Election Reform Revs Up*, Newsday, Apr. 3, 1974, at 9 (quoting Sen. John Calandra). That is, the Legislature lifted the ban to discourage corporations from evading the rules by directing their officers to make contributions.

Assemblyman Hayley, speaking in support of the bill, explained that it was precisely because of corporations' power to unduly influence elections that he supported allowing them to make limited and regulated contributions:

[5] Available at http://www.elections.ny.gov/NYSBOE/Finance/2015ContributionLimits.pdf (last accessed Apr. 28, 2016). As a courtesy, we have also attached it as Ex. 1.

> I would much rather have the corporations' contributions out in the open where we can see them and have some control on them than try and pretend that making them illegal will stop them because we have been going that way for a long time and it didn't work. From my point of view, I would rather have them out in the open with some controls.

N.Y. Assembly Debate, Apr. 4, 1974 at 3176-77, Ex. 4.

During the Assembly debate on April 4, 1974, several members worried that corporate entities controlled by the same persons might be allowed to give up to $5,000 per corporation, thereby circumventing the new limit. *Id*. at 3158-60. Of particular concern was how the rule would apply to real estate entities, since "every building . . . is a separate corporation." *Id*. at 3190. In response to those concerns, on May 13, 1974, a cosponsor of the legislation assured members that the statutory language had been adjusted to prevent such abuse of the law. N.Y. Assembly Debate, May 13, 1974 at 9047-48, Ex. 5.[6] With these assurances, the legislation passed unanimously. *See* Patrick Brasley, *Election Reform Goes to Governor*, Newsday, May 14, 1974.

In short, while the Legislature sought to bring corporate political spending out into the open, it remained concerned about corruption resulting from abuse of the corporate form. It thus imposed far lower limits on contributions from corporations than from individuals, while taking steps to prevent persons from giving through multiple entities they control. *See* 50 N.Y. Jur. 2d Elections § 522 ("The purpose of the legislature in enacting this provision is to prevent

[6] After raising the circumvention concern, Assemblyman Pesce asked "whether or not the possibility of amending the bill was considered in this amended version." Assemblyman Biondo replied: "I refer you to page 24, Section 480, Subdivision B. It [says] '…notwithstanding the provisions of Subdivision A of this section,' which is the one allowing corporations to contribute $5,000, 'any corporation or organization financially supported in whole or in part by such corporation may make expenditures including contributions not otherwise prohibited by law,' and that section there should cover subsidiaries. That was added." *Id*. at 9048. Thus, Assemblyman Biondo reassured other members that the addition of the phrase "or organization financially supported in whole or in part by such corporation" addressed the corporate circumvention concern.

corruption of legislators and other elected officials through corporate contributions to political parties and candidates."); *Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp. 3d 365, 369 (N.D.N.Y. 2014) (noting that New York's system of corporate and individual limits is intended "[t]o protect against corruption and the appearance of corruption").

Since the 1970s, partnerships have been subject to even stricter contribution limits than corporations. Because partnerships were not specifically mentioned in the Election Law until 1992, it was left to the Board to determine their treatment. In 1976, the Board held that the Election Law did not permit contributions in the name of a partnership. N.Y. Bd. of Elections Formal Op. 1976 #4 (Apr. 23, 1976), Ex. 6. Instead, contributions from partnerships were required to be reported in the names of the partners and allocated to each partner according to his share of the partnership. *Id*. In other words, contributions from a partnership were counted against the statutory limit allowed for each partner as an individual. In making this determination, the Board relied on the section of the Election Law that prohibits contributions from being made in the name of another: "No person shall in any name except his own, directly or indirectly" make a contribution. N.Y. Elec. Law § 14-120(1). The Board thus treated each partnership contribution as a contribution from a collection of individuals—not from a separate entity—whose members were each separately subject to the individual contribution limits.

In 1992, the Legislature amended the law to partially codify the Board's policy: It allowed partnerships to contribute no more than $2,500, but stated that any donation over that amount must "be attributed to each partner whose share of the contribution exceeds ninety-nine dollars." N.Y. Elec. Law § 14-120(2); 1992 N.Y. Sess. Laws Ch. 79 § 26 (S. 7922, A. 11505).

II. THE BOARD CREATES THE "LLC LOOPHOLE"

In 1994, the Legislature authorized the creation of LLCs, hybrid entities with characteristics of both corporations and partnerships. 1994 N.Y. Sess. Laws Ch. 576 § 1 (S. 7511–A, A. 11317–A); *see also* N.Y. Senate Debate, June 30, 1994 at 6909-6910. New York's law defines a limited liability company as an unincorporated organization other than a partnership or trust "unless the context otherwise requires." N.Y. Ltd. Liab. Co. Law § 102(m).

Because LLCs did not exist when the corporate and partnership campaign contribution limits were codified, the Election Law does not specify how such entities should be treated. That determination fell to the Board, pursuant to its statutory authority to "issue instructions and promulgate rules and regulations relating to the administration of the election process, election campaign practices and campaign financing practices consistent with the provisions of law." N.Y. Elec. Law § 3-102(1).[7]

In a formal opinion from January 1996, the Board ruled that LLCs should be treated as separate and distinct *individuals* for purposes of campaign contributions. N.Y. Bd. of Elections Formal Op. 1996 #1 (Jan. 30, 1996) ("the 1996 Opinion"), Ex. 7. Accordingly, under this rule—even though partnership donations over $2,500 are attributed to each partner, and corporations can give no more than $5,000 in any one year—LLCs are considered by the Board to be fully separate individuals, able to contribute the maximum allowed for each individual ($65,100 per candidate in a statewide race). Further, none of those contributions is counted against each *member's* individual contribution limit, such that each LLC member can contribute an additional $65,100 per candidate, *in addition to* the large contribution made by the LLC itself.

[7] The law also grants the Board the power to "perform such acts as may be necessary to carry out the purposes of this chapter." *Id.* § 3-102(17).

The Board relied on only two pieces of evidence in making its decision. First, the Board reasoned that, because the LLC Law defines an LLC as an "unincorporated" organization "other than a partnership or a trust," none of the Election Law statutes applicable to corporations or partnerships could apply. *Id.* at 1. Significantly, the Board did not cite, let alone analyze, the Legislature's inclusion of the phrase "unless the context otherwise requires" in the definition of LLC. *Id.* (omitting, in its quotation of the definition of limited liability company, the "unless the context otherwise requires" language). Second, the Board relied on a (now superseded) Federal Election Commission ("FEC") advisory opinion determining that a Virginia-chartered LLC should be treated as an individual under federal election law (and therefore not subject to the federal ban on corporate contributions). The Board concluded that New York would follow the same approach as the FEC. *Id*. at 1-2 (citing FEC AO 1995-11).

The 1996 Opinion was a departure from the Board's own past practice with respect to "unincorporated" artificial entities. Not only had the Board already declined to treat partnerships like individuals, *see* N.Y. Bd. of Elections Formal Op. 1976 #4, Ex. 6, it had similarly limited "unincorporated trade associations" to the *corporate* contribution limit of $5,000 each year under Election Law § 480, the precursor to Election Law § 14-116, N.Y. Bd. of Elections Formal Op. 1974 #2, Ex. 15. In its singular treatment of LLCs, the Board provided no explanation for why it deviated from its past practice; indeed, it did little but quote (in part) the definition of an LLC and mention the FEC's advisory opinion—an opinion that was rescinded three years later, *infra* Facts III.

III. THE FEC CHANGES COURSE

The FEC's 1995 advisory opinion, on which the Board relied, was rescinded in 1999 through a formal rulemaking. The current FEC rules provide that an LLC will be treated as either a corporation or a partnership for purposes of federal contribution limits depending on the

tax status it elects under IRS rules. *See* 11 C.F.R. § 110.1(g); *Final Rule: Treatment of Limited Liability Companies Under the Federal Election Campaign Act*, 64 Fed. Reg. 37397-01 (1999). In its rulemaking, the FEC noted that Congress "did not directly address . . . whether the definition of corporation includes LLCs." *Id.* at 37399 (internal emphasis and quotation marks omitted). The Commission nevertheless reasoned that treating LLCs as either corporations or partnerships depending on their tax status would best effectuate congressional intent, by taking into account the starkly different characteristics an LLC has depending on its tax status and "the special advantages which go with the corporate form of organization." *Id.* (internal quotation marks omitted). In particular, an LLC electing partnership status must maintain individual accounts for each partner, meaning that contributions made by such entities can fairly be attributed to the partners on a pro rata basis. *Id.* at 37398.[8] When an LLC elects corporate status, on the other hand, "it is essentially telling the IRS that its organizational structure and functions are more akin to a corporation." *Id.* at 37399.

Tellingly, the FEC did not seriously consider continuing to treat LLCs as individuals who could separately make unattributed contributions. As the Commission explained, that "approach could lead to possible proliferation problems, since a person who was a member of numerous LLCs could contribute up to the statutory limits through each of them." *Id.* at 37398.

IV. THE LLC LOOPHOLE IS CONSISTENTLY ABUSED

Since the Board's 1996 Opinion, LLCs have become a major player in funding New York State elections. According to Board of Elections data compiled by the Hedge Clippers

[8] As in New York, contributions by partnerships in federal elections are generally attributed to each partner in proportion to his or her share of profits. 11 C.F.R. § 110.1(e). If an LLC has only a single natural person member, the contribution is "attributed only to that single member." *Id.* § 110.1(g)(4).

project, LLCs contributed more than $54.2 million to candidates, parties, and traditional PACs[9] between 2011 and 2014, and more than twice that—$118.6 million—between 1999 and 2014. *See* Affidavit of Brent Ferguson ("Ferguson Aff."), ¶¶ 3, 8. In 2014 alone, LLCs gave over $19 million, a more than *400% increase* over the amount given by LLCs in 2002. *Id.* ¶ 3. Governor Cuomo raised $9 million from LLCs in his first term, roughly 20% of his first-term fundraising total. *Id.* ¶ 4; Thomas Kaplan, William K. Rashbaum & Susan Craig, *After Ethics Panel's Shutdown, Loopholes Live On in Albany*, N.Y. Times, Dec. 8, 2014. Approximately 83% of these funds were contributed in increments exceeding the $5,000 corporate limit. Ferguson Aff. ¶ 4. The Governor has raised another $2.3 million from LLCs just since December 2014, $1.9 million of which was donated in increments of $5,000 or more. *Id*. ¶ 4. The same is true for approximately 72% of the more than $1.7 million that LLCs contributed to Attorney General Eric Schneiderman, approximately 71% of the $611,000 LLCs contributed to former Nassau County Executive Tom Suozzi, and approximately 49% of the almost $1.2 million LLCs contributed to Suffolk County Executive Steve Bellone, to name just a few examples. *Id.* ¶¶ 5-7.

Donors have routinely filtered money through multiple LLCs, bypassing existing contribution limits altogether to give millions of dollars and secure influence over state government. One real estate developer reportedly used 27 LLCs to contribute over $4.3 million in 2013 and 2014, Bill Mahoney, *State's Largest Campaign Donor a Client of Silver's Second Firm*, Politico New York, Dec. 30, 2014, Ex. 19-a; a single telecommunications provider reportedly used eight LLCs to give $1.5 million between 2005 and 2013, including $190,000 to

[9] Contributions to traditional PACs may be limited because such PACs contribute directly to candidates. In contrast, "Independent Expenditure PACs" (also known as "super PACs") make only independent expenditures, and therefore may not be subject to contribution limits. *See New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013).

one candidate in a single day, Susan Lerner, *New "Moreland Monday" Analysis: Political Cash Buys Big Telecom Veto Power Over Bills*, Common Cause N.Y., Sept. 23, 2013, Ex. 19-b.

LLCs played an outsized role in the recent corruption prosecutions of Sheldon Silver, former speaker of the Assembly, and Dean Skelos, the former majority leader of the Senate. According to the prosecution, real estate firm Glenwood Management sent $100,000 to Mr. Skelos on a single day, using five different LLCs contributing $20,000 each. Bill Mahoney, *Skelos Complaint Details Glenwood Connection*, Politico New York, May 4, 2015, Ex. 19-c. At Mr. Silver's trial, a Glenwood Management lobbyist testified that his practice was to donate money through LLCs, but that he would personally deliver the checks from numerous LLCs, paper-clipped together and placed in an envelope with Glenwood's business card—to ensure that the recipient knew exactly who was donating. Silver Trial Tr. 1716:14-25, 1717:13-18, 15-cr-93 (S.D.N.Y. 11/13/16), Ex. 20; *see also* Ex 18. A Common Cause investigation revealed that Glenwood Management was able to contribute $12.8 million to state candidates and committees in a nine-year period—and 90% of those contributions were made through at least 50 different LLCs established by the company.[10] This abuse of business entities is precisely what the Legislature was worried about, with corporations, when it passed the Election Law (decades before LLCs existed). Indeed, the widespread reliance on LLCs to fund political campaigns led the Moreland Commission to Investigate Public Corruption to conclude that the LLC Loophole "help[s] facilitate the larger pay-to-play culture" in Albany. N.Y. Comm'n to Investigate Public Corruption, Preliminary Report 33 (2013) ("Moreland Report"), Ex. 8.[11] The Commission dedicated a section of its December 2013 report to abuse of the LLC Loophole, noting that

[10] *Common Cause/NY Examines Political Contributions from Glenwood Management Corp. and Affiliates*, Common Cause New York, http://www.commoncause.org/states/new-york/press/glenwood-issue-brief.pdf.

[11] Available at http://publiccorruption.moreland.ny.gov/sites/default/files/moreland_report_final.pdf.

"numerous entities and organizations unabashedly use this loophole," and that it "dramatically undermines the limits already in place." *Id.* at 36-37. It should come as no surprise that New York ranks among the worst states in the country when measured for residents' confidence in state government. Gallup, *Illinois Residents Least Confident in Their State*, Gallup.com (Feb. 17, 2016) (showing New York among eight lowest-ranked states on resident confidence in state government).[12]

Using LLCs to funnel campaign contributions permits donors not only to evade corporate limits but also to keep their identities secret. While investigators and journalists have managed to identify a handful of individual donors who make regular use of the LLC Loophole, the true source of much LLC spending remains obscured.[13] *See, e.g.,* Affidavit of Daniel L. Squadron ("Squadron Aff."), ¶ 12 (describing the difficulty of ascertaining the identity of LLC donors and conveying that information to the public); Affidavit of Brian Kavanagh ("Kavanagh Aff."), ¶ 8 (same); Affidavit of Gerald Benjamin ("Benjamin Aff."), ¶ 9 (same); Affidavit of Don Lee ("Lee Aff.") ¶ 9 (same); Affidavit of Maureen Koetz ("Koetz Aff.") ¶ 14 (same). That lack of disclosure, along with the continued use of LLCs to bypass contribution limits, led the *New York Times* to observe in 2014 that New York has "some of the most porous campaign fund-raising

[12] Available at http://www.gallup.com/poll/189281/illinois-residents-least-confident-state-government.aspx?g_source=trust%20in%20state%20government&g_medium=search&g_campaign=tiles.

[13] While LLCs must register with the New York Department of State, that office "does not require or maintain information regarding the names and addresses of members or managers of nonprofessional limited liability companies." *E.g.*, N.Y. Dep't of State, Div. of Corporations, Entity Information, Shared Concepts LLC, http://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=4601017&p_corpid=4600733&p_entity_name=Shared%20Concepts%20LLC&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0, Ex. 9.

laws in the nation." Thomas Kaplan, *Awash in Campaign Cash, Cuomo Benefited From Big Donors and Loopholes*, N.Y. Times, Nov. 4, 2014.[14]

Candidates and elected officials are acutely aware of LLC contributions and their effects on elections and governance. For example, Petitioners Senator Liz Krueger, Senator Daniel L. Squadron, and Assemblyman Brian Kavanagh often faced pressure to raise money from LLCs as candidates for office. Affidavit of Senator Liz Krueger ("Krueger Aff."), ¶ 5; Squadron Aff. ¶¶ 8-9; Kavanagh Aff. ¶ 6. Senator Krueger notes that many officeholders realize that, regardless of their performance and dedication, they could easily lose their next election if they take action adverse to industries, such as the real estate industry, that can spend huge amounts of money through LLCs. Krueger Aff. ¶¶ 7-8; *accord* Koetz Aff. ¶¶ 7-10. Don Lee, a candidate for Assembly District 65, states that he is always conscious of the need to raise money, and that his competitors are at an advantage because they solicit large donations from LLCs rather than individual people. Lee Aff. ¶ 8.

Similarly, Petitioner Maureen Koetz, who ran against former Assembly Speaker Sheldon Silver in 2014, was rebuked by members of her own party after criticizing the practice of granting tax abatements to campaign supporters who own luxury buildings in New York City, who normally donate to politicians through LLCs. Koetz Aff. ¶ 7. Ms. Koetz was told by her colleagues not to mention the issue again because they did not want to alienate the real estate industry, which provides significant campaign contributions though LLCs. *Id.* These same officeholders are also acutely aware of who their own major LLC donors are. Krueger Aff. ¶ 8; *accord* Benjamin Aff. ¶ 6; Squadron Aff. ¶ 10.

[14] Available at http://www.nytimes.com/2014/11/05/nyregion/in-lopsided-money-race-cuomo-campaign-is-awash-in-cash.html.

The ability of individuals who control multiple LLCs to use the LLC Loophole to skirt the individual contribution limits and disclosure rules distorts the political process. *See* Squadron Aff. ¶¶ 7- 8; Koetz Aff. ¶ 13-14. Petitioner Senator Squadron, who has a policy of refusing to accept LLC contributions, experienced firsthand the influence that LLC contributions can have on elections. Squadron Aff. ¶ 8. When his opponent raised large contributions from two anonymous LLCs with the same address, it was difficult for Senator Squadron to determine which interests were supporting his opponent and to convey that information to the public. *Id*.; *accord* Koetz Aff. ¶ 14.

The Loophole thus leads to corruption, as the Moreland Commission explained:

> Because our laws make it easy to raise very large sums of money from a very small number of special interest donors—and do not provide an alternative source of funding—the system gives candidates and parties a powerful incentive to concentrate their fund-raising efforts on people or entities who have the means (vast resources) and the motive (significant financial interests in government decisions) to write large checks. Some of these large donors expect at least a hearing—if not more—for their views on economic regulation, tax breaks, government contracts, and other public matters in which they have a stake.

Moreland Report 28, Ex.8; *see also* Koetz Aff ¶ 9 (noting "unambiguous appearance that campaign money has been exchanged for favorable legislation" involving New York City real estate developers.

As a consequence, legislation with broad support among those who would be impacted, such as rent regulation in New York City, is often blocked because legislators seek to protect the interests of LLC donors. Krueger Aff. ¶ 10. The same donors also work hard to isolate legislators they perceive as unfriendly. In one instance, Senator Krueger was explicitly told that she had been excluded from a series of important meetings involving senior Democrats at the request of lobbyists representing, among others, Glenwood Management, the same real estate company involved in the silver and Skelos criminal trials. *Id.* ¶ 11; *see also* Moreland Report 34,

Ex. 8 (describing special tax breaks inserted into a rent regulation bill, apparently at the behest of real estate industry donors); Moreland Commission Testimony of N.Y. City Council Member Eric Ulrich (R-Queens), Ex. 17, at 58-59 (describing candidacy for New York Senate and his "belie[f] that some of the people in Albany are more willing to listen to people from the real estate industry, for instance . . . because they're the ones who are writing $10,000 checks").[15]

Aside from the direct effect on the legislative process, the ease with which the campaign finance rules can be circumvented has fostered extraordinary anger and cynicism about the democratic process among Petitioners' constituents, many of whom believe that those in power represent big donors' interests rather than those of typical citizens. Krueger Aff. ¶ 13; Squadron Aff. ¶ 11; Koetz Aff. ¶ 13; Lee Aff. ¶ 7. Petitioner Gerald Benjamin, Distinguished Professor of political science at SUNY-New Paltz and a former Chairman of the Ulster County Legislature, notes the same cynicism and lack of engagement among his students, which has increased greatly in recent years. Benjamin Aff ¶ 7.

V. THE BOARD REFUSES TO ISSUE NEW RULE ALIGNED WITH ELECTION LAW AND CLOSING LOOPHOLE

On April 16, 2015, the Board took up a motion made by Board Co-Chair Douglas A. Kellner to rescind the 1996 Opinion and issue a new opinion with respect to the treatment of LLCs. After a discussion of the motion, the Board denied the proposal on a 2-2 vote: Board Co-Chair Douglas A. Kellner and Commissioner Andrew J. Spano agreed that the LLC Loophole was contrary to statutory intent, and supported the motion to eliminate it. Co-Chair Peter S. Kosinski and Commissioner Gregory P. Peterson opposed it; they maintained that the LLC Loophole is *required* by statute, and that only the Legislature could close the Loophole—even

[15] Available at http://publiccorruption.moreland.ny.gov/sites/default/files/PUBLIC-CORRUPTION09-17-13.pdf.

though it was created by the Board. *See* Tr. of April 16, 2015 NYSBOE Commissioners' Meeting, at 27-35, Ex. 13.

Many of the Petitioners challenged this decision in Court, alleging that the Board's vote was arbitrary, capricious, and contrary to law. Justice Lisa Fisher of the Supreme Court denied the petition as untimely, noting that the 1996 Opinion was issued twenty years ago and finding that the April 2015 vote was not a vote on the merits of the Loophole and was instead "the ministerial act of directing [the Board's] counsel to re-draft a new opinion which could preserve, modify, or eliminate the 'LLC Loophole.'" *Brennan Ctr. v. N.Y. Bd. of Elections*, 2916 N.Y. Slip Op. 26081, 2016 WL 1061727, at *7 (Sup. Ct. Albany Cnty. March 16, 2016). As explained in detail in the prior proceeding, the April 2015 vote was in fact a vote on the merits of the LLC Loophole. *See* Ex. 13 at, *e.g.*, 27 (voting on a motion "that will rescind opinion 1996-1"); *id.* at 34 (urging that Board's prior interpretation "be corrected to treat [a] limited liability company as a partnership").

Following the Court's ruling, on April 5, 2016, the Board took up a new motion made by Board Co-Chair Douglas A. Kellner to approve a new, already-drafted Board opinion (the "Proposed Opinion") rescinding the 1996 Opinion and ordering that, for purposes of campaign contributions, each LLC would be treated as a partnership or corporation, depending on the tax status that it elects. Ex. 21. The Proposed Opinion, which was circulated to the Board prior to the vote, determined that treating LLCs as persons subject to the individual contribution limits is unreasonable under the Election Law. *Id.* It concluded that the Election Law requires limiting campaign contributions from LLCs to the same extent that contributions are limited from partnerships and corporations, depending on the LLC's tax status. *Id.*

Presenting the motion, which was seconded by Commissioner Andy Spano, Mr. Kellner explained that the Board had the power to rescind the LLC Loophole once and for all: "[A]ll we need is either you or you to vote for this and it will all be over," Mr. Kellner said, indicating the two other commissioners. Tr. of N.Y. Bd. of Elections Comm'rs Meeting, Ex. 22 at 50.

After a discussion of the motion, the Board rejected the Proposed Opinion with a tie vote.[16] Mr. Kellner and Mr. Spano agreed that the LLC Loophole was contrary to statutory intent, and that the Election Law required the rule as stated in the Proposed Opinion. *Id.* at 49-50. Co-Chair Peter S. Kosinski and Commissioner Gregory P. Peterson opposed it, citing ongoing litigation, enforcement efforts to rein in shell LLCs, and their previously-stated views that the LLC Loophole could only be closed by legislative act. *Id*. According to the Election Law, a tie leaves the status quo policy in place. N.Y. Elec. Law § 3-100(4). The Proposed Opinion to treat LLCs as corporations or partnerships based on their elected tax status was therefore rejected by a 2-2 vote on April 5, 2016.

Petitioners bring this Article 78 Petition to reverse the Board's arbitrary, capricious, and legally erroneous April 2016 Decision. Petitioners Krueger, Squadron, and Kavanagh are current elected officials who plan to run for re-election; they will therefore be directly impacted by the LLC Loophole, both because LLCs will contribute to their opponents, and because they face pressure to raise LLC contributions in order to stay competitive or else must make extraordinary efforts to raise comparable funds from non-LLC sources. Krueger Aff. ¶¶ 2-4, 9; Squadron Aff. ¶¶ 2, 6-9; Kavanagh Aff. ¶¶ 3, 6. Petitioner Don Lee is a first-time candidate currently running for election to the Assembly, in large part to help reform New York politics, including diminishing the influence of big money in politics. Lee Aff. ¶ 2. The LLC Loophole

[16] According to the Election Law, a tie vote is a rejection. N.Y. Elec. Law § 3-100(4).

allows business entities to have an outsized influence in state politics, and LLC contributions to the other candidates in his race put Mr. Lee at a competitive disadvantage. *Id*. ¶¶ 8, 10. Other Petitioners are former officeholders, future candidates, and current voters, whose own ability to participate in the political process as citizens is also directly affected by the proliferation of large-scale contributions from LLCs and those who control them, and who have been denied information to which New York law entitles them about who is spending money to influence their votes. Benjamin Aff. ¶¶ 8-11; Koetz Aff. ¶¶ 7-14. Petitioner Brennan Center is a not-for-profit, nonpartisan public policy and law institute whose staff and contributors, many of whom are New York residents, have suffered similar injuries. Affidavit of Lawrence D. Norden ("Norden Aff.") ¶¶ 2, 5.

ARGUMENT

The Board's April 2016 Decision refusing to issue the Proposed Opinion, which would have closed the LLC Loophole and conformed treatment of LLCs to the Election Law, represents an error of law and is arbitrary and capricious. This Court should reverse the April 2016 Decision and order the Board to adopt the Proposed Opinion to treat LLCs as partnerships or corporations, depending on their elected tax status, or to adopt another opinion consistent with the Election Law and the LLC Law. The Board's 1996 Opinion and April 2016 Decision contravene both the Election and LLC Laws and are arbitrary and capricious decisions in three distinct ways. First, the Board failed to take into account the *purpose* of the campaign finance scheme as a whole, including the Legislature's imposition of strict contribution limits on artificial business entities. Second, the Board failed to consider the *entire text* of the statutory definition of an LLC, ignoring language that reveals the Legislature's intention to define LLCs flexibly depending on the legal context and overlooking court precedents that have accordingly

treated LLCs as partnerships or corporations in many contexts. Finally, the Board failed to consider *how LLCs are treated in context by other agencies,* including the FEC's decision in 1999 that LLCs should be treated as corporations or partnerships. As a result of these failures, the Board did not properly analyze and apply the Legislature's intent. The Board's decision must be overturned.

I. ARTICLE 78 REQUIRES THE COURT TO PROBE AGENCY DECISIONS

A petition pursuant to Article 78 of the Civil Practice Law and Rules must be granted when the determination of a government body, such as the Board of Elections, "was affected by an error of law or was arbitrary and capricious." CPLR 7803(3). The Board's decisions, including discretionary decisions *not* to adopt a proposed opinion, are "determinations" subject to review in an Article 78 proceeding. *See, e.g., Marchi v. Acito,* 77 A.D.2d 118, 120 (3d Dep't 1980) (Board's decision not to act on petitioner's complaint was an arbitrary abuse of discretion). In addition, pursuant to CPLR 3001, the Court may declare the Board-created LLC Loophole null and void. *See, e.g., Yatauro v. Mangano,* 17 N.Y.3d 420, 427 (2011) (in hybrid Article 78/declaratory judgment petition, ruling that reapportionment of county legislature was "null and void" in connection with the upcoming general election, finding that reapportionment violated legislative intent).

"In matters of statutory and regulatory interpretation, legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the enactors." *Nostrom v. A.W. Chesterton Co.,* 15 N.Y.3d 502, 507 (2010) (internal quotation marks omitted) (internal alterations omitted). Accordingly, courts look to the text of the provision(s) at issue as "the clearest indicator of the enactors' intent." *Id.* Reviewing courts must "give effect and meaning to the entire statute and *every* part and word thereof." *Friedman v. Conn. Gen. Life Ins.,* 9 N.Y.3d 105, 115 (2007) (emphasis added) (internal quotation marks

and alterations omitted). While agencies are sometimes afforded deference in interpreting a statute, courts "will accord no such deference when the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent." *Kent v. Cuomo*, 124 A.D.3d 1185, 1186 (3d Dep't 2015) (internal quotation marks and citation omitted).[17]

"Additionally, inquiry should be made into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." *Id*. (internal quotation marks omitted); *Carney v. Philippone*, 1 N.Y.3d 333, 339 (2004) (explaining that court must "discern and implement the will of the Legislature and attempt—by reasonable construction—to reconcile and give effect to all of the provisions of the subject legislation"). "In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. Literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted." *Essenfeld Bros. v. Hostetter*, 14 N.Y.2d 47, 52 (1964) (internal quotation marks omitted). When interpreting legislation, courts "must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted).

Consistent with these precedents, New York courts in Article 78 actions look closely at statutory text and legislative intent in evaluating agency decisions; if the agency's action does not properly interpret the statute's text *and* spirit, the decision will be invalidated. For example, in *Burger King v. State Tax Commission*, the Court of Appeals held that the Tax Commission improperly levied taxes on fast-food retailers. 51 N.Y.2d 614, 623 (1980). State law required

[17] Further, the Board's 1996 Opinion purported to interpret the LLC Law, not the Election Law, and the Board has no expertise in interpreting or administering the LLC Law. Therefore, its interpretation of the LLC Law merits no deference. *See, e.g.*, *Kent*, 124 A.D. at 1186 (noting that deference is sometimes appropriate "to the governmental agency *responsible for the administration of a statute*") (emphasis added).

vendors to pay taxes on certain packaging materials, but created an exception for packaging materials purchased for purposes of resale. While the Commission required Burger King to pay taxes on materials it used to package its food, the Court rejected the Commission's interpretation of the law. It thoroughly examined the nature of the fast food industry, finding that Burger King's packaging was "a critical element of the final product sold to customers" and therefore qualified for the resale exception. *Id.* The Court explained that the holding complied with "the spirit underlying our sales tax law," and that accepting the Commission's decision "would distort the original legislative intent." *Id. See also, e.g., People v. Boyer*, 6 N.Y.3d 427, 431 (2006) (noting that despite literal text of criminal procedure statute, purpose of law has led Court of Appeals to create two exceptions to rule requiring state to provide criminal defendants with notice of plans to introduce identification testimony); *Jones v. Berman*, 37 N.Y.2d 42, 52-53 (1975) (rejecting Commissioner of Social Services Rule and emphasizing that agencies "have no authority to create a rule out of harmony with the statute"); *In re Horchler's Estate*, 37 A.D.2d 28, 31 (2d Dep't 1971) ("In short, we think that the statute must be read not narrowly, as it might be parsed, but in context with the then current law and the contemporaneous explanation which accompanied its passage.").

This Court has authority under Article 78 to grant Petitioners the relief they seek. CPLR 7803(3) specifically allows this Court to hear petitions alleging that an agency "determination was . . . affected by an error of law or was arbitrary and capricious or an abuse of discretion." Petitioners ask this Court to declare that the April 2016 Decision conflicts with the Election Law and the LLC Law, and to rule that both laws foreclose treating LLCs as natural persons for purposes of campaign donations. Such a review is at the core of the judicial function. The Board created the LLC Loophole and voted to reaffirm it pursuant to authority specifically issued

by the Legislature to "promulgate rules and regulations relating to . . . campaign financing practices *consistent with the provisions of law*." N.Y. Election Law § 3-102(1) (emphasis added). The Court is thus obligated, using the traditional tools of statutory interpretation, to determine if the Board's treatment of LLCs is "consistent with the provisions" of the Election Law.[18] Because the April 2016 Decision to perpetuate the LLC Loophole runs directly counter to the legal text, legislative intent, and precedent, the Board's decision must be invalidated.

II. THE BOARD'S DECISION SEVERELY UNDERCUTS THE CENTRAL PURPOSE OF THE CAMPAIGN FINANCE SCHEME

By allowing essentially unlimited, undisclosed contributions from LLCs, the April 2016 Decision neuters the central, animating purpose of the Election Law: namely, the imposition of reasonable contribution limits—for artificial business entities and individuals—and full disclosure requirements for major donors. In its overhaul of the Election Law in 1974, the Legislature indisputably sought to implement a comprehensive system in which contributions from individuals and business entities were limited in order to prevent the corruption of elected officials. *See, e.g.*, *Hispanic Leadership Fund, Inc.*, 42 F. Supp. 3d at 369 (explaining that New York's corporate and individual limits are intended "[t]o protect against corruption and the appearance of corruption"). As one Assemblyman, speaking on the Assembly floor in support of the bill, starkly put it: "[T]he American political process is on the block and it is for sale . . . . It is lousy and it has restricted political leadership in this country at high levels to a very small number of people who were either themselves or closely connected to multi-millionaires." N.Y.

[18] That another branch of government, like the Legislature or the Governor, *could* act on an issue does not mean that it is the *only* branch of government so empowered. In *Bourquin v. Cuomo*, 85 N.Y.2d 781 (1995), the Court examined the propriety of an executive order establishing a private non-profit corporation, after the Legislature considered but failed to enact a bill with substantially similar provisions. "While it may have been more desirable for the Legislature to have passed a statute" establishing the board, the Court held, the executive was not barred from acting simply because the Legislature also had the power to pass a similar statute. *Id*. at 788.

Assembly Debate, Apr. 4, 1974, Ex. 4 at 3238-39 (calling the changes to the Election Law "an essential step"). The Legislature set much lower limits for artificial business entities precisely because legislators were wary of them being used to circumvent other limits on contributions to candidates.

The Legislature's circumvention concerns are reflected in the legislative debates before the passage of the 1974 law, during which several legislators expressed wariness about ending the corporate contribution ban because of the difficulty of preventing corporations from being used as a tool for circumvention. While debating the bill on April 4, 1974, Assemblyman Berle pointed out the possibility that related corporations could try to give separate $5,000 contributions to increase their influence. He explained, "It is a real problem particularly in the real estate side of things in which a real estate combine can have multiple corporations in which each particular piece of property is a separate corporation." *Id.* at 3239. More generally, he worried that "industries that use a multiple corporate structure for limitation of liability are going to have a disproportionate amount of strength in the political process and that is not healthy." *Id.* at 3240. The bill passed only after such concerns had been addressed. *Supra* Facts I. Agreeing about the danger of unfettered corporate contributions, Assemblyman Hayley stated, "I would much rather have the corporations' contributions out in the open where we can see them and have some control on them." *Id*. at 3176-77.

In short, there can be no question that the Legislature specifically intended, through the Election Law, to curtail the use of artificial business entities to circumvent the Election Law's limits and disclosure requirements.

It is no surprise, then, that the Board initially took the Legislature's concerns seriously when interpreting the law and making its rulings. For example, the Board ruled that the new

corporate limit also governed contributions by an "unincorporated trade association," and held that the Election Law prohibited the association from "act[ing] as a conduit" for its members' individual political contributions, which would allow the trade association to skirt the $5,000 corporate limit. N.Y. Bd. of Elections Formal Op. 1974 # 2, Ex. 15. Two years later, the Board determined that partnership contributions would have to be allocated to each individual partner, rather than attributed to the partnership itself, to comply with the Election Law's prohibition on contributing in the name of another. N.Y. Bd. of Elections Formal Op. 1976 # 4, Ex. 6. Although the Legislature modified this rule in 1992 to allow partnerships to make contributions in their own name, it allowed them to give only a modest $2,500, after which contributions would need to be attributed to the individual partners. *See supra* Facts I.

The Board also repeatedly effectuated the Legislature's effort to bring campaign contributions into the light through disclosure requirements—even looking beyond the text of the statute to do so. For example, the Board held that candidates or political committees must report *all* depository bank accounts, even though the law mentions "account" in the singular, because "the legislative intent in establishing the above requirements was to insure that there is complete disclosure of all political bank accounts of a candidate or political committee." N.Y. Bd. of Elections Formal Op. 1978 #2, Ex. 16. In 1981, the Board required political committees to disclose in their primary election financial reports contributions specifically donated for the general election, if the funds are deposited into the same account. N.Y. Bd. of Elections Formal Op. 1981 #3, Ex. 18. Nowhere in the Election Law is such a requirement specifically stated.

Given the clear legislative intent and its own prior decisions, the Board's treatment of LLCs is anomalous. It thwarts the overarching goals of New York's system of campaign finance regulation by enabling wealthy donors to engage in massive circumvention. *Supra* Facts IV. As

a result, the very consequence that legislators most feared and sought to avoid—disproportionate dominance of New York government by the wealthiest individuals and business interests—has too often come to pass. *Supra* Facts IV.

In contrast to the Board's unreasonable approach, interpreting the Election Law to require LLCs to be treated like corporations or partnerships—as the Proposed Opinion required—"fits best with the statutory context," *King*, 135 S. Ct. at 2491. Applying legislative intent and the Board's own precedents, particularly its decisions on partnership contributions, the Proposed Opinion required LLCs that elect treatment as partnerships for tax purposes to be required to contribute in the name of their members, who would be subject to the limits that individuals face—just like partners. On the other hand, "unincorporated" LLCs that nevertheless choose to be treated as corporations for tax purposes would be subject at least to the $5,000 overall corporate limit.

The Proposed Opinion thus effectuates the legislative purpose behind New York's comprehensive campaign finance scheme. By contrast, the Board-created LLC Loophole, which treats LLCs unlike other artificial business entities, permits an individual LLC member to avoid all contribution limits by setting up countless separate LLCs and contributing the maximum in the name of each separate LLC—without ever having to disclose his own name or political interests. This flouts the central purposes of the Election Law. For this reason, the Board's rejection of the Proposed Opinion in favor of an anomalous rule without basis in law or reason should be reversed.

III. THE BOARD'S DECISION RENDERS NULL PART OF THE STATUTORY TEXT OF THE LLC LAW AND IS CONTRARY TO PRECEDENT

The Board's treatment of LLCs is not only contrary to the Election Law, it also does not align with the LLC Law. The 1996 Opinion, which the April 2016 Decision reaffirmed, ignored

the *full* statutory definition of a limited liability company. The 1996 Opinion purported to quote the statutory definition of "limited liability company," from N.Y. Ltd. Liab. Co. Law § 102(m)—but it left out a key portion of the definition. The statutory provision reads in full:

> "Limited liability company" and "domestic limited liability company" mean, *unless the context otherwise requires*, an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business (except as authorized or provided in section six hundred nine or twelve hundred five of this chapter), other than a partnership or trust, formed and existing under this chapter and the laws of this state.

N.Y. Ltd. Liab. Co. Law § 102(m) (emphasis added). The 1996 Opinion failed to quote and ignored the phrase "unless the context otherwise requires," a crucial component of the statute that reveals that the Legislature intended the definition of these recently-invented entities to be adaptable to the legislative context. The Board ignored this language in 1996, as did the two Commissioners who voted against adopting the Proposed Opinion in the April 2016 vote.

The Board's interpretation of the LLC Law failed to give effect and meaning to every word of the statute, as required by the Court of Appeals. *See Friedman*, 9 N.Y.3d at 115. The Board simplistically relied on the definition of the LLC as an "unincorporated organization . . . other than a partnership" to hold that LLCs are always distinct from corporations and partnerships. This interpretation renders null the explicit language that reveals the Legislature's intent to create a new, hybrid entity that combines elements of the corporate and partnership forms and that is often treated like a corporation or a partnership. *Supra* Facts, II; *infra* Argument IV. The Board's determination is thus infected by a grave error of law and is arbitrary and capricious.

Consistent with the language of the LLC Law, courts in New York routinely treat LLCs like corporations or partnerships as the context requires. For example, courts have applied to LLCs the requirement that corporations and voluntary associations be represented by an attorney,

even though the attorney representation law does not mention them. *Jacoby & Meyers, LLP v. Presiding Justices of Appellate Div. of Supreme Court of N.Y.*, 847 F. Supp. 2d 590, 595 (S.D.N.Y. 2012) (citing cases from New York state courts to hold that that LLCs are "corporations or voluntary associations" under the Judiciary Law and thus barred from practicing law). As the Second Department explained, "An LLC, like a corporation or voluntary association, is created to shield its members from liability and once formed is a legal entity distinct from its members," and thus it must be represented by an attorney and not one of its members. *Michael Reilly Design, Inc. v. Houraney*, 40 A.D.3d 592, 593 (2d Dep't 2007); *see also Comm'rs of State Ins. Fund v. Lawrence LaRose Constrs., LLC*, 22 Misc. 3d 1101(A), 2008 WL 5413057, at *1 (Sup. Ct. Suffolk Cnty. 2008) (LLC may only appear in an action by an attorney and not one of its members); *Monte Carlo, L.L.C. v. Yorro*, 195 Misc. 2d 762, 763 (Dist. Ct. Nassau Cnty. 2002) (LLC owner "cannot benefit from the protections of the Department of State by virtue of being an LLC but then disclaim the very status that affords those protections to avoid engaging an attorney to represent him" in court) (internal quotation marks omitted).

Similarly, an Albany court determined that an LLC should be permitted to bring a commercial claims action even though, according to the Commercial Claims Act, such an action could only be brought by "a corporation, partnership or association." *Richard G. Roseetti, LLC v. Werther*, 6 Misc. 3d 1040(A), 2005 WL 689479, at *1 (Albany City Ct. 2005). Recognizing that none of those categories applied to an LLC, the court expressly concluded that an LLC "is a cross between an association and a corporation" and should therefore be treated as such under the law. *Id.*[19]

[19] The court also cited *North4ore Realty LLC v. Bishop*, 2 A.D.3d 1184 (3d Dep't 2003), in which the Third Department affirmed a judgment in a commercial claim brought by an LLC, but did not directly address whether LLCs could bring commercial claims.

Courts have also analogized LLCs to corporations when applying the doctrine of corporate veil piercing to LLCs. *E.g., Matias ex rel. Palma v. Mondo Props. LLC*, 43 A.D.3d 367, 367-78 (1st Dep't 2007) (*citing Williams Oil Co. v. Randy Luce E–Z Mart One*, 302 A.D.2d 736, 739-40, (3d Dep't 2003)) (piercing the corporate veil is a "doctrine applicable to limited liability companies"). Under this doctrine, LLC members—like corporate owners—may be held individually liable for torts, despite the statutory proscription that an LLC member "cannot be held liable for the company's obligations by virtue of his status thereof." N.Y. Ltd. Liab. Co. Law § 609.

In addition, courts have treated LLCs like partnerships for establishing federal diversity jurisdiction, such that the LLC is a citizen of any state in which one of its members is a citizen. *Handelsman v. Bedford*, 213 F.3d 48, 52 (2d Cir. 2000). The Court of Appeals has allowed LLC members to bring derivative suits on the LLC's behalf, just like shareholders of a corporation, despite the fact that such suits are not explicitly authorized by the LLC Law. *Tzolis v. Wolff*, 10 N.Y.3d 100, 103 (2008). Courts have also held that LLCs can be liable for the criminal acts of their managing member, despite the LLC Law's silence on the topic. *See People v. Highgate LTC Mgmt*., 69 A.D.3d 185, 189 (3d Dep't 2009) ("long-standing analogous principles" of corporate criminal liability applied to LLCs); *JMM Properties, LLC v. Erie Ins. Co*., No. 08 Civ. 1382, 2013 WL 149457, at *6 (N.D.N.Y. Jan. 14, 2013), aff'd, 548 F. App'x 665 (2d Cir. 2013) (criminal acts of LLC managing member imputed to LLC, noting that "a characteristic of both corporations and partnerships is that the acts of the principals are imputed to the business entity").

These precedents demonstrate that it is simply not enough for the Board to continue to rely entirely on the fact that LLCs are "unincorporated," without any examination of context. The Board's insistence on doing so is erroneous.

IV. CONTEXT AND AGENCY PRACTICE WEIGH STRONGLY IN FAVOR OF TREATING LLCS LIKE PARTERNSHIPS AND/OR CORPORATIONS, NOT INDIVIDUALS, UNDER THE ELECTION LAW

Though it is for the Board to determine how LLCs should be treated under New York's campaign finance system, the Board cannot ignore the law as it is written. The clear weight of the context—a consideration mandated by the LLC statute—as well as the practice of other agencies strongly support treating LLCs as partnerships and/or corporations under the Election Law. The Board's rejection of the Proposed Opinion was arbitrary, capricious, and contrary to law.

LLCs are a hybrid between the corporate and partnership forms. In enacting the LLC Law, New York followed a trend that began in 1977 in Wyoming, when an oil company lobbied for establishment of a new entity that would allow it to limit its liability like a corporation but obtain the favorable tax status of a partnership. Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 Ohio St. L.J. 1459, 1464-66 (1998). The following decade, the IRS ruled that LLCs could elect to be taxed as partnerships, and within eight years all 50 states had passed laws allowing for their creation. *Id*. at 1460. As the LLC Law's Senate sponsor made clear, LLCs were intended to "have the tax attributes of a partnership, the single taxation, while they contain also the liability benefits of a corporation." N.Y. Senate Debate June 30, 1994, Ex. 14 at 6909. The Board itself acknowledged in its 1996 Opinion that LLCs are essentially a kind of corporate/partnership hybrid. *See* 1996 Opinion, Ex. 7 ("Limited liability companies have been endowed with some of the characteristics of corporations and some of the characteristics of partnerships . . . ."); *see also* Treatise on the Law of Corporations (3d) §

1:11[5] (noting that an LLC is "essentially a partnership with a legislative grant of limited liability").

Rather than taking this reality into account, the Board has chosen to treat LLCs not like other artificial business entities but instead as individual persons, based in significant part on the fact that, at the time (when LLCs were still very new), the FEC had preliminarily done the same. Yet after the FEC soon reversed course and determined that LLCs should be treated as partnerships or corporations for federal election purposes based on their elected tax status, the Board stubbornly refused to change its position. *Supra* Facts III & V. Given the Board's reliance in 1996 on an interim FEC advisory opinion, the FEC's subsequent reversal should have been highly relevant to the Board's determination. The Board's failure to address the FEC's new position highlights the arbitrary nature of its decision.

Nor did the Board consider the many areas of state law that treat LLCs as partnerships or corporations. As explained above, courts in New York frequently treat LLCs as corporations or partnerships. *Supra* Argument III. Likewise, the New York Department of Taxation and Finance treats LLCs as either corporations or partnerships for tax purposes, depending on their federal tax elections. N.Y. Dep't of Taxation and Finance, *New York Tax Status of Limited Liability Companies and Limited Liability Partnerships*, Publication 16, Nov. 2014.[20] The New York Department of Financial Services also treats LLCs like corporations—and *not* like individuals—for purposes of its trade name registration requirements. N.Y. Dep't of Financial Servs., *Instructions for Corporations, Partnerships, Trade Names, Trademarks, Etc.*[21] And the New York Workers' Compensation Board treats LLC members as partners for purposes of

[20] Available at http://www.tax.ny.gov/pdf/publications/multi/pub16.pdf.

[21] Available at http://www.dfs.ny.gov/insurance/licensing/applications/lboent.pdf.

processing members' workers' compensation claims. *Captain's Galley LLC*, Case No. 6020 9539, 2003 WL 21995078 (N.Y. Work. Comp. Bd. Aug. 15, 2003). While the Workers' Compensation Law specifically covers executive officers of a corporation and allows partners to elect to be included in the program, the law does not specify how LLC members should be treated. Despite the law's silence on LLCs, the New York Compensation Insurance Rating Board determined that LLC members be treated as partners, and the Workers' Compensation Board ratified that determination. *Id*.

The Board's failure to take into account this legal treatment of LLCs was arbitrary, legally deficient, and directly contrary to the express legislative language. The Board-created LLC Loophole has resulted in wholesale circumvention of New York's system of contribution limits and disclosure requirements. *Supra* Facts III. Courts and other agencies have followed the text of the LLC statute: They have defined LLCs as unincorporated organizations other than partnerships "*unless the context otherwise requires*." N.Y. Ltd. Liab. Co. Law § 102(m) (emphasis added). But the Board has steadfastly ignored this language and this precedent. A full reckoning with these other applications would show that the Legislature did mean something when it included the important proviso that the definition of an LLC may vary based on the legal context. Had the Board considered that language, considered the Legislative intention to effectively limit campaign spending by business entities, and examined how LLCs are treated elsewhere in the law, it would have approved the Proposed Opinion, and would not have likened LLCs to individuals when it comes to campaign contributions. The Board's faulty determination should be reversed.

V. PETITIONERS HAVE STANDING TO SUE

All Petitioners have standing to bring this action. Each has suffered concrete injury falling within the zone of interests the Election Law was meant to protect. If these Petitioners

were disqualified, "the result would be to completely shield a particular action from judicial review," *Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation*, 23 N.Y.3d 1, 6 (2014)—precisely what the Court of Appeals has made clear the rules of standing must not do.

A. Petitioners Have Standing Under General Standing Principles

Standing to bring an Article 78 petition challenging an agency decision is governed by *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6 (1975), in which the Court of Appeals adopted a broadly permissive approach in keeping with "[t]he increasing pervasiveness of administrative influence on daily life." *Id*. at 10. Under this approach, a Petition must allege: (1) an injury in fact, and (2) "that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated." *Better Long Island, Inc.*, 23 N.Y.3d at 6.[22] Petitioners need only allege sufficient injury; they need not prove that the injury occurred. *See Kosmider v. Garcia*, 111 A.D.3d 1134, 1135 (3d Dep't 2013).

Addressing the second prong first, Petitioners' claims plainly fall into the "zone of interests" protected by the Election Law, which was intended to "restrict unduly large contributions to any one campaign," Gov. Malcolm Wilson's Mem. on Approving Law, Bill Jacket, 1974 N.Y. Laws ch. 304, Ex. 2, and mandate "full and complete disclosure of campaign financing and practices," 1974 N.Y. Laws 1602, 1603 Ex. 3. Underlying these objectives was the Legislature's desire to prevent corruption of government officials, especially by business interests, *see, e.g.*, 50 N.Y. Jur. 2d Elections § 522; *Hispanic Leadership Fund, Inc.*, 42 F. Supp. 3d at 369, and "to maintain citizen confidence [] and full participation in the political process of

[22] At least one court has suggested that the "zone of interest" test does not even apply in the context of administrative challenges. *See McKinney v. Comm'r of New York State Dep't of Health*, 15 Misc.3d 743, 751 (Sup. Ct. Bronx Cnty 2007). This Court need not decide this issue, however, given that Petitioners' claims plainly fall within the zone of interests protected by the Election Law.

our state to the end that the government . . . remain ever responsive to the needs and dictates of its residents." Ex. 3 at 1602. These are precisely the interests Petitioners seek to vindicate through this action.

As to the first prong, all of the Petitioners have alleged specific injuries that are more than sufficient to confer standing. Most Petitioners are running for office now or have run for office recently.[23] Several have faced opponents with major LLC funding, *see, e.g.*, Koetz Aff. ¶ 6; Squadron Aff. ¶¶ 8-9; multiple Petitioners have been subjected to significant pressure to raise money from LLCs or otherwise avoid taking positions adverse to the interests of their parties' LLC donors, Koetz Aff. ¶ 7; Krueger Aff. ¶ 5; and all of the Petitioners who run for office again likely will face LLC-funded opponents in the future, *see, e.g.*, Kavanagh Aff. ¶ 6. The LLC Loophole thus directly impacts each of these Petitioners by forcing them to compete for office in an illegally-structured competitive environment.

The competitive disadvantage Petitioners face here is a textbook example of the kind of injury sufficient to confer standing to challenge an election rule, as federal and New York courts have recognized. *See Shays v. FEC* (*Shays I*), 414 F.3d 76, 84, 87 (D.C. Cir. 2005) (applying "competitor standing" doctrine to find that candidates had standing to challenge FEC rule because their "opponents may undertake any conduct permitted by the challenged regulations without fear of penalty, even if that conduct violates campaign statutes"); *Marchi v. Acito*, 77 A.D.2d 118 (3d Dep't 1980) (allowing a candidate to challenge the Board of Elections' failure to prevent his opponent's violations of the Fair Campaign Code); *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 17 (2d Dep't 2012) (recognizing competitor standing in

[23] As noted in their affidavits, Petitioners Krueger, Squadron, Kavanagh, and Lee are all running for election or reelection in 2016, and Petitioner Koetz is contemplating another run for office in the future. Krueger Aff. ¶ 3; Squadron Aff. ¶ 3; Kavanagh Aff. ¶ 3; Lee Aff. ¶ 2; Koetz Aff. ¶ 5.

the business context). Thus, Petitioners face the sort of injury courts have repeatedly found is sufficient to confer standing to challenge an election rule.[24]

Moreover, Petitioners Krueger, Squadron, and Kavanagh have been injured not only in their capacity as candidates but also as government officials, as massive LLC political donations have impaired their ability to represent their constituents. Krueger Aff. ¶¶ 9-11. *See also Morgenthau v. Cooke*, 56 N.Y.2d 467, 470 (1982) (elected district attorney had a "cognizable interest" in challenging potentially unconstitutional judicial assignment process that could affect his duties); *New York State Soc'y of Surgeons v. Axelrod*, 157 A.D.2d 54, 56 (3d Dep't 1990), *aff'd*, 77 N.Y.2d 677 (1991) (practicing surgeons had standing to challenge agency rule that potentially "interfere[d] with their ability to provide quality treatment to their patients").

In addition, all of the individual Petitioners, as well as many of Petitioner Brennan Center's members,[25] have been injured in their capacity as New York voters. For example, because LLCs can be used to shield the true identity of major contributors, Petitioners often do not know who is bankrolling candidates' campaigns, information to which the Election Law entitles them. *See, e.g.*, Dunn Aff. ¶ 8; Benjamin Aff. ¶ 8; Koetz Aff. ¶ 14; Norden Aff ¶ 5. The U.S. Supreme Court has long held that deprivation of disclosure information to which a voter is legally entitled is a sufficient injury in fact to confer standing. *See FEC v. Akins*, 524 U.S. 11, 21

[24] *See also Schulz v. N.Y. State Bd. of Elections*, 633 N.Y.S.2d 915, 918 (Sup. Ct. Albany Cnty. 1995) *rev'd on other grounds*, 214 A.D.2d 224 (3d Dep't 1995) ("Firstly, as a citizen-taxpayer and a person specifically aggrieved by the prohibitive impact of [the Election Law], upon his quest for ballot access for the office of Governor, plaintiff-petitioner has standing to bring this lawsuit.").

[25] While the Brennan Center does not grant "membership" status, it has numerous individual contributors, staff, and volunteers who play the exact same role as members do in other organizations (who, for ease of reference, will be referred to here as the Brennan Center's "members"). Case law makes clear that the existence of official membership status is irrelevant for organizational standing purposes; the important question is whether the organization's lawsuit properly represents the people it serves. *See, e.g.*, *Sullivan v. Paterson*, 80 A.D.3d 1051,1052-53 (3d Dep't 2011) (holding that statewide organization representing local bargaining units of school employees had standing despite the fact that members were not individuals); *Mixon v. Grinker*, 157 A.D.2d 423, 425 (1st Dep't 1990) (holding that the Coalition for Homeless had organizational standing to sue the city for failure to provide proper housing for homeless men with HIV).

(1998); *accord Shays v. FEC* (*Shays II*), 528 F.3d. 914, 923 (D.C. Cir. 2008). The LLC Loophole also impacts Petitioners' ability to vote for their preferred candidates due to the immense resources needed to mount a successful statewide campaign. Benjamin Aff. ¶¶ 9-11; *see also* Norden Aff. ¶ 5. This type of injury has also been recognized as cognizable for standing purposes. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 790 (1983) (filing requirements dissuaded certain candidates from running and thus injured voters who wanted to vote for them, an injury sufficient to confer standing on these voters).

B. The Brennan Center Has Organizational Standing

Petitioner Brennan Center has organizational standing to challenge the LLC Loophole. For an organization to have standing, (1) one or more of its members must have standing; (2) the interests asserted in the case must be germane to the organization's overall purpose; and (3) the claim asserted must not require participation of any individual member. *Aeneas McDonald Police Benevolent Ass'n, Inc. v. City of Geneva*, 92 N.Y.2d 326, 331 (1998). The Brennan Center clearly meets this test. First, as noted above, many of the Brennan Center's contributors, employees, and volunteers are New York voters, who suffer the same injuries as do the individual Petitioners. *See* Norden Aff. ¶ 5. Second, the Brennan Center's overall purpose is to advocate for a more fair and representative democracy, including through robust campaign finance protections—exactly the interests animating the Election Law, which Petitioners seek to vindicate. *See* Norden Aff. ¶¶ 2, 4. Third, no individual member of the Brennan Center is affected differently by the LLC Loophole such that his or her participation as an individual is necessary.

New York courts have consistently recognized organizational standing in similar contexts. For example, in *Saratoga County Chamber of Commerce Inc. v. Pataki*, the Third Department held that two nonprofit organizations opposed to gambling had standing to challenge

the validity of the Governor's compact with a Native American tribe, because the religious and grassroots organizations had "alleged cognizable harm to their members" and their purpose—opposing casino gambling—was germane to the relevant litigation. 275 A.D.2d 145, 155-56; *see also Soc'y of Surgeons*, 157 A.D.2d at 56 (four medical societies had standing to sue in order to vindicate their members' "ethical responsibilities to improve the public health"); *Nat'l Org. for Women v. State Div. of Human Rights*, 34 N.Y.2d 416, 420 (1974) (NOW had standing to challenge publisher's discriminatory advertising because the group was "a bona fide recognized organization" representing those with a "specific interest in the litigation in question").

C. Petitioners Have Standing Under the Public Interest Doctrine

Petitioners also have public interest standing. New York has a long tradition of opening the courthouse doors to litigants who seek to raise issues of genuine public interest through the legal process. A departure from ordinary standing jurisprudence, the public interest standing doctrine permits courts to decide cases of significant public concern that affect the operation of the government, even when the touchstones of traditional standing may be absent. *Andresen v. Rice*, 277 N.Y. 271, 281 (1938). Here, Petitioners have standing under the public interest standing doctrine because the Board-created LLC Loophole has gutted the state's campaign finance laws, permitted wholesale evasion of the Election Law's contribution limits for individuals, and facilitated grotesque corruption, as demonstrated by the recent convictions of the state's former top two legislators. *Supra*, Facts IV; *see also* Editorial, *Defending Corruption*, Albany Times-Union, Dec. 20, 2015, Ex. 19-e (noting that a major LLC donor "played a key role in the corruption schemes that recently brought down former Assembly Speaker Sheldon Silver and ex-Senate Majority Leader Dean Skelos"); William K. Rashbaum, *Albany Trial Exposed the Power of a Real Estate Firm*, N.Y. Times, Dec. 19, 2015, at A1, Ex. 19-f (discussing how Glenwood Management, the largest LLC contributor, played a key role in both

trials and gained tax benefits of $100 million from one state program alone). If ever there was a case where the public interest standing doctrine should apply, this is it. This Court should acknowledge Petitioners' standing and move to the merits.

VI. THE PETITION IS TIMELY

The April 2016 Decision by the Board rejected a specific proposal to limit LLC contributions to those permitted to either corporations or partnerships, depending on the tax status that the LLC elects. This suit alleges that the Board's rejection of that rule was arbitrary, capricious, and contrary to law. It is brought within four months of the April 2016 Decision, and is thus timely. *See* CPLR 217.

There is no question that the April 2016 Decision was a *determination* by the Board, subject to review under Article 78. A denial of a request to act is itself a challengeable action under Article 78. *See, e.g., Gottlieb v. City of New York*, 129 A.D.3d 724, 725 (2d Dep't 2015) (Article 78 permits review of Office of Child Support Enforcement's denial of petitioner's claim that it had made a mistake regarding his arrears); *Meegan v. Griffin*, 161 A.D.2d 1143, 1143 (4th Dep't 1990) (rejecting statute of limitations argument in Article 78 proceeding challenging decade-long practice of failing to appoint deputy fire commissioners); *Marchi v. Acito*, 77 A.D.2d at 120 (Board of Elections' refusal to act on a petition, citing purported unconstitutionality of statute in question, was an abuse of discretion and arbitrary and subject to invalidation under Article 78). Here, the Board voted on—and denied—a motion to replace the 1996 Opinion with a new rule on LLC contributions. Prior to the vote, the Board members had the opportunity to review the Proposed Opinion; during the vote, its merits were discussed and debated. Ex. 22 at 49-50. The April 2016 Decision is precisely the sort of administrative action that is subject to judicial review under Article 78; as this suit was brought within four months of

that determination, this Court may hear Petitioners' challenge and rule on the merits of the Decision.

* * * *

Petitioners are each specifically harmed by the LLC Loophole—as elected officials, as candidates, as an organization promoting good government, and as voters. If these Petitioners lack standing to challenge the Board's decision—a challenge specifically authorized by CPLR 7803—then *no* person would have standing, and the agency's decision would be insulated from judicial review. The Court has authority to review the legal question of whether the Board's decision complied with the Election Law and the LLC Law, and these Petitioners have standing to ask this Court for such a review.

CONCLUSION

For the reasons stated above, we ask that this Court invalidate the April 2016 Decision not to rescind the Board's 1996 Opinion and order the Board to issue a new opinion or regulation consistent with the text and spirit of the Election and LLC Laws.

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New York, New York

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