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.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

WENDY R. WEISER
Director, Democracy Program
LAWRENCE D. NORDEN
Deputy Director
DANIEL I. WEINER, Senior Counsel
BRENT FERGUSON, Counsel
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, New York 10271
(646) 292-8310

ANDREW G. CELLI, JR.
ELIZABETH S. SAYLOR
ALISON FRICK
EMERY CELLI BRINCKERHOFF
& ABADY LLP
600 Fifth Avenue at Rockefeller Center,
10th Floor
New York, New York 10020
(212) 763-5000

Attorneys for Petitioners-Appellants

Albany County Clerk's Index No. 3279/16

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES ..... iii-iv

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. THE LLC LOOPHOLE IS INDEFENSIBLE ON THE MERITS 2

II. THIS COURT HAS AUTHORITY TO DECIDE THESE CASES 3

A. Neither Case Presents a Political Question 3

B. Deciding These Cases Does Not Threaten the Separation of Powers 4

C. The Board's Substantive Decisions Are Subject to Judicial Review 5

D. Article 78 Offers the Relief Petitioners Seek 7

III. THE PETITIONS WERE TIMELY 8

A. The 2015 and 2016 Decisions Trigger New Limitations Periods 8

B. The LLC Loophole Creates a Continuing Harm, Tolling the Limitations Period for the 1996 Opinion 10

C. An Interest in Finality Does Not Preclude Petitioners' Challenges 10

IV. PETITIONERS HAVE STANDING 11

A. The Board's Substantive Determinations Confer Standing to Those Harmed 11

B. Petitioners Were Harmed by the 2015 and 2016 Decisions 12

V. COLLATERAL ESTOPPEL DOES NOT APPLY 13

CONCLUSION 15

TABLE OF AUTHORITIES

PAGE NO.

Cases

Am. Home Assurance Co. v. Int'l Ins. Co.,
90 N.Y.2d 433 (1997) 15

Ass'n for a Better Long Is., Inc. v. N.Y. State Dep't of Envtl. Conservation,
23 N.Y.3d 1 (2014) 11

Baker v. Carr,
369 U.S. 186 (1962) 3

Bourquin v. Cuomo,
85 N.Y.2d 781 (1995) 5

Buechel v. Bain,
97 N.Y.2d 295 (2001) 14, 15

Bush v. Gore,
531 U.S. 98 (2000) 4

Capruso v. Vill. of Kings Point,
23 N.Y.3d 631 (2014) 10

Dental Society of State v. Carey,
61 N.Y.2d 330 (1984) 12

Gottlieb v. City of N.Y.,
129 A.D.3d 724 (2d Dep't 2015) 9

Held v. N.Y. State Workers' Comp. Bd.,
58 A.D.3d 971 (3d Dep't 2009) 14, 15

Kurcsics v. Merchs. Mut. Ins.,
49 N.Y.2d 451 (1980) 6

Marbury v. Madison,
5 U.S. 137 (1803) 7

Meegan v. Griffin,
161 A.D.2d 1143 (4th Dep't 1990) 9, 12

Quantum Health Res. v. De Buono,
273 A.D.2d 730 (3d Dep't 2000) 9

Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.,
77 N.Y.2d 753 (1991) 8

Shays v. FEC,
337 F. Supp. 2d 28 (D.D.C. 2004) 4

Rules

CPLR 7803 ..... 3, 8

PRELIMINARY STATEMENT

The LLC Loophole, created and perpetuated by the Board, has allowed corruption to flourish in New York politics. Without basis in the LLC Law or the Election Law, the Board-created loophole permits one and only one type of business entity—the LLC—to donate at nearly unlimited levels to New York political candidates. In 2015 and again in 2016, the Board voted not to close the LLC Loophole. These cases challenge those Board decisions.

Neither the Board nor the New York Republican State Committee (together, "Respondents") offer any substantive response to Petitioners' arguments. They do not try to defend the LLC Loophole on the merits or the conclusions of the courts below. Rather, Respondents rehash a variety of procedural objections that Petitioners already addressed in their opening brief. If their procedural objections are accepted, no one would have standing to challenge the LLC Loophole, no legal challenge would be deemed timely, and no court would be permitted to decide whether it conforms to the law.

In enacting and reaffirming the LLC Loophole, the Board acted arbitrarily, capriciously, and contrary to law, because the LLC Loophole does not conform to either the LLC Law or the Election Law. The Board, not the Legislature, created the LLC Loophole. This Court can (and should) order the Board to close it.

ARGUMENT

I. THE LLC LOOPHOLE IS INDEFENSIBLE ON THE MERITS

Respondents once again offer no real defense of the LLC Loophole on the merits. This is unsurprising, since a loophole that defeats the central goals of the Election Law and cannot be squared with the text and purpose of the LLC Law is indefensible. *See* Pet. Br. 17-36.

The Board's passing suggestion that the LLC Loophole is compelled by the "plain" language of the LLC Law cannot be taken seriously. Board Br. 29. When it created the LLC Loophole, the Board did not acknowledge (and still has not acknowledged) critical language in the definition of a "limited liability company" providing that such entities should be treated as unincorporated organizations "*unless the context otherwise requires*." Pet. Br. 26-27. By writing this language out of the statute, the Board committed a clear error of law. *Id.* at 27-29.

Nor can it be denied that the Loophole frustrates the core goals of the Election Law. It has opened the floodgates to corruption in New York politics. LLCs contributed almost $20 million to political campaigns in 2014, up from only $4.5 million in 2002. One single businessman gave $4.3 million over a two-year period through 27 different LLCs; another individual donor contributed $250,000 to the Governor through nine LLCs over a 48-hour period. Pet. Br. 11. Respondents do not even try to argue that this is what the Legislature intended.

II. THIS COURT HAS AUTHORITY TO DECIDE THESE CASES

As the Board concedes, Board Br. 31-32, these cases ask the question: Were the 2015 and 2016 Decisions arbitrary, capricious, or contrary to law? This Court is authorized by law to answer these questions. *See* CPLR 7803(3). Respondents' confused assertions about the political question and separation of powers doctrines are non-starters: This Court, like all courts, has authority to review questions of statutory interpretation decided by an agency. And Article 78's review process permits the relief Petitioners seek: an order requiring the Board to rescind the LLC Loophole and issue a new opinion consistent with the LLC and Election laws.

A. Neither Case Presents a Political Question

This matter is not barred by the political question doctrine. Acting Justice Ferreira's ruling to the contrary was wrong. Citing the six categories of political questions enumerated in *Baker v. Carr*, 369 U.S. 186, 217 (1962), he concluded that this case falls into the second category—that the court lacked "judicially enforceable standards that govern the exercise of the Board's authority." 2016-R14. Respondents do not attempt to defend this reasoning, likely because the standard in question is self-evident: Petitioners ask the Court to apply the standard set forth in CPLR 7803(3). Pet. Br. 41-42. Courts have reviewed thousands of agency actions to determine if they were "affected by an error of law or . . . [were] arbitrary and capricious," *see* CPLR 7803(3); it is a judicially enforceable standard.

Instead, the Board points to the first *Baker* category, claiming that the "question of campaign finance regulation has demonstrably and textually been committed to determination by the legislature and administration by the Board." Board Br. 22. Yet campaign finance law is no more removed from the judicial domain than any other type of law, and courts often play a prominent role in ruling on campaign finance rules promulgated by agencies. *See, e.g., Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). The framework set forth by Article 78 is straightforward: The Legislature passes a law, an executive agency interprets and enforces it, and the courts ensure that the agency's interpretation of the statute is not arbitrary, capricious, or contrary to law. There is no special exception for campaign finance rules.

To be sure, the stakes are high in this case—not only for the parties, but for elected officials and the entire political community. That a court's decision may have significant political consequences, however, does not make it nonjusticiable. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000). Respondents' invocation of the political question doctrine fails. *See also* Pet. Br. 36-43.

B. Deciding These Cases Does Not Threaten the Separation of Powers

Adjudication of this matter would not encroach on the domain of either the Executive or the Legislature. The Executive does not enjoy untrammeled authority in interpreting and applying state statutes; Article 78 explicitly envisions judicial

oversight over these functions. *See* Pet. Br. 37. The exercise of court power Petitioners request—judicial review to ensure that the Board exercised its delegated authority consistent with the governing law—is not only within the authority of this Court, it is the core of the judicial function.

Respondents repeatedly emphasize the Legislature's failure to eliminate the LLC Loophole. Board Br. 22-23; GOP Br. 19. But the LLC Loophole is the *Board's* creation, not the Legislature's. The relevant inquiry is whether it is consistent with the intent of the legislators who passed the Election and LLC Laws, not what the Legislature thinks today. "Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences." *Bourquin v. Cuomo*, 85 N.Y.2d 781, 787-88 (1995) (internal quotation omitted). That another branch of government *could* act on an issue does not mean that it is the only branch so empowered. That the Legislature has not repealed the Board-created LLC Loophole does not immunize it from legal challenge.

C. The Board's Substantive Decisions Are Subject to Judicial Review

The Board wrongly argues that its refusal to act to close the LLC Loophole is foreclosed from judicial scrutiny because the Decisions merely "involve[d] questions of judgment, allocation of resources and ordering of priorities." Board Br. 21. While the Board does not distinguish between the 2015 and 2016

Decisions, the latter rejected a pre-drafted Proposed Opinion, so there can be no serious claim that it was about whether to allocate resources to draft an opinion.

Justice Fisher's opinion erroneously categorized the 2015 Decision as an exercise of the Board's judgment over "ministerial act[s]." 2015-R17-18. But the Decision was a substantive agency determination subject to judicial review under Article 78. *See* Pet. Br. 38-43. The Board did not vote down the motion to close the LLC Loophole because it lacked resources to write a new opinion. Rather, it rejected the motion on the merits, after a thorough discussion of the LLC Loophole. Petitioners distinguished the cases that Respondents and the lower court relied on, which involved administering programs or allocating pre-authorized resources. *See* Pet. Br. 40-41. But Respondents recycle these same citations without attempting to rebut Petitioners' arguments. *See* Board Br. 21.[1]

Further, because both Decisions were substantive agency decisions based in statutory interpretation, the Board is entitled to no deference by this Court. "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." *Kurcsics v. Merchs. Mut. Ins.*, 49 N.Y.2d 451, 459 (1980).

---

[1] In any event, Petitioners' 2016 challenge to renders this issue moot. Pet. Br. 13-15.

Even as the Board argues that the Decisions pertained only to allocations of resources, Board Br. 21, it simultaneously *admits* that the Board engaged in "interpretation of the state statute," specifically, an examination of "[t]he plain letter" of the LLC Law, *id.* at 30. The Board's admission that the Decisions were exercises of statutory interpretation vitiates their claims of non-justiciability: Courts are not only permitted but required to be the final word on interpreting statutes.[2] *Marbury v. Madison*, 5 U.S. 137, 177 (1803). And the Board's characterization of the governing laws is simply wrong: The LLC Law is silent about campaign contributions and the Election Law does not expressly state how LLC contributions should be categorized. *See* Pet. Br. 9-12. In short, this Court has authority to review the Board's erroneous statutory interpretation.

D. Article 78 Offers the Relief Petitioners Seek

Respondents wrongly suggest that the relief Petitioners seek—an order invalidating the LLC Loophole and requiring the Board to issue a rule that conforms with the law—is unavailable under Article 78. Petitioners seek judicial review under Article 7803(3), specifically, a mandamus to *review* in which "a court examines an administrative action involving the exercise of discretion. . . .

---

[2] The claim that the "intersection" of the Election Law and the LLC Law "is special and technical language" of which the Board has specific "knowledge and understanding," Board Br. 31, is meritless. Nothing in the 1996 Opinion, the 2015 Decision, or the 2016 Decision relies on *any* special administrative knowledge. *See also* Pet. Br. 19 n.10.

The standard of review in such a proceeding is whether the agency determination was arbitrary and capricious or affected by an error of law." *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 757-58 (1991). This Court has authority to review and order remedies for the Board's Decisions. *Id.* at 759.

Contrary to Respondents' assertions, Petitioners do *not* seek a mandamus to *compel*, *cf.* Board Br. 27; GOP Br. 11. A mandamus to compel action, under CPLR 7803(1), seeks to compel an agency action "that is merely ministerial in that it would require no discretion on the part of the Board." Board Br. 27. Petitioners have never claimed that the Decisions were "ministerial" or non-discretionary, but rather that they were arbitrary, capricious, and affected by an error of law. *See* CPRL 7803(3). Article 78 specifically authorizes the judicial review Petitioners seek and CPLR 7803(3) permits the remedy Petitioners request.

III. THE PETITIONS WERE TIMELY

Equally unavailing are Respondents' assertions that Petitioners' claims are time-barred. Respondents' briefs do not acknowledge Petitioners' arguments or the cases that support them, but rely solely on the same general statements of law made to the courts below.

A. The 2015 and 2016 Decisions Trigger New Limitations Periods

Under Article 78, substantive agency determinations trigger the four-month statute of limitations. Claiming that "Petitioners' true grievance is against the 1996

opinion," Board Br. 23, Respondents argue that 1996 must serve as the starting point for the limitations period on any Board action involving LLC contributions, forever insulating the LLC Loophole from court review. But that is not the law. The limitations period begins any time an agency makes a substantive determination, regardless of whether it is relying on longstanding practice or a prior decision. *See Gottlieb v. City of N.Y.*, 129 A.D.3d 724, 725 (2d Dep't 2015); *Meegan v. Griffin*, 161 A.D.2d 1143, 1143 (4th Dep't 1990); Pet. Br. 44-45. No matter how many times Respondents try to dismiss the Board's votes on motions to close the LLC Loophole in 2015 and 2016 as "failed motion[s]," Board Br. 24, the fact remains that they were new agency actions subject to review. *See* Pet. Br. 45.

Further, Respondents fail to address clear Third Department precedent holding that even if a statute of limitations period has expired, an agency's "fresh and complete examination of the matter based on newly presented evidence" restarts the limitations period. *Quantum Health Res. v. De Buono*, 273 A.D.2d 730, 732 (3d Dep't 2000). No party disputes that in both 2015 and 2016, the Board engaged in "a fresh and complete examination" of how LLC contributions should be treated: As the Board's brief notes, "[t]here is no question that the matter was fully aired in both instances." Board Br. 32. Thus, even if the limitations periods were otherwise expired, the new hearings restarted them. *See* Pet. Br. 47-48.

B. The LLC Loophole Creates a Continuing Harm, Tolling the Limitations Period for the 1996 Opinion

Even if the limitations periods had not begun in 2015 and 2016, neither case would be time-barred because failure to properly enforce the Election Law's contribution limits and disclosure requirements creates a continuing harm that tolls the statute of limitations. *See, e.g.*, *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631, 640 (2014). Justice Fisher's assertion in *Brennan Center I* that the continuing harm doctrine only applies in civil service cases is wrong. 2015-R20. The doctrine has been applied in a wide variety of cases, and its application depends on the nature of the harm involved, not the statute in question. Pet. Br. 51. Respondents do not try to defend the lower court's reasoning. The continuing harm doctrine provides an additional ground for finding Petitioners' claims timely.

C. An Interest in Finality Does Not Preclude Petitioners' Challenges

Underlying all of Respondents' arguments is the asserted need to "achieve finality and avoid repeated and fruitless challenges," Board Br. 24, a theme Justice Fisher invoked. 2015-R18. But an interest in finality does not justify barring Petitioners from challenging a broad rule whose original creation they were uninvolved in and would not have been able to challenge, especially when the rule in question has never been litigated and there is new evidence as to its illegality. Pet. Br. 47-48. To bar Petitioners from the courthouse in these circumstances does

far more to undermine the rule of law and basic fairness than allowing their challenges to move forward ever could.[3]

Under Respondents' limitations arguments, the LLC Loophole would be forever shielded from any and all judicial review. That cannot be permitted.

IV. PETITIONERS HAVE STANDING

Respondents' arguments that Petitioners lack standing boil down to the proposition—which the Board admits—that "*no one can have standing*" to challenge the Board's Decisions. Board Br. 13 (emphasis added). But, as the Court of Appeals has held, standing principles must not be applied "in an overly restrictive manner where the result would be to completely shield a particular action from judicial review." *Ass'n for a Better Long Is., Inc. v. N.Y. State Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014).

A. The Board's Substantive Determinations Confer Standing to Those Harmed

There is no doubt that the Board's Decisions were just that—decisions. *See* Pet. Br. 59-61. That the Board acted *not* to close the LLC Loophole does not affect the standing of those who were harmed by that choice. Just as those who opposed the 2016 Proposed Order closing the LLC Loophole would have had standing to

---

[3] To be sure, any time an agency rule is in effect, even an illegal one, people will rely on it. While penalizing this behavior retroactively is wrong, past reliance on an erroneous agency rule does not prevent a court from invalidating it prospectively.

challenge a decision to *approve* the order, those who favor the Proposed Order have standing to challenge the Board's *rejection* of it.[4]

Respondents insist that no actual injury could result from an administrative decision "that left existing law intact." Board Br. 12. That is not the law. A party injured by an agency's decision to reject a specific alternative and maintain the status quo has standing to challenge the agency's decision. For example, in *Dental Society of State v. Carey*, 61 N.Y.2d 330 (1984), an association of New York dentists challenged the state's failure to increase Medicaid reimbursements, which had not been raised for seven years. The Court of Appeals concluded that the association had standing because inadequate rates adversely affected service providers, even though the reimbursement rate had been set years earlier. *Id.* at 334; *see also*, *e.g.*, *Meegan,* 161 A.D.2d at 1143 (permitting Article 78 challenge seeking to force Buffalo to appoint four deputy fire commissioners under city charter requirement, despite decade-long practice of appointing only two). One can be injured by a decision to maintain an illegal rule.

B. Petitioners Were Harmed by the 2015 and 2016 Decisions

The Board's 2015 and 2016 Decisions refusing to close the LLC Loophole directly injured the individual Petitioners as candidates for office, Pet. Br. 54-56,

---

[4] The Board raises the specter of a floodgate of litigation "if every administrative board motion" is accorded standing, Board Br. 18, but principles of *stare decisis* and *res judicata* would foreclose re-litigation of legal and factual questions. Pet. Br. 47 n.25.

office-holders, *id.* at 57-58, and/or New York voters, *id.* at 58-59, giving each of them standing to sue. *See id.* at 53-65.[5]

Respondents do not directly respond to these arguments. Instead, they assert that Petitioners are not injured in any specific way, and claim that Petitioners are merely "avengers at large on behalf of the public." Board Br. 13. But Petitioners laid out how, specifically, they are individually harmed. *See* Pet. Br. 53-65.

Similarly, Respondents' insistence that the Brennan Center lacks standing fails to grapple with the numerous cases Petitioners cited demonstrating that the well established organizational standing doctrine applies. *Compare* Pet. Br. 62-64 *with* Board Br. 14-15. The Board does not attempt to distinguish these cases.

Under Respondents' rule, *no one* has standing to challenge the Board's Decisions. Combined with their claims that no court can review the Board's Decisions *and* that the Board itself is powerless to close the LLC Loophole, the Board's true aim becomes clear: to declare the matter closed to court review of any kind. The Court must not permit the standing doctrine to be twisted this way.

V. COLLATERAL ESTOPPEL DOES NOT APPLY

The *Brennan Center II* court rejected Respondents' claim that collateral estoppel prevented it from deciding the case. And for good reason: Respondents

---

[5] Senator Squadron resigned his Senate seat on August 11, 2017 but remains a New York voter. Petitioners Liz Krueger and Brian Kavanagh remain members of the New York State Senate and Assembly, respectively.

failed to meet their burden to show that the *Brennan Center I* court *necessarily* decided *identical* issues raised by the same parties or parties in privity with one another. *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001). First, Respondents cannot show that the issues in *Brennan Center II* are identical to those raised in *Brennan Center I* because the suits arose from different actions by the Board. Whereas Justice Fisher found that the Board's 2015 Decision was simply "the ministerial act of directing Respondent's counsel to re-draft a new opinion which could preserve, modify, or eliminate the 'LLC Loophole,'" 2015-R17, the Board in 2016 voted on a specific Proposed Opinion to close the LLC Loophole, 2016 R-254-57.

Second, Justice Fisher's opinion cannot have preclusive effect with respect to any issue other than whether the Board's decision was a ministerial act, because those issues were discussed in *dicta* and thus were not necessary to the court's reasoning. *Cf.* 2015-R18 (holding that 2015 Decision was a ministerial act concerning "an allocation of resources and, thus, outside the purview of this Court"), 2015-R22 (addressing several other issues "assuming *arguendo*" that the Board had voted on whether to close the LLC Loophole). Because those issues were not "necessarily decided," collateral estoppel does not apply. *See Buechel*, 97 N.Y.2d at 303-04; *Held v. N.Y. State Workers' Comp. Bd.*, 58 A.D.3d 971, 973 (3d Dep't 2009) (doctrine does not apply to "alternate holding[s] by the trial court").

Third, collateral estoppel cannot apply with respect to the merits of Petitioners' claims because the doctrine does not preclude relitigation of pure questions of law. *Am. Home Assurance Co. v. Int'l Ins. Co.*, 90 N.Y.2d 433, 440 (1997) (noting that "the critical issue . . . is a pure question of law," and "[c]onsequently, the doctrine of collateral estoppel" did not apply); *Held*, 58 A.D.3d at 972- 973.

Finally, Petitioner Don Lee's claims cannot be precluded because he was not a litigant in *Brennan Center I*, and collateral estoppel may be applied only against an opponent who was a party to the previous lawsuit or was in privity with a party to that suit. *Buechel*, 97 N.Y.2d at 303.

CONCLUSION

The LLC Loophole is contrary to the LLC and Election Laws, and has accelerated New York's rampant political corruption. If Respondents' attempt to dodge the matter through procedural objections succeeds, an egregious error of law will be permanently insulated from judicial review. This Court must require the Board to issue a new opinion consistent with the LLC and Election Laws.

Dated: September 1, 2017
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

Elizabeth S. Saylor

Andrew G. Celli, Jr.
Alison Frick
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
Wendy Weiser
Lawrence D. Norden
Daniel I. Weiner
Brent Ferguson
Brennan Center for Justice
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310

Attorneys for Appellant-Petitioners