Supreme Court of the State of New York
Appellate Division – Fourth Department

In the Matter of the Application of

HEARTBEAT INTERNATIONAL INC., CRISIS PREGNANCY SERVICES INC. D/B/A CompassCare, CARING CHOICES PREGNANCY HELP COMMUNITY INC., STUDY THE OPTIONS PLEASE INC. D/B/A Care Net Pregnancy Center Of Wayne County, PREGNANCY CENTER OF PENN YAN, INC. D/B/A Care Net Penn Yan, ADIRONDACK PREGNANCY CENTER D/B/A AscentCare, THE BRIDGE TO LIFE INC. D/B/A Bridge Women's Support Center, ALTERNATIVE CRISIS PREGNANCY CENTER, INC. D/B/A Care Net Pregnancy Center Of The Hudson Valley, 1ST WAY LIFE CENTER INC., NEW HOPE FAMILY SERVICES, INC. THE CARE CENTER D/B/A Soundview Pregnancy Services And Soundview, CARE NET PREGNANCY CENTER OF CENTRAL NEW YORK D/B/A Willow Network

Plaintiffs-Respondents

– against –

LETITIA JAMES, ATTORNEY GENERAL, STATE OF NEW YORK

Defendant-Appellant.

MOTION FOR REARGUMENT AND IN THE ALTERNATIVE FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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APPELLATE DIVISION – FOURTH DEPARTMENT
STATE OF NEW YORK

In the Matter of the Application of

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Plaintiffs-Respondents,

– versus –

LETITIA JAMES, ATTORNEY GENERAL, STATE OF NEW YORK,

Defendant-Appellant.

Monroe County Clerk's Index No. E2024007242

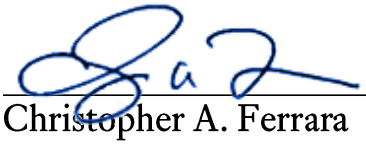
Appellate Division Case No. 24-00921

NOTICE OF MOTION FOR REARGUMENT AND IN THE ALTERNATIVE FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of Plaintiffs-Respondents' Motion for Reargument and in the

Alternative for Leave to Appeal order of the Appellate Division with Notice of Entry, Affirmation of Christopher A. Ferrara, order of the Supreme Court, Monroe County, record in the Appellate Division, and briefs in the Appellate Division, Plaintiffs-Respondents will move this Court on the 8th day of September for an order granting reargument or in the alternative for leave to appeal the attached order to the New York Court of Appeals.

Dated: August 27, 2025



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MEMORANDUM OF LAW

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-RESPONDENTS' MOTION FOR REARGUMENT AND IN THE ALTERNATIVE FOR LEAVE TO APPEAL

Pursuant to CPLR 5516 and 22 NYCRR 500.22 and 22 NYCRR § 1250.16(d), Plaintiffs-Respondents respectfully submit this memorandum in support of their motion for reargument and in the alternative for leave to appeal.

PRELIMINARY STATEMENT

Movants seek reargument and in the alternative leave to appeal from the Fourth Department's order reversing the Monroe County Supreme Court's venue determination and consolidating these actions in New York County. The order raises an important question of New York law: whether a party's timely filing to protect constitutional rights, after receiving a government notice of intent to sue but before the government files its own action, is categorically "preemptive" and forfeits the protections of the first-filed rule—regardless of the record or the equities.

This Court's order departs from settled precedent and disregards the evidentiary record and is thus worthy of reargument or leave to appeal. The order renders any defensive filing after a government threat as "preemptive," even where, as here, the complaint is comprehensive, the chosen forum is closely connected to the parties and events, and the government offers no evidence of gamesmanship or inconvenience. Because of its holding of preemptive filing, the Court did not consider the

unrebutted affidavits establishing that Monroe County is the most convenient venue and failed to address the Attorney General's own inconsistent positions on venue and her lack of any showing that New York County was proper under CPLR § 503.

After issuing broad threats of enforcement targeting protected speech to a dozen pregnancy help organizations scattered across the state (and beyond), the Attorney General then sought to force litigation into a forum with no connection to the parties or the underlying events—solely for tactical advantage. The AG offered no evidence of hardship or prejudice, while Plaintiffs-Respondents demonstrated that litigating in New York County would impose severe burdens on their small nonprofit organizations and undermine the first-filed rule's core purpose of fairness and efficiency.

If allowed to stand, this Court's approach will enable state officials to manipulate venue to punish disfavored speakers, chilling the exercise of constitutional rights and eroding the predictability of New York's venue rules. The issue is of statewide importance, the record is fully developed, and the legal question is cleanly presented. Either reargument or leave to appeal should be granted.

PROCEDURAL HISTORY

The Attorney General initiated this dispute by serving Plaintiffs-Respondents with notices of intent to sue under General Business Law §§ 349 and 350, alleging

that their speech regarding "abortion pill reversal" was unlawful. (R. 96–120). Plaintiffs-Respondents—twelve nonprofit pregnancy help organizations, most with limited resources—filed suit in Monroe County, a centrally located forum, seeking declaratory and injunctive relief for First Amendment violations under 42 U.S.C. § 1983 and other bases. (R. 13-80). Their verified complaint was detailed and comprehensive, addressing constitutional and statutory issues.

Six days later, the Attorney General commenced a separate enforcement action in New York County, a forum with no connection to the parties or the alleged conduct. (R. 121–196). Plaintiffs-Respondents moved to consolidate in Monroe County under the first-filed rule, supported by seven unrebutted affidavits demonstrating that Monroe County has a close nexus to the dispute, that Monroe County is the most convenient venue, and that New York County would impose severe burdens. (R. 197–249). The Attorney General offered no contrary evidence showing that Monroe County is improper or showing that New York County is an appropriate venue. Despite having her principal office in Albany, the AG argued below that she is resident in New York County to support venue there under CPLR § 503—however, the AG's office through the same lead attorney as in this case swore in briefing to the Third Department that it is *not* principally based in New York County when it wanted to drag a Long Island rabbi with a chronic illness that he said made it hard to

drive into court in distant Albany. (*See* Appellant's Br., No. 528735, *New York v. Konikov*, 2019 NY App. Div. Briefs LEXIS 3729, at *6, *22 [Sept. 25, 2019].)

Plaintiffs-Respondents explained in reply that government actors are not exempt from the law and New York's preemptive-filing exception to the first-filed rule is narrow. They showed that their survey of the whole corpus of venue caselaw had found no Appellate Division in New York to have *ever* found a plaintiff to have preemptively filed suit absent four necessary conditions. First, the plaintiff knew with certainty that he would be sued. Second, that suit was imminent. Third, the plaintiff ran to a trial court to file a barebones complaint asking only for a declaratory judgment. And fourth, that trial court had no connection to the litigants or the dispute.

Plaintiffs-Respondents observed that this case satisfies none of those predicates. The Attorney General herself argued in her New York County case (when convenient for a ripeness argument) that the notices of intent had not made lawfare imminent. (Resp. Br. 15; *see State v. Heartbeat Int'l, Inc.*, Index No. 451314/2024, Dkt. 16, at 11& n.5 [N.Y. Cnty. Sup. Ct. May 8, 2024].) And though Plaintiffs-Respondents had filed promptly when she threatened them with lawfare that chilled their speech, their dispatch was deliberate, not a dash. Their verified complaint was

detailed, deeply researched, densely argued, and asked for more than declaratory relief. The connection between the court where they filed and the facts was clear.

On May 21, 2024, Supreme Court, Monroe County (Valleriani, J.) granted consolidation, designated Plaintiffs-Respondents' first-filed Monroe County action as venue, and stayed further proceedings pending appeal (R. 6–12; 251–52).

During the stay, other pregnancy help organizations brought similar 42 U.S.C. § 1983 claims as Plaintiffs-Respondents' here in the U.S. District Court for the Western District of New York. In those consolidated cases, the District Court entered a preliminary injunction enjoining the Attorney General from filing further similar enforcement actions against those other pregnancy help organizations. (*Nat'l Inst. for Fam. & Life Advocs. v. James*, 746 F. Supp. 3d 100 [W.D.N.Y. 2024]; *id.*, Case No. 1:24-cv-00514-JLS (Dkt. 49) (Sept. 24, 2024) (Attorney General stipulated to preliminary injunction not to enforce or seek to enforce GBL §§ 349 and 350 or N.Y. Exec. Law § 63(1) against Summit Life Center, Inc., the Evergreen Association, Inc., and EMC Frontline Pregnancy Centers).[1] The court compared the Attorney

[1] The federal district court, in granting the injunction, recognized that the plaintiffs in that case had already begun to accrue the constitutional injury of chilled speech, even *without* the Attorney General having mailed them similar notices of intent to sue. 746 F. Supp. 3d at 123 ("Here, absent a preliminary injunction, Plaintiffs' constitutional rights are being violated. Plaintiffs wish to speak freely about a protocol that a pregnant woman may use, with her doctor, to reverse the effects of a first chemical abortion pill and, thereby, help to save the life of her unborn child" but had been chilled from doing so).

General's efforts to suppress speech to Orwell's Ministry of Truth. *See id.* at 108 ("our Constitution and Constitutional tradition stand against the idea that we need Oceania's Ministry of Truth") (citing *United States v. Alvarez*, 567 U.S. 709, 723 [2012] (citing George Orwell, *Nineteenth Eighty-Four* [1949] [Centennial ed. 2003]). It warned that the "broad censorial power" the AG sought is "unprecedented in the Supreme Court's cases or in our constitutional tradition." *Id.* (citation modified). And it cautioned that the AG's abuse of the courts to silence disfavored speakers cast "a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id.* (citation modified).

The Attorney General pressed on in this appeal regardless, urging that a preemptive filing does not just occur when the four conditions discussed in prior precedent hold. It instead compasses *any* case a target threatened with an enforcement action brings before being haled into court, regardless of whether the mere act of vaguely threatening the enforcement action itself caused the target harm.

Plaintiffs-Respondents demonstrated that the Attorney General's theory lacked an anchor in precedent and collided with the first-filed rule's history, doctrinal development, and purpose. Accepting it, they noted, would upend decades of settled law on both what constitutes a race to the courthouse and what qualifies as abuse of discretion. To underscore the point, Plaintiffs-Respondents observed that a

survey of Westlaw cases suggests only one supreme court venue decision is reversed in an average *decade.*

Plaintiffs-Respondents argued that nothing in this case marks it as such a rare exception. The Monroe County court had scoured the record for reasons to set aside the first-filed rule yet found none under long-settled legal principles. (*See Rosen Trust v. Rosen*, 53 AD2d 342, 366, 386 NYS2d 491 [4th Dept 1976]). In short, the Monroe County court had dutifully done all required of it when it set venue, careful rather than cavalier. It had modeled judicial diligence, not abused its discretion.

This Court reversed, substituting its judgment for that of the supreme court under *Phoenix Mutual Life Insurance Company v. Conway*, 11 NY2d 367, 370 [1962]. It held that, because "the HBI parties received the notice of intent to sue letters and were given five days to respond to the letters but instead chose to immediately commence this action seeking, inter alia, declarations that the AG's anticipated causes of action against them are without merit," Plaintiffs-Respondents' lawsuit was "preemptive." (*Heartbeat Intl, Inc. v. James*, 240 AD3d 1353 [4th Dept 2025]). This Court then held that "the preemptive filing by the HBI parties warrants a departure from the first-in-time rule" and on that *sole* basis designated "New York County, the chosen venue of the AG as the acknowledged plaintiff, as the place of trial of the consolidated action." *Id.* (citation omitted).

This Court did not weigh or address any of the analysis precedent requires when a court departs from the first-filed rule, including the extensive unrebutted evidence that Monroe County is vastly superior venue for this lawsuit over New York County. Nor did the Court consider or address Plaintiffs-Respondents' argument that New York County—where none of the parties are resident and none of the alleged wrongdoing occurred—was not a proper venue choice under CPLR § 503 for the AG's suit. The Court did not merely hold that Plaintiffs-Respondents lost the benefit of the first-filed rule—it gave the traditional benefits of first-filing to the AG, without requiring the AG to prove why New York County is superior to Monroe County under the traditional venue factors considered in the absence of first-filing. Plaintiffs-Respondents lost out precisely *because* they were prompt in asserting their ripe federal and state constitutional claims.

To summarize, longstanding precedent foreclosed the panel's order reversing the Monroe County court. Plaintiffs-Respondents ask the Court to grant them reargument or in the alternative leave to appeal that order so that the New York Court of Appeals may clarify whether every appellate division decision applying *Phoenix Mutual Life Insurance Company v. Conway*, 11 NY2d 367, 370 [1962], for the past six decades, until this Court's order, was correct that the exceptions to the first-filed

rule are too narrow to cover a case like this. The continuing vitality of the rule as a transparent device for setting a fair and efficient venue hangs in the balance.

TIMELINESS

This motion is timely under 22 NYCRR 500.22(b), CPLR § 5513(b), and 22 NYCRR § 1250.16(d)(1) because it was filed within thirty days after service with notice of entry of the challenged order. The panel entered its order on July 25, 2025. Notice of entry followed on July 28, 2025. Plaintiffs-Respondents are filing this motion on August 27, 2025, which is exactly thirty days from the notice of entry as time is calculated under applicable court rules. *See* 22 NYCRR 500.22(b)(2); CPLR 5513(b); CPLR 2103(b). The docket confirms the controlling dates and removes any doubt as to timeliness, allowing the Court to reach the merits.

JURISDICTION

The Court has 22 NYCRR § 1250.16(d) discretionary jurisdiction to hear this motion for reargument and under CPLR 5602(b)(1). No prudential barrier exists to granting the requested leave to appeal because the record on appeal is compact, preservation of Plaintiffs-Respondents' arguments is clear, and the issues Plaintiffs-Respondents move to appeal are purely legal.

QUESTIONS PRESENTED

1. Is a defensive filing made during the statutory waiting period under GBL § 349(c)—especially one raising ripe constitutional and statutory defenses in a comprehensive 47-page complaint—*per se* "preemptive" under *L-3 Communications* and warranting departure from the first-filed rule, absent *L-3*'s predicates of gamesmanship, bare-bones complaints, and forum shopping?

The Fourth Department answered this question in the affirmative.

2. Did the Fourth Department abuse its discretion by reversing the Monroe County Supreme Court's reasoned consolidation and venue order and ordering venue in New York County without itself considering the record evidence of traditional venue factors—including convenience of material witnesses, location of events giving rise to the claims, residence and principal offices of the parties, access to sources of proof, judicial efficiency, and the ends of justice—or otherwise finding error in the Supreme Court's reasoning?

The Fourth Department did not reach this question in substituting its own judgment, without considering traditional venue factors or otherwise finding error by the Monroe County Supreme Court.

3. Whether the Attorney General's choice of New York County—where none of the parties reside, none of the alleged wrongdoing occurred, and her own office

previously disclaimed principal residence—was a proper venue for her suit under CPLR § 503, and whether the Appellate Division thus erred in crediting the Attorney General's venue choice, without any showing that New York County was the superior venue to Monroe County?

The Fourth Department did not reach this question.

ARGUMENT

I. Leave Should Be Granted Because the Order Misapplies *L-3 Communications* and Disregards the Required Statutory Framework to Novelly Recast Prompt Defensive Filings as a "Race to the Courthouse."

A. The purpose of the first-filed rule.

The first-filed rule restrains arbitrary venue selection. Before the American Revolution, aristocratic English courts gave judges broad latitude to set venue as they saw fit. (*See* 1 William Blackstone, *Commentaries* *589-90; Joseph Story, *Commentaries on Equity Jurisprudence* § 64 [1836].) After Yorktown, a more democratic New York cabined the discretion in the name of transparency, predictability, and fairness via two rules. First, consolidate related actions in the court where the first was filed. Second, depart from that practice if but only if a thorough record review reveals compelling reasons to select another venue. (CPLR Practice Commentaries, C3211:22.).

For two centuries since New York's first-filed rule took shape, appellate divisions have deferred to supreme courts' fact-bound venue calls. Precedent still

demands that approach, shielding a supreme court's valid use of its discretion when setting venue from reflexive reversal; even an appellate division that invokes its own discretion should do so only when the decision was "improvident". (*See Rosen Trust v. Rosen*, 53 AD2d 342, 366, 386 NYS2d 491 [4th Dept 1976]; *see Forman v. Henkin*, 30 NY3d 656, 662 n.3 [2018].).

Legendary New York jurist Chancellor Kent praised the first-filed rule in 1828 as a trustworthy tool to resolve disputes with minimal expense and maximal public trust. (*See Murray v. Blatchford*, 1 Wend. 583 [N.Y. Corr. Err. 1828].) The framers of New York's constitution in 1846 agreed and scaffolded other venue rules off it, (*see* 1 Christopher Morgan, *The Documentary History of the State of New York* 50, 89-91, 130-35, 196-98 [1849]), and consistent with what they recognized as the rule's purpose and purchase, state courts for the ensuing two centuries have limited departures from it. (*See generally* David D. Siegel & Patrick M. Connors, *New York Practice* §§ 123-25 [6th ed. 2018]).

B. *L-3 Communications* carved out a narrow exception to the first-filed rule to prevent abuse of the rule from undermining its purpose through tactical gamesmanship.

It was understood from the start that rule should not be applied robotically, lest enterprising attorneys abuse the rule to defeat its ends. But as equally understood was that departures were serious and "the court which first takes jurisdiction is the

one where the matter should be heard" save for grave gamesmanship. (*White Light Prods. v. On the Scene Prods.*, 231 AD2d 90, 96 [1st Dept 1997].). Deviations needed to be rare even if a first-filed action is "vexatious, oppressive, or instituted to obtain some unjust in inequitable advantage." (*L-3 Commc'ns Corp. v. SafeNet*, 45 AD3d 1, 7, 841 NYS2d 82, 88 [1st Dept 2007].)

The Court invoked *L-3 Communications* to establish a laxer rule, but a close read of the case shows it in fact only established a narrow exception to the rule requiring specific factual predicates. There, a plaintiff corporation accused a competitor of breaching exclusivity and noncompetition clauses in license for VPN encryption technology. (*Id.* at 3-5.) During settlement talks, the plaintiff shared a draft complaint and it warned would file if talks failed. (*Id.* at 5) The defendant responded duplicitously: it requested a written explanation of the claims, then raced to a Maryland court with a declaratory action while the blindsided plaintiff was engaged in drafting its settlement response in good faith. (*Id.*)

If "brevity is the soul of wit," (William Shakespeare, *Hamlet* act II, sc. 2, *l.* 90), the Maryland complaint would have wowed Oscar Wilde. It cited no cases, did no analysis. It merely recited facts, asserted without reasoning that contract terms did not apply, and asked the Maryland court to declare so. (*See SafeNet, Inc. v. L-3*

Commc'ns Corp., Case No. 12-C-06-1213 [Cir. Ct. Harford Cnty. May 7, 2006], *in L-3 Commc'ns v. SafeNet, Inc.*, Index No. 601686/06 [N.Y. Cnty. Sup. Ct. 2006]).

When the duped defendant in the Maryland suit later filed the complaint it had already shared during the settlement talks in New York, the plaintiff in the Maryland suit moved to consolidate there, relying on the first-filed rule. But the First Department emphasized that such gamesmanship should not be rewarded because doing so would undermine the first-filed rule's purpose of promoting fairness to the litigants and, derivatively, maintaining public trust. (*L-3 Commc'ns Corp. v. SafeNet*, 45 AD3d at 8-9.) It reaffirmed the first-filed rule but overrode it to keep the defendant from converting its force into farce. Rather than let a plaintiff who sees a starting gun for litigation cocked and then false starts under false pretenses use the rule to gain an unfair tactical advantage, the *L-3 Communications* court carved out a narrow exception that required a showing of several predicated discussed below.

C. This case presents none of *L-3 Communications'* predicates.

Twenty-two appellate division orders have applied *L-3 Communications*, and none before this case read it to apply beyond the scenario of a plaintiff racing to court with a bare complaint seeking declaratory judgment. Least of all the four opinions the Attorney General relied on below, which when read carefully instead establish only that the first-filed rule *sometimes* can be overridden, but only if a plaintiff knows

with certainty (1) that he imminently will be sued, yet (2) sprints for another forum with (3) no connection to the parties or facts, and (4) files a barebones declaratory judgment action. (*See, e.g.*, *RDF Agent, LLC v. Elec. Red Ventures, LLC*, 227 AD3d 424 [1st Dept 2024]; *Aldridge v. Governing Body of Jehovah's Witnesses*, 167 NYS3d 687, 688 [4th Dept 2022].)

Not one of these predicates exists here.

The panel broke with six decades of statewide precedent in this case, based on a misreading of *Phoenix Mutual Life Insurance Company v. Conway*, 11 NY2d 367, 370 [1962]. That case allows an Appellate Division to wield only the *same* discretion as a Supreme Court to apply correct standards to the record. (*See id.* at 370.) Put differently, either an appellate division or a supreme court abuses its discretion if it does not supply reasoning to support its use of discretion, for the judicial role "is never exercised for the purpose of giving effect to the will of the judge." (*Osborn v. Bank of the United States*, 22 U.S. [9 Wheat.] 738, 866 [1824]; *accord* The Federalist No. 78, at 484-85 [Clinton Rossiter ed. 1961] [Hamilton].).

D. The new approach the order takes creates dangerous precedent.

If left standing as is, this Court's published order threatens to nullify the centuries-old first-filed rule and invite uncertainty, waste, and forum shopping. (*See Nelson v. Noh*, 913 NYS2d 452 [4th Dept 2010].) The order lacks any limiting principle,

allowing the government (or any party) to make a threat of suit—without a threatened venue, time of filing, or detailed legal theories, and without any negotiations pending between the parties—and thwart the first-filed rule based on that mere vague threat. In particular, the order emboldens the Attorney General and other government actors to more quickly send notices of possible enforcement to parties they are investigating, to ensure the government secures its chosen venue should New Yorkers decide to challenge their enforcement on Free Speech or other grounds.

II. Reargument or Review Is of Public Importance.

Reargument or review is important to clarify the scope of supreme court discretion in a venue ruling and what a party must show to successfully challenge one. The order cannot without further explanation be reconciled with several Court precedents, including *Zelazny Family Enterprises, LLC v. Town of Shelby*, 180 AD3d 45 [4th Dept 2019]. There the Court held that a supreme court's discretion is broad but that a party appealing a venue order must show "both that the plaintiff's choice of venue was improper and that its choice of venue is proper." (*Id.* at 47.) This Court has required such a showing—and required itself to examine the entire record—even in the specific context of a Monroe County court consolidating actions filed there and in New York County. (*See Perinton Assocs. v. Heicklen Farms, Inc.*, 67 AD2d 832,

833 [4th Dept 1979]). Yet the Attorney General made *neither* showing below or on appeal, and the Court did not make the first finding.

This case presents even higher stakes. Plaintiffs-Respondents contend that the Attorney General forum-shopped to chill their speech (and other constitutional rights) by inflating litigation costs, haling Plaintiffs-Respondents into an inconvenient venue utterly unconnected with the alleged wrongdoing—and where the case could not be venued in the first place. By freeing government actors like the AG from the first-filed rule's bonds, the order gives them a license to chill fundamental rights: to harass opponents, toy with them while they cannot respond, and then spring an attack in an expensive and designedly inconvenient forum. Recognizing the structural disadvantage of fighting a government Goliath on its chosen terrain, many speakers of modest means will simply accede to censorship of their message. (*See* Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 Conn. L. Rev. 1045, 1053-56 [2014].).

Disfavored speakers' wariness to risk defending their rights will be amplified if the exercise of discretion does not rest on rules, reasons, and the record. The cases the Court cites do not show otherwise. (*See Di Pasquale v. Sec. Mut. Life Ins. Co. of N.Y.*, 273 AD2d 621, 623 [3d Dept 2000]). The panel quoted from *Di Pasquale* that "'the placement of venue rests in the sound discretion of the motion court.'"

(Order, Dkt. No. 46, at 2 [*quoting* 273 Ad2d at 622]). But *Di Pasquale* did not need to rule on venue since the issue had not been preserved in that case. (*See* 273 Ad2d at 623). And in all three cases *Di Pasquale* itself cited for the proposition, an Appellate Division reversed a venue order for abuse of discretion only after analyzing the record in light of established factors for diverging from the first-filed rule. (*See Reckson Assocs. Realty Corp. v. Blasland, Bouck & Lee, Inc.*, 230 AD2d 723, 645 NYS2d 873, 874 [2d Dept. 1996] (mem); *Rist v. Comi*, 260 AD2d 890, 688 NYS.2d 806 [3d Dept 1999]; *Israel v. Hirsh*, 81 AD2d 694, 438 NYS2d 631[3d Dept 1981]).

III. This Case Is an Excellent Vehicle.

This case cleanly presents issues for clarification by either reargument or leave to appeal to the Court of Appeals. The timeline is uncontested, the record focused, and the relevant arguments preserved. The Monroe County Supreme Court applied settled first-filed rule precedents and weighed sworn evidence to assess whether extraordinary circumstances warranted overriding the rule. This Court then reversed, solely on the basis of an alleged preemptive filing, and awarded the second-filed case the benefits of first-filed status, and thus not considering the typical analysis applied in a case where the first-filed rule is abrogated. This Court can correct or clarify these issues on reargument or certify the question to the Court of Appeals to resolve the division in authority the order creates.

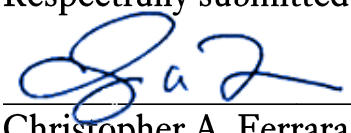
CONCLUSION

Plaintiffs respectfully submit that this Court's order departs from settled law, disregards the evidentiary record, and creates a rule without limiting principles. By treating any defensive filing after a government threat as "preemptive," the decision nullifies the first-filed rule, substitutes appellate discretion for the trial court's reasoned judgment, and ignores the traditional factors that govern venue and consolidation. If left uncorrected, it will invite forum shopping, burden small nonprofits with unnecessary costs, and chill the exercise of constitutional rights.

This case presents an ideal vehicle to clarify the narrow scope of the "anticipatory filing" exception, reaffirm that departures from the first-filed rule require a fact-specific analysis, and ensure that venue determinations rest on rules, reasons, and the record. For these reasons, the Court should grant reargument and reinstatement of the Monroe County order or, in the alternative, grant leave to appeal to the Court of Appeals and restore the consistency of New York's venue jurisprudence.

Dated: August 27, 2025
Whitestone, New York

Respectfully submitted,



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APPELLATE DIVISION – FOURTH DEPARTMENT

STATE OF NEW YORK

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Plaintiffs-Respondents,

– versus –

LETITIA JAMES, ATTORNEY GENERAL, STATE OF NEW YORK,

Defendant-Appellant.

Monroe County Clerk's Index No. E2024007242

Appellate Division Case No. 24-00921

AFFIRMATION OF CHRISTOPHER A. FERRARA IN SUPPORT OF MOTION FOR REARGUMENT OR IN THE ALTERNATIVE FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

(CPLR 2106; 22 NYCRR 1250.16)

Christopher A. Ferrara, an attorney duly admitted to practice in the courts of the State of New York, affirms the following under penalty of perjury:

1. Capacity and Familiarity. I am Senior Counsel with the Thomas More Society and counsel for Plaintiffs-Respondents. I submit this affirmation in support of a motion for reargument or in the alternative for leave to appeal to the New York Court of Appeals from the Appellate Division, Fourth Department's Memorandum and Order entered July 25, 2025 (CA 24-00921).

2. Order Sought to Be Reviewed. The Fourth Department modified the Monroe County Supreme Court's consolidation/venue order and designated Supreme Court, New York County as the place of trial for the consolidated action and remitted the matter to that court for further proceedings.

3. Timeliness and Mode of Review. This motion is made under CPLR 5602 (b) (1) and 22 NYCRR 1250.16 (d) within the time allowed by CPLR 5513 (b).

4. Questions Presented (Concise).

(a) Whether a party's prompt, record-supported filing to protect constitutional rights after receiving a government "notice of intent to sue," but before any enforcement filing, is categorically "preemptive," thereby forfeiting the first-filed rule regardless of forum nexus or unrebutted convenience evidence.

(b) Whether an Appellate Division may select a new venue for consolidated actions without applying the settled predicates for the "anticipatory filing" exception and without engaging the record-based venue factors the Supreme Court applied, which are required by precedent.

(c) Whether the Attorney General's suit was properly venued in New York County under CPLR § 503, and whether the Appellate Division thus erred in crediting the Attorney General's choice of an improper venue.

5. Why Leave Should Be Granted. The decision below recasts timely defensive filings as a "race to the courthouse" and shifts venue to the government's chosen forum without analyzing in sufficient depth the predicates that constrain departures from the first-filed rule. (*See Di Pasquale v. Sec. Mut. Life Ins. Co. of N.Y.*, 273 AD2d 621, 622 [3d Dept 2000]; *Phoenix Mut. Life Ins. Co. v Conway*, 11 NY2d 367, 370 [1962].) The ruling is of statewide importance, invites forum shopping against nonprofits, and conflicts with the first-filed rule's narrow exceptions.

6. Background—Procedural Posture. On April 30, 2024, Plaintiffs-Respondents commenced the Monroe County action by verified complaint alleging federal and state fundamental constitutional violations and other bases, and filed for preliminary injunction on May 1, and served the complaint and preliminary injunction motion on May 1. On May 6, the Attorney General filed an enforcement action

in New York County, which she served on May 14. The Monroe County Supreme Court consolidated the actions and designated Monroe County as the place of trial.

7. Supreme Court's Record-Based Venue Ruling. Justice Sam L. Valleriani granted consolidation and fixed venue in Monroe County after reviewing extensive motion papers, including seven witness affidavits on convenience, cost, and nexus. Notice of entry of the order was filed May 24, 2024, with a related Decision entered May 21, 2024.

8. The Fourth Department's Modification. On appeal limited to venue, the court deemed Plaintiffs-Appellants' filing "preemptive"; declined to apply the first-in-time rule; did not analyze the record evidence, the traditional choice of venue factors, or analyze whether venue was properly laid by the AG in her New York County action; and acceded to the AG's choice of New York County as the trial venue, citing *L-3 Communications* and related authorities. Entered: July 25, 2025.

9. Governing Standards and Conflict. Consolidated actions are generally tried where the first action was commenced, but venue rests in the motion court's sound discretion; appellate courts possess the same discretion—to be exercised by applying the correct standards to the record. (*Di Pasquale*, 273 AD2d at 622; *Phoenix Mut.*, 11 NY2d at 370.) Exceptions for "anticipatory filings" are narrow and turn on gamesmanship and bare-bones filings in unrelated fora. (*L-3 Commc'ns*, 45 AD3d at

8-9; *White Light Prods.*, 231 AD2d at 99-100.) The Monroe County court applied the traditional factors and found Monroe County most fair and convenient. (*See Varney v. Edward S. Gordon Co.*, 139 AD2d 973 [4th Dept 1988]; *Reckson Assocs. Realty Corp. v Blasland, Bouck & Lee*, 230 AD2d 723 [2d Dept 1996] [mem].)

10. Jurisdiction. Permission to appeal lies under CPLR 5602 (b)(1) (nonfinal Appellate Division order). This motion for reargument and in the alternative for leave to appeal is properly made in the Appellate Division under 22 NYCRR 1250.16(d).

11. Preservation. The issues were raised and decided below in the consolidation/venue rulings and the Fourth Department's modification.

12. Relief Requested. Grant reargument and reinstate the Monroe County order fixing venue in Monroe County or in the alternative grant leave to appeal to the Court of Appeals from the Fourth Department's Memorandum and Order entered July 25, 2025.

Dated: August 27, 2025

Christopher A. Ferrara
Thomas More Society
148-29 Cross Island Pkwy
Whitestone, NY 11357
(718) 357-1040
cferrara@thaomsmoresociety.org

Affirmed pursuant to CPLR 2106.

ATTACHMENT 1

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

511

CA 24-00921

PRESENT: WHALEN, P.J., BANNISTER, NOWAK, AND KEANE, JJ.

HEARTBEAT INTERNATIONAL, INC., ON BEHALF OF ITSELF AND ITS MEMBERS AND CLIENTS, ET AL., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LETITIA JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF STATE OF NEW YORK, DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER A. FERRARA, THOMAS MORE SOCIETY, WHITESTONE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered May 24, 2024. The order, inter alia, granted the motion of plaintiff to consolidate two actions in Supreme Court, Monroe County.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by denying plaintiffs' motion to the extent that it seeks an order designating Supreme Court, Monroe County, as the place of trial for the consolidated action and designating Supreme Court, New York County, as the place of trial of the consolidated action and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, New York County, for further proceedings.

Memorandum: On April 22, 2024, defendant Letitia James, in her official capacity as Attorney General of the State of New York (AG), sent notice of proposed action letters to various entities, including plaintiff Heartbeat International, Inc., and its members (HBI parties). The HBI parties were afforded, upon receipt of the letters, five business days to provide a reason why the litigation should not be commenced (*see* General Business Law § 349 [c]). The HBI parties did not respond to the letters and instead commenced the instant action in Supreme Court, Monroe County, seeking declaratory and injunctive relief from the litigation anticipated in the letters. Thereafter, on May 6, 2024, the AG commenced an action against the HBI parties in Supreme Court, New York County, consistent with her notice letters. The HBI parties moved in this action to, inter alia, consolidate this action with the AG's action and transfer the AG's action to Monroe County. Supreme Court, Monroe County, granted the

HBI parties' motion, consolidated the actions, designated Monroe County as the place of trial for the consolidated action, and deemed the AG to be the plaintiff and the HBI parties the defendants. The AG now appeals, as limited by her brief, from that part of the order that designated Monroe County as the appropriate venue.

"[C]onsolidated actions are generally tried where the first action was commenced, although the placement of venue rests in the sound discretion of the motion court" (*Di Pasquale v Security Mut. Life Ins. Co. of N.Y.*, 273 AD2d 621, 622 [3d Dept 2000]). This Court, moreover, "is vested with the same power and discretion as the [motion court] possesses" and we may substitute our own discretion even absent a finding that the motion court abused its discretion (*Phoenix Mut. Life Ins. Co. v Conway*, 11 NY2d 367, 370 [1962]; *see O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 171-172 [2d Dept 1995]; *see generally Smith v MDA Consulting Engrs., PLLC*, 210 AD3d 1448, 1448-1449 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]). To that end, the first-in-time rule is not to be applied mechanically and exceptions may apply to the rule, including where the first-filed action constitutes an improper anticipatory filing (*see L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 8-9 [1st Dept 2007]; *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 99-100 [1st Dept 1997]).

Here, we agree with the AG that the HBI parties commenced this action preemptively and that the first-in-time rule should not apply (*see L-3 Communications Corp.*, 45 AD3d at 8-9). It is undisputed that the HBI parties received the notice of intent to sue letters and were given five days to respond to the letters but instead chose to immediately commence this action seeking, inter alia, declarations that the AG's anticipated causes of action against them are without merit. Application of the first-in-time rule under circumstances such as these, which evince a race to the courthouse, "would create disincentives to responsible litigation, by discouraging settlements due to fear of a preemptive strike and by providing a tactical advantage to defendants seeking a more favorable forum for litigation" (*id.* at 8). We therefore conclude that the preemptive filing by the HBI parties warrants a departure from the first-in-time rule and we modify the order by designating Supreme Court, New York County, the chosen venue of the AG as the acknowledged plaintiff (*see generally Matter of Zelazny Family Enters., LLC v Town of Shelby*, 180 AD3d 45, 47 [4th Dept 2019]), as the place of trial of the consolidated action.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **Ann Dillon Flynn**, *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*

***IN WITNESS WHEREOF**, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this July 25, 2025*

Ann Dillon Flynn

Clerk

ATTACHMENT 2

MONROE COUNTY CLERK'S OFFICE THIS IS NOT A BILL. THIS IS YOUR RECEIPT.

Receipt # 3881171

Book Page CIVIL

No. Pages: 4

Instrument: ORDER

Control #: 202405280635
Index #: E2024007242

Date: 05/28/2024

Time: 12:12:14 PM

Return To:
Edward W. White
99 Exchange Blvd
Rochester, NY 14614

HEARTBEAT INTERNATIONAL INC.
CRISIS PREGNANCY SERVICES INC. d/b/a COMPASSCARE
CARING CHOICES PREGNANCY HELP COMMUNITY INC.
STUDY THE OPTIONS PLEASE INC. d/b/a CARE NET
JAMES, LETITIA

Total Fees Paid: $0.00

Employee: RR

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS ENDORSEMENT, REQUIRED BY SECTION 317-a(5) & SECTION 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
MONROE COUNTY

HEARTBEAT INTERNATIONAL INC., on behalf of itself and its members and clients, et al., Plaintiffs, v. LETITIA JAMES, in her official capacity as Attorney General of the State of New York, Defendant.	Action No. 1 **ORDER** Index No. E2024007242 The Hon. Sam Valleriani, Judge Presiding

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, Plaintiff, v. HEARTBEAT INTERNATIONAL INC., et al., Defendants.	Action No. 2 Index No. 45131/2024 IAS Part 46 Hon. Richard G. Latin

PRESENT: The Hon. Sam Valleriani, Justice.

The plaintiffs in the above-entitled action first set out having moved for an order to consolidate said actions, the first of which actions is now pending in the New York Supreme Court, County of Monroe, and the second of which actions is now pending in the New York Supreme Court, County of New York, to fix the County of Monroe as the place of trial of the consolidated action and for such other and further relief as may be just and proper, and said motion having come on regularly to be heard,

NOW, on reading and filing the pleadings of the plaintiffs in the above-entitled action first set out, including their memorandum of law dated the 7th day of May, 2024 and the affirmations of Christopher A. Ferrara, Esq., and Anjan K. Ganguly, Esq., sworn to the 7th day of May, 2024, and their reply memorandum dated the 15th day of May, 2024 and the affirmations of Christopher A. Ferrara, Esq., and Anjan K. Ganguly, Esq., Jackie Rosa, Melissa Kowaleski, Andrea Johns, Michael Arington, Annette Rein, and Jennifer Hunt and affidavit of Kathleen Jermain, all sworn to the 15th day of May, 2024, with due proof of service of said papers in support of the said motion, and the opposition papers of the defendant in the above-entitled action first set out, including her memorandum of law dated the 14th day of May, 2024 and affirmation of Heather L. McKay, Esq., sworn to the 14th day of May, 2024 in opposition, and on all the pleadings and proceedings in the aforesaid actions, and due deliberation having been had,

NOW, on motion of the plaintiffs in the above-entitled action first set out it is

ORDERED that the motion be and the same hereby is granted and it is further

ORDERED that the said action now pending in the Supreme Court, Monroe County entitled HEARTBEAT INTERNATIONAL INC., on behalf of itself and its members and clients, et al., plaintiffs, against LETITIA JAMES, in her official capacity as Attorney General of the State of New York, defendant, and the action now pending in the Supreme Court, New York County entitled THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, plaintiff, against HEARTBEAT INTERNATIONAL INC., et al., defendants, be and the same hereby are consolidated into one action and that the respective pleadings in the action hereby consolidated stand as the pleadings in the consolidated action and it is further

ORDERED that the place of trial of the consolidated actions be and the same is hereby fixed as the Supreme Court, County of Monroe, and it is further

ORDERED that in the said consolidated action, LETITIA JAMES, in her official capacity as Attorney General of the State of New York , shall be deemed plaintiff and have the right to open and close and HEARTBEAT INTERNATIONAL INC., et al., shall be deemed defendants and it is further

Signed this 24th day of May, 2024 at Rochester, New York.

ENTER:

The Hon. Sam Valleriani
Justice, Supreme Court
Monroe County

ATTACHMENT 3

MONROE COUNTY CLERK'S OFFICE

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Chery A. Porter
545 Hall of Justice
Rochester, NY 14617

HEARTBEAT INTERNATIONAL INC.
CRISIS PREGNANCY SERVICES INC. d/b/a COMPASSCARE
CARING CHOICES PREGNANCY HELP COMMUNITY INC.
STUDY THE OPTIONS PLEASE INC. d/b/a CARE NET
JAMES, LETITIA

Total Fees Paid: $0.00

Employee: CW

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS ENDORSEMENT, REQUIRED BY SECTION 317-a(5) & SECTION 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK

At a Term of the Supreme Court, in and for the County of Monroe, Hall of Justice, Rochester, New York.

PRESENT: HON. SAM L. VALLERIANI
Supreme Court Justice

SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

HEARTBEAT INTERNATIONAL INC., on behalf of itself and its members and clients, and

CRISIS PREGNANCY SERVICES INC. d/b/a COMPASSCARE, CARING CHOICES PREGNANCY HELP COMMUNITY INC., STUDY THE OPTIONS PLEASE INC. d/b/a CARE NET PREGNANCY CENTER OF WAYNE COUNTY, PREGNANCY CENTER OF PENN YAN, ADIRONDACK PREGNANCY CENTER d/b/a ASCENTCARE, THE BRIDGE TO LIFE INC. d/b/a BRIDGE WOMEN'S SUPPORT CENTER, ALTERNATIVE CRISIS PREGNANCY CENTER, INC. d/b/a CARE NET PREGNANCY CENTER OF THE HUDSON VALLEY, 1ST WAY LIFE CENTER INC., NEW HOPE FAMILY SERVICES, INC., THE CARE CENTER d/b/a SOUNDVIEW PREGNANCY SERVICES AND SOUNDVIEW CARE NET PREGNANCY CENTER OF CENTRAL NEW YORK d/b/a WILLOW NETWORK, on behalf of themselves and their clients,

Plaintiffs,

DECISION

-vs-

INDEX No.: E2024007242

LETITIA JAMES, in her capacity as Attorney General of the State of New York,

Defendant.

APPEARANCES:

Attorney for Plaintiffs: *Anjan K. Ganguly, Esq.*
140 Allens Creek Rd., Suite 220
Rochester NY 14618

Attorney for Defendant: *Heather L. McKay, Esq., AAG*
144 Exchange Blvd., Suite 200
Rochester, NY 14623

Sam L. Valleriani, J.

Plaintiffs commenced their action in Monroe County Supreme Court by filing the summons and complaint on April 30, 2024. On May 1, 2024 plaintiffs filed an order to show cause with a temporary restraining order barring the Defendant, Attorney General Letitia James, from initiating or continuing litigation which was threatened in a letter titled Notice of Proposed Litigation. The notices of proposed litigation were issued pursuant to New York Executive Law § 63(12) and/or New York Business Law Article 22-A, §§ 349, 350, based upon alleged fraudulent advertising relating to the "Abortion Pill Reversal" (NYSCEF dkt #3 OTSC).

The Attorney General's Office filed an action on May 6, 2024 in New York County, opposing the order to show cause with a temporary restraining order filed in this action. Defendant contends that plaintiffs hastily commenced their action before the 5-day notice period elapsed under GBL §§ 349 or 350 (affirmation of H. McKay, Esq. dated May 6, 2024). Plaintiffs allege that they had not been served as of May 13, 2024 (supplemental affirmation dated May 13, 2024). Similarly, plaintiffs contend that the defendant is forum shopping and seeking, by order to show cause, an order directing upstate entities to appear in a Manhattan Court (*see id.*).

Both parties have filed applications to consolidate. Defendants have filed an application in the New York County case to consolidate this matter with that one, whereas plaintiffs have filed an order to show cause in this matter to consolidate the New York County case.[1] The parties, based upon their respective motions, implicitly agree that the two actions should be consolidated. The dispute is strictly venue.

[1] The People of the State of New York, by Letitia James, Attorney General of the State of New York v Heartbeat International, Inc., et al., Index No. 451314/2024.

Although plaintiffs acknowledge that defendant has an office in New York County, they contend that defendant has offices throughout the state and there is no other nexus to New York County. Plaintiffs submit that they were the first-in-time to file, and thus, this court should retain jurisdiction. Defendant disagrees, and contends that plaintiff improperly and unfairly commenced this action during defendant's 5-day waiting period. Moreover, says defendant, the first-in-time rule should not be applied here, but rather the court should consider service of the intent to sue letters as commencement.

CPLR § 3211(a)(4) provides the court may dismiss an action if "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires" (CPLR § 3211[a][4]). As a general rule, courts will customarily determine the priority of an action based upon the dates of filing (*see L-3 Communications Corp. v SafeNet*, 45 AD3d 1 [1st Dept 2007]). The general rule of first-in-time will not reward conduct where a party preemptively files after learning the opposing party intends to commence litigation (*see White Light Prods. v On the Scene Prods.*, 231 AD2d 90 [1st Dept 1997]). The courts for purposes of determining first-in-time have held that both commencement and service of a summons and complaint is required (*see Graev v Graev*, 219 AD2d 535 [1st Dept 1995]; *see also Wharton v Wharton*, 244 AD2d 404 [2d Dept 1997]). Those cases, however, do not address the situation where the statutory framework prohibits one side, here the Attorney General, from commencing an action for 5-days.

Courts have dismissed actions where there was a likelihood of litigation and the opposing party races to the courthouse with a preemptive filing. The intent to sue letter does not constitute commencement nor does it establish a likelihood of litigation (*Continental Ins. Co. v Polais*

Industries Partners, L. P., 199 AD2d 222 [1st Dept 1993] [action filed first in time dismissed where second action filed close in time and offered more than the first action]). The notice itself here provided plaintiff with the option to "show, orally or in writing ... why such proceeding should not be commenced" (Notice of Proposed Litigation). Moreover, defendant has engaged in effectively the same practice they find objectionable, inasmuch as defendant also rushed to the courthouse and filed an action with actual knowledge of this action pending and, nonetheless, requested removal and consolidation to New York County. Additionally, based upon the joint affirmation of counsel for plaintiffs, five of the twelve plaintiffs are entities located in the Seventh Judicial District with no connection to New York County, which is hundreds of miles from where the majority of plaintiffs and their attorneys are situated; whereas, defendant has offices located throughout the state (joint affirmation of Anjan Ganguly, Esq., and Christopher A. Ferrara, Esq., dated May 7, 2024).[2] In light of these factors, venue in New York County would result in an avoidably unfair logistical disadvantage to plaintiffs and their counsel, while defendant having various office locations throughout the state, would not endure the same disadvantage. For these reasons, this court finds that Monroe County is the most fair, appropriate and logistically convenient venue (*see Varney v Gordon Corp.*, 139 AD2d 973, [4th Dept 1988]; *see also Reckson Assoc. v Blasland, Bouck & Lee*, 230 AD2d 723 [2d Dept 1996]).

This constitutes the decision of the court. Any relief requested but not specifically granted is denied.

Dated: 5/21/2024

HON. SAM L. VALLERIANI
Supreme Court Justice

[2] The other seven entities have no connection to New York County.