

An aerial photograph of the New York City skyline, featuring a dense cluster of skyscrapers. The Empire State Building is the most prominent structure in the center-right. The city extends to the water's edge, with a bridge visible in the distance under a clear sky.

ARTICLE 78 PROCEEDINGS

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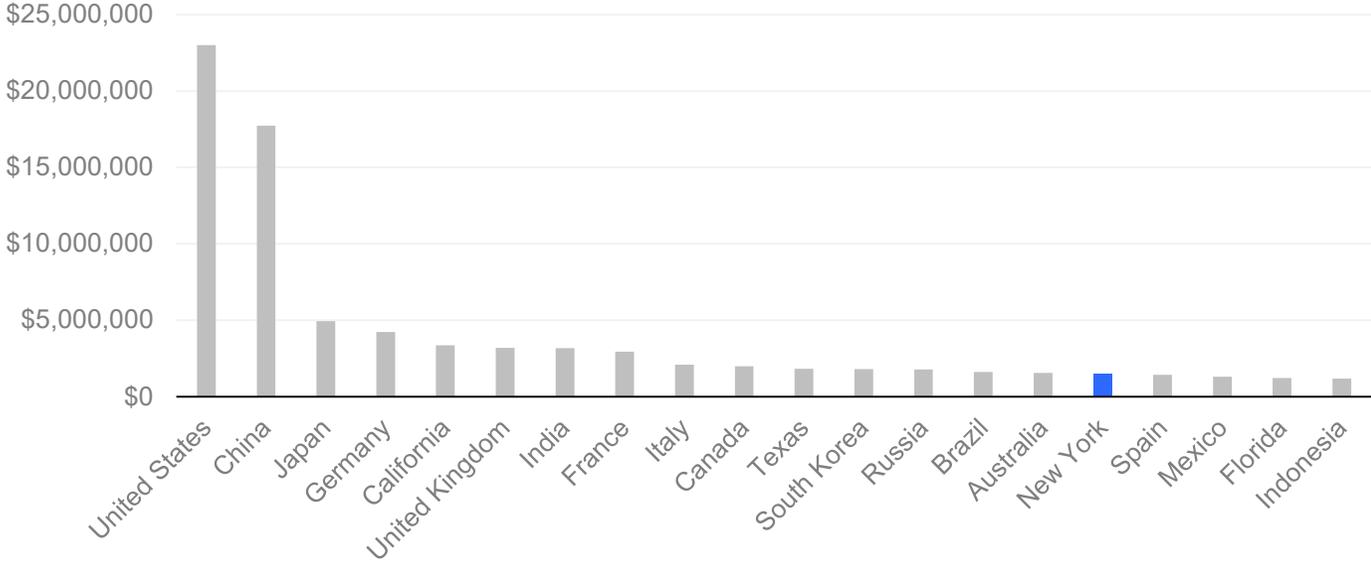
NEW YORK STATE IS A LEADER

01

New York State Is a Leader

- New York City is the financial capital of the world.
- New York State is the third largest economy in the United States, with a gross state product in 2021 of approximately \$1.5 trillion.
- If New York were a country, it would have about the 16th biggest economy in the world, falling between Australia and Spain:

Approx. GDP in 2021 (USD Million)



New York is also a **leader in regulation**: having come to regulate virtually every industry across the state in recent years, New York has more regulations than any other state in the nation except California.

PURPOSE OF ARTICLE 78 PROCEEDINGS

02

Purpose of **Article 78 Proceedings**

Article 78 of the CPLR establishes the procedure for challenging the determinations of administrative agencies, public bodies, or officers.

There are four subsections of **Article 78**, which respectively allow a party to:

1. Compel a state or local body or officer to act when it has “failed to perform a duty enjoined upon it by law;”
2. Prohibit a state or local body or officer from acting beyond its authority or invalidate such an action;
3. Challenge a government decision that was made in violation of lawful procedure, was affected by an error of law, was “arbitrary and capricious,” or constituted an abuse of discretion; and
4. Contest a government decision made at a hearing that was not supported by “substantial evidence.”

Scope of **Article 78 Proceedings**

An Article 78 proceeding can be used to challenge a wide range of government actions:

- Challenge a State or City agency regulation or policy.
- Appeal the denial of a license.
- Prohibit government official from acting in violation of law or outside the scope of her authority.
- Contest zoning decisions or variance denials.

Examples:

- Successful challenge to NYC Department of Health proposed ban on sale of sweetened drinks larger than 16 fluid ounces.
- Successful challenge to New York State Insurance Regulation 208 restricting certain spending activities by the title insurance industry.
- Successful challenge to NYPD policy to issue violations to street-side ticket vendors.

Benefits of an Article 78

- **Relief can be obtained quickly**, due to the fact that the proceedings take place on an expedited timeline, generally without discovery (although the lower court has discretion to grant discovery).
- As a result, an Article 78 proceeding is often **more cost-effective than a federal action**, and has a more predictable cost structure.
- Challenging a law, rule, or agency decision in an Article 78 proceeding can **lead to delay in its enforcement**, whether or not the suit is successful.
 - Petitioners often seek a temporary restraining order, preliminary injunction, or other form of stay of some or all of the challenged policy or action.
 - The government sometimes agrees to delay implementation until legal challenges are resolved.

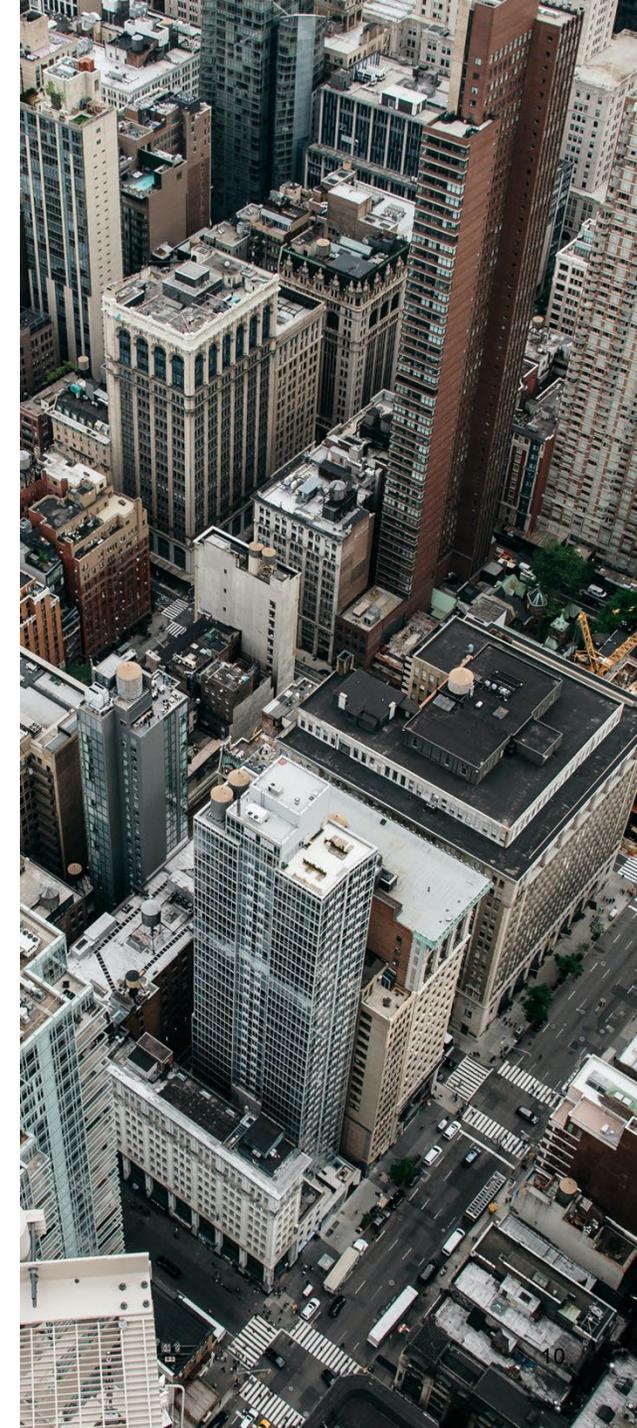
PREPARING FOR AN ARTICLE 78

03

Preparing for an Article 78: **Building a Record**

When you know it's coming, don't wait:

- Build an evidentiary record in front of the agency.
 - Attend public hearings, submit testimony, participate in the public comment process, and encourage other affected parties to do the same.
 - The administrative record is the primary body of evidence the court will look to in evaluating the challenged action.
- Find expert and lay witnesses, gather documents, and start preparing affidavits for submission to the court.



Preparing for an Article 78: **The Public Comment Process**

When a new rule or regulation is being developed, the public has the opportunity to submit written comments to the promulgating agency.

The public comment period has several important purposes:

- Provides citizens a public forum for participating in the rulemaking process.
- Provides prospective Article 78 litigants an opportunity to develop a robust and favorable administrative record.
- Places the agency on notice of the public's concerns with the proposed rule.
 - An agency's failure to take all public comments into account prior to issuing a final rule can qualify as grounds for vacating the rule in an Article 78 proceeding.

Preparing a comment:

- Typically written in the form of a letter (ranging from a few paragraphs to several pages).
- Be comprehensive: include an overview of all key concerns/claims regarding proposed rule.
 - This ensures that the agency is provided adequate notice of these issues and forces its consideration of those issues (in writing), prior to publishing a final rule.
- Must be submitted during the agency's designated comment period (typically 60 days).

Preparing for an Article 78: **FOIL Requests**

New York's Freedom of Information Law ("FOIL") provides the public the right to request records from state agencies and the New York Legislature.

- "Records" is defined broadly to include any information "kept, held, produced or reproduced by, with or for an agency or the state legislature." N.Y. Pub. Off. Law § 86.
- The **FOIL framework** is designed to promote transparency and public accountability.



Preparing for an Article 78: **FOIL Requests**

Benefits of FOIL requests:

- Serves as valuable information-gathering tool in the development of Article 78 claims.
- Forces the agency's hand: must either disclose records or articulate in writing why it will not.

Preparing a FOIL request:

- The records sought must be "reasonably described." N.Y. Pub. Off. Law § 89(3)(a).
- Be specific and clear in describing desired records; identify date range for request.
- Timing requirements/deadline: None. Request can be made at any time—but earlier in the process is better, as it often takes agencies months to produce requested records.

Procedure and remedies if FOIL request is denied:

- Administrative appeal may be made to head of agency.
- If administrative appeal is unsuccessful, a party can seek judicial review in NY Supreme Court.

Preparing for an Article 78: **Final Agency Determination**

Must obtain an unambiguously final agency determination—generally issued or expressly approved by the commissioner of the relevant agency, and expressing a final position on the issue.

Must exhaust administrative process before filing—petitioner must utilize all administrative remedies and appeals, and if he does not pursue such appeals a party will be barred from judicial relief.

When a party anticipates an unfavorable agency decision, she must move quickly to make her case—the Article 78 action must be filed within four months (or sooner) of a final agency determination.

Building Legal Theories and Claims — Causes of Action

Research and develop claims, zeroing in on the strongest two or three.

- Can you put together a solid case that the agency action was:
 - Arbitrary and capricious, for example because the agency record does not support the challenged action, is internally contradictory, or would have outsized negative impacts not adequately considered by the agency.
 - Outside of the agency's authority, for example that the agency inappropriately assumed the legislative function (a Boreali claim), was preempted by federal law, or acted contrary to a governing statute establishing the agency's authority.
 - Affected by errors of law, for example based on a misapplication of a statute or case law.
 - In violation of procedural requirements, such as the State Administrative Procedure Act.

Can you build out constitutional or tort claims to combine with Article 78 claims?

- Federal constitutional claims, including due process, First Amendment, and takings.
- Tort claims, such as public nuisance, tortious interference with contract, or tortious interference with business advantage.
- State constitutional claims, including those relating to procedural requirements for the passage of legislation, taxes, and structural claims about the division of powers.

Building Legal Theories and Claims — Relief Requested

Can Consider what forms of relief meet your strategic and business goals:

- Petitioners can ask that the agency decision be vacated in full or in part.
- Petitioners can seek reversal of the agency decision and a new hearing or determination.
 - Consider the additional time the agency will take if the action is remanded for reconsideration.
- In certain circumstances, Petitioners can ask that the agency be directed to perform an action.

Monetary relief is sometimes available as well:

- Takings claims and tort claims permit the petitioner to request money damages, which are helpful in creating leverage.
- Legal fees can also be recovered for the successful prosecution of federal constitutional claims and under state law in certain circumstances.

Strategic Considerations: State versus Federal Court

- There are advantages and disadvantages to bringing suit in state and federal court.
- Article 78 actions can only be brought in state court, so if you have a strong argument that the government acted arbitrarily and capriciously, you should consider filing in state court. You can bring federal claims in the same action.
- If your client has been wronged but your legal arguments are not as strong as you would like, it is sometimes better to be in state court.
- On the other hand, if your strongest claims are federal in nature—such as federal constitutional claims—you may want to sue in federal court even if it means foregoing Article 78 claims.

Finding Petitioners: Building the Narrative

- Ideal petitioners can speak passionately and concretely about the injustices and negative impacts of the challenged law.
- Ideal petitioners have a compelling, sympathetic backstory (small business owner, immigrant success story, and the like).
- Petitioners can be individuals, companies, or organizations.
 - For standing purposes, we prefer to have a mix of different kinds of petitioners who have suffered relevant harms.
 - We prefer not to have organizational petitioners without individuals joining as well.



Finding Petitioners: **Standing**

Petitioners must have standing.

For an individual:

- First, must show “injury in fact,” meaning that it will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural.
- Second, the injury must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.

For an association or organization:

- First, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent.
- Second, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of the interests.
- Third, neither the asserted claim nor the appropriate relief can require the participation of the individual members. These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury.

Gathering and Presenting Evidence

- An Article 78 proceeding is like a summary judgment motion from day one.
- Attach relevant administrative documents to your petition (Article 78 version of a complaint) or as exhibits to attorney affirmations.
- Prepare and submit with the petition fact-witness and expert affidavits.
- Scour the administrative record, including testimony from hearings.
- Since there is no right to discovery (“disclosure” in state parlance), utilize Freedom of Information Law requests early.

Retaining and Utilizing Expert Witnesses

- Even if the expert did not submit a report at the administrative level, courts will usually accept expert reports submitted with and in support of the Article 78 petition, especially if the report is focused on the irrationality or negative effects of the regulation.
- Experts can be extremely effective in cases involving technical or scientific data.
- Experts can also be critical in proceedings in which you are seeking a TRO or preliminary injunction due to the industry or company-destroying economic impacts of the challenged regulation or policy.
- In selecting an expert, considering finding someone who previously held a high-level position at the agency whose actions you are challenging.

Strategic Considerations: Seeking a TRO/Preliminary Injunction

Consider whether to seek a temporary restraining order and/or preliminary injunction at the outset of the case.

- Often difficult to obtain an injunction—irreparable harm is the key factor.
- You don't want to start the case off with a setback.
- But if petitioners can demonstrate concrete, irreparable harm—and in particular if you are challenging a regulation, policy, or order that is about to go into effect and the effects of which cannot be undone at a later date—it can be a powerful opening blow and may provide an opportunity to shape the judge's view of the equities at the outset.

Consider waiting to see how the case is playing out before filing for a TRO/PI.

- This is often the smart move when there is some lag time before the challenged regulation, policy, or decision is going to go into effect.
- You can try to get the case expedited and resolved before that deadline and then seek a TRO, stay, or PI if you don't receive a decision in ahead of the effective date.

What to File



Notice of Petition

- Initiation document—serves as a summons, but looks like a notice of motion.
- Petitioner chooses the return date for the proceeding. Must be served at least 20 days before the return date.



Order to Show Cause

- Used in urgent situations when requesting expedited hearing, TRO, injunction, or the like.
- Gets you in front of a judge immediately and the court sets return date and service date/method.

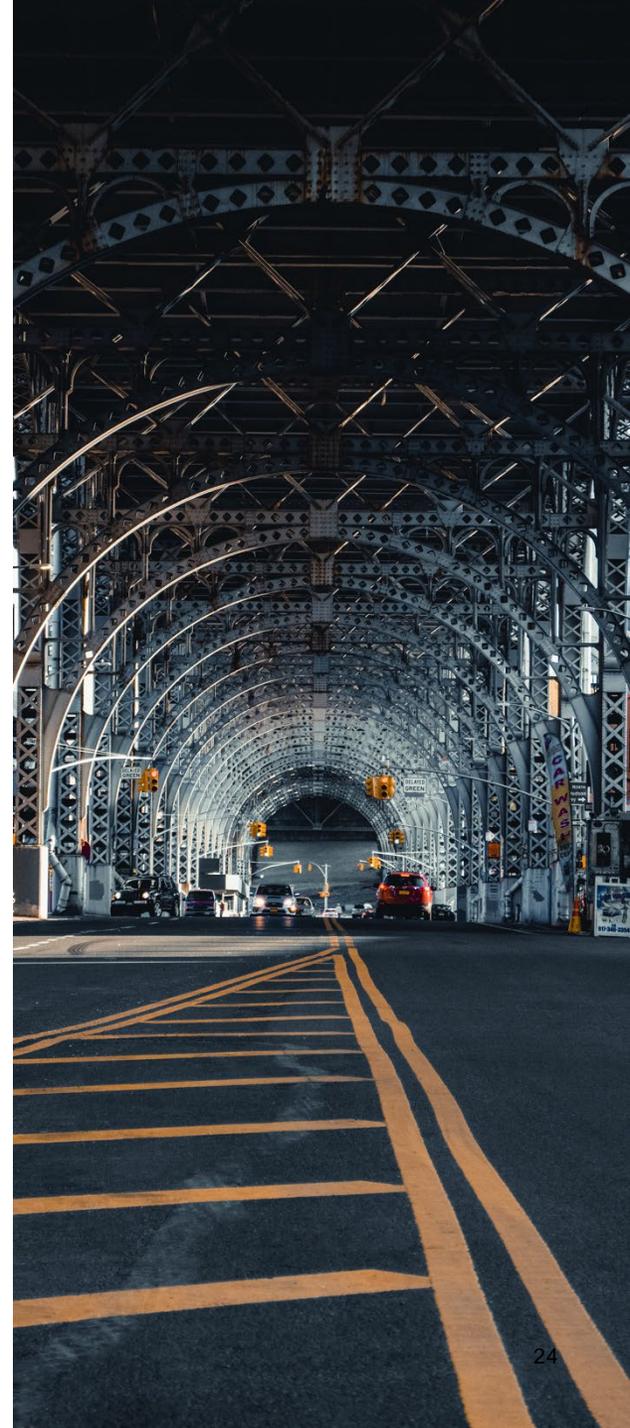


Verified Petition signed by petitioner

- Memorandum of law
- Supporting fact affidavits
- Supporting expert affidavits (often attaching expert report)

Checklist

- Know the statute of limitations
- Exhaust administrative remedies
- Choose your forum
- Find your petitioners
- Confirm standing
- Decide on your causes of action and relief sought
- Determine your fact affiants
- Engage your experts
- Decide if you are seeking immediate injunctive relief



BRIEFING AND ORAL ARGUMENT

04

What Happens Next: Briefing

Briefing:

- The government will answer the petition and submit a memorandum of law and affidavits of its own.
- If you've submitted expert materials, the agency will submit affidavits or reports from experts of its own, often from within the agency.
- You will be permitted a reply brief and the opportunity to submit reply affidavits and documents.



What Happens Next: Oral Argument

Oral Argument:

- Many (but not all) courts will schedule a hearing on the merits of the petition.
- For those courts that do schedule a hearing, parties will typically have only one opportunity to address the court, after which it will decide the case, depending on where the case is filed.
- State judges have enormous dockets and there will likely be other hearings scheduled for your date.
- Need to simplify your facts and theories to catch judge's attention.
- Demonstratives can be key:
 - Poster boards or blown-up photos
 - Handouts quoting key cases and factual materials
 - Maps, floor plans, schematics



APPEALS

05

Appeals

Stay pending appeal

- If you lose and the challenged regulation is about to or has already gone into effect, you may want to move for a stay pending appeal. This application can be made in either the lower court or the Appellate Division, but the former is often futile.
- At the First Department, the application is generally argued in front of a clerk and then, sometimes, in an informal conference with a single appellate justice. The single judge immediately issues an interim order deciding the application until a panel of judges decides the full stay pending appeal (without further oral argument).
- In certain circumstances, the government obtains an automatic stay upon appeal.

Oral argument

- The Appellate Division hears many cases; parties typically get only 5-10 minutes to make their case, so it's once again critical to simplify and grab their attention.
- State trial and appellate courts often will write briefer, more summary opinions compared to federal judges.

PRESS MANAGEMENT AND LEGISLATIVE STRATEGY

06

Press Management



Our Article 78 proceedings are often high-profile and receive media coverage.



It is often essential to work closely with public relations firms to develop a press and public relations strategy.



The State and City are not afraid to speak to the media.

Legislative Strategy

- **It often makes sense for parties to work on a legislative strategy as a compliment to litigation.**
- **Legislative strategy may include doing the following:**
 - Identify legislators and other policymakers who are likely to be an ally.
 - To the extent the party has an existing relationships with legislators, those can be key to garnering meaningful legislative support.
 - Support from legislators might include: submitting comment to the agency during the public comment period, publishing an op-ed, offering supportive quotes to media, preparing a fact affidavit in support of an Article 78 petition, or proposing new or amended legislation that resolves the party's concerns with the rule at issue.
- **Identify and closely monitor pending legislation (if any) addressing issues relevant to the agency rule in dispute.**

CONCLUSION

07

Conclusion

- **Article 78 actions are an important and often underutilized tool for businesses and industry groups operating in New York State.**
- **There are many benefits to Article 78 proceedings, including expedited timelines, lower costs, and opportunities to delay enforcement.**
- **If you are facing adverse government action in New York, think seriously about bringing an Article 78 challenge.**
- **If you are considering bringing an Article 78 action, start strategizing and planning early.**



QUESTIONS?

08

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