US v. City of Columbus

PN-OH-001-037

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil No. C2-99-1097
	)	
v.	)	Judge Holschuh
	)	
CITY OF COLUMBUS, OHIO, et al..	)	Magistrate Judge King
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE AS AMICI CURIAE

Individual Members of Congress frequently seek to file amicus briefs in cases raising novel issues of the interpretation or constitutionality of important federal statutes, and courts routinely accept those briefs.* Members of Congress do so to call a court's attention to aspects of

*See, *e.g.*, *Wright* v. *West*, 505 U.S. 277, 279 (1992) (Sen. Biden, *et al.*, filed brief in case involving interpretation of federal habeas corpus statute); *United States* v. *Eichman*, 496 U.S. 310, 311 (1990) (Sen. Biden filed brief in case involving constitutionality of federal flag burning statute); *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 612 (1986) (Sen. Hatch filed brief in case involving interpretation of Section 504 of the Rehabilitation Act of 1973); *Milk Industry Found.* v. *Glickman*, 949 F. Supp. 882, 897 (D.D.C. 1996) (four senators filed amicus brief in constitutional and statutory challenge to administration of Northeast Interstate Dairy Compact); *NAACP, Jefferson County Branch* v. *U.S. Sec'y of Labor*, 865 F. Supp. 903, 909 & n.6 (D.D.C. 1994) (Reps. William Ford, George Miller, and Howard Berman filed brief in case challenging Department of Labor's interpretation of regulations governing "piece-rate" pay of sugar cane workers); *Nat'l Comm. to Preserve Social Security* v. *Bowen*, 735 F. Supp. 1069, 1071 n.3 (D.D.C. 1990) (five Members of Congress filed brief in statutory challenge to practices of Social Security Administration); *State of New York* v. *Bowen*, 690 F. Supp. 1261, 1263 n.2 (S.D.N.Y. 1988) (Sen. Humphrey and Rep. Tauke filed brief in constitutional and statutory challenge to regulations implementing statutory prohibition on funding programs where abortion is a method of family planning); see also Brief Amicus Curiae of Sens. Orrin Hatch, *et al.*, *Dickerson* v. *United States*, 2000 WL 272002 (U.S., filed March 9, 2000) (ten senators filed brief in case involving constitutionality of 18 U.S.C. § 3501, which purported to govern admissibility of

the statutory text or legislative history that might otherwise be overlooked. The motion by fourteen Members of Congress to file an amicus brief in this case is a typical example of that practice. The fourteen Members of Congress – three of whom were original cosponsors of the legislation that became 42 U.S.C. § 14141, and all of whom share a particular concern with issues of police misconduct – seek to file an amicus brief in this case to assure that the Court is aware of important aspects of the statute's text and legislative history that substantially undercut the Report and Recommendation filed by the Magistrate Judge.

The City contends that "[t]he legislative branch of government has a strict and time-tested method for enacting laws and expressing legislative intent regarding those laws." Memorandum Contra Motion for Leave to Participate at 3. We agree. The fourteen Members of Congress seek to file an amicus brief precisely because the Magistrate Judge's report disregarded the "time-tested" indicia of congressional intent in at least two respects. First, the Magistrate Judge disregarded Congress's considered decision – reflected in the text of Section 14141 – to forego the "policy or custom" requirement that applies to private lawsuits under 42 U.S.C. § 1983 and instead to adopt the "pattern or practice" test for public enforcement of modern civil rights statutes. See [Proposed] Brief of Amici Curiae at 3-10. Second, the Magistrate Judge ignored important statements in the legislative history that bear directly on the "policy or custom" issue.

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confessions in federal court); Brief of Sens. Harkin, *et al.*, as Amici Curiae in Support of Respondents, *Bragdon* v. *Abbott*, 1998 WL 52258 (U.S., filed Feb. 9, 1998) (three senators and three representatives – all of whom sponsored or cosponsored the Americans with Disabilities Act – filed brief in case involving interpretation of the statute); Brief of Sen. Joseph Biden, Jr., as Amicus Curiae in Support of Petitioners, *United States* v. *Morrison*, 1999 WL 1072538 (U.S., filed Nov. 12, 1999) (Senate sponsor of Violence Against Women Act filed brief in case involving constitutionality of a provision of that statute); Brief for Sen. Orrin Hatch, *et al.*, as Amici Curiae Supporting Respondent, *Felker* v. *Turpin*, 1996 WL 277110 (U.S., filed May 17, 1996) (twenty senators and thirty-four representatives filed brief in case involving constitutionality and scope of the Antiterrorism and Effective Death Penalty Act of 1996).

Those statements make clear that the "policy or custom" requirement was a substantial part of the *problem* Congress sought to address in Section 14141; reading the statute to *incorporate* such a requirement is thus particularly inappropriate. See [Proposed] Brief of Amici Curiae at 12-15.

Contrary to the position of the City (Memorandum Contra at 4-5), no party to this litigation adequately represents the interests of the fourteen Members of Congress who seek to participate as amici. It is notable that *no party* – neither the City, the United States, nor the Fraternal Order of Police – directed this Court's attention to the portions of the legislative history that directly address the "policy or custom" requirement. Indeed, the United States appears to have argued that this legislative history – which dispositively confirms the reading that is apparent from the statutory text – is *irrelevant* to this Court's decision. See United States' Objections to the Magistrate's Report and Recommendation at 12, 15. Because the Magistrate Judge's report relied so significantly on Section 14141's legislative history, the fourteen Members of Congress could reasonably have feared that the parties' failure to bring the most relevant portions of the legislative history to the Court's attention had influenced her mistaken conclusion.

Finally, the City is simply wrong to suggest (Memorandum Contra at 3-4) any improper collusion with the Justice Department. No attorney or other official of the Justice Department solicited the brief amici seek to file, and the argument in the brief is not, in any event, entirely consistent with the argument presented by the United States. Nor is there anything sinister about the fact that both counsel for the amici formerly served as attorneys for the Justice Department's Civil Rights Division. More than two years have passed since either attorney was employed by the Department or the Division. Clients frequently retain counsel who have developed subject-matter expertise during their government service. Just as a company seeking to file an antitrust

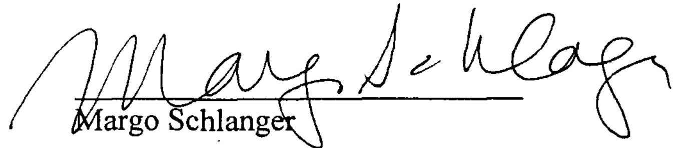
suit against a competitor might logically turn to counsel with Justice Department antitrust experience, counsel with experience dealing with Section 14141 are plainly a plausible choice to write a brief about the interpretation of that important but infrequently litigated statute.

CONCLUSION

For the foregoing reasons, this Court should follow the normal practice and grant the fourteen Members of Congress leave to file their brief as amici curiae.

Respectfully submitted,

Samuel R. Bagenstos



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CERTIFICATE OF SERVICE

This is to certify that on this nineteenth day of September, a copy of the foregoing Reply in Support of Motion for Leave to Participate as Amici Curiae was sent by Federal Express, next day delivery, to:

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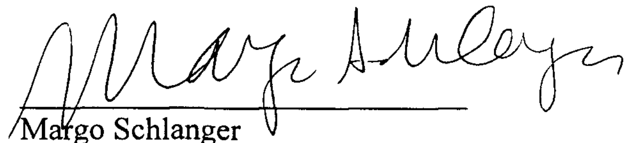

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