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

RICHARD VIETH, *et al.*, Plaintiffs, v. COMMONWEALTH OF PENNSYLVANIA , *et al.*, Defendants. ROBERT J. MELLOW, Senator, 22nd District, Proposed Intervenor.	Civil No. 1:CV-01-2439

MEMORANDUM OF SENATOR ROBERT J. MELLOW IN SUPPORT OF HIS MOTION FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO PARTICIPATE AS *AMICUS CURIAE*

INTRODUCTION

Senator Robert J. Mellow, as leader of the Senate Democratic Caucus ("Movant"), asks this Court's permission to intervene in the remedial phase of this matter or, in the alternative, to participate as *amicus curiae*. This Court has already granted Senator Mellow leave to participate as *amicus curiae* for the purpose of supporting Defendants' renewed Motion for a Stay. Movant now asks this Court for leave to intervene or to participate as *amicus curiae* for the purpose of presenting an alternative redistricting plan ("the Senate Democrats' plan") and otherwise participating in the remedial phase of this case. The Senate Democrats' plan complies with the "one-person, one-vote" rule, divides no precincts, splits fewer political subdivisions than any other proferred plan, likely achieves a politically fair result (a congressional delegation that approximates the makeup of the current delegation), and has districts that, on average, are more compact than those in any other proffered plan.

As set forth below, Movant meets the criteria for intervention under Fed. R. Civ. p. 24.

- First, the motion is timely because intervention will not prejudice any party. Movant does not seek to re-litigate the issues of liability addressed in this Court's April 8 Opinion and Order. Rather, Movant seeks only to participate at the remedial stage of this case.

- Second, as a voter, legislator, and member of the Democratic Party, Movant has an obvious interest in this litigation. In particular, Movant

has an interest in the adoption of a plan that complies with the United States Constitution and respects traditional districting principles.

- Third, Movant's interest will be adversely affected by the disposition of this action if the Court denies intervention.

- Fourth, Movant's interest is not adequately represented by any of the existing parties. The plan Movant seeks to offer differs from those of both the Plaintiffs and the Defendants.

Accordingly, Movant respectfully requests that this Court permit him to intervene or participate as *amicus curiae* in the remedial phase of this matter.

FACTS

On April 8, 2002, this Court issued an order (the "Order") declaring Act 1, the congressional redistricting plan enacted by the General Assembly and signed into law by the Governor, unconstitutional. The Order permanently enjoined the Defendants from implementing Act 1 and gave the Pennsylvania General Assembly three weeks to prepare, enact, and submit for review and approval by this Court a constitutional congressional redistricting plan. In an opinion accompanying the Order (the "Opinion"), the Court explained that Act 1 violated the "one person, one vote" rule because the proposed districts had a total deviation of 19 people and that the Defendants had failed to justify this deviation.

On April 9, Republicans in the State Senate introduced Senate Bill 1234, a congressional redistricting plan that sought to remedy the deficiencies in Act 1. On April 15, Democrats in the State Senate proposed a competing redistricting plan as an amendment to Senate Bill 1234. The Senate's Republican majority voted down the Democratic alternative on a party-line vote. On April 17, the Senate, on a party-line vote, passed House Bill 2545, a Republican-supported plan

that subsequently passed the House. On April 18, Governor Schweiker signed House Bill 2545 into law as Act 34 of 2002.

Meanwhile, on April 11, 2002, Defendants asked this Court to stay the Order pending an appeal to the United States Supreme Court. On April 12, this Court denied the motion. On April 18, Defendants renewed their motion. On April 22, Senator Mellow moved for permission to participate as *amicus curiae* for the purpose of supporting the renewed motion for a stay. On April 23, this Court granted both Senator Mellow's motion and the renewed motion for a stay, and scheduled a hearing on remedies for May 8. Movant now respectfully requests that this court grant him leave to intervene (or, in the alternative, to participate as *amicus curiae*) for the purpose of submitting a redistricting plan and otherwise participating in the remedial phase of this proceeding.

ARGUMENT

I. THIS COURT SHOULD ALLOW MOVANT TO INTERVENE AS OF RIGHT UNDER FED. R. CIV. P. 24(A)(2)

Fed. R. Civ. P. 24(a)(2) provides that "anyone shall be permitted to intervene" as a matter of right

> [u]pon timely application . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In deciding whether a party may intervene as of right, courts require proof of four elements: "first, a timely application for leave to intervene; second, a sufficient interest in the litigation; third, a threat that the interest will be impaired

or affected, as a practical matter, by the disposition of the action; and fourth, inadequate representation of the prospective intervenor's interest by existing parties to the litigation." *Kleissler v. United States Forest Service*, 157 F.3d 964, 969 (3d Cir. 1998). Movant satisfies all four elements, and thus respectfully requests that the Court grant his motion to intervene as of right.

A. The Motion to Intervene Is Timely

Although Rule 24 requires a "timely" application for intervention, the rule does not specify any particular time limit for filing a motion to intervene. Timeliness "is not just a function of counting days; it is determined by the totality of the circumstances." *U.S. v. Alcan Aluminum,* 25 F.3d 1174, 1181 (3d Cir. 1994). In discussing timeliness, courts look at a variety of factors, including whether the proposed intervention would prejudice current parties to the case. *See Mountain Top Condominium Association v. Stabbert,* 72 F.3d 361, 370 (3d Cir. 1995) (holding that motion to intervene filed four years after commencement of proceedings was timely).

Courts frequently have permitted intervention in proceedings far more advanced than those in the present case. *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134-36 (1967) (State of California's motion to intervene in antitrust case, filed with the district court after the Supreme Court had ruled that a natural gas company had violated the Clayton Act and remanded for divestiture, should have been granted); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780 (3d Cir. 1994) (motion to intervene filed to enforce confidentiality of settlement was timely).

It is appropriate for a party to intervene at the remedy phase when the party does not intend to re-litigate the merits of the case. For example, in *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.3d 385 (1967), the United States moved to intervene after the district court had ruled on liability and had ordered the parties to submit school desegregation plans but before the Plaintiffs had submitted their plan and before the court had ruled on the plans. *See id.* at 896. The district court denied the motion, but the court of appeals reversed, concluding that the motion to intervene was timely. *See id.*

The Third Circuit likewise has recognized that intervention at the remedy phase is appropriate where the movant has a legally cognizable interest in the outcome of that phase. *See Brody v. Spang,* 957 F.2d 1108, 1125 (3d. Cir. 1992) (affirming district court's decision to deny intervention to parents and students at the merits phase of a case brought by other students against school board alleging that baccalaureate service violated Establishment Clause, because the ruling on the merits would not affect proposed intervenors' free speech rights; remand was necessary, however, to determine whether proposed intervenors had a legally cognizable interest in the outcome of the remedial phase that warranted granting their motion to intervene at that time).

Movant's participation in the present case would neither disrupt the proceedings nor prejudice any party. Movant does not seek to re-litigate the

Court's prior rulings regarding Plaintiffs' standing or Plaintiffs' claims under the First Amendment or the Privileges and Immunities Clause. Nor does Movant seek to re-litigate the Court's dismissal of Plaintiffs' partisan gerrymandering claim. Finally, Movant does not seek to re-try the issue of whether Act 1 violates the constitutional principle of "one person, one vote."

Movant seeks only an opportunity to propose a remedial plan, offer testimony in support of it at the May 8 hearing, and otherwise participate in the remedial phase of this matter. This phase is a new one in which all parties will focus on two issues not previously before the Court: (1) whether Act 34 cures the constitutional deficiencies in Act 1 and otherwise complies with applicable legal principles; and (2) if Act 34 does not do so, whether the plan proposed by Plaintiffs or that proposed by Movant is an appropriate remedy. With respect to the first issue, Movant anticipates relying primarily upon evidence offered by Plaintiffs; thus, there will be no duplication of testimony. With respect to the second issue, Movant anticipates that he will offer the plan proposed by the Democrats in the Senate following the Court's April 8 Order. This plan is a matter of public record, having been presented to the Senate on April 15, 2002. Consequently, neither Plaintiffs nor Defendants can claim surprise. Movant anticipates offering only limited testimony in support of this plan.

In short, because the remedial phase of this proceeding represents a "fresh start" for all parties involved, and because Movant will not seek to re-litigate issues already decided, Movant's participation will not prejudice any party. Thus, the motion to intervene is timely.

B. Movant Has An Interest Relating To The Property Or Transaction That Is The Subject Matter of Litigation

As noted above, under Rule 24(a)(2), an applicant must have an interest related to the subject matter of the pending action. *See Kleissler*, 157 F.3d at 969. This interest must be "significantly protectable." *See id.* The question whether an intervenor has a significantly protectable interest is handled flexibly and pragmatically. *See id.*

The interest of state Senators in promoting a fair redistricting process is sufficiently "protectable" for purposes of Rule 24(a)(2) to warrant granting a motion to intervene as of right. The Supreme Court has repeatedly emphasized that state legislatures have the primary responsibility for legislative reapportionment. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) ("reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court"). Consistent with this legislative duty to reapportion, Movant and other Democrats in the State Senate have already invested a significant amount of time and effort soliciting public comment, analyzing census data, participating in public hearings, formulating and debating redistricting proposals, and presenting plans on the Senate floor. In short, Movant and other

Senate Democrats plainly have interests in reapportionment that warrant intervention.

C. The Disposition of This Litigation Will Impede The Movant's Protectable Interest In The Reapportionment Process

The Movant's burden in demonstrating that his interests will be impaired is not an onerous one. In order to intervene as of right, Movant must only demonstrate that his interests *may* be impaired by the outcome of the litigation. *See Brody*, 957 F.2d at 1122. "[T]his factor may be satisfied if, for example, a determination of the action in the applicants' absence will have a significant stare decisis effect on their claims, or if the applicants' rights may be affected by a proposed remedy." *Id.* at 1123.

Resolution of this matter without the Movant's participation will affect his rights and interests as a voter and legislator and the rights and interests of his constituents and other Senate Democrats and their constituents. Specifically, unless permitted to intervene, Movant will be unable to represent the interests of his constituents and others who support the Senate Democrats in the reapportionment process.

D. Movant Is Not Adequately Represented In This Litigation

The final requirement under Rule 24(a)(2) is that the applicant's interests in the litigation must not be "adequately represented by existing parties." *See Kleissler*, 157 F.3d at 972. "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Mountain Top*

Condominium Ass'n, 72 F.3d at 368, *quoting Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972). Representation is inadequate where "the interest of the applicant so diverges from those of the representative party that the representative party cannot devote proper attention to the applicant's interest." *Alcan Aluminum,* 25 F.3d at 1186.

Although governmental entities are usually presumed to represent the public's interests adequately, *see id.*, reapportionment cases are the exception to that rule. *See Nash v. Blunt,* 140 F.R.D. 400, 402-03 (W.D. Mo. 1992) (denying reconsideration of order permitting members of state house of representatives to intervene in reapportionment case). In *Nash*, the Democratic representatives contended in their motion to intervene that the Republican defendants would not adequately represent their interests. *See id.* The court observed that the movants did not have to prove that their interests were inadequately represented: "Allowance of intervention does not require a finding that the intervenors' interests have not been and will not be adequately represented by the state officials. Intervention is allowed when this 'may' happen." *Id.*

In the present case, the interests of both Plaintiffs and Defendants diverge from Movant's interests. The Plaintiffs support a different plan from the one Movant proposes to offer. The Defendants' interests diverge even more clearly from those of the Movant. During legislative consideration of the plan held unconstitutional by this Court (Act 1), Movant's party proposed an alternative congressional redistricting plan, which the Senate Republicans, under the leadership of Defendant Jubelirer, defeated. Similarly, when Senate Republicans

introduced a revised redistricting plan on the floor of the Senate in response to this Court's Order (a plan that, with modifications, ultimately became Act 34), Movant's party proposed an amendment containing an alternative redistricting plan, which the Senate Republicans defeated in a party-line vote on April 15, 2002. Thus there can be no doubt that Movant's interests differ from those of both Plaintiffs and Defendants.

Not only Movant's interests but also the interests of many voters would be inadequately represented if the Motion to intervene were denied. As the *Nash* court observed, intervention by elected officials helps to insure that diverse interests are adequately represented in reapportionment litigation. *See Nash*, 140 F.R.D. at 402-03 (*citing Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991)). In support of its decision to permit Democratic legislators to intervene, the *Nash* Court quoted the *Terrazas* decision as follows: "a district court cannot order a reapportionment plan for the State based upon nothing more than the agreement of the Governor, the Attorney General, and a few citizens." *Id.* (citing Terrazas, 829 S.W.2d at 714).

Thus, Movant satisfies all of the criteria for intervention as of right under Fed. R. Civ. P. 24(a). Senator Mellow's motion is timely, because he seeks leave to intervene in only the remedial phase of the litigation. As a Democratic Senator charged with representing voters' interests in redistricting, he has an interest in the outcome of this proceeding that will be impaired if he is not permitted to intervene. Neither the Republican Defendants nor the Plaintiffs adequately represent the

interests of Senator Mellow and his supporters. Senator Mellow's motion to intervene as of right should therefore be granted.

II. THIS COURT SHOULD ALLOW THE MOVANTS PERMISSIVE INTERVENTION UNDER FED. R. CIV. P. 24(B)

In addition to intervention as of right under Rule 24(a)(2), courts have discretion to allow "permissive intervention" under Fed. R. Civ. P. 24(b)(2). *See McKay v. Heyison*, 614 F.2d 899, 906 (3d Cir. 1980) (holding that movants, who were not entitled to intervene as of right, met the standard for permissive intervention). Rule 24(b)(2) provides as follows:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication or the rights of the original parties.

As discussed above, the Movant's application to intervene is timely because the parties would not be unduly delayed or prejudiced by Movant's presenting the Senate Democrats' plan to this Court. Furthermore, the Movant's claim has questions of both law and fact in common with the main action, including whether Act 34 cures the constitutional flaws in Act 1 and, if it does not, what the appropriate remedy should be. Accordingly, even if the Court denies intervention under Rule 24(a), the Court should grant the Movant permission to intervene pursuant to Fed. R. Civ. P. 24(b)(2).

III. IF THIS COURT DENIES THE MOTION TO INTERVENE UNDER FED. R. CIV. P. 24(A) AND (B), THE COURT SHOULD NONETHELESS GRANT THE MOVANT PERMISSION TO PARTICIPATE AS *AMICUS CURIAE*

Movant has a significant interest, as a voter and as an elected official who is sworn to protect the interests of this Commonwealth, in securing a fair, constitutional redistricting plan that represents the interests of voters throughout the Commonwealth. In addition, Movant brings a perspective not represented by either the Plaintiffs or the Defendants in this case. Accordingly, even if the Court denies the motion to intervene, Movant respectfully requests permission to participate in the remedial phase of this matter as *amicus curiae* so that he may offer a redistricting plan for the Court's consideration. *See Johnson v. Miller,* 864 F.Supp. 1354, 1369 (S.D.Ga. 1994), *aff'd on other grounds,* 515 U.S. 900 (1996) (congressional Black Caucus participated as *amicus curiae* in redistricting case); *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 131, 134 (3d Cir. 1979) (district court erred in denying motion to intervene, but the error was harmless because the court of appeals granted movants permission to file brief as *amicus curiae*).

CONCLUSION

For all of the reasons set forth above, Movant respectfully requests that this Court grant the Motion to Intervene pursuant to Fed. R. Civ. P. 24(a) or 24(b) or, in the alternative, grant him permission to participate as *amicus curiae*.

Respectfully submitted,

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Lawrence J. Moran
ABRAHAMSEN, MORAN & CONABOY, P.C.
W.C. Carter Building
205-207 North Washington Ave.
Scranton, PA 18503
(570) 348-0200 (telephone)
(570) 348-0273 (facsimile)

Mark A. Packman
Lara H. Schwartz
GILBERT HEINTZ & RANDOLPH LLP
1350 I Street, NW, Suite 200
Washington, DC 20005-3324
(202) 772-2320 (telephone)
(202) 772-2322 (facsimile)

COUNSEL FOR
SENATOR ROBERT J. MELLOW