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**FILED**  
HARRISBURG, PA

OCT 18 2002

MARY E. D'ANDREA, CLERK  
Per         
Deputy Clerk

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

RICHARD VIETH, et al,		:	
	Plaintiffs,	:	
		:	
v.		:	No. 1:CV-01-2439
		:	(Judge Rambo)
THE COMMONWEALTH OF		:	
PENNSYLVANIA, et al.,		:	
	Defendants.	:	

**MEMORANDUM OF PRESIDING OFFICERS  
(REQUESTED BY THIS COURT IN ITS OCTOBER 10, 2002 ORDER)**

On October 9, 2002, Senator Mellow, an *amicus* in this case, asked this Court to stay further action in this case pending resolution of a challenge he filed, also on October 9, 2002, in the Commonwealth Court of Pennsylvania – *Mellow v. Schweiker, et al.*, Dkt. No. 725 M.D. 2002. In his Commonwealth Court petition, Senator Mellow claims that the congressional redistricting plan put in place by Act 34 violates the one-person, one-vote principle established by the Pennsylvania and U.S. Constitutions. His basis for that claim is identical to the basis alleged by Plaintiffs in this case, i.e., the March 15, 2002 purported change in the location of the boundary between the two elections precincts in South Buffalo Township, Armstrong County.

On October 10, 2002, this Court, in response to Senator Mellow's "motion," postponed the October 15, 2002 hearing on the issue of whether the Act 34 plan violated the one-person, one-vote principle and directed the parties to file memorandum by Friday, October 17, 2002, addressing the following questions:

- (A) Whether this litigation should be stayed pending disposition by the state court of *Mellow v. Schweiker, et al.*, Commonwealth Court Number 725-MD-2002; and
- (B) Whether *amicus curiae*, Senator Robert J. Mellow, has standing to file a motion for stay in this case.

#### A. STAY

Presiding Officers take no position on whether this Court should stay this litigation pending resolution of the action Senator Mellow has instituted in the Commonwealth Court of Pennsylvania.

#### B. STANDING

As Middle District Judge (now Chief Judge) Vanaskie explained in *Waste Management of Pennsylvania, Inc. v. York*:

An amicus, of course, is not a party to the litigation and participates only to assist the court. ...

A bright line test between an amicus and a named party was articulated in *Wyatt* by and through *Rawlins v. Hanan*, 868 F. Supp. 1356, 1358 (M.D. Ala. 1994). The court found that the bright line centered around 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.' Further, an amicus has no right to appeal or dismiss issues. *Id.* at 1358-1359.

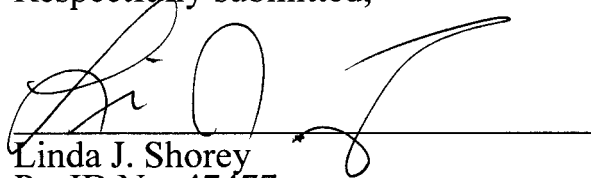
162 F.R.D. 34, 36 (M.D. Pa. 1995). *See also DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 731 (3d Cir. 1995), *cert. denied*, 516 U.S. 916 (1995) (court declined to address issue raised only by *amicus*); *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (in reversing trial court order permitting *amicus* to litigate as party, court noted that "[a]micus curiae may not and, at least

traditionally, has never been permitted to rise to the level of a named party/real party in interest").

With the filing of his motion to defer, Senator Mellow, allowed to participate as *amicus*, improperly seeks to take control of this case. This Court should reject this attempt to overreach, return Senator Mellow's motion to him, and delete the motion from the docket in this case.

Respectfully submitted,

October 18, 2002



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**CERTIFICATE OF SERVICE**

I certify that on October 18, 2002, I caused a copy of the foregoing Motion for Leave to Present Evidence to be served on the following as indicated:

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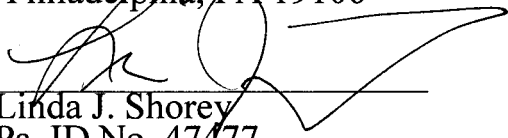
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