

To Be Argued By  
Melanie L. Oxhorn

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

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BARKLEE REALTY COMPANY LLC and BARKLEE  
94 LLC,

Plaintiffs-Respondents,

-against-

New York County  
Index No. 120546/99

GEORGE E. PATAKI, as Governor of The  
State of New York,

Defendant-Appellant.  
-----X

**BRIEF FOR DEFENDANT-APPELLANT**

ELIOT SPITZER  
Attorney General of the  
State of New York  
Attorney for Defendant-Appellant  
120 Broadway, 25th floor  
New York, New York 10271-0332  
(212) 416-6229

CAITLIN HALLIGAN  
Solicitor General

MICHAEL S. BELOHLAVEK  
Deputy Solicitor General

MELANIE L. OXHORN  
Assistant Solicitor General  
of Counsel

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**BRIEF FOR DEFENDANT-APPELLANT**

**Preliminary Statement**

Defendant-appellant George E. Pataki, Governor of New York ("defendant"), appeals from a decision and order of Supreme Court, New York County (Schlesinger, J.S.C.) dated November 16, 2001, granting summary judgment in favor of plaintiffs-respondents Barklee Realty Company LLC and Barklee 94 LLC ("plaintiffs") and declaring Limited Liability Company Law ("LLC Law") § 206 unconstitutional. Section 206 requires that each newly organized limited liability company ("LLC") publish either its articles of organization or a notice containing the substance thereof in designated local newspapers, and bars LLCs from maintaining an action or proceeding in the New York State courts until they have filed an affidavit of compliance. This publication requirement is administered by the Department of State and is enforced by the courts when an LLC's lack of capacity to maintain an action is raised by way of a motion to dismiss. Because Section 206 merely bars LLCs from "maintaining" or continuing, but not from commencing, an action "unless

and until" they have complied with the publication requirement, and because the sole purpose of this prohibition is to induce statutory compliance, courts faced with such motions to dismiss are authorized to grant a continuance to afford an LLC a reasonable time to comply with the statute in order to avoid dismissal after the statute of limitations has run.

As discussed below, there was no basis for Supreme Court's ruling that Section 206 violated plaintiffs' constitutional rights to unencumbered access to state civil courts, due process of law and equal protection of the law. There is, in fact, no general due process or other constitutional right to use New York's courts, and Section 206 neither targets a suspect class nor precludes use of the courts to vindicate a fundamental interest (such as in the present case). Therefore, Section 206 could lawfully restrict plaintiffs and other LLCs from maintaining a civil action as long as that restriction has some rational connection to promotion of the community's welfare -- and regardless of whether it has any connection to the court system. Contrary to what the lower court found, Section 206's provisions making the fulfillment of the publication requirement a precondition for maintaining an action are rationally related to a legitimate state interest. The State has a legitimate interest in informing all (and especially less sophisticated) citizens who might invest in or otherwise have dealings with an LLC based in their community about the salient features of this newer type of business entity -- and, in particular, about its limited

liability status and the pertinent terms of its articles and operating agreement -- to ensure that the LLC is not confused with, for example, a traditional partnership, each of whose members have unlimited liability.

While Supreme Court questioned the wisdom and efficacy of this legislation as a means of disseminating the desired information to the public, it was for the Legislature alone to assess the relative advantages or drawbacks of possible approaches to attaining that objective. Moreover, it was rational for the Legislature to determine that LLCs (as well as limited partnerships, which are also subject to a similar publication requirement) pose special concerns not presented by corporations or other types of business entities, and, in any event, the Legislature was not required to adopt sweeping laws directed at all entities that might create problems of a given nature, but could tackle those problems in a more discrete fashion by instead addressing them one step (and one business type) at a time. Finally, it was irrelevant that Section 206's provisions were not designed to enhance the adjudication of justice, where those provisions were otherwise designed to promote the welfare of the State and its citizens. Nor was there any basis for the lower court's assumption that Section 206 would frustrate that adjudication by depriving aggrieved LLCs of access to this State's courts for administrative reasons unrelated to the validity of their asserted claims. Here, as noted, the language and purpose of the statute would favor staying rather than dismissing an action brought by a non-complying

LLC, to allow that party to comply and thereby avoid any potential statute of limitations problems.

### Questions Presented

1. Is LLC Law § 206 unconstitutional beyond a reasonable doubt? Supreme Court implicitly answered this question in the affirmative.

2. Does LLC Law § 206 violate any alleged constitutional right to unencumbered access to the state courts purportedly enjoyed by plaintiffs under Article 10, § 4 of the New York State Constitution by conditioning access on their compliance with the statute's publication requirement? Supreme Court answered this question in the affirmative.

2. Does Section 206 violate plaintiffs' substantive due process rights by arbitrarily or irrationally restricting an alleged right of access to the civil courts granted them under state law, where the same legislation that established LLCs as recognized business entities and empowered them to sue and participate in court proceedings also provided that this power was subject to those limitations imposed by state law? Supreme Court answered this question in the affirmative.

3. Is Section 206 so "patently arbitrary" and so devoid of a "rational relationship to a legitimate government interest" as to deny plaintiffs equal protection of the law by requiring them and other LLCs, but not corporations and all other business entities, to comply with the publication requirement or be precluded from maintaining an action in state court? Supreme Court answered this question in the affirmative.

## Statement Of The Case

### A. Overview Of The Statute

In 1994, New York State enacted the LLC Law. An LLC is an "unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business." LLC Law § 102(m). An LLC combines the corporate limitations on personal liability with the operating flexibility of a partnership. See LLC Law (McKinney's ed.), Practice Commentaries at 4.

Section 206 of the LLC Law requires that each LLC publish its Articles of Organization or comparable specified information weekly for six successive weeks in two local newspapers elected by the County Clerk where the LLC has its principal office, followed by filing an affidavit with the Department of State stating that such publication has been made. If the foregoing requirement has not been met within 120 days of its formation, the LLC will be precluded from "maintaining any action or special proceeding" in any New York court "unless and until" it complies with that requirement.<sup>1</sup> Section 206 is typical of similar statutes in New

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<sup>1</sup>Although in a few instances, defendant's papers below mistakenly recited that Section 206 prohibited an LLC from even "commencing" (as opposed to merely "maintaining") state court actions or proceedings until that LLC complied with the publication requirement (see, e.g., R. 410), this was a mis-statement of the statute's actual language. Courts construing similar statutory language have distinguished a prohibition against "commencing" an action from a prohibition against "maintaining" or continuing an action previously commenced. See, e.g., Caspian Invest., Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 883 (S.D.N.Y. 1991) (noting that N.Y. Business Corporation Law § 1312 "does not prohibit an unlicensed corporation from commencing an action, only from continuing, or "maintaining," the suit") (emphasis in original); Hot Roll Mfg. Co. v. Cerone Equipment

York and elsewhere that condition access to state courts on compliance with various administrative requirements.<sup>2</sup>

For the Court's convenience, Section 206 is set forth in full below:

Within one hundred twenty days after the effectiveness of the initial articles of organization, a copy of the same or a notice containing the substance thereof shall be published once in each week for six successive weeks, in two newspapers of the county in which the office of the limited liability company is located, to be designated by the county clerk, one of which newspapers shall be a newspaper published in the city or town in which the office is intended to be located, if a newspaper be published therein; or, if no newspaper is published therein, in the newspaper nearest thereto, and proof of such publication by the affidavit of the printer or publisher of each of such newspapers must be filed with the department of state. The notice shall include: (1) the name of the limited liability company; (2) the date of filing of the articles of organization with the secretary of state; (3) the county within this state, in which the office of the limited liability company is to be located; (4) a statement that the secretary of state has been designated as agent of the limited liability company upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him or her; (5) if the limited liability company is to have a registered agent, his or her name and address within this state and a statement that the registered agent is to be the agent of the limited liability

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Co., 38 A.D.2d 339, 341 (3d Dep't 1972) ("Subdivision (a) of section 1312 of the Business Corporation Law prohibits a foreign corporation doing business in this State without authorization from maintaining an action. To be prohibited from maintaining an action, however, is different from being prohibited from commencing an action.").

<sup>2</sup>See, e.g., N.Y. Partnership Law §§ 121-201(c), 121-902(d), 121-1500(a), and 121-1502(f); N.Y. Bus. Corp. L. § 1312; N.Y. Gen. Bus. L. § 130. See generally Application of Statute Denying Access to Courts or Invalidating Contracts Where Corporation Fails to Comply with Regulatory Statute as Affected by Compliance After Commencement of Action, 23 A.L.R.5th 744 (2002) (discussing numerous cases from New York and other jurisdictions involving statutes conditioning access to courts on corporation's compliance with unrelated regulatory statutes).

company upon whom process against it may be served; (6) if the limited liability company is to have a specific date of dissolution in addition to the events of dissolution set forth in section seven hundred one of this chapter, the latest date upon which the limited liability company is to dissolve; and (7) the character or purpose of the business of such limited liability company. Failure to cause such notice to be published and to file such proof within one hundred twenty days of the effective date of the articles shall prohibit the limited liability company from maintaining any action or special proceeding in this state unless and until such limited liability company causes such notice to be published and files such proof of publication. The failure of a limited liability company to cause such notice to be published and to file proof of publication shall not impair the validity of any contract or act of the limited liability company or the right of any other party to the contract to maintain any action or special proceeding thereon, and shall not prevent the limited liability company from defending any action or special proceeding in this state.

**B. Case Background**

Plaintiffs are LLCs organized and doing business pursuant to the LLC Law (R. 95).<sup>3</sup> Their organizer filed their Articles of Organization with the Secretary of State in May and June of 1999, respectively (R. 97). At the time of filing, the organizer received a receipt that included information advising of the publication requirement imposed by LLC Law § 206 (R. 97-98). However, plaintiffs chose not to comply with that requirement, allegedly because of the cost of publication (R. 97-98). A member of the plaintiff LLCs had previously formed another LLC and paid \$1,645 in order to meet the publication requirement (R. 97).

Plaintiffs commenced this action on or about October 6, 1999, by filing their summons and complaint, seeking a declaration that LLC Law

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<sup>3</sup>"R. \_\_\_" designates the relevant pages in the record on appeal.

§ 206 is unconstitutional (R. 21). Defendant moved to dismiss the complaint, arguing that plaintiffs lacked capacity and standing to maintain this action (R. 43-52, 76-81); that motion was denied in a decision and order dated April 4, 2000 (R. 89-94). Plaintiffs then filed an amended complaint on or about April 26, 2000, claiming that LLC Law § 206 is unconstitutional because it allegedly denied them due process of law, equal protection of the law and unencumbered access to the courts, in violation of Article 1, §§ 6 and 11, and Article 10, § 4 of the New York State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution (R. 99-100).

After defendant answered plaintiffs' amended complaint (R. 119-22) and unsuccessfully moved to reargue their motion to dismiss (R. 125-169, 223), each party subsequently moved for summary judgment (R. 225-26, 405-06). Plaintiffs argued that the publication requirement imposed a costly burden on the right of LLCs (but not corporations) to commence lawsuits and lacked any adequate justification, especially since the information required to be published could be obtained from the Secretary of State "at minimal or no expense" and it was "highly unlikely that any party to be sued by a LLC would have seen the published notice when the LLC was formed" (R. 10, 227-42, 470-82). Defendant argued that plaintiffs were not members of any suspect class, that they had not alleged violation of any fundamental right and that Section 206 was reasonably related to the goal of assuring that the public is given notice of the information that the statute requires to be disclosed (R. 410-24, 485-95, 510-20).

C. Supreme Court's Decision

Preliminarily, Supreme Court's opinion began by noting that the "publication and filing requirement" was not applicable to "any other non-limited liability business entity" (R. 6).<sup>5</sup> Moreover, although the statute actually prohibited LLCs from "maintaining" any action or special proceeding in any New York court until they complied with that requirement, the court characterized this language as precluding non-complying LLCs from "bringing or maintaining" any litigation (R. 2).

Turning to the merits, the court noted initially that while access to courts, except where the subject matter is one of fundamental concern, is generally a matter of state concern and subject to restriction, "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard'" (R. 12) (citation omitted). The court went on to conclude that the publication requirement did not embody such "a countervailing state interest," reasoning that the statute did not provide financial support to the courts, or a measure of security to an adversary, or even any notice as to a pending lawsuit, but that the "only coffers enriched by the publication requirement is the newspapers" (R. 12). The court also viewed it as an "obvious stretch" to assume that

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<sup>5</sup>In fact, as noted in Argument, Section C, infra, this precondition applies not only to LLCs but to other kinds of unincorporated limited liability business entities as well, including limited partnerships.

potential defendants would be "perusing the classifieds on a regular basis so as to note the organizing information provided by a newly formed LLC" (R. 12)

While acknowledging that the Court of Appeals has held that "[a]ccess to the Civil Courts is primarily a matter of State concern and legislatures have been granted broad latitude in establishing the machinery for resolving disputes as long as the challenged provision is adopted in the interest of the community, is reasonable in relation to its subject, and affords litigants the fundamentals of procedural due process'" (Matter of Colton v. Riccobono, 67 N.Y.2d 571, 576 (1986)), the court also noted language in that case stating that where "a state . . . create[s] a right of access by its Constitution or statutes . . . , the legislature may not alter or restrict this property right arbitrarily'" (R. 12-13) (citation omitted). The court found that the Legislature did create a statute enabling the formation of LLCs in New York (specifically, the 1994 LLC Law) and gave this new business form a right of access to New York courts, and that "the establishment of this right has been compromised by the publication requirement which makes no sense and is thus arbitrary," constituting a violation of plaintiffs' substantive due process rights (R. 13).

With respect to plaintiffs' equal protection claim, the court acknowledged that plaintiffs did not fall into a suspect class, that a statute enjoys a strong presumption of constitutionality that has to be overcome beyond a reasonable doubt, and that as economic legislation, the

statute needed only to be supported by a rational basis (R. 13-14). Notwithstanding this highly deferential standard of review, the court found that defendant's proffered rationale, namely "informing members of the public of specific important information regarding the newly organized company," was not "persuasive," because the published information was readily available to anyone who wanted or needed such information, and because "no other business entity" carried such an expensive precondition for going to court (see supra, n.3) (R. 14-15).

In addition, noting the statement in Heller v. Doe, 509 U.S. 312 (1993), that "[a] statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective," the court found that the publication requirement as a precondition for access to the courts failed this test because "[t]he notice given for six consecutive weeks after an LLC's formation does not in any way enhance the adjudication of justice," but could even have the "opposite effect" since the LLC may be unable to bring actions because "a short statute of limitations has expired" (R. 15).

The court then observed that the LLC Law was intended to expand business opportunities and render the State a more "amenable place to do business" (R. 16), and found that there was no rational basis for Section 206's publication requirement and that plaintiffs had consequently carried their burden of demonstrating an unfair discrimination that violated their equal protection of the laws (R. 16).

Having found Section 206 to be unconstitutional in these various ways, the court then enjoined the State (which was not, technically, a party to the dispute) and the Governor from enforcing the statute (R. 17).

#### Summary Of Argument

Plaintiffs claim that Section 206 denies them access to the courts, due process of law and equal protection of the law. However, access to the State's civil courts in and of itself is not an independent constitutional right under state or federal law, and is only required where a party seeks to use the courts to vindicate a fundamental interest and has no alternative forum in which to do so. See Section A, infra. Access to the courts for the resolution of claims not subject to special constitutional protection may be restricted in whatever way the State sees fit, except where state law grants a right of access to certain parties, in which case that property right may still be restricted as long as the restriction otherwise satisfies substantive due process concerns by being rationally related to the achievement of a legitimate state purpose. See Sections A, B.1 & 2, infra. Likewise, where, as here, legislation neither targets a suspect class nor impinges upon any fundamental right, it can restrict access by members of a given class without denying them equal protection of the law as long as the classification drawn by that legislation is not arbitrarily or irrationally discriminatory. See Section C.1, infra. Moreover, contrary to what Supreme Court concluded, a restriction on a party's right of

access to the courts need not itself be related to the court system, the litigation process or the adjudication of justice, as long as it otherwise bears some reasonable connection to promoting the welfare of the State or its citizens. See Sections B.3 and C.4, infra.

In this case, Section 206 fully satisfies the applicable rational-basis test because: (i) the statute's publication requirement bears a rational relationship to the State's legitimate interest in ensuring that all -- but especially less sophisticated -- would-be investors and other citizens having dealings with an LLC based in their community are aware of the salient features (and especially the limited liability status) of this new type of unincorporated business entity, which might otherwise resemble, and consequently be mistaken for, a traditional partnership, whose members have unlimited liability; and (ii) the provision precluding an LLC from maintaining an action or proceeding previously filed by it in a New York court, until it complies with the publication requirement, likewise bears a rational relationship to the State's legitimate interest in ensuring that the public disclosure required by the statute is made. See Sections B.3 and C.2, infra.

While the lower court found that requiring publication of an LLC's articles in this manner was a costly, unnecessary and ineffective method of getting the desired information to members of the public, it was for the Legislature alone to assess the wisdom and utility of publication as a means of supplementing existing sources of that same information (such as the Department of State). See Section B.3, C.2, infra. Moreover,

contrary to what plaintiffs contended and the court concluded, it was neither irrational nor arbitrarily discriminatory to subject LLCs to the publication requirement but not corporations or other business entities, where LLCs and other unincorporated business associations like limited partnerships (which were likewise subject to such a publication requirement) raised special concerns not applicable to other entities, and where the Legislature did not in any event have to adopt sweeping legislation to deal with a given economic problem but could address it discretely one step at a time. See Section C.3, infra. Finally, Section 206 in no way requires dismissal of otherwise meritorious actions commenced by a non-complying LLC, as both plaintiffs and the court apparently assumed, inasmuch as the statute's purpose is not to deny LLCs access to the courts but to encourage them to make the required publication, and, consequently, Section 206 authorizes courts to hold an LLC's action in abeyance or grant a continuance in order to allow the LLC time to comply and thereby avoid a dismissal (particularly after the limitations period has already run). See Section C.5, infra.

## ARGUMENT

SECTION 206 IS CONSTITUTIONAL BECAUSE IT DOES NOT AFFECT A SUSPECT CLASS OR A FUNDAMENTAL RIGHT, AND IT IS RATIONALLY RELATED TO INFORMING THE STATE'S CITIZENS ABOUT UNINCORPORATED LIMITED LIABILITY BUSINESSES WITH WHICH THEY MIGHT HAVE DEALINGS

As a legislative enactment, Section 206 "carr[ies] an exceedingly strong presumption of constitutionality, and while this presumption is rebuttable, one undertaking that task carries a heavy burden of demonstrating unconstitutionality beyond a reasonable doubt." Elmwood-Utica Houses, Inc. v. Buffalo Sewer Auth., 65 N.Y.2d 489, 495 (1985); see also Montgomery v. Daniels, 38 N.Y.2d 41, 54 (1975) (observing that "every legislative enactment is deemed to be constitutional until its challengers have satisfied the court to the contrary"). Plaintiffs have not met their burden of demonstrating Section 206's unconstitutionality beyond a reasonable doubt.

### A. Access To Courts

Plaintiffs first contend that "Section [206] violates [their] rights to unencumbered access to State courts under Article 10 sec. 4 of the New York State Constitution" (R. 100). This claim is meritless, however, because Article 10, § 4 does not grant LLCs any general right of access to civil courts, but at most guarantees them the same right accorded to a natural person in a similar case, who likewise have no such general constitutional right. Specifically, Article 10, § 4 provides, in relevant part, that: "The term corporation as used in this section . . . shall be construed to include all associations and joint-stock

companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons." N.Y. Const., Art. 10, § 4. However, New York does not recognize a general due process right of access to civil courts. See Matter of Colton v. Riccobono, 67 N.Y.2d 571, 576 (1986). Instead, access will be required (at least absent a compelling governmental justification for denying such access) "only when the right sought to be asserted is one recognized as carrying a preferred status in the constitutional sense, and so entitled to special protection, and only then when there is no alternative forum where vindication of the right may be sought." Id. Where "no such fundamental interest is at stake, the State is free to condition access to the [civil] courts" by natural persons however it sees fit, provided that any "right of access" created by other constitutional provisions or statutes is not "alter[ed] or restrict[ed] . . . arbitrarily," in "violat[ion of] substantive due process concerns." Id.

In short, Article 10, § 4 merely guarantees that corporations and other business associations like plaintiffs will have the same right of access to civil courts under the law as natural persons would have in a similar case. Natural persons do not have a right of access except where the courts are the exclusive forum in which they can vindicate a fundamental interest, or where some other constitutional or statutory provision independently grants such a right (and even in the latter case,

the Legislature may still restrict that right of access as long as it has a rational basis for doing so). Here, as discussed in the next section, infra, plaintiffs do not allege and cannot show that Section 206 prevents them from vindicating their fundamental rights, nor can they establish that Section 206 arbitrarily restricts any right of access previously granted them under state law.

**B. Due Process**

Plaintiffs further claim that "Section 206 violates [their] rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1 Sec. 6 of the New York State Constitution" (R. 99). This substantive due process claim fails, however, because the requirements of Section 206 are rationally related to the goal of informing members of the public about newly organized LLCs doing business in their community.

**1. Section 206 does not violate plaintiffs' federal constitutional rights**

In Boddie v. Connecticut (401 U.S. 371 (1971)), and subsequent cases clarifying Boddie (e.g., Ortwein v. Schwab, 410 U.S. 656 (1971) and United States v. Kras, 409 U.S. 434 (1973)), the United States Supreme Court has made it clear that access to a state's courts in and of itself is not an independent constitutional right. Access to the courts will be accorded special due process protection only where the underlying right sought to be asserted through such access is a right recognized in the constitutional sense as carrying a preferred status and so entitled

to special protection, and then only where there is no alternative forum in which vindication of that constitutionally protected right may be sought.

For example, in Boddie, the Court struck down mandatory payment of court fees and service costs for indigent plaintiffs in divorce actions, after finding that access to the courts was "the exclusive precondition to the adjustment of a fundamental human relationship" -- that of marriage -- and concluding that a state may not "preempt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U.S. at 383. By contrast, access to the courts for the resolution of other claims (involving rights not subject to special constitutional protection) may be denied as long as there is some rational basis for such denial; no proof is required of any compelling state interest, nor need it be established that the legislative choice of means of accomplishment was the least restrictive. See Ortwein, 410 U.S. at 660.

Plaintiffs do not allege that Section 206's provisions have prevented them from maintaining any action in which a fundamental constitutionally preferred interest was at stake that could be vindicated only through the courts. Moreover, to the extent that plaintiffs' constitutional challenge to those provisions in the present case arguably involves such a fundamental interest, it is clear that they were allowed to continue the litigation despite defendant's motion to dismiss for non-compliance with the publication requirement. And, it is also clear that

the overwhelming number of state court actions to which Section 206's conditional litigation bar could apply would not involve a fundamental interest subject to special constitutional protection.

Because the Due Process Clause does not give plaintiffs a right of access to state courts, any claim of right must emanate from state law. Accordingly, based on Boddie and its progeny, plaintiffs could establish a violation of their substantive due process rights as a result of the general application of Section 206 only if they could demonstrate that that statute arbitrarily restricts a right of access granted to them under state law.

2. Section 206 does not violate plaintiffs' state constitutional rights

Likewise, as noted in Section A, supra, for purposes of the State Constitution, the New York Court of Appeals has held that, at least where no fundamental interest is at stake, "substantive due process concerns" are satisfied as long as legislation does not "arbitrarily" "alter or restrict" a right of access to the State's civil courts possessed under state law. Matter of Colton, 67 N.Y.2d at 576. Specifically, such legislation conditioning a party's right of access need only be "adopted in the interest of the community . . . [and] reasonable in relation to its subject." Id. See also Montgomery v. Daniels, 38 N.Y.2d 41, 54 (1975) (noting that "where a statute is challenged on nonprocedural grounds as violative of due process of law we have consistently asked the question whether there is "'some fair, just and reasonable connection'

between it and the promotion of the health, comfort, safety and welfare of society""") (citations omitted). This is an application of the rational-basis test, "the least rigorous standard of judicial constitutional review." D'Amico v. Crosson, 93 N.Y.2d 29, 32 (1999) (equal protection case). See Section C, infra, for a discussion of rational-basis analysis in the equal protection context.

As a threshold matter, plaintiffs have failed to identify a protectible property interest for purposes of the substantive due process doctrine, because the LLC Law, which created the LLC as a recognized business entity, also provided that the right of that entity to sue was subject to those restrictions contained in that legislation, including Section 206's publication requirement. Specifically, while the Legislature gave LLCs the power to "sue or be sued, or institute, participate in or defend any action or proceeding . . . in its name," it also provided that that power was "subject to any limitations provided in this chapter [including the condition provided in Section 206] or any other law of this state." LLC Law § 202. Thus, LLCs have never enjoyed an unrestricted right of access under state law. And, as noted earlier (see Section A, supra), Article 10, § 4 of the State Constitution does not confer any independent right of access to the State's civil courts, but merely permits LLCs and those other entities to which that constitutional provision applies to exercise the same rights, and to be subject to the same limitations, as natural persons.

Accordingly, plaintiffs never had a right of access to state courts unencumbered by those restrictions contained in Section 206, and thus cannot claim that Section 206 deprived them of any right created by state law, let alone that it did so without affording them due process of law. Compare with Matter of Colton, 67 N.Y.2d at 576-77 (noting that "[a]lthough our State Constitution does not create a per se right of access to civil courts, it does prohibit the Legislature from abrogating the cause of action for wrongful death," and thus gave petitioner, "by implication, a right of access to the civil courts to plead and prove her wrongful death cause of action," which the Legislature could not limit arbitrarily). In sum, absent a protectible property right or liberty interest, there is no predicate for plaintiffs' claim alleging a denial of due process.

In any event, as suggested in Section A, supra, even if plaintiffs had a general due process right of access to New York courts, such a right could be limited without violating substantive due process concerns as long as that limitation was reasonably related to a legitimate state interest.

**3. Section 206 has a rational basis**

In this case, Section 206 is designed to provide members of the public with specific, important information about the newly organized LLC (including the exact name of the company; the county in which the office of the company is to be located; or, if the company is to have a registered agent, the registered agent's name and address within this

State and a statement that the registered agent is to be the agent of the company upon whom process may be served, see LLC Law § 206) so as to permit them to act upon that information, if and when appropriate. The statutory publication requirement ensures that the disclosed information is made available to interested members of the public in the area where the LLC has its office, and is thus directed at those persons most likely to have dealings with the LLC, as a means of preventing LLCs from using their operating flexibility and limited liability to the detriment of such persons. Cf. White v. Eiseman, 134 N.Y. 101, 103 (1892) (noting that purpose of the publication requirement applicable to limited partnerships "was to furnish reasonable protection to those dealing with the concern by requiring certain acts to be done and public notice thereof given, so that all who desired might know the essential features of the arrangement"); Smith v. Argall, 6 Hill 479, 480-81 (1844) (discussing similar publication requirement applicable to limited partnerships, and noting that "[t]he object of the [requisite] notice is publicity; that all who deal with the [limited] partnership may know the names of the persons composing it, and, so far as respects the special partners, the extent of its capital actually paid in").

The statute's second provision, which conditions the maintenance of an action or special proceeding on compliance with the publication requirement, provides an incentive to ensure that the required disclosure will be made. The Court of Appeals has upheld the use of limitations on legal proceedings as a means of obtaining compliance with a statute's

principal goal. See, e.g., Curiale v. Ardra Ins. Co., Ltd., 88 N.Y.2d 268, 277-79 (1996) (upholding constitutionality of provision of Insurance Law requiring striking of answer and entry of default judgment against unlicensed alien insurance company if it did not post pre-answer security).

Moreover, while the court below attacked Section 206's condition on maintaining an action for failing to provide "financial support to the courts," "a measure of security to an adversary," or "notice as to a pending lawsuit" (R. 12), a condition or limitation on access to state courts need not in fact be related to the court system or litigation process, as long as it is otherwise reasonably designed to promote the interests of the community. See, e.g., Matter of Colton, 67 N.Y.2d at 577 (holding that condition on access to courts did not violate substantive due process where it was rationally related to goal of "helping preserve quality health care in this State"). Barring the maintenance of a court proceeding by companies that have not complied with the publication requirement is rationally related to the goal of ensuring that those companies will publish the designated information. That is, such a limitation provides an incentive to gain compliance with other statutory requirements that might otherwise be ignored by an LLC.<sup>4</sup>

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<sup>4</sup>Many other laws in New York and elsewhere likewise condition the right to bring or maintain suits on compliance with administrative requirements otherwise unrelated to the court system or the adjudication of justice, as a rational means of encouraging such compliance. See, e.g., N.Y. Bus. Corp. L. § 1312 (enforcing business licensing requirements by providing that "[a] foreign corporation doing

In addition, in evaluating whether a given law bears a rational connection to promotion of a legitimate state interest, courts are not to consider the wisdom or efficacy of that law or whether it is superior to other alternatives. Rather, it is for the Legislature alone to determine the advantages and drawbacks of the legislation in achieving a legitimate purpose. See Montgomery v. Daniels, 38 N.Y.2d 41, 53 (1975) (noting that, when applying rational-basis test to legislation, "[t]he judiciary . . . is not called on to weigh the relative worth of data or arguments which may be marshaled on either side as to the wisdom of determinations made by the Legislature in the realm of policy," because "[w]hether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its

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business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority"); N.Y. Gen. Bus. L. § 130 (enforcing requirements relating to filing of assumed business name certificate by providing that "[a]ny person or persons carrying on, conducting or transacting business . . . who fails to comply with the provisions of this section shall be prohibited from maintaining any action or proceeding in any court in this state on any contract, account or transaction made in a name other than its real name until the certificate required by this section has been executed and filed in accordance with the provisions set forth herein"). See generally Application of Statute Denying Access to Courts or Invalidating Contracts Where Corporation Fails to Comply with Regulatory Statute as Affected by Compliance After Commencement of Action, 23 A.L.R.5th 744 (2002) (discussing numerous cases from New York and other states involving statutes conditioning access to courts on corporation's compliance with regulatory statutes wholly unrelated to court system).

prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature'"). Thus, Supreme Court's perception that Section 206's publication requirement was costly, unnecessary and ineffective as a means of informing the public about LLCs should have had no place in its evaluation of the constitutionality of that statute under the applicable rational-basis analysis. Again, the only question before that court was whether Section 206's publication requirement and limitation on use of the courts could conceivably further some legitimate state interest, even if there might be better or less imperfect means of accomplishing the same objective.

C. Equal Protection

Plaintiffs lastly allege that "Section [206] violates [their] right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article 1 Section 11 of the New York State Constitution" (R. 99). This claim should likewise be rejected because Section 206's publication and compliance provisions rationally distinguish between LLCs, to which they apply, and other entities, such as business corporations and traditional partnerships, to which they do not apply.

1. The standard of review

As a preliminary matter, since the economic legislation challenged by plaintiffs in this case does not distinguish on the basis of either fundamental rights or suspect classifications, the rational-basis test applies to their equal protection claim, just as it applied to their

substantive due process claim. It is well established that a legislative classification that neither involves a suspect class nor impinges on any fundamental right denies equal protection of the laws only if the classification is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest." Frontiero v. Richardson, 411 U.S. 677, 683 (1973). See Heller v. Doe, 509 U.S. 312, 319-20 (1993); Henry v. Milonas, 91 N.Y.2d 264, 267-68 (1998). In the equal protection context, just as in the substantive due process context, a "statute subject to rational basis scrutiny is presumed to be constitutional, and the party challenging the statute bears the heavy burden of proving that there is no reasonably conceivable state of facts which rationally supports the distinction" drawn in the statute. D'Amico, 93 N.Y.2d at 31-32.

More specifically, "[u]nder the rational basis standard, the Legislature, in creating a classification, 'need not actually articulate at any time the purpose or rationale supporting its classification,'" but "[i]nstead, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Port Jefferson Health Care Facility v. Wing, 94 N.Y.2d 284, 290 (1999) (emphasis in original) (citing Heller, 509 U.S. at 320). Thus, in a case where the legislative history fails to disclose the actual reason(s) for enacting certain legislation, "a court may even hypothesize the motivations of the State legislature to discern any conceivable legitimate objective

promoted by the provision under attack." Maresca v. Cuomo, 64 N.Y.2d 242, 251 (1984); Port Jefferson Health Care Facility, 94 N.Y.2d at 290-91. Finally, the State "has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Heller, 509 U.S. at 320; Port Jefferson Health Care Facility, 94 N.Y.2d at 290-91.

2. **Section 206's requirements have a legitimate purpose and apply equally to all forms of domestic and foreign unincorporated limited liability business entities**

As previously shown, the legitimate need served by Section 206 is that of providing members of the public with specific important information regarding newly-organized (unincorporated) limited liability business entities based in their community. The statute's conditional bar against maintaining legal proceedings ensures that the required publication will be made. Thus, the statute clearly has a legitimate purpose. Moreover, the statute itself applies equally to all domestic LLCs, and the same requirements are imposed on other forms of unincorporated limited liability business entities. See LLC Law § 802(b) (foreign LLCs); LLC Law § 1203(c)(1) (professional service LLCs); LLC Law § 1306(d) (foreign professional service LLCs); Partnership Law § 121-201(c) (limited partnerships); Partnership Law § 121-902(d) (foreign limited partnerships); Partnership Law § 121-1500(a) (registered limited liability partnerships); and Partnership Law § 121-1502(f) (registered

foreign limited liability partnerships). While plaintiffs complain about the cost of complying with the statutory publication requirement, they present no evidence that this cost is designed to be prohibitive or invidiously discriminatory in nature, or that it exceeds those amounts that limited partnerships have been required to pay over the years. And whether those requirements are "necessary" as one of a number of means of disseminating particular information concerning newly-formed LLCs to members of the public -- including those who cannot or would not otherwise attempt to gain access to the Department of State's website or pay a fee for the information -- is a question to be addressed by the Legislature, not the courts.

3. It is reasonable to distinguish between LLCs and corporations for purposes of Section 206's requirements

Plaintiffs nevertheless assert that Section 206 is unreasonably discriminatory because there is a distinction between the requirements imposed by the LLC Law and those imposed by statutes applicable to corporations under the Business Corporation Law. See R. 99. Assuming that a distinction between differing statutory regimens can give rise to an equal protection claim, it is nevertheless the case that "[w]here the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." Elmwood-Utica Houses, Inc., 65 N.Y.2d at 495 (internal quotation marks omitted). Thus, the fact that business corporations --

which may face other burdens not imposed on LLCs, and which, in contrast to LLCs, have been recognized by the State for many years and are thus familiar to the public as a form of limited liability business -- are not subject to the same publication requirement and conditional litigation bar as LLCs does not deprive plaintiffs of their equal protection rights. Moreover, as previously noted (see Section B.3, supra), it is certainly conceivable that the Legislature was concerned that newly-formed LLCs might take advantage of their operating flexibility and limited liability to the detriment of those who did business with them. As a result, the Legislature could reasonably have concluded that the publication requirement was necessary as one means of ensuring that members of the public doing business with LLCs would be able to obtain information about those entities that might be of some value to them.

In any event, even if corporations and other business entities did raise similar concerns as LLCs, the Legislature would not be required to tackle a given economic problem all at once, but could do so in stages as it sees fit, provided that its classifications are otherwise rational in relation to their subject and adopted in the interests of the community. See Jefferson v. Hackney, 406 U.S. 535, 546 (1972). "[I]n 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect,'" and "[a] legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.'" Id. (citations omitted). Indeed,

"[t]he very complexity of the problems" to be tackled in protecting investors in business entities and consumers of the services provided by those entities "suggests that there will be more than one constitutionally permissible method of solving them." Id. at 546-47. Thus, for example, the fact that there may have been other ways for citizens to obtain the same information provided by publication (for example, by contacting the Department of State or using its website) did not make it irrational for the Legislature to also require publication in local newspapers as a means of supplementing those existing channels.

4. **Section 206's publication requirement did not have to enhance the adjudication of justice**

Supreme Court also concluded that the classification drawn in Section 206 fails rational-basis review because "it rests on grounds wholly irrelevant to the achievement of the State's objective." R. 15 (quoting Heller v. Doe, 509 U.S. 312, 324 (1993)). Specifically, the court found that the publication requirement as a precondition for access to the courts failed this test because "[t]he notice given for six consecutive weeks after an LLC's formation does not in any way enhance the adjudication of justice," but might even have the "opposite effect" in those situations where LLCs are unable to commence actions because a short statute of limitations has expired (R. 15).

However, this conclusion was misplaced, insofar as it was based on the erroneous assumptions that: (a) the objective of the statutory condition on an LLC's access to the courts must necessarily have been to

enhance the adjudication of justice (rather than to promote the welfare of the State's citizens by encouraging compliance with administrative requirements unrelated to the court system that might otherwise have been ignored); and (b) application of Section 206 would actually frustrate the adjudication of justice insofar as it would require dismissal, even after the statute of limitations had already run, of otherwise meritorious causes of action brought by non-complying LLCs.

In the first place, as noted previously (see Section A, n.1 and accompanying text, supra), it is irrelevant whether or not Section 206 (and, in particular, the statutory precondition) enhances the adjudication of justice, inasmuch as the only relevant question in applying the rational-basis test is whether Section 206's provisions are rationally related to the promotion of a legitimate State interest. Contrary to what Supreme Court assumed, the fact that the Legislature chose to make publication by the LLC a condition for maintaining an action in the State's courts -- as opposed to making that publication a condition for doing business at all within the State, or for enjoying some other privilege -- does not mean that the objective of such a condition must necessarily have been related to the court system.

Rather, the clear goal of that condition would be to obtain compliance with other statutory requirements enacted for the benefit of the State and its citizens. Compare Laws 1897, chap. 420 (repealed) (requiring publication of certificate of limited partnership in newspapers as essential element of proper formation of limited

partnership) with Partnership Law § 121-201 (added in 1990) (conditioning limited partnership's power to maintain actions in court on its compliance with that publication requirement). In short, compliance with Section 206's publication requirement, which carries with it a conditional bar on the LLC's power to maintain litigation previously commenced by it, has no direct bearing on the court system but is simply a step that an LLC must take in order to enjoy the full scope of its privilege to do business.

5. Compliance with Section 206's publication requirement does not impede the adjudication of justice

In the second place, and again contrary to what the court below assumed, there is no basis for construing Section 206 to require dismissal of all actions brought by LLCs that have not yet complied with the publication requirement. Indeed, as a practical matter, an LLC's non-compliance with that statutory condition is only an obstacle where the LLC's lack of capacity to maintain an action it is timely raised by a defendant. See Judarl L.L.C. v. Cycletech Inc., 246 A.D.2d 736, 737-38 (3d Dep't 1998) (noting that "we have not considered defendants' argument premised upon [LLC] Law § 206 as it was not raised before Supreme Court"). But, even more importantly, both the language and the clear purpose of Section 206 indicate that application of the statute was not intended to prejudice any property interest of aggrieved LLCs by barring them from commencing actions within a statute of limitations.

For these purposes, the operative language of Section 206 provides that non-compliance with the publication requirement "shall prohibit the limited liability company from maintaining any action or special proceeding in this state unless and until" it complies. LLC Law § 206 (emphasis added). Thus, LLCs are only barred from continuing, but not from commencing, a lawsuit. Cf. Caspian Invest., Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 883 (S.D.N.Y. 1991) (noting that N.Y. Business Corporation Law § 1312 "does not prohibit an unlicensed corporation from commencing an action, only from continuing, or "maintaining," the suit") (emphasis in original); Hot Roll Mfg. Co. v. Cerone Equipment Co., 38 A.D.2d 339, 341 (3d Dep't 1972) (construing N.Y. Business Corporation Law § 1312 and noting that "[t]o be prohibited from maintaining an action . . . is different from being prohibited from commencing an action," inasmuch as "such a corporation, after commencing an action, could . . . [comply] and, thereafter, maintain a lawsuit").

Moreover, inasmuch as the purpose of the statute's conditional litigation bar is to encourage LLCs to make the requisite publication, rather than punish them for past non-compliance, it would be entirely consistent with the statute to grant a stay to give the LLC a reasonable time to comply and thereby avoid any possible statute of limitations problems resulting from the need to refile after dismissal. (By contrast, dismissing an action after the running of the statute of limitations would undermine this purpose, because the LLC would have been denied access to the courts and no longer have an immediate incentive to

publish the requisite information.) Cf. Reese v. Harper Surface Finishing Systems, 517 N.Y.S.2d 522, 524 (2d Dep't 1987) (observing that N.Y. Business Corporation Law § 1312, which bars foreign corporations from maintaining actions in state court prior to becoming qualified to do business in New York and paying franchise taxes, "was not enacted to deny foreign corporations access to the courts of New York," but was instead "designed to encourage foreign corporations to qualify to conduct intrastate business and to pay the State taxes levied on that intrastate business").

After all, a motion to dismiss for lack of capacity to continue the action would be mooted if the LLC made the necessary publication prior to the hearing on that motion, and there is no reason why a court could not grant a stay or continuance with respect to the motion or proceedings, in lieu of an outright dismissal, so as to give the LLC a reasonable time to comply with the State's laws. Cf. Tri-Terminal Corp. v. CITC Industries, Inc., 78 A.D.2d 609, 432 N.Y.S.2d 184, 185 (1st Dep't 1980) ("The record demonstrates that plaintiff is a foreign corporation doing business in New York without having qualified pursuant to section 1312 of the Business Corporation Law. Recent case law demonstrates that the failure to qualify is not a jurisdictional impediment. Accordingly, the more appropriate remedy was not outright dismissal of the complaint, but a conditional dismissal or a stay affording plaintiff an opportunity to cure this nonjurisdictional defect, i.e., to obtain the requisite authority."). In addition, to the extent that the statutory condition

on maintaining an action was intended to be in the nature of a penalty, it should not be strictly construed as against the LLC. This would further support permitting an aggrieved LLC to maintain an action in state court when it obtains affidavits demonstrating compliance with the publication requirement, even though the LLC did not comply at the time it commenced the action.

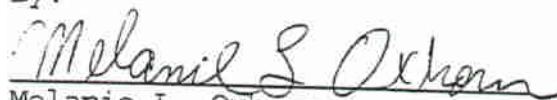
Accordingly, the lower court's concern that application of Section 206's conditional litigation bar would in many cases be unjust and irrational is entirely baseless, because that provision does not put LLCs at risk of forfeiting claims under statutory time restrictions.

CONCLUSION

For all the foregoing reasons, this Court should reverse the order below awarding plaintiffs summary judgment, grant defendant's cross-motion and declare Section 206 to be constitutional.

Dated: September 30, 2002  
New York, New York

ELIOT SPITZER  
Attorney General of the  
State of New York  
Attorney for Defendant-Appellant  
By:

  
Melanie L. Oxhorn  
Assistant Solicitor General  
120 Broadway, 25th floor  
New York, New York 10271-0332  
(212) 416-6229

CAITLIN HALLIGAN  
Solicitor General

MICHAEL S. BELOHLAVEK  
Deputy Solicitor General

MELANIE L. OXHORN  
Assistant Solicitor General  
of Counsel