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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FILED
HARRISBURG, PA

OCT 28 2002

MARY E. D'ANDREA, CLERK
Per _____

RICHARD VIETH and NORMA
JEAN VIETH,

Plaintiffs

v.

THE COMMONWEALTH OF
PENNSYLVANIA, *et al.*,

Defendants

NO. 01-CV-01-2439

(JUDGES RAMBO
NYGAARD & YOHN)

**DEFENDANTS GOVERNOR SCHWEIKER, SECRETARY WEAVER
AND COMMISSIONER FILLING'S JOINDER
IN THE PRESIDING OFFICERS' MEMORANDUM IN
RESPONSE TO THIS COURT'S OCTOBER 10, 2002 ORDER**

Defendants Governor Schweiker, Secretary of the Commonwealth Weaver, and Commissioner Filling (the Executive Officers), through their undersigned counsel, hereby join in Lt. Governor Jubelirer and Speaker Ryan's (The Presiding Officers) Memorandum in Response to this Court's October 10, 2002 Order. The Executive Officers write separately to address certain specific points.

BACKGROUND

This Court, by order dated September 13, 2002, scheduled a hearing regarding the constitutionality of Act 34 for October 15, 2002. On October 9, 2002, Senator Robert J. Mellow, as *amicus curiae*, sought to have this Court stay further action in this case pending resolution of a challenge he filed on that date in the Commonwealth Court of Pennsylvania — *Mellow v. Schweiker, et al.*, No. 725 M.D.

2002.¹ In the Commonwealth Court petition just initiated by Senator Mellow, he claims that Act 34 violates the one person / one vote principle established by the United States and Pennsylvania constitutions.

By order dated October 10, 2002, this Court postponed the hearing previously scheduled for October 15, 2002 and asked the parties to file memorandum addressing the following questions: whether *amicus curiae* Senator Robert J. Mellow has standing to file a motion for stay in this case and whether this litigation should be stayed pending disposition of the state court of *Mellow v. Schweiker, et al.*?

**SENATOR MELLOW LACKS STANDING TO SEEK
A STAY FROM THIS COURT.**

An *amicus curiae* is not a party to litigation. Because an *amicus curiae* is not a party and participates only for the benefit of the Court, it is solely within the discretion of the Court to determine the fact, extent, and manner of participation by an *amicus*. *Newark Branch NAACP v. Town of Harrison, NJ*, 940 F.2d 792, 808 (3d Cir. 1991). The Court in *Branch* went on, in outlining the proper exercise of that discretion to cite with approval *Berry v. Doles*, 583 U.S. 190, 202 (1978) (Rehnquist, J., dissenting) (*amicus curiae* has no standing to request relief not requested by the parties). *Id.*

Other circuits have reached the same conclusion. Participation as an *amicus* is within the sound discretion of the courts. However, *amicus* have never

¹Neither plaintiffs nor defendants concurred in Senator Mellow's request for a stay.

been recognized, elevated to, or accorded the full litigating status of the named party or real party in interest. Accordingly, *amicus* have been consistently precluded from initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of a case or controversy. *United States v. State of Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). There is a bright line distinction between *amicus curiae* and named parties / real parties in interest in a case or controversy. Standing to litigate equal to that exercise by named parties / real parties in interest may be acquired or conferred only pursuant to intervention. *Id.*

The courts in this Circuit have recognized this bright line distinction. An *amicus* is not a party to the litigation and participates only to assist the Court. A bright line distinction between an *amicus* and a party to litigation centers on the control of the litigation.

The named parties should always remain in control, with the *amicus* merely responding to the issues presented by the parties. An *amicus* cannot initiate, create, extend, or enlarge issues. . . .

Waste Management of Pennsylvania v. City of York, 162 F.R.D. 34, 36 (M.D.Pa. 1995) (quoting *Rawlins v. Hanan*, 868 F.Supp. 1356, 1358 (M.D. Ala. 1994)). See also, *Kreider v. County of Lancaster*, 1999 WL 1128942 (E.D.Pa., *6, n6) (an *amicus curiae* is not an advocate before the court and has no standing to request relief that has never been requested by the parties) (citing *Newark Branch NAACP v. Town of Harrison, NJ*).

The case law is clear and consistent. The role of *amicus curiae* is to aid the Court in its consideration of issues presented by parties in a case or controversy

which they control. Senator Mellow improperly seeks to introduce issues neither party has presented. Senator Mellow also seeks to improperly take control of this action. As an *amicus curiae*, Senator Mellow may not take such actions. As *amicus curiae*, Senator Mellow lacks standing to move this Court for a stay. That motion should not be considered by this Court.

Respectfully submitted,

**D. MICHAEL FISHER
Attorney General**

BY:



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DATED: October 18, 2002

CERTIFICATE OF SERVICE

I, **J. BART DeLONE**, Senior Deputy Attorney General for the Commonwealth of Pennsylvania, hereby certify that on October 18, 2002, I caused to be served a copy of the foregoing document entitled **Defendants Governor Schweiker, Secretary Weaver, and Commissioner Filling's Joinder in the Presiding Officers' Memorandum in Response to This Court's October 10, 2002 Order**, upon the following:

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