SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW; GERALD BENJAMIN; LIZ KRUEGER; DANIEL L. SQUADRON, MAUREEN KOETZ; BRIAN KAVANAGH, and DON LEE

- Petitioners,

OBJECTIONS IN POINTS OF LAW

Index No. 3279-16

For a Judgment Pursuant to Article 78 of the Civil Practice law and Rules,

-against-

NEW YORK STATE BOARD OF ELECTIONS,

-Respondents.

Preliminary Statement

This case is a virtual repeat of what these same petitioners have tried before – to ask the court to compel an agency to take an action to issue an opinion and to sit in place of the legislature. *Brennan Center for Justice v NYS Board of Elections*, Index num. 3579-15 (Sup Ct Greene County, March 16, 2016) (hereinafter referred to as "Brennan Center I") (Copy of which is attached as Valentine Affirmation, Ex A).

In Brennan Center I, the two Republican Commissioners of the State Board voted against a motion to direct State Board staff to prepare an opinion altering a 19 year old State Board opinion concerning Limited Liability Company donation limitations. After a full discussion, the State Board voted which resulted in a tie vote. As a consequence, in the absence of a majority the motion failed. Thus, the State Board policy remained the

same. There was no change in a 19 year old policy of the State Board and candidates continued to rely on this policy. The petitioners unsuccessfully challenged that action.

The petitioners now challenge essentially a repeat of that case with the same result at the State Board. At an April 5, 2016 State Board meeting, the two Republican Commissioners of the State Board again voted against a motion on a proposed opinion put forth by the two Democratic Commissioners to alter the now 20 year old State Board opinion concerning Limited Liability Company donation limitations. After a discussion, the State Board voted which resulted in a tie vote. As a consequence in the absence of a majority the motion failed and thus, again, the State Board policy remained the same. There was no change in a 20 year old policy of the State Board. As a result all candidates have continued to raise money from LLC's as they have for the past two decades.

The petitioners again bring the same action. The State Board submits this Objections in Points of Law in opposition to the Article 78 CPLR application. The application seeks annulment of a tie vote of April 5, 2016, a rescission of a 1996 opinion of the State Board and that the Court order a different State Board determination in accordance with Petitioners' belief of what the law should be.

As before, the petition should be dismissed in all respects.

Petitioners should be collaterally estopped from re-litigating the identical issues. As in the prior matter, Petitioners still lack standing to bring the instant petition. Further, the relief sought creates a political question and thus is non-justiciable because it requires the Court to act to make a change in the law that the Legislature has refused to make, no matter how many times elected Petitioners and others have demanded such

a change. Petitioners also seek to circumvent the statute of limitations bar raised by the fact that the opinion sought to be abrogated has been the law for the last 20 years. Finally, should the court reach the merits, there is no basis for relief in that the vote of the State Board on the motion was not arbitrary or capricious. It was not contrary to laws or procedure, having been decided after a full open discussion. The determination denying the motion did not give rise to Article 78 relief.

Statement of Facts

The primary responsibility for administering the system of laws and rules is vested in New York State Board of Elections (herein after "the State Board") The State Board is an administrative agency of the Executive Branch of the State government, with authority over matters of elections, including campaign finance matters under Article 14 of the Election Law. By the statute, in line with the State Constitution, it is required to be numerically even and bipartisan. It is governed by four appointed Commissioners, two representatives of the major parties, two of each major party are appointed by the Governor upon the recommendation of various leaders ensuring that there is representation from the two major political parties in equal balance.

In 1996 the State Board issued Opinion 1996-01 by a unanimous vote. In 1996, the State Board examined the statute that created the statutory form of a limited liability company (LLC). The State Board examined the structure and makeup of the unique form of doing business of a limited liability company. It properly found that a limited liability company is separate and distinct from all other forms of business organizations.

It has some characteristics of partnership and some of corporations but it is specifically neither. In a clear reading of the text of the law, it states that a limited liability company is an "unincorporated organization." Limited Liability Company Law sec. 102 (m). The Legislature determined that such an entity is not a corporation but instead it is a company. In 1996, fourteen years before the Supreme Court decided *Citizens United v FEC*, 558 U.S. 310 (2010). In reliance upon the text of the statute, the Board determined that a limited liability company is a person. Limited Liability Company Law 102 (w). The State Board and its enforcement teams have relied upon the opinion since 1996 as have statewide, district-wide and local candidates of all political parties as have all the political parties themselves.

The law, as enacted, has not changed. There has been a myriad of opportunities for the Legislature to change the law or enact a statute that alters the opinion, as cited in the court in Brennan I at 21 (citing in the current legislative session the following as examples of attempts to address the LLC issue: A 2614 Sponsor Kavanaugh; S 2051 Sponsor Squadron; A 5089 Sponsor Simon; S 5093A Sponsor Squadron; S 60A Sponsor Squadron; and A 6975b Sponsor Kavnaugh). The Legislature since 1996 has not acted, despite agitation for such changes. In each session, the two houses of the Legislature and the Executive have not amended the law to make Petitioners' interpretation the law. Attached as Exhibit B to the Affirmation of Todd Valentine are a few examples of the news articles concerning this issue during just this last legislative session.

Similarly, the State Board was petitioned for the change sought in this proceeding and before the prior proceeding. Counsel to the State Board's opinion in 2008 was that a legislative change was required for the same policy determination demanded from this

Court. The 2008 opinion of counsel was accepted by a vote of the Commissioners including Commissioner Kellner who on April 15, 2015 took the exact opposite position.

No one sought to adjudicate the State Board's opinion issued on January 30, 1996. The Statute of Limitations to challenge the 1996 opinion expired at the end of May 1996. Some years later, the ruling became the focus of attention and was labeled "the LLC loophole," acknowledging its legality and the frustration of some, a loophole being a law that is disfavored.

This is not the first time since 1996 that the Petitioners and other like entities have attempted to revive and revisit this issue. In 2015, these petitioners attempted to have the court substitute its judgement for that of the State Board. *Brennan Center for Justice v NYS Board of Elections,* Index num. 3579-15 (Sup Ct Greene County March 16, 2016) (referred to as "*Brennan Center I*"). In their own papers, Petitioners set out the facts in 2007 when a "number of groups wrote the Board urging it to revisit its 1996 Opinion. In response to this request the Board sent a one page letter stating "that [an initial review indicates that a change in policy would require a statutory amendment." See, Brennan Center I, Petitioners Notice of Petition ¶¶80-84. Again, no legal action was brought for judicial review at that time, presumably because the statute of limitations had already run on the 1996 opinion.

The state of the law, while commented upon by many, has not changed though these many years have passed. In *Brennan Center I* Petitioners challenged a 2015 inaction by the State Board. In 2015, the Commissioners of the State Board formally met on April 16 and before the State Board was a motion by Commissioner Kellner to have "our counsels . . . prepare an opinion that will rescind opinion 1996-1 and provide

updated guidance on the applicability of article 14 to limited liability companies." The motion was a direction to staff to prepare something for possible future action. The motion sought the preparation of an opinion to reverse the State Board's 1996 opinion constituting its legal interpretation of the law. The motion was made and seconded. The State Board conducted a lengthy debate on the merits and the interpretation of the law in which all four commissioners participated. The vote on the motion resulted in a tie, as a consequence without a majority the motion fails. The tie vote kept that longstanding opinion in place. Election Law 3-100(4). No new action or change occurred as a result of this vote. Where the State Board, as an administrative body hears a motion and then divides equally after a full discussion and hearing from the public, the split occasions no action.

Petitioners commenced the *Brennan Center I* action on July 14, 2015. They sought the same relief then as now: a. invalidate the State Board's April 2015 decision, b. Rescind the State Board's 1996 Opinion, c. Order the State Board to issue a new opinion "consistent with the text and purpose of the Election and LLC Laws".

After a hearing and the submission of multiple sets of briefs the Court denied the relief finding a review of a new advisory opinion is "an allocation of resources and, thus, outside the purview of this Court." *Brennan Center I* at 10. The Court went on to deny the Petitioners challenge to the 1996 opinion through the vehicle of the 2015 non-action by the State Board as beyond the statute of limitations: "Since the motion on April 16, 2015 was to rescind the 1996 Opinion and provided updated guidance on the applicability of article 14 of the Election Law on LLC's, a challenge to the 1996 Opinion is improper as time barred." *Brennan Center I* at 11. The Court continued on to hold that Petitioners lacked standing applying the two part standing test:

"Here, none of the Petitioners have established that Respondent's tie vote on April 16, 2015 has caused them any injury in fact. As noted above, Respondent's action was to rescind and provide "updated guidance" in a new advisory opinions which, even if it had been a successful vote would not guarantee closing the "LLC Loophole." It would be far too speculative to hold otherwise. As also noted above, any assault on the 1996 Opinion is barred as untimely. Therefore, the first step of the standing test is not met.

Even assuming *arguendo* that the vote was to close the "LLC Loophole" like Petitioners contend, none of the Petitioners have suffered any direct harm or injury including under association and organizational test. The argument that a candidate would have won or had a viable campaign if not for the "LLC Loophole" is grossly "conjecture or speculation" which cannot create standing." *Brennan Center I* at 14, *citing, Matter of Animal Legal Defense Fund*, 119 Ad 3d at 1203; *Nurse Anesthetists*, 2 NY 3d at 211; *Society of Plastics Indus.*, 77 NY 2d at 778.

The Court then turned to the merits finding that Petitioners challenge also fails:

"The Court has carefully reviewed the 1996 Opinion and the April 2015 Decision, including the full transcript. It cannot be said the Respondent or its agent (The Commissioners) acted outside the purview of the Election Law in declining the motion, and such declination was not without any sound basis in reason. The Court cannot substitute its own judgement. Therefore, the Respondent's decision was not affected by an error of law, made in an arbitrary and capricious manner, or was an abuse of discretion warranting judicial intervention." *Brennan Center I* at 19.

Finally the Court also dismissed the Petitioners second cause of action seeking a declaratory judgement finding that "the act of voting on April 12, 2015 was not affected by an error of law, was arbitrary and capricious, or constituted an abuse of discretion. Thus, the court surmises the Petitioners are attacking the "policy" of the 1996 Opinion." The Court declined to issue the declaratory judgement on the grounds that the statute of limitations had run. *Brennan Center I* at 19.

Petitioners commenced this action, "*Brennan Center II*", on June 14, 2016. They seek to: a. invalidate the State Board's April 2016 decision which would rescind the State Board's 1996 Opinion, b. Order the State Board to issue a new opinion "consistent with

the text and purpose of the Election and LLC Laws". Plaintiffs also seek the awarding of reasonable costs and attorney's fees. This is the relief which was sought and denied in *Brennan Center I*.

The Petition should be denied in all respects, being defective jurisdictionally as well as on the merits.

POINT I

PETITIONERS ARE COLLATERALLY ESTOPPED

With respect to the doctrine of collateral estoppel, has held that: "Collateral estoppel is a flexible doctrine that "precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." *Weston v Cornell University*, 116 AD 3d 1128 (3d Dept 2014), *quoting* (*Buechel v. Bain,* 97 N.Y.2d 295, 303, 740 N.Y.S.2d 252, 766 N.E.2d 914 [2001], *cert. denied* 535 U.S. 1096, 122 S.Ct. 2293, 152 L.Ed.2d 1051 [2002].

To invoke the doctrine of collateral estoppel as a defense a respondent is required to establish "(1) ... that an identical issue was necessarily decided in a prior action which is decisive of the present action, and (2) that the party to be precluded [here, petitioner,] must have had a full and fair opportunity to contest the prior decision said to be controlling". *Susan UU v Scot VV*, 119 AD 3d 1117 (3d Dept 2014) *citing*, (*Marotta v. Hoy,* 55 A.D.3d 1194, 1196, 866 N.Y.S.2d 415 [2008]; *see D'Arata v. New York Cent. Mut. Fire Ins. Co.,* 76 N.Y.2d 659, 664, 563 N.Y.S.2d 24, 564 N.E.2d 634 [1990]).

The identical issues in *Brennan Center I* are present here. The application then, as now, seeks annulment of a tie vote to not issue an opinion which would have

rescinded the 1996 opinion of the State Board and that the Court order a different State Board determination in accordance with Petitioners' belief of what the law should be.

Both of these issues had a full and fair hearing. Extensive papers were filed by both sides as well as by the Intervenor and Amicus Curiae. A full hearing was held with post hearing briefs file by all parties. *See, Brennan Center I* at 6-8.

Under the facts and procedural history of these cases, petitioners had a full and fair opportunity to litigate their essential challenge to the 1996 opinion, through their challenges to the failed motions at the State Board in 2015 and now in 2016 motion. The Court not only decided their issue on standing but provided a full, well-reasoned, decision on all the issues raised by the Petitioners.

As such, they should now be estopped from raising the same issues and their case dismissed.

POINT II

PETITIONERS LACK STANDING TO SUE

As it was in *Brennan Center I*, the same is true in *Brennan Center II*, that the threshold for any action by a petitioner is not a political grievance but an actual case or controversy caused by concrete injury to Petitioner. The allegations in the Petition fail that threshold test. First, there must be an actual administrative action to challenge. Second, the action must of necessity cause each petitioner to suffer concrete injury as a result of the administrative action. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769 (1991). *See, also, Matter of John Graziano v. County of Albany*, 3 N.Y.3d 475, 479 (2004); *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). The injuries to the petitioners must be distinct from

that of the general public. Lastly, to establish standing in the administrative context, it is "crucial" also that the injury asserted fall within the zone or interest sought to be promoted or protected by the statute under which the agency has acted. *Id.* at 769. The burden to establish a concrete injury is on Petitioners. *Rudder v. Pataki*, 246 AD 2d 183, 185 (3d Dept. 1988) *aff'd* 93 N.Y.2d 273 (1999). Petitioners again fail to meet their burden. Standing to sue must be denied here, thus blocking the doors to courthouse for Petitioners who seek relief based upon abstract, generalized complaints, speculative injury, or the dilettante or amorphous claimants. *See, Saratoga Chamber of Commerce Inc. v. Pataki*, 100 N.Y.2d 801, 822 (2003).

As before, Petitioners cannot have standing to sue on the basis of a motion made, heard and rejected by an administrative agency that left existing law intact. Petitioners claim jurisdiction on the basis that the State Board not review a 1996 opinion of the State Board is a concrete injury to them. Under *Society of Plastics, supra*, petitioners must show that they have suffered an injury in fact. At its heart, an injury in fact must be an actual harm suffered by Petitioner that is distinct from that of the general public. *Society of Plastics Industry, Inc.*, 77 N.Y.2d at 771-774. *See also Transactive Corp. v. New York State Dept. of Social Services*, 92 N.Y.2d 579, 587 (1998). The purpose is to ensure that the party seeking relief has a "cognizable stake in the outcome" *Community Board 7, supra*. The fact that the issue may be argued to be one of grave public concern as claimed by Petitioners fails to provide standing. *See, Rudder, supra*. It is a situation in which no one can have standing since one cannot be injured by an inaction that leaves intact a 20 year precedent.

In the instant matter, Petitioners seek to claim standing on the basis that they are avengers at large on behalf of the public concern. Contrary to any allegation of public

concern is the fact that the State Board's ability to issue advisory opinions is purely discretionary. As such there is no zone of interest that plaintiff can claim that they are deprived of or must be protected from and therefore petitioners do not have standing to maintain the challenge. Faced with an identical posture of alleged widespread public concern, the Court of Appeals in *Society of Plastics, supra,* rejected similar bases for according standing. The Court expressly held: "That an issue may be one of 'vital public concern' does not entitle a party to standing. Courts surely do provide a forum for airing issues of vital public concern, but so do public hearings and publicly elected legislatures... By contrast to those forums, a litigant must establish its standing in order to seek judicial review." *Society of Plastics Indus.*, 77 N.Y.2d at 769.

As part of the establishment of standing Petitioners must also meet their burden to prove that the interests asserted fall within the "zone of interests." *Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433 (1990). Those interests have to be ones affected or threatened by the actions of the administrative agency. Where there is no action to change a 20 year precedent, no zone of interest is impacted. Coupled with the injury in fact requirement, the rule of standing circumscribes the universe of persons who may bring a lawsuit to challenge actions by a government agency. Petitioners fail to articulate any direct injury to themselves or their entities, other than the injury every citizen allegedly suffers by reason of a 1996 opinion of the State Board. Nothing in their papers explain how the State Board's non-determination prevents them from continuing to advocate in the Legislature, or with the Governor.

Petitioners' own claims of standing demonstrate their failure to meet their threshold burden of proof of injury in fact within the zone of interest. The State Board

entertained a motion. It failed after debate. Actions of the State Board require a majority vote. Election Law section 3-100(4). Not having a majority agree to review a prior opinion results in no action being taken. Thus the grievances of Petitioners demonstrate a dissatisfaction with the motion not being passed to meet their particular beliefs about how the law should be or in some cases annoyance that their side did not win the vote. The lack of a victory however gives no party standing.

Specifically, the Brennan Center for Justice by its own definition, an institute that focuses on the issues of democracy and justice is not actually injured in fact so as to confer standing even in the form of an associational standing theory. They fail to make any allegation whatsoever as to how it actually suffered injury in fact by the vote to review a 20 year old opinion that was made on April 5, 2016. It is obvious that they are unable to legitimately claim that they will suffer an actual harm by the challenged administrative action, which is in some way different from that of the public at large. Instead they seem to claim that it is distracting them from other important causes. The Brennan Center claims that its injury is occasioned by having to pay attention to the issue and to devoting its energy and resources to analyzing the issue. They wish this Court to relieve them of their self-imposed burden. This articulates the classic public at large claim. "Where organizations seek standing to challenge administrative agency actions, there must exist concrete adversarial interests requiring judicial intervention. *Society of Plastic Indus. v. County of Suffolk*, 77 N.Y.2d 761 (1991). Thus, an organizational plaintiff must demonstrate a harmful effect on at least one of its members. The Brennan Center failed to meet the threshold requirement of anything other than a generalized grievance.

The same is true of Petitioners Gerald Benjamin, Liz Krueger, Daniel Squadron, Maureen Koetz, Brian Kavanagh and Don Lee. Each of these Petitioners attempt to enunciate some injury or standing with the substance of the 1996 opinion, which is clearly time barred or as a justification for what should be in the "new" opinion, that is clearly barred by the doctrine of mandamus and what an agency can or cannot be compelled to do. All but Lee were parties to the last action. Lee has no distinguishable attributes to make it so that standing would attach.

No petitioner in this proceeding can properly allege or demonstrate that the failed motion of April constitutes an administrative decision that has resulted in ay cognizable or real harm to its members. The effect of the maintenance of the status quo ante is the same as the effect upon the general public at large. In the absence of a uniqueness, the claim of standing fails. *See, Rudder v. Pataki*, 93 N.Y.2d, 279. *See, also, Unicom v. NYS Commissioner of Transportation*, 36 Misc. 3d 1212 (Sup. Ct. Albany Co. 2012, *citing, NY State Ass'n of Nurse Anesthetists v. Novella*, 2 N.Y.3d 207 (2004). As the Court said in *Brennan Center I*: "As to the claim by prospective candidates, the "harm" allegedly suffered is nothing different than the public at large and the community generally, as all individual aspiring to be part of the political process are following the same rule – albeit, some are not getting the benefit of it – but that does not afford them standing in an article 78 matter. Moreover, a petitioner cannot manufacture and injury in fact by declining to accept donations from LLCs where there is no legal prohibition to accepting them; certainly a petitioner who does not accept money from corporations would not be able to create standing in such fashion either. Said differently, a self-inflicted injury cannot create standing." *Brennan Center I* at 15

Each of the Petitioners affidavits can only cite generalized or tangential harm that is common to the public at large, which would evaporate any standing requirement if it is permitted in this matter. For example, "my confidence in the fairness and effectiveness of government is lessened." (Benjamin Affidavit, ¶9). Or, that her constituents are "angry and deeply cynical about the political process in our state." (Krueger Affidavit ¶ 13). Similarly, "In my experience, voters feel enormous cynicism about the political process. . ." (Squadron Affidavit ¶ 11). "I share my constituents' sense of frustration about the ability of grassroots organizing or small donors to have an appropriate impact in State politics." (Squadron Affidavit ¶12). As to Krueger and Squadron, having failed to persuade their colleagues of either party, they seek to establish standing on political considerations inappropriate for seeking court intervention. And these same statements were made in support of *Brennan Center I*, in some cases, *verbatim*. For example, Senator Kreuger stated in 2015 that her constituents are "angry and deeply cynical about the political process in our state." (Krueger Affidavit ¶ 13). Senator Squadron stated: "I share my constituents' sense of frustration about the ability of grassroots organizing or small donors to have an appropriate impact in State politics." (Squadron Affidavit ¶12).

While the elected officials or candidates or potential candidates would seem to have a more direct contact with the underlying merits of the subject of the administratively issued opinion, they too fail to attempt to enunciate what actual harm they have suffered by the non-action that State Board took on April 5 of 2016, which resulted in no change to a 20 year old policy. Tangential personal beliefs and practices regarding fund raising or a choice whether to or not to solicit these types of donations

are of no moment. Injury-in-fact is a critical and threshold element. *Dairylea Coop v. Walkley*, 38 N.Y.2d 6 (1975). Injury in fact requires more than a displeasure with the outcome of the political process in which it's claimed interpretation of law fails to prevail. Each Petitioner is either unhappy, disaffected, disgruntled, or a representative of the disgruntled or disaffected. None of these emotional conditions can be an injury in fact sufficient to confer standing.

In addition, none of the elected officials or others have attempted, nor could they claim, that the administrative action of the State Board has or could cause them injury-in-fact since the State Board determination of 1996 applies to them as well. Each elected official has been free to obtain the benefits of the ruling they decry. Whether or not such officials have obtained contributions from the LLCs is evidenced by their filed records.

Each Petitioner has the burden to come forward with probative evidence sufficient to prove standing. Probative evidence is not provided by conclusory, albeit impassioned allegations in the Petition. *See, e.g., Piela v. Van Voris*, 229 A.D.2d 94, 96 (3d Dept. 1997).

Under the facts of this litigation, no Petitioner could plausibly claim that he/she was actually or directly harmed in any way by the State Board's vote not to review a long standing opinion, regardless of the subject matter. Here, where the State Board has not done anything or threatened to do anything that varies in any respect from the status quo ante, no injury can result to anyone that was at least present since the State Board ruling in 1996. In the absence of an act, there is nothing for the Petitioners to challenge except the time barred 1996 opinion of the State Board.

Lastly, if every administrative board motion that fails for a majority vote suddenly would accord standing, the courts would be swamped. A failed motion preserving the status quo is a nonevent. A failed motion does not present a case or controversy, nor can it revive a 1996 determination. The defeated motion does not give rise to recourse to the courts where the discretionary act of an administrative agency made no change in the status quo.

Petitioners seek judgment directing the State Board to rescind its 1996 opinion and directing the State Board to adopt a new opinion. Assuming *arguendo* what petitioners allege is true, they have in no way demonstrated that they have suffered injury-in-fact as a result of the State Board's choice to not to review a prior opinion. Since petitioners have alleged no injury-in-fact as a result of their grievances, they have no standing and these claims should be dismissed. Petitioners' failure to submit the proofs necessary to meet the well-established requirements to demonstrate standing require the dismissal of the Petition in all respects. *Otsego 2000 Inc. v. Planning Board of Ostego*, 171 A.D.2d 258, 259 (3d Dept. 1991) *lv. denied* 29 N.Y.2d 753 (1992).

POINT III

THE PRESENT LITIGATION PRESENTS A NON-JUSTICIABLE POLITICAL ISSUE

Petitioners' action by its own sought after relief, has placed before the Court a non-justiciable issue it cannot hear because as a remedy it seeks to violate the separation of powers doctrine. Petitioners remedy can only embroil the judicial branch in the management and operations of the campaign finance law, and political campaigns

throughout the state. Any change in the law as sought by the Petitioners can only come through legislative action as the State Board counsel's opinion, adopted by the State Board in 2008 determined. Petitioners seek the Court to issue an order sweeping aside the proper procedural activity of the State Board and then go on to amend the law to conform to their "interpretation" of the law, without regard to the actual legislative intent. Excerpts from a floor debate in one House of the legislature do not determine legislative intent of the other house. Further, it is clear that the repeated efforts of Petitioners and likeminded thinkers have not caused the legislature to amend the statutes at issue and interpreted in 1996. To seek a court order, ostensibly based upon motion voted down by operation of law, is to invite the court into a morass that the doctrine of justiciability encourages it to bypass. Although ultimately holding the action untimely, the Court in Brennan Center I opined: "this application has all the hallmarks of a political question best suited for resolution through Legislative action, and the application is attacking a "policy" and allocation of resources which are both nonjusticiable." *Brennan Center I* at 21.

The State Board's action is a lawful act of the executive branch agency. For the law to change, it must be changed by the legislature. Both areas are matters for the judgment in the first instance of the experts in the area and in the second instance the elected representatives of all the people, as opposed to the Petitioners. The frustration of the elected Petitioners is evidence that the democratic process functions. The issue of the change in the law is a political question committed to the entirety of the legislature and not a few disaffected members. See for examples of the legislative discussion of the issue in the news articles attached as Valentine Affirmation Ex. B.

The political question doctrine as one component of justiciability are designed to protect the courts from being caught invading spheres of the other two coordinate and equal branches of government. The doctrine of justiciability was developed to identify appropriate occasions for the exercise of judicial authority. Justiciability is the generic term of art which encompasses discrete, subsidiary concepts including, *inter alia*, political questions, ripeness and advisory opinions. At the heart of the justification for the doctrine of justiciability lies the jurisprudential canon that the power of the judicial branch may only be exercised in a manner consistent with the "judicial function" *Matter of State Ind. Comm.*, 224 N.Y. 13, 16 (1918) [Cardozo, J.], upon the proper presentation of matters of a "Judiciary Nature" (2 Farrand, Records of Federal Convention of 1787 [1911], p. 430).

New York State's pattern of government does not explicitly state a separation of powers doctrine. Separation of powers is universally understood as part of the tri-partite government's boundaries so as to maintain the separation of the executive, legislative and judicial powers. *Matter of LaGuardia v. Smith*, 288 N.Y. 1, 5-6 (1942); *Matter of Guden*, 171 N.Y. 529, 531 (1902). It's a fundamental principle of the organic law that each department of government should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches. *People ex rel. Burby v Howland*, 155 N.Y. 270, 282 (1898). With respect to the distribution of powers within our system of government, it has been said that no concept has been "more universally received and cherished as a vital principle of freedom". *Dash v. Van Kleeck*, 7 Johns 477, 509 [Kent, Ch. J.].

The lawful acts of the State Board in voting on the motion, while functioning as executive branch officials were performed in satisfaction of responsibilities conferred by law and required the exercise of the State Board's delegated judgment bounded by statutory powers and responsibilities. Determinations to not adopt a new opinion due to a tie, is an act which involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review. *Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980); *Matter of Abrams v. New York City Tr. Auth.*, 39 N.Y.2d 990, 992 (1976); *Jones v. Beame*, 45 N.Y.2d 402, 408 (1978); *James v. Board of Educ.*, 42 N.Y.2d 357, 368 (1977); *Matter of Smiley*, 36 N.Y.2d 433, 441 (1975).

Such determinations are entitled to complete deference by the judicial branch in the absence of an identifiable illegality. This judicial deference to a coordinate, coequal branch of government includes one issue of justiciability generally denominated as the "political question" doctrine. *Jones v. Beame*, 45 N.Y.2d 402, 408, *supra*; *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 996 (1980), *app. dismissed*, 449 U.S. 1119 (1981); *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984).

To allow Petitioners to enter the courthouse with standing in this action would illegally usurp the lawful acts of appointive officials charged with the management of the public enterprise of campaign finance. *See, Matter of Abrams v. New York City Tr. Auth.*, 39 N.Y.2d 990, 992 (1976).

Petitioners seek a change in the law that has not been adopted by the Legislature, though specifically raised before it. They seek to have this Court substitute their wisdom for that of the political branches of government. The manner by which the State through

its Legislature addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government. *Klostermann v. Cuomo*, 61 N.Y.2d 525, *supra*; *Matter of Abrams v. New York City Tr. Auth.*, 39 N.Y.2d 990, 992 *supra*. The question of campaign finance regulation has demonstrably and textually been committed to determination by the legislature and administration by the Board. Courts have limited jurisdiction under the Election Law in order to not shove them into the political realm to the detriment of the branch. Further the Legislature has the constitutional obligation to determine whether the law should change. New York State Constitution, Article III, section 1.

Since the issuance of the 1996 opinion, many, many political candidates at all levels of government have solicited and obtained campaign contributions from these entities. In fact, many of the candidate/elected Petitioners also admitted to raising political funds in this way. The legislature did not modify the statute to make the provisions clearer or to prohibit the practice as they did in the case of the partnership issue. In fact, the issue has been repeatedly negotiated and discussed at the highest levels of the Executive and Legislative branches of government with no change resulting to the statute. There is no claim that the 1996 opinion needs clarifying or correction of any misunderstanding or misinterpretation by the State Board. Petitioners themselves admit to attempting to get this matter rectified by legislative action, both by arguing the salient points to their respective leadership and the Governor and/or actually submitting legislative bills setting out what they believe to be the proper direction. None of these proposed bills have become law, having been defeated through the legislative process.

Petitioners seek to wipe out a 20 year precedent and leap frog the Legislature in order to get it done. Such a dramatic changes in public policy are the province of and require the function of the Legislature. It cannot be the province of an administrative agency. *Boreali v. Axelrod*, 130 A.D. 2d 107 (3d Dept. 1987). It is not the province of a court to invade the political decision making of the representative of the People, the legislature, on behalf of group of persons offended by the existing law.

The Petition should be dismissed as barred by the doctrine of justiciability because it solely raises a political question that is reserved by the State Constitution to the Legislative Branch of government and as such is a non-justiciable question for this court.

POINT IV

THE PROCEEDING IS BARRED BY THE STATUTE OF LIMITATIONS

Petitioners' true grievance is against the 1996 opinion of the State Board. Petitioners seek to use the failed motion as vehicle to revive a 20 year old claim. Thus, Petitioners are attempting to completely evade the unalterable four month statute of limitations that expired at the end of May 1996, twenty years after the original and final determination was made. The Petition should be dismissed as barred by the Statute of Limitations. As the Court found in *Brennan Center I* that this was a challenge to the State Board's 1996 opinion and "any challenge to the 1996 Opinion would have had to occur four months after it was issued". *Brennan Center I* at 12.

CPLR 217 provides, in pertinent part, that: "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner ..." CPLR 217 (1) provides that the time begins to run when the determination becomes final and binding upon the petitioner. CPLR 201 provides that "No court shall extend the time limited by law for the commencement of an action." The rule of law governs CPLR Article 78 petitions. The Supreme Court is without authority to extend this four month Statute of Limitations. *Magat v. County of Rockland*, 265 A.D.2d 483 (2d Dept. 1999). Recasting the matter cannot also revive a case, especially in election-related matters. *See, e.g., Manfield v. Epstein*, 5 N.Y. 2d 70 (1958).

While statute of limitations in the area of Article 78 proceedings have vexed petitioners and courts, (*see,* Siegel N.Y. Prac. 566), the key determination is when the final and binding determination occurred. Clearly not every act revives the matter. The purpose of the four month statute of limitations is to achieve finality and avoid repeated and fruitless challenges to administrative decisions. In this matter, the final and binding determination is not the April 5 failed motion but is actually the substantive action which occurred in 1996 with the issuance of the opinion. For the last twenty years the 1996 opinion has been final and binding. The failed motion altered nothing. A failed motion does not constitute the type of decision making process that provides Article 78 relief. The lost motion is not a determination that is subject to attack by an Article 78 proceeding. It gives rise to no administrative remedy. It does not alter the status quo ante.

This is not the first time since 1996 that the Petitioners and other like entities have attempted to revive and revisit this issue. As recently as last year in *Brennan Center I*, these Petitioners brought an action challenging a similar State Board determination not to rescind the 1996 opinion. In their own papers in that case, petitioners set out the facts in 2007 when a number of groups wrote the Board urging it to revisit its 1996 Opinion. In response to this request the State Board sent a one page letter stating "that [an initial review indicates that a change in policy would require a statutory amendment." *See, Brennan Center I*, Petitioners Notice of Petition ¶¶80-84. Interestingly, no one claimed a right to sue at that time. No legal action was brought for judicial review at that time, presumably because the statute of limitations had already run on the 1996 opinion. It should be noted that at a meeting of the State Board on January 23, 2008, Commissioner Kellner, who argued and voted otherwise on April 15, 2015, previously joined with all the other commissioners directing the State Board's counsel to send the State Board's response letter to the persons seeking guidance. That letter stated that the State Board cannot change the law and that only the Legislature can make the requisite change. In fact, that response was sent with the unanimous determination of all four Commissioners constituting the State Board of Elections agreeing that it should be sent, stating that legislative action would be required to change the policy.

Petitioners seek to revive the statute of limitations that expired in 1996, in order to create a claim. The four month Statute of Limitations' period begins to run when that decision-making process is completed, *Villella v. Dept. of Transp.*, 142 A.D.2d 46, 48 (3d Dept. 1988), that is, when the decision is final and binding. *Wing v. Coyne*, 129

A.D.2d 213, 216 (3d Dept. 1987). An agency action is final when the "decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998); *Jones v. Amicone,* 27 A.D.3d 465, 468 (2d Dept. 2006). The final decision was made in 1996. The purpose of the statute of limitations is to establish finality and order. Petitioners' theory of revival by denial of a motion would ensure that any matter may be revived with zombie-like powers by the defeat of a ministerial motion, i.e. issuing a directive to staff.

The motion to seek a new opinion does not revive any action against the 1996 opinion. Any injury in fact that occurred happened in 1996. Explicitly and implicitly the Petitioners seek to challenge the 1996 opinion on the pretext of a failed motion. Petitioners claim that the State Board has a duty to adopt the losing sides' position, but there is no basis in law or equity for such a claim. Further, such a specious claim cannot revive a long stale claim. The Petition should be dismissed as time barred.

POINT V

THE COURT IS WITHOUT POWER TO USURP THE BOARD'S DISCRETIONARY POWER TO MAINTAIN THE STATUS QUO ANTE WHEN A MOTION FAILS TO THEN COMPEL THE BOARD TO ADOPT THAT MOTION WHEN ITS ACTION WAS NOT ARBITRARY OR CAPRICIOUS

The Article 78 proceeding contemplates the consolidation of mandamus, certiorari and prohibition, the fundamental common law writs merged into the new special proceeding. Siegel N.Y. Prac. At 557. *Certiorari* reviews an administrative proceeding after a judicial-type hearing, *mandamus* compels action that would admit no

discretion and so clearly required as being referred to as ministerial and *prohibition* prevents a body from exercising power that exceeds its jurisdiction. These categories are refined in CPLR 7803, and dictate the only questions that can be raised under Article 78. The denial of a motion after a tie vote of an administrative board where the motion sought to re-open a 1996 opinion of the agency falls within no CPLR 7803 category.

CPLR 7803 provides in relevant part that the only questions that may be raised in a proceeding under this article are: 1. whether the body or officer failed to perform a duty enjoined upon it by law; or 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

The relief sought in this action is to abrogate the 1996 opinion and to order the State Board to then adopt a new opinion paralleling the belief of the Petitioners and only two of the four commissioners. It is prohibited by the terms of CPRL 7803 in that it seeks to enjoin and direct an administrative body to alter longstanding rules occasioned by nothing other than the desire of Petitioners--that relief is not available at law. The statute allows for seeking an order in the nature of mandamus under CPLR 7803 (3) seeking to compel an action of an administrative board that is merely ministerial in that it would require no discretion on the part of the Board and is clearly required by law. The writ of relief in mandamus sought by the Petitioners is properly denominated as an

extraordinary writ. It needs to meet certain requirements even to be maintained.

The extraordinary remedy of mandamus lies against a governmental agency or officer only to compel the performance of a purely ministerial act and only where there exists a clear right to the relief sought. The availability of mandamus to compel performance by an agency or officer depends on the applicant's substantive entitlement to prevail, but on the nature of the duty sought to be commanded, i.e. mandatory, non-discretionary action. *New York Civil Liberties Union v. State*, 4 N.Y.3d 175, (2005) (*citing Matter of Brusco v. Braun*, 84 N.Y. 2d 647 (1994).

Mandamus lies, however, only to compel the performance of an official duty clearly imposed by law and involving no exercise of discretion. *Saumell v. New York Racing Ass'n*, 58 N.Y.2d 231, 239 (1983). The determination of whether or not to adopt a motion to revisit current law is at most a question of 'judgment, discretion, allocation of resources and priorities [which is] inappropriate for resolution in the judicial arena,' ". *Id.*; *Matter of Hamptons Hospital v. Moore,* 52 N.Y.2d 88, 96 (1981); *Matter of Fried v. Fox*, 49 A.D.2d 877, 878 (2d Dep't 1975). The Court can only order compulsion of a "ministerial, nondiscretionary and nonjudgmental, and [must be] premised upon specific statutory authority mandating performance in a specified manner [citations omitted]." *Matter of Peirez v. Caso*, 72 A.D.2d 797, 797 (2d Dep't 1979). Otherwise the petition must fail. Mandamus does not lie to compel an administrative agency to exercise discretionary powers. *Matter of Stannard v. Axelrod*, 100 Misc.2d 702, 710 (Sup.Ct. Broome Co. 1979). A discretionary act is not the same as a ministerial act. In fact it is diametrically the opposite. Petitioners seek to convince this Court to order the State Board to perform a discretionary act of the kind and nature that is statutorily

committed to the Board and goes to the State Board's core function.

A plain reading of the record, clearly shows that the issuance of an opinion in 1996 relating to the contribution limit of a particular, statutorily-created entity is not a ministerial act, but one of unique discretion.

Petitioners challenge the 1996 opinion of the State Board and the April 2016 attempt to revisit the opinion. The issuance or non-issuance of an advisory opinion is wholly discretionary matter in the hands of the State Board. Petitioners are unable to show that there was a non-discretionary act from which their claim for relief flowed. The administrative agency in the instant matter had and exercised a discretionary duty to entertain and reject a motion according to law. Because there is no ministerial act sought to be compelled, Petitioners application fails on its face.

Petitioners neither have a clear legal right to require the rescinding of an opinion from 1996 nor the right to require the State Board to issue a new opinion on the same topic that for all intents and purposes says what the Petitioners prefer it to say. The issuance of advisory opinions by the State Board is by itself a wholly discretionary action. No ministerial action exists that can be subject to this Court's jurisdiction. Petitioners fail in this threshold requirement for issuance of the extraordinary relief sought.

The second prong of CPLR 7803 requires that Petitioners demonstrate that they have a clear right to the relief requested. Even assessing the claims of Petitioners their papers demonstrate high dungeon but fail to meet the legal requirements under CPLR 7803 of a clear right to the relief demanded. Petitioners, on the face of their papers, demonstrate that they do not have any right, no less a clear right, to the relief demanded. Petitioners also claim that the State Board has a duty to grant them the relief of a new

Board opinion concerning LLCs. Their claim has no legal basis.

Petitioners cannot properly claim that they are seeking correction of an error of law, despite the strength of their earnest desire that the statute, plain upon its face, be interpreted differently. There was no erroneous interpretation of law. The language of the Limited Liability Company statute was plain, as is the continual emerging law flowing from the First Amendment e.g., *Citizens United, supra*. No error of law is inherent in the State Board maintaining its own precedent. Of significance is the fact that in order to provide Petitioners with their requested relief the Court must now compel the State Board to act contrary to the law. Election Law 3-100 (4) requires a vote of the majority of the State Board to enact policy.

POINT VI

THE REJECTION OF A MOTION BY A TIE VOTE DOES NOT GIVE A COURT JURISDICTION TO IN EFFECT "CAST" THE DECIDING VOTE

In 1996 the State Board issued an opinion as to a specific statutory term treating each Limited Liability Company as a person for the purpose of making political contributions, relying specifically upon the language of the statute. That 1996 opinion was a determination by the agency charged with administering the law and interpreting it. In such instances the function of the court is limited. *See, Bredero v. Tax Comm,* 138 Misc. 2d 27 (Sup. Ct., Albany Co. 1988). In such matters, the court may not substitute its judgment in place of the judgment of the administrative agency where reasonable minds

may differ as to the probative force of the evidence. *Matter of Kopec v. Buffalo Brake Beam — Acme Steel & Malleable Iron Works*, 304 N.Y. 65, 71 (1952).

At issue is the 1996 interpretation of the statute. It should not be disturbed given 20 years of unbroken consistency in interpretation. The Court may not now review the 20 year old interpretation. However, assuming *arguendo,* that the Court would seek to undertake the precluded review, two standards of review are applicable. *Matter of Teachers Ins. & Annuity Assn. of Am. v. City of New York,* 82 N.Y.2d 35, 41 (1993). Where the application of the law involves knowledge and understanding of the underlying operational practices or entails an evaluation of factual data and inferences to be drawn, courts regularly defer to the administrative agency. Where the interpretation is not irrational or unreasonable, it will be upheld. If the question is purely one of statutory construction, of reading and analysis, dependent upon an accurate apprehension of legislative intent, there is little basis to rely on the special competence or expertise of the administrative agency and its interpretations through regulation are accorded less weight. *Kurcsics v. Merchants Mut. Ins. Co.,* 49 N.Y.2d 451, 459 (1980). In the instant matter the issue is circumscribed at one end as seeking review and alteration of a 1996 legal determination in form of a Board opinion. The opinion itself is a reading of the face of the statute and its definitional sections, there is no apprehension of legislative intent of the Limited Liability Company law. The plain letter of the statute led to the State Board's opinion. The treatment of entities for the purpose of administering Article 14 of the Election Law in the arcane area of campaign finance is predicated upon the State Board's knowledge and understanding of the underlying operational practices in the area of campaign finance. The intersection of the language

of Article 14 of the Election Law and the Limited Liability Company Law is special and technical language. *See, Matter of N Y State Assn. of Life Underwriters v. N Y State Banking Dept.*, 83 N.Y.2d 353, 360 (1994).

A Court should not act to set aside the 1996 opinion or to review the failed motion. Here, the agency adhered to the 1996 opinion. Assuming that the failed motion would allow the Court to interpose itself, the agency determination is by the entity by law charged with the administration and enforcement of the particular law. Because the agency is entrusted with a reasonable measure of discretion in the interpretation of the law in its delegated area, the judicial function in reviewing a board's decision is limited. *Richard Dudyshyn Constr. Co v. Zoning Board of Appeals*, 255 A.D.2d 445 (2d Dept. 1998).

Petitioners fundamentally urge the Court to step in and force a result different from the administrative action or inaction of the agency to whom the determination is delegated. A court may not substitute its own judgment and discretion for a duly authorized executive agency. Even if the Court believes that it would reach a contrary result, the Court cannot act. *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009). The 1996 opinion is a function of the State Board's special competence it is presumed to have. The rejection of the motion is also evidence that in its 19 year administration of this particular area of the law makes it settled precedent, which should also stay the Court's hand.

If the determination is supported by a rational basis, if it is not arbitrary and capricious, if is not affected by an error of law and is not an abuse of discretion, then the Court should uphold the action of the agency. In the instant matter there is only one

matter for the Court to examine despite the blunderbuss challenge. Did the State Board in the vote on the motion to direct the staff to prepare an opinion act without a rational basis or in a manner arbitrary and capricious? Did it make an error of law or did it abuse its discretion?

The answer to all and each of these inquiries is no. The State Board acted with a rational basis. It adhered to the law as it has existed for 20 years. In 2008, State Board counsel advised the State Board that in order for the 1996 opinion to be changed it required legislative action, not State Board action. The State Board did not act in an arbitrary or capricious manner. There is no allegation of procedural irregularities. The matter was fully aired at the State Board meeting. After the matter was fully aired (See Petitioners Exhibit 22), there was a vote of the four commissioners which tied along party lines. The vote by law caused the motion to fail. It made no error of law given that no error of law is occasioned by a motion that fails. Even if there were an issue on the merits, the 1996 retains its legal authority in the wake of *Citizens United v. FEC, supra.* The State Board did not abuse its discretion in that the matter raised was within its jurisdiction and all the proper procedures were followed. The only grievance Petitioners have is that they did not prevail. Petitioners failed to sustain their burden of proof for court usurpation of the agency's 1996 determination or its 2016 motion determination.

POINT VII

THE PETITION FATALLY FAILS TO NAME NECESSARY PARTIES

Petitioners in their action are requesting the court order relief in the form of forcing the State Board to act and rescind their 1996 opinion. However, they have failed

to name the Commissioners of the State Board of Elections, who are by definition, necessary parties to this action. *See,* CPLR 1001 (a). The State Board of Elections is a unique creature in the realm of Executive Departments. There are four commissioners appointed comprising the board. In order to undertake any official action, the affirmative votes of three commissioners are required. See, Election Law § 3-100 (1); 3-100 (4). The petition, in this sense, is directly challenging the action of only two commissioners of the State Board - Commissioners Kosinski and Peterson – claiming that they failed to vote in support of the motion which deprived the procedural motion of a majority of three votes. Ostensibly if either of the Commissioners had voted in favor, then the State Board would have revisited the 1996 opinion. In this court action, the petitioners claim relief should be granted as follows: Rescind the April 2016 failure to act (as it was a failure to act, it is unclear what such rescission would mean as a pure legal matter); repeal the 1996 opinion leaving no State Board guidance on contribution limits for LLCs; and ordering the State Board to issue a new opinion or regulation, an act which would clearly require the assent of more than simply two of the Commissioners. As such, plaintiffs should have properly named them as defendants.

Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. CPLR section 1001(a). A person who is not a party, but who might be inequitably affected by a judgment should be joined as a party, is applicable to special proceedings under Article 78. *Hearst Corporation v. New York State Police,* 109 A.D.3d 32 (3d Dept. 2103); *Herald Company v. School District of City of Syracuse,* 102 Misc.2d 637 (Sup. Ct. Onondaga

Co. 1980). Petitioner's failure to join the four Commissioners is faulty in the sense that the "State Board of Elections" on its own can take no action. It is only by a vote of a majority of the individual Commissioners that any action can be taken. As in this case, where Petitioners are specifically claiming that the two Commissioners that voted against a motion to rescind a 20 year old State Board policy should have their votes rescinded must be a necessary party. *See,* Article 78 Petition Paras. 90 - 93.

Further, even if Commissioners Kellner and Spano are inclined to support the objectives of the Petitioners here, they must still act to provide relief. Thus, each of the independent Commissioners who comprise the State Board of Elections must be joined as necessary parties. The failure to join the independent Commissioners renders the relief requested impossible. However, had they been named, the above arguments would hold true and relief would still be required to be denied.

CONCLUSION

The Petition should be dismissed in all respects.

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Albany, New York

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