SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

THE COUNTY OF ONONDAGA, THE ONONDAGA COUNTY LEGISLATURE, and J. RYAN MCMAHON II, Individually and as a voter and in his capacity as Onondaga County Executive,

Plaintiffs,

-against-

THE STATE OF NEW YORK, KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, DUSTIN M. CZARNY, in his capacity as Commissioner Of the Onondaga County Board of Elections, and MICHELE L. SARDO, in her capacity as Commissioner Of the Onondaga County Board of Elections,

Defendants.

Action No. 1:
Index No.: 003095/2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

THE COUNTY OF NASSAU, THE NASSAU COUNTY LEGISLATURE, and BRUCE A. BLAKEMAN, individually and as a voter and in his official capacity as Nassau County Executive,

Plaintiffs,

-against-

THE STATE OF NEW YORK and KATHY HOCHUL, in her capacity as the Governor of the State of New York,

Defendants.

Action No. 2:
Index No.: 605931/2024

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

THE COUNTY OF ONEIDA; THE ONEIDA COUNTY BOARD OF LEGISLATORS, ANTHONY J. PICENTE, JR., Individually as a voter and in his capacity as Oneida County Executive; and ENESSA CARBONE, Individually and as a voter and in her capacity as Oneida County Comptroller,

Plaintiffs,

Action No. 3:
Index No.: EFCA 2024-000920

-against-

THE STATE OF NEW YORK and KATHLEEN HOCHUL, in her capacity as Governor of the State of New York,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

COUNTY OF RENSSELAER; STEVEN F. MCLAUGHLIN, Individually as a Voter, and in his Capacity as RENSSELAER COUNTY EXECUTIVE; and the RENSSELAER COUNTY LEGISLATURE,

Plaintiffs,

Action No. 4:
Index No.: EF2024-276591

-against-

THE STATE OF NEW YORK and KATHLEEN HOCHUL, in her Capacity as Governor of the State of New York,

Defendants.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF JEFFERSON

JASON ASHLAW, JOANN MYERS, TANNER RICHARDS, STEVEN GELLAR, EUGENE CELLA, ROBERT MATARAZZO, THE COUNTY OF SUFFOLK, and THE TOWN OF HEMPSTEAD,

Plaintiffs,

-against-

Action No. 5:
Index No: EF2024-00001746

THE STATE OF NEW YORK, KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, MICHELLE LAFAVE, in her capacity as Commissioner of the Jefferson County Board of Elections, JUDE SEYMOUR, in his capacity as Commissioner of the Jefferson County Board of Elections, THE JEFFERSON COUNTY BOARD OF ELECTIONS, JOHN ALBERTS, in his capacity as Commissioner of the Suffolk County Board of Elections, BETTY MANZELLA, in her capacity as Commissioner of the Suffolk County Board of Elections, THE SUFFOLK COUNTY BOARD OF ELECTIONS, JOSEPH KEARNEY, in his capacity as Commissioner of the Nassau County Board of Elections, JAMES SCHEUERMAN, in his capacity as Commissioner of the Nassau County Board of Elections, and THE NASSAU COUNTY BOARD OF ELECTIONS,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CONSOLIDATE UNDER CPLR § 602

PRELIMINARY STATEMENT

This Memorandum of Law, together with the accompanying Affidavit in Support by Julia Kaplan Toce, Esq., dated May 8, 2024 ("Toce Aff.") and the Exhibits annexed thereto, are respectfully submitted in support of the instant motion by Defendants The State of New York and Kathleen Hochul, in her capacity as Governor of the State of New York (together "State Defendants") in Index No. EF2024-00001746 ("Action No. 5") for an Order (a) pursuant to CPLR § 602(b), consolidating Action No. 5 with the action filed by Plaintiffs The County of Onondaga, the Onondaga County Legislature, and J. Ryan McMahon II, individually and as a voter and in his capacity as Onondaga County Executive (the "Action No. 1 Plaintiffs") in Index No. 003095/2024 ("Action No. 1 ") for consolidated discovery and trial; (b) transferring venue of Action No. 5 to Onondaga County in accordance with the "first county" rule; (c) extending the State Defendants' times to Answer or otherwise move; and (d) granting State Defendants such other, further and different relief as the Court deems just, equitable, and proper.

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Action No. 5 should be consolidated with Action No. 1 because both suits arise out of the same events—the Legislature's enactment of the Even Year Law, which moves certain local elections to even years—and involve the same request for declaratory judgment finding that the Even Year Law is unconstitutional and in violation of Article IX of the New York Constitution. Here, consolidation will lead to increased efficiency and importantly avoid the risk of inconsistent determinations. The Onondaga Case having been filed first, and in the absence of other special circumstances, consolidation in Onondaga County is proper pursuant to the "first county rule."

STATEMENT OF FACTS

The facts of this case are fully set forth in the Toce Affidavit, which is incorporated by reference. On June 9, 2023, the Legislature passed the Even Year Law, Assembly Bill

A4282B/Senate Bill S3505B, entitled, an "ACT to amend the town law, the village law, the county law, and the municipal home rule law, in relation to moving certain elections to even-numbered years." Like Onondaga County, both Jefferson and Suffolk Counties have recently held county-wide elections in odd years, the last being 2023. The Even Year Law, signed by Governor Hochul on December 22, 2023, moved the elections for certain town and county officials from odd-numbered years to even-numbered years.

Seeking declaratory judgments that the Even Year Law violates Article IX of the New York State Constitution, the Onondaga County Plaintiffs filed Action No. 1 on March 22, 2024; the Nassau County Plaintiffs filed Action No. 2 on April 5, 2024; the Oneida County Plaintiffs filed Action No. 3 on April 9, 2024; the Rensselaer County Plaintiffs filed Action No. 4 on April 15, 2024; and now the Jefferson and Suffolk County Plaintiffs have filed Action No. 5 on April 19, 2024.

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ARGUMENT

I. ACTION NO. 1 AND ACTION NO. 5 SHOULD BE CONSOLIDATED PURSUANT TO CPLR § 602 BECAUSE THEY SHARE COMMON QUESTIONS OF LAW AND FACT AND SEPARATE ACTIONS RISKS INCONSISTENT DETERMINATIONS.

CPLR § 602 provides:

> (a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> (b) Cases pending in different courts. Where an action is pending in the supreme court it may, upon motion, remove itself an action pending in another court and consolidate it or have it tried together with that in the supreme court.

CPLR § 602(a)-(b).

CPLR § 602 provides the Court with broad discretion to consolidate actions presenting common question of law or fact. *See Coakley v. Africano*, 181 A.D.2d 1071, 581 N.Y.S.2d 515 (4th Dep't 1992). "Where common questions of law or fact exist, a motion pursuant to CPLR § 602(a) to consolidate or for a joint trial should be granted absent a showing of prejudice to a substantial right of the party opposing the motion." *Whiteman v. Parsons Transp. Group of New York, Inc.*, 72 A.D.3d 677, 678 (2d Dep't 2010) (citations omitted); *see also Humiston v. Grose*, 144 A.D.2d 907, 908 (4th Dep't 1988) ("Although such a motion is addressed to the sound discretion of the court, consolidation is favored by the courts . . .") (internal citations omitted). As explained by the Court of Appeals, consolidation is favored because, "Where complex issues are intertwined, albeit in technically different actions, it would be better . . . to facilitate one complete and comprehensive hearing and determine all of the issues involved between the parties at the same time." *Shanley v. Callanan Industries, Inc.,* 54 N.Y.2d 52 (1981). Consolidation is appropriate to avoid unnecessary duplication of trials, save unnecessary costs and expense in discovery and prevent injustice which would result from divergent decisions based on the same facts. *Chinatown Apartments, Inc. v. N.Y. City Transit Auth.*, 100 A.D.2d 496 (4th Dep't 1984). Courts may consolidate cases at a pre-answer stage where it is evident that common issues are presented. *Cushing v. Cushing*, 85 A.D.2d 809 (3d Dep't 1981). Fragmentation of related matters increases unnecessary litigation, places an unnecessary burden on the Court, and imposes the risk of inconsistent verdicts. *See Shanley v. Callanan Indus.*, 54 N.Y.2d 52 (1981); *see also Boyman v. Bryant*, 133 A.D.2d 802 (2d Dep't 1987) (ordering consolidation "[i]n the interest of judicial economy, in order to avoid inconsistent verdicts, and in the absence of demonstrable prejudice").

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Consolidation is appropriate even where individual actions have additional, or differing claims and parties. "It is usually sufficient if evidence admissible in one action is admissible or

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relevant in the other." *Maigur v. Saratogian, Inc.*, 47 A.D.2d 982, 982 (3d Dep't 1975) (noting that some causes of action may be eliminated after pre-trial examination and hearings). "Each and every factual and legal issue need not be identical. A single common issue will suffice in the absence of a showing of prejudice of a substantial right." *Harby Associates, Inc. v. Seaboyer*, 82 A.D.2d 992, 993 (3d Dep't 1981).

To overcome the general favor towards consolidation, therefore, the opposing party must demonstrate prejudice of a substantial right in a specific, non-conclusory manner. *See, e.g., Amcan Holdings, Inc. v. Torys LLP*, 32 A.D. 3d 337, 339 (1st Dep't 2006) (holding the burden is on any opposing party to demonstrate prejudice*); Steele v. Consolidated Edison Co. of N.Y.*, 222 A.D.3d 511 (1st Dep't 2023) ("plaintiffs did not meet his burden to demonstrate that consolidation would prejudice a substantial right"). Importantly, "[t]he mere desire to have one's dispute heard separately does not, by itself, constitute prejudice involving a 'substantial right.'" *Vigo S.S. Corp. v. Marship Corp. of Monrovia,* 26 N.Y.2d 157, 162 (1970); *Symphony Fabrics Corp. v Bernson Silk Mills, Inc.*, 12 N.Y.2d 409 (1963). Even factors such as inconvenience and additional expenses may not, by themselves, override the preference for consolidation. *See Sullivan County v. Edward L. Nezelek, Inc.*, 54 A.D. 2d 670, 671 (1st Dep't 1976).

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Here, Actions No. 1 and No. 5 are textbook examples of the sensibilities of consolidation under CPLR § 602. The actions each involve the same essential facts—the passage of the Even Year Law—and ask the Court to make the same legal determination—declaratory judgment regarding the law's constitutionality. Specifically, Plaintiffs each allege that their counties and towns hold odd year elections of legislators and county executives. *See* Toce Aff. ¶ 7. The Plaintiffs further allege that the Even Year Law unconstitutionally burdens their Counties' rights to control the timing of elections under the "home rule rights" afforded by Article IX of the New

York State Constitution. Toce Aff. ¶ 8.

Consolidation will lead to efficiencies for all parties and promote judicial economy. The State Defendants named in Action No. 1 are also named in Action No 5. Both actions name various county election officials, albeit for differing counties. Any discovery would be largely duplicative in both actions and, if the actions remained separate, the same fact witnesses would be called upon to provide the same, repetitive testimony, in two separate courts.

In addition to the common question of law regarding the constitutionality of the Even Year Law pursuant to Article IX of the New York State Constitution, Action No. 5 raises certain other constitutional challenges including freedom of speech and assembly, equal protection, and the right to vote. *See* Toce Aff. ¶ 20. The fact that there are differing parties and certain additional claims made in Action No. 5 that are not present in Action No. 1 makes no difference to the essential determination of consolidation. Here, the core facts, and the bulk of the legal analyses are the same across all Actions. Additionally, the differing parties are similarly situated and are raising the same concerns to the passage of the Even Year Law. At root, all of the cases seek the same relief, involve the same set of facts and the same core legal questions, and as such are ideal for consolidation.

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Most significantly, if these matters were to proceed separately, there would be a risk of inconsistent judgments on an important constitutional question. Of note, Plaintiffs in Action No. 5 the Town of Hempstead and resident Robert Matarazzo, are both located within the County of Nassau, a plaintiff in Action No. 2. *See* Toce Aff. ¶ 23. Plaintiffs in Action No. 2 have moved for consolidation as well, and without consolidation of all matters there will be the risk of inconsistent determinations even among towns and individuals within Nassau County itself. Justice and judicial economy would be best served by consolidating these actions, resulting in a

single determination on the constitutionality of the Even Year Law. Therefore, to avoid inconsistent judgments, the inconvenience of all the parties, and duplicative discovery costs, joining Action No. 1 and Action No. 5 is necessary in this instance. *Flaherty v. RCP Assocs.*, 208 A.D. 2d 496 (2d Dep't 1994). Given the absence of substantial prejudice to Plaintiffs, the motion should be granted. *See Page v. Lar Lakeshore Corp.*, 138 A.D.2d 970, 971 (4th Dep't 1988).

II. ACTION NO. 5 SHOULD BE TRANSFERRED TO ONONDAGA COUNTY PURSUANT TO THE "FIRST COUNTY RULE."

It is well established that "[w]here two actions are pending in the Supreme Court in different counties, the motion to consolidate may be made in either County." *Gomez v. Jersey Coast Egg Producers, Inc.*, 186 A.D.2d 629 (2d Dep't 1992). "Generally, where actions commenced in different counties have been consolidated pursuant to CPLR § 602, the venue should be placed in the county where the first action was commenced, unless special circumstances are present." *Id.*; *see also In re Wilber*, 2 A.D.3d 1266, 1266 (4th Dep't 2003) (affirming consolidation and transfer where first action was properly commenced); *Arnheim v. Prozeralik*, 191 A.D.2d 1026, 1026 (4th Dep't 1993) ("We further conclude that the court properly changed the venue of the second action from Niagara County to Erie County because the action first commenced was brought in Erie County.").

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Certain "special circumstances" occasionally necessitate that a county other than the first-filed county be the proper venue, but none of those circumstances exist in the instant case. For instance, where the majority of witnesses and evidence are located in the county of the second-filed case or if the second-filed case has already progressed, the venue may be more reasonably relocated. *See, e.g.*, *Pub. Serv. Truck Renting, Inc. v. Ambassador Ins. Co.*, 136

A.D.2d 911, 912 (4th Dep't 1988); *Perinton Associates v. Heicklen Farms, Inc.*, 67 A.D. 2d 832 (4th Dep't 1979) (noting that, "while normally the venue to be preferred, assuming both counties are proper, is that in which the first action was commenced . . . the decision rests in the sound discretion of the motion justice . . .").

Here, all related actions have just recently been filed. Action No. 1 was filed first (on March 22, 2024) in Onondaga County, and Action No. 5 was filed shortly thereafter on April 19, 2024. The actions present no special circumstances speaking to any need to alter the location of the determination of the validity of the Even Year Rule. In fact, many of the parties in Action No. 5 are located in either Nassau or Suffolk Counties, which have no relation to Jefferson County and are closer in proximity to Onondaga County. *See* Toce Aff. ¶ 24. As such, judicial efficiency dictates that Action No. 5 be transferred to Onondaga County under the First County Rule.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant motion be granted, and that the above captioned Action No. 5 be consolidated with the above captioned actions and transferred to Onondaga County Supreme Court.

Dated: May 8, 2024
Watertown, NY