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May 8, 2012

By ECF & Hand

The Honorable Reena Raggi
United States Court of Appeals
for the Second Circuit
225 Cadman Plaza East
Brooklyn, NY 11201

The Honorable Gerald E. Lynch
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

The Honorable Dora L. Irizarry
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Favors et al. v. Cuomo et al.*, No 11 Civ. 5632

Dear Judges Raggi, Lynch, and Irizarry:

This firm, together with Jeffrey M. Wice, represents Defendant Senators John L. Sampson and Martin Malavé Dilan (together, the "Senate Minority") and the proposed Breitbart Intervenors in the above-referenced matter. We write to respond briefly to the Senate Majority's May 4, 2012 opposition to the applications to intervene and to cross-claim.

First, the Senate Majority's assertion that it was improper for the Senate Minority and the proposed Breitbart Intervenors to await the completion of the preclearance process before asserting claims against the enacted Senate plan cannot be reconciled with the Senate Majority's April 2, 2012 motion to dismiss, which expressly argued that the claims that were asserted against the enacted Senate plan were *unripe* and that this Court had *no Article III jurisdiction over them* because "preclearance proceedings for the plan are pending." Dkt. Entry No. 286-1, at 9.

Second, Mr. Breitbart's claim is not precluded because he could not have asserted it in the *Cohen* case during the pendency of the preclearance process. Moreover, even if he could have, the other proposed intervenors' claims would not be precluded because they are not even arguably "in privity" with Mr. Breitbart.

Third, the Senate Majority cites no authority for its assertion that it is "outrageous" and an "abuse" for this firm to represent both nominal Defendants and Intervenors in the same case. This firm plainly has no conflict of interest, and if the Senate Majority disagrees, it is free to move to disqualify – just as one or more parties may move to disqualify Jones Day from representing the Senate Majority at trial under the witness-advocate rule.

Finally, we reiterate that if the Breitbart Intervenors are denied leave to intervene, they will commence a plenary action and will designate it as a related case before Judge Irizarry and seek the appointment of a three-judge court. Under the Eastern District rules, it is likely that any such separate action would be consolidated with this case. The Breitbart Intervenors' claims obviously are not time-barred, they are entitled to pursue them, and denying them leave to litigate them as intervenors in this case – where all claims can be managed by this Court centrally and efficiently, which is in everyone's best interests – would accomplish nothing.

Respectfully submitted,

/s/

Eric Hecker (EH 0989)

cc: The Honorable Roanne L. Mann (by ECF)
All counsel (by ECF)