UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al.	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case: 1:11-cv-05632-DLI-RR-GEL
	)	
	)	**Date of Service**: May 4, 2012
ANDREW M. CUOMO, et al.	)	
	)	
	)	
Defendants.	)	
	)	

SENATE MAJORITY'S OPPOSITION TO BREITBART MOTION TO INTERVENE AND SENATE MINORITY DEFENDANTS' MOTION TO ASSERT A CROSS-CLAIM

Michael A. Carvin (MC 9266)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
202/879-3939

Todd R. Geremia (TG 4454)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
212/326-3939

David Lewis (DL 0037)
LEWIS & FIORE
225 Broadway, Suite 3300
New York, NY 10007
212/285-2290

Attorneys For Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez

The Senate Majority Defendants—New York State Senators Dean G. Skelos and Michael F. Nozzolio, and LATFOR member Welquis R. Lopez—respectfully submit this memorandum in opposition to the motion to intervene filed by Cuti Hecker Wang LLP on behalf of a group led by Todd Breitbart and the motion to assert a cross-claim filed by the Senate Minority Defendants, who are represented in this action by the same law firm as the proposed plaintiff intervenors.

INTRODUCTION

The Court set March 27, 2012 as the deadline for motions to intervene in this action and the deadline for plaintiffs to amend their complaints. In accordance with that Order, the Drayton, Ramos, and Lee intervenors all asserted a claim against the defendants, including against the Senate Minority Defendants, that the enacted 2012 Senate Plan violated the "one-person, one-vote" rule embodied in the Fourteenth Amendment.

Counsel for the Senate Minority Defendants did not come forward with any proposed intervenors by the March 27 deadline. Nor did the Senate Minority Defendants interpose what they now style as a "cross claim" against the Senate Majority Defendants by the Court's March 27 deadline. Nor did counsel for the Senate Minority Defendants ever utter a word at any time before this deadline about a plan to "intervene" or assert a "cross claim" in this action. Now, however, a group or proposed intervenors represented by counsel for the Senate Minority Defendants seeks to intervene in this case to assert the same claim against the Senate Majority Defendants that the existing intervenors are already asserting in this action. And the Senate Minority Defendants wants to do something even more bizarre, as they seek permission to assert the same one-person, one-vote claim against the Senate Majority Defendants that is already being asserted against these defendants *and the Senate Minority Defendants* by no fewer than three other parties. In other words, counsel for the Senate Minority Defendants wants this Court

to inject more parties in to this case to allow counsel to be on both sides of this litigation—all so that it can assert the same redundant claim against the Senate Majority Defendants that other plaintiffs are already asserting against those defendants and counsel's own clients.

The Court should not permit counsel for the Senate Minority Defendants to contort these proceedings as it is proposing to do. As a threshold matter, the Court should simply enforce the March 27 deadline for filing motions to intervene and amending complaints that the Breitbart movants and the Senate Minority Defendants failed to meet by more than a month. There is also no reason to complicate this action in the manner that the Senate Minority Defendants are proposing. It is the Breitbart movants' burden on this motion to rebut the presumption that the existing intervenors are inadequate to prosecute the same one-person, one-vote claim that the Breitbart movants are seeking leave to assert here. The Breitbart movants do not even try to rebut this presumption, and instead erroneously claim that they have only a "minimal" burden and that they have met it with conclusory (and false) assertions that their interests are not already adequately represented by the teams of plaintiffs' lawyers in this action.

For these and other reasons set forth below, the Court should deny the Breitbart movants' application for leave to intervene in this action and the Senate Minority Defendants' motion for leave to assert as a "cross claim" the same claim that multiple parties are already making in this action against the Senate Minority Defendants and all other defendants.

BACKGROUND

This action started as an impasse case on November 17, 2011. Plaintiffs alleged that "time [wa]s running out" for the state legislature to create and pass a new map, declaring that the redistricting process was "hopelessly stalled," and asked the Court to undertake a process to draw a new districting map for congressional and State Senate and Assembly districts. (DE 1). The Senate Majority were named as defendants in this impasse case, as were Senate Minority

Leader Jeffrey Sampson and Senator Martin Malave Dilan. Senators Sampson and Dilan have referred to themselves in this action as the "Senate Minority Defendants," and they are represented by the same counsel, Cuti Hecker Wang LLP, that submitted the instant motion to intervene on behalf of the group led by Todd Breitbart. Mr. Breitbart and Senator Dilan were also represented by Cuti Hecker Wang as petitioners in the *Cohen v. Cuomo* proceeding, in which the Court of Appeals recently rejected petitioners' claim that the New York State Legislature violated article III, section 4 of the New York State Constitution by setting the size of the Senate at 63 seats.

This three-judge Court in this action was convened on February 14, 2012 (DE 74). That same day, the Court granted the motions to intervene that had been filed to date by three groups of intervenors: the Drayton, Lee, and Ramos intervenors. The next week, the Court granted a motion to intervene by the Rose intervenors. Counsel for all parties, including the Senate Minority Defendants, attended a status conference on February 27, 2012. At that conference the Court stated at the outset: "Motions to intervene have been filed and granted. Let me say in that respect that at this point, the Court would probably entertain motions to intervene only reluctantly, but if there are parties who think that that might deprive them of an opportunity to be heard, that is hardly the case." 2/27/12 Tr. at 4.

The Court proceeded to address plaintiffs' impasse claim with respect to congressional districts and, on March 19, 2012, ordered a plan to be used for congressional districting in the 2012 election. (DE 242). In the meantime, the Legislature passed state Senate and Assembly districting plans on March 14, and the Governor subsequently signed them into law. At a subsequent status conference on March 21, 2012, the Court ordered the plaintiffs and intervenors to file amended complaints by March 27, 2012 detailing what claims the plaintiffs were now

asserting in light of the enactment of the State Senate and Assembly districting plans. (3/21/2012 Minute Entry). Counsel for the Senate Minority Defendants attended that conference as well. Unlike in February, when the Court stated it would entertain new motions to intervene only "reluctantly," this time the Court made crystal clear: "That [March 27, 2012] will also be the deadline for any additional persons who may wish to seek intervenor status." 3/21/2012 Tr. at 65.

Plaintiffs and the various intervenors filed amended complaints in accordance with the Court's March 21, 2012 Order. These amended complaints asserted that the enacted Senate and Assembly plans violated the "one person, one vote" rule embodied in the Fourteenth Amendment to the U.S. Constitution and Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973. (DEs 253-57). Plaintiffs also maintained that the Court should continue to prepare to draw new districting maps for the New York State Senate and Assembly, on the basis of their amended allegations that the ultimate fate of the enacted plans remained uncertain while the preclearance process required under Section 5 was ongoing, and while the *Cohen v. Cuomo*, proceeding remained unresolved.

As noted, Mr. Breitbart was represented in the *Cohen v. Cuomo* state court proceeding by the same counsel who represents the Senate Minority Defendants in this action. But Mr. Breitbart did not file a motion to intervene on March 27, 2012 in accordance with the deadline for filing such motions set by this Court. Nor did his counsel, Cuti Hecker Wang, file such a motion on behalf of any other proposed intervenors. Instead, Cuti Hecker Wang, on behalf of the Senate Minority Defendnats, answered the amended complaints filed by the plaintiffs and intervenors.

The Senate Minority Defendants did not seek to dismiss either the Section 2 or the "one person, one vote" claims in the amended complaints on the basis that these challenges to the enacted Senate districting plan were not ripe until the U.S. Department of Justice had precleared the Senate plan in accordance with Section 5 of the Voting Rights Act. Nor did the Senate Minority Defendants assert an affirmative defense to this effect in their answers. Instead, the Senate Minority Defendnats *admitted* plaintiffs' allegations that their votes were diluted in violation of the Equal Protection Clause. (DE 276). The Senate Minority Defendants also used their answers as a platform to make a number of position statements espousing the purported merit of the Section 2 and equal population claims. For example: "Defendants admit that over the past several decades, New York's process of redistricting its State Senate, Assembly, and congressional districts often has been based to an inappropriate degree on partisan considerations and that many New Yorkers have been denied a meaningful opportunity to select their own leaders as alleged in Paragraph 1 of the Complaint." (DE 276). In another example, the Senate Minority Defendants *admitted* the allegations of the Lee Intervenors that "[t]here are no legitimate . . . state policies which justify" the alleged population deviations in the Senate Plan, and that the Plan "arbitrarily and discriminatorily dilutes and debases the weight of certain citizens' votes". (DE 279).

For these and other reasons, the parties and the Court have several times pointed out that the Senate Minority Defendants are behaving more like plaintiffs in this action than defendants. In one such exchange with Judge Raggi, counsel for the Senate Minority Defendants expressly represented to the Court that, although this was an unusual situation, he was not planning on switching to the plaintiffs' side as this litigation goes forward:

> HON. RAGGI: You know you do sound more like a plaintiff than a defendant in this argument. Are you planning on changing tables as this litigation goes forward?
>
> MR. HECKER: I'm very comfortable sitting with my distinguished colleagues in this proceeding, and I also have lots of fun jousting with them over *Cohen*. And it is an unusual situation.

3/21/12 Tr. at 47; *see also id.* at 47-48 ("HON. LYNCH: Because you're a plaintiff in that case and defendants in this one. MR. HECKER: Correct. And just a couple of other brief points and then I'll step down."). As noted, the deadline for any further motions to intervene was less than one week after this conference and Cuti Hecker Wang did not file any such motion by that deadline, or even so much as expressly or implicitly indicate before the deadline that counsel for the Senate Minority Defendants had hatched a plan to seek intervention at a later date notwithstanding the deadline set by the Court.

The first time counsel for the Senate Minority Defendants made any mention of his intent to seek intervention was weeks after the deadline set by the Court. At an April 20, 2012 status conference, the Senate Minority Defendants disagreed with the Court's characterization of them as "hybrid" parties and announced: "if and when that plan [the 2012 Senate plan] is precleared, there is a strong likelihood that my clients in this matter and other clients I represent in the Cohen matter would seek to intervene here to assert a statewide malapportionment claim. I just want to make that clear." 4/20/12 Tr. at 38-39. The Court accurately pointed out: "We set a deadline for intervention in this case," to which counsel for the Senate Minority Defendants responded, "Yes, we're aware of that Your Honor" and proceeded to explain why "given our hybrid role," the Court should make an exception to this deadline for counsel for the Senate Minority Defendants. *Id.* at 39. The Court ended this discussion by saying, "Whether or not we will allow you to intervene is a matter for another day." *Id.*

On April 26, 2012, the Senate Minority Defendants responded to the Court's April 20, 2012 order to the *plaintiffs* to produce the evidence they have in support of their equal population claim. The Senate Minority Defendants submitted a Declaration by Cohen petitioner Todd Breitbart. (Underscoring how the Senate Minority Defendants have all along been operating as if they are plaintiffs in this action, without seeking to intervene as such in accordance with the Court's orders, the April 26, 2012 Declaration by Mr. Breitbart, DE 327, has an uncanny resemblance to a declaration submitted on behalf of the Drayton intervenors by Andrew Beveridge, DE 331. The two are word-for-word identical in many parts.) In that same letter, the Senate Minority Defendants also asked the Court to "simply grant us leave to file a Complaint on behalf of Mr. Breitbart and other prospective plaintiffs, and to grant us leave to amend Senators Sampson's and Dilan's Answer to assert cross-claims." The Senate Minority Defendants made no mention of the March 27, 2012 deadline for making motions to intervene. This April 26 letter was also the first time that counsel for the Senate Minority Defendants expressed any intent to assert "cross-claims" in this action, which was filed more than five months ago. The Senate Minority Defendants further offered that they "certainly will" file motions seeking leave to assert such claims "[i]f this Court would prefer" not to give them a free pass to interpose such claims.

The Court rejected the Senate Minority Defendants' invitation to "simply grant" them leave to file the untimely intervention motion and the motion to seek leave to assert a cross claim. Instead, the Court ordered the Senate Minority Defendants to submit motions seeking leave to assert these claims. The two motions that counsel for the Senate Minority Defendants submitted have proposed complaints that each assert a claim under the Equal Protection Clause that the districts created by the 2012 Senate Plan are unconstitutionally malapportioned. (DE 344, DE 345). This malapportionment claim is far from unique, in two different ways: it is not

unique *in* this proceeding, as three other intervenor plaintiffs are already ably presenting malapportionment claims to this Court; and it is not unique *to* this proceeding, as counsel for the Senate Majority Defendants has been pressing such a claim in every available forum.

First, counsel for the Senate Minority Defendants is seeking the Court's leave to assert a claim that is already before the Court, several times over. The amended complaints of the Drayton Intervenors (DE 254), Lee Intervenors (DE 256), and Ramos Intervenors (DE 257), all assert "one person, one vote" claims. There is absolutely no chance that, absent the assertion of the proposed claims by counsel for the Senate Minority Defendants, this Court would somehow overlook or fail to adjudicate the claim that the Senate Plan violates the "one person, one vote" requirement. Moreover, counsel for the Senate Minority Defendnats itself has already been advocating an equal protection claim in this Court. For example, in the Senate Minority Defendants' answer filed on April 12, 2012, they assert that the districts of the 2012 Senate Plan are unconstitutionally malapportioned, based on allegations that upstate districts are underpopulated and districts in and around New York City overpopulated. (DE 303). This is the same argument, relying on the same basis, now proposed by counsel for the Senate Minority Defendants on behalf of the would-be Intervenors and the Senate Minority.

Second, counsel for the Senate Minority Defendants has availed itself of every possible forum in which to press this argument. Counsel made this malapportionment argument—unsuccessfully—before the New York Supreme Court and the New York Court of Appeals on behalf of Mr. Breitbart and his fellow *Cohen* plaintiffs The Senate Minority Defendants also made this same argument—again without success—in their submission to the Department of Justice as it undertook the Section 5 preclearance process for the Senate Plan. (DE 295). In short, counsel for the Senate Minority Defendants has not been lacking opportunities to raise this

equal population claim. The Senate Minority and its privies have made this claim repeatedly, and has simply failed to convince any decisionmaking body of its merit. There is no reason that counsel for the Senate Majority Defendants should be permitted to contravene this Court's clear scheduling order in order to make the same claim yet again.

ARGUMENT

I. THE BREITBART MOVANTS' UNTIMELY REQUEST TO INTERVENE SHOULD BE DENIED

A party seeking intervention under Federal Rule of Civil Procedure 24(a) must show (i) that its application is timely; (ii) an interest in the action; (iii) that the interest may be impaired by the disposition of the action; and (iv) that the interest is not protected adequately by the parties to the action. *See Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001). "A would-be intervenor's failure to meet *all* of these requirements justifies the denial of its motion." *Id.* (emphasis added). The proposed Breitbart intervenors' terse motion has not carried their burden to show that they satisfy all four of these requirements.

A. The Breitbart Movants' Application for Intervention Is Untimely

First, this motion is untimely. After entertaining and granting several motions to intervene at the outset of this case, the Court initially stated that it would entertain intervention motions only "reluctantly" after February 2012 and later expressly ordered that the "deadline" for filing any further motions to intervene was March 27, 2012. 3/21/2012 Tr. at 65. That same date was the deadline for filing any amended complaints. The Breitbart intervenors do not so much as mention this deadline in their motion, but they have missed it by more than a month, and they did so *after* the Court's admonition to the parties about abiding by Court-ordered deadlines:

> [I]t is not fair for some lawyers to work to meet deadlines and others to, you know, sit and give themselves some grace time. So I

> do want to emphasize to everyone that this Court does mean its deadlines when it sets them and expects you to satisfy them.

4/18/2012 Tr. at 11-12. On this basis alone, the Court should deny the Breitbart intervenors' motion, especially because there is no question that their counsel should have been well aware of the March 27, 2012 deadline for seeking to intervene in this action.

The Senate Minority Defendants and the Breitbart intervenors offer the excuse that their one-person, one-vote challenge to the enacted Senate Plan did not become ripe for adjudication until the U.S. Department of Justice precleared the Senate plan on April 27, 2012. But other intervenors have asserted such a claim against the defendants in this case, including against the Senate Minority Defendants who are represented by the same counsel as the Breitbart intervenors. And, before they announced their intention to make these untimely motions, the Senate Minority Defendants uttered not a word, either in a motion to dismiss or even as an affirmative defense in their answers, that these claims had been improperly asserted against them before the 2012 Senate plan had been precleared.

The Breitbart intervenors and the Senate Minority Defendants rely on a statement in Justice Kennedy's concurrence in *Branch v. Smith*, 538 U.S. 254 (2003), that "[w]here state reapportionment enactments have not been precleared in accordance with § 5, the district court errs in deciding the constitutional challenges to these acts." *Id.* at 283 (Kennedy, J., concurring) (internal quotation marks and citation omitted). This statement does not bear the weight that the Senate Minority Defendants place on it. It is an instruction to *district courts* that they should not *decide* a constitutional challenge to a districting plan prior to preclearance, not that a *party* may not *assert* such a challenge prior to preclearance—as the intervenor plaintiffs in this case have all done. Indeed, in his *Branch v. Smith* concurrence Justice Kennedy expressed his agreement with a disposition of the action that vacated a judgment that Mississippi's plan, which had not yet

been precleared, violated the U.S. Constitution. *See id.* at 1446 ("The Court then vacates the District Court's alternative holding that the state-court plan violated Article I, § 4 of the United States Constitution."). But the Court did not order *dismissal* of this claim on the ground that it was not ripe. Accordingly, nothing in Justice Kennedy's concurrence, or anywhere else, authorized counsel for the Senate Minority Defendants to make a unilateral determination that his would-be intervenor clients could disobey this Court's scheduling order and refrain from seeking to assert their claims in accordance with the deadline set for all intervenors—all of whom raised one-person, one-vote claims—or that the Senate Minority Defendants should decline to assert their one-person, one-vote "cross claim" at the same time as the other plaintiffs, when the Court called for amended complaints to be filed by March 27, 2012.

B. The Breitbart Movants Have Not Made the Requisite Rigorous Showing That the Existing Intervenors Are Inadequate

Second, even putting to one side this fatal timeliness problem with the two motions, these proposed intervenors have not carried their burden to show that their interests in a one-person, one-vote claim are not adequately protected by the existing parties in this action. The Breitbart intervenors say in passing that this is only a "minimal" burden. (DE 345-1 at 2). They are wrong. "While the burden to demonstrate inadequacy of representation is generally speaking 'minimal," the Second Circuit demands a "more rigorous showing of inadequacy of representation in cases where the putative intervenor and a named party have the same ultimate objective." *Butler*, 250 F.3d at 179; *see also Great Atlantic & Pacific Tea Co. v. Town of East Hampton*, 178 F.R.D. 39, 42 (E.D.N.Y. 1998) ("[A]dequate representation is presumed when the would-be intervenor party shares the same ultimate objective as a party to the lawsuit."). "To overcome the presumption of adequate representation in the face of shared objectives, the would-be intervenor must demonstrate collusion, nonfeasance, adversity of interest, or incompetence on

the part of the named party that shares the same interest." *Great Atlantic & Pacific Tea Co.*, 178 F.R.D. at 42-43.

The Breitbart intervenors do not even mention this more rigorous standard in their motion, but it applies here and they have not carried their burden to rebut the presumption of adequacy or even undertaken to try to rebut the presumption. On their proposed one-person, one-vote claim, the would-be Breitbart intervenors plainly have the same "ultimate objective" as the Drayton, Lee, and Ramos intervenors have in connection with their one-person, one-vote claim that they assert against the Senate Majority Defendants. They are all seeking, among other things, to invalidate the 2012 Senate Plan on the ground that it violates the equal population mandate of the Fourteenth Amendment to the U.S. Constitution.

The Breitbart intervenors argue that "the parties" (they do not say who) take "divergent views" of relevant precedent and claim that they do not allege "racial animus" motivated the 2012 Senate Plan. Like the other intervenors, the Breitbart intervenors proposed complaint does in fact expressly rely on purported racial discrimination as a pretext for their one-person, one-vote claim: "As a result of the Chapter 16 Senate Plan's overpopulating of minority-concentrated New York City-area districts, most of the black, Hispanic and Asian-American residents of New York State, along with their non-Hispanic white neighbors in New York City, are deprived of their due proportion of representation, while residents of the upstate region are overrepresented." (DE 345-3 ¶ 58; *see also id.* ¶¶ 57, 59). And, indeed, the Drayton intervenors have submitted a declaration by Andrew Beveridge as purported proof of their claims that is substantially similar to the declaration that Mr. Breitbart attaches to his proposed complaint—and that the Senate Minority Defendants submitted to the Court in response to the Court's Order that the *plaintiffs* submit their evidence on their one-person, one-vote claim.

In any event, the test is whether the proposed Breitbart intervenors have the same "ultimate objective" as the other plaintiffs in this action. A proposed intervenor cannot avoid application of the more rigorous test (which the Breitbart intervenors do not even acknowledge) by asserting that it has different motives than parties already in the action to achieve a shared objective, or that the proposed intervenors would use different legal strategy to achieve this objective. *See Great Atlantic & Pacific Tea Co.*, 40 F.R.D. at 43-44 ("different motives" and "disagreement with an actual party over trial strategy" do not suffice to show inadequacy of representation when the proposed intervenor shares the same ultimate objective as a party already in the action).

Accordingly, because the Breitbart movants share the same ultimate objective as the Drayton, Lee, and Ramos intervenors—and, for that matter, the same ultimate objective as the Senate Minority Defendants—the Breitbart movants are required to show "collusion, nonfeasance, adversity of interest, or incompetence on the part of the named party that shares the same interest." *Great Atlantic & Pacific Tea Co.*, 178 F.R.D. at 42-43. The Breitbart movants have made no such showing. Nor have they even attempted to make it in their one-paragraph argument on the adequacy prong (and, in light of this failure, they should not be permitted to try to make this showing in any reply brief). On this separate ground, their motion should be denied.

C. The Breitbart Movants Have Not Carried Their Burden to Show That Their Interests Will Be Impaired If Their Untimely Motion Is Denied

Finally, the Breitbart movants assert that their interest may be impaired or impeded if they are unable to participate in this litigation. That is not at all clear, however. Mr. Breitbart himself was a petitioner in the *Cohen v. Cuomo* proceeding. As the Court knows, in that proceeding Mr. Breitbart and the other petitioners challenged the legality of the 2012 Senate Plan on the ground that it violated article III, section 4 of the New York State Constitution. And,

indeed, Mr. Breitbart himself submitted an affidavit to the New York Supreme Court in which he addressed, at length, the same allegations that he now proposes to make in this action: that "the Legislature's plan, as codified in Chapter 16 of the Laws of 2012 contains extreme population deviations that have no justification and are not necessary," and that the Senate plan "engages in unnecessary and improper regional malapportionment." (DE 289-2 ¶¶ 10-12, 18). Mr. Breitbart then goes on, just as he does in the declaration attached to his proposed complaint in this action, to address traditional redistricting criteria in the enacted Senate plan and his proposed alternative. (*Id.* ¶¶ 13-16).

Whether or not Mr. Breitbart had submitted this affidavit in the *Cohen v. Cuomo* proceeding, there would be a substantial question as to whether his proposed claim in this action challenging the constitutionality of the 2012 Senate Plan is precluded by the judgment for the respondents in the *Cohen* proceeding, in which Senator Dilan and Mr. Breitbart also challenged the legality of the 2012 Senate Plan. The *Cohen v. Cuomo* proceeding and Mr. Breitbart's proposed claim in this proceeding both arise out of the same event: the Legislature's enactment of the 2012 Senate Plan. *See Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 265 (2d Cir. 1997) (holding that plaintiff's "present lawsuit is barred by his prior state action," because "[h]is claims undeniably aris[e] out of the same factual grouping as those he advanced in the state court, and his present suit merely asserts different legal theories to obtain additional relief from the very same defendant, for the identical injuries."). And, because the same counsel represented the Cohen petitioners as represents the Senate Majority Defendants and the Breitbart movants, Mr. Breitbart should plainly be deemed in privity with his co-movants here for purposes of determining whether the *Cohen v. Cuomo* judgment should be afforded *res judicata* effect. *See id.* ("Under the doctrine of res judicata, a final judgment on the merits of an action precludes the

parties *or their privies* from relitigating issues that were or could have been raised in that action" (emphasis added & internal quotation marks omitted)).

The point is that the Breitbart movants' asserted interest in pressing a one-person, one-vote claim in this Court has likely already been "impaired" by the judgment against Mr. Breitbart and Senator Dilan in the *Cohen v. Cuomo* proceeding. That judgment is likely to have *res judicata* effect on the claim that the Breitbart movants are seeking leave to assert against the 2012 Senate Plan in this action. The Breitbart movants thus cannot show that failure to grant their untimely motion to intervene would impair their interests in any cognizable way.

D. The Breitbart Movants' Alternative Application for Permissive Intervention Should Be Denied

The Breitbart movants also make a perfunctory plea for permissive intervention, which should be denied. They say they should be granted permissive intervention because "the Court previously permitted the other intervenors to intervene." (*Id.*) But they fail to mention a crucial distinction between them and the other intervenors: the latter filed their motions to intervene, and amended their complaints, in compliance with this Court's scheduling orders. The Breitbart movants failed—by more than a month—to meet this deadline even after the Court explicitly admonished that it would not be "fair" for some groups of potential intervenors to work to meet the Court's deadlines and others to "sit and give themselves some grace time." 4/18/2012 Tr. at 11-12. The Court should enforce its recent declaration that it expects parties to adhere to deadlines by denying the Breitbart movants permission to intervene at this late stage.

The Court should also deny the motion for leave to intervene pursuant to Rule 24(b) to avoid unnecessary distractions in this case. As shown above, the entry of the Breitbart movants as intervenors would raise the issue of whether their claim—the same claim that other plaintiffs are already asserting—is barred by the preclusive effect of the judgment for Senator Skelos and

other respondents in the *Cohen v. Cuomo* proceeding. Moreover, the attempt by counsel for the Senate Minority Defendants to function as both defense counsel and, effectively, plaintiff's counsel in this action will give rise to a motion practice over whether he should be disqualified from continuing to participate in the case.

The Breitbart movants assert that they "bring an important perspective that will assist the Court." (DE 345-1 at 3). They do not explain what they mean, however, and to the extent they mean that counsel for the Senate Minority Defendants is the person who brings this "important perspective," the Senate Minority Defendants are already doing that. There is, at bottom, no need for this Court to have yet another party assert the same one-person, one-vote claim that no fewer than three other parties are already asserting against the defendants in this action. And, as shown above, the Breitbart movants have not carried their burden to show that these intervenor plaintiffs are not up to the task. The Breitbart movants should not be allowed to skirt this burden through the mechanism of "permissive intervention," especially when they have failed to meet the deadlines that this Court has warned must be met.

II. THE SENATE MINORITY DEFENDANTS SHOULD NOT BE PERMITTED TO ASSERT AS A "CROSS CLAIM" THE SAME CLAIM THAT PLAINTIFFS ARE ALREADY ASSERTING AGAINST THE SENATE MAJORITY AND MINORITY

Finally, the Senate Minority Defendants are seeking leave to assert a "cross claim" against the Senate Majority Defendants. This cross claim is the same claim that the Breitbart movants are seeking leave to assert against the Senate Majority Defendants, and the Court should reject this application by the Senate Minority Defendants for the same reason it should reject the Breitbart movants' application.

Indeed, the Senate Minority Defendants' motion is outrageous on its face. They are seeking to assert against the Senate Majority Defendants not only the same claim that the

existing intervenor plaintiffs are asserting against the Senate Majority Defendants, but the same claim that the intervenor plaintiffs are asserting against the *Senate Minority Defendants*. In other words, the Senate Minority Defendants want to function as both a plaintiff and a defendant in the *same action*, effectively asserting the same claim that is being asserted against them. They do not cite any authority that would allow them to abuse the Rules of Civil Procedure in this manner, or give any reason why this highly unusual proposed course of conduct would contribute to the "just, speedy, and inexpensive determination" of this action. Fed. R. Civ. P. 1. To the contrary, allowing the Senate Minority Defendants to assert this proposed cross claim would only delay this litigation with distracting motion practice to disqualify the Senate Minority Defendants' counsel if they are permitted to be on both sides of this dispute in the manner they are proposing.

Moreover, as with the Breitbart motion to intervene, "[u]ndue delay" is grounds for denying a motion for leave to amend, *see Dluhos v. Floating & Abandoned Vessel Known as "New York,"* 162 F.3d 63, 69 (2d Cir. 1998), and the Senate Minority Defendants unduly delayed in asserting their cross-claim. The Court set March 27, 2012 as the deadline for plaintiffs to amend their complaints in this action. And the intervenor plaintiffs all asserted their one-person, one-vote claims against the defendants in accordance with this Order. Good-faith adherence to this scheduling order would have required the Senate Minority Defendants to assert any "cross claim," pursuant to which they want to act as a plaintiff, by March 27, 2012 as well. But the Senate Minority Defendants did not do that, and their excuse for why they failed to adhere to the Court's scheduling order does not withstand scrutiny.

Finally, "Rule 13(g) permits a party to bring a crossclaim against a co-party which arises out of the 'transaction or occurrence' that is the subject matter of the original action." *See*

Centaur Ins. Co. v. Port Auth. of New York and New Jersey; 1987 WL 6224, at *3 (E.D.N.Y. Jan. 13, 1987); *see also* Fed. R. Civ. P. 13(g) (cross claim must "arise[] out of the same transaction or occurrence that is the subject matter of the original action"). The test is the same as for determining whether a claim is deemed "compulsory" pursuant to Rule 13(a)(1).

Here, the Senate Minority Defendants' proposed cross claim is a challenge to the enacted 2012 Senate Plan. That has *nothing* to do with "the main action," namely, the plaintiffs' claims that the Legislature had reached an impasse in drawing redistricting maps for Congress and the State Legislature in light of the 2010 Census. The Senate Minority Defendants' claim arises out of the Legislature's *enactment* of the 2012 Senate Plan, not its failure to enact such a plan. And it would be no answer for the Senate Minority Defendants' to contend that their proposed cross claim arises out of the same transaction that gave rise to the other intervenors' claims. The cross claim must, by Rule, arise of "the original action." A contrary rule would allow claims by intervenors to have a snowballing effect on the scope of the claims, counterclaims, and cross claims that could be asserted in a single action.

CONCLUSION

This Court should deny the Breitbart movants' application to intervene and the Senate Minority's request to amend its complaint to assert a cross-claim against the Senate Majority Defendants.

Dated: May 4, 2012

Respectfully submitted,

/s/Michael A. Carvin

Michael A. Carvin (MC 9266)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
202/879-3939

Todd R. Geremia (TG 4454)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
212/326-3939

David Lewis (DL 0037)
LEWIS & FIORE
225 Broadway, Suite 3300
New York, NY 10007
212/285-2290

Attorneys For Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of April, 2012, a true and correct copy of the foregoing was served on the following counsel of record through the Court's CM/ECF system:

Richard Mancino
Daniel Max Burstein
Jeffrey Alan Williams
WILLKIE FARR & GALLAGHER
787 Seventh Avenue
New York, NY 10019

Attorneys for Plaintiffs

Joshua Pepper
Assistant Attorney General
120 Broadway, 24th Floor
New York, NY 10271

Attorney for Defendants Andrew M. Cuomo, Eric T. Schneiderman, and Robert J. Duffy

Leonard M. Kohen
67 E. 11th Street #703
New York, NY 10003

Attorney for Defendants John L. Sampson and Martin Malave Dilan

Jonathan Sinnreich
SINNREICH KOSAKOFF & MESSINA LLP
267 Carleton Avenue, Suite 301
Central Islip, NY 11722

Attorney for Defendant Robert Oaks

Harold D. Gordon
Couch White, LLP
540 Broadway
Albany, NY 12201

Attorney for Defendant Brian M. Kolb

Joan P. Gibbs
Center for Law and Social Justice
1150 Carroll Street
Brooklyn, NY 11225

Attorney for Intervenors Drayton, Ellis, Forrest, Johnson, Woolley, and Wright

James D. Herschlein
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

Attorney for Intervenors Lee, Chung, Hong, and Lang

Jackson Chin
LatinoJustice PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013

Attorney for Intervenors Ramos, Chavarria, Heymann, Martinez, Roldan, and Tirado

Jeffrey Dean Vanacore
Perkins Coie LLP
30 Rockefeller Center, 25th Floor
New York, NY 10112

Attorney for Rose Intervenors

Lee D. Apotheker
PANNONE LOPES DEVEREAUX & WEST
81 Main Street, Suite 510
White Plains, New York 10601

Attorney for Ullman Intervenor

/s/ Michael A. Carvin