ORIGINAL

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.

FILED
HARRISBURG, PA
MAY 30 2002
MARY E. D'ANDREA, CLERK
Per

Civil No. 1:CV-01-2439

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

On May 6, 2002, Senator Robert J. Mellow moved, on behalf of the Democrats in the Pennsylvania Senate, for leave to intervene in the remedial phase

of this matter or, in the alternative, to participate as *amicus curiae*. In support of his motion, Senator Mellow demonstrated that he has satisfied all four of the criteria for mandatory intervention under Fed. R. Civ. P. 24(a). In particular, Senator Mellow showed that (a) the motion to intervene is timely; (b) as a legislator, voter, and Democrat, he has an obvious interest in this litigation; (c) his interest will be adversely affected by the disposition of this action if the Court denies intervention; and (d) Senator Mellow's interest is not adequately represented by any of the existing parties. Senator Mellow further showed that he has met the criteria for permissive intervention because his claim and the Plaintiffs' claim have "question[s] of law or fact in common." Fed. R. Civ. P. 24(b). Finally, Senator Mellow demonstrated that if it does not grant his motion to intervene, the Court should grant him leave to participate as *amicus curiae*.

Lieutenant Governor Jubelirer and Speaker Ryan (the "Presiding Officers") have stated that, although they oppose intervention, they "do not . . . oppose Senator Mellow's participation as amicus curiae, if this Court finds such to be appropriate." Presiding Officers' Response to Senator Mellow's Motion to Intervene or, in the Alternative, to Participate as Amicus Curiae ("Response") at 8 (filed May 17, 2002). The remaining defendants have taken the same position as the Presiding Officers. *See* Defendants Governor Schweiker, Secretary Weaver, and Commissioner Filling's Joinder in the Response of Defendants Lt. Governor Jubelirer and Speaker Ryan to Senator Mellow's Motion to Intervene or, in the Alternative, to Participate as Amicus Curiae (filed May 20, 2002). The Plaintiffs

have not responded to Senator Mellow's motion. Accordingly, the Court should, at the very least, allow Senator Mellow to participate as *amicus curiae*.

In addition, the Court should grant the motion to intervene, notwithstanding the arguments of the Presiding Officers. As Senator Mellow demonstrates below, those arguments are without merit.

I. SENATOR MELLOW HAS SATISFIED THE REQUIREMENTS FOR MANDATORY INTERVENTION UNDER FED. R. CIV. P. 24 (A)

In opposing mandatory intervention, the Presiding Officers make the unsupported argument that the Court should decide separately, for each issue in this case, whether to grant intervention. Citing no precedent, the Presiding Officers read an additional requirement into Rule 24: must satisfy all four criteria for mandatory intervention for each issue in the case.

With respect to the issue of the constitutionality of Act 34, Presiding Officers concede that the motion is timely and that Senator Mellow has a legitimate interest in the outcome of this case. Response at 5, 6 n.5. Nor do they dispute that, absent intervention, his interest in the issue of the constitutionality of Act 34 would be impaired. Nonetheless, the Presiding Officers contend that the Court should deny the motion to intervene with respect to the issue of Act 34's constitutionality because, they argue, the Plaintiffs will adequately represent Senator Mellow's interests with respect to this particular issue.

The Presiding Officers concede Senator Mellow's interest in the issue of the appropriate remedy if the Court finds Act 34 unconstitutional; and it is undisputed that none of the existing parties can adequately represent his interest. The

Presiding Officers argue, however, that, with respect to this issue, the motion is premature. Response at 5. They further claim that Senator Mellow's interest in this issue will not be impaired if intervention is denied because, if the Court finds Act 34 unconstitutional, the Court should allow the General Assembly yet another opportunity to pass a constitutional plan, at which time Senator Mellow can advocate passage of the plan he has offered to this Court. Response at 6-7.[1]

In support of their argument, the Presiding Officers cite *Kleissler v. United States Forest Service,* 157 F.3d 964 (3d Cir. 1998). *See* Brief at 5. In fact, *Kleissler* militates *against* adopting the novel approach to Rule 24 that the Presiding Officers urge upon this Court. Rejecting a "wait and see" approach similar to Presiding Officers' suggestion, the *Kleissler* court observed that "intervenors and the public interest in efficient handling of litigation are better served by prompt action on an intervention motion." *Id.* at 974. The Court gave the following explanation for this conclusion:

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[1] Presiding officers cite *Caterino v Barry,* 922 F.3d 37 (1st Cir. 1990) in support of their assertion that Senator Mellow would not be prejudiced if this Court were to deny his motion to intervene. *Caterino* is not applicable to the present case. In *Caterino*, the district court concluded that the motion was untimely because it would delay the start of the trial and prejudice the parties. *See id.* at 41. Concluding that the district court had not abused its discretion in denying the motion to intervene, the Court of Appeals noted that the prejudice to the movants due to exclusion from the liability phase of the litigation was minimal. *See id.* at 42. Unlike the motion in *Caterino*, Senator Mellow's motion is timely. In fact, the Presiding Officers' sole ground for opposing it is that the motion comes *too soon* in the current litigation.

> The early presence of intervenors may serve to prevent errors from creeping into the proceedings, clarify some issues, and perhaps contribute to an amicable settlement. Postponing intervention in the name of efficiency until after the original parties have forged an agreement or have litigated some issues may, in fact, encourage collateral attack and foster inefficiency. In other words, the game may already be lost by the time the intervenors get to bat in the late innings.

Id.

Therefore, in considering applications seeking intervention as of right, courts do not conduct a separate inquiry for each issue in the case to determine whether the applicant has satisfied each of the four criteria for intervention. Rather, once the court determines that the motion is timely, the court asks whether the applicant "claims an *interest relating to the* property or *transaction which is the subject of the action*," whether disposition of the action "may as a practical matter impair or impede the applicant's ability to protect *that interest*," and whether "*applicant's interest* is adequately represented by existing parties." Fed. R. Civ. P. 24(a) (emphasis added). In other words, the relevant interest is not the applicant's interest in a particular issue, but rather his/her interest in the "transaction which is the subject of the action." *Id.*

In the present case, the "transaction which is the subject of the action," *id.*, is the entire process of drawing new congressional districts for the Commonwealth of Pennsylvania. As the Presiding Officers admit, "state legislators, as members of the bodies charged by the United States Constitution with the duty of providing a mechanism for the election for 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)." Response at 6 n.5. And, when one considers

Senator Mellow's interest in congressional redistricting as a whole (rather than as a series of discrete issues, as the Presiding Officers would have this Court do), that interest unquestionably would "as a practical matter [be] impair[ed] or impede[d]," Fed. R. Civ. P. 24 (a), if the Court were to resolve this action without granting Senator Mellow intervention. It is equally apparent that none of the existing parties can "adequately represent[]," *id.*, Senator Mellow's interest in the congressional redistricting process as a whole, because the existing parties' interests, as expressed in their ultimate legal positions and their proposed plans, differ from those of Senator Mellow. Thus, when the Court focuses on Senator Mellow's interest in the "transaction which is the subject of the action," rather than any individual issue or issues, it becomes apparent that Senator Mellow has satisfied the criteria for intervention as of right. For that reason alone, the Court should grant the motion to intervene.

II. SENATOR MELLOW HAS ALSO SATISFIED THE REQUIREMENTS FOR PERMISSIVE INTERVENTION UNDER FED. R. CIV. P. 24 (B)

In addition to opposing intervention as of right under Rule 24(a), the Presiding Officers argue that the Court should not allow permissive intervention under Fed. R. Civ. P. 24(b), either. In support of this argument, the Presiding Officers assert that, because Senator Mellow "does not meet the requirements for intervention as of right . . ., there is no reason for this Court to allow permissive intervention." Response at 8.

Because Senator Mellow's motion does, in fact, satisfy the requirements for mandatory intervention under Rule 24(a), the Court need not reach the question of

whether to grant permissive intervention. But even if the Presiding Officers are correct regarding mandatory intervention, the Court should grant permissive intervention, because their argument against permissive intervention ignores the differences between Fed R. Civ. P. 24(a) and 24(b). Unlike Rule 24(a), which requires that the applicant for intervention demonstrate that his/her interest may be impaired absent intervention and that this interest may not be adequately represented by the existing parties, Rule 24(b) requires only that "an applicant's claim and the main action have a question of law or fact in common" and that, 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." Fed. R. Civ. P. 24(b).

Here, Senator Mellow'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. Moreover, none of the existing parties claims that delay or prejudice would result from granting permissive intervention. Accordingly, even if the Court denies intervention under Rule 24(a), the Court should grant Senator Mellow intervention under Rule 24(b).

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,

Dated: May 29, 2002

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CERTIFICATE OF SERVICE

I, MARK A. PACKMAN, co-counsel for Senator Robert J. Mellow, hereby certify that on May 30, 2002, I caused to be served a copy of the Reply Memorandum of Senator Robert J. Mellow in Support of His Motion for Leave to Intervene or, In the Alternative, to Participate as *Amicus Curiae* by first-class mail upon the following:

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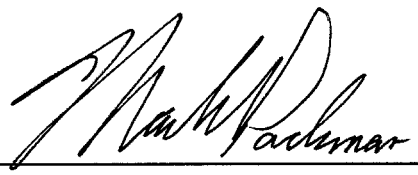

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