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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,

Amicus Curiae.

Civil No. 1:CV-01-2439

J. Rambo

REPLY MEMORANDUM IN SUPPORT OF SENATOR ROBERT J. MELLOW'S MOTION TO STAY PENDING RESOLUTION OF STATE COURT PROCEEDING CONCERNING REDISTRICTING

INTRODUCTION

Senator Robert J. Mellow respectfully files this reply memorandum in support of his Motion to Stay Pending State Court Proceeding Concerning Redistricting. Notwithstanding the arguments of Plaintiffs and Defendants, Senator Mellow does have standing to make the present motion. Even though Senator Mellow is an *amicus curiae* and not a party, the case law makes clear that

an *amicus* can exercise a variety of powers, including the power, in a case like the present one, to seek appropriate relief by means of a motion.

If, however, the Court should disagree, Senator Mellow respectfully requests that this Court either (a) reconsider its denial of his motion to intervene and make him a party to this case, or (b) take judicial notice of the redistricting lawsuit he has filed in Commonwealth Court (the "State Court Litigation") and stay the present action *sua sponte*. In any event, this Court should consider Senator Mellow's Motion to Stay, and, for the reasons set forth in that motion, stay this proceeding until the conclusion of the State Court Litigation.

ARGUMENT

As *Amicus Curiae,* Senator Mellow properly can move the court for a stay

As the Plaintiffs and Defendants correctly point out, Senator Mellow is not a party to the action, but rather an *amicus curiae*. However, "[t]he extent, if any, to which an *amicus curiae* should be permitted to participate in a pending action is solely within the broad discretion of the district court." *Waste Management of Penn., Inc. v. York*, 162 F.R.D. 34, 35 (M.D. Pa. 1995); *Avellino v. Herron,* 991 F. Supp. 730, 732 (E.D. Pa. 1998) (district court has inherent authority to allow the participation of *amicus*; holding that a state court administrator could participate as *amicus* in a civil rights action brought by state trial judge against a state administrative judge). Moreover, "the concept of amicus curiae is flexible and . . ., as long as the amicus does not intrude on the rights of the parties, it can have a range of roles: from a passive one of providing information to a *more active participatory one*." *Waste Management*, 162 F.R.D. at 35 (emphasis added); *see*

id. at 36 (*amicus* can play an active role so long as named parties "remain in control" of the litigation); *League of Women Voters of California v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980) ("[T]he role of an amicus is flexible and can be moulded by the Court to best serve the exigencies of the particular action.").

Applying these principles, the court in *League of Women Voters*, 489 F. Supp. at 518-19, held that an *amicus curiae* could bring a motion to dismiss. In *League of Women Voters,* plaintiffs sued the FCC, challenging the constitutionality of a statute that prohibited noncommercial broadcast licensees from endorsing candidates for public office. *Id.* at 518. The FCC agreed that the statute was unconstitutional and refused to defend it. *Id.* The United States Senate moved to appear as *amicus curiae* in defense of the statute, and subsequently moved to dismiss. *Id.* The plaintiffs sought to disallow the filing of the *amicus*' motion to dismiss. The court however, rejected the plaintiffs' position and dismissed the complaint. *Id.* at 518-21. In allowing the *amicus* to proceed with its motion to dismiss, the court reasoned that the motion "would in no manner interfere with the conduct of the case." *Id.* at 518.

Thus, the court in *League of Women Voters* allowed an *amicus* to make a motion over a party's opposition and to obtain relief that neither party wanted – dismissal of the action. If that result does not "interfere with the conduct of the case," 489 F. Supp. at 518, then surely the relief sought here – a stay – does not either. For the same reason, Senator Mellow's Motion to Stay does not "intrude on the rights of the parties," *Waste Management*, 162 F.R.D. at 35; the parties "remain in control [the litigation]." *Id.* The remedy that Senator Mellow seeks

here (a stay) is less intrusive and controlling than that granted by the court in *League of Women Voters* (dismissal). Moreover, the Defendants can litigate as readily in the Commonwealth Court as in this proceeding. (Indeed, the Defendants already have gone on the record in the present case as favoring the adjudication of redistricting cases by state courts rather than federal courts. *See Motion to Abstain of Defendants Lieutenant Governor Robert C. Jubelirer and Speaker Matthew J. Ryan*, filed January 25, 2002.) Similarly, the Plaintiffs will lose no rights if this Court stays its hand pending resolution of the State Court Litigation. If Senator Mellow prevails in the State Court Litigation, Plaintiffs will obtain the very relief that they currently seek – an injunction preventing the implementation of Act 34. If, however, Senator Mellow were to lose in the State Court Litigation, the Plaintiffs remain free to pursue the present case.

Thus, Senator Mellow does not seek to control this litigation, interfere in the conduct of the case, nor intrude upon the rights of the parties. Rather, Senator Mellow simply asks that the Court exercise its discretion to hear his motion (like the court in *League of Women Voters*), and that the Court stay its hand in accordance with the principles of *Growe v. Emison*, 507 U.S. 25 (1993), and *Scott v. Germano*, 381 U.S. 407 (1965).[1]

[1] Even the cases that the Plaintiffs and the Defendants cite to defeat Senator Mellow's motion indicate that *amici* can play an active role in litigation. *See, e.g., Berry v. Doles*, 438 U.S. 190 (1978). Defendants Schweiker, Weaver and Filling, for example, cite then-Justice Rehnquist's dissent in *Berry*, a voting rights case, for the proposition that *amici* do not have standing to request relief not requested by the parties. However, *Berry* stands for exactly the opposite proposition, because the relief granted by the Court in *Berry* was the very relief that was requested by the United States, as *amicus curiae*. *Berry*, 438 U.S at 192-93. Therefore, the Supreme Court itself has recognized that there are circumstances in which *amici* can, and do, play an active role in a litigation. Other courts have also recognized that *amici* can play such an

should the Court Conclude that An *Amicus Curiae* Lacks Standing to Move for A Stay, The court should Reconsider its denial of Senator Mellow's Motion to Intervene

Should this Court choose to limit Senator Mellow's role as *amicus* and to rule that an *amicus* has no standing to seek a stay, Senator Mellow respectfully requests that the Court reconsider its denial of his motion for intervention. Senator Mellow requests this reconsideration for all of the reasons set forth in his original motion to intervene.[2]

alternatively, The Court Should take Judicial Notice of the State Court Litigation and Stay This Proceeding *Sua Sponte*

Should this Court determine that Senator Mellow does not have standing to bring his Motion to Stay, and should the Court also refuse to reconsider allowing him to intervene, the Court nonetheless should take judicial notice of the State Court Litigation and stay this proceeding *sua sponte*. A federal court can take judicial notice of pleadings in state cases, *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3rd Cir. 1947), briefs and petitions filed in state court, *U.S. ex rel. Geisler v.*

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active role. *See, e.g., In Re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449 (3rd Cir. 2000) (permitting *amicus curiae* to argue for reversal of district court decision based on argument that appellant had abandoned in Court of Appeals); *In Re Meinen*, 228 B.R. 368, 376 (W.D. Pa. 1998) (reviewing an affidavit filed in support of a brief by an *amicus curiae* that had been rejected as an intervenor).

[2] In his motion to intervene, Senator Mellow demonstrated that he met the criteria for intervention under Fed. R. Civ. P. 24. In particular, Senator Mellow showed that his motion was timely because intervention will not prejudice any party. Senator Mellow does not seek to re-litigate the issues of liability already decided by the Court, but rather seeks only to participate at the remedial stage of this case. Moreover, as a voter, legislator, and member of the Democratic Party, Senator Mellow has an obvious interest in this litigation, an interest that will be adversely affected by the disposition of this action if the Court denies intervention. Finally, Senator Mellow's interest is not adequately represented by any of the existing parties. Indeed, the inadequacy of the existing parties as representatives is demonstrated by the fact that they all oppose the relief Senator Mellow seeks in his motion to stay.

Walters, 510 F.2d 887 (3rd Cir. 1975), orders issued by state courts, *McDowell v. Clerk of the Courts of Delaware County*, 1985 WL 5034 (E.D. Pa. 1985), and other documents contained in the record of state court actions within its jurisdiction, *Soto v. PNC Bank*, 221 B.R. 343 (E.D. Pa. 1998). *See generally*, Fed. R. Evid. 201(c). Moreover, abstention is an equitable doctrine that this Court can invoke of its own accord, without the need for a motion. *See, e.g., Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976). Finally, the important issues of comity and federalism implicated by *Germano* and *Growe* dictate that this Court should defer to the Commonwealth Court. Therefore, regardless of whether Senator Mellow is recognized as having standing to bring his Motion to Stay, and regardless of whether he is granted intervention, Supreme Court precedent dictates that this Court should stay its hand. *See Germano*, 381 U.S. at 409.

This Court should Defer Further Consideration of this case until the Commonwealth Court Has Ruled

In the only substantive response to Senator Mellow's motion, Plaintiffs wrongfully suggest that the applicability of the doctrine of deferral set out in *Germano* and *Growe* depends on the timing of the motion to defer, and that Senator Mellow's motion is untimely. In fact, neither *Germano* nor *Growe* turned on the timing of the request to the federal court to stay further proceedings. Indeed, as discussed in the Memorandum in Support of Senator Mellow's Motion to Stay, this case is very similar to *Germano*. In *Germano*, the state court proceeding commenced in April, 1964, after the district court had begun its consideration of the issues in 1963, a situation similar to the one in this case.

Germano v. Kerner, 220 F. Supp. 230 (N.D. Ill. 1963); *Germano*, 381 U.S. at 408. In addition, the district court in *Germano* had already issued its ruling invalidating the reapportionment scheme in January, 1965, before the state court issued its ruling in February, 1965. *See Germano*, 381 U.S. at 408. However, recognizing the appropriateness of the issue for state court consideration, the Supreme Court overruled the district court's refusal to stay the federal proceedings. Here, just as in *Germano*, the issue is not when the state court action commences, but rather whether a state court action exists. Because a state court proceeding exists challenging the constitutionality of Act 34, this Court should stay the present litigation. *Id.*; *Growe*, 507 U.S. at 42. [3]

CONCLUSION

For all the reasons set forth above and in the Motion to Stay, Senator Mellow respectfully requests that this Court

(1) hold that he has standing to assert his Motion to Stay, and grant his Motion to Stay this action pending a resolution of the State Court Litigation; or

(2) in the alternative, grant his motion to intervene and grant his Motion to Stay this action pending a resolution of the State Court Litigation; or

(3) in the alternative, take judicial notice of the State Court Litigation

[3] Plaintiffs further imply that the decisions in *Smith v. Clark*, at 189 F. Supp. 2d 503 (S.D. Miss. 2002), 189 F. Supp. 2d 529 (S.D. Miss. 2002), and 189 F. Supp. 2d 548 (S.D. Miss. 2002), dictate that this Court refuse to stay this proceeding. However, the *Smith* rulings are inconsistent with almost forty years of Supreme Court precedent represented by *Germano* and *Growe*, and the Supreme Court has noted probable jurisdiction and intends to hear oral arguments on the *Smith* cases. *Branch v. Smith*, 122 S. Ct. 2355 (2002); *Smith v. Branch*, 122 S. Ct. 2355 (2002).

and, *sua sponte*, stay this action pending resolution of that litigation.

Respectfully submitted,

Dated: October 22, 2002

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CERTIFICATE OF SERVICE

I, MARK A. PACKMAN, counsel for Senator Robert J. Mellow, hereby certify that on October 22, 2002, I caused to be served a copy of the Reply Memorandum In Support Of Senator Robert J. Mellow's Motion To Stay Pending Resolution Of State Court Proceeding Concerning Redistricting by fax upon the following:

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