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. 3579-15

Assigned to Justice Judith A. Hard

MEMORANDUM OF LAW IN FURTHER 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 ask this Court to recognize that the LLC Loophole created by the Board of Elections ("Board") is an arbitrary and capricious agency determination that is contrary to law. In dozens of pages of briefing, neither the Board nor the Intervenor[1] (together, "Respondents") offers a *single* substantive defense of the LLC Loophole. Not once do they suggest that the LLC Loophole accords with the Election Law's intent to control campaign contributions by limiting and requiring disclosure of donations. Not once do they intimate that the LLC Loophole's singular treatment of LLCs aligns with the LLC Law. Instead, Respondents attempt to muddle what is plain: that the Board created a rule that has no basis in law, and that its affirmance of this rule in April 2015 perpetuated a legal wrong that this Court has the authority to—and should—correct.

ARGUMENT

The Board's April 2015 Decision refusing to close the LLC Loophole represents an error of law and is arbitrary and capricious.

I. RESPONDENTS MAKE NO ARGUMENTS IN SUPPORT OF THE LLC LOOPHOLE ON THE MERITS

The LLC Loophole is an arbitrary and capricious agency decision predicated on an error of law—and neither the Board nor Intervenor offers *any* argument to the contrary. Nowhere in their papers do Respondents attempt to explain how the 1996 Opinion, treating LLCs uniquely among business entities, comports with the Election Law or with the LLC Law. Instead, Respondents simply (and repeatedly) insist that this Court may not set aside the reasonable judgment of the Board. But this lawsuit alleges and Petitioners' papers demonstrate that the

[1] On September 10, 2015, Petitioners received a copy of a motion to intervene via order to show cause on behalf of the New York Republican State Committee (hereinafter, "Intervenor"). Petitioners do not object to the Intervenor's motion to intervene, but they strenuously dispute the legal arguments offered by the Intervenor in opposition to the Petition. This brief addresses both the Intervenor's arguments and those of the Board.

Board's determination was *not* reasonable—that it was arbitrary, capricious, and legally deficient. Neither Respondent presents any substantive defense of the Board's ruling.

And that is because there are no arguments to be made: Far from a reasonable interpretation of the Election Law, the Board's April 2015 Decision contradicts it. Respondents cannot dispute that the Legislature, in overhauling the Election Law in 1974, sought to implement a comprehensive system that would, among other things, limit political campaign contributions from individuals and businesses and ensure broad disclosure of campaign financing. Pets.' Br. 4-7. The Legislature specifically extended these limits to artificial business entities like corporations and partnerships. *Id.*

Nor do (nor can) Respondents argue that the Board's treatment of LLCs comports with the LLC Law. Respondents have no explanation for why the 1996 Opinion omitted the key limiting language in the statutory definition of a limited liability company. *See* Pets.' Br. 24. Indeed, the Board makes the extraordinary concession that the 1996 Opinion contains "no apprehension of the legislative intent of Limited Liability Company Law," Board Br. 20. In failing to examine the full language of the LLC Law and admitting that it did not look to the legislative intent, the Board effectively concedes that its application of the law was arbitrary and capricious. The Board attempts to suggest that no interpretation was necessary because "[t]he plain letter of the statute led to the State Board's opinion." *Id.* But it never quotes a single word, let alone the full text, that supports its interpretation of the law. Neither Respondent even attempts to argue, let alone convincingly demonstrates, that the 1996 Opinion was a valid interpretation of the governing law. Nor do Respondents even address the fact that the 1996 Opinion was based on a Federal Election Commission ("FEC") advisory opinion that was later superseded.

II. PETITIONERS' SUIT IS TIMELY

The April 2015 Decision by the Board was an explicit reaffirmance of the LLC Loophole and a specific refusal to close it. Accordingly, this special proceeding under Article 78 is timely, in that it was commenced within four months of the April 16, 2015 Decision. That the Board defeated the motion to rescind the Loophole by a 2-2 tie vote rather than a majority vote makes no difference as to the status of the Board's determination to reaffirm the LLC Loophole—a determination challengeable under Article 78. Finally, setting aside the April 2015 Decision, Petitioners' suit is timely because the existence of the LLC loophole is a continuing wrong, which tolls the statute of limitations.

A. The Board's April 2015 Decision Is a Determination Subject to Article 78 Review

Contrary to Respondents' contention, the April 2015 Decision was a *determination* by the Board. A denial of a request to act is itself a challengeable action under Article 78. *See, e.g., Gottlieb v. City of New York*, 129 A.D.3d 724, 725 (2d Dep't 2015) (Article 78 permits review of Office of Child Support Enforcement's denial of petitioner's claim that it had made a mistake regarding his arrears); *Meegan v. Griffin*, 161 A.D.2d 1143, 1143 (4th Dep't 1990) (rejecting statute of limitations argument in Article 78 proceeding challenging decade-long practice of failing to appoint deputy fire commissioners); *Marchi v. Acito*, 77 A.D.2d 118, 120 (3d Dep't 1980) (Board of Elections' refusal to act on a petition, citing purported unconstitutionality of statute in question, was an abuse of discretion and arbitrary and subject to invalidation under Article 78).

Here, the Board voted on—and denied—a motion to prepare an opinion "that will rescind opinion 1996-1." Ex. 13 at 27.[2] Prior to the vote, the Board heard comments from interested members of the public who spoke about the influence of money in politics and the effects of the LLC Loophole. *Id.* at 30-31. The commissioners then engaged in a substantive discussion about whether the Board should close the LLC Loophole. Contrary to the characterization of the vote in the Board's papers, the Board members understood that they were voting on whether or not the LLC Loophole should stand. For example, 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." *Id.* at 33-34.[3] 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." *Id.* at 33. Commissioner 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." *Id.* at 34 (emphasis added). After Counsel Kim Galvin characterized the motion as one to "rescind 1996 #1 on the applicable guidance regarding contributions of LLCs," Commissioner Kosinski stated, "I do not support that." *Id.* at 35. In other words, the vote was not just a vote to refer the issue to counsel: It was a substantive decision about whether to rescind or reaffirm the LLC Loophole.

The Board's decision to reaffirm the LLC Loophole is a determination challengeable under Article 78. CPLR 7803(3) specifically allows this Court to hear petitions alleging that an

[2] "Ex." refers to exhibits attached to the Affidavit of Elizabeth S. Saylor, dated July 13, 2015.

[3] Commissioner Kosinski's argument that only the state legislature has the authority to close the LLC Loophole is addressed below, in Section IV.

agency "determination was . . . affected by an error of law or was arbitrary and capricious or an abuse of discretion." Here, Petitioners argue that the Board's decision was an arbitrary, capricious, and erroneous interpretation of law—specifically, the LLC Law and the Election Law. As the Board acknowledged that its decision was an interpretation of law, *id.* at 34 (Kellner urging Board to "correct[]" its "interpretation" of the Election Law), 35-36 (Kosinksi stating that the Board's "job is to interrupt [*sic*] the statute"), there can be no question that the vote was a "determination" reviewable under Article 78, and that the petition, brought within four months of that determination, is timely.

B. The Tie Vote Was a Valid Defeat of the Motion and Is Reviewable Under Article 78

That the Board rejected the motion by a tied 2-2 vote rather than a majority vote does not alter the fact that the Board's vote constituted a determination to reaffirm the LLC Loophole and to refuse to correct the Board's faulty reading of the relevant statutes. While it is true that the Board's rules require an affirmative majority vote to approve an action, N.Y. Election Law § 3-100(4), a tie vote that defeats a motion remains a determination reviewable by this Court. Otherwise, Petitioners would be in a *better* position had the motion been defeated unanimously. Indeed, were a tie vote to constitute a nonaction precluded from judicial review, the Board could routinely defeat motions by tie and insulate itself entirely from the courts—a position the Court of Appeals has specifically decried. In *Tall Trees Construction Corp. v. Zoning Board of Appeals of Town of Huntington*, 97 N.Y.2d 86 (2001), the Court held that a tie vote is a denial subject to Article 78 review even though the zoning board labeled its tie vote a "NON-ACTION." *Id.* at 90. Similarly, in the context of public disability retirement benefits where an application must be *approved* by a majority of the fund's board of trustees, the Court of Appeals has concluded that a tie vote constituted a denial subject to judicial review. *See id.* at 92 n.4 ("This Court has long

held that a tie vote is deemed a denial of those benefits which is then subject to judicial review.") (citing *Meyer v. Bd. of Trustees*, 90 N.Y.2d 139 (1997); *Canfora v. Bd. of Trustees*, 60 N.Y.2d 347 (1983); *City of New York v. Schoeck*, 294 N.Y. 559 (1945)). *See also 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 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); *Zagoreos v. Conklin*, 109 A.D.2d 281, 296 (2d Dep't 1985) (explaining that, because a resolution was rejected by a tie rather than by a majority and therefore no resolution rejecting the proposal existed, "examination of the transcript of the Town Board meeting at which the vote was taken and the affidavits submitted in these proceedings by the two members who voted against the application provides a sufficient basis for determining whether the denial was arbitrary and capricious").

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

Setting aside the April 2015 Decision, the Petition would nevertheless be a timely challenge to the 1996 Opinion itself, because the LLC Loophole is a continuing wrong that tolls the statute of limitations. *See City of Saratoga Springs v. City of Saratoga Springs Civil Serv. Comm'n,* 90 A.D.3d 1398, 1400 (3d Dep't 2011) (holding it was a "continuing violation" when city commission improperly abolished city job title in contravention of Civil Service Law); *Walsh v. Police Comm'r of City of New York*, 159 N.Y.S.2d 6, 9 (Sup. Ct. N.Y. Cnty. 1956) (failure to appoint a qualified applicant to the position of probationary patrolman, "if proved unreasonable, arbitrary or contrary to law, would constitute a continuing wrong, and if so, the argument of untimeliness is of no avail"). As the Second Department has explained, "If a

continuing wrong is alleged, the action is not time-barred because the cause of action continues to accrue anew, each day the wrong is perpetrated." *Town of Huntington v. Cnty. of Suffolk*, 79 A.D.3d 207, 215 (2d Dep't 2010) (complaint sought a statutory interpretation and alleged a continuing erroneous interpretation of the law); *see also Grossman v. Rankin*, 43 N.Y.2d 493, 506 (1977) (because "the petition charge[d] a continuing failure . . . to follow the command" of the State Constitution, "the usual time limitations [would] not bar review").

The LLC Loophole is a wrong that has continued since the Board's 1996 Opinion. As discussed in Petitioners' Opening Brief and above, the 1996 Opinion and all subsequent action taken in reliance on that 1996 Opinion fail to comply with New York's campaign finance laws. Pets.' Br. 20-26. The LLC Loophole violates these laws by undermining the Legislature's intent to limit and require full disclosure of contributions. *Id.* at 20-23. Since 1996, the LLC Loophole has allowed individuals to evade the corporate contribution limits imposed by the Legislature, thereby violating New York's campaign finance laws. *Id* at 23. Indeed, in each election since 1996, LLCs have been able to contribute significantly more than corporations have, and they have been able to do so under different names and corporate identities. *Id.* at 10-14. Moreover, wealthy individuals have been able to use LLCs to effectively skirt contribution limits and disclosure requirements entirely. *Id.* at 11. The continuing wrong doctrine is designed for situations precisely like this one: A prospective petitioner injured in 2015 may not have been a candidate, or eligible to vote, or even *alive* when the 1996 Opinion was adopted. Under the Board's approach, that petitioner, through no fault of her own, would be entirely barred from relief. Such a result is unacceptable, especially in a case as important as this one.

Because the LLC Loophole is a continuing wrong that has existed since the Board's 1996 opinion, Article 78's four-month statute of limitations is tolled and the Petition is timely.

III. PETITIONERS HAVE STANDING TO SUE

All Petitioners have standing to bring this action. Each has suffered concrete injury falling within the zone of interests the Election Law was meant to protect. If these Petitioners were disqualified, "the result would be to completely shield a particular action from judicial review," *Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation*, 23 N.Y.3d 1, 6 (2014)—precisely what the Court of Appeals has made clear the rules of standing must not do. Respondents fail entirely to address this core concern, instead relying on the novel theory that there can *never* be standing to challenge an agency's decision to maintain the status quo. Their arguments are unavailing and unsupported.

Standing to bring an Article 78 petition challenging an agency decision is governed by *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6 (1975), in which the Court of Appeals adopted a broadly permissive approach in keeping with "[t]he increasing pervasiveness of administrative influence on daily life...." *Id.* at 10.[4] Under this approach, a Petition must allege: (1) an injury in fact, and (2) "that the asserted injury is within the zone of interests sought to be

[4] The Board leads with a largely inapposite case, *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991). *Society of Plastics* arose from an action brought under the State Environment Quality Review Act ("SEQRA"). The Court of Appeals reasoned that SEQRA actions implicate unique standing considerations because they pose a heightened risk of "interminable delay and interference with crucial governmental projects" at the hands of "special interest groups or pressure groups, motivated by economic self-interests, to misuse SEQRA." *Id.* at 774. "In the non-SEQRA context," on the other hand, "New York courts have taken a broader view of both individual and organizational standing to challenges to government action or inaction." *In re Samuelsen*, 29 Misc. 3d 225, 234 (Sup. Ct. N.Y. Cnty 2010), *rev'd on other grounds sub nom. Samuelsen v. Walder*, 88 A.D.3d 587 (1st Dep't 2011); *accord McKinney v. Comm'r of New York State Dep't of Health*, 15 Misc. 3d 743, 751 (Sup. Ct. Bronx Cnty 2007). In any event, Petitioners would have standing even under *Society of Plastics*, which involved an attempt by business interests to hijack an environmental protection statute to redress alleged economic injuries not within the statute's purview. *See Soc'y of Plastics*, 77 N.Y.2d at 777-78. Here, in contrast, Petitioners seek to vindicate core interests protected by the Election Law.

The two other leading cases relied on by the Board are similarly unhelpful. The first is a *capacity* case, not a standing one. As the Court of Appeals noted in that matter, "capacity is often confused with standing, but the two legal doctrines are not interchangeable." *Cmty. Bd. 7 of the Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 154 (1994). The other case found that there *was* standing based on the respondent's failure to take certain official actions. *See Graziano v. Cnty of Albany*, 3 N.Y.3d 475 (2004). Here, it bolsters Petitioners' case, not Respondent's, because the Board has similarly failed to implement the Statute.

protected by the statute alleged to have been violated." *Better Long Island, Inc.*, 23 N.Y.3d at 6.[5] Petitioners need only allege sufficient injury; they need not prove that the injury occurred. *See Kosmider v. Garcia*, 111 A.D.3d 1134, 1135 (3d Dep't 2013).[6]

Addressing the second prong first, Petitioners' claims plainly fall into the "zone of interests" protected by the Election Law, which was intended to "restrict unduly large contributions to any one campaign," Gov. Malcolm Wilson's Mem. on Approving Law, Bill Jacket, 1974 N.Y. Laws ch. 304, Ex. 2, and mandate "full and complete disclosure of campaign financing and practices," 1974 N.Y. Sess. Laws 1602, 1603 Ex. 3. Underlying these objectives was the Legislature's desire to prevent corruption of government officials, especially by business interests, *see, e.g.*, 50 N.Y. Jur. 2d Elections § 522; *Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp. 3d 365, 369 (N.D.N.Y. 2014), and "to maintain citizen confidence [] and full participation in the political process of our state to the end that the government . . . remain ever responsive to the needs and dictates of its residents." Ex. 3 at 1602. These are precisely the interests Petitioners seek to vindicate through this action, and neither Respondent attempts to argue otherwise.

As to the first prong, all of the Petitioners have alleged specific injuries in fact, which are more than sufficient to confer standing. The majority of Petitioners have run for office recently

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

[6] Respondent cites *Piela v. Van Voris*, 229 A.D.2d 94 (3d Dep't 1997) for the proposition that each Petitioner must provide "probative evidence sufficient to prove standing." Resp. Br. at 9. *Piela* did not require proof of injury. It dismissed the case for lack of standing because petitioners, who had claimed to own property near a proposed subdivision, failed to respond to the standing argument or provide any information about the location of their property.

and either plan to run again or are considering whether to do so.[7] Several have faced opponents with major LLC funding, *see*, *e.g.*, Koetz Aff. ¶ 6; Squadron Aff. ¶¶ 7-8; 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, Koetz Aff. ¶ 7; Krueger Aff. ¶ 5; and all of the Petitioners who run for office again could obviously face LLC-funded opponents in the future, *see*, *e.g.*, Kavanagh Aff. ¶ 6. The LLC Loophole thus directly impacts each of these Petitioners by forcing them to compete for office in an illegally-structured competitive environment. This is a textbook example of the kind of injury sufficient to confer standing to challenge an election rule, as the federal D.C. Circuit Court of Appeals (which routinely hears campaign finance and other election law cases) has recognized in a virtually identical context. *See Shays v. FEC* (*Shays I*), 414 F.3d 76, 85, 87 (D.C. Cir. 2005) (applying "competitor standing" doctrine to permit members of Congress to bring an administrative challenge to FEC rules that were inconsistent with the McCain-Feingold campaign finance law).

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

[7] As noted in their affidavits, Petitioners Krueger, Squadron, and Kavanagh affirmatively plan to run for reelection in 2016, and Petitioner Koetz is contemplating another run for office in the future. Krueger Aff. ¶ 3; Squadron Aff. ¶ 3; Kavanagh Aff. ¶ 3; Koetz Aff. ¶ 5.

In addition, all of the individual Petitioners, as well as many of Petitioner Brennan Center's members,[8] have been injured in their capacity as New York voters. For example, because LLCs can be used to shield the true identity of major contributors, Petitioners often do not know who is bankrolling candidates' campaigns, information to which the Election Law entitles them. *See* Pets.' Br. 11-12; Kavanagh Aff. ¶ 8. 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. Benjamin Aff. ¶ 8; *see also* Dunne Aff. ¶ 8; Norden Aff. ¶ 5. This type of injury has also been recognized as cognizable for standing purposes. *See*, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 790 (1983) (filing requirements dissuaded certain candidates from running and thus injured voters who wanted to vote for them, an injury sufficient to confer standing on these voters).

Finally, Petitioner Brennan Center has organizational standing to challenge the LLC Loophole. For an organization to have standing, (1) one or more of its members must have standing; (2) the interests asserted in the case must be germane to the organization's overall

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

Petitioners note that the affidavit submitted on behalf of the Brennan Center contains a typographical error; paragraph five of the affidavit should refer to Brennan Center "staff and contributors," rather than "staff contributors." Norden Aff. ¶ 5.

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

New York courts have consistently recognized organizational standing in similar contexts. For example, in *Saratoga County Chamber of Commerce Inc. v. Pataki*, 275 A.D.2d 145, 155-56 (3d Dep't 2000), the court held that two nonprofit organizations opposed to gambling had standing to challenge the validity of the Governor's compact with a Native American tribe, because the religious and grassroots organizations had "alleged cognizable harm to their members" and their purpose—opposing casino gambling—was germane to the relevant litigation. *Id.* at 156. *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").

Respondents offer only the most general arguments against Petitioners' standing. Besides those which have been dispatched above, the Board's main assertion is that no actual injury could result from an administrative decision "that left [the] existing law intact." Board Br. at 5. This assertion finds no support in the governing law and defies common sense. When a party has been injured by an agency's decision to leave an erroneous rule in place, no part of New York standing doctrine turns on the timing of the original rule or the fact that the new decision maintained the status quo. 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. The reimbursement schedule was last amended in 1974, yet the lawsuit was filed over seven years later because of alleged injury caused by rising costs of dental service. The Court of Appeals concluded that the association had standing because inadequate rates would adversely affect service providers. *Id.* at 334. The original date of the adoption of the reimbursement schedule was not considered an obstacle by the Court. *See also*, *e.g.*, *Meegan*, 161 A.D.2d at 1143 (petitioners could bring Article 78 proceeding to force City of Buffalo to appoint four deputy fire commissioners under city charter requirement, despite decade-long practice of appointing only two); *Marone v. Nassau Cnty.*, 39 Misc. 3d 1034, 1042 (Sup. Ct. Nassau Cnty. 2013) (inmates had standing to bring Article 78 action directing county to appoint members to correctional board, when legislation requiring such appointment was passed over ten years before suit was brought). These cases acknowledge the basic reality that one can just as easily be injured by a decision to maintain an illegal rule as by that rule's original enactment—sometimes more so, in fact, since the harm caused by a rule may increase as time goes by (as is the case here).[9]

[9] As Petitioners have noted, the number of dollars funneled through LLCs into New York elections has increased

IV. WHETHER THE LLC LOOPHOLE IS AN ARBIRTRARY, CAPRICIOUS, OR LEGALLY ERRONEOUS RULE IS A JUSTICIABLE QUESTION

There can be no question that Petitioners have presented a live claim whose adjudication lies fully within the power and authority of this Court. Respondents' claims to the contrary ignore the governing statute—Article 78—that explicitly authorizes such petitions; breathlessly raises the specter of separation of powers to gloss over the fact that it was the Board itself that created the Loophole; and wholly misstates the deference courts owe to administrative agencies.

First and most crucially, Respondents entirely elide the fact that the Petition is brought pursuant to Article 78, whose *entire purpose* is to allow persons aggrieved by the actions or non-actions of a "court, tribunal, board, corporation, [or] officer" to obtain judicial review of that tribunal's determinations. As discussed above, Article 78 specifically authorizes suits challenging "whether a determination [by a body] was . . . affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3).[10] No wonder Respondents, in their various protestations that this Court has no authority to act on the Petition, never mention—let alone quote—Article 78. There can be no doubt that this Petition—which specifically asks

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exponentially in the last decade, from roughly $4.5 million in 2002 to over $19 million in 2014. *See* Billig Aff. ¶ 3.

[10] Respondents are wrong to suggest that Petitioners have sought a mandamus to compel. Petitioners seek no such thing. As the Petition and opening brief make clear, Petitioners seek judicial review under Article 7803(3), a mandamus to review that the Court of Appeals has distinguished from a mandamus to compel. In a mandamus to review action:

> a court examines an administrative action involving the exercise of discretion. Mandamus to review resembles certiorari, except that in a certiorari proceeding a quasi-judicial hearing normally is required and the reviewing court has the benefit of a full record. . . . In a mandamus to review proceeding, however, no quasi-judicial hearing is required; the petitioner need only be given an opportunity "to be heard" and to submit whatever evidence he or she chooses and the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise. 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 Co-op. Educ. Servs., 77 N.Y.2d 753, 757-58 (1991). This Court has clear authority to review the Board's determination and order it to be remedied. *Id.* (ordering that petitioner be reinstated to the State position from which she was terminated).

this Court to determine whether the Board's decision to reaffirm the LLC Loophole and refuse to rescind it was legally deficient, arbitrary, or capricious—is contemplated by the Rule.

Second, Respondents' claim that judicial intervention here would threaten the sanctity of the separation powers because only the Legislature can close the LLC Loophole borders on the absurd. There is no dispute that the LLC Loophole is a creation of *the Board*, not the Legislature, rendered pursuant to its authority to "issue instructions and promulgate rules and regulations relating to . . . campaign financing practices consistent with the provisions of law," N.Y. Election Law § 3-102(1). Indeed, *the Board itself* claims that it has a unique and important role to play in determining the "treatment of entities for the purpose of administering" the Election Law, for which it relies on its "knowledge and understanding of the underlying operational practices in the area of campaign finance." Board Br. 20. It cannot be the case *both* that the Board was statutorily authorized to create the LLC Loophole, predicated on its own unique knowledge and understanding of campaign finance, *and* that *now* it has no power to rescind the LLC Loophole. I it similarly implausible that this Court lacks the authority to review the Board's determination. Respondents have cited no cases holding that an agency cannot correct its own administrative error. Far from threatening the separation of powers, this Petition shows how the three branches of government properly intersect: The Legislature adopted a law to curb campaign contributions but was silent on the treatment of LLCs; the Legislature delegated rule-making authority to the agency; the agency interpreted that statute (erroneously); and now Petitioners ask this Court to review that determination—and resolve its legal errors. This is exactly how the three branches of government are meant to work together.

Finally, Respondents err in insisting that the Court must defer absolutely to the Board's determination, simply because the Board used its discretion. Far from holding that complex

matters involving administrative discretion remain outside the purview of courts, the very cases relied on by the Board show that the judiciary has an important role to play in ensuring that agencies comply with legislative intent. For example, in *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984), the Court of Appeals rejected the defendants' claim that it had no power to review the case "merely because the activity contemplated on the State's part may be complex and rife with the exercise of discretion." *Id.* at 530. Rather, the Court held, "it is within the courts' competence to ascertain whether an administrative agency has satisfied the duty that has been imposed on it by the Legislature and, if it has not, to direct that the agency proceed forthwith to do so." *Id.* at 531.

Moreover, the courts are clear that *no* deference to agency determinations is warranted "where the question is one of pure legal interpretation." *Teachers Ins. & Annuity Assn. of Am. v. City of New York*, 82 N.Y.2d 35, 42 (1993). In *Teachers Ins.*, for example, the Court of Appeals determined that the definition of a term in a statute "is a law question for the courts rather than one of administrative expertise." *Id.* And in *Kurcsics v. Merchants Mutual Insurance Company*, 49 N.Y.2d 451 (1980), which the Board relies upon, the Court of Appeals stated: "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. *See also Kent v. Cuomo*, 124 A.D.3d 1185, 1186 (3d Dep't 2015) (courts accord no deference to administrative agencies when the question is one of statutory reading and analysis) (citing *Kurcsics*). Here, the Board-created LLC Loophole was the result of the Board's faulty interpretation and application of state law, and thus the Board's

determination is entitled to no deference.[11] And given that Respondents have failed to present even a single argument as to why the LLC Loophole comports with state law, their arguments should carry little weight with this Court.

V. CLOSING THE LLC LOOPHOLE WOULD NOT INFRINGE ANY FIRST AMENDMENT RIGHTS

Both Respondents make vague references to *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), seeming to assert that the Supreme Court's decision requires that LLCs be permitted to make contributions under the same limits as individuals. *See*, *e.g.*, Intervenor Ans. at ¶ 5 (*Citizens United* has "liberalize[d] contribution limitations"); *id.* at ¶ 86 (closing the LLC Loophole "[w]ould improperly and adversely affect the Intervenors' rights of Free Speech and Association"); Resp. Br. at 21 ("[T]he 1996 [opinion] retains its legal authority in the wake of *Citizens United*."). That assertion is false. Neither *Citizens United* nor any other precedent prevents the State from limiting direct contributions to candidates by artificial business entities, as the continuing existence of a federal ban on corporate contributions—which applies to many LLCs—demonstrates. In 2003, the Supreme Court reaffirmed such bans, which the Court characterized as "intended to prevent corruption or the appearance of corruption." *FEC v. Beaumont*, 539 U.S. 146, 154 (2003). The *Citizens United* decision struck down a *different* law, which banned *independent expenditures* by corporations. The Court took pains to distinguish contributions to candidates—at issue here, and which the Court has said can lead to *quid pro quo* corruption—from independent spending, which was at issue in the case. 558 U.S. at 356-57.

[11] The Board erroneously asserts that "[t]here is no claim that the 1996 opinion needs clarifying or correction of any misunderstanding or misinterpretation by the State Board." Board Br. 13. In fact, the Board's incorrect interpretation of State law is the entire basis of Petitioners' claim, and its correction was the purpose of the April motion to correct the Board's rule.

Beaumont remains good law. *See Ognibene v. Parkes*, 671 F.3d 174, 194-97 (2d Cir. 2011) (relying on *Beaumont* to uphold New York City's ban on contributions by LLCs and partnerships); *see also United States v. Danielczyk*, 683 F.3d 611, 615 (4th Cir. 2012) (upholding federal corporate contribution ban and concluding that "*Citizens United*, a case that addresses corporate independent expenditures, does not undermine *Beaumont*'s reasoning on this point"); *United States v. Suarez*, 2014 WL 1898579, at *6 (N.D. Ohio May 8, 2014) (noting "continued validity of *Beaumont*" and explaining that criminal defendants' argument "wholly ignores the distinction between direct contributions and corporate expenditures"). The Supreme Court has refused to hear cases using *Citizens United* to contend that the corporate contribution ban should be struck down. *Iowa Right to Life Comm., Inc. v. Tooker*, 134 S. Ct. 1787 (2014) (cert. denied); *Danielczyk*, 133 S. Ct. 1459 (2013) (cert. denied); *Ognibene*, 133 S. Ct. 28 (2012) (cert. denied).

Consistent with these precedents, the federal government and many states and cities continue to ban corporate contributions. *See, e.g.*, 52 U.S.C. § 30118.[12] Under federal law, those LLCs that elect corporate tax status are—like corporations—prohibited from making contributions to candidates. 11 C.F.R. § 110.1(g)(3).[13] New York City likewise prohibits contributions from corporations, LLCs, and partnerships, a ban upheld by the Second Circuit in *Ognibene* after *Citizens United*. 671 F.3d at 194-97.

[12] Twenty-two states ban corporate contributions to candidates. Nat'l Conf. of State Legislatures, *Contribution Limits Overview*, http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx#corporation.

[13] LLCs that elect to be treated as partnerships must attribute their contributions to the individual partners, just as they must under New York law. 11 C.F.R. § 110.1(g)(2).

Because there is no First Amendment impediment to banning contributions from artificial business entities like LLCs, applying a statutorily-mandated contribution limit to LLCs cannot violate the Constitution.[14]

VI. THE PETITION NAMES ALL NECESSARY PARTIES

Article 78 expressly authorizes challenges to actions taken by "every court, tribunal, *board*, corporation, officer, or other person, or aggregation of persons." CPLR 7802(a) (emphasis added). Accordingly, the Board of Elections, just like other administrative agencies, is routinely named as the sole respondent in Article 78 petitions challenging its conduct. *See, e.g., Harper v. New York State Bd. of Elections,* 34 A.D.3d 919, 919 (3d Dep't 2006); *Conservative Party of the State of New York v. New York State Bd. of Elections*, 231 A.D.2d 481 (2d Dep't 1996); *Independence Party of Orange Cnty. v. New York State Bd. of Elections*, 32 A.D.3d 804, 804 (2d Dep't 2006).

Far from requiring that individual administrative board members be named as respondents, courts have held that naming such individual members in Article 78 petitions is cause for *dismissal*. For example, in an Article 78 case challenging the decision of a village board of trustees, this Court dismissed the petition for failing to name the village board itself, rather than the individual trustees, as respondents. *Hayes v. Gibbs*, 111 Misc.2d 1062 (Albany Cnty. Sup. Ct. 1981), *aff'd* 89 A.D.2d 656 (3d Dep't 1982). Affirming that dismissal, the Third Department explained that the board must be named in a suit challenging the approval of site plans, as "it was the responsibility for the village board of trustees, acting as the planning board, to review and affirm site plans. Approval or disapproval of site plans is not a duty to be

[14] *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), appears to have invalidated aggregate limits like the $5,000 limit as applied to *individuals*. *See Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp. 3d 365, 382-87 (N.D.N.Y. 2014). But that ruling has no application to artificial business entities, which can still be prohibited entirely from making direct contributions.

performed by individual members of the board, but by the board acting as an entity." 89 A.D.2d at 656. *See also Baum v. Town Bd. of Town of Sand Lake*, 98 A.D.2d 918, 919 (3d Dep't 1983) (Article 78 mandamus petition must name the town board, rather than the individual members).[15]

Article 78 is the procedure by which injured petitioners can challenge the arbitrary, capricious, or unlawful acts of state bodies, including administrative agencies. Petitioners seek a declaration that the Board's 1996 Opinion is unlawful and a direction that it be rescinded; in other words, the relief Petitioners request can come only at the hands of the Board itself. If certain individual commissioners were to resign or be replaced tomorrow, Petitioners' claim for relief would not change. The Board was appropriately sued, and the commissioners need not be named. However, if this Court determines otherwise, Petitioners respectfully request leave to submit an amended petition naming the individual commissioners.[16]

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[15] Respondents inaccurately characterize the Petition as seeking a mandamus to compel. *See supra* n.10. But even a mandamus petition would have to be filed against the Board itself, rather than the individual commissioners. "Although mandamus lies to compel the . . . board as a whole to act, it is inappropriate to direct any . . . individual . . . board members to act in a specific way." *Baum*, 98 A.D.2d at 919.

[16] Petitioners note that Your Honor served as Legislative Counsel to the Minority Leader and the Minority Leader Pro Tempore in the New York State Assembly from 1990-1994, the period during which the LLC Law was introduced, debated, and passed. Petitioners do not know the extent, if any, of Your Honor's involvement with the legislation at issue here. To the extent that Your Honor was involved in the framing and passage of that legislation, or in privileged or non-privileged discussions with legislators and/or their staff members about it, Your Honor may wish to consider whether this circumstance creates an appearance of partiality, or provides the Court with information or insights not available to the litigants, such that recusal is in order.

CONCLUSION

For the reasons stated above and in Petitioners' opening brief, 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: September 23, 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

SUPREME COURT OF THE STATE OF ALBANY
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.: 3579-15

AFFIDAVIT OF SERVICE

I, Cielo Renta, a legal assistant at Emery Celli Brinckerhoff & Abady LLP, hereby certify under penalty of perjury that I am *not* a party to the above action, am over 18 years of age, and reside in Queens County, New York:

On September 23, 2015, I caused to be served a true and accurate copy of **REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION,** dated September 23, 2015, by enclosing same in a properly addressed envelope and sending via Federal Express Overnight Delivery upon:

Kimberly A. Galvin
Special Counsel's Office
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207

Counsel for Respondent Board of Elections

John Ciampoli
267 Carleton Avenue, Suite 301
Central Islip, NY 11722

Counsel for Proposed Intervener New York Republican State Committee

Dated: September 23, 2015
New York, New York

Cielo Renta

Sworn to before me this
23rd day of September, 2015

Notary Public

IAN WAHRENBROCK
NOTARY PUBLIC-STATE OF NEW YORK
No. 01WA6310939
Qualified in New York County
My Commission Expires September 18, 2018