STATE OF NEW YORK : COURT OF APPEALS
GARY J. LAVINE,

Plaintiff-Appellant,

v.

ROBERT ORTT, as Senate Minority Leader, and WILLIAM BARCLAY, Assembly Minority Leader,

Defendants-Appellants,

and

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

Defendants-Respondents.

Court of Appeals Motion No. 2024-622

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

Onondaga County Index No. 007623/2022

AFFIRMATION OF CRAIG R. BUCKI ON BEHALF OF GOVERNOR KATHY HOCHUL IN OPPOSITION TO MOTION BY SENATE MINORITY LEADER ROBERT ORTT AND ASSEMBLY MINORITY LEADER WILLIAM BARCLAY FOR LEAVE TO APPEAL

CRAIG R. BUCKI subscribes and affirms under the penalties of perjury as follows, pursuant to CPLR 2106:

1. I am admitted to practice law in the Courts of the State of New York, and I am a Partner in the law firm of Phillips Lytle LLP, counsel to Governor Kathy Hochul (the "Governor") in the above-captioned action. As such, I am fully familiar with the facts stated in this Affirmation, except for those stated upon information and belief, which I believe to be true.

2. I make this Affirmation in opposition to the motion dated August 26, 2024, for leave to appeal to the New York Court of Appeals made by New York State Senate Minority Leader Robert Ortt and New York State Assembly Minority Leader William Barclay from the Memorandum and Order entered by the Appellate Division, Fourth Department, on July 26, 2024, in this action. A true and accurate copy of that Memorandum and Order is Exhibit A to the Affirmation of W. Bradley Hunt, Esq., dated August 26, 2024 ("Hunt Affirmation" or "Hunt Aff."), and offered in support of Senator Ortt's and Assemblymember Barclay's motion for leave to appeal.

3. **Exhibit A** is a true and accurate copy of the Governor's Memorandum of Law dated August 29, 2024, and previously offered in opposition to Plaintiff-Appellant Gary J. Lavine's own motion for leave to appeal to this Court from the Fourth Department's Memorandum and Order.

4. **Exhibit A** is incorporated into this Affirmation as if fully set forth herein, and the Governor's Statement of Facts and contentions set forth in **Exhibit A** in opposition to Lavine's motion for leave to appeal likewise oppose Senator Ortt's and Assemblymember Barclay's motion for leave to appeal with equal force.

5. The contentions offered in the Hunt Affirmation do not support leave to appeal for the following additional reasons.

A. Senator Ortt's and Assemblymember Barclay's contentions cannot support leave to appeal, because they are not preserved for appellate review.

6. Critically, Senator Ortt and Assemblymember Barclay failed to preserve for appellate review any of their contentions offered in support of their motion for leave to appeal. *Accord*, Ex. A, pp. 13-15. Their motion should be denied for this reason alone.

7. In early December 2022, the Governor, State Senator Andrea Stewart-Cousins, Assembly Speaker Carl Heastie, and the Independent Review Committee moved to dismiss the Complaint in this action. R. 38, 60-62, 233-34, 648-49.

8. In response, Senator Ortt and Assemblymember Barclay served only an "Attorney Affirmation" signed by their counsel (R. 35-36), 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 respond to any of the Complaint's particular allegations.

9. When 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, counsel for Senator Ortt and Assemblymember Barclay simply stated his clients "welcome[d] any ruling that would result in the

appointment of Mr. Lavine" to the New York State Commission on Ethics and Lobbying in Government (the "Ethics Commission"), and offered no other substantive argument. R. 858.

10. "In general, arguments, including constitutional challenges, are preserved *only* if presented *at the trial court level*," and "[t]o demonstrate that a question of law is presented for this Court's review, a party must show that it 'raise[d] the *specific* argument *in Supreme Court* and *ask[ed] the court to conduct that analysis* in the first instance.'" *Henry v. N.J. Transit Corp.*, 39 N.Y.3d 361, 367 (2023) (emphasis added) (quoting, in part, *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84, 89 (2019)).

11. Here, aside from advising the Trial Court that they "did not object to" and "welcome[d]" Lavine's appointment to the Ethics Commission (R. 35, 858), Senator Ortt and Assemblymember Barclay offered no arguments concerning Lavine's standing, the constitutionality of the Ethics Commission's appointment structure, or any question of law to the Trial Court, "where the record could have been further developed had the contentions been raised at Special Term." *Lefkowitz v. Lebensfeld*, 51 N.Y.2d 442, 448 (1980).

12. Indeed, counsel for Senator Ortt and Assemblymember Barclay admits that their reasons "for opposing the constitutionality" of the Ethics Commission's appointment structure "are somewhat different" from Lavine's.

Hunt Aff. ¶ 20. Senator Ortt's and Assemblymember Barclay's failure to raise any of their "somewhat different" reasons for opposing the Ethics Commission's appointment structure to the Trial Court denied the Governor and other Defendants an opportunity for briefing and argument in response, and deprived the Trial Court of the opportunity to evaluate those reasons pursuant to a complete record. *Id.*

13. Contrary to the assertion of counsel for Senator Ortt and Assemblyman Barclay, moreover, Lavine was indeed "'the sole party challenging the constitutionality of [New York] Executive Law § 94 in this case." Hunt Aff. ¶ 24 (quoting Hunt Ex. A, p. 2).

14. "[A] pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3013. At no time did Senator Ortt or Assemblymember Barclay serve a formal answer to Lavine's Complaint, let alone any pleading setting forth a cross-claim or counterclaim seeking to invalidate the Ethics Commission's appointment structure. Much as the Trial Court could not adjudicate any argument that Senator Ortt nor Assemblymember Barclay "never raised in the pleadings" (*Macina v. Macina*, 60 N.Y.2d 691, 693 (1983)), their current arguments "not raised in the pleadings or in its motions before the trial

court" are "not properly before" the New York Court of Appeals (*Quain v. Buzzetta Constr. Corp.*, 69 N.Y.2d 376, 380 (1987)).

15. Further, "[w]hile in some circumstances the Appellate Division has interest of justice jurisdiction to review an issue raised for the first time on appeal, this Court 'ha[s] no power to review either the Appellate Division's exercise of its discretion to reach that issue, *or the issue itself*[.]'" *U.S. Bank*, 33 N.Y.3d at 89 (emphasis added) (quoting, in part, *Hecker v. State*, 20 N.Y.3d 1087, 1087 (2013)).

16. Simply put, with Senator Ortt and Assemblymember Barclay having offered the Trial Court none of the contentions presented in support of their motion for leave to appeal, those contentions are unpreserved for appellate review. Telling the Trial Court they "did not object to" and "welcome[d]" Lavine's appointment to the Ethics Commission (R. 35, 858), without more, was insufficient, and their motion should be denied.

B. This appeal presents no substantial constitutional question, and the Fourth Department's Memorandum and Order should remain in force.

17. Even if Senator Ortt and Assemblymember Barclay had preserved for appellate review their contentions raised in their motion (which they did not), they would not support an appeal to the New York Court of Appeals from the Fourth Department's Memorandum and Order in any event.

18. "An appeal may be taken to the court of appeals as of right from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state" of New York. CPLR 5601(b)(1).

19. In the past, however, this Court has held that, when "[t]he basis of the Appellate Division's affirmance of the dismissal of [a] complaint ... was not the merits of [a constitutional] challenge, but rather on consideration of the standing of [the] parties to bring [the] suit," "it cannot be said that the asserted constitutional issue was a basis of the decision below," and "[t]he appeal to this court on that constitutional issue, therefore, does not lie as of right[.]" *Town of Hardenburgh, Ulster County v. State*, 52 N.Y.2d 536, 540 (1981).

20. So too here, this Court should determine no appeal is available as of right to Senator Ortt or Assemblymember Barclay, in view of the Fourth Department's affirmance of the Complaint's dismissal on account of Lavine's lack of standing. *See* Hunt Ex. A, pp. 2-3.

21. Also, "[a] direct appeal" to the New York Court of Appeals "does not lie [when] no substantial question is presented as to the constitutional validity of a challenged statute[.]" *People* ex rel. *Uviller v. Luger*, 38 N.Y.2d 854, 854 (1976).

22. When "the constitutional issues on the basis of which an appeal is taken are but a restatement of questions whose merit has been clearly adjudicated against the appellant's position," "they must be held to lack the requisite substantiality to sustain [an] appeal as of right under CPLR 5601(b)(1)[.]" *Matter of Tabankin v. Codd*, 40 N.Y.2d 893, 894 (1976). Such is true of the "two novel issues of public importance" that Senator Ortt and Assemblymember Barclay claim their proposed appeal will present. Hunt Aff. ¶ 18.

23. First, Senator Ortt and Assemblymember Barclay claim the New York Court of Appeals should evaluate "whether Executive Law § 94 is constitutional insofar as it gives the IRC [*viz.*, the Independent Review Committee] — a committee composed entirely of unelected, unappointed deans of certain New York law schools — unreviewable veto power over nominees to the [Ethics] Commission." Hunt Aff. ¶ 18.

24. In both *Sturgis v. Spofford*, 45 N.Y. 446 (1871), and *Lanza v. Wagner*, 11 N.Y.2d 317 (1962), 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*, Ex. A, pp. 15-18; Governor's Brief to the Fourth Department ("Governor Br.") at pp. 13-20. Neither Senator Ortt nor Assemblymember Barclay has offered this Court any reason to ignore or

contravene these controlling precedents, which expressly reject Senator Ortt's and Assemblymember Barclay's claimed rationale for disputing the Ethics Commission's appointment structure.

25. Notwithstanding *Sturgis* and *Lanza*, *supra*, Senator Ortt and Assemblymember Barclay also claim that, in *Cuomo v. New York State Commission on Ethics and Lobbying in Government*, 81 Misc. 3d 246 (Sup. Ct. Albany County 2023), *aff'd*, 228 A.D.3d 175 (3d Dep't 2024), the trial court had held appointment of Ethics Commission members by the IRC "violates the [New York] Constitution[.]" Hunt Aff. ¶ 22.

26. In reality, however, *Cuomo* expressly invalidated only those portions of Executive Law § 94, particularly subdivisions (5)(a), (5)(c), (10), and (14), that prescribed the powers of the Ethics Commission, rather than the Commission's appointment structure described in Executive Law § 94(3). 81 Misc. 3d at 266. **Exhibit B** is a true and accurate copy of a Decision and Order entered on December 13, 2023, in which Albany County Supreme Court confirmed a second time (at p. 1) the Executive Law § 94 subdivisions it had annulled, and stayed further briefing as to whether those subdivisions should be severed from Executive Law § 94's other provisions that the Court had not expressly invalidated.

27. Whereas "the court's decision" in *Cuomo* "was rooted in the improper exercise of *executive* power" by the Ethics Commission (Ex. B, p. 1)

(emphasis added), Lavine's Complaint concerns a far different issue, namely whether Executive Law § 94 unconstitutionally delegates *legislative* authority to the IRC. *Accord*, Governor Br. p. 9.

28. The answer to this question is "no," for the reasons articulated in the Governor's Brief to the Fourth Department (at pp. 12-27) and in the Governor's Memorandum of Law (Ex. A, pp. 15-18) that opposed Lavine's motion for leave to appeal. This Court's well-settled holdings in *Sturgis* and *Lanza*, *supra*, justify the Ethics Commission's appointment structure, as well as numerous New York statutes that empower "unelected, unappointed" citizens to select members of a variety of public boards and commissions, some of which have retained the same appointment structure for more than a century. Hunt Aff. ¶ 18; Governor Br. pp. 23-26.

29. Senator Ortt and Assemblymember Barclay contend the "second issue … warrant[ing] review by this Court" is "whether Lavine or Leader Ortt (who nominated Lavine) has standing" in this action. Hunt Aff. ¶ 23.

30. For the reasons described in opposition to Lavine's motion for leave to appeal, the Fourth Department correctly concluded, in accordance with this Court's controlling precedent, that Lavine lacks standing to maintain this action. Ex. A, pp. 8-15.

31. Senator Ortt's standing is immaterial because, as discussed *supra* at ¶¶ 13-16, Senator Ortt never pled any cross-claim, counterclaim, or other cause of action that sought invalidation of the Ethics Commission's appointment structure. Because he "did not raise" any substantive argument opposing Executive Law § 94's constitutionality before the Trial Court, Senator Ortt "failed to preserve the issue … on appeal[.]" *Antone v. Gen. Motors Corp., Buick Motor Div.*, 64 N.Y.2d 20, 31 (1984).

32. For all the foregoing reasons, and for the reasons offered in the Governor's Memorandum of Law dated August 29, 2024, included herewith as **Exhibit A**, Senator Ortt's and Assemblymember Barclay's motion for leave to appeal from the Fourth Department's Memorandum and Order entered in this action on July 26, 2024, should be denied.

33. I affirm this 5th day of September, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: Buffalo, New York
September 5, 2024

Craig R. Bucki

CRAIG R. BUCKI

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A

STATE OF NEW YORK : COURT OF APPEALS

GARY J. LAVINE,

Plaintiff-Appellant,

v.

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

Respectfully submitted,

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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

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[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

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At an all-purpose term of the Supreme Court of the State of New York held in and for the County of Albany at the Albany County Courthouse on the 13th day of December 2023.

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

ANDREW M. CUOMO,

Plaintiff,

-against-

Index No.: 903759-23

DECISION & ORDER

NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT,

Defendant.

APPEARANCES: Holwell Shuster & Goldberg LLP, New York (*Gregory J. Dubinsky*, of counsel); Glavin PLLC, New York (*Rita Glavin,* of counsel) for Plaintiff

Letitia James, *Attorney General*, Albany (*Ryan W. Hickey,* of counsel) for Defendant

Thomas Marcelle, J.

On September 11, 2023, the court issued a Decision and Order declaring unconstitutional Executive Law § 94 (10) and Executive Law § 94 (14) (together with any and all power and authority of the commission derived from or ancillary or incidental to these provisions including but not limited to Executive Law § 94 [5] [a & c]) as violative and contrary to the New York State Constitution.

In essence, the court's decision was rooted in the improper exercise of executive power by the commission. However, it is essential to note that the court did recognize that not all of

the commission's functions can be characterized as executive in nature. The court explicitly acknowledged:

> The commission possesses certain responsibilities consistent with being a public watch dog. The commission may investigate, issue reports, and make referrals on ethics issues (Executive Law § 94 [10] [d]). These functions rank as government oversight—alerting the public to corruption in their government. While the Legislature normally performs these tasks, it may, leaving aside potential delegation problems, assign a particularized chore in this arena to an independent body. A body absolved from the taint of partisanship may aid the Legislature's oversight mission by adding an element of trust to its findings. Such may be the case with the commission. In other words, the people might credit the commission's findings about a public official's misdeeds precisely because the commission, in theory, lacks political bias, animus, or allegiance.

(*Cuomo v New York State Comm'n on Ethics & Lobbying in Gov't*, 81 Misc3d 246, 249 [Sup Ct, Albany County 2023]).

Given that Executive Law § 94 [12] incorporates a severability clause, and such a clause inherently presumes a preference for severability, the court allowed the commission the opportunity to present arguments regarding severability. On November 10, the commission submitted its brief on severability and Cuomo responded on November 29. The briefing revealed that the Appellate Division Third Department had issued a stay order, with the exception of its application to Cuomo, and had set a rapid pace for briefing and argument.

In light of this new information, the court set a conference with the parties to discuss the implications of the schedule at the Appellate Division. The court was concerned that any decision on severability might undermine the Appellate Division's briefing schedule. In particular, a decision on severability may, as the commission advocates, entail a fine tuning (or "clarification") of the injunction's scope. Thus, any further decision by this court would inevitably trigger requests for supplemental briefing and delay the appellate process. The court

deems such a result disrespectful and contrary to the expeditious course mandated by the Appellate Division.

Therefore, the court will stay the commission's request for severability until the Appellate Division has rendered a decision on the commission's appeal.

The foregoing constitutes the Decision and Order of the court.

DATED: December 13, 2023

Thomas Marcelle
Supreme Court Justice

12/13/2023