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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.	:	

PRESIDING OFFICERS' RESPONSE TO SENATOR MELLOW'S MOTION TO INTERVENE OR, IN THE ALTERNATIVE, TO PARTICIPATE AS *AMICUS CURIAE*

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BACKGROUND

On April 8, 2002, this Court declared the congressional redistricting plan in Act No. 2002-1 ("Act 1") unconstitutional under the principle of one-person, one-vote, enjoined its implementation, and directed the Pennsylvania General Assembly to "within three weeks of the date of this order, prepare, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion."

On April 17, 2002, the General Assembly enacted a bill (HB 2545, PN 3726) containing a revised congressional redistricting plan for Pennsylvania. On April 18, 2002, Governor Schweiker signed the bill into law as Act No. 2002-34 ("Act 34"). Act 34 repeals Act 1 and puts in place a revised congressional redistricting plan. Defendants Jubelirer and Ryan, joined by Executive Officers, immediately notified this Court of the passage of Act 34 in connection with the renewal of their motion for a stay of the April 8th injunction against the use of the Act 1 plan for the 2002 congressional elections.

On April 22, 2002, Plaintiffs opposed the renewed motion for stay and moved for the imposition of remedial districts and, in the alternative, to reject Act 34 and begin remedial hearings ("Remedial Motion"). Plaintiffs' Remedial Motion attacked the validity of the Act 34 plan on the basis that it also violates the one-person, one-vote principle because of a purported change of a voting precinct boundary line in South Buffalo Township approved by the Court of Common Pleas of Armstrong County ("Armstrong County Court") on March 15, 2002. That boundary line also forms part of the boundary between the 3rd and 13th congressional districts under the Act 34 plan.

On April 23, 2002, this Court stayed its April 8th injunction, allowing the 2002 congressional elections to be conducted under Act 1. The order granting the stay also set a hearing for May 8, 2002 "for the purpose of determining whether

Act 34 suitably remedies the constitutional violation found by this court in its order of April 8, 2002."[1] However, on May 2, 2002, this Court, after a conference call with counsel, canceled that hearing. In lieu of the hearing, this Court instructed Defendants to file a status report on the dispute caused by the Armstrong County Court's order of March 15, 2002. Defendants' status report, due by June 3, 2002, is to address:

> (A) If the matter has been resolved, has the line separating the South [sic] Buffalo Township election district from the Eastern Buffalo Township election district been restored to its original configuration prior to the Armstrong County order?
>
> (B) If the line has not been restored, did the Armstrong County order result in a movement of population between congressional districts?
>
> (C) If the line drawn by the Armstrong County order resulted in a movement of population between congressional districts, how many people have been moved?
>
> (D) If the Armstrong County order issue has not been resolved, are Defendants pursuing the matter through litigation?.

May 2, 2002 Order at 1-2. Plaintiffs were given until June 18, 2002 to file any objections to Defendants' submission. *Id.*

On May 6, 2002, Senator Mellow sought leave, by motion and supporting memorandum, to intervene or to participate as *amicus curiae*[2] "for the purpose of presenting an alternative redistricting plan . . . and otherwise participating in the remedial phase of this case." Senator Mellow's Supporting Memorandum at 2. Presiding Officers, Jubelirer and Ryan, now respond to Senator Mellow's request.

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[1] On May 1, 2002, pursuant to this Court's order of April 22, 2002, Defendants filed a certified copy of Act 34 and a colored map of the Act 34 plan.

[2] Senator Mellow sought, and was permitted, to participate as *amicus curiae* for the purpose of supporting the renewed motion for stay of the April 8th injunction so that the 2002 congressional elections could be held under Act 1.

ARGUMENT

I. INTRODUCTION

Senator Mellow's request for leave to intervene should be denied. His primary purpose for intervening, which is to present an alternative congressional redistricting plan, would serve no purpose. This litigation is not at a point (and may never be) where the Court needs to assume responsibility for redistricting the Commonwealth of Pennsylvania into 19 congressional districts.

At most, what is currently before this Court is whether, with due regard to the presumption of constitutionality and the burden of proof that Plaintiffs bear, the General Assembly corrected the constitutional deficiency found in Act 1, i.e., violation of the one-person, one-vote principle. *See McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988) ("Where [] the legislative body does respond with a proposed remedy, a court may not thereupon simply substitute its judgment of a more equitable remedy ...; it may only consider whether the proffered remedial plan is legally unacceptable because it ... fails to meet the same standards applicable to an original challenge of a legislative plan in place."). On this issue, Senator Mellow admits that his interests are adequately represented by Plaintiffs. *See* Senator Mellow's Supporting Memorandum at 7 (stating that, with respect to "whether Act 34 cures the constitutional deficiencies in Act 1," he will rely on the "evidence offered by Plaintiffs").

Moreover, even if this Court should determine that the Act 34 plan does not comply with the one-person, one-vote principle (the basis for finding the Act 1 plan unconstitutional), it would not be proper for this Court to move forward with adopting a congressional redistricting plan. There remains sufficient time for the Pennsylvania General Assembly to again consider and enact legislation addressing

congressional redistricting.[3] *See White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("reapportionment is primarily a matter for legislative consideration and determination and [] judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so"); *see also* Opinion of April 8, 2002 at 11. Senator Mellow, as a member of the legislature, would be a participant in any future action that the Pennsylvania General Assembly might need to consider and, accordingly, would suffer no prejudice to his interest.[4]

II. INTERVENTION

Senator Mellow seeks leave to intervene pursuant to Fed.R.Civ.P. 24(a)(2) or (b)(2), which state:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: ... (2) when an 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.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense 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 of the rights of the original parties.

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[3] The 2002 elections for Congress, as a result of this Court's stay of its April 8th injunction, are proceeding under the Act 1 plan. The Act 34 plan does not become effective until November 6, 2002, for use in the 2004 election cycle.

[4] Even if it were appropriate at the present time for this Court to consider the adoption of a remedial plan, the alternative that Senator Mellow proposes, like that of Plaintiffs, bears no resemblance to the plan embodied in Acts 1 and 34. A federal court, should it undertake the task of redistricting, must respect the policy choices of the General Assembly that are inherent in Acts 1 and 34. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) ("An appropriate reconciliation of the[] two goals [reconciling requirements of the Constitution with goals of state political policy] can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect"); *White*, 412 U.S. 783 (district court should have imposed Plan B, which adhered to desires of state legislature while attempting to alleviate one-person, one-vote violation found in the previous plan).

A. Timeliness

Timeliness is a requirement for intervention, whether of right or permissive. *See* Fed.R.Civ.P. 24(a) and (b). To the extent that Senator Mellow wishes to intervene in the proceedings for the purpose of claiming that the Act 34 plan does not remedy the one-person, one-vote deficiency this Court found in the Act 1 plan, Senator Mellow's application is timely.

To the extent, however, that Senator Mellow wishes to intervene for the purpose of proposing an alternative redistricting plan for this Court's adoption, his application is not timely, but is, rather, premature. At most, the only issue before this Court is whether the Act 34 plan cures the one-person, one-vote violation that this Court found in the Act 1 plan. Should this Court determine that the Act 34 plan fails to remedy this constitutional violation, it will be up to the General Assembly to again take action. *See White*, 412 U.S. at 794-94. It would serve no purpose to permit Senator Mellow to intervene to propose an alternative congressional redistricting plan for adoption by this Court when that issue is not presently (and may never be) before the Court. Senator Mellow will not be prejudiced by a denial of intervention at this time on this issue since the issue of the adoption of an alternative plan is not even before the Court. *See Caterino v. Barry*, 922 F.2d 37, 42 (1st Cir. 1990) (order denying intervention at liability phase with permission to renew application if remedy phase needed affirmed, in part, because potential prejudice to prospective intervenors in liability phase minimal).

B. Intervention Of Right

In addition to a timely application, a prospective intervenor, to be permitted to intervene of right, must prove (1) "a sufficient interest in the litigation," (2) a threat that the interest will be impaired or affected," and (3) "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). Senator Mellow cannot meet either the second or third requirement with respect to the two issues on which he seeks to intervene[5] - (1) "whether Act 34 cures the constitutional deficiencies in Act 1 and otherwise complies with applicable legal principles," and (2) if the Act 34 plan does not cure the deficiency of the Act 1 plan, "whether the plan proposed by Plaintiffs or that proposed by [Senator Mellow] is an appropriate remedy." Senator Mellow's Supporting Memorandum at 7.

1. Threat to interest

Senator Mellow's interest as a state legislator is not threatened with respect to the second issue on which he seeks to be heard, i.e., the "appropriate" remedy should this Court find that the Act 34 plan does not comply with the one-person, one-vote principle. Should this Court determine that the Act 34 plan does not meet constitutional standards, it should, given that the Act 34 plan will not be used until the next election cycle, allow the Pennsylvania General Assembly an opportunity to enact a revised plan before adopting a plan of its own. *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'") (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

The Pennsylvania General Assembly, as demonstrated by its prompt action in enacting Act 34, is not in a deadlock situation that would weigh in favor of this Court adopting a remedial plan. Federal courts may draw districts only where the state cannot or will not do so. *See Growe*, 507 U.S. at 34; *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978); *White*, 412 U.S. at 794-95 ("judicial relief becomes

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[5] Presiding Officers believe that state legislators, as members of the bodies charged by the United States Constitution with the duty of providing a mechanism for the election of the congressional representatives allocated to the states, have sufficient interest in congressional redistricting to meet the interest requirement of Fed.R.Civ.P. 24(a). "Adequacy of interest alone, however, is not enough to grant intervention." *Kleissler*, 157 F.3d at 972.

appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so").

Senator Mellow's interest as a state legislator is, therefore, not threatened. He will again have the opportunity to convince his fellow Senators, and the members of the House, to adopt the alternative plan he wishes to present to this Court for consideration.

2. Adequate representation

Senator Mellow's interest in the first issue on which he seeks to intervene – whether the Act 34 plan cures the deficiencies of the Act 1 plan –is, by his own admission, adequately represented by the Plaintiffs. Senator Mellow raises challenges to the Act 34 plan that are also raised by Plaintiffs. *Compare* Mellow Complaint ¶13 *with* Plaintiffs' Remedial Motion at 6-8. Senator Mellow makes no argument that Plaintiffs' representation on this issue is in any way deficient or ineffectual. In fact, Senator Mellow states, with respect to the validity of the Act 34 plan, that he "anticipates relying primarily upon evidence offered by Plaintiffs; thus, there will be no duplication of testimony." Senator Mellow's Supporting Memorandum at 7. Accordingly, all that Senator Mellow's participation offers on this issue is legal argument, which can be accomplished through his participation as *amicus curiae.* Since Senator Mellow's legal interest in the validity of the Act 34 plan is adequately represented by Plaintiffs, he should not be permitted to intervene as of right on this issue. *See Hoots v. Commonwealth*, 672 F.2d 1133, 1135 (3d Cir. 1982) (order denying intervention as of right because prospective intervenor's interest, at the stage intervention sought, was identical to a party's and prospective intervenor had not shown that such party's representation was "ineffectual or not diligent").

C. Permissive Intervention

"Whether to grant permissive intervention under Rule 24(b), as the doctrine's name suggests, is within the discretion of the district court ... ." *Brody v. Spang*, 957 F.2d 1108, 1124 (3d Cir. 1992). Since, as discussed above, Senator Mellow does not meet the requirements for intervention as of right because he concedes that Plaintiffs' representation of his interest on the issue of the validity of the Act 34 plan is adequate and because, at this point in the litigation, there is no threat to his interest with respect to the adoption of a remedial plan by this Court, there is no reason for this Court to allow permissive intervention. Given that there is no hearing scheduled in this matter, Senator Mellow's participation as *amicus curiae* would be sufficient for him to make legal argument concerning the validity of the Act 34 plan. Further, should this Court find that the Act 34 plan fails to cure the violation of the one-person, one-vote principle for which this Court found the Act 1 plan unconstitutional, and the General Assembly fails to enact a revised congressional redistricting plan in a timely fashion, Senator Mellow can again seek leave to intervene.

CONCLUSION

For the reasons above, this Court should deny Senator Mellow's motion for leave to intervene without prejudice to renewal if and when such becomes appropriate. Presiding Officers do not, however, oppose Senator Mellow's participation as *amicus curiae*, if this Court finds such to be appropriate.

Respectfully submitted,

May 17, 2002

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CERTIFICATE OF SERVICE

I certify that on May 17, 2002, I caused a copy of the foregoing Response to Senator Mellow's Motion for Leave to Intervene or, in the alternative, to Participate as *Amicus Curiae* to be served on the following in the manner indicated:

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