

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARGARITA LÓPEZ TORRES, STEVEN BANKS, C. ALFRED
SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W.
CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER,
AND COMMON CAUSE/NY,

Plaintiffs,

v.

Index No. CV 04-1129 (JG)

NEW YORK STATE BOARD OF ELECTIONS; NEIL W. KELLEHER,
CAROL BERMAN, HELENA MOSES DONOHUE, AND EVELYN J.
AQUILA, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF
THE NEW YORK STATE BOARD OF ELECTIONS,

Defendants,

**MEMORANDUM OF
LAW IN OPPOSITION TO
MOTION TO
INTERVENE
SUBMITTED BY
CHRISTOPHER EARL
STRUNK**

NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK
REPUBLICAN STATE COMMITTEE, ASSOCIATION OF JUSTICES
OF THE SUPREME COURT OF THE STATE OF NEW YORK,
ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE
CITY OF NEW YORK, AND JUSTICE DAVID DEMAREST,
INDIVIDUALLY, AND AS PRESIDENT OF THE STATE
ASSOCIATION,

Defendant-Intervenors,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Statutory Intervenor.

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Plaintiffs oppose the motion to intervene. The proposed intervenor’s claim, and the questions of fact raised by that claim, are entirely unrelated to the parties’ claims before this Court. To allow the proposed intervention at this stage would significantly delay the resolution of this matter and would prejudice the interests of the existing parties. Accordingly, Plaintiffs respectfully submit that Mr. Strunk’s motion should be denied.

ARGUMENT

I. The Proposed Intervenor Is Not Entitled to Intervention of Right

Intervention of right is permitted only where (1) the application is timely; (2) the applicant's interest "relates to the transaction which is the subject of the action;" (3) "the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest;" and (4) the applicant's interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2). "Failure to satisfy any one of these requirements is a sufficient ground to deny the application." *United States v. City of New York*, 198 F.3d 360, 364 (2d Cir. 1999). The applicant bears the burden of demonstrating that his interest is not adequately represented by existing parties. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). The proposed intervenor has failed to satisfy these four necessary conditions.

First and foremost, the proposed intervenor's claims appear to center on the "illegal mal-apportionment of Assembly Districts wrongly overlapping municipalities" and their relationship to "the entire provision of suffrage and Home-rule autonomy" under New York's Election Law. Whatever the merits of such a challenge, it simply does not "relate[] to the transaction which is the subject of the action." Under Rule 24(a)(2), a proposed intervenor must have a "direct, substantial, and legally protectable interest in the subject matter of the action." *United States v. City of New York*, 198 F.3d at 365 (internal quotation marks omitted). Any objections the proposed intervenor may have to the creation of the Assembly Districts are separate and distinct from the original parties' claims concerning the means by which the judicial convention system deprives New York voters of the right to have a meaningful choice among candidates for their party's

nomination, and from potential nominees' commensurate right to put their names before party members. The Court is not now called upon to decide the constitutionality of the apportionment of New York's Assembly Districts. Nor do the proposed new claims relate in any substantive way to the constitutional challenge before the Court. For these reasons, it does not appear that the proposed intervenor has even a remote interest in the claims raised by the parties in this case, much less the requisite direct or substantial interest.

Second, the proposed intervenor has no unique interest in the litigation and has not provided any reason why "the disposition of the action may as a practical matter impair or impede [his] ability to protect that interest." No portion of the relief sought or obtained by Plaintiffs would preclude Mr. Strunk from asserting his claims in a future or pending case. Specifically, the Court's final determination of the constitutionality of New York's judicial convention system will not in any way preclude or affect a future challenge to the apportionment of New York's Assembly Districts. *See In re Holocaust Victim Assets Litigation v. Swiss Bankers Ass'n*, 225 F.3d 191, 1999 (2d Cir. 2000) ("Because appellants remain free to file a separate action, they have not established that they will be prejudiced if their motion to intervene is denied."); *United States v. City of New York*, 198 F.3d at 365-66 (upholding denial of intervention because proposed intervenor's interest "only collaterally related" on an abstract level with main action and no bar exists to future actions by proposed intervenor).

With respect to timeliness, the determination of the applicant's timeliness is within the broad discretion of this Court. *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 182 (2d Cir. 2001). Among the circumstances generally considered are

(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.

Pitney Bowes, 25 F.3d at 70. Courts do not measure a delay subjectively, but rather ask whether the proposed intervenor knew *or should have known* of his interest at an earlier time. *Butler, Fitzgerald*, 250 F.3d at 182.

The proposed intervenor's application is untimely. The complaint in this case was filed over two years ago and received widespread attention in New York State, particularly in Brooklyn. In late 2004, this Court held a lengthy hearing on the Plaintiffs' preliminary injunction motion, and the Court granted the motion in January 2006. Now, two months after this Court's order granting the preliminary injunction, and with the parties having sought and received an expedited briefing schedule on the Defendants' appeal before the U.S. Court of Appeals for the Second Circuit, it would be highly disruptive to litigate these unrelated claims.

Moreover, the timing of the proposed intervenor's motion, if granted, would prejudice the existing parties to this action. If the Court were to allow intervention at this stage, litigation of his unrelated claims would doubtless delay the final resolution of the existing parties' claims substantially. Such a delay would not only disrupt the appeal itself, but, after the 2006 general election, intervention could result in delayed legislative solutions to New York's selection system for its trial judges. Such a delay would jeopardize the rights of numerous candidates for judicial office, as well as the rights of the millions of New Yorkers who wish to vote for those candidates. In short, the potential disruptions caused by intervention would far outweigh the potential prejudice to the proposed intervenor if his motion is denied.

II. The Proposed Intervenor's Application for Permissive Intervention Would Unduly Delay and Prejudice Adjudication of the Parties' Rights and Their Claims Have No Questions of Law or Fact in Common

Permissive intervention may be granted only where (1) the application is timely and intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties;” and (2) the applicant’s claim “and the main action have a question of law or fact in common.” Fed. R. Civ. P. 24(b)(2). The “principal guide” in determining whether permissive intervention is appropriate is whether the intervention will unduly delay or prejudice the original parties’ rights. *Pitney Bowes*, 25 F.3d at 73.

For the reasons already stated, the proposed intervenor’s application is untimely and his intervention at this stage of the litigation would unduly delay the adjudication of the parties’ rights. Permitting such intervention now would disrupt the expedited appeal before the Second Circuit by injecting new and entirely irrelevant claims into the Second Circuit’s consideration of this Court’s January Opinion and Order. Any trial would likely be delayed in order to allow the intervenor a sufficient opportunity to present his claims and the Court and the parties would be substantially burdened by the need to address those claims while attempting to address the issues already presented by the case. Such delay is unnecessary to preserve his claims for another case, and would serve only to prejudice the original parties and the voters of New York. *See United States v. City of New York*, 198 F.3d at 367-68 (“Since the claimed interests of the proposed intervenors, although broadly related to the subject matter of this action, are extraneous to the issues before the court, . . . intervention would indeed unduly delay the adjudication of the rights of the existing parties to the action.”) (internal quotation marks omitted); *Rector, Wardens, and Members of the Vestry of St. Bartholomew’s Church v. City of New York*,

914 F.2d 348, 360 (2d Cir. 1990) (affirming denial of permissive intervention because such intervention would “complicate the litigation, and thereby unduly delay the adjudication of the rights of the original parties”) (internal quotation marks omitted).

Other than vague references to collaterally related issues tangentially involving elections and Assembly Districts, there is simply no common question of law or fact between the two sets of claims. For this reason as well, therefore, the proposed intervenor’s application for permissive intervention should be denied.

CONCLUSION

For the foregoing reasons, the proposed intervenor's motion to intervene in this action should be denied.

Dated: April 3, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeremy M. Creelan, Esq., do hereby certify that on April 3, 2006, I served true and correct copies of the foregoing *Memorandum of Law in Opposition to Motion to Intervene Submitted By Christopher Earl Strunk* upon the following attorneys of record via electronic mail and upon Mr. Strunk (listed below) via first class U.S. mail, postage prepaid:

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