IN THE SUPREME COURT OF PENNSYLVANIA

No. 3 EAP 2021

ROBERT MALLORY,

Appellant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Appellee.

APPELLANT'S RESPONSE TO NORFOLK SOUTHERN'S APPLICATION TO SET A BRIEFING SCHEDULE

Norfolk Southern thought so little of its dormant-commerce-clause argument that it never bothered to raise it in the trial court. After waiving the issue in the first instance, Norfolk Southern treated it as a makeweight in this Court, lightly touching the issue as an alternative ground for affirmance and spilling almost all of its appellate ink on the Due Process Clause argument now unequivocally rejected by the Supreme Court of the United States.

Having lost on Due Process, Norfolk Southern has experienced a convenient epiphany about the Commerce Clause. Norfolk Southern has penned a 24-page dormant commerce clause merits brief masquerading as an "Application to Set a Briefing Schedule." In this motion, Norfolk Southern urges affirmance based on an issue never presented to the trial court, hardly raised in this Court, and only mused about by a single justice in a concurrence the primary purpose of which was to agree that Norfolk Southern's Due Process argument is wrong. Yet Norfolk Southern proposes that this Court somehow already has ruled in its favor, or remarkably, that the Supreme Court of the United States did so, too.

As the Supreme Court of the United States recently admonished, a "dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion." *Students for Fair Admission, Inc. v. Presidents and Fellows of Harvard University*, No. 21-1099, Slip op. at 39. The losing *party* is even more poorly positioned to contort an unequivocal loss into some sort of victory.

Suffice to say, Mr. Mallory disagrees with Norfolk Southern's argument and would welcome an opportunity to explain why. But this response is not a merits brief, nor was Norfolk Southern's "application" supposed to be one.

The question now is how to move forward after the mandate issues from the Supreme Court of the United States to this Court. The parties agree that this Court will have jurisdiction to address the Commerce Clause argument once the mandate issues. They further agree that the Court should set a briefing schedule and that the Court should order oral argument if it would be helpful to the Court. To that end, Mr. Mallory proposes the following for the Court's consideration.

First, Mr. Mallory proposes that Norfolk Southern, as the proponent of a Commerce Clause argument, file a supplemental brief limited on that issue. By agreeing that Norfolk Southern can file such a brief, Mr. Mallory is not waiving any argument on the merits, including that Norfolk Southern failed to preserve the issue it now so fervidly wishes to rely upon. Norfolk Southern should file first because it is the proponent of the Commerce Clause argument as an alternative ground for affirmance. Further, under the status quo, Mr. Mallory has prevailed, and would merely ask this Court to reverse the trial court's erroneous conclusion that the Due Process Clause forbids his suit. After Norfolk Southern has filed its supplemental brief, Mr. Mallory should be allowed to file a responsive supplemental brief. That would track the ordinary mode of appellate briefing with respect to an issue raised

by the Appellee in the first instance. Norfolk Southern should not be entitled to file a "reply" supplemental brief. As the Appellee, Norfolk Southern had an obligation to raise all arguments in favor of affirmance in its initial briefs to this Court. A supplemental brief, therefore, is already generous. Permitting a reply would be gilding the lily.

Second, Norfolk Southern's supplemental brief should be due within 30 days, with Mr. Mallory's responsive supplemental brief due 30 days later. Of course, the parties should be afforded the usual leave accorded by this Court for parties to seek additional time on their briefing.

Third, the supplemental submissions should be limited to 8,000 words per side—slightly more than half the amount of space that would normally be afforded to an appellate brief.

Fourth, because there is intense public interest in this case, it is possible that amicus curiae will wish to present submissions in connection with the supplemental briefs. The Court should permit amicus curiae to file such briefs consistent with Pa.R.A.P. 531 as if these supplemental briefs were the opening and responsive briefs on appeal.

Fifth, if oral argument is warranted, the Court should schedule oral argument at its convenience.

CONCLUSION

The Court should enter a case management order consistent with the suggestions made above.

Respectfully submitted,

/s/ Daniel C. Levin
Daniel C. Levin
Frederick S. Longer
LEVIN, SEDRAN, & BERMAN
510 Walnut Street
Suite 500
Philadelphia, PA 19106

Ashley Keller*
KELLER POSTMAN LLC
150 N. Riverside Plaza, Suite 4100
Chicago, IL 60606
Tel: (312) 741-5222
ack@kellerpostman.com

Counsel for Plaintiff-Appellant

Dated: July 31, 2023

CERTIFICATE OF CONFIDENTIALITY COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Daniel C. Levin

Daniel C. Levin
Frederick S. Longer
LEVIN, SEDRAN, & BERMAN
510 Walnut Street
Suite 500
Philadelphia, PA 19106

Dated: July 31, 2023