Appellate Division, Fourth Department Case No. CA 23-01332
Supreme Court, Onondaga County Index No. 007623/22

Court of Appeals of the State of New York

GARY J. LAVINE,

Respondent,

v.

ROBERT ORTT, AS SENATE MINORITY LEADER, AND WILLIAM BARCLAY, AS ASSEMBLY MINORITY LEADER,

Appellants,

and

STATE OF NEW YORK, KATHY HOCHUL, AS GOVERNOR, ANDREA STEWART-COUSINS, AS TEMPORARY PRESIDENT OF THE SENATE, CARL E. HEASTIE, AS SPEAKER OF THE ASSEMBLY, AND THE INDEPENDENT REVIEW COMMITTEE,

Respondents.

MEMORANDUM OF LAW FOR RESPONDENT CARL E. HEASTIE, AS SPEAKER OF THE ASSEMBLY, IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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NEW YORK STATE
COURT OF APPEALS

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PRELIMINARY STATEMENT

The Commission on Ethics and Lobbying in Government is a New York state agency tasked with administering, enforcing, and interpreting the State's ethics and lobbying laws. Under Executive Law § 94, state executive and legislative officials, including defendant Carl E. Heastie, the Speaker of the Assembly, are responsible for nominating persons to serve on the Ethics Commission. The statute provides, however, that persons who are nominated to serve on the Ethics Commission shall not be appointed as members unless and until they are first confirmed by the Independent Review Committee, a non-partisan body comprised of the deans of New York's accredited law schools. Gary Lavine, an Ethics Commission nominee whom the Independent Review Committee rejected, sued the State, the Independent Review Committee, and certain of the officials entrusted with the nomination and appointment process, including Speaker Heastie, in Supreme Court, alleging that § 94 violates the New York State Constitution insofar as it provides that nominees

must be approved by the Independent Review Committee—rather than by the Senate—before they may be appointed.[1]

Also among the aforementioned state-official defendants were Senate Minority Leader Robert Ortt and Assembly Minority Leader William Barclay (the "minority-leader defendants"). However, neither of the minority-leader defendants substantively participated in the litigation in Supreme Court. A single filing was submitted on their behalf: an affirmation, filed by the attorney who jointly represented both of them, stating that they "do not object to Plaintiff's request for relief."

Supreme Court ultimately issued a declaratory judgment that Executive Law § 94 is constitutional. Lavine filed a notice of appeal. The minority-leader defendants did not.

In a memorandum and order issued on July 26, 2024, the Appellate Division, Fourth Department unanimously held that Lavine lacked standing to bring his lawsuit, modified Supreme Court's judgment to reflect that threshold basis for dismissal of Lavine's complaint, and

[1] Lavine's constitutional challenge to Executive Law § 94 is distinct from the constitutional challenge to § 94 involved in *Cuomo v New York State Commission on Ethics and Lobbying in Government* (Case No. APL-2024-00076), which is currently pending in this Court on the merits.

affirmed the judgment as modified (2024 NY App Div LEXIS 4026 [4th Dept, July 26, 2024, Case No. CA 23-01332]). As explained herein, the minority-leader defendants' motion for leave to appeal from the Fourth Department's decision should be dismissed, or, in the alternative, denied.

REASONS FOR DISMISSING OR DENYING THE MOTION[2]

The minority-leader defendants' motion for leave to appeal should be dismissed, or, in the alternative, denied, for two reasons, each of which reflects a threshold defect in their attempted appeal.

First, the minority-leader defendants are legally prohibited from appealing the Fourth Department's memorandum and order. Neither of the minority-leader defendants is "aggrieved" by the decision within the meaning of CPLR 5511, and only parties aggrieved by court orders are statutorily authorized to appeal them (*see generally Parochial Bus Sys. v Board of Educ.*, 60 NY2d 539, 544–545 [1983]; *Matter of Bayswater Health Related Facility v Karagheuzoff*, 37 NY2d 408, 412–413 [1975]).

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[2] In addition to the arguments expressly set forth herein, Speaker Heastie adopts the arguments made by Governor Hochul in her separate submission opposing the minority-leader defendants' leave motion, as well as the arguments made by the Speaker and by the Governor in their submissions opposing the prior leave motion in this case made by Lavine, which are attached hereto as Exhibit A and Exhibit B, respectively.

The absence of aggrievement on the part of the minority-leader defendants traces back to what transpired in Supreme Court. The minority-leader defendants did not file notices of appeal from Supreme Court's judgment. So, when Lavine appealed, they became respondents, rather than co-appellants with Lavine, in the Fourth Department. The Fourth Department disposed of the appeal in a manner consistent with the only relief that a respondent is lawfully permitted to request: affirmance. The Fourth Department essentially affirmed Supreme Court's judgment on alternative grounds, modifying it from a declaratory judgment of constitutionality on the merits to a judgment of dismissal for lack of standing (*see* 2024 NY App Div LEXIS 4026, at *1; *see also* Hunt Aff in Support of Motion for Leave, at ¶ 15 [describing the Fourth Department's decision as having "affirmed the Supreme Court's order on the basis that Lavine lacks standing"]).

To be sure, the minority-leader defendants did ask the Fourth Department to reverse Supreme Court's judgment and declare Executive Law § 94 unconstitutional (*see* Hunt Aff in Support of Motion for Leave, at ¶ 10). But their failure to appeal from Supreme Court's judgment rendered that request to the Fourth Department improper and non-

cognizable (*see e.g. Matter of Fischione v PM Peppermint, Inc.*, 197 AD3d 970, 972 [4th Dept 2021] ["Insofar as respondents contend that the court erred by failing to impose sanctions against petitioners below, that request for affirmative relief is 'not properly before us because respondents did not file a notice of appeal'" (quoting *Matter of Hennessy v Board of Elections of County of Oneida*, 175 AD3d 1777, 1778 [4th Dept 2019])]).

Second, if the motion for leave is not dismissed for lack of aggrievement, it should be denied because any appeal to this Court by the minority-leader defendants would be ineffectual. The Court would lack the power to review whatever legal arguments the minority-leader defendants might present.

The minority-leader defendants did not advance any legal arguments in Supreme Court. All they did in that forum was "not object to Plaintiff's request for relief" (4th Dept Record on Appeal ["R"] 35). They therefore did not properly preserve any legal arguments for this Court's review.

As a result, this Court "ha[s] no power to review * * * [any] issue" that the minority-leader defendants may wish to raise in this Court

(*Hecker v State of New York*, 20 NY3d 1087, 1087 [2013], *rearg denied*, 21 NY3d 987 [2013] [holding that the Court was unable to review an issue that "was not preserved in the Court of Claims," notwithstanding that the issue was litigated in the Appellate Division on intermediate appeal]; *accord e.g. U.S. Bank N.A. v DLJ Mortgage Cap., Inc.*, 33 NY3d 84, 89–90 [2019] ["To preserve an argument for review by this Court, a party must raise the specific argument in Supreme Court and ask the court to conduct that analysis in the first instance"]). This Court, as contrasted with the Appellate Division, lacks "interest of justice jurisdiction to review unpreserved issues in the exercise of its discretion" (*People v Weber*, 40 NY3d 206, 211 n 2 [2023] [explaining that the Appellate Division is "unlike this Court" in that respect]).

Thus, an appeal to this Court by the minority-leader defendants could not succeed. The Court would lack the power to consider the minority-leader defendants' legal arguments presented in such an appeal.

CONCLUSION

The minority-leader defendants' motion for leave to appeal should be dismissed, or, in the alternative, denied.

September 9, 2024

Respectfully submitted,

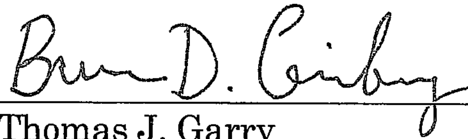

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Exhibit A

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Court of Appeals of the State of New York

GARY J. LAVINE,

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v.

STATE OF NEW YORK, KATHY HOCHUL, AS GOVERNOR, ANDREA STEWART-COUSINS, AS TEMPORARY PRESIDENT OF THE SENATE, ROBERT ORTT, AS SENATE MINORITY LEADER, CARL E. HEASTIE, AS SPEAKER OF THE ASSEMBLY, WILLIAM BARCLAY, AS ASSEMBLY MINORITY LEADER, AND THE INDEPENDENT REVIEW COMMITTEE,

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MEMORANDUM OF LAW FOR RESPONDENT CARL E. HEASTIE, AS SPEAKER OF THE ASSEMBLY, IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

The New York State Commission on Ethics and Lobbying in Government is a New York state agency tasked with administering, enforcing, and interpreting the State's ethics and lobbying laws. Under Executive Law § 94, state executive and legislative officials, including defendant Carl E. Heastie, the Speaker of the Assembly, are responsible for nominating persons to serve on the Ethics Commission. The statute provides, however, that persons who are nominated to serve on the Ethics Commission shall not be appointed as members unless and until they are first confirmed by the Independent Review Committee, a non-partisan body comprised of the deans of New York's accredited law schools. Gary Lavine, an Ethics Commission nominee whom the Independent Review Committee rejected, sued the State, the Independent Review Committee, and certain of the officials entrusted with the nomination and appointment process, including Speaker Heastie, in Supreme Court, alleging that § 94 violates the New York State Constitution insofar as it

provides that nominees must be approved by the Independent Review Committee—rather than by the Senate—before they may be appointed.[1]

In a memorandum and order issued on July 26, 2024, the Appellate Division, Fourth Department unanimously held that Lavine lacked standing to bring the lawsuit (2024 NY App Div LEXIS 4026, at *3 [4th Dept, July 26, 2024, Case No. CA 23-01332]). The court explained that "[a] plaintiff has standing to maintain an action upon alleging an injury in fact that falls within their zone of interest" (*id.* at *4, quoting *Silver v Pataki*, 96 NY2d 532, 539 [2001] [alteration marks omitted]). An injury in fact, in turn, entails "an actual legal stake in the matter being adjudicated" (*id.*, quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]). Further, standing, including the injury-in-fact requirement, "must be considered at the outset of [the] litigation" (*id.* at *3–4, quoting *Society of Plastics Indus.*, 77 NY2d at 769). Undertaking that consideration, the court concluded that Lavine did not have standing

[1] Lavine's constitutional challenge to Executive Law § 94 is distinct from the constitutional challenge to § 94 involved in *Cuomo v New York State Commission on Ethics and Lobbying in Government* (Case No. APL-2024-00076), which is currently pending in this Court on the merits.

to bring the lawsuit because he "did not suffer an injury-in-fact" from the rejection of his nomination (*id.* at *4).

Although the Fourth Department did not recite in detail its rationale for finding that the rejection of the nomination did not cause Lavine to experience an injury in fact, it referred to the briefs filed in that court by Governor Hochul and by the Independent Review Committee, which addressed the issue in detail (*see* 2024 NY App Div LEXIS 4026, at *2). Those parties explained that (1) at the time Lavine commenced this litigation, he was statutorily ineligible to become a member of the Ethics Commission because he had served as a commissioner of an executive agency—the now-defunct Joint Commission on Public Ethics, often called "JCOPE"—within the previous two years, and that (2) in any event, because Lavine was not entitled as of right to be named a member of the Ethics Commission, he was not concretely and legally harmed by the rejection of his nomination (4th Dept Brief for Respondent Hochul, at 29–31; 4th Dept Brief for Respondent Independent Review Committee, at 11–18). Speaker Heastie advanced those same arguments by adopting,

in his Fourth Department brief, the arguments made by Governor Hochul (*see* 4th Dept Brief for Respondent Heastie, at 14 n 3).[2]

As explained more fully herein, the Fourth Department's sound, unanimous decision does not warrant this Court's review. In holding that Lavine lacked standing to sue, the Fourth Department faithfully applied this Court's case law in a manner that reaches the correct result and that breaks no new jurisprudential ground. Lavine's motion for leave to appeal should be denied.

REASONS FOR DENYING LEAVE TO APPEAL[3]

A. The Fourth Department's Decision Unanimously Holding That Lavine Lacked Standing To Commence This Lawsuit Is Not Leaveworthy

The Fourth Department's unanimous decision holding that Lavine lacked standing to bring this litigation does not warrant this Court's

[2] Speaker Heastie followed that same course in Supreme Court, adopting the arguments that Governor Hochul made in support of dismissal of Lavine's lawsuit (*see* 4th Dept Record on Appeal 669 [Speaker Heastie's Supreme Court memorandum of law in support of his cross-motion to dismiss Lavine's complaint]).

[3] In addition to the arguments expressly set forth herein, Speaker Heastie adopts the arguments made by Governor Hochul in her separate submission opposing Lavine's leave motion.

review. The Fourth Department's decision follows directly from this Court's precedent on standing.

As this Court has explained, "[a] plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest" (*Silver*, 96 NY2d at 539). An injury in fact entails "an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus.*, 77 NY2d at 772). And the determination of whether the plaintiff possesses that requisite legal stake "must be considered at the outset of [the] litigation" (*id.* at 769).

A part of Executive Law § 94 that is not challenged here provides that anyone "who is currently, or has within the last two years * * * been * * * a commissioner of an executive agency appointed by the governor" is prohibited from serving on the Ethics Commission (Executive Law § 94 [3] [e] [ii]). Persons who served on JCOPE within the relevant two-year period fall within that prohibition, because, during its existence, JCOPE was an agency in the Department of State with a membership that was, in part, gubernatorially appointed (*see* Public Officers Law § 73-a [1] [b] [defining "state agency" as "any department, or division, board, commission, or bureau of any state department, any public benefit

corporation, public authority or commission at least one of whose members is appointed by the governor"]). Lavine thus was statutorily prohibited from joining the Ethics Commission at the time he commenced this litigation in 2022 because he had been a member of JCOPE as recently as earlier that same calendar year (*see* 4th Dept Record on Appeal ["R"] 20 [January 2022 letter from Lavine in which he stated "I am not acting on behalf of the Commission"], 23–24 [June 2022 letter from JCOPE identifying Lavine as a member]).

Plainly, then, as a matter of this Court's well-settled standing jurisprudence, Lavine lacked standing to bring this lawsuit. At the time he filed his complaint, Lavine had no "legal stake in the matter being adjudicated" (*Society of Plastics Indus.*, 77 NY2d at 772) because he was barred, by statute, from assuming the role for which he had been nominated. And Lavine, in his motion for leave to appeal to this Court, does not argue otherwise. Nor does Lavine contend that any other decisions of this Court or of the Departments of the Appellate Division render the statutory bar inapplicable or would allow him to maintain his lawsuit notwithstanding the bar's application.

Instead, Lavine takes issue only with the second of the two standing arguments raised by the defendants in the Fourth Department: the argument that, even putting the statutory bar to one side, Lavine was not concretely and legally harmed by the rejection of his nomination because he was not entitled as of right to be named a member of the Ethics Commission. That argument, however, is squarely supported by this Court's cases, which hold that "public offices are created for the benefit of the public, and not granted for the benefit of the incumbent, and the office holder has no contractual, vested or property right in the office" (*Lanza v Wagner*, 11 NY2d 317, 324 [1962], *appeal dismissed*, 371 US 74 [1962], *cert denied*, 371 US 901 [1962]). *A fortiori*, a mere nominee has no legal interest in the position, either. Rejection of a nomination—even a nomination that (unlike here) the nominee is *not* statutorily barred from accepting—thus does not cause the nominee an injury in fact for standing purposes.

Lavine does not cite any case from this Court to the contrary. Nor does he demonstrate that any Appellate Division Department outside the Fourth Department would find that (ignoring the statutory bar) the rejection of his nomination caused him to suffer an injury in fact. The

only decision Lavine cites from another Department, *Urban Justice Center v Pataki* (38 AD3d 20 [1st Dept 2006]), does not address the standing of a nominee for a state agency position to challenge the rejection of his nomination (Valentino Aff in Support of Motion, at ¶ 21). *Urban Justice Center* addresses the standing of advocacy organizations and legislators to contest certain practices of the Legislature and of the Governor that allegedly impaired certain legislators' ability to participate in the legislative process (38 AD3d at 22).

Lavine asserts that the Fourth Department itself has, on two prior occasions, recognized standing on the part of litigants similarly situated to him in this case: *Dekdebrun v Hardt* (68 AD2d 241 [4th Dept 1979]) and *Phelan v City of Buffalo* (54 AD2d 262 [1976]) (Valentino Aff in Support of Motion, at ¶ 20). Thus, according to Lavine, there is a conflict between those prior Fourth Department decisions and the Fourth Department's decision here (Valentino Aff in Support of Motion, at ¶ 20). Lavine is incorrect, and his reliance on those two prior Fourth Department decisions is unavailing.

There is no conflict between the Fourth Department's prior decisions in *Dekdebrun* and *Phelan* (neither of which were reviewed by

this Court) and its decision below. Only *Dekdebrun* involves a challenge made by a rejected nominee to a state agency; *Phelan* involved a candidate for elected office (54 AD2d at 263). And the standing issue litigated in *Dekdebrun* was highly idiosyncratic and completely unlike the standing issue here. The Fourth Department framed the question presented in that case as "whether plaintiff has standing to bring this declaratory judgment action notwithstanding that plaintiff has not recorded [certain documentation] with the office of the Secretary of State" (68 AD2d at 245). It was a case about paperwork.

Moreover, any potential conflict between or among decisions of the Fourth Department of the sort that Lavine (incorrectly) posits would affirmatively counsel *against* leave to appeal to this Court. That sort of supposed intra-departmental inconsistency would suggest that the issues that are the subject of the alleged conflict are not yet ripe for review in this Court, and that they instead should be allowed to further percolate within the Fourth Department so as to allow the Fourth Department to settle on a definitive position that this Court can then evaluate if necessary (*cf.* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.6 [10th ed. 2013] [explaining that the existence of conflicts between panels

of a single federal circuit court of appeals generally counsels against certiorari review by the United States Supreme Court]). If indeed the Fourth Department's position on the standing issue that Lavine discusses is unsettled (as Lavine suggests), then further percolation would give that court the opportunity to align itself with what Lavine considers to be the appropriate stance on the issue; and if the court ultimately did so, it would eliminate the need for this Court to intervene and prescribe that rule itself.

All of that said, regardless of the state of standing jurisprudence in the Appellate Division generally, in this case specifically the Court would have no legitimate occasion to reach the particular standing issue that Lavine discusses in his motion for leave, *i.e.*, whether a nominee to a state agency suffers an injury in fact if his or her nomination is rejected. Whatever the resolution of that question might be, Lavine still would lack standing due to the absence of an injury in fact because, at the time he initiated this case, he was statutorily barred from joining the Ethics Commission (*supra* 4–6). He suffered no injury in fact because his nomination could not lawfully have been accepted.

Finally on standing, adhering to the black-letter precedent under which Lavine lacked standing to commence this lawsuit does not run afoul of the intention this Court once stated (in a case involving taxpayer standing) "to recognize standing where * * * the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action" (Valentino Aff in Support of Motion, at ¶ 22, quoting *Boryszewski v Brydges*, 37 NY2d 361, 364 [1975]). As noted in the briefing below, insofar as Lavine's challenge complains of a purported usurpation of senatorial power, members of the Senate may well have standing to mount the challenge that Lavine did: to sue on the ground that Executive Law § 94 violates the New York State Constitution insofar as it provides that nominees must be approved by the Independent Review Committee—rather than by the Senate—before they may be appointed (*see* 4th Dept Brief for Respondent Hochul, at 30; 4th Dept Brief for Respondent Heastie, at 14 n 3).

B. The Fourth Department's Decision Is A Poor Vehicle For Reviewing Any Standing Issues That Might Be Perceived As Leaveworthy In The Abstract

In the event that this Court perceives any of the standing issues presented by the Fourth Department's decision to be leaveworthy in the

abstract—which, as shown above, it should not (*supra* 4–11)—Lavine's motion for leave to appeal still should be denied. This case is a poor vehicle for reviewing any such issues, because even if the case were accepted for plenary review and Lavine were found to have standing, the ultimate outcome of the case in this Court would still be the same: Lavine's constitutional challenge to Executive Law § 94's appointment process would fail, as Speaker Heastie demonstrated in his detailed discussion of the merits in his brief to the Fourth Department (4th Dept Brief for Respondent Heastie, at 15–45), and as Supreme Court, in its cogent opinion, so held (R 1.2–1.9). Accordingly, any ruling that this Court might make on the issue of standing would be relegated to *dicta*. The Court should adhere to its usual practice of reserving its scarce leave-docket resources for cases, unlike this one, in which the supposedly leaveworthy issues are likely case-dispositive.

CONCLUSION

Lavine's motion for leave to appeal should be denied.

September 3, 2024

Respectfully submitted,

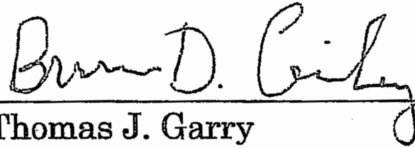

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Exhibit B

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STATE OF NEW YORK; KATHY HOCHUL, as Governor; ANDREA STEWART-COUSINS, as Temporary President of the Senate; ROBERT ORTT, as Minority Leader of the Senate; CARL HEASTIE, as Speaker of the Assembly; WILLIAM BARCLAY, as Minority Leader of the Assembly; and the INDEPENDENT REVIEW COMMITTEE,

Defendants-Respondents.

Court of Appeals Motion No. 2024-609

Fourth Dep't Dkt. No. CA 23-01332

Onondaga County Index No. 007623/2022

GOVERNOR KATHY HOCHUL'S MEMORANDUM OF LAW OPPOSING GARY J. LAVINE'S MOTION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS FROM THE FOURTH DEPARTMENT'S MEMORANDUM AND ORDER ENTERED ON JULY 26, 2024

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PRELIMINARY STATEMENT

Defendant-Respondent Governor Kathy Hochul (the "Governor") respectfully submits this Memorandum of Law in opposition to the motion by Plaintiff-Appellant Gary J. Lavine ("Lavine") for leave to appeal to the New York Court of Appeals from the Memorandum and Order entered by the New York State Supreme Court, Appellate Division, Fourth Department, on July 26, 2024 (the "Memorandum and Order"), which determined Lavine lacked standing to challenge the constitutionality of the process and structure prescribed by New York Executive Law § 94 for appointing members of the Commission on Ethics and Lobbying in Government (the "Ethics Commission") and affirmed the dismissal of his Verified Complaint (the "Complaint").

Pursuant to the Rules of the New York Court of Appeals, leave to appeal is to be granted in cases that raise "novel [issues] of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4). Lavine's proposed appeal satisfies none of these criteria. This Court's well-settled jurisprudence demonstrates that Lavine indeed lacked standing. Unable to claim any entitlement to membership on the Ethics Commission, Lavine's objections to its appointment structure are inadequate to maintain it caused him to sustain any injury in fact. At best, this action alleges violations of prerogatives that

purportedly belong to the New York State Senate and to the elected officials assigned to nominate prospective Commission members, not to Lavine himself.

Further, even if Lavine did have standing (which he did not), his challenge to the Ethics Commission's appointment structure lacks merit regardless. Consistent with this Court's controlling decisions in *Sturgis v. Spofford*, 45 N.Y. 446 (1871), and *Lanza v. Wagner*, 11 N.Y.2d 317 (1962), nothing in the New York Constitution prohibits Executive Law § 94's assignment of authority to the "Independent Review Committee," consisting of the deans of New York's accredited law schools or their designees, to approve or reject the nominations of prospective Ethics Commission members pursuant to the Review Committee's evaluation of nominees' credentials and capacity for impartial and even-handed decision-making. Because the Fourth Department correctly applied this Court's precedent in affirming the action's dismissal, Lavine's motion for leave to appeal should be denied.

STATEMENT OF FACTS

A. The process established by Executive Law § 94 for appointing members of the Ethics Commission

Governor Hochul's Brief to the Fourth Department ("Governor Br.") details the enactment of the Ethics Commission Reform Act of 2022 (L.2022, c, 56, Part QQ, § 2, the "2022 Act"), which amended Executive Law § 94 to create

the Ethics Commission, which itself replaced the former Joint Commission on Public Ethics ("JCOPE"). Governor Br. pp. 3-6.

The 2022 Act empowered "the governor, speaker of the assembly, temporary president of the senate, minority leader of the senate, minority leader of the assembly, comptroller, and the attorney general" to choose nominees for the new Ethics Commission. N.Y. EXEC. LAW § 94(2)(b). Those nominees, in turn, are subject to approval or rejection by the Independent Review Committee (the "Review Committee"), which consists of "the American Bar Association credited New York state law school deans or interim deans, or their designee who is an associate dean of their respective law school." *Id.* § 94(2)(c), (3)(a)-(b).

In June 2022, the Review Committee published procedures — including interviews, background checks, and an opportunity for public comment — by which it would "review the qualifications of the nominated candidate[s]" to join the Ethics Commission. R. 172-75. At that time, the Review Committee also announced it would consider, among other things, whether a nominee "clearly demonstrated ability to be impartial and independent, be fair and even-handed, and decide matters based solely on the law and facts presented." R. 172.

Pursuant to the Ethics Commission's appointment structure established by the 2022 Act, nominees whom the Review Committee "deems to meet the qualifications necessary for the services required based on their

background and expertise that relate to the candidate's potential service on the commission shall be appointed as a commission member." N.Y. EXEC. LAW § 94(3)(d). If the Review Committee rejects a nominee, the nominating official "shall nominate a new candidate." *Id.*

B. The Review Committee unanimously rejects Senator Ortt's nomination of Gary Lavine

In August 2022, State Senate Minority Leader Robert Ortt nominated Gary Lavine to serve on the Ethics Commission. R. 12. Lavine had previously served as a member of JCOPE. R. 15.

On September 1, 2022, the Review Committee's Chair, Anthony Crowell, advised Senator Ortt's Chief Counsel in writing that the Review Committee "unanimously determined not to confirm" Lavine's nomination. R. 12. According to Crowell, "a series of noteworthy concerns led to [the] determination," and Lavine's interview and written submission to the Review Committee specifically gave "the appearance of an inability to act impartially, fairly, and even-handedly, solely with respect to service on the new Commission." *Id.* Because the Review Committee had rejected Lavine's nomination, Crowell requested that Senator Ortt present another nominee. R. 12-13. To date, Senator Ortt has not done so.

C. The Trial Court's dismissal of Lavine's challenge to the Ethics Commission's appointment structure

Three weeks after the Review Committee rejected his nomination, Lavine alone commenced this lawsuit in Onondaga County Supreme Court. R. 4. Lavine's Complaint alleged, in pertinent part, that Executive Law § 94

> violates the [New York State] Constitution to the extent i) the Senate's prerogative of advice and consent is delegated to a cohort of private citizens in violation of Article III and Article V, Section Four and ii) the statute purports to amend the Constitution in violation of Article XIX.

R. 8.[1]

In response, the Governor, State Senator Andrea Stewart-Cousins, Assembly Speaker Carl Heastie, and the Independent Review Committee moved in early December 2022 to dismiss the Complaint. R. 38, 60-62, 233-34, 648-49. All these Defendants contended that the Complaint failed to state a cause of action, and the Governor and the Review Committee particularly contended that Lavine lacked standing to challenge the Ethics Commission's appointment structure. R. 227, 630-32.

Senator Ortt and New York State Assemblymember William Barclay, by contrast, served only an "Attorney Affirmation" signed by their counsel (R. 35-

[1] Lavine's Complaint also included a cause of action that alleged the Review Committee's rejection of his nomination violated his right to freedom of speech (R. 8), but Lavine withdrew that cause of action before the Trial Court could evaluate its merit (R. 697).

36), who stated simply that Senator Ortt and Assemblymember Barclay did "not object to [Lavine's] request for relief to the extent he demands to be seated as a member of" the Ethics Commission (R. 35), and did not otherwise answer any of the Complaint's particular allegations.

The motions to dismiss were argued before Onondaga County Supreme Court (the "Trial Court," Hon. Joseph E. Lamendola, J.S.C.) on December 22, 2022. R. 820-60. Having served no papers in opposition to those motions, counsel for Senator Ortt and Assemblymember Barclay stated simply:

> Senator Ortt is the one who nominated Mr. Lavine. And Minority Leader Barclay also supports the appointment of Mr. Lavine. So we welcome any ruling that would result in the appointment of Mr. Lavine.

R. 858. Other than identifying himself to the Court and referencing his travel plans for the Christmas holiday in the face of an approaching snowstorm (R. 824), counsel for Senator Ortt and Assemblymember Barclay offered no other substantive argument to Supreme Court.

On February 9, 2023, the Trial Court entered a Decision and Order (the "Order," R. 1.2-1.10) that dismissed the Complaint, and "declar[ed] that Executive Law § 94 is constitutional and that it was proper for the Independent Review Committee to reject or approve nominees in accordance with the provisions of Executive Law § 94[.]" R. 1.9. In doing so, the Trial Court

acknowledged, but did not evaluate or decide, the Governor's objection to Lavine's claimed standing. R. 1.3 n.1.

D. The Fourth Department's affirmance of the dismissal of Lavine's Complaint, upon determining Lavine lacked standing

On February 22, 2023, Lavine tried to appeal directly to the New York Court of Appeals from the Trial Court's Order. R. 1-1.12. This Court concluded a direct appeal was unavailable for jurisdictional reasons, so it transferred Lavine's appeal to the Fourth Department. R. 1.13.

After full briefing and argument, the Fourth Department entered its Memorandum and Order deciding Lavine's appeal on July 26, 2024. Exhibit A to Affirmation of John L. Valentino, Esq., dated August 15, 2024 ("Valentino Ex. A"). The Fourth Department concluded that Lavine, "the *sole* party challenging the constitutionality of Executive Law § 94 in this case, lacks standing," because he "did not suffer an injury-in-fact" from the rejection of his candidacy for appointment to the Ethics Commission. Valentino Ex. A, pp. 2, 3 (emphasis added). For that reason, the Fourth Department determined the Trial Court had "properly granted" the motions to dismiss the Complaint, but "should have done so on the "threshold determination" of lack of standing rather than on the merits[.]" *Id.* p. 2 (quoting *Matter of Borrello v. Hochul*, 221 A.D.3d 1484, 1484 (4th Dep't 2023), *appeal dismissed*, 41 N.Y.3d 1006 (2024)).

Because the Fourth Department's disposition of Lavine's appeal was both correct and entirely consistent with this Court's jurisprudence, his motion for leave to appeal to this Court from the Fourth Department's Memorandum and Order should be denied.

ARGUMENT

POINT I

APPLYING THIS COURT'S PRECEDENTS, THE FOURTH DEPARTMENT CORRECTLY CONCLUDED LAVINE LACKS STANDING

Before the Fourth Department, Lavine contended he had "standing to bring this action since [he had] been manifestly harmed by the unconstitutional delegation" of review and approval of his Ethics Commission nomination to the Review Committee. Gary J. Lavine's Brief dated November 3, 2023 ("Lavine Br."), at p. 17. Stated differently, in Lavine's view, the Review Committee's prerogative (and its determination) to reject his nomination, as opposed to an appointment process by which nominees would require confirmation by the New York State Senate, was sufficient to afford him standing to challenge Executive Law § 94's enacted mechanism for populating the Ethics Commission. *Accord*, Valentino Aff. ¶¶ 18-20.

Lavine is mistaken. Invoking this Court's past decisions, the Fourth Department explained in its Memorandum and Order:

> "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, *when challenged*, must be considered at the outset of any litigation" .... "A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within [that plaintiff's] zone of interest" .... "The existence of an injury in fact — an actual legal stake in the matter being adjudicated — ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution[.]"

Valentino Ex. A, pp. 2-3 (emphasis in original) (quoting *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001); *Soc'y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769, 772 (1991)).

Lavine's unfulfilled desire to attain membership on the Ethics Commission and his objection to the Review Committee's role in disapproving his nomination, without more, do not qualify as an injury in fact sufficient to confer standing upon him to challenge the Commission's appointment structure. Injury could be credibly claimed by the Senate itself, which Lavine claims should be able to confirm Ethics Commission appointees, and by elected officials charged with nominating the Commission's members, but none of them have prosecuted the challenge that Lavine improperly does here.

In New York, the requirement of standing incorporates "a ban on generalized grievances more appropriately addressed by the legislative branches[.]" *Soc'y of Plastics Indus.*, 77 N.Y.2d at 773. *Accord*, *Rudder v. Pataki*,

93 N.Y.2d 273, 280 (1999) (noting "[g]rievances generalized to the degree that they become broad policy complaints ... are best left to the elected branches"). For that reason, an injury in fact sufficient to confer standing entails having "suffer[ed] 'special damage, different in kind and degree from the community generally,'" as a result of a challenged action. *Matter of Colella v. Bd. of Assessors of County of Nassau*, 95 N.Y.2d 401, 410 (2000) (quoting, in part, *Matter of Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of Town of N. Hempstead*, 69 N.Y.2d 406, 413 (1987)). Absent belonging to "the class of persons whose rights are claimed to have been violated," therefore, one "does not have standing to assert [those] rights[.]" *Urowsky v. Bd. of Regents of Univ. of State of N.Y.*, 38 N.Y.2d 364, 369 (1975).

Applying these principles, Lavine's objection to the Ethics Commission's appointment structure is nothing more than a generalized grievance inadequate to support standing, because it lacks differentiation from the injury millions of other New Yorkers could claim from having received no selection to join the Commission's membership. Such is the outcome counseled by analogy to this Court's election law jurisprudence, which has held that a disappointed candidate denied the nomination of a political party to which the candidate does not belong generally "lacks standing to challenge that party's compliance with its own rules" in the endorsement process. *Matter of Fehrman v. N.Y. State Bd. of*

Elections, 10 N.Y.3d 759, 760 (2008). Only a political party's own registrants can play any role in selecting that party's candidates for public office, this Court has reasoned, so therefore only party members and the rare candidate who can claim some absolute legal entitlement to the party's nomination can "challenge candidates for party offices or candidates designated as a result of a failure to follow party rules[.]" *Scoville v. Cicoria*, 65 N.Y.2d 972, 974 (1985) (citing, *inter alia*, *Matter of Stempel v. Albany County Bd. of Elections*, 97 A.D.2d 647, 648 (3d Dep't), *aff'd*, 60 N.Y.2d 801 (1983)).

Similarly, Lavine cannot claim standing here, because: (1) he "has never argued he has an inalienable 'right'" to serve on the Ethics Commission (Valentino Aff. ¶ 18), and indeed, he does not have one; (2) he alleges a legislative prerogative to confirm Commission members rests with the Senate, not himself; and (3) Lavine is not among the elected officials whom Executive Law § 94(2)(b) charges with nominating Commission members.

The few cases upon which Lavine relies in support of his motion for leave to appeal do not compel a different conclusion. *Matter of Dekdebrun v. Hardt*, 68 A.D.2d 241 (4th Dep't 1979), and *Phelan v. City of Buffalo*, 54 A.D.2d 262 (4th Dep't 1976) (both cited at Valentino Aff. ¶ 20), held litigants interested in a public office had standing to challenge alleged limitations on their eligibility to seek that office. Here, by contrast, Lavine claims not that the Executive Law

precludes his own eligibility for appointment to the Ethics Commission, but rather that the Commission's appointment structure contravenes the alleged prerogatives of others to select and approve nominees.[2]

Urban Justice Center v. Pataki, 38 A.D.3d 20 (1st Dep't 2006), and *Powell v. McCormack*, 395 U.S. 486 (1969) (both cited at Valentino Aff. ¶ 21), are also inapposite, because they concern standing principles that uniquely govern lawsuits by an elected legislator, which Lavine is not. Further, unlike the plaintiff in *Powell*, who had standing to enforce his right to be seated in Congress as the representative of a district from which he had been duly elected, Lavine can claim no similar entitlement to serve on the Ethics Commission. Even if his Complaint had merit (which it does not), it would contemplate his appointment to the Commission would require the approval of the Senate, which could properly exercise discretion to reject his nomination as the Review Committee did.

Critically, "[t]his is not a case where to deny standing to [Lavine] would be to insulate governmental action from scrutiny[.]" *Soc'y of Plastics*

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[2] Before the Trial Court and the Fourth Department, the Governor did contend Lavine lacked eligibility to serve on the Ethics Commission, because Lavine had served as a JCOPE member within two years before the Review Committee evaluated his Ethics Commission nomination. R. 227, Governor Br. pp. 30-31. Now that more than two years have passed since his service on JCOPE concluded, Lavine would be eligible to join the Ethics Commission today, but regardless, he lacks standing to challenge the Commission's appointment structure for the reasons set forth herein, consistent with the Fourth Department's conclusion that he had not sustained the required injury in fact.

Indus., 77 N.Y.2d at 779; *contra* Valentino Aff. ¶ 23.[3] For starters, "'[t]he assumption that if [Lavine has] no standing to sue, no one would have standing, is not a reason to find [he has] standing.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982)). Even so, "the class of persons whose rights are claimed to have been violated" and who could plausibly challenge the Ethics Commission's appointment structure could include the Senate, and also the elected officials tasked by Executive Law § 94(2)(b) with nominating prospective Commission members. *Urowsky*, 38 N.Y.2d at 369.

Yet none of them joined Lavine as a plaintiff in this action, which Lavine "alone" commenced and prosecuted. Valentino Ex. A, p. 2.[4] Senator Ortt (who had nominated Lavine for the Ethics Commission) and Assemblymember Barclay, both represented by the same counsel, did not even serve a formal answer

[3] *Boryszewski v. Brydges*, 37 N.Y.2d 361 (1975) (quoted at Valentino Aff. ¶ 22), does not aid Lavine's standing argument, because this Court has disagreed that *Boryszewski* created any "broad right of standing on behalf of taxpayers to seek judicial review of government action which is said to be unconstitutional[.]" *Wein v. Comptroller of State of N.Y.*, 46 N.Y.2d 394, 396 (1979). Rather, *Boryszewski* only "abandon[ed] ... an old constitutional impediment" to taxpayer standing (*Wein*, 46 N.Y.2d at 397), and after this Court decided *Boryszewski*, New York State Finance Law Article 7-A was enacted to establish procedures and requirements for invoking taxpayer standing. Lavine has never purported to satisfy the requirements of State Finance Law Article 7-A, and has never claimed taxpayer standing in this action.

[4] Given how the Fourth Department emphasized in its Memorandum and Order that Lavine "alone" challenged the Ethics Commission's appointment structure as the "sole" plaintiff in this action (Valentino Ex. A, p. 2), Lavine's assertion that the Fourth Department "implicitly held that Senate Minority Leader Ortt (as well as Assembly Minority Leader Barclay) did not have standing to pursue" that challenge lacks credibility. *See* Valentino Aff. ¶ 15.

to the Complaint. Instead, their counsel simply served an attorney affirmation that stated Senator Ortt and Assemblymember Barclay did "not object" to Lavine's appointment to the Commission (R. 35), and confirmed the same during oral argument before the Trial Court on motions to dismiss the Complaint (R. 858).

"To preserve an argument for review by" the Court of Appeals, a litigant must "'raise the specific argument[ ]' in Supreme Court 'and ask the court to conduct that analysis' in the first instance[.]" *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84, 89 (2019) (quoting, in part, *Konstantin v. 630 Third Ave. Assocs. (Matter of N.Y. City Asbestos Litig.)*, 27 N.Y.3d 1172, 1176 (2016)). Having offered the Trial Court no arguments to support Lavine's standing or the merits of his challenge to the constitutionality of the Ethics Commission's appointment structure, Senator Ortt and Assemblymember Barclay have failed to preserve any such arguments they may make now to this Court of Appeals in a belated and untimely effort to bolster Lavine's motion for leave to appeal from the Fourth Department's Memorandum and Order. *Accord*, *Kuriansky v. Bed-Stuy Health Care Corp.*, 73 N.Y.2d 875, 876 (1988) (concluding the defendants' constitutional argument "was not preserved for [Court of Appeals] review," absent evidence in the record that "they made the argument they now advance on appeal" before the trial court); *Barber v. Dembroski*, 54 N.Y.2d 648, 650 (1981) (finding

the defendant's constitutional arguments "not raised in his answer" were "not reviewable" in the Court of Appeals).

Simply put, pursuant to application of this Court's well-settled standing jurisprudence, Lavine's challenge to the Ethics Commission's appointment structure presents only a generalized policy grievance, in that he can claim no greater right to serve on the Ethics Commission than millions of other New Yorkers, and would have no guarantee of Senate confirmation and appointment to the Commission even if he were to prevail in this action. Only the Senate, which Lavine alleges should confirm Ethics Commission nominees, and the elected officials charged with selecting nominees for the Review Committee's evaluation could credibly claim the Commission's appointment structure has caused them to sustain any injury in fact. The Fourth Department correctly concluded Lavine lacks standing to maintain this action, and he should be denied leave to appeal to this Court from the Memorandum and Order.

POINT II

EVEN IF HE HAD STANDING, WHICH HE DOES NOT, LAVINE'S CHALLENGE TO THE ETHICS COMMISSION'S APPOINTMENT STRUCTURE FAILS ON THE MERITS

Lavine also should be denied leave to appeal for a second, independent reason: because the Ethics Commission's challenged appointment structure passes constitutional muster pursuant to this Court's controlling

precedent. Apart from claiming standing, which he does not have, Lavine's motion makes several contentions about his lawsuit, but the Governor's Brief to the Fourth Department details why all of them lack merit.

First, Lavine faults the Ethics Commission's appointment structure for "delegation" of what his counsel calls "the Senate's core legislative power of *advice & consent*" to the Review Committee, which Lavine claims to violate Articles III, V, and XIX of the New York Constitution. Valentino Aff. ¶¶ 4-5, 10 (emphasis in original). In both *Sturgis v. Spofford*, and *Lanza v. Wagner*, *supra*, however, this Court previously upheld statutes that delegated the power to appoint members of certain public boards and commissions to individuals who are neither elected to public office nor employed by the State or a public corporation. *Accord*, Governor Br. pp. 13-20. Lavine has offered this Court no reason to ignore or contravene these precedents, which counsel that "the exercise of the [Review Committee's] power of appointment" of Ethics Commission members "is not a function of such essentially legislative character as to fall afoul of" Article III, § 1, of the New York Constitution, which vests the State's legislative power in the Senate and the Assembly. *Lanza*, 11 N.Y.2d at 333.

Second, Lavine asserts the Trial Court "held that the Governor and Legislature are empowered to establish any protocol for appointment they deem appropriate" for Ethics Commission members. Valentino Aff. ¶ 11. The Trial

Court never made such a sweeping assertion, however. Rather, the Trial Court applied and confirmed what this Court already held in *Sturgis* and *Lanza*: that absent some contrary limitation in the New York Constitution, the "'the power of appointment'" to a public board or commission is "'not restricted'" only to elected officials or public employees. R. 1.7-1.8 (quoting *Sturgis*, 45 N.Y. at 450). Even so, the Trial Court's reasoning does not currently survive, because the Fourth Department modified the Trial Court's Decision and Order by affirming the Complaint's dismissal only for Lavine's "lack of standing rather than on the merits[.]" Valentino Ex. A, p. 2.

Third, Lavine maintains upholding the constitutionality of the Ethics Commission's appointment structure entails reliance upon a former provision of New York Constitution Article IX that was repealed in 1963. Valentino Aff. ¶ 11. The 1963 simplification of Article IX did not accompany any claimed intent to abrogate the holdings of *Sturgis* or *Lanza*, however. Governor Br. p. 21. Moreover, the current Article IX, § 3(a)(3), confirms that nothing in Article IX restricts the State's power to regulate matters of statewide concern, which would certainly include how the State "administer[s], enforc[es], and interpret[s] New York state's ethics and lobbying laws" via the operation of the Ethics Commission. N.Y. EXEC. LAW § 94(1)(a). *Accord*, Governor Br. pp. 21-22 (citing, *inter alia*, *Matter of Town of Islip v. Cuomo*, 64 N.Y.2d 50, 56 (1984)).

Fourth, Lavine purports the Trial Court held the Review Committee "exercise[s] a *de facto* power of *appointment* and that the power of *appointment* may be delegated to private citizens" and "even to individuals who are not citizens of [New York] state." Valentino Aff. ¶ 12 (emphasis in original). Again, the Trial Court did not say this. Rather, the Trial Court expressly recognized that, pursuant to Article V, § 4, of the New York Constitution, the Senate retains the power to give advice and consent by confirming appointed judges and the heads of the twenty permanent departments of the Executive Branch. R. 1.5-1.6. Because "[a]n appointment to the Ethics Commission is neither an appointment to a head of department of the executive branch, nor an appointment to the judiciary," however, the Trial Court was correct that the Commission's appointment structure did not divest any constitutional "power of the Senate[.]" R. 1.6.

Hence, even if Lavine did have standing to prosecute this action, which he did not, Lavine's motion does not offer any compelling reason why the Ethics Commission's appointment structure fails to satisfy any provision of the New York Constitution or this Court's controlling precedents in *Sturgis* and *Lanza*. Leave to appeal should be denied on account of the Complaint's lack of merit.

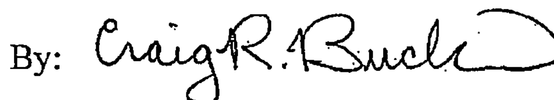
CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Governor's Brief to the Fourth Department, the Governor respectfully requests that

the New York Court of Appeals deny Gary J. Lavine leave to appeal to the Court of Appeals from the Fourth Department's Memorandum and Order entered on July 26, 2024. The Governor joins in any additional contentions that her co-Defendants offer in opposition to Lavine's motion for leave.

Dated: Buffalo, New York
August 29, 2024

PHILLIPS LYTLE LLP

By: 

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COURT OF APPEALS OF THE STATE OF NEW YORK

GARY J. LAVINE,

Respondent,

v.

ROBERT ORTT, AS SENATE MINORITY LEADER, AND WILLIAM BARCLAY, AS ASSEMBLY MINORITY LEADER,

Appellants,

and

STATE OF NEW YORK, KATHY HOCHUL, AS GOVERNOR, ANDREA STEWART-COUSINS, AS TEMPORARY PRESIDENT OF THE SENATE, CARL E. HEASTIE, AS SPEAKER OF THE ASSEMBLY, AND THE INDEPENDENT REVIEW COMMITTEE,

Respondents.

AFFIRMATION OF SERVICE

Appellate Division, Fourth Department Case No. CA 23-01332

Supreme Court, Onondaga County Index No. 007623/22

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NEW YORK STATE COURT OF APPEALS

I, Brian D. Ginsberg, an attorney admitted to practice in the courts of the State of New York and a partner in Harris Beach PLLC, counsel for respondent Carl E. Heastie, as Speaker of the Assembly, in the above-captioned case, hereby swear and affirm under penalty of perjury that,

on September 9, 2024, I served one copy of the within Memorandum of Law for Respondent Carl E. Heastie, as Speaker of the Assembly, in Opposition to Motion for Leave to Appeal on the parties to this appeal by sending it via first-class mail to the following addresses:

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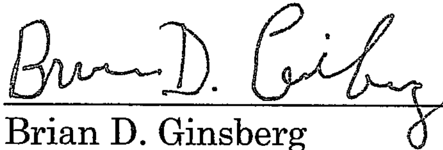

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