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,

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

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.

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,

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

Plaintiffs,

-against-

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

Defendants.

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,

-against-

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

Defendants.

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

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,

-against-

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

Defendants.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF JEFFERSON

JASON ASHLAW, JOANN MYERS, TANNER RICHARDS, STEVEN GELLAR, EUGENE CELLA, ROBERT MATARAZZO, ROBERT FISCHER, JAMES JOST, KEVIN JUDGE, THE COUNTY OF SUFFOLK, THE TOWN OF HEMPSTEAD, THE TOWN OF BROOKHAVEN, THE TOWN OF HUNTINGTON, THE TOWN OF ISLIP, THE TOWN OF SMITHTOWN, THE TOWN OF CHAMPION, THE TOWN OF NORTH HEMPSTEAD, and THE TOWN OF NEWBURGH,

Plaintiffs,

-against-

Action No. 5:
Index No: EF2024-01746

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, MARGARET MEIER, in her 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, THE NASSAU COUNTY BOARD OF ELECTIONS, LOUISE VANDEMARK, in her capacity as Commissioner of the Orange County Board of Elections, COURTNEY CANFIELD GREENE, in her capacity as Commissioner of the Orange County Board of Elections, THE ORANGE COUNTY BOARD OF ELECTIONS,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

COUNTY OF ROCKLAND and EDWIN J. DAY, in his individual and official capacity as Rockland County Executive,

Plaintiffs,

-against-

THE STATE OF NEW YORK,

Defendants.

Action No. 6:
Index No.: 032196/2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

STEVEN M. NEUHAUS, Individually, and as a voter in his capacity as Orange County Executive, THE COUNTY OF ORANGE, THE ORANGE COUNTY LEGISLATURE, ORANGE COUNTY LEGISLATORS, KATHERINE E. BONELLI, THOMAS J. FAGGIONE, JANET SUTHERLAND, PAUL RUSZKIEWICZ, PETER V. TUOHY, BARRY J. CHENEY, RONALD M. FELLER, GLENN R. EHLERS, KATHY STEGENGA, KEVIN W. HINES, JOSEPH J. MINUTA, LEIGH J. BENTON, ROBERT C. SASSI, and JAMES D. O'DONNELL, Individually and as voters,

Plaintiffs,

-against-

KATHLEEN HOCHUL, in her capacity as Governor of the State of New York, THE STATE OF NEW YORK, ORANGE COUNTY REPUBLICAN COMMITTEE, ORANGE COUNTY DEMOCRATIC COMMITTEE, CONSERVATIVE PARTY OF NEW YORK STATE, and NEW YORK WORKING FAMILY PARTY,

Defendants.

Action No. 7:
Index No.: 004023/2024

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

PRELIMINARY STATEMENT

Seven separate lawsuits have been filed throughout the State of New York challenging the Even Year Election Law. All of the suits name Defendants The State of New York and Governor Hochul, and all suits seek a declaratory ruling that the Even Year Election Law offends Article IX of the State Constitution. Because these coordinated challenges are all so alike and seek the same relief, consolidation is critical to conserve judicial resources and avoid inconsistent rulings and unnecessary duplicative briefing.

This Memorandum of Law, together with the accompanying Affidavit in Support by Julia Kaplan Toce, Esq., dated May 28, 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; and (c) granting State Defendants such other, further and different relief as the Court deems just, equitable, and proper.

Action No. 5 should be consolidated with Action No. 1 because both suits arise out of identical events—the Legislature's enactment of the Even Year Election Law, which moves certain local elections to even years—and involve the same request for declaratory judgment finding that the Even Year Election Law is unconstitutional and in violation of Article IX of the

New York State 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 Election 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, Jefferson, Suffolk, Orange and Nassau Counties have recently held county-wide elections in odd years, the last being 2023. The Even Year Election 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 Election 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; Jefferson, Suffolk and Orange County Plaintiffs filed the instant Action No. 5 on April 19, 2024; Rockland County Plaintiffs filed Action No. 6 on April 22, 2024; and Orange County Plaintiffs filed Action No. 7 on April 24, 2024.

Since the filing of each of these similar actions, many parties have voluntarily consented to consolidate in Onondaga County, the first county filed. To date, Nassau County Plaintiffs have moved to consolidate Action No. 2, Oneida County Plaintiffs have moved to consolidate

Action No. 3, and Rensselaer County Plaintiffs have stipulated to consolidate Action No. 4. Toce Aff. ¶¶ 14-16. Rockland County Plaintiffs have agreed to consolidate Action No. 6, and Orange County Plaintiffs have agreed to consolidate Action No. 7. Toce Aff. ¶¶ 17-18. The instant case, therefore, Action No. 5, is the sole case in which Plaintiffs' counsel has been unwilling to agree to consolidate for judicial economy, and thus this motion follows. Toce Aff. ¶ 19.

ARGUMENT

I. CONSOLIDATING ACTION NO. 1 AND ACTION NO. 5 IS APPROPRIATE TO PROMOTE JUDICIAL ECONOMY AND AVOID 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.

"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, "[w]here 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); *see also Holland v. State*, 134 Misc. 2d 826, 827 (Ct. Cl. 1987) (finding that one judge should preside over six separate claims involving the same defendant, "similar and related" causes of action, and the same general underlying events).

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 824 (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, 810 (3d Dep't 1981); *see also Bernstein v. Silverman*, 228 A.D.2d 325, 325-26 (1st Dep't 1996) (holding that it is reversable error and an abuse of discretion to deny consolidation where the "actions are in the early stages of discovery and will not be unduly delayed if consolidated, both arise from the [same issues] . . ., the same witnesses will be required in both actions, and there is a possibility that injustice would result from inconsistent results in the two actions"). Fragmentation of related matters increases unnecessary litigation, places an unnecessary burden on courts, and imposes the risk of inconsistent verdicts. *See Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 57 (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").

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 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 the opposing party to demonstrate prejudice*); Steele v. Consolidated Edison Co. of N.Y.*, 222 A.D.3d 542, 543 (1st Dep't 2023) ("plaintiff did not meet his burden to demonstrate that consolidation would prejudice a substantial right"). Moreover, "[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, delay, and additional expense may not, by themselves, override the preference for consolidation. *See Page v. Lar Lakeshore Corp.*, 138 A.D.2d 970, 970 (4th Dep't 1988); *see also Sullivan County v. Edward L. Nezelek, Inc.*, 54 A.D. 2d 670, 671 (1st Dep't 1976).

Here, Actions No. 1 and No. 5 are textbook examples of the sensibilities of consolidation under CPLR § 602. The two actions arise out of the same exact factual background: the passage of the Even Year Election Law. State Defendants are parties in both actions. The relief sought is identical in both actions. Toce Aff. ¶¶ 25. Given these many similarities, it is anticipated that State defenses will be the same on these claims as well.

Moreover, each claim within Action No. 1 is also pled in Action No. 5. Toce Aff. ¶¶ 21-24. Plaintiffs in both cases allege that the Even Year Election Law unconstitutionally burdens local governments' rights to control the timing of elections under the "home rule rights" established by Article IX of the New York State Constitution. Toce Aff. ¶ 20. Action No. 1

cites three causes of action, claiming that the Even Year Election Law violates sections 1, 2 and 3 of Article IX. Toce Aff. ¶¶ 21, 25. These three causes of action are mirrored as Counts IV, V, and VI of Action No. 5, appearing in some paragraphs word-for-word. Id. Given the commonality of factual issues and uniformity of claims and defenses, "[j]udicial economy, efficiency and logic all dictate that these claims should be presided over by a single Judge." *Holland*, 134 Misc. 2d at 827.

Because the three claims within Action No. 1 appear in Action No. 5, consolidation is necessary to avoid inconsistent judgments on important questions of constitutional law where the state has a substantial interest. As pled, these separate Actions ask seven separate courts to make determinations about the State's interests and abilities to legislate. *See e.g. Patrolmen's Benevolent Ass'n of City of New York Inc. v. City of New York*, 97 N.Y.2d 378 (2001) (concluding the home rule procedural requirements were not triggered because the statute was enacted in furtherance of and bears a reasonable relationship to a substantial state-wide concern); *Kelley v. McGee*, 57 N.Y.2d 522 (1982) (in a consolidated appeal, concluding that the State had an appropriate level of interest in maintaining the salaries of District Attorneys at an acceptable level and therefore did not violate the home rule provision). Seven different courts may easily come up with different takes on the same question, resulting in a mishmash of inconsistent and conflicting rulings. *See* Toce Aff. ¶ 26.

Further illuminating this concern is a unique factor that certain Plaintiffs in Action No. 5 are in fact towns within counties that appear as Plaintiffs in other Actions. Toce Aff. ¶ 26. In an unusual posture, certain of these counties have stipulated to consolidation while the towns therein are objecting to consolidation. Toce Aff. ¶¶ 30-32. For instance, Plaintiffs in Action No. 5 the Towns of Hempstead, and North Hempstead, and resident Robert Matarazzo, are all

located within the County of Nassau, a plaintiff in Action No. 2. *See* Toce Aff. ¶ 30. Nassau County has agreed to consolidation. *See* Toce Aff. ¶ 14. Similarly, Plaintiffs in Action No. 5 the Town of Newburgh and resident Robert Fischer, are located within Orange County, a plaintiff in Action No. 7. *See* Toce Aff. ¶ 31. The coordinated and interrelated aspects of these Actions necessitate consolidation, where each seeks the same determination about the Even Year Election Law. *See New York Annual Conference of the Methodist Church v. Nam Un Cho*, 156 A.D.2d 511, 514 (2d Dep't 1989) ("the parties may, if they be so advised, move [to consolidate] in order to obviate the possibility of inconsistent results").

Consolidation will lead to efficiencies for all parties and promote judicial economy. All Actions relate exclusively to the passage of the Even Year Election Law, and challenge the constitutionality thereof. The cases are all at the same procedural stage, having recently been filed. *See* Toce Aff. ¶ 29. Consolidation at this early stage will allow State Defendants to coordinate answering or otherwise moving and will simplify this litigation considerably. Consolidation now will streamline any necessary discovery; were the Actions to continue separately, State Defendants could be required to provide the same repetitive testimony and documents in differing courts throughout the State.

In addition to the common questions of law regarding the constitutionality of the Even Year Election 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. ¶ 27. The fact that Plaintiffs allege additional claims in Action No. 5 that are not present in Action No. 1 makes no difference to the essential determination of consolidation. Here, the State Defendants, the facts, and the bulk of the legal analysis are the same across all Actions. Additionally, the differing Plaintiffs across the Actions

are similarly situated and are raising the same concerns to the passage of the Even Year Election Law. All the actions seek the same relief, involve the same set of facts and the same core legal questions, and as such are ideal for consolidation.

Finally, Plaintiffs cannot demonstrate prejudice from consolidation. Proceeding with these Actions in a consolidated manner from their infancy will streamline the entire litigation. It will save the parties from duplicative and costly litigation and will ensure a uniform determination on these important questions of law. Plaintiffs' subjective desire to have a case heard separately is not sufficient to defeat a motion to consolidate, nor are "bare allegations of prejudice." *See Humiston*, 144 A.D.2d at 908 (reversing denial of consolidation). The need for judicial economy and interest in avoiding inconsistent decisions will outweigh Plaintiffs' purported prejudice. *See Page v. Lar Lakeshore Corp.*, 138 A.D.2d 970, 970 (4th Dep't 1988).

Justice and judicial economy will be best served by consolidating these actions, resulting in a single determination on the constitutionality of the Even Year Elections Law. Therefore, to avoid inconsistent judgments, the inconvenience of all the parties, and duplicative discovery costs, consolidating 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 Nelson v. Noh*, 79 A.D.3d 1670, 1671 (4th Dep't 2010) ("Supreme Court properly granted the cross motions inasmuch as consolidation is favored by the courts.") (internal quotation marks omitted); *Zimmerman v. Mansell*, 584 N.Y.S.2d 378, 378 (4th Dep't 1992) (holding that consolidation "should be granted where there are common issues of law or fact"); *Humiston,* 144 A.D.2d at 908 (affirming consolidation where movant had "sustained her burden of demonstrating that the cases contain common issues of fact, making consolidation appropriate").

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.").

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. Venue should be placed in Onondaga County because the first action was commenced in that county, and there are no special circumstances which would warrant placement of venue elsewhere. *See e.g. Mas-Edwards v Ultimate Services, Inc.*, 45 A.D.3d 540, 541 (2d Dep't 2007). Furthermore, Actions No. 1, 3 and 5 have all been filed separately in the 5th Judicial District, and this choice will be maintained should venue be transferred to Onondaga County. *See* Toce Aff. ¶¶ 33-34.

In fact, the majority of the parties in Action No. 5 are located in Nassau, Suffolk, or Orange Counties, which have no relation to Jefferson County and are each closer in proximity to Onondaga County. *See* Toce Aff. ¶ 32. As such, judicial efficiency dictates that Action No. 5 be transferred to Onondaga County under the First County Rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion be granted, and that the above captioned Action No. 5 be consolidated with the above captioned Action No. 1 and transferred to Onondaga County Supreme Court.

Dated: May 28, 2024
Watertown, NY

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