UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARK A. FAVORS et al.,

Plaintiffs,

v.

ANDREW M. CUOMO et al.,

Defendants.

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No. 11 Civ. 5632 (RR) (GEL) (DLI)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

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Proposed Intervenor-Plaintiffs Todd Breitbart, Tobias Sheppard Bloch, Gregory Lobo-Jost, Raul Rothblatt, Mark Weisman, and David Wes Williams (collectively, the "Breitbart Intervenors"), by and through their attorneys, Cuti Hecker Wang LLP, hereby move to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure.

The Breitbart Intervenors' proposed Complaint is attached as Exhibit 1 to the accompanying Declaration of Alexander Goldenberg dated May 1, 2012.

Rule 24(a) of the Federal Rules of Civil Procedure entitles a movant to intervene as of right where (1) the motion is timely; (2) the movant asserts an interest relating to the property or transaction that is the subject of the action; (3) the movant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the movant's interest is not adequately represented by the other parties. *See Windsor v. United States*, 797 F. Supp. 2d 320, 323 (S.D.N.Y. 2011). The Breitbart Intervenors meet all four of these criteria.

First, this motion is timely. The Breitbart Intervenors' one-person, one-vote challenge to the enacted Senate plan did not become ripe for adjudication until the United States Department of Justice precleared the plan on April 27, 2012. *See Branch v. Smith*, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts.") (quoting *Connor v. Waller*, 421 U.S. 656 (1975)); *see also*, *e.g.*, *Hughley v. Adams*, 667 F.2d 25, 26 (11th Cir. 1982) ("We also decline, for reasons of ripeness, to consider plaintiffs' remaining objections to the plan before it has received preclearance."). The Breitbart Intervenors seek leave to intervene only four days after the Department's preclearance decision, and at the time for moving set by this Court in its order dated April 27, 2012. Discovery has not yet

commenced, and allowing the movants to intervene will not prejudice any of the existing parties. *See In re Bank of New York Derivative Litigation,* 320 F.3d 291, 300 (2d Cir. 2003).

Second, the Breitbart Intervenors plainly assert a protectable interest relating to the subject matter of this litigation. The movants claim that they were denied their rights under the federal Equal Protection Clause because the Defendants did not make the requisite "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Movants all reside in significantly over-populated downstate districts and their interest is "direct, substantial, and legally protectable." *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010); *see also Brennan v. N.Y.C. Bd. of Educ*., 260 F.3d 123, 130-31 (2d Cir. 2001).

Third, the disposition of this action may impair or impede movants' ability to protect their interest. This Court's adjudication of the merits of this dispute will serve as precedent in any other action that the Breitbart Intervenors might bring, and thus, as a practical matter, this Court is the only forum in which the constitutionality of the malapportionment in the 2012 Senate plan will be meaningfully assessed. If the Breitbart Intervenors are unable to participate in this litigation, they may be forced to wait until the next decennial redistricting following the 2020 Census to have the opportunity to assert their right to vote in equipopulous districts.

Finally, the movants' interests are not adequately represented by the existing parties. As a threshold matter, the movants have only a "minimal" burden with respect to demonstrating inadequacy of representation. *Trbovich v. United Mine Workers of Am*., 404 U.S. 528, 538 n.10 (1972). That burden is easily satisfied here, as demonstrated by the hearing held before this Court on April 20, 2012, which brought to light the parties' divergent views concerning the precedents relevant to this case and the legal standard for this Court to apply. For example, the

Breitbart Intervenors respectfully disagree with the other parties that *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), and *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), can be reconciled. Nor do the Breitbart Intervenors allege racial animus. Rather, the Breitbart Intervenors allege that although the Legislature may depart from population equality to pursue legitimate redistricting goals such as compactness and the preservation of county boundaries, the Legislature may not depart from population equality in order to maximize partisan advantage. Because no other party has taken the positions that the Breitbart Intervenors intend to take in this action, their interests are not adequately represented by the existing parties.

In the alternative, the Breitbart Intervenors respectfully request that the Court permit them to intervene pursuant to Rule 24(b). The Breitbart Intervenors bring an important perspective that will assist the Court in resolving the weighty claims that are before it. As a practical matter, moreover, the Breitbart Intervenors' claims are likely to be before the Court even if leave to intervene is denied. In that event, the Breitbart Intervenors would file a plenary action as a related case before Judge Irizarry. Chief Judge Jacobs may then assign that case to the same three-Judge Court that is presiding over this case. For these reasons, and because the Court previously permitted the other intervenors to intervene, we respectfully request that the Court permit the Breitbart Intervenors to intervene as well.

Dated: May 1, 2012
New York, New York

By: /s/ Eric Hecker
Eric Hecker
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