STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

In the matter of
RICH AMEDURE, GARTH SNIDE, ROBERT SMULLEN, EDWARD COX, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, JOSEPH WHALEN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, ERIK HAIGHT, and JOHN QUIGLEY,

Petitioners/Plaintiffs,

-against-

STATE OF NEW YORK, BOARD OF ELECTIONS OF THE STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents/Defendants.

ATTORNEY AFFIRMATION IN SUPPORT OF MOTION TO CHANGE VENUE

FOR RESPONDENTS/DEFENDANTS SENATE OF THE STATE OF NEW YORK AND MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE OF THE SENATE OF THE STATE OF NEW YORK

Index No.: 20232399

BENJAMIN F. NEIDL, an attorney admitted to practice law in the State of New York, affirms under penalty of perjury the following:

1. I am an attorney with the law firm of E. Stewart Jones Hacker Murphy LLP, attorneys for Respondents/Defendants New York State Senate and the Majority Leader and President Pro Tempore of the New York State Senate. I respectfully submit this Affirmation in support of said Respondents/Defendants' motion to change venue pursuant to CPLR §510.

2. The movants seek a change of venue for two reasons: (i) under Election Law §16-101, which went into effect September 23, 2023 and should be applied retroactively, the mandatory

venue for this case is Supreme Court, Albany County; (ii) notwithstanding Election Law §16-101, this case should have been brought in Supreme Court, Albany County pursuant to CPLR §506(b), because the Petitioners/Plaintiffs seek Article 78 relief against bodies and officers located in Albany County, and the "determination complained of" occurred in Albany County.

BRIEF HISTORY OF THE PROCEEDING

3. Petitioners/Plaintiffs commenced this action on September 1, 2023 by the filing of a "Verified Petition." (Docket #5.) The pleading styled the case as a "hybrid proceeding" seeking relief "pursuant to CPLR Article 78 and a declaratory judgment action brought pursuant to [CPLR §3001]." (Id. at ¶¶1-2.)

4. The "Verified Petition" seeks a judgment declaring a provision of the NYS Election Law unconstitutional. (Id. ¶2.) Specifically, the Petitioners/Plaintiffs target Election Law §9-209, as amended by Chapter 763 of the Laws of New York of 2021. (Id.) That statute governs how County Boards of Elections canvass absentee ballots. Petitioners/Plaintiffs contend that the 2021 amendments to the statute impede candidates' and parties' abilities to scrutinize and object to absentee ballots, and contend that the amendments infringe on voter privacy. The Respondents/Defendants, on the other hand, maintain that the Election Law is replete with protections for the review and verification of absentee ballots, and that there are more than adequate opportunities for stakeholders to be heard concerning the propriety of absentee ballots.

5. At the time of commencement, Petitioners/Plaintiffs also moved for a temporary restraining order and preliminary injunction, to bar County Boards of Election across the State from following the complained-of procedures in Election Law §9-209.

6. The undersigned movants (Respondents/Defendants Senate and Senate President Pro Tempore) appeared in the case on September 18, 2023, by filing an opposition to the motion

for injunctive relief and a cross-motion to dismiss the Verified Petition for failure to state a cause of action. (Docket #8 and #9.) Those motions are still pending. Inasmuch as the movants' motion to dismiss has not been decided, the Senate and Senate President Pro Tempore have not yet served an Answer to the Verified Petition.

7. The other Respondents/Defendants have appeared in the case by varying means. Some of them have moved to dismiss while others have answered. (Docket #12 through #53.) No discovery has occurred or been requested.

8. The case was initially assigned to Justice James E. Walsh. Justice Walsh recused himself pursuant to Judiciary Law §9 by letter dated September 19, 2023, to then District Administrative Judge Catena.

9. The case was assigned to Justice Diane N. Freestone on September 20, 2023. On October 5, 2023, Justice Freestone heard oral argument on the motion for injunctive relief and several cross-motions to dismiss, and motions to intervene by non-parties. Justice Freestone reserved decision on the motions that day.

10. In a Decision and Order on October 5, 2023 Justice Freestone denied a motion to intervene by several non-parties (Docket #81) and in an Order dated December 20, 2023 she granted the motion of Respondent/Defendant Gov. Kathy Hochul to be dismissed from the case as an improper party. (Docket #100.)

11. All other motions remain pending.

12. On February 15, 2024, Justice Freestone reportedly advised Administrative Judge Singh that she was disqualified from continuing with the case. (Docket #108.) The case was briefly assigned to Justice Richard Kupferman, but Justice Kupferman reportedly advised Administrative Judge Singh that he was disqualified from hearing the case. (Docket #110.) On

February 16, 2024, Judge Singh assigned Justice Rebecca A. Slezak, of Supreme Court, Montgomery County, to the case. (Id.)

RELIEF REQUESTED

13. The movants seek to have this case transferred to Supreme Court, Albany County because Saratoga County Supreme Court is not the proper venue. *See* CPLR §510(2). There are two grounds for the change of venue: (i) Albany County has become the mandatory venue under Election Law §16-101; and (ii) in any event, this case should have been brought in Supreme Court, Albany County pursuant to CPLR §506(b).

14. Pursuant to CPLR R. 511(a), a demand for a change of venue "shall be served with the answer or before the answer is served," and a motion to change venue "shall be made within a reasonable time after commencement of the action." As noted, the movants have not yet answered. Their pending pre-answer motion to dismiss has stayed their time to answer. On today's date, we have served counsel with a demand to change venue, a true and accurate copy of which is annexed hereto as Exhibit A.[1]

15. Motions to change venue filed several months after the commencement of an action—even upwards of 9 months—may be deemed within a "reasonable time" in the absence of prejudice to the plaintiff. *See* Gissen v. Boy Scouts of America, 26 A.D.3d 289 (1st Dep't 2006)(holding that a motion made approximately 9 months after commencement [October to the following July] was within a "reasonable time" in absence of prejudice); McLaughlin v. City of Buffalo, 259 A.D.2d 1014 (4th Dep't 1999)(holding that a motion five months into a case was timely); Ryan v. Great Atlantic & Pacific Tea Co., 30 A.D.2d 549 (2d Dep't 1968)("In the absence of a showing of prejudice, we find that a period of five months does not constitute unreasonable

[1] If Petitioners/Plaintiffs consent to change venue to Albany County within 5 days from today (*see* CPLR R. 511[b]) then the movants will withdraw this motion as moot.

delay"). This motion is brought approximately 5 months after commencement, and poses no prejudice for reasons discussed below.

16. As a practical matter, we bring this motion now because the case is at a re-set point. The prior assigned justice, Justice Freestone, disqualified herself two days ago, and the case was re-assigned to a judge from outside of Saratoga County (Justice Slezak) today. All of the pending motions and papers are now set to be re-read by a new jurist with no prior experience with the case. Given that, and given that the Administrative Judge has ventured outside of Saratoga County to make the current appointment anyway, this is a natural moment to take a close look at whether the current venue is appropriate. Having re-examined these issues, it is now clear to us that this case should have been brought in Albany County under CPLR §506(b) and, in any event the adoption of Election Law §16-101 in September 2023 compels a transfer to Albany County now.

17. This motion does not impose prejudice because, as noted, the parties and the judiciary find themselves at a re-set point anyway. If Justice Freestone was not disqualified and we brought this motion at a time when we might expect to see a decision from her imminently, complaints of prejudice could be understandable. But since we are back to square one in any event, there is no prejudice in a motion that raises the question of whether the successor judge should be one in Albany County, or the Fourth Judicial District. Therefore, we respectfully submit the motion is timely, and should be heard.

I. Albany County is the Mandatory Venue Under Election Law §16-101.

18. Election Law §16-101(c) provides as follows:

> Notwithstanding any other law to the contrary, in any action or proceeding in which any party challenges the constitutionality of a provision of this chapter, and any related statutory claims, ***venue shall be proper only in*** one of the following designated courts in a judicial department within which at least one plaintiff is located:
>
> ***
>
> (c) third judicial department: Albany County

(Emphasis added.)

19. Section 16-101 was adopted and went into effect immediately on September 20, 2023. A true and accurate copy of the legislation adopting the statute is annexed hereto as Exhibit B. The legislation notes: "Approved and effective September 20, 2023. Moreover, §2 of the legislation provides: "This act shall take effect immediately."

20. This instant case was commenced on September 1, 2023 (Docket #1), nineteen days before Election Law §16-101 went into effect. However, the text of the statute, the nature of its mandate, and the legislative history indicate collectively that the law should be applied retroactively.

21. If legislation does not specify whether it is meant to apply retroactively, "the court must attempt to discern the legislative intent either from the particular words used or, barring that, from the nature of the legislation." Posillico v. Southold Town Zoning Bd. of Appeals, 219 A.D.3d at 885, 888 (2d Dep't 2023). Generally, legislation is presumed to apply prospectively. Id. "However, *remedial legislation* should be given retroactive effect in order to effectuate its beneficial purpose." Posillico, 219 A.D.3d at 888 (emphasis added), *quoting* Gleason v. Michael Vee Ltd., 96 N.Y.2d 117, 122 (2001).; *see also* Pacheco v. PVE Co, LLC, 80 Misc.3d 1109 (S. Ct. Kings Co. 2023). Remedial statutes include, among other things, laws that are "designed to correct

imperfections in prior laws." Posillico, 219 A.D.3d at 888. If the manner of a law's adoption "conveyed a sense of urgency," this also supports the inference that it is intended to be applied retroactively. Gleason, 96 N.Y.2d at 122; Pacheco, 80 Misc. 3d at 1111. A sense of urgency may be inferred if "the statute took effect immediately." Pacheco, 80 Misc. 3d at 1112; *see also* Gleason, 96 N.Y.2d at 122 ("the Legislature did not state that [the law] was to have retroactive effect. However … it conveyed a sense of immediacy: it acted swiftly … and it directed that the amendment was to take effect immediately, thus evincing 'a sense of urgency'"). Another factor in considering a law's susceptibility to retroactive application is whether retroactive application would "result in unfairness or impair substantive rights." Posillico, 219 A.D.3d at 888.

22. Election Law §16-101 is a remedial statute. The Legislature's Committee Report, a true and accurate copy of which is annexed hereto as Exhibit C, states that the law's purpose was to cure forum shopping in Election Law cases that had been disruptive to election administration:

> This bill attempts to reduce the partisan gamesmanship that occurs in election law related litigation. Currently, it is far too easy for those seeking to destabilize the elections process to do so through frivolous litigation. This bill aims to reduce that and prevent the forum shopping seen recently by designating one court in each judicial department in the state as the appropriate venue for challenges to the election law.

The Sponsor's Memo, a true and accurate copy of which is annexed hereto as Exhibit D, recites the same purpose.

23. This case is reflective of that policy. The instant case is not a challenge to some irregularity in an election *in* Saratoga County. The case seeks statewide relief, namely a permanent nullification of a statewide statute, and injunctive relief that would bar County Boards of Elections from following the Election Law §16-101 procedures across the State. The case has no particular connection to Saratoga County, except that the Petitioners/Plaintiffs happen to reside there. Through the adoption of Election Law §16-101, the Legislature clearly endeavored to cut off

"forum shopping," such as arbitrarily bringing a case of Statewide concern in one's own backyard instead of the County where State government is seated. This is a remedial statute, and the Legislature's remedy was to centralize all cases challenging the constitutionality of Election Law Statutes in one court within the Third Department: Supreme Court, Albany County.

24. Moreover, the Legislature "conveyed a sense of urgency" in adopting Election Law §16-101, by making it "effective immediately." Gleason, 96 N.Y.2d at 122; Pacheco, 80 Misc. 3d at 1112.

25. The text of the statute itself is consistent with retroactive application. There are other statutes that designate particular forums for particular types of litigation, but usually those are written as a directive to the plaintiff where he or she may commence claims in the future. *See, e.g.*, Abandoned Prop. Law §1406(2)(a) ("Such court withdrawal action shall be commenced in the court which had original jurisdiction of the underlying matter"); Real Property Tax Law §589 ("the action shall be commenced in the county in which the real property is located"); Lien Law §302 ("An action to establish a mechanic's lien on real property shall be brought in the district in which such property or a part thereof is situated"). Under the language of those statutes, the statute's mandate is fulfilled once the plaintiff "commences" or "brings" the action in the right venue. In contrast, Election Law §16-101(c) is not a prospective command as to where plaintiffs should bring their constitutional challenges in the *future*, it is an immediate, present command that all such cases (even pending ones) belong only in section 16-101's designated courts:

> …in ***any*** action or proceeding in which any party challenges the constitutionality of a provision of this chapter, and any related statutory claims, ***venue shall be proper only in*** one of the following designated courts

26. "Any" means any. That means that the rule applies to existing actions as well as yet-to-be filed ones. And the phrase "venue shall be proper only in" the designated courts (such as Albany County Supreme) means that continuation of the case in any other venue is unlawful.

27. Furthermore, retroactive application will "not result in unfairness or impair substantive rights." Posillico, 219 A.D.3d at 888. Albany County Supreme Court is as viable a forum as any in the State to hear the case and adjudicate the claims and defenses. Applying Election Law §16-101 to this case puts the Petitioners/Plaintiffs in no worse a position than any other litigant bringing a constitutional challenge to an Election Law case today (or even a litigant who may have brought such a challenge a mere nineteen days after Petitioners/Plaintiffs did).

28. The plain text further buttresses this conclusion in §16-101 subdivision (2). That section clarifies that constitutional challenges subject to this mandatory venue in Albany County are not just initial claims brought by the plaintiff, but also counter-claims, cross-claims and defenses brought by other parties:

> For the purposes of this section, a challenge to the constitutionality of a provision of this chapter shall mean a challenge in any form, including but not limited to a claim, counter-claim, cross-claim, defense, or affirmative defense. Such a claim may be raised by any party, including but not limited to a plaintiff, defendant, third-party plaintiff, third-party defendant, intervenor, or substituted party.

Election Law §16-101(2). This means that even if the plaintiff's initial case was not a constitutional challenge subject to mandatory venue in Albany, it can *become* one after the fact if one of the other parties raises constitutionality by counterclaim, crossclaim or defense—thus, the case must be *transferred to* Albany if it was not brought there in the first place. Put more succinctly, the statute is not merely concerned with telling plaintiffs where they can sue, it also tells the judiciary which *courts can hear* a constitutional claim, and mandates transfer to the designated court. Transferring this case to Albany County because the statute was adopted days

later is no more prejudicial than transferring a case that becomes subject to the statute by virtue of a counterclaim, crossclaim or defense.

29. Accordingly, the statute should be applied retroactively and, the case transferred to Supreme Court, Albany County.

II. In Any Event, the Case Should Have Been Brought in Albany County Pursuant to CPLR §506(b).

30. As noted, the "Verified Petition" in this case seeks Article 78 relief.

31. CPLR §506(b) provides in relevant part as follows:

> A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law … or where the material events otherwise took place, or where the principal office of the respondent is located

32. The "determination" complained of in the Verified Petition, is the amendment of Election Law §16-101, which occurred in Albany County, in the Capitol Building. That is where the Legislature votes on amendments, and it is where the Governor signs bills into law. Consequently, Albany County is also the place where "the material events … took place."

33. Moreover, the place where most of the Respondents/Defendants have their principal offices is in Albany County. That is where the seat of government for Respondent Defendant "State of New York" is located. It is where Respondent/Defendant NYS Senate convenes, and where the President Pro Tempore has her office. It is where Respondent/Defendant NYS Assembly convenes, and where the Speaker's office is. It is where Respondent/Defendant NYS Board of Elections has its office (at 40 North Pearl Street in Albany). None of the Respondents/Defendants are alleged to have their offices in Saratoga County, or even to have any particular connection to Saratoga County.

34. For this separate and distinct reason, venue should be transferred to Supreme Court, Albany County.

WHEREFORE, the motion to change venue from Supreme Court Saratoga County to Supreme Court Albany County should be granted in its entirety.

I affirm this 16th day of February, 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 will be filed in an action or proceeding in a court of law.

Dated: Schenectady, New York
February 16, 2024

Respectfully submitted,

E. STEWART JONES HACKER MURPHY LLP

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CERTIFICATION PURSUANT TO RULE 202.8-B

I Benjamin F. Neidl hereby certify pursuant to Rule 202.8-b of the Uniform Rules of the Supreme Courts, that the length of this Affirmation, is **3,293 words**. In making this certification, I have relied on the word count tool in the word processing program that I used to compose this document, Microsoft Word.

Dated: Schenectady, New York
February 16, 2024

Respectfully submitted,

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