To be Argued by:
ELIZABETH S. SAYLOR
(Time Requested: 15 Minutes)

Case No. 524950

New York Supreme Court
Appellate Division – Third Department

In the Matter of the Application of

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

Petitioners-Appellants,

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

– against –

NEW YORK STATE BOARD OF ELECTIONS,

Respondent-Respondent.

BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

This case and its related case[1] raise a simple question: For purposes of New York's campaign finance laws, should limited liability companies ("LLCs") be treated like corporations and partnerships, or should they be given the privileges afforded to natural persons (i.e. human beings)?

The answer is clear: Treating LLCs like the other artificial business entities they most closely resemble (partnerships and corporations) is the only way to effectuate the Election Law's purpose of imposing reasonable contribution limits and disclosure requirements. Treating LLCs like partnerships or corporations is also consistent with the text and purpose of the LLC Law. The State Board of Elections' decisions in 2015 and 2016 (both by a 2-2 vote) to instead continue treating LLCs like natural persons are arbitrary, capricious, and clear errors of law. No one who has considered the issue—not the two lower courts or the controlling bloc of commissioners on the Board—has come up with a single compelling

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[1] This memorandum of law is filed in support of Petitioners' appeal of the Board's 2016 Decision, *Brennan Center v. Board of Elections*, Index No. 3279-16 (Sup. Ct. Albany Cnty. Feb. 10, 2017) ("*Brennan Center II*"). To preserve the Court's resources, to simplify the briefing, and because all parties consented to Petitioners' request to consolidate cases Index Nos. 3579-15 and 3279-16 for purposes of appeal, Petitioners have filed identical briefs in support of their appeals of both Supreme Court decisions.

Many of the citations to the Record ("R__") are identical for both Records on Appeal. For those citations that are specific to Case No. 524905, which relates to *Brennan Center I* (Index No. 3579-15), the Record will be cited as "2015-R__." For citations specific to Case No. 524950, which relates to *Brennan Center II* (Index No. 3279-16), the Record will be cited as "2016-R__."

argument to treat LLCs like natural persons. Instead, they have hidden behind meritless procedural objections.

An LLC is a classic legal fiction, a hybrid entity created in 1994 by state law to allow its owners to enjoy the limited liability benefits of the corporate form and also the tax treatment afforded to partnerships. There is no evidence that, in creating such entities, the Legislature intended to impair New York's carefully crafted system of campaign finance rules, which long predates the LLC Law and for decades has imposed strict limits on both corporations and partnerships to keep them from being used to circumvent the system's other contribution limits and disclosure requirements.

Because LLCs did not exist at the time the Legislature passed the key provisions of the Election Law governing campaign contributions, it fell to the Board, in 1996, to determine which contribution limits applied to the newly created entities *consistent with the text and purpose of the governing statutes*. The Board failed in this task.

The Board's 1996 Opinion erroneously determined that LLCs should be treated as if they were human beings instead of business entities (creating the so-called "LLC Loophole"). The LLC Loophole allows LLCs to give campaign contributions at much higher rates than corporations or partnerships: They are allowed to contribute to political candidates and organizations at the maximum

level allowed for every *individual* ($65,100 per candidate in a statewide race)—even as partnerships are limited to $2,500 donations and corporations can give no more than $5,000 in any one year. In essence, the LLC Loophole permits LLCs to be used as vehicles for the individuals who control them to make virtually limitless, often secret donations. The Board's 1996 Opinion relied on a portion of the LLC Law that stated that LLCs are distinct from corporations and partnerships. But the Board ignored vital language in the same provision clarifying that LLCs should still be treated as corporations or partnerships if the context so requires. The Board also ignored the basic objectives of the Election Law: to limit and provide full disclosure of campaign contributions.

If the consequences of this error were not clear in 1996, they are obvious now. LLC contributions are central to New York's pernicious corruption problem. Unsurprisingly, they played a critical role in the scandals that brought down both former Assembly Speaker Sheldon Silver and former Senate Majority Leader Dean Skelos. Businesses routinely and egregiously exploit the LLC Loophole by giving massive contributions through many different LLCs, each of which is treated as a separate person by the Board—rendering the Legislature's contribution limits essentially meaningless. And the problem is getting worse. LLCs gave almost $20 million to political campaigns and candidates in 2014, compared to $4.5 million in

2002.[2] As the Moreland Commission to Investigate Public Corruption ("Moreland Commission") observed, Albany today is awash in campaign money funneled through LLCs.

Despite overwhelming evidence that the LLC Loophole undermines the purposes of the Election Law, a controlling bloc of the Board inexplicably decided—twice, in 2015 and 2016 (the "2015 Decision" and "2016 Decision")—to continue giving LLCs and those behind them special treatment. To justify this decision, the controlling bloc did little more than gesture back to the same clearly erroneous statutory analysis used in 1996. Not only did it ignore the full text and purpose of the LLC Law and the underlying goals of the Election Law, it also failed to address the fact that the Federal Election Commission—whose approach the Board followed in 1996—now treats LLCs as corporations or partnerships depending on their tax status. Other New York agencies and courts routinely follow a similar approach, looking to the LLC's tax status to determine treatment. *Infra* Argument I.

The Board's 2015 and 2016 Decisions can and should be reversed by this Court. The purported technical deficiencies relied upon by both lower courts to avoid addressing the Board's clear error are illusory. First, the statutory interpretation undergirding the Board's 1996 Opinion and its 2015 and 2016

[2] *See infra* Argument I-A-2(a).

Decisions are reviewable by a court, rendering the Petitions justiciable. *Infra* Argument II. Second, the Petitions were timely because they were each filed within four months of substantive Board decisions to reject motions to repeal the LLC Loophole; in any event, the 1996 Opinion itself created a continuous harm that tolls the statute of limitations. *Infra* Argument III. And third, elected officials and voters who are directly impacted by campaign finance rules have standing to challenge them, giving the Petitioners standing. *Infra* Argument IV.

Having created the LLC Loophole, the Board now claims that it has no power to close it, and that courts have no authority to review it. This is nonsense. The LLC Loophole and the Decisions affirming it are arbitrary, capricious, and legally erroneous. This Court should reverse.

QUESTIONS PRESENTED

1. Did the Board of Elections err when it decided that LLCs should be subject to the higher contribution limits under the Election Law applicable to natural persons, rather than the lower limits applicable to other business entities, such as corporations or partnerships?

The *Brennan Center I* court (Justice Fisher) erred in answering "no." The *Brennan Center II* court (Acting Justice Ferreira) did not address the question.

2. Do Article 78 Petitions challenging the Board of Elections' interpretation of the Election Law and the LLC Law present justiciable questions of statutory interpretation well within the province of the judicial branch?

The lower courts erred in answering "no."

3. Were the Article 78 Petitions, filed within four months of the Board of Elections' decisions to treat LLCs like natural persons for purposes Election Law, timely filed?

The *Brennan Center* I court (Justice Fisher) erred in answering "no." The *Brennan Center II* court (Acting Justice Ferreira) did not address the question.

4. Do the Petitioners, who are directly injured by the Board's decisions, have standing to challenge the decisions?

The Brennan Center I court (Justice Fisher) erred in answering "no." The *Brennan Center II* court (Acting Justice Ferreira) did not address the question.

FACTS AND PROCEDURAL BACKGROUND

I. THE LEGISLATURE LIMITS CAMPAIGN CONTRIBUTIONS, APPLIES LOWER LIMITS TO BUSINESS ENTITIES, AND REQUIRES DISCLOSURE

The New York Election Law comprehensively regulates political contributions in an effort to reduce corruption and its appearance, and to ensure citizens know who is giving money to our elected officials. *See* N.Y. Elec. Law §§ 14-102 , 14-104 , 14-114 , 14-116 . In service of those goals, the Election Law

contains three principal mandates: (1) contributions from individuals to candidates and committees are limited, though those limits are relatively generous; (2) contributions from business entities are more strictly limited than those from individuals; and (3) all contributions must be disclosed.

The state's effort to limit potentially corruptive political spending is not new: contributions from corporations were banned completely until the 1970s. In 1974, partially in response to the Watergate scandal, New York joined many other states in reformulating its campaign finance regulations in order to "further mandate full and complete disclosure of campaign financing and practices, and to maintain citizen 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." R116 (1974 N.Y. Laws 1602).

The cornerstone of the Legislature's reforms was a new set of contribution limits to "restrict unduly large contributions to any one campaign." R112 (Gov. Malcolm Wilson's Mem. on Approving Law, Bill Jacket, 1974 N.Y. Laws ch. 304). The Legislature set different limits for each office and indexed the limits to inflation: candidates for statewide office may now raise up to $65,100 per election cycle from each individual contributor; the limits for candidates for Senate and Assembly are $18,000 and $8,800, respectively. It also required all contributions

more than $50 to be disclosed. R113 (Gov. Malcolm Wilson's Mem. on Approving Law, Bill Jacket, 1974 N.Y. Laws ch. 304).

In 1974, the Legislature also replaced the corporate contribution ban with a new rule allowing each corporation to give a total of $5,000 per year to all candidates combined. This was not because the Legislature wanted corporations to engage in more political spending, but because corporations had long circumvented the contribution ban by giving through straw donors. The Senate sponsor explained that the new limit was meant "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) . Assemblyman Hayley likewise urged that corporate contributions should be "out in the open where we can see them and have some control on them [rather] 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." R141-42.

Some members of the Assembly nevertheless worried that allowing separate corporate entities controlled by the same individual to each make $5,000 contributions would permit easy circumvention of the individual limits. R138-40. This concern applied to real estate corporations especially, because "every building . . . is a separate corporation." R143. In response, the legislation was amended to provide that, in applying the new limit, contributions of a corporation's

subsidiaries would be aggregated with those of their parent. R147-48 (N.Y. Assembly Debate, May 13, 1974). With this amendment, the legislation passed unanimously.[3] *See* Patrick Brasley, *Election Reform Goes to Governor*, Newsday, May 14, 1974 .

Because the 1974 legislation did not separately address partnerships, the Board decided that the law did not allow *any* contributions in the name of a partnership. R149 (N.Y. Bd. of Elections Formal Op. 1976 #4 (Apr. 23, 1976) . In 1992, the Legislature changed the law to allow partnerships to give up to $2,500; any contribution over $2,500 is attributed to the individual members of the partnership. N.Y. Elec. Law § 14-120 (2); 1992 Sess. Laws of N.Y. Ch. 79 § 26 (S. 7922, A. 11505).

II. THE BOARD CARVES OUT A SPECIAL LOOPHOLE FOR NEWLY CREATED LIMITED LIABILITY COMPANIES

The contribution limits in the Election Law operated largely as intended for over two decades. That pattern should have continued after 1994 when, following a national trend in business law, the Legislature passed the LLC Law to allow for the creation of limited liability companies that combine elements of a corporation (limited liability) and a partnership (profits pass through to individual members).

[3] As Assemblyman Pesce put it, the original bill "allowed the corporations to make a $5,000 contribution and . . . allowed the subsidiaries of those corporations to make the same contribution . . . so that one huge conglomerate may contribute [] an extensive amount or quite a bit in any one individual campaign." R147. In response, Assemblyman Biondo assured Assemblyman Pesce that a recent amendment to the bill would prevent corporate subsidiaries from making contributions separately from their parent corporations. R148.

1994 N.Y. Sess. Laws Ch. 576 § 1 (S. 7511–A, A. 11317–A). While the LLC Law's goals had nothing to do with campaign finance, in 1996 the Board ruled that LLCs could not be treated like any other business entity, and instead had to be permitted to donate to political campaigns at the same level as individuals. R150-51 (N.Y. Bd. of Elections Formal Op. 1996 #1 (Jan. 30, 1996)) ("the 1996 Opinion").

The Board's 1996 Opinion constituted a sharp break from New York's history of strictly limiting contributions by corporations and partnerships. The Board justified this special exemption for LLCs with two main arguments. 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. R150 . The Board's opinion made no mention of the fact that this definition was qualified by the prefatory phrase "unless the context otherwise requires." *See infra* Argument I-B.

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. R150-51 .

The Board-created LLC Loophole allows LLCs to contribute the maximum allowed for every *individual* ($65,100 per candidate in a statewide race), which each LLC treated as a separate person and thus subject to separate limits, even if a group of LLCs is actually owned or controlled by the same individual or entity. As a result, none of the safeguards the Legislature enacted for corporations and partnerships apply. And since LLCs are quite easy to form, New York's system of contribution limits and disclosure requirements has been rendered essentially meaningless for sophisticated players.

Examples of circumvention enabled by the LLC Loophole abound. For instance, one individual businessman gave $4.3 million in campaign contributions over a two-year period ending in 2014 through 27 different LLCs, each of which was controlled by the real estate company Glenwood Management.[4] Another donor gave $250,000 to the Governor through nine different LLCs over a 48-hour period in 2015, less than a week after the Governor vetoed a bill that would have damaged the donor's real estate development prospects.[5] In total, Governor Cuomo raised $9 million from LLCs during his first term. 2015-R78, 2016-R76; *see also* Thomas

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[4] Bill Mahoney, *State's Largest Campaign Donor a Client of Silver's Second Firm,* Politico New York (Dec. 30, 2014 1:27PM) [hereinafter Mahoney, *Largest Campaign Donor*] http://www.politico.com/states/new-york/albany/story/2014/12/states-largest-campaign-donor-a-client-of-silvers-second-firm-018514.

[5] Bill Mahoney, *Filings Show Kiryas Joel Money Flowed to Cuomo After Veto*, Politico New York (July 17, 2015) (hereinafter Mahoney, *Money Flowed to Cuomo*). http://www.politico.com/states/new-york/albany/story/2015/07/filings-show-kiryas-joel-money-flowed-to-cuomo-after-veto-023846.

Kaplan, William K. Rashbaum & Susan Craig, *After Ethics Panel's Shutdown, Loopholes Live On in Albany*, N.Y. Times, Dec. 8, 2014 .[6] Other state and local candidates have likewise raised millions from the hundreds of LLCs controlled by massive corporations, something they would never be able to do without the LLC Loophole. The culture of impunity fostered by the LLC Loophole features prominently in the Moreland Commission's findings[7] and played a critical role in the recent Silver and Skelos scandals that rocked Albany.[8]

III. THE BOARD TWICE VOTES AGAINST A NEW RULE THAT WOULD HAVE CLOSED THE LLC LOOPHOLE

These appeals (*see supra* n.1) challenge the Board's determinations in 2015 and 2016 to reject motions to bring the treatment of LLCs into conformity with the Election Law by closing the LLC Loophole. In both instances, the Board deadlocked 2-2, thereby leaving the 1996 Opinion that created the LLC Loophole in place. Supreme Court Justice Lisa Fisher upheld the Board's 2015 Decision, and Acting Justice James H. Ferreira upheld the 2016 Decision, for different reasons.

The Board's 2015 Decision & Justice Fisher's 2015 Opinion Upholding It

On April 16, 2015, following a request from Petitioner Brennan Center and Emery Celli Brinckerhoff & Abady LLP, the Board took up a motion made by

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[6] Available at https://www.nytimes.com/2014/12/08/nyregion/after-moreland-commission-shutdown-by-gov-cuomo-loopholes-live-on-in-albany.html.

[7] *See* Argument I-A-2(a) and IV-A-2, *infra*.

[8] *See* Argument I-A-2(b), *infra*.

Board Co-Chair Douglas A. Kellner to rescind the 1996 Opinion and issue a new opinion that would repeal the LLC Loophole. Co-Chair 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 was *required* by statute, and that only the Legislature could close it—even though it was created by the Board. *See* R197-205.

After a thorough discussion of the merits of a motion to close the LLC Loophole, the Board denied the proposal on a 2-2 vote. As a tie leaves the status quo policy in place, N.Y. Elec. Law § 3-100 (4), the motion to rescind the 1996 Opinion was officially rejected. This determination ("the 2015 Decision") formed the basis of Petitioners' first Article 78 petition alleging that the Board's vote was arbitrary, capricious, and contrary to law. *See Brennan Ctr. v. Bd. of Elections*, Index. No. 3579-15 (Sup. Ct. Albany Cnty.).

On March 16, 2016, Justice Fisher held that the petition was not reviewable because the 2015 Decision was not a vote on the merits of the LLC Loophole but 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.'" 2015-R17 (*Brennan Ctr. v. N.Y. Bd. of Elections*, 52 Misc.3d 246, 256 (Sup. Ct. Albany Cnty. March 16, 2016 ("Brennan Center I")). Her ruling did not address the

extensive discussion among the Board commissioners that made plain the fact that the April 2015 vote was a vote on the merits of the LLC Loophole. *See, e.g.*, R197 (voting on a motion "that will rescind opinion 1996-1"); R204 (urging that Board's prior interpretation "be corrected to treat [a] limited liability company as a partnership").

Justice Fisher also held that the petition was untimely, that petitioners lacked standing to bring the challenge, and that, on the merits, the 2015 Decision did not involve any statutory interpretation and was not arbitrary or capricious. 2015-R18-30.

The 2016 Decision & Acting Justice Ferreira's Decision Upholding It

After the ruling in *Brennan Center I*, Co-Chair Kellner raised a new motion, on April 5, 2016, 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. 2016-R254-257. 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. 2016-R257. The Proposed Opinion 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. 2016-R257. After discussing the motion, the Board rejected the Proposed Opinion by a tie vote ("the 2016 Decision").

Petitioners filed a new Article 78 challenging the 2016 Decision.[9] *Brennan Ctr. v. Bd. of Elections*, Index. No. 3279-16 (Sup. Ct. Albany Cnty.) . Acting Justice Ferreira dismissed the Petition, finding that the case presented a non-justiciable political question. 2016-R25-32. (*Brennan Ctr. v. Bd. of Elections,* Index No. 3279-16 (Sup. Ct. Albany Cnty. Feb. 10, 2017) ("*Brennan Center II*")). Acting Justice Ferreira did not address the merits of the LLC Loophole, nor did he adopt Justice Fisher's opinion or address any of the other issues mentioned in that opinion.

This Appeal

Both opinions were entered on March 3, 2017. 2015-R32, 2016-R18. Notices of appeal were timely filed. 2015-R32-33, 2016-R18-19. This court denied Petitioners' motion (on consent) to consolidate for purposes of the appeal. Decision and Order on Motion, Nos. 524905 & 524950 (3d Dep't May 18, 2017).

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[9] The petitioners who brought *Brennan Center I* were the Brennan Center for Justice at NYU School of Law, Gerald Benjamin, Liz Krueger, John R. Dunne, Daniel L. Squadron, Maureen Koetz, and Brian Kavanagh. The same petitioners later brought *Brennan Center II*, except that the *Brennan Center II* petitioners include Don Lee and do not include John R. Dunne. Unless otherwise specified, references to "Petitioners" include generally all the petitioners from *Brennan Center I* and *Brennan Center II.*

ARGUMENT

In rejecting motions to repeal the LLC Loophole, both the 2015 and 2016 Decisions were arbitrary and capricious rulings by the Board and were affected by an error of law. The Decisions do not conform to the text or intent of the Election Law or LLC Law. Once in court, Respondents never even tried to defend the LLC Loophole on the merits—because it is indefensible.

First, the Board's 2015 and 2016 Decisions rejecting motions to repeal the LLC Loophole are clearly wrong on the merits: The controlling members of the Board dramatically misapplied the Election Law, frustrated its core purposes, ignored key statutory text of the LLC law and precedent interpreting that text, and did not even attempt to justify their continued reliance on an outdated and since-overturned federal analogue. *Infra* Argument I.

Second, both the courts below erred in dismissing the 2015 and 2016 petitions as non-justiciable, although they did so for very different reasons. Justice Fisher erred in concluding that the Board's 2015 Decision pertained to a mere "allocation of resources," given that all four commissioners plainly intended to vote—and did vote—on the merits of whether to adopt a rule rescinding the LLC Loophole. Acting Justice Ferreira erred in concluding that the second petition addressed a non-justiciable political question. Both petitions challenged the Board's interpretation of two statutes, the Election Law and the LLC Law—and

courts are not only equipped but required to review an agency's act of statutory interpretation. *Infra* Argument II.

Third, Justice Fisher also erred in finding that the legal challenge in *Brennan Center I* was time-barred. The 2015 petition did not challenge only the 1996 Board-created LLC Loophole; rather, it raised a timely challenge to the specific 2015 Board determination refusing to close the LLC Loophole and enact a new rule that conformed to the Election Law. And the continued enforcement of the 1996 Opinion constitutes a continuing violation that renders the petitions timely. *Infra* Argument III.

Fourth, Justice Fisher erred in finding that Petitioners lacked standing, as each Petitioner is directly harmed by the LLC Loophole. Under the court's analysis, *no one* would have standing to challenge the Board's decision—an outcome that standing case law forbids. *Infra* Argument IV.

I. THE BOARD'S DECISIONS WERE ARBITRARY, CAPRICIOUS, AND A CLEAR ERROR OF LAW

Notwithstanding the obvious weakness of the 1996 Opinion, throughout these proceedings, neither the Board nor either court below has offered *any* substantive defense for the LLC Loophole, which is understandable, since the LLC Loophole is indefensible. Not only does it negate the core goals of the Election Law—to provide reasonable limits and full transparency for campaign contribution—but in crafting and now perpetuating the LLC Loophole, the Board

ignored crucial statutory language in the LLC Law directing that LLCs be treated as corporations or partnerships where the context so requires. In its recent decisions the Board also ignored the Federal Election Commission's treatment of LLCs, though it previously followed that agency's approach when it adopted the LLC Loophole in 1996; and refused to consider countless decisions by state agencies and courts that treat LLCs like corporations or partnerships.

In short, the Board cannot muster *any* remotely compelling rationale for the LLC Loophole, instead opting to hide behind various procedural technicalities. The charade has gone on for long enough. This Court should hold that the 2015 and 2016 Decisions are erroneous interpretations of law and direct the Board to close the LLC Loophole.

A. The Board's Decisions to Vote Against Closing the LLC Loophole Are Not Consistent with the Purpose or History of the Election Law

The Board's decisions—thanks to a controlling bloc of two commissioners—to continue treating LLCs as natural persons when they make campaign contributions subvert the basic purposes of the Election Law, which are to (1) limit campaign contributions; (2) ensure that business entities are subject to lower limits than individuals; and (3) require that campaign contributions be transparent. The Legislature expressed specific concern about business entities taking advantage of a corporate structure in order to circumvent contribution

limits. Yet because of the LLC Loophole, corporations and wealthy individuals have given millions through the dozens of LLCs they have created. *See infra* Argument I-A-2(a).

In ignoring the Legislature's core goals, the Board violated its basic obligation to discern legislative intent anytime it interprets statutes and creates legally-binding rules. *See, e.g., United Univ. Professions v. State*, 36 A.D.3d 297, 302 (3d Dep't 2006) (explaining that a new agency decision is valid only if "the new interpretation is supported by the statute's language and legislative intent"); *Vink v. N.Y. State Div. of Hous. & Cmty. Renewal*, 285 A.D.2d 203, 209 (1st Dep't 2001) (noting that a statute's plain meaning "must be honored by the agency," and "[i]f the meaning is unclear, legislative intent must be discerned"). The Board's failure to do so means its decisions cannot stand.[10]

1. The Goal of the Election Law Is to Prevent Corruption or Its Appearance by Providing Meaningful Limits and Disclosure Requirements

The Election Law's central goal is to reduce corruption and the appearance of corruption by limiting campaign contributions and ensuring that they are properly disclosed. *See, e.g., Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp.

[10] Though the Board has a duty to interpret the Election Law, it should be afforded no deference here for two reasons. First, 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). Second, when it created the Loophole, the Board interpreted the LLC Law, and it has no special expertise with regard to that statute. *See id.* (noting that deference is sometimes appropriate "to the governmental agency responsible for administration of a statute").

3d 365, 369 (N.D.N.Y. 2014) . That purpose was clearly stated by the Legislature and the Governor at the time the contribution limits were passed. *See* 2015-R45-48 at ¶¶ 20-28, 2016-R41-43 at ¶¶ 17-25. The Governor's approval memorandum for the Election Law noted that the limits were intended to "restrict unduly large contributions to any one campaign." R112 . The Legislative declaration explained that the bill was intended 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." R1 16 (1974 N.Y. Laws 1602).

Legislators recognized the potential for business entities to circumvent limits and sought to ensure that such circumvention would not occur. On April 4, 1974, Assemblyman Berle raised the possibility that if corporations were allowed to give $5,000 each, affiliated corporations could try to give separate $5,000 contributions to increase their influence: "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." R146. 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 law was enacted only after Assemblyman Berle's concerns were addressed. 2015-R46-47 at ¶¶ 26-28, 2016-R43 at ¶¶ 23-25; *supra* Facts I.

2. The LLC Loophole Subverts the Legislature's Objectives and Creates Problems the Election Law Sought to Forestall

The Legislature was principally concerned that a single business entity would manage to give multiple $5,000 contributions only because it never imagined that the Board would create a loophole to allow similar entities to be used to give *millions* of dollars. The problems the Legislature sought to prevent by enacting a low corporate contribution limit are exactly those that the LLC Loophole fosters by allowing one type of entity, and only that type of entity—not corporations or partnerships—to give millions of dollars to candidates, often with no transparency. The result is that the $5,000 corporate limit applies only to those without the sophistication or willingness to circumvent the law. As the bipartisan Moreland Commission explained, the LLC Loophole "dramatically undermines the limits already in place." N.Y. Comm'n to Investigate Public Corruption, Preliminary Report 37 (2013) ("Moreland Report")[11].

In the four years preceding the last election for Governor, LLCs were used to give $54.2 million to candidates, parties, and traditional PACs,[12] adding to the

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[11] The report is available at https://www.propublica.org/documents/item/1183017-moreland-commission-report.html (last accessed June 18, 2017).

[12] 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 N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013).

$118.6 million total for 1999 to 2014. *See* 2015-R78 at ¶ 3, 2016-R76-77 at ¶¶ 3, 8. The problem has increased exponentially in recent years, with LLCs giving almost $20 million in 2014, compared to $4.5 million in 2002. *Id.*

When big money comes from LLCs, it almost always comes in amounts that exceed the $5,000 corporate limit, and often from unidentifiable groups—a strong indication that the entities are used to circumvent the law. Of the LLC donations given to Governor Cuomo during his first term, about 83% of them came in increments exceeding $5,000. 2015-R78 at ¶ 4, 2016-R76 at ¶ 4. The situation is similar for other offices: Preceding the 2014 election, Attorney General Eric Schneiderman raised $1.7 million from LLCs, 72% of which came from contributions exceeding $5,000; former Nassau County Executive Tom Suozzi raised $611,000 from LLCs, and 71% of that money came from contributions above $5,000. 2015-R78-79 at ¶¶ 5-6, 2016-R77 at ¶¶ 5-6.

And donors often contribute through multiple LLCs, each of which is allowed to give as much as any individual in the state. *See supra* Facts II.

Because LLCs are not required to publicly disclose the names of their members or who actually runs them,[13] the public has no way of knowing where

[13] According to the New York Department of State's Division of Corporations, "[t]his office does not require or maintain information regarding the names and addresses of members or managers of nonprofessional limited liability companies." N.Y. Dep't of State, Div. of Corporations, Entity Information, Zuffa, LLC, https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_token=A4F2F6101C4172F831B4CC469594B1E3AC68ECFFA77953EB3A043CEA0F0FFF6995AAF

these contributions are coming form. This exacerbates the corruption problem created by large LLC contributions: Not only can candidates and elected officials take massive sums from individuals and corporations, but the public is often unaware of the true source of that money.

Although the public is kept in the dark, big donors take pains to make sure candidates know who is behind those LLCs, as was revealed during the recent corruption convictions of Sheldon Silver, former speaker of the Assembly, and Dean Skelos, former majority leader of the Senate. In the latter case, the prosecutors explained that real estate firm Glenwood Management sent $100,000 to Mr. Skelos in one day, using five different LLCs.[14] A lobbyist from the same firm testified at Mr. Silver's trial that he would personally deliver checks from multiple LLCs that were paper clipped together with a Glenwood Management business card. This ensured that Mr. Silver, if not the public, would know where the LLC donations came from. 2016-R252-53. In total, Glenwood gave almost $13 million to candidates and committees during a nine-year period, with 90% of those

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[14] Bill Mahoney, *Skelos Complaint Details Glenwood Connection*, Politico New York (May 4, 2015) http://www.politico.com/states/new-york/albany/story/2015/05/skelos-complaint-details-glenwood-connection-021807.

Petitioner Senator Liz Krueger was once told that she had been kept from attending meetings involving senior Democrats because lobbyists from Glenwood Management asked that she be excluded. 2016-R64 at ¶ 11. She is a champion for rent regulation legislation, which is often blocked at the behest of LLC donors. *Id.*

donations coming from more than 50 LLCs it established.[15] This is exactly what the Election Law was supposed to prevent.

3. The LLC Loophole Is at Odds with the Board's Own Past Decisions

In previous decisions, the Board has acknowledged its obligation to effectuate the purposes of the Election Law by preventing business entities from being used to make large contributions.

In one early decision, the Board determined that an unincorporated trade association needed to comply with corporate contribution limits. The Board explained that the decision prevented the association from "act[ing] as a conduit" for corporations that might want to give contributions above the $5,000 limit. R212 (N.Y. Bd. of Elections Formal Op. 1974 # 2).

Likewise, even though the text of the Election Law at the time was silent on partnerships,[16] the Board also decided that, for purposes of contribution limits, money given by partnerships should be allocated to each individual partner, rather than the partnership as a whole. R149 (N.Y. Bd. of Elections Formal Op. 1976 # 4) .

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[15] *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.

[16] The Legislature modified this rule in 1992, thereafter allowing partnerships to make contributions in their own name only up to $2,500. Any larger contribution must be attributed to the individual partners. N.Y. Elec. Law § 14-120 (2).

Indeed, in the past the Board was faithful to the objectives of the Election Law even when those goals seemed to conflict with the letter of its text. In yet another opinion, for instance, the Board held that candidates and political committees must report each of their depository bank accounts—even though the law uses the word "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." 2016-R213 (N.Y. Bd. of Elections Formal Op. 1978 #2).

Times have clearly changed. Despite its awareness of the purposes of the Election Law and its obligations to effectuate those purposes as reflected in these previous decisions, the Board has repeatedly refused to close the LLC Loophole, and has provided no coherent reasoning for its refusal. In doing so, it has undercut the Legislature's attempt to reduce corruption, allowing wealthy individuals and businesses to give millions of dollars to candidates, often in secret. The Board's repeated failures to correct its mistakes and close the LLC Loophole cannot be squared with the Election Law and must be reversed.

B. The Board's Decisions Also Conflict with Text and Purpose of the LLC Law

The Board's 1996 Opinion creating the LLC Loophole and its 2015 and 2016 Decisions declining to close the LLC Loophole are at odds not just with the Election Law, but also with the text and purpose of the LLC Law.

1. The Text of the LLC Law Specifies that LLCs Should Be Treated as Corporations or Partnerships When the Context Requires

a. The Board Ignored Part of the LLC Statute in Violation of Law

When the Legislature first provided for the creation of LLCs in 1994, it recognized that the exact nature of the new entity was not yet clear for all purposes. It thus provided that a "limited liability company" is,

> *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.

NY Limit. Liab. Co. § 102(m) (emphasis added). By beginning the definition of "limited liability company" with the phrase "unless the context otherwise requires," the Legislature acknowledged that in some circumstances, LLCs *should* be treated like other business entities. Rather than re-write every state law addressing corporations, partnerships, and trusts, the Legislature created flexibility to avoid unintended consequences.

In creating the LLC Loophole, the Board literally wrote the phrase "unless the context otherwise requires" out of the statute. The Board's 1996 Opinion stated that the LLC Law "very clearly states that [LLCs] are 'unincorporated organizations,' therefore, they are not corporations and not subject to the

contribution limits placed on corporations." R150. The 1996 Opinion conspicuously *omitted* that phrase "unless the context otherwise requires" from its quotation of the statute's defining language. R150-51. Nowhere in its original opinion, and at no time leading up to its April 2016 vote to retain the Loophole, did the Board so much as acknowledge that the phrase even exists, let alone explain why it did not apply.

b. Agencies Violate the Law When They Ignore Statutory Text

By basing its decision on only a portion of the relevant statute, the Board committed a clear error. The Court of Appeals and other New York appellate courts have long adhered to the uncontroversial principle that a state agency may not make decisions based on incomplete portions of the statutes it interprets. An agency must take the entire relevant provision into account in order to effectuate the intent of the Legislature.

New York courts routinely reverse agency determinations that fail to give meaning to statutory text. In *Lewis Family Farm, Inc. v. New York State Adirondack Park Agency*, 64 A.D.3d 1009, 1015 (3d Dep't 2009), this Court rejected an agency's argument in a dispute about whether a farmworker dwelling constituted an "agricultural use structure." The agency's reading of the statutory definition, the court held, would "render the word 'structure' . . . meaningless." Likewise, the Second Department, facing a statute similar to that at issue here,

rejected an argument by the New York City Department of Finance about the reviewability of a property tax assessment, finding that it had disregarded the full text of the governing statute stating that a tax proceeding "shall be brought as provided in this article *unless otherwise provided by law*." *Better World Real Estate Grp. v. N.Y. City Dep't of Fin.*, 122 A.D.3d 27, 34 (2d Dep't 2014). Courts have done the same thing when agencies have ignored text in the social security statute, *Rodriguez v. Perales*, 86 N.Y.2d 361, 366 (1995), a county's civil service rules, *Albano v. Kirby*, 36 N.Y.2d 526, 530 (1975), and the public health statute, *Tonis v. Bd. of Regents of Univ. of State of N.Y.*, 295 N.Y. 286, 292 (1946).

In short, agency determinations—like the Board's 2015 and 2016 Decisions—that result in the "nullification of one part of" the relevant rule or statute are invalid. *Albano*, 36 N.Y.2d at 530.[17]

c. Courts Have Given Meaning to the Very Language the Board Disregarded

The statutory phrase at issue here is hardly unusual. New York courts "have paid great attention to the introductory phrase 'unless the context otherwise requires' in the effort to give an appropriate and just meaning" to statutory provisions they are interpreting. *U.S. Trust Co. of N.Y. v. First Nat'l City Bank*, 57

[17] *See Rubeor v. Town of Wright*, 134 A.D.3d 1211, 1213-14 (3d Dep't 2015) ("'[A] statutory construction which renders one part meaningless should be avoided.'") (quoting *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 515 (1991)); *see also Universal Metal & Ore, Inc. v. Westchester Cnty. Solid Waste Comm'n*, 145 A.D.3d 46, 56 (2d Dep't 2016) (finding "the Commission's attempt to ignore 'final' in the clause 'final disposal' to be an unsupported interpretation of the statute that runs counter to the clear language of the statutory definition").

A.D.2d 285, 290 (1st Dep't 1977). For example, in *Cesar v. United Technology*, 173 A.D.2d 394, 394 (1st Dep't 1991), the court examined the CPLR provision that New York's age of majority should apply "unless [the] context requires otherwise" for purposes of tolling the statute of limitations in a personal injury action. Because the plaintiffs were domiciled in Uruguay, the court held that the context required that Uruguay's age of majority governed, rendering the suit timely. *Id.* at 394-95; *see also State Tax Comm'n v. Shor*, 378 N.Y.S.2d 222, 224 (Sup. Ct. N.Y. Cnty. 1975) ("However, Fidelity overlooks that CPLR 105 is prefaced with this caveat: 'unless the context requires otherwise, the definitions in this section apply to the civil practice law and rules'").

Here, the Board's 2015 and 2016 Decisions ignored and rendered meaningless key and often-used language in the LLC Law. Those Decisions should be reversed.

2. The Legislative Intent Behind the LLC Law Did Not Include the Creation of a Gaping Loophole in the Election Law

Nothing from the text of the LLC Law nor from its history suggests that LLC Law was passed with any intention of gutting New York's contribution limits and disclosure requirements. The legislative discussion preceding passage of that law was focused on the need to keep up with business trends by allowing for the creation of an entity that would retain the limited liability of a corporation, but

could be treated like a partnership for tax purposes.[18] At no point in the legislative discussion of the LLC Law did any legislator contemplate that the new entity would fundamentally change the nature of the Election Law and campaign finance in New York.[19] The lack of any discussion of such a radical change in law is a strong indication the change was not intended. *See, e.g., Wallach v. Town of Dryden*, 23 N.Y.3d 728, 753 (2014) (holding that statute did not supersede local zoning laws because legislative history made no mention of zoning and that the "primary concern was with preventing wasteful oil and gas practices"); *In re Charilyn N.*, 46 A.D.2d 65, 66 (3d Dep't 1974) ("Had the radical change proposed by petitioners for the financing of these services been intended by the Legislature, mention thereof would certainly have been included in the Governor's memorandum.").

C. The Federal Election Commission, Courts, and Agencies Consistently Treat LLCs Like Corporations or Partnerships, Not Like Human Beings

Looking to the context, as the LLC Law instructs, shows that the Board's decision to treat LLCs like individuals is not only contrary to law, but anomalous.

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[18] For instance, the Senator who sponsored the LLC Law explained that LLCs had "become a very popular structure for the organization of new business in this country," and would "be an advantage to the City in attracting foreign companies." R209, 211 (N.Y. Senate Debate June 30, 1994) .

[19] Surveying legislative debates preceding the passage of LLC laws in the states, two experts found that there was virtually no legislative debate on the impacts of the law beyond business concerns. Allan W. Vestal & Thomas E. Rutledge, *Disappointing Diogenes: The LLC Debate That Never Was*, 51 Saint Louis U. L.J. 53, 70 & n. 55 (2006).

The FEC—whose approach the Board purported to follow when it originally crafted the LLC Loophole—and other state agencies and courts have consistently treated LLCs like corporations or partnerships.

1. The FEC Treats LLCs Like Corporations or Partnerships, Depending on the Tax Status They Elect

When it created the LLC Loophole, the Board relied on a 1995 FEC advisory opinion holding that a Virginia LLC should be treated as an individual contributor for purposes of federal campaign finance law (meaning that it was not subject to the federal ban on corporate contributions). *See* R150-51 (citing FEC AO 1995-11).

Yet shortly thereafter, as the role of LLCs and the consequences of its decision became clearer, the FEC changed its approach, adopting a formal rule providing that LLCs should be treated as corporations or partnerships, depending on the status they elected for tax purposes. 11 C.F.R. § 110.1(g); *Final Rule: Treatment of Limited Liability Companies under the Federal Election Campaign Act*, 64 Fed. Reg. 37397 (1999). The FEC explained that this treatment would properly effectuate Congress's intent to prevent circumvention of campaign finance rules through use of the corporate form. 64 Fed. Reg. at 37399. Treating LLCs like individuals would be a mistake, the FEC reasoned, because 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. Despite this change, the Board's 2015 and 2016 Decisions refused to similarly refine its own approach to LLCs.

2. Courts Treat LLCs as Partnerships or Corporations, Not Individuals

"Courts have looked to New York common law regarding corporations and partnerships to determine whether LLCs share certain characteristics where the statutory language is silent." *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).

For instance, courts have consistently held that LLCs—just like corporations—must be represented by an attorney, even though the Judiciary Law providing that no corporation may practice law is silent on LLCs. *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); *In re Garas*, 65 A.D.3d 164, 165 (4th Dep't 2009). In so holding, the Second Department reiterated that "[a]n 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, "like a corporation or a voluntary association, the LLC may only be represented by an

attorney." *Michael Reilly Design, Inc. v. Houraney*, 40 A.D.3d 592, 593 (2d Dep't 2007).[20]

Similar reasoning has won the day in other legal disputes about the rights and responsibilities of LLCs:

Commercial Claims Act: Courts have held that LLCs may bring commercial claims actions, despite the Commercial Claims Act language permitting claims only from corporations and partnerships. *North4ore Realty LLC v. Bishop*, 2 A.D.3d 1184 (3d Dep't 2003); *Richard G. Roseetti, LLC v. Werther*, 6 Misc. 3d 1040(A), 2005 WL 68479 (Albany City Ct. 2005).

Corporate Veil Piercing: This Court has held that the doctrine of corporate veil piercing applies to LLCs. *Williams Oil Co. v. Randy Luce E-Z Mart One, LLC*, 302 A.D.2d 736, 739 (3d Dep't 2003); *see also Matias ex rel. Palma v. Mondo Properties LLC*, 43 A.D.3d 367, 368 (1st Dep't 2007) (same).

Diversity Jurisdiction: Courts have treated LLCs like partnerships for purposes of federal diversity jurisdiction. *Handelsman v. Bedford Vill. Assocs. Ltd. P'ship*, 213 F.3d 48, 52 (2d Cir. 2000).

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[20] *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, LLC v. Yorro*, 195 Misc. 2d 762, 763 (Dist. Ct. Nassau Cnty. 2003) (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).

Derivative Lawsuits: And members of LLCs have been permitted to bring derivative suits on an LLC's behalf, like corporations, "even though there are no provisions governing such suits in the [LLC] Law." *Tzolis v. Wolff*, 10 N.Y.3d 100, 103 (2008).

Criminal Actions: This Court has permitted LLCs to face criminal liability for acts of their employees despite the fact that the Penal Law only explicitly allows such liability for corporations. *People v. Highgate LTC Mgmt., LLC*, 69 A.D.3d 185, 189 (3d Dep't 2009). The criminal acts of LLC members have been imputed to the LLC itself, just like the criminal acts of principals of corporations and partnerships may be imputed to the business entity. *JMM Properties*, 2013 WL 149457, at *6.

3. New York Agencies Treat LLCs as Partnerships or Corporations, Depending on the Tax Status They Elect

New York agencies have taken a similar approach when determining how to define LLCs in different contexts:

Department of Taxation and Finance: For example, the New York Department of Taxation and Finance does not treat LLCs as human beings for tax purposes; rather, it treats them as corporations or partnerships, depending on how they are taxed by the federal government. N.Y. Dep't of Taxation and Finance,

New York Tax Status of Limited Liability Companies and Limited Liability Partnerships, Publication 16, Nov. 2014.[21]

Department of Financial Services: Likewise, the New York Department of Financial Services applies its trade name registration requirements to LLCs as if they were corporations. N.Y. Dep't of Fin. Servs., *Instructions for Corporations, Partnerships, Trade Names, Trademarks, Etc.*[22]

Workers' Compensation Board: And the Workers' Compensation Board treats LLC members as partners of a partnership when it processes their workers' compensation claims, even though the Workers' Compensation Law does not mention LLC members at all. *Captain's Galley LLC*, Case No. 6020 9539, 2003 WL 21995078 (N.Y. Work. Comp. Bd. Aug. 15, 2003); *see also Empact*, Case No. 9010 6794, 2004 WL 482616, at *2 (N.Y. Work. Comp. Bd. Mar. 5, 2004). This Court has recognized that under the Workers' Compensation Law, LLCs were covered despite the fact that they were not mentioned specifically.[23] *Burroughs v. Empire State Agric. Comp. Tr.*, 2 A.D.3d 1120, 1120-21 (3d Dep't 2003).

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

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

[23] At the time *Captain's Galley*, *Empact*, and *Burroughs* were decided, section 54(8) of the Workers' Compensation Law did not mention LLCs. N.Y. Workers' Comp. Law § 54(8).

The LLC Loophole has allowed businesses from within and outside New York—and those who control them—to give astonishingly large contributions to state candidates. No statute gives them the right to donate at such high levels. Rather, they have exercised this power over state elections as a result of decisions by the Board that ignore key statutory language and fail to consider both legislative intent and the persuasive decisions of various state courts and agencies. There is no legal basis for maintaining the LLC Loophole, and this Court should direct the Board to close it.

II. THE PETITIONS PRESENT JUSTICIABLE QUESTIONS OF STATUTORY INTERPRETATION

In creating the LLC Loophole in 1996 and voting against closing it in 2015 and 2016, the Board was engaged in statutory interpretation. This Court therefore has authority to review the Board's legal determinations—precisely what these Article 78 petitions seek. The Board's 2015 Decision was not a "ministerial act" over which the courts have no jurisdiction, as Justice Fisher called it. 2015-R17 (*Brennan Center I* at 9). Nor was the 2016 Decision a "classic discretionary policy judgment" that renders it a non-justiciable political question, as Acting Justice Ferreira asserted. 2016-R30 (*Brennan Center II* at 6). These Decisions were exercises of statutory interpretation over which the courts squarely retain supervisory authority.

Determining whether an administrative body's decision was "affected by an error of law or was arbitrary and capricious or an abuse of discretion" is precisely the task assigned to the courts under Article 78. CPLR 7803(3). Such review constitutes the very core of the judicial function. *Dental Soc'y of State of N.Y. v. Carey*, 61 N.Y.2d 330, 335 (1984) ("Whether administrative action violates applicable statutes and regulations is a question within the traditional competence of courts to decide."); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (interpreting a statute "is a familiar judicial exercise"). The Petitions—which asked the courts to review the Board's statutory interpretations of the Election Law and the LLC Law—present justiciable questions of legal analysis.

Both Justices Fisher and Ferreira erred when they held that the Board's Decisions presented non-justiciable questions. Justice Fisher mistakenly found that the 2015 Decision was nothing more than a ministerial act to ask the Board's counsel to draft a new opinion regarding the treatment of LLCs. 2015-R17-18. That reading ignores that the Board debated at length the merits of whether to close the LLC Loophole. But even if Justice Fisher was right, the problem she identified—that no draft opinion was presented—was solved when Board Co-Chair Kellner, in 2016, offered up for a vote a specific, pre-drafted opinion closing the LLC Loophole. 2016-R254-57.

Acting Justice Ferreira found a different (also incorrect) reason to declare the case non-justiciable: that the Board's "negative vote" was a "classic discretionary policy judgment." 2016-R30 (*Brennan Center II* at 6). But when agencies undertake statutory interpretation to enact their policy judgments, courts have always had a role to play in ensuring that the agency acts reasonably and in conformance with the purpose and text of the law. Such judicial review is the entire purpose of Article 78. The courts have jurisdiction over these cases.

A. The Board's 1996 Opinion, 2015 Decision, and 2016 Decision All Relied on Statutory Interpretation

1. The 1996 Opinion Relied on Statutory Interpretation

The Board explicitly framed its 1996 Opinion as an exercise of statutory interpretation. It ruled that, because the LLC Law defined "limited liability company" as an "unincorporated" organization "other than a partnership or trust," the Election Law provisions applicable to corporations and partnerships could not apply. R150. After determining that the Election Law's limits on partnerships and corporations do not apply, the Board had to "determine what limits do apply to these business organizations." *Id.* It looked to the definition of "person" found in the LLC Law, as well as the FEC's now superseded approach. "Given all of the above," the Board concluded, "it is the opinion of the Board that limited liability companies *are persons*, and as such, may make contributions in their own right

subject to the limits applicable to other individuals as enumerated" by the Election Law. R151 (emphasis added).

2. The 2015 and 2016 Relied on Involved Statutory Interpretation

In rendering its 2015 and 2016 Decisions, the Board was also engaged in statutory interpretation. Introducing the motion at the 2015 hearing, Commissioner Kellner pointed out that, under Article 14-116(2), if LLCs were considered unincorporated joint stock associations, they would be barred from making any contributions at all. R198. Commissioner Kosinski, who opposed the motion, agreed that the 1996 Opinion "was done based upon New York State law" and that it had concluded that "th[e] law makes [LLCs] not subject to corporate contribution because by definition those entities are unincorporated." R201. He continued: "Our role is to administer the law not make the law, not change the law. . . . We don't have that authority." *Id.* Kosinski explained that the 1996 Opinion was "interpreting state law. . . . We interpret state law yes." R203. That Opinion should be reaffirmed, Kosinski said, "because the state of the law continues to be the same and our only job is to interrupt [*sic*] the statute." R203-04. Commissioner Spano agreed that the Board was being asked to interpret the law, and said that he and others supporting the motion were "interpreting [the law] differently." R204. Commissioner Kellner discussed the Election Law's requirement that campaign

contributions be made under the true name of the contributor as an important factor in considering the treatment of LLCs. *Id.*

Similarly, in 2016, the Proposed Opinion on which the Board voted thoroughly explained the background of the LLC Law and held that the new opinion would "effectuate[] the purposes of the Election Law" and "give[] full meaning to the Legislature's definition of a limited liability company." 2016-R256.

B. As Matters of Statutory Interpretation, the 2015 and 2016 Decisions Are Reviewable by Courts

Justice Fisher and Acting Justice Ferreira erred in holding that the petitions presented non-justiciable questions of the Board's "judgment" or "discretion" over "ministerial act[s]." 2015-R17-18; 2016-R328.

Unlike the cases relied upon by Justice Fisher, the Board in creating the LLC Loophole and voting against closing it in 2015 and 2016 was *not* administering a program, like a statewide education test, *James v Bd. of Educ. of City of N.Y.*, 42 N.Y.2d 357, 368 (1977), or a city zoo, *Jones v Beame*, 45 N.Y.2d 402, 407 (1978); ordering the creation of a new program, like a comprehensive foster care system, *In re Lorie C.*, 49 N.Y.2d 161, 172 (1980); or determining how to allocate pre-authorized resources, like transit funds, *Abrams v. N.Y. City Transit Auth.*, 39 N.Y.2d 990, 992 (1976)—all types of decisions for which legal challenges have been deemed non-justiciable. Rather, as the Board itself repeatedly affirmed, it was engaged in statutory interpretation, an exercise that courts are authorized—indeed,

mandated—to review: "[W]here a statutory or constitutional provision is at root of a dispute, the courts may offer the definitive resolution of these issues." *James*, 42 N.Y.2d at 365.

Nor, as Justice Ferreira erroneously found, was the question presented to the court a "political question which the Court lacks the power to decide." 2016-R14. Relying on the U.S. Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), the court held that there were no "judicially enforceable standards to govern" the Board's 2016 Decision. Yet the standards are clear, and contained in the text of Article 78: The Court must decide whether the Board's interpretation of the governing statutes was arbitrary, capricious, or a clear error of law—the same standards as any New York case challenging an agency rule.

Here, the Board was engaged in statutory interpretation, determining what treatment of LLCs was mandated by the Election Law and LLC Laws. Such determinations are wholly separate from, for example, a governor's decision to close a correctional facility, as in *New York State Inspection, Security,. & Law Enforcement Employees, District Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 239 (1984). That case, which Acting Justice Ferreira cited, 2016-R29 (*Brennan Center II* at 5), did not involve statutory interpretation. And the petitioners sought "a remedy which would embroil the judiciary in the management and operation of the State correction system." *N.Y. State Inspection*,

64 N.Y.2d at 239. No such long-term judicial management is demanded here. Instead, Petitioners ask the Court only to require the Board of Elections to act in a manner that is not "affected by an error of law [n]or . . . arbitrary and capricious." CPLR 7803(3). Acting Justice Ferreira's comparison to *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14 (2006), is similarly inapposite. In that case, the Court of Appeals—which had already mandated that the State significantly increase the funding provided to New York City schools—accepted the Governor's school funding reform plan over a plan created by court-appointed referees. But far from declaring the issue non-justiciable, the Court thoroughly examined the Governor's plan to determine whether it was reasonable under the law. *Id.* at 30-31. Such an examination is precisely what Petitioners request of the courts here.

Because the Board was engaged in statutory interpretation, it is entitled to no deference "where the question is one of pure legal interpretation." *Teachers Ins. & Annuity Assoc. of Am. v. City of N.Y.*, 82 N.Y.2d 35, 42 (1993) (holding that the definition of a term in a statute "is a law question for the courts rather than one of administrative expertise"). Courts routinely review and correct administrative agencies' interpretation of statutes, *e.g., id.*, and Petitioners seek nothing more or less from the Court here. For example, in *Kurcsics v. Merchants Mutual Insurance*, 49 N.Y.2d 451, 457-58 (1980), the court looked to the "legislative purpose" and the "statutory scheme" to overrule an agency determination of an ambiguous

statute. "Where . . . the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency." *Id.* at 459. Just as *Kurcsics* court overruled the superintendent's interpretation of a law that was silent on the specific matter involved, so too must *this* court overrule the Board's erroneous interpretation of the LLC and Election Laws.

Because the Petitions present justiciable questions of law, this Court should reverse the rulings below.[24]

III. THE PETITIONS WERE TIMELY

Both of Petitioners' lawsuits were timely filed within four months of substantive Board determinations. Contrary to the Board's position, the existence of the 1996 Opinion does not mean that its treatment of LLCs is forever immune from challenge. Such a rule would be not only legally erroneous, it would undermine the interests of the citizens of this state without furthering the purposes

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[24] Both lower court decisions also determined that Petitioners' request for declaratory judgment was non-justiciable. 2015-R27-30 *(Brennan Center I* at 19-22); 2016-R31 *(Brennan Center II* at 7). This conclusion was wrong: A declaration of the scope of the Board's authority to interpret the law is within the authority of the courts to provide. "[T]here is nothing inherent in plaintiffs' attempts to seek a declaration and enforcement of their rights that renders the controversy nonjusticiable. They do not wish to controvert the wisdom of any program. Instead, they ask only that the program be effected in the manner that it was legislated." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984); *see also Schulz v Silver*, 212 A.D. 2d 293, 295 (3d Dep't 1995) (taxpayers' request for judgment declaring that all expenditure of state funds made without the proper passing of budget bills is unconstitutional is justiciable question about the scope of the governor's authority, and court "not only ha[s] the authority, but the obligation, to interpret the scope of the Governor's authority in this regard").

of the statute of limitations. Even if the Board were correct to argue that the 1996 Opinion should serve as the starting point for the limitations period, moreover, the petitions are not time-barred because the constant application of the LLC Loophole creates a continuing harm.

A. The 2015 and 2016 Decisions Are Subject to Article 78 Review

The statute of limitations does not bar Petitioners' lawsuit because each case was filed within four months of the erroneous 2015 and 2016 Decisions by the Board. Article 78 requires plaintiffs to file within four months of an agency decision, not within four months of a previous decision based on a separate petition and different facts. The existence of a prior decision (here, the 1996 Opinion) does not alter the fact that the Board made substantive determinations in 2015 and 2016 that are properly subject to Article 78 review.

1. Substantive Agency Determinations Trigger the Statute of Limitations

Cases from throughout the state demonstrate that when an agency makes a substantive decision, it is a determination subject to review regardless of whether its reasoning is based on a longstanding practice or prior opinion. The Fourth Department made this clear in *Meegan v. Griffin*, 161 A.D.2d 1143, 1143 (4th Dep't 1990), which held that petitioners' demand that a city hire four deputy fire commissioners triggered the statute of limitations, not the original decision, made a decade earlier, to hire only two. *See also Gottlieb v. City of N.Y.*, 129 A.D.3d 724,

725 (2d Dep't 2015) (petitioner's challenge to agency denial of his claim that it had, three years earlier, miscalculated his child support payments was timely filed within four months of the agency's denial).

2. The Board's 2015 and 2016 Decisions Were Substantive Agency Determinations Triggering the Statute of Limitations

As in *Meegan* and *Gottlieb*, the Board's 2015 and 2016 Decisions were substantive determinations that triggered the four-month review period. The Board's 2015 Decision was made after an extensive argument among the Commissioners regarding the wisdom and legality of the LLC Loophole. *Supra* Argument II-A. The Board considered a detailed request submitted by the Brennan Center and Emery Celli Brinckerhoff & Abady LLP that documented abuse of the LLC Loophole, including the millions of dollars spent in recent election cycles, and also made novel legal arguments in favor of treating LLCs as corporations or partnerships that could not have been made in the 1996 proceeding. R197. The Board also considered a letter from Attorney General Eric Schneiderman asking it to close the LLC Loophole, citing the more than $40 million spent by LLCs between 2005 and 2013, R169-70, and oral testimony from interested parties present, R197-204. Before the final vote, Commissioner Spano urged his fellow Commissioners to vote to close the LLC Loophole because the parties to the hearing had presented additional evidence showing the situation had changed since

the Board issued its 1996 Opinion. R204 ("[W]hy should we be there now if we have different eviden[ce]. We have different research."). Nevertheless, the Board voted 2-2 to reject the proposal to rescind the LLC Loophole and issue a new opinion. R204-05.

Similarly, the Board's 2016 Decision was a determination that started the four-month statute of limitations clock. The Board voted on a specific Proposed Opinion to rescind the LLC Loophole and replace it with a rule that conformed to the Election Law and the LLC Law. *Supra* Argument II-A. The Board engaged in debate, and again voted to reject the proposal.

Both the 2015 and 2016 Decisions are determinations that triggered the statute of limitations.

3. Reviewing the Board's Determinations Does Not Vitiate the Purposes of the Statute of Limitations

Justice Fisher, in *Brennan Center I*, held that the case was time-barred because the 1996 Opinion, not the 2015 Decision, should serve as the starting point for the statute of limitations. The court worried that "[t]o hold otherwise would eviscerate the finality afforded to litigants by the statute of limitations," relying on *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Cooper*, 173 A.D.2d 60 (3d Dep't 1991) and *De Milio v. Borghard*, 55 N.Y.2d 216 (1982). 2015-R18-20 (*Brennan Center I* at 10-12). Yet unlike *Meegan*, discussed above, neither of those cases bears much resemblance to the case at bar. In both of those cases, a

petitioner asked an agency to reconsider a one-time adjudicative order that applied only to the petitioner, then sued the agency over the result. The courts held that the plaintiffs' request for reconsideration by the agency did not re-start the limitations period. In contrast, the LLC Loophole is a broad rule affecting others besides the Petitioners; Petitioners had no involvement in the development of that rule, and many of them would have had no opportunity to be involved because they were too young or did not live in New York (and thus would not have had standing to raise a challenge). Further, the 1996 Opinion did not purport to decide whether multiple LLCs controlled by a single individual or corporation would be treated as separate individuals, meaning that the extent of the injury caused was not clear. Thus, there is no concern about finality "between litigants," as there was in *Cooper* and *De Milio*, both of which are too distinct from this case to guide the court.[25]

Cooper and *De Milio* do not apply in this case for a second reason: Unlike in those cases, the Board here conducted "a fresh and complete examination of the matter based on newly presented evidence," which restarts the limitations period even if it had previously run. *Quantum Health Res. v. De Buono*, 273 A.D.2d 730,

[25] The lower court appeared to express concern that if the statute of limitations did not apply here, an agency rule could be challenged over and over. 2015-R18-19 (*Brennan Center I* at 10-11).Yet the doctrines of *stare decisis* and *res judicata* answer that concern: A decision on the merits of this case will control future cases with similar facts. Experience in New York and in federal courts demonstrates that despite plaintiffs' ability to challenge regulations years after they are promulgated, the courts have not been flooded with endless challenges to the same rule. *See, e.g., Wind River Min. Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) ("As in this case, principles of res judicata will likely bar further challenges to the agency decision once the claimant's first challenge is resolved.").

732 (3d Dep't 2000).[26] The Brennan Center and others testified with evidence about the disastrous effects of the LLC Loophole that occurred in the two decades following the 1996 Opinion, and also presented new arguments regarding the FEC's altered approach to LLC contributions and the legislative history of the Election Law. Commissioner Spano highlighted the new evidence presented and argued that it should serve as the basis for closing the LLC Loophole. R204. All of the Board members engaged in a lengthy discussion of the new factual circumstances and the law, eventually voting 2-2 on whether to treat LLCs like corporations and/or partnerships. Under the standard set forth in *Quantum Health* and *Chase*, the Board's extensive reconsideration of its treatment of LLCs triggered a renewed limitations period.[27]

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[26] *See also Riverso v. N.Y. State Dept of Envtl. Conservation*, 125 A.D.3d 974, 977 (2d Dep't 2015) (citing *Quantum Health* approvingly and restarting limitations period because agency conducted new review); *Chase v. Bd. of Educ. of Roxbury Cent. Sch. Dist.*, 188 A.D.2d 192, 197 (3d Dep't 1993) (holding that limitations period is restarted when agency "agrees to hold a new hearing at which new testimony is taken, new evidence is proffered and new matters are considered") (quoting *Delbello v. N.Y. City Transit Auth.*, 151 A.D.2d 479, 480 (2d Dep't 1989)).

[27] The rule applied in *Quantum Health* has been recognized and expanded upon by federal appellate courts seeking to clarify complex questions about the federal statute of limitations and apply basic rules of fairness. Under federal case law, substantive challenges to generally-applicable regulations are not barred by the federal six-year statute of limitations. *See Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990) (explaining the "long-standing rule that although a statutory review period permanently limits the time within which a petitioner may claim that an agency action was procedurally defective, a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition."); *see also Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("It is possible, however, to challenge a regulation after the limitations period has expired, provided that the ground for the challenge is that the issuing

Justice Fisher, in *Brennan Center I*, went on to determine that the Board's 1996 Opinion was a "quasi-legislative function," and that the date of "promulgation or issuance" of an agency rule serves as the starting date for the statute of limitations. 2015-R19 (*Brennan Center I* at 11). Yet that ignores the Board's review and its 2015 Decision. None of the four cases cited by the court demonstrate that the rule should prevent the court from hearing this case.[28]

If the Supreme Court's reasoning were adopted, the LLC Loophole could never be challenged in the future, even if the plaintiffs injured by the LLC Loophole were not alive when the 1996 Opinion was issued. That is not the law.

B. The Loophole Is a Continuing Harm that Tolls the Statute of Limitations

Even in the absence of the 2015 and 2016 Decisions, the statute of limitations would pose no obstacle to reaching the merits of this case. The Board's

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agency exceeded its constitutional or statutory authority."); *Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (explaining that statute of limitations should not prevent review of regulation "simply because the agency took the action long before anyone discovered the true state of affairs").

[28] In *Owners Comm. on Elec. Rates, Inc. v. Pub. Serv. Comm'n of State of N.Y.*, 150 A.D.2d 45, 50 (3d Dep't 1989), the petitioners sought to directly challenge a ratemaking and missed the four-month limitations window; there was no agency decision that occurred comparable to the 2015 decision. The same is true in *N.Y. State Rehab. Ass'n Inc. v. New York*, 237 A.D.2d 718 (3d Dep't 1997), and in that case the court focused on the petitioners' awareness of the agency decision during the comment period before its release. *Id.* at 720. In *Walton v. N.Y. State Dep't of Corr. Servs.*, 8 N.Y.3d 186 (2007), the Court of Appeals held that the petition was timely because it was brought within four months of the date on which it became clear that further administrative remedies would be futile. And *Best Payphones, Inc. v. Dep't of Info. Tech. & Telecommunications of City of N.Y.*, 5 N.Y.3d 30 (2005) did not involve a quasi-legislative decision, but a city agency's disciplinary action against an individual company that was not challenged within four months.

continued and repeated reliance on the 1996 Opinion constitutes a continuing harm that tolls the statute of limitations. As the Court of Appeals explained when it applied the doctrine in 2014, a government body's "ongoing failure to comply with the law" triggers the continuing harm doctrine. *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631, 640 (2014). Here, the Board's erroneous analysis in 1996 has led to an ongoing failure to comply with the Election Law as LLCs funnel millions of dollars into state elections in each cycle.

1. Courts Routinely Recognize that a Continuing Harm Tolls the Statute of Limitations

The Court of Appeals and this Court have applied the continuing harm doctrine in a variety of contexts. For example, the *Capruso* Court allowed a challenge to a village's alleged improper use of parkland more than six years after that use had begun, noting that the "harm sustained by the public . . . cannot be traced exclusively to the day" when the initial usage occurred. 23 N.Y.3d at 639. The Court held that the claim was "predicated on continuing unlawful acts and not the continuing effects of earlier unlawful conduct." *Id.* at 640. *See also Taub v. Comm. on Prof'l Standards,* 200 A.D.2d 74, 78 (3d Dep't 1994) (attorney's challenge to Third Department's Committee on Professional Standards decision was not time-barred, even though it was not brought within four months of the most recent censure letter, because the harm was "clearly ongoing").

2. The Lower Court's Interpretation of the Continuing Harm Doctrine Is Wrong

Justice Fisher, in *Brennan Center I*, erred in finding that "the continuing harm theory has been flatly rejected in contexts outside of [Civil Service Law] appointments." 2015-R20 (*Brennan Center I* at 12).[29] The continuing harm doctrine has been applied and recognized in many circumstances not involving the Civil Service Law. For example, in addition to *Taub* and *Capruso*, this Court last year applied the doctrine in *461 Broadway, LLC v. Vill. of Monticello*, 144 A.D.3d 1464, 1466 (3d Dep't 2016), a case in which plaintiffs sued a municipality for negligence due to damage sustained from sewer backups.[30]

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[29] Justice Fisher acknowledged that *Town of Huntington v. Cnty. of Suffolk*, 79 A.D.3d 207 (2d Dep't 2010) did not involve the Civil Service Law, but discounted the case's importance due to its belief that the Second Department "found the limitations period was 'inapplicable' as the relief sought could not be granted on its face." *Brennan Center I*, 52 Misc.3d at 259. Yet the only relief that was unavailable in *Town of Huntington* was a damage award for the County's past conduct in failing to pay for the maintenance of a county road. 79 A.D.3d at 210. The court in fact granted the Town's request for an injunction requiring the County to pay for the road's maintenance in the future, and held that the claim was not time-barred because "where a municipality pursues a policy which the plaintiff claims violates a statute or regulation, each particular violation is subject to review pursuant to CPLR article 78 and starts the statute of limitations running anew." *Id.* at 215.

[30] *See also Nelson v. Lippman,* 271 A.D.2d 902, 905 (3d Dep't 2000), *rev'd on other grounds,* 95 N.Y.2d 952 (2000) ("Indeed, judicial pay disparity is recognized as a continuing harm for which the cause of action continues to accrue"); *State v. Gen. Elec. Co.*, 199 A.D.2d 595, 598 (3d Dep't 1993) (applying continuing harm doctrine to Town's damages claim based on leakage of toxic waste into groundwater); *Davis v. Rosenblatt*, 159 A.D.2d 163, 168 (3d Dep't 1990) (applying the continuing harm doctrine in an equal protection case challenging the Judiciary Law); *Amerada Hess Corp. v. Acampora*, 109 A.D.2d 719, 722 (2d Dep't 1985) (applying doctrine in challenge to town zoning decision and explaining that "'no period of limitation at all is applicable to an action for a declaratory judgment in cases involving a continuing harm, such as the application of an invalid statute'") (quoting 1 Weinstein-Korn-Miller, NY Civ. Practice, para. 213.02).

3. The LLC Loophole Initiated a Continuous Harm that Tolled the Statute of Limitations

The existence of these cases makes clear that it is not the type of action that determines whether the continuing harm doctrine should apply, but simply whether the harm continues to occur because of an "ongoing failure to comply with the law." *Capruso*, 23 N.Y.3d at 640. Petitioners meet that standard and the statute of limitations is no bar to reaching the merits.

The harm to Petitioners is continuous and traceable to the Board's ongoing refusal to enforce the law, as LLCs are allowed to give unlawful contributions without disclosing the identities of the individuals that control them. The donations continuously prevent citizens (including Petitioners) from learning who provides their representatives with campaign funding and they increase the real risk of corruption that the Legislature sought to prevent. Large LLC contributions repeatedly disadvantage Petitioners who have run and will run for office, and they constantly hurt Petitioners that seek to represent their constituents fairly. *See* 2015-R84-85 at ¶¶ 4-10, 2016-R72-73 at ¶¶ 4-10; 2015-R 70-71 at ¶¶ 2-12, 2016-R63-64 at ¶¶ 2-12; *infra* Argument IV-A. And the harm created by the Loophole has been exacerbated in recent years. *Supra* Argument I-A-2.

The Board has the power to abate this ever-increasing harm, but has expressed "every intention of continuing to act in accordance" with its misinterpretation of law. *Taub*, 200 A.D.2d at 78.

IV. PETITIONERS HAVE STANDING TO CHALLENGE THE BOARD'S 2015 AND 2016 DECISIONS

Justice Fisher erroneously declared that no Petitioner had been harmed by the 2015 Decision and thus no Petitioner had standing to sue the Board for its arbitrary, capricious, and unfounded interpretation of the law. But each Petitioner suffered concrete injuries sufficient to grant them standing under the law's capacious standing rules. In addition, the Brennan Center for Justice has organizational standing, a point the lower court failed to address. Third, the public interest standing doctrine permitted Petitioners' suit.

The lower court's ruling would mean that *no one* could have standing to challenge the Board's 2015 or 2016 Decision—or any decision the Board made to sustain the LLC Loophole. The law does not permit such a result.

A. Petitioners Suffered Concrete Injury Sufficient to Grant Standing

The Court of Appeals has adopted a broadly permissive approach to determining standing in challenges to administrative actions, in keeping with "[t]he increasing pervasiveness of administrative influence on daily life." *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 10 (1975). Under this approach, a petitioner has standing where he or she alleges (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." *Ass'n for a Better Long Is., Inc. v. N.Y. State Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014).

1. The LLC Loophole Injures Petitioners Running for Office

Petitioners alleged specific injuries sufficient to grant them standing. *See Kosmider v. Garcia*, 111 A.D.3d 1134, 1135 (3d Dep't 2013).[31] At the time of filing, most Petitioners were running for office or had run for office recently.[32] Several have faced opponents with major LLC funding, *see, e.g.*, 2015-R84-85 at ¶¶ 4-6, 2016-R72-73 at ¶¶ 4-6; 2015-R75-76 at ¶¶ 2-5, 8, 2016-R69-70 at ¶¶ 2-5, 8; 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, 2015-R85 ¶ 7, 2016-R73 at ¶ 7; 2015-R70-71 at ¶¶ 6-7, 11, 2016-R63-64, ¶¶ 6-7, 11; and all of the Petitioners who run for office again likely will face LLC-funded opponents in the future, *see, e.g.*, 2015-R81-82 at ¶ 6, 2016-R79-80 at ¶ 6. The LLC Loophole directly impacts each of these Petitioners by forcing them to compete for office in an illegally structured competitive environment.[33]

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[31] The trial court acknowledged that Petitioners' claims of competitive injury fell within the zone of interests meant to be protected by the Election Law. 2015-R23-24 (*Brennan Center I* at 15-16).

[32] As noted in their affidavits, Petitioner Krueger, Squadron, Kavanagh, and Lee all ran for election or reelection in 2016, and Petitioner Koetz is contemplating another run for office in the future. 2016-R63 at ¶ 3; 2016-R69 at ¶ 3; 2016-R79 at 3; 2016-R84 at ¶ 2; 2016-R72 at ¶ 5.

[33] Petitioners who are elected officials have faced pressure to raise money from LLCs during their campaigns, always aware that their next election could be their last if they support legislation adverse to the interests of the big donors who give through these entities. 2015R76 at ¶¶ 7-9, 2016R70 at ¶¶ 7-9; 2015R81-82 at ¶ 6, 2016R79-80 at ¶ 6.

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 the business context). Petitioners face the sort of injury courts have repeatedly found is sufficient to confer standing to challenge an election rule.[34]

Justice Fisher wrongly held that the Petitioners could prove no injury sufficient for standing because none of them could establish that he or she would have won an election but for the LLC Loophole. 2015-R22 (*Brennan Center I* at 14). The court cited no case for the proposition that a political candidate can

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[34] *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.").

challenge an election or campaign finance scheme only if she can show that she lost an election due to the rules—an impossible task. In fact, courts have repeatedly held that minor parties and candidates—who have no real hope for electoral success—have the same rights to challenge ballot access restrictions and other electoral or campaign finance rules as candidates more likely to win. *See, e.g., Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 627 (2d Cir. 1989) (candidate had standing to challenge rules regarding access to televised debate, "'even if the particular candidate has little hope of election'") (quoting *Common Cause v. Bolger*, 512 F.Supp. 26, 32 (D.D.C. 1980)).

Further, the Court of Appeals for the District of Columbia Circuit has repeatedly held that a political candidate has standing to challenge "illegally structured campaign environments" even if he cannot establish that the challenged structure harms his chances of winning. *LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011); *accord Shays I*, 414 F.3d at 87. If candidates were required to perform the almost-impossible task of proving that illegal contributions affected the outcome of a race in order to show standing, illegal contributions could never be challenged.

New York courts have adopted broad standards for plaintiffs to establish standing, *Dairylea Coop.*, 38 N.Y.2d at 10. No law (or logic) supports the notion that political candidates must meet a higher bar.

2. The LLC Loophole Injures Petitioners Holding Office

Petitioners Krueger, Squadron, and Kavanagh have been injured not only in their capacity as candidates, but also as elected representatives, since the LLC Loophole interferes with their ability to carry out their duties. *See, e.g., Morgenthau v. Cooke*, 56 N.Y.2d 24, 30 (1982) (elected district attorney had a "cognizable interest" in challenging potentially unconstitutional judicial assignment process that could affect his duties); *N.Y. 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").

Petitioners averred that massive LLC political donations have impaired their ability to represent their constituents. *E.g.,* 2015-R71, 2016-R64. For example, Petitioner Krueger was excluded from several meetings involving Democratic leaders at the request of lobbyists representing Glenwood Management, one of the most prominent LLC donors, due to her consistent support for rent control laws. 2015-R71 ¶¶ 10-11, 2016-R64 ¶¶ 10-11.

More broadly, the LLC Loophole has had a profoundly "demoralizing" effect on the public, which perceives that real estate interests control legislation in Albany. Moreland Report 34 (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), 2015-R216-17, 2016-R215-16 (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"). As the Moreland Commission found, "it is clear that the combination of very large campaign contributions and very narrowly targeted benefits to those same donors creates an appearance of impropriety that undermines public trust in our elected representatives." Moreland Report at 34. That erosion of public trust directly harms the elected official Petitioners in their ability to represent and serve their constituents.

3. The LLC Loophole Injures Petitioners as New York Voters

All of the individual Petitioners, as well as many of Petitioner Brennan Center's members, have also 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.,* 2015-R74 at ¶ 8; 2016-R67 at ¶ 9; 2016-R74 at ¶ 14; 2016-R83 at ¶ 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 (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. 2015-R66, 2016-R67; *see also* 2015-R69, 2016-R83. 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).

4. The 2015 and 2016 Decisions Were Substantive Agency Determinations that Harmed Petitioners

There can also be no serious argument that the 2015 and 2016 Decisions were not substantive decisions sufficient to cause concrete injury.

Justice Fisher in *Brennan Center I* held that Petitioners were not injured by the 2015 Decision because it was merely a vote on whether to have counsel draft a new opinion, not a vote on whether to close or to perpetuate the LLC Loophole. 2015-R22. This ignores the clear facts of the vote, including:

— The Board voted on—and denied—a motion to prepare an opinion "that will rescind opinion 1996-1," the opinion creating the LLC Loophole. R197;

— The vote followed a lengthy and substantive discussion about whether to close the LLC Loophole, in which Commissioner Kosinski stated that the 1996 Opinion "is still valid today because the state of the law continues to be the same and our only job is to interrupt [sic] the statute, the statute remains the same." R203-04;

— Commissioner Spano agreed that the ultimate question before the Board was the validity of the Board's 20-year rule: "If the Board's opinion is important

enough to go through all that rigmarole for what almost 20 years, why can't we discuss this now and why can't we vote on it." R203.

— Co-Chair Kellner discussed the Election Law's requirement that campaign contributions be made under the true name of the contributor, and urged "that the interpretation be corrected to treat [a] limited liability company as a partnership for the purposes of article 14 of the Election Law." R204.

— After Board counsel characterized the motion as one to "rescind 1996 #1 on the applicable guidance regarding contributions of LLCs," Co-Chair Kosinski stated, "I do not support that." R205.

The Commissioners understood they were not simply voting to refer the issue to counsel, but rather on the merits of the LLC Loophole itself and whether to close it.[35]

Justice Fisher's suggestion that a "tie vote" cannot confer an injury, 2015-R24 (*Brennan Center I* at 16), is equally erroneous. Under the Election Law, a tie vote constitutes an outright rejection of the substantive question presented—in this case, whether to close the LLC Loophole. *See* N.Y. Elec. Law § 3-100(4). Moreover, courts have repeatedly found that a tie vote constitutes a rejection of a matter permitting Article 78 review. *See, e.g., Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 90 (2001) (a tie vote is a denial subject to Article 78 review even though the zoning board labeled its tie vote a "NON-ACTION"); *Monro Muffler/Brake, Inc. v. Town Bd. of Town of Perinton*, 222 A.D.2d 1069, 1069 (4th Dep't 1995) ("The fact that two members

[35] Moreover, assuming arguendo that the 2015 Decision was simply a vote to refer the matter to counsel, that deficiency was cured by the 2016 Decision, during which the Board voted on whether to approve an already-drafted, specific Board opinion closing the LLC Loophole.

voted to grant the application, two members voted to deny it, and one member abstained from voting did not, as petitioners contend, constitute a 'non-action' by respondent" but rather constituted a denial subject to Article 78 review for arbitrariness and capriciousness"). Petitioners injured by such determinations have the same standing to challenge them as parties aggrieved by the acceptance of a proposal.

5. Petitioners Have Suffered Sufficient Particularized Harm

Finally, Justice Fisher held that Petitioners lacked standing because any harm they suffered is the same as that suffered by the public at large. 2015-R23. This ignores repeated rulings by the U.S. Supreme Court and other courts that members of the voting public have standing to challenge rules that deprive them of information to which they are entitled or the ability to vote for their preferred candidates. *Supra* Argument IV-A-3. And even if this Court rejects that reasoning, the people most directly affected by rules for campaign contributions are those running campaigns: political candidates, not members of the general public, "for who suffers more directly when political rivals get elected using illegal financing?" *Shays I*, 414 F.3d at 83. Petitioners who are political candidates and elected officials thus are not similarly situated to the public at large.

The fact that Petitioners are not the only ones with standing is irrelevant. As the Court of Appeals has explained: "To force a court to reject [] a challenge on the

grounds of standing when the group contesting the [rule] represents that segment of the public which stands to be most severely affected by it is, in our view, an ironic situation which should not be permitted to continue." *Douglaston Civic Ass'n, Inc. v. Galvin*, 36 N.Y.2d 1, 6–7 (1974) (property owners' association without direct proprietary interest in the zoned land had standing to challenge zoning variance). The same logic applies here. "That more than one person may be harmed does not defeat standing." *Sierra Club v. Vill. of Painted Post,* 26 N.Y.3d 301, 310 (2015). "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *Id.* (internal quotation marks omitted).

B. The Brennan Center Has Organizational Standing

Although the trial court failed to address this point, the Brennan Center's organizational standing grants Petitioners an independent basis for standing, separate and apart from the specific injuries detailed above. 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 the test for organizational standing. 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* 2015-R69 at ¶ 5, 2016-R83 at ¶ 5.[36] 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 that Petitioners seek to vindicate. *See* 2015-R68-69 at ¶¶ 2, 4, 2016-R82-83 at ¶¶ 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

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[36] 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, are 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).

"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 (3d Dep't 2000); *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. Justice Fisher's Reasoning Would Prevent Any Judicial Review of the LLC Loophole

Despite the clear harms imposed on Petitioners by the LLC Loophole and the Board's 2015 and 2016 Decisions not to repeal it, Justice Fisher held that none of the Petitioners had standing. If her reasoning were followed, no one would have standing to challenge the Board's actions creating and sustaining a rule that has no basis or support in the law, an outcome that even she recognized is not permitted by law.

Justice Fisher acknowledged that standing rules "should not be heavy handed" such as to "'shield a particular action from judicial review,'" 2015-R24 (quoting *Better Long Is.*, 23 N.Y.3d at 6). Yet that is precisely the effect of her ruling. To deny Petitioners standing here would be to "to erect an impenetrable

barrier to any judicial scrutiny" of the Board's actions, *Colella v. Bd. of Assessors of Cnty. of Nassau*, 95 N.Y.2d 401, 410 (2000)—an outcome standing rules must not create. Refusing to grant Petitioners standing would "effectively insulate this provision from meaningful judicial scrutiny." *Ricket v. Mahan*, 97 A.D.3d 1062, 1063–64 (3d Dep't 2012).

In fact, Justice Fisher admitted at the conclusion of her analysis that "the April 2015 Decision *is reviewable here* if it was affected by an error of law, arbitrary and capricious, or an abuse of discretion to the vote." 2015-R24. Petitioners agree. The 2015 Decision *is* reviewable, and Petitioners have standing to seek that review as individuals directly affected by the LLC Loophole and the Board's 2015 and 2016 Decisions sustaining it. At the very least, the public interest standing doctrine would also apply to ensure that the Board's legal errors can be properly reviewed.[37]

[37] 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. *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. *See generally* Argument I-A; 2016-R218-53.

CONCLUSION

The decisions of the lower courts should be reversed and the Petitions should be granted. The Board of Elections should be ordered to repeal the LLC Loophole and approve the Proposed Opinion requiring that LLCs abide by the campaign contribution limits of partnerships or corporations, depending on the tax status that each individual LLC elects.

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