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January 26, 2017

VIA ECF

The Honorable Nicholas G. Garaufis
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Common Cause New York et al. v. Board of Elections in the City of
New York et al.*, 16-cv-6122 (NGG) (RML)

Dear Judge Garaufis:

Pursuant to this Court's Rule III(A)(2), the Office of the New York State Attorney General (the "NYAG"), on behalf of the People of the State of New York, respectfully requests a pre-motion conference in order to file a motion to intervene in the above-captioned matter or, in the alternative, requests that the Court treat this letter as an unopposed motion to intervene pursuant to Federal Rules of Civil Procedure 24(a)(2) and (b)(1)(B).

In this action, Common Cause New York and six named Plaintiffs (collectively, "Private Plaintiffs") allege violations of the National Voter Registration Act ("NVRA") and New York State Election Law against the Board of Elections in the City of New York and its Commissioners and Executive Director (collectively, "NYCBOE"). On January 12, 2017, the United States Department of Justice ("DOJ") submitted a letter-motion to intervene, which was granted by this Court on January 18, 2017.¹

As set forth below, the NYAG seeks approval to intervene because it has a substantial interest in protecting the rights of New Yorkers who, as a result of NYCBOE policies and practices, were unlawfully removed from voter registration rolls and consequently disenfranchised. Further, the NYAG has been investigating irregularities in the NYCBOE's practices and policies for maintaining voter registration rolls since the April, 19, 2016 presidential primary. Over the course of this nine-month investigation, the NYAG has interviewed several senior NYCBOE officials, reviewed key materials produced by the BOE, and identified extensive, systemic

¹ ORDER re 17 to Intervene, Jan. 12, 2017, ECF No. 22.

problems in the NYCBOE's policies and procedures which caused voters throughout New York City to be improperly removed from the voter registration rolls. The NYAG's investigation found that the NYCBOE conducted illegal purges of voters from the voting rolls, resulting in at least 200,000 voters being removed, in violation of state and federal laws. The NYAG's investigation of the NYCBOE is directly related to the allegations at issue in the instant action.

NYAG intervention would serve at least two important purposes. First, any resolution of this action without the NYAG as a party may impair his ability to protect New Yorkers' voting rights. Second, because the NYAG's investigation has uncovered material facts directly related to the claims at issue, the NYAG respectfully suggests that the Court would benefit from a full airing of those facts, particularly if the parties seek the Court's approval of a potential settlement.

Given that the NYAG has obtained consent from the original parties in this action, as well as the DOJ as Intervenor Plaintiff, and given the procedural posture of this case, the NYAG respectfully submits that a pre-motion conference and full motion practice may not be necessary, and the Court may treat this letter as an unopposed motion to intervene. To that end, the NYAG's proposed Complaint in Intervention is attached hereto as Exhibit A. A proposed Order is attached hereto as Exhibit B.

Procedural Background

The NYAG operated an election helpline during New York State's presidential primary on April 19, 2016. The helpline received hundreds of complaints alleging widespread voting irregularities across New York City, and specifically complaints that eligible voters were purged from the voter rolls in Brooklyn. On April 20, 2016, the NYAG launched an ongoing investigation into the policies and practices of the NYCBOE that led to the cancellation of 117,000 voters in Brooklyn.² To date, the NYAG has, (a) interviewed nine senior officials at the NYCBOE and five former officials in the NYCBOE's Brooklyn Borough Office³, (b) reviewed more than 30,000 NYCBOE internal documents and communications, and (c) analyzed the voter files of approximately 100 affected individuals.

Although the investigation is ongoing, the NYAG has already found extensive, systemic problems in the NYCBOE's policies and procedures, which caused voters—not only in Brooklyn but in all five boroughs—to be improperly removed from the voter registration rolls. Specifically, the NYAG has found that the NYCBOE conducted large “purges” of voters over the course of 2014 and 2015. The NYCBOE unlawfully removed individuals from the voter registration rolls solely because they did not vote, resulting in the unlawful removal of 117,000 voters in Brooklyn (later referred to as the “Brooklyn Project”). The NYAG further found that the NYCBOE conducted at least two additional improper purges by removing voters from the voter rolls who it suspected

² Press Release, New York State Office of the Attorney General, Statement from A.G. Schneiderman on Voting Issues during New York's Primary Election (April 20, 2016), <https://ag.ny.gov/press-release/statement-ag-schneiderman-voting-issues-during-new-york%E2%80%99s-primary-election>.

³ Over the course of the investigation, the NYAG interviewed some of the Defendants named in the Amended Complaint, specifically Commissioners John Flateau and Simon Shamoun and NYCBOE Executive Director Michael Ryan.

had moved to another jurisdiction, without following the procedures as prescribed in federal and state law. These additional purges led to the cancellation of over 100,000 voters. Collectively, these unlawful purges of voter registrations resulted in the cancellation of over 200,000 voters.

On November 3, 2016, Private Plaintiffs filed their complaint. The complaint alleged that the two named plaintiffs and similarly situated voters were removed from the list of registered voters in violation of 52 U.S.C. § 20507(d) and requested a preliminary injunction. ECF No. 1. On November 4, 2016, Private Plaintiffs and the NYCBOE entered into a Joint Stipulation resolving the motion for preliminary injunction. ECF No. 8. On December 10, 2016, Private Plaintiffs filed an Amended Complaint, which added four additional named plaintiffs and additional claims under the NVRA. ECF No. 13. The Court ordered the NYCBOE to respond to the Amended Complaint by January 9, 2017. ECF No. 15. On January 6, 2017, the NYCBOE informed the Court that it consented to the DOJ's request to intervene in this case, and requested an extension of four weeks to respond to the Private Plaintiffs' Amended Complaint to permit the parties, as well as the DOJ, to discuss an appropriate resolution. ECF No. 16. The Court granted that request, and the NYCBOE's response to the Amended Complaint is due February 6, 2017.⁴ On January 12, 2017, the DOJ filed a Letter Motion to Intervene or in the Alternative, Requesting A Pre-Motion Conference. ECF No. 17. That motion was granted on January 18, 2017, and the Court ordered the Defendants to respond to the DOJ's pleadings "on or before February 6, 2017, or within 21 days after being served with the Complaint in Intervention, whichever is later." ECF No. 22.

I. The NYAG is Entitled to Intervene As of Right Pursuant To Federal Rule of Civil Procedure 24(a)(2).

In the Second Circuit, a court must grant a motion to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2) if (1) the motion is timely, (2) the movant has asserted an interest relating to the subject of the action, (3) the movant is situated such that disposing of the action without it might, as a practical matter, impair or impede its ability to protect the interest, and (4) existing parties cannot adequately represent the movant. *MasterCard Int'l Inc. v. Visa Int'l Service Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006). Parties seeking to intervene as a matter of right need not establish standing, as long as they assert the same legal theories and seek the same relief as an existing plaintiff. *See Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 64-65 (2d Cir. 2016). As explained *infra*, the NYAG is entitled to intervene as of right in this action as all four requirements under Rule 24(a)(2) are satisfied, and in any event, the NYAG has standing under the *parens patriae* doctrine.

A. The NYAG's motion to intervene is timely.

Timeliness is evaluated based on the totality of the circumstances, including "(1) how long the applicant had notice of the interest before [he] 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." *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (quoting *U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994) (citations omitted)).

⁴ See Order re Defendants' Application for Extension of Time, Jan. 12, 2017, ECF No. 16.

The NYAG's motion is timely because it comes approximately five weeks after Private Plaintiffs filed an Amended Complaint that contained new claims⁵ concerning the Brooklyn Project. *See Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 95 (E.D.N.Y. 1996) (motion to intervene as of right, filed 46 days after plaintiffs amended their complaint, was timely). Further, the NYAG's request to intervene will not delay any proceedings or prejudice the original parties' rights. The NYAG is prepared to comply with the Court-ordered schedule and the NYCBOE has yet to file a responsive pleading.⁶ In addition, the parties consent to the NYAG's request to intervene, militating against any finding of prejudice. Accordingly, under the totality of the circumstances, the NYAG's motion to intervene is timely.

B. The NYAG has a strong interest in this litigation.

In the Second Circuit, a moving party's interest in this context must be "direct, substantial, and legally protectable." *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). The NYAG has a substantial interest in this action because the allegations in the Amended Complaint are directly related to the NYAG's extensive investigation into the NYCBOE's unlawful practices and policies for maintaining its registration rolls, as discussed *supra*. More broadly, the NYAG is at the forefront of protecting voting rights in New York State. The NYAG has operated statewide helplines during almost every Election Day since 2012.⁷ Most recently, the NYAG conducted a helpline during the November 8, 2016 general election, during which the office received voter complaints from New York City as well as the rest of New York State. In addition to his ongoing investigation into the NYCBOE, the NYAG conducted a statewide inquiry into voter practices and procedures and issued a report on the findings of that inquiry in December 2016.

The NYAG brings this action pursuant to its *parens patriae* authority on behalf of New Yorkers who were removed from the registration rolls and disenfranchised as a result of NYCBOE unlawful policies and practices. *See* Ex. A, ¶¶ 19-20. The NYAG has a quasi-sovereign interest in the health and well-being of the citizens of New York, including their right to vote, which is one of our nation's most fundamental rights. *See New York v. Utica City Sch. Dist.*, 177 F. Supp.3d 739, 748 (N.D.N.Y. 2016) (denying motion to dismiss in action in which the NYAG asserted *parens patriae* authority; the court reasoned that the NYAG's action was not duplicative of a private lawsuit asserting similar claims as the NYAG has a "unique status as the representative of the greater public good and [a] concomitant mandate to secure wide-ranging relief that will inure to the direct and indirect benefit of the broader community."); *see also New York v. Cnty. of Del.*, 82 F. Supp. 2d 12, 13 n. 1 (N.D.N.Y. 2000) (holding that the NYAG had *parens patriae* authority to bring a suit to protect the voting rights of disabled New Yorkers based on its "quasi-sovereign interest in the health and well-being of the disabled citizens"). *See also, Cal. ex rel. Lockyer v. Cnty. of Santa Cruz*, 416 F. Supp. 2d 797, 800 (N.D. Cal. 2006) (holding that the

⁵ The Private Plaintiffs' original complaint did not contain claims regarding the Brooklyn Project. Further, it only named two Plaintiffs whose voter registrations were cancelled in an unrelated purge prior to the Brooklyn Project purge. *See* Compl., Jan. 12, 2017, ECF No. 1, ¶¶ 14, 15, 35-61.

⁶ Defendants' Response is due on February 6, 2017. *See* ORDER re Defendants' 16 Application for Extension of Time, Jan. 12, 2017, ECF No. 16.

⁷ The exception is November 4, 2014, when the NYAG himself ran for election.

California Attorney General had *parens patriae* standing to seek injunctive relief to prevent defendants from violating sections of the Americans with Disabilities Act in order to ensure disabled citizens were not denied their right to vote).

C. Resolution of this action would impede the NYAG's ability to ensure that complete relief is granted.

Any resolution of the instant case would significantly affect the NYAG's efforts to seek a remedy for purged voters throughout New York City and to protect New Yorkers' right to vote under both the NVRA and New York State Election Law. To show an impairment of interests for the purposes of Rule 24(a)(2), a proposed intervenor need only show that the disposition of an action "may as a practical matter impair or impede the movant's ability to protect its interest." *Pitney Bowes*, 25 F.3d at 69-70 (citing Fed. R. Civ. P. 24(a)(2)) (emphasis added). The NYAG's enforcement interests are not adequately represented by the original parties or the DOJ because the NYAG seeks relief that is significantly broader than that requested by Private Plaintiffs or the DOJ.

The Amended Complaint requests an order requiring the NYCBOE to restore the registrations and count the ballots of the named Plaintiffs and similarly situated voters (ECF No. 13, p. 21), and the DOJ's Complaint in Intervention asks the Court to remedy deficient oversight practices (ECF No. 17, at ¶¶ 74-76). By contrast, the NYAG is requesting relief on behalf of a much larger number of voters affected by the NYCBOE's unlawful voter registration roll maintenance practices. First, beyond those voters affected by the Brooklyn Project, the NYAG seeks relief for voters in Queens and Manhattan who were cancelled based on a similar unlawful policy of removing voters from the registration rolls for not voting. The NYAG also seeks relief on behalf of voters throughout New York City who the NYCBOE improperly cancelled in two additional large purges based on suspicion that the voters moved out of the jurisdiction. These purges occurred in 2014 and 2015, the latter of which has not been alleged in the Amended Complaint or the DOJ's Complaint in Intervention. *See* Ex. A, ¶¶ 148-154. In total, these cancellations resulted in the removal of over 200,000 voters from the registration rolls. *See* Ex. A, ¶¶ 90, 142, and 152. As such, the NYAG seeks an order requiring the NYCBOE to review its voter database to identify and reinstate voters across *all five boroughs* who have been improperly purged since 2014 as a result of various programs and activities that violated federal and New York State election laws. Further, because the NYAG has substantial evidence indicating systemic problems with the NYCBOE's voter maintenance policies and practices, the relief requested by the NYAG would ensure that any resolution of this action would be complete.

Moreover, judicial economy would be best served by granting the NYAG's motion to intervene. A parallel lawsuit brought by the NYAG concerning many of the same legal and factual issues in this action could lead to overlapping legal rulings or remedial orders.

Neither the Private Plaintiffs nor the DOJ can adequately represent the NYAG's interests in protecting the voting rights of all New Yorkers. As pled in the NYAG's proposed Complaint in Intervention attached as Exhibit A, the NYAG has information of widespread violations relating to registration roll maintenance that are not alleged by either party. *See* Ex. A, ¶¶ 83, 92-113, and 125-174. In addition to the extensive evidence gathered in the NYAG's investigation, the NYAG

has learned much about the operation of local BOEs throughout the state from the office's experience in administering several election hotlines. Thus, the NYAG is uniquely situated to seek complete relief for the issues presented.

II. Alternatively, The NYAG is Entitled To Permissive Intervention Under Rule 24(b)(1)(B).

In the alternative, the NYAG respectfully asks the Court to exercise its discretion and grant the NYAG permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). When deciding whether to permit intervention, a court must consider “substantially the same factors” as for intervention as of right. *Kaliski v. Bacot (In re Bank of N.Y. Derivative Litig.)*, 320 F.3d 291, 300 & n.5 (2d Cir. 2003). The discussion in Part I.A. *supra* demonstrates that the NYAG has satisfied these criteria.

A “principal consideration” for permissive intervention is “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *See Pitney Bowes*, 25 F.3d at 73 (quoting Fed. R. Civ. P. 24(c)). The NYAG is prepared to participate immediately in this case on the schedule set forth by the Court. As noted in I.A. *supra*, the NYCBOE has not yet filed a responsive pleading, and the parties have all consented to the NYAG's motion to intervene. These facts establish that the intervention will not unduly delay this action nor prejudice the adjudication of the claims of the existing parties.

Moreover, under Rule 24(b), a timely applicant may be permitted to intervene when an applicant's claims or defense and the main action share a question of law or fact in common. Fed. R. Civ. P. 24(b); *see also United States v. City of N.Y.*, 07-CV-2067, 2012 WL 314353, at *13 (E.D.N.Y. Feb. 1, 2012) (“The first requirement” for permissive intervention is a “claim or defense that shares with the main action a common question of law or fact”) (quoting Fed. R. Civ. P. 24(b)(1)(B)) (Garaufis, J.), *aff'd in part, vacated in part on other grounds*, 717 F.3d 72 (2d Cir. 2013). Courts also consider whether intervenors “will significantly contribute to full development of the underlying factual issues” and “just and equitable adjudication of the legal question presented.” *H.L. Hayden Co. of N.Y. v. Siemens Med. Sys. Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (internal quotations omitted); *see also City of N.Y.*, 2012 WL 314353, at *13 (additional factors considered by this Court included “whether the putative intervenor will benefit from the application, the nature and extent of its interests, whether its interests are represented by the existing parties, and whether the putative intervenor will contribute to the development of the underlying factual issues”). Ultimately, permissive intervention lies in the Court's discretion. *See U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 192 (2d Cir. 1978).

The NYAG's Proposed Complaint in Intervention shares “common questions” of law and fact with the Amended Complaint, as provided by Rule 24(b)(1)(B). *Compare* ECF No. 13, ¶¶ 122-131, *with* Ex. A, ¶¶ 181-186. The NYAG's claims are similar to those presented in the instant action, namely whether the NYC BOE violated the NVRA and New York State Election Law in its registration roll maintenance practices.⁸ Moreover, if the NYAG is permitted to intervene, the

⁸ As stated in Part I.C. *supra*, as a result of the NYAG's investigation, the NYAG is aware of extensive, widespread voter maintenance issues that were not alleged in the Amended Complaint or in the DOJ's Complaint in Intervention. *See* Ex. A, ¶¶ 83, 92-113, and 125-174. Therefore, although the Amended Complaint, DOJ's Complaint in Intervention, and the NYAG's Proposed Complaint in Intervention share common questions of law

information and findings drawn from the NYAG's investigation would "significantly contribute to full development of the underlying factual issues," and further inform this Court to ensure that a "just and equitable adjudication of the legal questions presented" is reached. *H.L. Hayden Co. of N.Y.*, 797 F.2d at 89 (internal quotations omitted). The NYAG's intervention, therefore, presents common legal questions fully satisfying the requirements for permissive intervention under Rule 24(b)(1)(B).

For the foregoing reasons, the NYAG respectfully requests leave to intervene in this action as allowed under Federal Rules of Civil Procedure 24(a)(2) or 24(b)(1)(B).

Respectfully submitted,

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Encl.

and fact, the NYAG's Proposed Complaint in Intervention includes essential additional facts for the Court to consider.