To be Argued by:
JOHN CIAMPOLI, ESQ.
(Time Requested: 15 Minutes)

Case Nos. 524905 and 524850

New York Supreme Court

Appellate Division—Third Department

In the Matter of the Application of

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

Petitioners-Appellants,

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

– against –

NEW YORK STATE BOARD OF ELECTIONS,

Respondent-Respondent

BRIEF FOR INTERVENORS-RESPONDENTS-RESPONDENTS

John Ciampoli, Esq.
Of Counsel to
SINNREICH, KOSAKOFF & MESSINA, LLP
Attorneys for Intervenors-Respondents-Edward Cox and the NYS Republican State Committee
267 Carlton Avenue, Suite 302
Central Islip, New York 11722
(631) 650-1200

Albany County Clerk's Index No. 3579/15

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Intervenor Respondents below, Edward Cox and the New York Republican State Committee, in Brennan Center for Justice v NYS Board of Elections, Index No. 3579-15 (Sup Ct Greene County, March 16, 2016) (hereinafter referred to as "Brennan Center I") (Record, P.). The Intervenors were not parties to Brennan Center for Justice v NYS Board of Elections, Index No. 3279-16 (Sup Ct Albany County, February 10, 2017) (hereinafter referred to as "Brennan Center II") (RECORD P.), the second case before this Court.

The decisions and orders in both Brennan Center I and Brennan Center II are harmonious and in accord with each other. There is a large commonality of issues presented.

The salient issue in Brennan Center I focused on the Republican Commissioners of the State Board of Elections (hereinafter, SBOE) voting against a motion to direct State Board staff to prepare an opinion updating the Board's guidance on contributions by Limited Liability Companies (LLCs) embodied in a 19 year old SBOE Formal Opinion.

The State Board vote on this motion resulted in a tie (a 2-2 vote). A majority of the four Commissioners is required to pass any measure. Accordingly, the motion failed There was no assignment of staff to draft a proposed opinion. The SBOE policy remains the same. Petitioners unsuccessfully challenged that action (see Brennan Center I).

Brennan Center II, is essentially a repetition of Brennan Center I, by the Petitioners / Appellants. At an April 5, 2016 SBOE meeting, the two Republican Commissioners of the Board again voted against a motion on a proposed opinion put forth by the two Democratic

Commissioners to alter what was by that juncture a 20 year old SBOE opinion concerning Limited Liability Company contribution limitations.

Once again the Board voted. Once again there was a tie vote. Failing to obtain a majority vote, the motion failed. There was no change made to the Board's 20 year old policy. As a result all candidates may continue to legally accept contributions from LLCs The campaign Finance Law and Policy remains unaltered for more than two decades.

Appellants brought Brennan Center II, seeking rescission of the tie vote of April 5, 2016, a reversal of the 1996 SBOE Opinion and finally, that the Court substitute and order the issuance of an Opinion accordance with Petitioners' view of what the law should be.

Contrary to the Appellants contentions, the Supreme Court properly found that the issue in Brennan Center I was not the State Board's interpretation of the statute, but rather an attempt by Appellants to commander the SBOE's internal processes and direct the discretionary allocation of staff resources, dictating the results to suit their views.

The subtle difference in Appellants' case in Brennan Center II, was that Appellants sought to compel the SBOE to overturn its policy and conform to Appellants' views, notwithstanding the objection of the agency Moreover, in each of the two cases the Appellants failed to demonstrate any actual harm or injury to their rights due to SBOE inaction.

In both Brennan Center I and Brennan Center II, the Appellants were unsuccessful. Yor Respondents urge this Appellate Division to deny these appeals in all respects, and affirm the dismissals ordered by the two Courts below.

As Intervenors who were intentionally excluded from Brennan Center II, we submit that Appellants should be deemed collaterally estopped from re-litigating the identical issues.

The Decisions by the Supreme Court(s) should be affirmed. Particularly in that Appellants were found to lack standing. Moreover, the Appellants continue to attempt to litigate a political question, which is non-justiciable (Appellants want the Court to act to make a change in the law that has repeatedly failed to pass in the Legislature.

In Brennan Center I the Supreme Court properly determined Appellants' proceeding was time barred and precluded by the statute of limitations The Brennan Center II Court referenced the earlier decision it its decision.

Both Courts were in accord that the facts of each case did not warrant Article 78 relief; as they were discretionary internal policy determinations immune form Judicial interference.

QUESTION PRESENTED

QUESTION I: Were the holdings in Brennan Center I and Brennan Center II correct?

ANSWER: Respondents urge an answer in the AFFIRMATIVE, and the affirmance of both orders by this Appellate Division.

FACTS

Intervenor – Respondents respectfully rely on the facts recorded by the Court(s) in Brennan Center I and Brennan Center II, respectively.

POINT I

THE COURT IN BRENNAN CENTER I PROPERLY DETERMINED THAT THE ACTION WAS TIME BARRED

Appellants desired remedy is to reverse the 1996 SBOE opinion. That opinion sets the standards by which LLC contributions to political committees are viewed and governed. Appellants disagree with the opinion. They fail to recognize that their claim has now aged for more than twenty years – weel beyond the statute of limitations for Article 78 proceedings.

This Court must rebuff the attempt to evade the four month statute of limitations that expired at the end of May 1996, some twenty years after the original and final determination was made. They are attempting to bootstrap their action on recent votes taken by the SBOE. None of the votes in question resulted in any action being taken by the Board. The 1996 opinion stands

The Court below correctly held this proceeding was time barred in Brennan I. The Brennan II Court did not address the issue but was cognizant of the earlier decision. The Court found in Brennan Center I that this was little more than 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 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 ..."

Moreover, the CPLR provides:

"No court shall extend the time limited by law for the commencement of an action.", CPLR 217 & 201 respectively

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). The statute of limitations is not extended by recasting the matter, this is especially true 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**. The purpose of the four month statute of limitations is to achieve finality and avoid repeated re-litigation of administrative decisions that would cripple administrative agencies.

Simply put, the April 5th for Brennan Center II or April 16th for Brennan Center I failed motion is not when the 1996 Opinion became effective upon the petitioners below. The failed motion altered nothing. A failed motion does not constitute the type of decision making process that provides Article 78 relief. A lost motion is not a determination that opens the door to an Article 78 proceeding. The 1996 opinion is the status quo ante.

Appellants are not alone in their efforts to revive this issue. There is a long history here of similar attempts The SBOE Commissioners relate in their papers: "In Brennan Center I, and II, these Petitioners brought actions challenging similar State Board determinations not to rescind the 1996 opinion. In their own papers in Brennan Center I, 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.", Respondents Brief, p. .

Justice Fisher properly held that 1996 was when the four month limitation period was triggered. 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 (3rd Dept. 1987). Administrative 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 (2nd Dept. 2006).

Here, the final decision was made in 1996.

This Court must strictly enforce the statute of limitations. The policy behind the CPLR's provisions is designed to create finality and preserve the smooth functioning of governmental agencies. To rule otherwise would be to open a Pandora's box, because any administrative

determination in the history of the state would be subject to being revived by a denial of an application to reverse or revise it.

Absent an alteration of the space time continuum, allowing Appellants to enter a claim in 1996; the Appeal must fail. Accordingly, this Court should affirm the decisions and orders below.

POINT II

APPELLANTS LACKED STANDING

The trial Court in Brennan Center I correctly found that Appellants lacked standing to bring their proceeding. The issue of standing is inextricably linked to the "political question" that the Appellants have placed before the Court. Others have tried to accomplish what the Appellants seek to do here, achieve standing in any way possible. The Appellants failed to establish standing on the basis of any test that may be applied.

Generally the test for standing is a petitioner who sustained an "injury-in-fact," the petitioner must show that petitioner will actually be harmed by the challenged administrative action, that is, that the injury is more than just conjectural (see New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d at 21 1, 778 N.Y.S.2d 123; see also Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 773, 570 N.Y.S.2d 778). It is "special damage, different in kind and degree from the community generally" (Matter of Sun—Brite Car Wash v. Board of Zoning & Appeals ofTown ofN. Hempstead, 69 N.Y.2d 406, 413, 515 N.Y.S.2d 418 [1987]; see also Society ofPlastics Indus. v. County, ofSuff01k, 77 N.Y.2d at 775 n. l , 570 N.Y.S.2d 778). The requirement of injury in fact for standing purposes is closely aligned with policy that the courts of New York do not render advisory opinions (see Cuomo v, LILCo. 71 N.Y.2d 349, 354, 525 N.Y.S.2d 828 [1988]). Thus, the alleged injury must be "personal to the party" (see Transactive Corp. v. New York State Dept. of Social Services, 92 N.Y.2d 579, 684 N.Y.S.2d 156 [1998]).

Secondly, the "zone of interests" test, requires that the petitioner show that the injury-infact falls within the zone of interests sought to be promoted or protected by the

statutory provision under which the agency has acted, or failed to act (Society of Plastics Indus. v. County of Suffolk 77 N.Y.2d at 773, 570 N.Y.S.2d 778). It ties the injury asserted by the petitioner to the government act challenged, and thus limits the pool of people who may challenge an administrative action. The requirement that a petitioner's injury fall within the concerns of the statute ensures that a group or individual "whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." (Matter of Transactive Corp., 92 N.Y.2d at 587, 684 N.Y.S.2d 156, quoting Society of Plastics Indus* v. County of Suffolk, supra.

Appellants have failed to satisfy these tests and have advanced the argument that they are acting in the public interest and should, therefore, be accorded standing.

As for the claim that the Appellants are acting in the public interest and should be accorded standing on that basis. Again, Appellants fail.

In matters of "great public interest," a "citizen may maintain a mandamus proceeding to compel a public officer to do his [or her] duty" (Police Conference of N.Y. v. Municioal Police Training Council, 62 A.D.2d 416, 417—418, 405 N.Y.S.2d 511 [3d Dept., 1978], quoting Albert Elia Bldg. co. v. New York state Urban Dev. corm, 54 A.D.2d 337, 341, 388 N.Y.S.2d 462 [4th Dept. 1976]; see Matter of Schenectadv County Sheriffs Benevolent Assn. v. McEvoy 124 A.D.2d 91 1, 912, 508 N.Y.S.2d 663 [3d Dept., 1986]). "The office which the citizen performs is merely one of instituting a proceeding for the general benefit, the only interest necessary is that of the people at large" (Police Conference of N.Y., 62 A.D.2d 416, 405 N.Y.S.2d 511). One who is a citizen, resident and taxpayer has standing to bring an Article

for the performance by officials of their mandatory duties, even without a personal grievance or a personal interest in the outcome (Matter of the Policemen's Benevolent Assn. of Westchester County v. Board ofTrustees Vil. of Croton-on-Hudson, 21 A.D.2d 693, 250 N.Y.S.2d 523 [2d Dept., 1964]; Matter of v Rice, 277 N.Y. 271, 14 N.E.2d 65 [1938]).

Here, the Appellants can point to no mandatory duty that they seek to compel. Indeed, assuming, arguendo, that the repeal of the 1996 opinion was before the Court, they are seeking to compel individual Commissioners to perform a discretionary act (of course the Appellants wish to remove the discretion and compel votes in accord with their opinion).

"It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion ... A party seeking mandamus must show a clear legal right to relief" (Matter of People v. Christensen, 77 A.D.3d 174, 906 N.Y.S.2d 301 [2d Dept., 2010], emphasis added, quoting Matter of Brusco v. Braun, 84 N.Y.2d 674, 679, 621 N.Y.S.2d 291 [1994]; see New York Civ. Liberties Union v. State of New York, 4 N.Y.3d 175, 183—184, 791 N.Y.S.2d 507 [2005]). "Mandamus is available ... only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (New York Civ. Liberties Union v. State of New York, 4 N.Y.3d at 184, 791 N.Y.S.2d 507, see CPLR 7803[1]). "[M]andamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial" (Matter Of Jnr. v Village of Wappingers Falls, 94 A.D.3d 879, 942 N.Y.S.2d 147 [2d Dept. 2012]). "A discretionary act 'involve [s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result' " (New York Civ. Liberties Union v. State of New York, 4 N.Y.3d at 184, 791 N.Y.S.2d 507, quoting Tango v. Tulevech, 61

N.Y.2d 34, 41, 471 N.Y.S.2d 73 [1983]). However, "[m]andamus will lie to compel acts that public officials are duty bound to perform regardless of how they may exercise their discretion in doing so" (Matter of Korn v. Gulotta, 72 N.Y.2d at 370, 534 N.Y.S.2d 108; see Klostermann v. Cuomo, 61 N.Y.2d 525, 539-540, 475 N.Y.S.2d 247 [1984]).

Thus, in the case at bar, while mandamus may lie to compel Respondent Board of Elections and Commissioners to certify the ballot or the results of an election, it is not appropriate to compel the Board of Elections to assign specific staffers to draft a proposed opinion or to compel the Board or the individual commissioners to vote a particular way on issuing or rescinding a particular opinion (see Matter of Kupersmith v, Public Health Council of State of N.Y.,101 A.D.2d 918, 475 N.Y.S.2d 619 [3d Dept. 1984]). The Supreme Court correctly determined the issue in Brennan Center I.

Further guidance comes from the Appellate Division, First Department, in Urban Justice Center v. Pataki, 38 A.D.3d 20 (1st Dept., 2006), The First Department addressed multi-theory attempts to establish standing and dispatched with them. The Court held that the petitioner [a not for profit similarly situated to the Brennan Center here] claimed injury that the challenged practices operate to exclude it and its clients from participating in the legislative process and fulfilling its mission, is too speculative to constitute an injury in fact necessary to confer standing". The Court continued to hold, "[Appellants] allegations are also insufficient to support a finding of representational standing, since the organization does not articulate any direct injury to its clients, other than the injury every citizen allegedly suffers by reason of the challenged practices of the legislative and executive branches of state government".

This is exactly the situation before this Court. There is no injury to anyone here.

Writing for the First Department in dismissing claims asserted by Legislator Plaintiffs, Presiding Justice Buckley used the following analysis:

"the remaining counts, obstacles to the discharge of bills from committee, secret majority party conferences, the improper use of messages of necessity, and the payment of allowances for special capacities, involve only "a type of institutional injury (the diminution of legislative power)," which does not provide standing (Raines, 521 U.S. at 821, 117 S.Ct. 2312)."

In Raines, the plaintiff legislators, who had been in the minority voting against the Line Item Veto Act, argued that the statute would render their votes on future appropriation bills less "effective" than before, thereby changing the "meaning" and "integrity" of their votes (see id. at 825, 117 S.Ct. 2312). Specifically, they asserted that, prior to the Act, a vote for an appropriation bill was a vote for a package of projects inextricably linked, but after the Act the President could cancel a particular project without vetoing the rest of the bill (see id.). The Court characterized that argument as alleging a mere "abstract dilution of institutional legislative power," insufficient to confer standing (see *26 id. at 825— 826, 117 s.ct. 2312).2 Similarly, in Silver v. Pataki, 96 N.Y.2d at 539 n. 5, 730 N.Y.S.2d 482, 755 N.E.2d 842, the Court of Appeals ruled that the Speaker's claimed injury to his ability "to negotiate the Assembly's priorities and interests in the budget process" was a political dispute and abstract institutional injury that did not satisfy the standing requirements.

The claims that it is difficult to discharge a bill from committee to the full chamber without the consent of the Majority Leader or Speaker (as the case may be), that majority party legislative conferences meet in secret, that the Majority Leader and Speaker importune the Governor to overuse messages of necessity to force votes before legislators have an adequate

opportunity to review and debate proposed bills (which messages of necessity the Governor does not personally sign), and that committee chairs receive higher "special capacity" allowances than ranking minority members (who in turn receive higher payments than the remaining legislators), are all abstract institutional grievances that do not rise to the level of an injury in fact.", Urban Justice Center v. Pataki, 38 A.D.3d 20 (1st Dept., 2006), emphasis added.

Here, rather than assert their claims against the Legislative Leadership, or the Majority Conferences in their respective legislative houses, the Appellants assert that the LLC contribution limit as applied for nearly two decades interferes with their ability to govern.

The Appellants have neglected to include in their analysis that in a legislative body the majority governs. They also skirt the fact that they have failed to create a majority of both houses in support of their legislation. In any event they have not made a case allowing for this Court to impose their views for failed legislation.

The Appellants who are failed candidates for public office are even further from being able to plead facts establishing standing. Certainly, none of the Plaintiffs has asserted sufficient facts to establish standing of any kind.

The burden to establish standing is put upon the Appellants, Rudder v. Pataki, 246 A.D.2d 183, affd, 93 N.Y.2d 273 [1999]. The Appellants have simply not met their burden. To accord Appellants standing every time a motion fails before a state agency governed by a board would open the floodgates for litigation. A failed vote on a discretionary action is a

'non-action" and should not make for a case or controversy to be put before the Courts. There is no public interest at stake here. This is little more than a common political squabble as to what the law should be.

Accordingly, this Appellate Division should deny the within appeals.

POINT III

APPELLANTS IMPROPERLY SEEK TO HAVE THIS COURT DECIDE A POLITICAL QUESTION

The Court of Appeals has framed the question of justiciability of certain issues which are defined as "political questions". The Court held:

"The doctrine of justiciability, developed to identify appropriate occasions for the exercise of judicial authority, represents perhaps the most significant and least comprehended limitation upon the judicial power. (See Jackson, The Supreme Court in the American System of Government, p. 11.) 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, 119 N.E. 1027 [Cardozo, J.]), upon the proper presentation of matters of a "Judiciary Nature" (2 Farrand, Records of Federal Convention of 1787 [1911], p. 430). Recognizing that we have no more right to usurp the authority conferred upon a coordinate branch of government than to decline the exercise of jurisdiction which is granted, we turn to the critical inquiry presented by this appeal— whether Appellants' claims are justiciable.

As a reflection of the pattern of government adopted by the State of New York, which includes by implication the separation of the executive, legislative and judicial powers (Matter of LaGuardia v. Smith, 288 N.Y. 1, 5-6, 41 N.E.2d 153; Matter of Guden, 171 N.Y. 529, 531, 64 N.E. 451), it is 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). 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.].) Within our tripartite governmental framework, the Governor, as chief executive officer, has the responsibility to manage the operations of the divisions of the executive branch, including the Department of Correctional Services. (Saxton v. Carey, 44 N.Y.2d 545, 549, 406 N.Y.S.2d 732) The lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, 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, 424 N.Y.S.2d 395; Matter of Abrams v. New York City Tr. Auth., 39 N.Y.2d 990, 992, 387 N.Y.S.2d 235; Jones v. Beame, 45 N.Y.2d 402, 408, 408 N.Y.S.2d 449; James v. Board of Educ., 42 N.Y.2d 357, 368, 397 N.Y.S.2d 934; Matter of Smiley, 36 N.Y.2d 433, 441, 369 N.Y.S.2d 87.) 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, 408 N.Y.S.2d 449, supra; Benson Realty Corp. v. Beame, 50 N.Y.2d 994, 996, 43 1 N.Y.S.2d 475, app. dsmd. 449 U.S. 11 19, 101 S.Ct. 933, 67 L.Ed.2d 106; Klostermann v. Cuomo, 61 N.Y.2d 525, 535, 475 N.Y.S.2d 247, supra.)", D.C.82, AFSCME v. Cuomo, 64 N.Y.2d 233 [1984] emphasis added.

In D.C.82 v Cuomo, supra, the Court of Appeals concluded:

> "While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute (Klostermann v. Cuomo, 61 N.Y.2d 525, 475 N.Y.S.2d 247), the manner by which the State 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, 475 N.Y.S.2d 247; Matter of Abrams v. New York City Tr. Auth., 39 N.Y.2d 990, 992, 387 N.Y.S.2d 235). Where, as here, policy matters have demonstrably and textually been committed to a coordinate, political branch of government, any consideration of such matters by a branch or body other than that in which the power expressly is reposed would, absent extraordinary or emergency circumstances (James v. Board of Educ., 42 N.Y.2d 357, 367, 397 N.Y.S.2d 934), constitute an ultra vires act."

Given this framework, the analysis in this case is rendered simple. The Election Law vests the State Board of Elections with the power to issue opinions which assist the public, candidates, and elected officials in carrying out and compliance with the law.

Clearly, the administration of the campaign finance process. The SBOE has done so for years since its establishment in the 1970's. In fact the opinion challenged by the

The 1996 opinion of the SBOE has served as a guide for over two full decades since its adoption in 1996. This is an attempt to interfere with the lawful acts of the Board of Elections, carrying out their statutory responsibilities and exercising the discretion the Commissioners have under the law. The assignment of staff and allocation of agency resources is not subject to judicial review, Matter of Lorie C., 49 N.Y.2d 161, 171 (1980); Matter of Abrams v. NYC Tr. Auth. 39 N.Y.2d 990, 992 (1976); Matter of Jones, 45 N.Y.2d 402, 408 (1978); James v. Board of Ed., 42 N.Y.2d 357, 368 (1977); Matter of Smiley, 36 N.Y.2d 433, 441 (1975).

Beyond this invasion of the internal affairs of the Board of Elections the Appellants have clearly invited this Court to legislate. They are seeking to impose a law upon LLCs that was never adopted by the Legislature. As has been argued below, this Court hearing the application is geographically located in a prime spot to accommodate a myriad of Legislators who are not successful in getting their bills passed. Unfortunately, for the Appellants, Judicial Legislation

would contravene the doctrine of Separation of Powers. It would also entail the Court appropriating to itself the "political questions" that are assigned by our Constitution to the Legislature and the Governor.

Indeed the Legislature is the political branch of government. Here, the framework for campaign finance is a matter that is best determined by the Legislature, and that determination is plainly reflected by the Constitution, see NYS Constitution, Art. III, Sec. 1. The administration of the law has been placed with the State Board of Elections. The statutory framework is clear. The Judiciary has no place deciding the questions which are relegated to the political branches of government, see Klostermann v. Cuomo, 61 N.Y.2d 525, Matter of Abrams v. NYC Transit Auth., 39 N.Y.2d 990; D.C.82. AFSCME v. Cuomo, 64 N.Y.2d 233, all supra.

The law regarding LLC contributions stands in stark contrast to partnerships, where the Legislature acted to change the law. As the Court considers this application the Governor is including LLC contribution changes in his State of the State message. Governor Cuomo has already stated he will forward legislation on this topic to the Legislature, see Cuomo previews ethics reform plans, Albany Times Union, December 13, 2015. Nothing could embody a 'political question" more than this issue does. Clearly, it does not belong in the Courthouse. It belongs in the Assembly and Senate Chambers. The Appellants must not be allowed to preempt the Legislative process or commandeer an administrative agency in their attempt to impose their will upon LLCs and to abridge their freedom of speech.

Accordingly, the decisions and orders below should be affirmed and the Appeal herein denied.

CONCLUSIONS

For all of the reasons advanced herein the decisions and orders in Brennan Center I and Brennan Center II should be AFFIRMED. To the extent that this brief does not address any issue rasied in this appeal, or the issues of Brennan Center II, the Respondents respectfully adopt the positions advanced by Commissioners Peterson and Kosinski by counsel to the SBOE.

DATED: August 24, 2017

RESPECTFULLY SUBMITTED,

John Ciampoli, Esq.
Of Counsel to
Sinnreich, Kosakoff & Messina, LLP
267 Carleton Avenue, Suite 301
Central Islip, New York 11722
631-650-1200
Cell 518 - 522 - 3548