SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners,

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

-against-

NEW YORK STATE BOARD OF ELECTIONS,

Respondent.

Index No. _____

Assigned to Justice

_____

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

Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

The Brennan Center for Justice
NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(646) 292-8310

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

PRELIMINARY STATEMENT

This case raises the simple question whether, for purposes of New York's campaign finance laws, a limited liability company ("LLC") is more like a traditional corporation or partnership or more like a natural person. To ask the question is to answer it: An LLC is a classic "legal fiction" created by state law; it bears virtually *none* of the characteristics of individual people acting in the political arena. An LLC cannot vote. It holds no political views separate from those of its "members." And it has none of the "associational rights" of the sort that individuals routinely exercise in the world of politics—for example, the right to form or join a political party. Yet, in New York—because of an interpretational anomaly that the State Board of Elections ("Board") simply refuses to correct—LLCs are permitted to contribute money to political candidates to the same extent that individuals do, even as other corporate entities (S-corporations, traditional stock-holding corporations, partnerships, etc.) face strict limits. The LLC loophole is an administratively-created and -perpetuated error that undermines the New York State Legislature's intent to control campaign contributions by limiting the donations permitted and mandating full disclosure of donors. This loophole must be closed.

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

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

In 1996, the Board interpreted state law in a manner that gravely undermined each of these principles. *See* N.Y. Bd. of Elections Formal Op. 1996 #1 (Jan. 30, 1996) (the "1996 Opinion"), Ex. 7.[2] The LLC Loophole, created by the Board's 1996 Opinion, grants LLCs and their owners a unique privilege among artificial business entities: The LLC Loophole allows LLCs to be *treated like individuals*, permitting them to contribute to political candidates and party committees at far greater levels than their corporate and partnership peers, and in a way where the names of individuals behind the LLCs are not disclosed. To cite just one example, the LLC Loophole permits LLCs to contribute to just a single candidate in a statewide race (a primary and general election) more than *twelve times* what corporations may give overall in any one year: $60,800 per candidate per election cycle for LLCs, versus $5,000 per year for corporations. And, because LLCs contribute in their own names, not in the names of their "members," who need not be disclosed, the goal of transparency is frustrated.

Wealthy individuals and businesses have exploited the LLC Loophole to flout contribution limits altogether, especially in recent years. In a particularly egregious example, one wealthy contributor used 27 different LLCs to contribute $4.3 million to political committees

[2] Numbered exhibits are attached to the Affirmation of Elizabeth S. Saylor ("Saylor Affirm."), dated July 13, 2015.

in the state over a two-year period.[3] Plainly, no one would tolerate the same individual *voting* 27 times. Likewise, we ought not tolerate a system that, in contravention of the Legislature's intent, permits one individual to evade the corporate contribution limits and contribute under 27 different names and corporate entities.

The Board-created LLC Loophole thus thwarts the Legislature's intent to comprehensively limit and require full disclosure of contributions, making a mockery of the state's campaign finance laws like never before. As explained below, the Board has offered no defensible rationale for this absurd choice.

The Board's most recent failure to fix this problem occurred on April 16, 2015. Voting 2-2, the Board refused to rescind its 1996 Opinion and close the LLC Loophole ("the April 2015 Decision"). This lawsuit—brought by the Brennan Center, former and current elected officials, and voters negatively affected by the LLC Loophole—challenges the Board's decision as arbitrary, erroneous, and contrary to law.

The Board's April 2015 Decision and the 1996 Opinion on which it was premised are arbitrary and capricious and reflect grave legal errors under both the Election and LLC Laws. *First*, the Board's decision violates the purpose and spirit of the Election Law, by facilitating massive circumvention of the Election Law's framework of contribution limits and disclosure requirements. Avoiding such circumvention is precisely why the Legislature created strict contribution limits for the other artificial business entities (*e.g.*, corporations and partnerships) that LLCs most closely resemble. *Second*, the Board failed to adequately examine the full text of the statutory definition of an LLC, ignoring a key portion of the statutory definition stipulating

[3] Bill Mahoney, *State's largest campaign donor a client of Silver's second firm*, Capital N.Y., Dec. 30, 2014, available at http://www.capitalnewyork.com/article/albany/2014/12/8559323/states-largest-campaign-donor-client-silvers-second-firm.

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

At a time when New York government is in crisis thanks to a series of high-profile corruption scandals, the Board has opted to perpetuate a deeply flawed rule that enables frequent and harmful circumvention of the law. This Court should invalidate the Board's arbitrary, capricious, and legally erroneous April 2015 Decision.

FACTS

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

New York law provides for a comprehensive system of limits and disclosure requirements for contributions to candidates, party committees, and PACs. *See* N.Y. Elec. Law §§ 14-102, 14-104, 14-114, 14-116. As part of this scheme, New York has restricted corporate contributions to political campaigns for well over a century, in order to guard against corruption and to preserve the confidence of citizens in their government. From the early 1900s until the 1970s, corporations were banned entirely from contributing to political campaigns. In 1974, as part of comprehensive reform legislation that created individual contribution limits, the corporate ban was replaced with a $5,000 overall limit (today part of Election Law § 14-116), significantly less than the limits for individuals in most races (currently $41,100 for general election

contributions and up to $19,700 for primary contributions for statewide office). *See* 1974 N.Y. Laws 1612-15; N.Y. Bd. of Elections 2014 Contribution Limits.[4] The Governor's approval memorandum explained that a central purpose of the reform law was to "restrict unduly large contributions to any one campaign." Gov. Malcom Wilson's Mem. on Approving Law, Bill Jacket, 1974 N.Y. Laws ch. 304, Ex. 2.

The replacement of the corporate ban with a modest contribution limit was part of the Legislature's efforts to increase transparency in campaign financing. The legislative declaration attached to the 1974 bill explained that the Legislature sought to "further mandate full and complete disclosure of campaign financing and practices to encourage 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 tradition of a free society with the ability to determine its own destiny." 1974 N.Y. Laws 1602, Ex. 3. According to the Senate sponsor, the Legislature lifted the corporate ban in favor of a $5,000 limit "to 'put what's going on under the table over the table.'" Judith Bender, *Election Reform Revs Up*, Newsday, Apr. 3, 1974, at 9 (quoting Sen. John Calandra). That is, the Legislature lifted the ban to discourage corporations from evading the rules by directing their officers to make contributions.

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

> I would much rather have the corporations' contributions out in the open where we can see them and have some control on them than

[4] Available at http://www.elections.ny.gov/NYSBOE/Finance/2014FamilyContributionLimitsRev06202014.pdf (last accessed June 8, 2015). As a courtesy, we have also attached it as Ex. 1.

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

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

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

In short, while the Legislature sought to bring corporate political spending out into the open, it remained concerned about corruption resulting from abuse of the corporate form. It thus imposed far lower limits on contributions from corporations than from individuals, while taking steps to prevent persons from giving through multiple entities they control. *See* 50 N.Y. Jur. 2d Elections § 522 ("The purpose of the legislature in enacting this provision is to prevent corruption of legislators and other elected officials through corporate contributions to political parties and candidates."); *Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp. 3d 365, 369

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

(N.D.N.Y. 2014) (noting that New York's system of corporate and individual limits is intended "[t]o protect against corruption and the appearance of corruption").

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

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

[6] That decision was based on a precursor to § 14-120 that did not contain a provision equivalent to §14-120(2), which requires allocation for contributions above $2,500.

II. THE BOARD CREATES THE "LLC LOOPHOLE"

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

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

In its 1996 Opinion, the Board ruled that LLCs should be treated as separate and distinct *individuals* for purposes of campaign contributions. N.Y. Bd. of Elections Formal Op. 1996 #1 (Jan. 30, 1996) ("the 1996 Opinion"), Ex. 7. Accordingly, under this rule, while partnership donations over $2,500 are attributed to each partner, and corporations can give no more than $5,000 in any one year, LLCs are considered by the Board to be fully separate individuals; each LLC may thus contribute the maximum allowed for each individual ($60,800 per candidate in a statewide race), without any of those contributions being counted against each member's individual contribution limits.

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

The Board relied on only two pieces of evidence in making its decision. First, the Board reasoned that, because the LLC Law defines an LLC as an "unincorporated" organization "other than a partnership or a trust," none of the Election Law statutes applicable to corporations or partnerships could apply. *Id.* at 1. Significantly, the Board did not cite, let alone analyze, the Legislature's inclusion of the phrase "unless the context otherwise requires" in the definition of LLC. *Id.* (quoting the definition of limited liability company without including the "unless the context otherwise requires" language). Second, the Board relied on a (now superseded) Federal Election Commission ("FEC") advisory opinion holding that a Virginia-chartered LLC should be treated as an individual under federal law (and therefore not subject to the federal ban on corporate contributions). The Board concluded that New York would follow the same approach as the FEC. *Id*. at 1-2 (citing FEC AO 1995-11).

The 1996 Opinion was a departure from the Board's own past practice with respect to "unincorporated" artificial entities, exemplified by the Board's longstanding treatment of partnerships, *see* N.Y. Bd. of Elections Formal Op. 1976 #4, Ex. 6. Likewise, in a 1974 opinion, the Board held that an "unincorporated trade association" could give up to the *corporate* limit of $5,000 each year under Election Law § 480, the precursor to Election Law § 14-116. N.Y. Bd. of Elections Formal Op. 1974 #2. In other words, such entities would *not* be treated like separate and distinct individuals for purposes of the contribution limits, notwithstanding that they were unincorporated just like LLCs. The Board provided no explanation for why it deviated from this past practice in the 1996 Opinion; indeed, it did little but quote (in part) the definition of an LLC and mention the FEC's advisory opinion—an opinion that was rescinded three years later, *infra* Facts IV.

III. THE LLC LOOPHOLE IS CONSISTENTLY ABUSED

Since the Board's 1996 Opinion, LLCs have become a major player in funding New York State elections. According to Board of Elections data compiled by the Hedge Clippers project, LLCs contributed more than $54.2 million to candidates, parties, and traditional PACs[8] between 2011 and 2014, and more than $118.6 million between 1999 and 2014. *See* Affidavit of Avram Billig ("Billig Aff."), ¶¶ 3, 8. In 2014 alone, LLCs gave over $19 million, more than *300% increase* over the amount given by LLCs in 2002. *Id.* ¶ 3. Governor Cuomo alone raised over $9 million from LLCs in his first term, roughly 20% of his first-term fundraising total. *Id.* ¶ 4; Thomas Kaplan, William K. Rashbaum & Susan Craig, *After Ethics Panel's Shutdown, Loopholes Live On in Albany*, N.Y. Times, Dec. 8, 2014. Approximately 83% of these funds were contributed in increments exceeding the $5,000 corporate limit. Billig Aff. ¶ 4. The same is true for approximately 72% of the more than $1.7 million that LLCs contributed to Attorney General Eric Schneiderman, approximately 71% of the $611,000 LLCs contributed to former Nassau County Executive Tom Suozzi, and approximately 49% of the almost $1.2 million LLCs contributed to Suffolk County Executive Steve Bellone, to name just a few examples. *Id.* ¶¶ 5-7.

Donors have routinely filtered money through multiple LLCs, bypassing existing contribution limits altogether to give millions of dollars and secure influence over state government. One real estate developer reportedly used 27 LLCs to contribute over $4.3 million in 2013 and 2014, Bill Mahoney, *State's Largest Campaign Donor A Client Of Silver's Second Firm,* Capital N.Y., Dec. 30, 2014, and a single telecommunications provider reportedly used

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

eight LLCs to give $1.5 million between 2005 and 2013, including $190,000 to one candidate in a single day, Susan Lerner, *New "Moreland Monday" Analysis: Political Cash Buys Big Telecom Veto Power Over Bills*, Common Cause N.Y., Sept. 23, 2013.[9]

This type of activity by companies in highly regulated industries led the Moreland Commission to Investigate Public Corruption to conclude that the LLC Loophole "help[s] facilitate the larger pay-to-play culture" in Albany. N.Y. Comm'n to Investigate Public Corruption, Preliminary Report 33 (2013) ("Moreland Report"), Ex. 8.[10] The Commission dedicated a section of its December 2013 report to abuse of the LLC Loophole, noting that "numerous entities and organizations unabashedly use this loophole," and that it "dramatically undermines the limits already in place." *Id.* at 36-37.

Disclosure of LLC giving is also lacking, as many LLCs have vague names with little connection to their actual operators. While investigators and journalists have managed to identify a handful of individual donors who make regular use of the LLC Loophole, the true source of much LLC spending remains obscured.[11] That lack of disclosure, along with the continued use of LLCs to bypass contribution limits, led the *New York Times* to observe in 2014 that New York has "some of the most porous campaign fund-raising laws in the nation." Thomas Kaplan, *Awash in Campaign Cash, Cuomo Benefited From Big Donors and Loopholes*, N.Y.

[9] Available at http://www.commoncause.org/states/new-york/press/press-releases/new-moreland-monday-analysis-political-cash-buys-big-telecom-veto-power-over-bills.html?referrer=https://www.google.com/.

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

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

Times, Nov. 4, 2014[12]; *accord* Affidavit of Daniel L. Squadron ("Squadron Aff."), ¶ 8 (describing the difficulty of ascertaining the identity of LLC donors and conveying that information to the public); Affidavit of Brian Kavanagh ("Kavanagh Aff."), ¶ 8.

Candidates and elected officials are acutely aware of LLC contributions and their effects on elections and governance. For example, Petitioners Senator Liz Krueger, Senator Daniel L. Squadron, and Assemblyman Brian Kavanagh often faced pressure to raise money from LLCs as candidates for office. Affidavit of Senator Liz Krueger ("Krueger Aff."), ¶ 5; Squadron Aff. ¶ 9; Kavanagh Aff. ¶ 6. Senator Krueger notes that many officeholders realize that, regardless of their performance and dedication, they could easily lose their next election if they take action adverse to industries, such as the real estate industry, that can spend huge amounts of money through LLCs. *Id.* ¶¶ 7-8; *accord* Affidavit of Maureen Koetz ("Koetz Aff.") ¶¶ 7-8. Similarly, Petitioner Maureen Koetz, who ran against former Assembly Speaker Sheldon Silver in 2014, was rebuked by members of her own party after criticizing the practice of granting tax abatements to campaign supports who own luxury buildings in New York City, who normally donate through LLCs. Koetz Aff. ¶ 7. Ms. Koetz was told by her colleagues not to mention the issue again because they did not want to alienate the real estate industry, which provides significant campaign contributions though LLCs. *Id.* These same officeholders are also acutely aware of who their own major LLC donors are. Krueger Aff. ¶ 8; *accord* Affidavit of John Dunne ("Dunne Aff."), ¶ 6; Affidavit of Gerald Benjamin ("Benjamin Aff."), ¶ 5; Squadron Aff. ¶ 10.

The ability of individuals who control multiple LLCs to use the LLC Loophole to skirt the individual contribution limits and disclosure rules creates palpable distorting effects on the

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

political process. *See* Squadron Aff. ¶ 7; Koetz Aff. ¶ 6, 9. Petitioner Senator Squadron, who has a policy of refusing to accept LLC contributions, experienced firsthand the influence LLC contributions can have on elections. Squadron Aff. ¶ 8. When his opponent raised large contributions from two anonymous LLCs with the same address, it was difficult for Senator Squadron to determine which interests were supporting his opponent and to convey that information to the public. *Id*; *accord* Koetz Aff. ¶¶ 6.

According to the Moreland Commission:

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

Moreland Report 28, Ex.8.

As a consequence, legislation with broad support among those who would be impacted, such as rent regulation in New York City, is often blocked because legislators seek to protect the interests of LLC donors. Krueger Aff. ¶ 10. The same donors also work hard to isolate legislators they perceive as unfriendly. In one instance, Senator Krueger was explicitly told that she had been excluded from a series of important meetings involving senior Democrats at the request of lobbyists representing, among others, Glenwood Management, a real estate company that controls a network of politically-active LLCs. *Id.* ¶ 1; *see also* Moreland Report 34, Ex. 8 (describing special tax breaks inserted into a rent regulation bill, apparently at the behest of real estate industry donors); Moreland Commission Testimony of N.Y. City Council Member Eric Ulrich (R-Queens), Ex. 16, at 58-59 (describing candidacy for New York Senate and his "belie[f]

that some of the people in Albany are more willing to listen to people from the real estate industry, for instance . . . because they're the ones who are writing $10,000 checks").[13]

Aside from the direct effect on the legislative process, the ease with which the campaign finance rules can be circumvented has, according to Senators Krueger and Squadron, fostered extraordinary anger and cynicism about the democratic process among their constituents, many of whom believe that those in power represent big donors' interests rather than those of typical citizens. Krueger Aff. ¶ 13; Squadron Aff. ¶ 11; *accord* Koetz Aff. ¶ 11. Petitioner Gerald Benjamin, Distinguished Professor of political science at SUNY-New Paltz and a former Chairman of the Ulster County Legislature, notes the same cynicism and lack of engagement among his students, which have increased greatly in recent years. Benjamin Aff ¶ 7. Petitioners Krueger, Benjamin, Dunne, Squadron, Koetz, and Kavanagh all aver that their own confidence in New York's democracy has been shaken by the rampant use of LLCs to circumvent campaign finance laws. Krueger Aff. ¶ 14; Benjamin Aff. ¶ 8; Dunne Aff. ¶ 8.; Squadron Aff. ¶ 12; Koetz Aff. ¶ 12; Kavanagh Aff. ¶ 10.

IV. THE FEC CHANGES COURSE

The FEC's 1995 advisory opinion, on which the Board relied, was rescinded in 1999 through a formal rulemaking. The current FEC rules provide that an LLC will be treated as either a corporation or a partnership for purposes of federal contribution limits, depending on the tax status it elects under IRS rules. *See* 11 C.F.R. § 110.1(g); *Final Rule: Treatment of Limited Liability Companies under the Federal Election Campaign Act*, 64 Fed. Reg. 37397 (1999). In its rulemaking, the Commission first found that Congress "did not directly address . . . whether the definition of corporation includes LLCs." 64 Fed. Reg. at 37399 (internal emphasis and

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

quotation marks omitted). The Commission nevertheless reasoned that treating LLCs as either corporations or partnerships depending on their tax status would best effectuate congressional intent, by taking into account the starkly different characteristics an LLC has depending on its tax status and "the special advantages which go with the corporate form of organization." *Id.* (internal quotation marks omitted). In particular, an LLC electing partnership status must maintain individual accounts for each partner, meaning that contributions made by such entities can fairly be attributed on a pro rata basis. 64 Fed. Reg. at 37398.[14] When an LLC elects corporate status, on the other hand, "it is essentially telling the IRS that its organizational structure and functions are more akin to a corporation." *Id.*

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

V. CITIZENS DEMAND CHANGE IN NEW YORK

In light of the FEC's changed position, the harm caused by the LLC Loophole, and the Loophole's lack of legal foundation, in 2007 a number of groups wrote to the Board urging it to revisit its 1996 Opinion. *See* Letter of Citizens Union et al. to N.Y. Bd. of Elections Requesting Re-evaluation of LLC Contribution Limits, June 11, 2007, Ex. 10. The 1996 Opinion, they argued, not only "creat[es] a loophole in the limits for political donations that apply to very similar business entities," but also "frustrates the disclosure requirements of the Election Law, making it difficult if not impossible for the public and candidates to identify the actual donor"

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

behind many LLC contributions. *Id*. at 4. Almost six months after receiving that request, the Board sent a one page letter stating that it would "undertak[e] a review of this issue," but that "[a]n initial review indicates that a change in policy would require a statutory amendment." Letter of Elizabeth C. Hogan, Enforcement Counsel, to Russ Haven, Feb. 1, 2008, Ex. 11. The Board provided no reasons for this preliminary conclusion, and Petitioners are not aware of any further action being taken. Since then, the rate of giving by LLCs has increased dramatically. *See* Billig Aff. ¶ 3.

VI. THE BOARD AGAIN REFUSES TO REVISE THE 1996 OPINION

On April 16, 2015, prompted by a request from ECBA and the Brennan Center, the Board took up a motion made by Board Co-Chair Douglas A. Kellner to rescind the 1996 Opinion and issue a new opinion with respect to the treatment of LLCs. Among others, New York Attorney General Eric Schneiderman also asked the Board to close the LLC Loophole. Ex. 12. Calling it "an exception that swallows the rule," the Attorney General noted that the Board-created LLC Loophole allows each LLC to donate up to $60,800 to a statewide candidate per election cycle, far more than corporations or partnerships may contribute. *Id*.

After a discussion of the motion, the Board voted 2-2 on the proposal: Board Co-Chair Douglas A. Kellner and Commissioner Andrew J. Spano agreed that the LLC Loophole was contrary to statutory intent, and supported the motion to eliminate it. Co-Chair Peter S. Kosinski and Commissioner Gregory P. Peterson opposed it; they maintained that the LLC Loophole is *required* by statute. *See* Tr. of April 16, 2015 NYSBOE Commissioners' Meeting, at 27-35, Ex. 13. According to the Election Law, a tie leaves the status quo policy in place. N.Y. Elec. Law § 3-100(4). Accordingly, the April 2015 Decision reaffirmed that LLCs would be treated like separate individuals for purposes of campaign contributions.

Petitioners bring this Article 78 Petition to reverse the Board's arbitrary, capricious, and legally erroneous April 2015 Decision. Petitioners Krueger, Squadron, and Kavanagh are current elected officials who plan to run for re-election; they will therefore be directly impacted by the LLC Loophole, both because LLCs may contribute to their opponents, and because they face pressure to raise LLC contributions in order to stay competitive or must make extraordinary efforts to raise comparable funds from non-LLC sources. Krueger Aff ¶¶ 4-6; Squadron Aff. ¶¶ 7-9; Kavanagh Aff. ¶¶ 3, 6. Other Petitioners are former officeholders, potential future candidates, and current voters, whose own ability to participate in the political process as citizens is also directly affected by the proliferation of large-scale contributions from LLCs and those who control them, whose identities often are not disclosed. Benjamin Aff. ¶ 8; Dunne Aff. ¶ 8; Koetz Aff. ¶¶ 7-12.

ARGUMENT

The Board's April 2015 Decision refusing to close the LLC Loophole represents an error of law and is arbitrary and capricious. This Court should reverse the April 2015 Decision and order the Board to rescind it 1996 Opinion. The Board's 1996 Opinion and April 2015 Decision contravene both the Election and LLC Laws and are arbitrary and capricious decisions in three distinct ways. First, the Board failed to take into account the *purpose* of the campaign finance scheme as a whole, including the Legislature's imposition of strict contribution limits on artificial business entities. Second, the Board failed to consider the *entire text* of the statutory definition of the LLC, ignoring language that reveals the Legislature's intention to define LLCs flexibly depending on the legal context and overlooking court precedents that have accordingly treated LLCs as partnerships or corporations in many contexts. Finally, the Board failed to consider *how LLCs are treated in context by other agencies*, including the FEC's decision in

1999 that LLCs should be treated as corporations or partnerships. As a result of these failures, the Board did not properly analyze and apply the Legislature's intent. The Board's decision must be overturned.

I. ARTICLE 78 REQUIRES PROBING EVALUATION OF AGENCY DECISIONS

A petition pursuant to Article 78 of the Civil Practice Law and Rules must be granted when the determination of a government body, such as the Board of Elections, "was affected by an error of law or was arbitrary or capricious." CPLR 7803(3). The Board's decisions, including discretionary decisions *not* to act, are "determinations" subject to review in an Article 78 proceeding. *See, e.g., Marchi v. Acito*, 77 A.D.2d 118, 120 (3d Dep't 1980) (Board's decision not to act on petitioner's complaint was an arbitrary abuse of discretion). In addition, pursuant to CPLR 3001, the Court may declare the 1996 Opinion and the Board-created Loophole null and void. *See, e.g., Yatauro v. Mangano*, 17 N.Y.3d 420, 427 (2011) (in hybrid Article 78/declaratory judgment petition, ruling that reapportionment of county legislature was "null and void" in connection with the upcoming general election, finding that reapportionment violated legislative intent).

"In matters of statutory and regulatory interpretation, legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the enactors." *Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010) (internal quotation marks omitted). Accordingly, courts look to the text of the provision(s) at issue as "the clearest indicator of the enactors' intent." *Id.* Reviewing courts must "give effect and meaning to the entire statute and *every* part and word thereof." *Friedman v. Conn. Gen. Life Ins.*, 9 N.Y.3d 105, 115 (2007) (emphasis added) (internal quotation marks and alterations omitted). While agencies are sometimes afforded deference in interpreting a statute, courts "will accord no such deference when the question is one of pure statutory reading and analysis, dependent only on accurate

apprehension of legislative intent." *Kent v. Cuomo*, 124 A.D.3d 1185, 1186 (3d Dep't 2015) (internal quotation marks and citation omitted).[15]

"Additionally, inquiry should be made into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." *Id*. (internal quotation marks omitted); *Carney v. Philippone*, 1 N.Y.3d 333, 339 (2004) (explaining that court must "discern and implement the will of the Legislature and attempt—by reasonable construction—to reconcile and give effect to all of the provisions of the subject legislation"). "In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. Literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted." *Essenfeld Bros. v. Hostetter*, 14 N.Y.2d 47, 52 (1964) (internal quotation marks omitted). When interpreting legislation, courts "must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell,* -- S. Ct. --, 2015 WL 2473448 at *8 (2015) (internal quotation marks omitted).

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

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

used to package its food, the Court rejected the Commission's interpretation of the law. It thoroughly examined the nature of the fast food industry, finding that Burger King's packaging was "a critical element of the final product sold to customers," and therefore qualified for the resale exception. *Id.* The Court explained that the holding complied with "the spirit underlying our sales tax law," and that accepting the Commission's decision "would distort the original legislative intent." *Id. See also, e.g., People v. Boyer*, 6 N.Y.3d 427, 431 (2006) (noting that despite literal text of criminal procedure statute, purpose of law has led Court of Appeals to create two exceptions to rule requiring state to provide criminal defendants with notice of plans to introduce identification testimony); *Jones v. Berman*, 37 N.Y.2d 42, 52-53 (1975) (rejecting Commissioner of Social Services Rule and emphasizing that agencies "have no authority to create a rule out of harmony with the statute"); *In re Horchler's Estate*, 322 N.Y.S.2d 88, 92 (2d Dep't 1971) ("In short, we think that the statute must be read not narrowly, as it might be parsed, but in context with the then current law and the contemporaneous explanation which accompanied its passage.").

Under these legal standards and precedents, the Board's decision must be invalidated.

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

By allowing essentially unlimited, undisclosed contributions from LLCs, the April 2015 Decision neuters the central, animating purpose of the Election Law: namely, the imposition of reasonable contribution limits—for artificial business entities and individuals—and full disclosure requirements for major donors. In its overhaul of the Election Law in 1974, the Legislature indisputably sought to implement a comprehensive system in which contributions from individuals and business entities were limited in order to prevent the corruption of elected officials. *See, e.g., Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp. 3d 365, 369 (N.D.N.Y.

2014) (explaining that New York's corporate and individual limits are intended "[t]o protect against corruption and the appearance of corruption"). As one Assemblyman, speaking on the Assembly floor in support of the bill, starkly put it: "[T]he American political process is on the block and it is for sale . . . . It is lousy and it has restricted political leadership in this country at high levels to a very small number of people who were either themselves or closely connected to multi-millionaires." N.Y. Assembly Debate, Apr. 4, 1974, Ex. 4 at 3238-39 (calling the changes to the Election Law "an essential step"). The Legislature set much lower limits for artificial business entities precisely because legislators were wary of them being used to circumvent other limits on contributions to candidates.

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

In short, while the 1974 Legislature decided to lift the ban on corporate contributions and replace it with a modest contribution limit, it was acutely aware of the risks associated with allowing artificial business entities to make contributions, which it sought to mitigate as much as possible. There can be no question that the Legislature specifically intended, through the Election Law, to curtail the use of such entities to circumvent the Election Law's other limits and requirements.

It is no surprise, then, that the Board initially took these concerns seriously when interpreting the law and making its rulings. For example, the Board ruled that the new limit also governed contributions by an "unincorporated trade association," and held that the Election Law prohibited the association from "act[ing] as a conduit" for its members' individual political contributions, which would allow the trade association to skirt the $5,000 limit. N.Y. Bd. of Elections Formal Op. 1974 # 2. Two years later, the Board determined that partnership contributions would have to be allocated to each individual partner, rather than attributed to the partnership itself, to comply with the Election Law's prohibition on contributing in the name of another. N.Y. Bd. of Elections Formal Op. 1976 # 4, Ex. 6. Although the Legislature modified this rule in 1992 to allow partnerships to make contributions in their own name, it allowed them to give only a modest $2,500, after which contributions would still need to be attributed. *See supra* at Facts I.

The Board also repeatedly effectuated the Legislature's effort to bring campaign contributions into the light through disclosure requirements. For example, it held that candidates or political committees must report *all* depository bank accounts, even though the law mentions "account" in the singular, because "the legislative intent in establishing the above requirements was to insure that there is complete disclosure of all political bank accounts of a candidate or

political committee." N.Y. Bd. of Elections Formal Op. 1978 #2. In 1981, it held that committees are required to disclose in their financial reports filed for primary elections contributions specifically donated for the general election, if the funds are deposited into the same account. N.Y. Bd. of Elections Formal Op. 1981 #3.

Given the clear legislative intent and its own prior decisions, the Board's treatment of LLCs is anomalous, and thwarts the overarching goals of New York's system of campaign finance regulation by enabling wealthy donors to engage in massive circumvention. *Supra* Facts III. As a result, the very consequence that Legislators most feared and sought to avoid, dominance of New York government by the wealthiest business interests, has too often come to pass. *Supra* Facts III.

In contrast to the Board's anomalous approach, interpreting the Election Law to require LLCs to be treated like corporations or partnerships "fits best with the statutory context," *King*, 576 U.S. at *12. Applying legislative intent and the Board's own precedents, particularly its decisions on partnerships, LLCs that elect treatment as partnerships for tax purposes should be required to contribute in the name of their members, who would be subject to the limits that individuals face—just like partners. And "unincorporated" LLCs that nevertheless choose to be treated as corporations for tax purposes should be subject at least to the $5,000 overall corporate limit. The Board's decision to treat LLCs unlike other artificial business entities—allowing each LLC to act as an individual itself—permits a single individual LLC member to avoid all contribution limits by setting up countless separate LLCs and contributing the maximum in the name of each separate LLC—without ever having to disclose his own name or political interests. This flouts the central purposes of the Election Law. For this reason alone, the Board's decision should be reversed.

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

The Board's absurd treatment of LLCs is not compelled by the LLC Law. Indeed, the reasoning of the two Board members who dictated the April 2015 Decision reaffirming the 1996 Opinion once again ignores the *full* statutory definition of a limited liability company. The 1996 Opinion purported to quote the statutory definition of "limited liability company," from N.Y. Ltd. Liab. Co. Law § 102(m)—but it left out a key portion of the definition. The statutory provision reads in full:

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

N.Y. Ltd. Liab. Co. Law § 102(m) (emphasis added). But the 1996 Opinion failed to quote and ignored the phrase "unless the context otherwise requires," a crucial component that reveals that the Legislature intended the definition of these recently-invented entities to be adaptable to the legislative context. Nor did the Board refer to this crucial language when reaching the April 2015 Decision.

The Board's interpretation fails to give effect and meaning to every word of the statute, as required by the Court of Appeals. *See Friedman*, 9 N.Y.3d at 115. Instead, the Board simplistically relied on the definition of the LLC as an "unincorporated organization . . . other than a partnership" to hold that LLCs are always distinct from corporations and partnerships. This interpretation renders a nullity the explicit language that reveals the Legislature's intent to create a new, hybrid entity that is typically distinct from other business forms—but that will *often* be treated like a corporation or a partnership. The Board's determination is thus infected by a grave error of law and is arbitrary and capricious.

Consistent with the language of the LLC Law, courts in New York routinely treat LLCs like corporations or partnerships as the context requires. For example, courts have applied the requirement that corporations and voluntary associations be represented by an attorney to LLCs, even though the attorney representation law does not mention them. A New York federal court, citing cases from New York state courts, held that that LLCs are "corporations or voluntary associations" under the Judiciary Law, and are thus barred from practicing law. *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). As the Second Department explained, "[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 it must be represented by an attorney and not one of its members. *Michael Reilly Design, Inc. v. Houraney*, 835 N.Y.S.2d 640, 641 (2d Dep't 2007); *see also Comm'rs of State Ins. Fund v. Lawrence LaRose Constrs., LLC*, 22 Misc.3d 1101(A), at *1 (Sup. Ct. Suffolk Cnty. 2008) (LLC may only appear in an action by an attorney and not one of its members); *Monte Carlo, L.L.C. v. Yorro*, 195 Misc.2d 762, 763 (Dist. Ct. Nassau Cnty. 2002) (LLC owner "cannot benefit from the protections of the Department of State by virtue of being an LLC but then disclaim the very status that affords those protections to avoid engaging an attorney to represent him" in court) (internal quotation marks omitted).

Similarly, an Albany court determined that an LLC should be permitted to bring a commercial claims action even though such an action could only be brought by "a corporation, partnership or association." *Richard G. Roseetti, LLC v. Werther*, 6 Misc.3d 1040(A), at *1 (Albany City Ct. 2005). While the court recognized that none of those categories applied to an

LLC directly, it concluded that an LLC "is a cross between an association and a corporation" and should therefore be treated as such under the law. *Id.*[16]

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

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

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

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

LLCs are a hybrid between the corporate and partnership forms. In enacting the LLC Law, New York followed a trend that began in 1977 in Wyoming, when an oil company lobbied

[16] The court also cited *North4ore Realty LLC v. Bishop*, 770 N.Y.S.2d 193 (3d Dep't 2003), in which the Third Department affirmed a judgment in a commercial claim brought by an LLC, but did not directly address whether LLCs could bring commercial claims.

for establishment of a new entity that would allow it to limit its liability like a corporation but obtain the favorable tax status of a partnership. Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 Ohio St. L.J. 1459, 1464-66 (1998). The following decade, the IRS ruled that LLCs could elect to be taxed as partnerships, and within eight years all 50 states had passed laws allowing for their creation. *Id*. at 1460. As the LLC Law's Senate sponsor made clear, LLCs were intended to "have the tax attributions of a partnership, the single taxation, while they contain also the liability benefits of a corporation." N.Y. Senate Debate June 30, 1994, Ex. 14 at 6909. The Board itself acknowledged in its 1996 Opinion that LLCs are essentially a kind of corporate/partnership hybrid. *See* 1996 Opinion, Ex. 7 ("Limited liability companies have been endowed with some of the characteristics of corporations and some of the characteristics of partnerships . . . ."); *see also* Treatise on the Law of Corporations (3d) § 1:11[5] (noting that an LLC is "essentially a partnership with a legislative grant of limited liability").

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

Nor did the Board consider the many areas of state law that treat LLCs as partnerships or corporations. As explained above, courts in New York frequently treat LLCs as corporations or partnerships. *Supra* Argument III. Likewise, the New York Department of Taxation and Finance treats LLCs as either corporations or partnerships for tax purposes, depending on their federal tax elections. N.Y. Dep't of Taxation and Finance, *New York Tax Status of Limited Liability Companies and Limited Liability Partnerships*, Publication 16, Nov. 2014.[17] The New York Department of Financial Services also treats LLCs like corporations—and *not* like individuals—for purposes of its trade name registration requirements. N.Y. Dep't of Financial Servs., *Instructions for Corporations, Partnerships, Trade Names, Trademarks, Etc.*[18] And the New York Workers' Compensation Board treats LLC members as partners for purposes of processing members' workers compensation claims. *Captain's Galley LLC*, Case No. 6020 9539, 2003 WL 21995078 (N.Y. Work. Comp. Bd. Aug. 15, 2003). While the Workers Compensation Law specifically covers executive officers of a corporation and allows partners to elect to be included in the program, the law does not specify how LLC members should be treated. Despite the law's silence, the New York Compensation Insurance Rating Board determined that LLC members be treated as partners, and the Workers' Compensation Board ratified that determination. *Id*.

The Board's failure to take into account this legal treatment of LLCs was arbitrary, legally deficient, and directly contrary to the express legislative language. The Board-created LLC Loophole has resulted in wholesale circumvention of New York's system of contribution limits and disclosure requirements. *Supra* Facts III. Courts and other agencies have followed

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

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

the text of the LLC statute: They have defined LLCs as unincorporated organizations other than partnerships "*unless the context otherwise requires*." N.Y. Ltd. Liab. Co. Law § 102(m) (emphasis added). But the Board has steadfastly ignored this language, and this precedent. A full reckoning with these other applications would show that the Legislature did mean something when it included the important proviso that the definition of an LLC may vary based on the legal context. Had the Board considered that language, considered the Legislative intention to effectively limit campaign spending by business entities, and examined how LLCs are treated elsewhere in the law, it would not have likened LLCs to individuals when it comes to campaign contributions. Its faulty determination should be reversed.

CONCLUSION

For the reasons stated above, we ask that this Court invalidate the April 2015 Decision not to rescind the Board's 1996 Opinion and order the Board to issue a new opinion or regulation consistent with the text and spirit of the Election and LLC Laws.

Dated: July 13, 2015
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

Andrew G. Celli, Jr.
Elizabeth S. Saylor
Alison Frick
Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, NY 10020
Telephone (212) 763-5000
Fax (212) 763-5001

BRENNAN CENTER FOR JUSTICE AT
NYU SCHOOL OF LAW

Wendy Weiser
Lawrence D. Norden
Daniel I. Weiner
Brent Ferguson
Brennan Center for Justice
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone (646) 292-8310
Fax (212) 463-7308

Counsel for Petitioners