SUPREME COURT OF THE STATE OF NEW YORK
SARATOGA COUNTY

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, & JOHN QUIGLEY,

Petitioners/Plaintiffs,

v.

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.

Index No.: 20232399
Assigned Judge:

Hon. Rebecca A. Slezak

MEMORANDUM OF LAW ON BEHALF OF RESPONDENTS/DEFENDANTS ORTT AND BARCLAY IN OPPOSITION TO MOTION TO CHANGE VENUE

Paul DerOhannesian II, Esq.
DEROHANNESIAN & DEROHANNESIAN
159 Wolf Road, Suite 305
Albany, New York 12205
518.465.6420

Attorneys for Respondents/Defendants Minority Leader of The Senate of the State of New York and Minority Leader of the Assembly of the State of New York

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PRELIMINARY STATEMENT

Respondents/Defendants Minority Leaders of the Senate and Assembly (collectively "Respondent Minority Leaders"), respectfully submit this Memorandum of Law in opposition to the motion of the Respondents/Defendants Senate of the State of New York and Majority Leader and President Pro Tempore of the Senate of the State of New York ("Respondents-Movants") for a change of venue pursuant to the Civil Practice Laws and Rules ("CPLR") §510 and Rules 511 and 512. Respectfully, for the following reasons, Respondent Minority Leaders submit that the venue designated by Plaintiffs in this matter, the County of Saratoga, is the proper county for venue and the amendment to Election Law §16-101 is prospective in application under well-established New York precedent.

BACKGROUND

This action, a hybrid proceeding pursuant to Article 16 of the Election Law and declaratory judgment action pursuant to CPLR §3001, was commenced September 1, 2023. Dkt. No. 5. The proceeding seeks at its core a declaration that Chapter 763 of the New York Laws of 2021 ("Chapter 763"), codified in Election Law §9-209(2)(g), is unconstitutional.

Several of the Plaintiffs/Petitioners reside in Saratoga County. *See* Complaint ¶¶ 11, 12, and 13. Dkt. 5. Others reside throughout New York State. Respondent Minority Leader Ortt is an elected official representing Niagara County, all of Orleans County, and the towns of Sweden and Ogden in Monroe County. Respondent Minority Leader Barclay is an elected official representing Oswego County, and the towns of Ira, Sterling and Victory in Cayuga County and the towns of Adams, Ellisburg, Lorraine and Worth in Jefferson County.

The New York State Board of Elections has submitted an Answer. Dkt. No. 24. As reflected by the court docket, multiple motions and filings relating to procedure and substance have been filed by multiple parties, intervenors[1] and amici. Since the September 1, 2023 filing no party, intervenor or amicus raised the issue of venue in any pleading, filing or the October 5, 2023 oral argument. On February 16, 2024, the action was reassigned; however, the judicial reassignment did not move the case outside of Saratoga County. Dkt. 111. On the same day of the judicial reassignment, February 16, 2024, Respondents-Movants filed a Motion to Change Venue. Dkt. 112.

ARGUMENT

I. The Repeal of Election Law §16-101 Is Prospective in Application.

"[A] statute is presumed to apply only prospectively," and "'a clear expression of the legislative purpose'" is needed to "'justify a retroactive application[.]'" *Matter of Regina v. N.Y.S. Div. of Housing & Community Renewal,* 35 N.Y.3d 332, 370 (2020) (citation omitted) (*quoting in part, Gleason v. Gleason,* 26 N.Y.2d 28, 36 (1970)). "It is a fundamental canon of statutory construction that retroactive operation is not favored by courts[.]" *Majewski v. Broadalbin-Perth*, 91 N.Y.2d 577, 584 (1998). "Retroactive legislation is viewed with 'great suspicion' . . . 'This 'deeply rooted' presumption against retroactivity is based on '[e]lementary considerations of fairness' that 'individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.]'" *Regina,* 35 N.Y.3d at 370 (quoting, in part, *Langford v. USI Film Prods.,* 511 U.S. 244, 265 (1994)). "The plain wording of the amended statute affords no reason to support

[1] Movants' affirmation in support states that the trial court denied a motion to Intervene by several non-parties. Dkt. No. 113, ¶10. This is incorrect. The court granted Intervenors' motion. *See* Dkt. 81.

an argument that the Legislature intended that it be applied retroactively." *Franz v. Dregalla*, 94 A.D.2d 963, 964 (4th Dep't 1983).

Respondents-Movants acknowledge that the Amendment to Election Law §16-101 expressly states it "shall take effect immediately." *See* Dkt. No. 115 (attached as Exhibit B to Respondents-Movants' Attorney Affirmation). Yet Respondents-Movants cite no basis for finding that the statute's language "conveyed a sense of urgency" in retroactively applying the amendment to Election Law §16-101. Dkt. No. 113, Affirmation of Benjamin F. Neidl ("Neidl Affirmation") ¶24. Furthermore, despite the plain language of the statute, Respondents-Movants inexplicably argue that the "the text of the statute itself is consistent with retroactive application." Neidl Affirmation, ¶25. This nebulous language, permitting an inference of multiple conclusions of consistency, is made without any legal authority to support retroactivity in Respondents-Movants' motions papers.

Even worse, Respondents-Movants omit on-point case law that says just the opposite-statutes with the "take effect immediately" language are applied *prospectively* and this language *excludes* the idea that the statute should be retroactive. *See Regina,* 35 N.Y.3d at 373 (declaring that provisions in statute "expressly provide that the relevant part applies prospectively only, such as by indicating that it takes effect immediately"); *accord, Marrero v. Nails*, 114 A.D.3d 101, 113 (2d Dep't 2013); *see also, Coane v. American Distilling Co.,* 298 N.Y. 197, 205 (1948) ("[T]he command of section 61, that it is to 'take effect immediately' and apply in 'any action brought,' is prospective rather than retrospective[.]"); *State of New York v. Daicel Chem. Indus., Ltd*., 42 A.D.3d 301, 302 (1st Dep't 2007) ("Language in the statute that it shall 'take effect immediately' does not support retroactive application."); *Franz,* 94 A.D.2d at 964 ("The amended statute was

declared by the Legislature to take effect 'immediately', i.e., June 30, 1980. No mention is made as to retroactive application of the statute" (citations omitted)).[2]

Given this long line of controlling appellate authority, in addition to well-established principles, the 2023 Amendment to Election Law §16-101 *does not* have retroactive effect. Nor have Respondents-Movants rebutted the presumption of prospective application.

II. The Repeal of Election Law 16-101 Is Not Remedial.

Classifying a statute as "remedial" does not automatically overcome the strong presumption of prospectivity because the term may broadly encompass any attempt to remedy some defect or abridge some superfluity in the former law. A statute may be remedial when it corrects an unintended judicial interpretation. There is no indication that New York courts have had any trouble interpreting the New York venue statute.

Indeed, nearly any amendment to a statute could be called "remedial" because the amendment seeks to change some perceived weakness, "imperfection" or issue with a statute. Legislative purpose in a statute does not overcome the presumption or prospective application of a statute. *Majewski,* 91 N.Y.2d at 589. To the extent that Respondents-Movants argue the amendment clarifies Election Law §16-101 or the CPLR venue statutes, a "so-called clarifying" amendment also cannot retroactively change what an unambiguous statute had meant previously. *Roosevelt Raceway, Inc. v. Monaghan*, 9 N.Y.2d 293, 304 (1961). As the Court of Appeals holds, "[t]he Legislature has no power to declare, retroactively, that an existing statute shall receive a

[2] To the extent Respondents-Movants latch on to the word "shall" as evidence of retroactivity, their argument falters yet again. *See Kuryak v. Adamczyk*, 265 A.D.2d 796 (4th Dep't 1999) ("Here, the amendments use the term 'shall'. 'As a question of intention, a statute framed in future words, such as 'shall' or 'hereafter,' is construed as prospective only'." [citations omitted]).

given construction when such a construction is contrary to that which the statute would ordinarily have received." *Id.*

III. Respondents' Belated Motion is Untimely and Further Delays Resolution of Time Sensitive Litigation.

Respondents-Movants' Motion is made close to six months after initiation of the proceeding. The court has already noted that Plaintiffs "sought expedited intervention of the Court" and Intervenors also moved for "Expedited Leave to Intervene as Respondents." Dkt. No. 81, pp. 2, 4. The court noted "the immediacy under which these proceedings are to be brought." *Id.* at 5. The Respondents-Movants, and indeed no party, intervenor or amicus has raised any issue- not even a peep- concerning venue for six months. Respondents-Movants have waited far too long and provide no reason or justification for the failure to make this motion during the past six months.

Indeed, despite Respondents-Movants' assertion to the contrary, six months after commencement of a proceeding is anything but "natural moment" to look at the venue of the action. Neidl Affirmation, ¶16. All information and facts necessary for the motion were available to Respondents-Movants in September – six months ago – when the case was filed. Moreover, the motion is made well after the Respondent New York State Board of Elections submitted its answer.[3] Dkt. No. 24. Given the "immediacy" of this proceeding, the upcoming election primary and general elections, and the lack of diligence, respectfully, the Respondents-Movants' motion should be deemed untimely.

[3] As a prerequisite to a CPLR §510(1) motion, under CPLR §511(a), "a demand …for change of place of trial on the ground that the county designated for that purpose is not a proper county shall be served with the answer or before the answer is served."

IV. The Venue Plaintiffs Petition/Complaint is Properly Placed in Saratoga County.

Plaintiffs have filed a combined declaratory judgment action combined with the possibility of Article 78 relief. Respondents-Movants do not dispute the venue of the declaratory judgment cause of action (where multiple plaintiffs reside[4]) but argue because of the Article 78 cause of action and the provisions of CPLR §506(b) venue "should be transferred to" Albany County. Neidl Affirmation, ¶25. The gravamen of Plaintiffs' proceeding is an action to declare unconstitutional Chapter 763, codified in Election Law §9-209(2)(g). While combined with the possibility of Article 78 relief, that relief is incidental to the question of the statute's constitutionality. *See New York C. R. Co. v. Lefkowitz*, 12 N.Y.2d 305, 310 (1963) (rejecting in an action involving a Civil Practice Act statute, which was a precursor to CPLR §506(b), the defendants' argument that the matter could only be brought in Albany County as the primary relief sought was to have the statute declared unconstitutional).

To the extent CPLR §506(b) conflicts with the venue provisions of CPLR §503(a), CPLR §502, which addresses conflicting venue provisions, provides the solution:

> Where, because of joinder of claims or parties, there is a conflict under this article, the Court, upon motion, shall order as the place of trial one proper under this article as to at least one of the parties or claims. CPLR §502.

Thus, the court has discretion to select a venue that would be proper as to any one of the appropriate venues when statutory venue provisions conflict. *Hurst v. Board of Educ*., 242 A.D.2d 130, 132-33 (3rd Dep't 1998) ("Where there are conflicting venue provisions and one or more parties seeks a change of venue, it is given to the discretion of the court to select the proper venue.")

[4] *See* Complaint ¶¶ 11, 12, and 13. Dkt. 5.

Inasmuch as venue in this proceeding was properly placed in Saratoga County, the time sensitive nature of the issues of this lawsuit, and Respondents-Defendants' belated motion made six months after initiation of the proceeding, venue should remain in Saratoga County.

CONCLUSION

For the foregoing reasons, Respondents/Defendants Minority Leader of the Senate of the State of New York and Minority Leader of the Assembly of the State of New York respectfully submit that the motion to transfer venue should be denied in its entirety together with such other and further relief as the Court deems necessary and just.

Dated: February 26, 2024
Albany, New York

Paul DerOhannesian II, Esq.
DEROHANNESIAN & DEROHANNESIAN
159 Wolf Road, Suite 305
Albany, New York 12205
518.465.6420

Attorneys for Respondents/Defendants Minority Leader of The Senate of the State of New York and Minority Leader of the Assembly of the State of New York

CERTIFICATION OF WORD COUNT

I, Paul DerOhannesian II, Esq., an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the foregoing document complies with the word count limits set forth in 22 N.Y.C.R.R. § 202.8-b(a) because it contains 1826 words, exclusive of the material identified by 22 N.Y.C.R.R. § 202.8-b(b).

In preparing this certification, I have relied on the word count of the word-processing system used to prepare this document.

Dated: February 26, 2023

Paul DerOhannesian II, Esq.