

IN THE SUPREME COURT OF THE STATE OF KANSAS

LUKE GANNON,
By his next friends and guardians, *et al.*,

Plaintiffs-Appellees,

v.

STATE OF KANSAS, *et al.*,

Defendants-Appellants.

Case No.: 113,267

**APPELLEES' RESPONSE TO KANSAS STATE BOARD OF EDUCATION'S
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

Plaintiff-Appellees (“Plaintiffs”), by their undersigned counsel of record, respond to The Kansas State Board of Education’s (“KSBE”) motion to file an *amicus curiae* brief as follows:

A. KSBE is a represented party in this matter.

Plaintiffs have concerns whether it is appropriate for KSBE to file an *amicus* brief. KSBE is an agency of the Executive branch of State of Kansas. KSBE is a represented party in this matter. The purpose of an *amicus curiae* brief is to allow a *nonparty* with an interest or expertise in a case to inform the court of a matter of law or fact. *See United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991) (“The orthodox view of *amicus curiae* was, and is, that of an *impartial* friend of the court – *not an adversary party in interest in the litigation.*”) (emphasis in original).

KSBE is not a *nonparty*. Plaintiffs filed this matter against the State of Kansas. KSBE is a state entity, created by Article 6, Section 2 of the Kansas Constitution. *See also Bd. of Educ. v. Kan. State Bd. of Educ.*, 266 Kan. 75, 96, 966 P.2d 68, 84 (1998) (holding the

Kansas Judicial Review Act applied to the Kansas State Board of Education because it is a state agency); *COPE v. Kan. State Bd. of Educ.*, 71 F. Supp. 3d 1233, 1241 (D. Kan. 2014) (Holding that the Kansas State Board of Education and the Kansas State Department of Education were state entities in analyzing Eleventh Amendment sovereign immunity). As Attorney General, Derek Schmidt represents the KSBE's interest in this matter. See K.S.A. 75-702. And, Mr. Schmidt has already filed a brief on behalf of the State of Kansas.

Here, KSBE's amicus brief would essentially be a second brief filed on behalf of the State of Kansas. That is not the purpose of an *amicus* brief. See *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991) ("The orthodox view of *amicus curiae* was, and is, that of an *impartial* friend of the court – *not an adversary party in interest in the litigation.*") (emphasis in original). To allow KSBE to file an *amicus* brief would create precedent allowing a state agency to file a second brief on behalf of the State. Plaintiffs have serious doubts as to whether this is the intended purpose of an *amicus* brief.

As an agency of the Executive Branch of the State of Kansas, KSBE represents the Defendant in this matter: the State of Kansas. KSBE's interests are adequately represented in the State's brief.

B. KSBE's motion is untimely.

In addition to Plaintiffs' concerns that a represented party should not be allowed to file an *amicus* brief, KSBE's motion is also untimely. KSBE filed its motion on April 18, 2019. The filing is untimely under Kansas Supreme Court Rule 6.06(b)(1), which requires an *amicus* brief to be filed no later than 30 days before oral argument. Kansas Supreme Court Rule 6.06(c) allows any party to respond to an "*amicus curiae* brief no later than 21

days after the brief is filed.” KSBE has not complied with this requirement, which justifies denial of its request. *See, e.g.*, Order denying Gov. Kelly’s request to file *amicus curiae* brief, dated 4-17-19.

KSBE claims that complying with the 30 day requirement was impossible. This is disingenuous. KSBE has been aware of the briefing schedule set by this Court – including the oral argument date – since *Gannon VI* was released last year. Further, KSBE admits that S.B. 16 is “the legislative culmination of the work the State Board did to craft and adopt its July 2018 plan.” Motion, at ¶7 (emphasis added). KSBE could have sought permission to file an *amicus* brief in July of 2018, when it crafted its plan. It did not. It could have sought permission on April 5, 2019, when S.B. 16 passed; on April 6, 2019, when Governor Kelly signed the bill into law; or on April 9, 2019, 30 days before oral arguments. It did not. Instead, KSBE delayed in making its request to file an *amicus* brief until two weeks before oral argument, and days *after* opening briefs were due to the Court.

Further, KSBE claims that Plaintiffs will not be prejudiced because KSBE can file its brief on April 24, and Plaintiffs can still respond by April 25. This allows Plaintiffs only one day to respond to the *amicus* brief; as a result of KSBE’s late request, Plaintiffs will not have the full 21 days to respond. KSBE instead suggests that Plaintiffs should respond in one day. This request diverts Plaintiffs’ attention from responding to the State’s brief and from preparing for oral argument. In drafting its rules, this Court had a reason to make an *amicus curiae* brief due 30 days before oral arguments. This Court recognized the importance of the parties’ ability to meaningfully respond to a nonparty *amicus curiae* brief in oral arguments. Granting KSBE’s request will strip Plaintiffs of their ability to meaningfully respond.

C. Conclusion

Plaintiffs respectfully request that this Court deny KSBE's motion to file an *amicus brief* in this proceeding since it is already a represented party and because it has submitted an untimely request.

Dated this 18th day of April, 2019.

/s/ Alan L. Rupe
Alan L. Rupe, #08914
Jessica L. Skladzien, #24178
LEWIS BRISBOIS BISGAARD & SMITH LLP
1605 North Waterfront Parkway, Suite 150
Wichita, KS 67206-6634
(316) 609-7900 (Telephone)
(316) 462-5746 (Facsimile)
alan.rupe@lewisbrisbois.com
jessica.skladzien@lewisbrisbois.com

and

John S. Robb, #09844
SOMERS, ROBB & ROBB
110 East Broadway
Newton, KS 67114
(316) 283-4650 (Telephone)
(316) 283-5049 (Facsimile)
JohnRobb@robblaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2019, I electronically served the foregoing to:

Derek Schmidt
Jeffrey A. Chanay
M.J. Willoughby
Memorial Building, 2nd Floor
120 SW 10th Ave.
Topeka, KS 66612-1597
Derek.Schmidt@ag.ks.gov
Jeff.Chanay@ag.ks.gov
MJ.Willoughby@ag.ks.gov

Arthur S. Chalmers
Hite, Fanning & Honeyman,
L.L.P.
100 North Broadway, Suite 950
Wichita, KS 67202-2209
chalmers@hitefanning.com

*Attorneys for Defendant State of
Kansas*

Steve Phillips
Assistant Attorney General
Office of the Attorney General
Memorial Building, 2nd Floor
120 S.W. 10th Ave.
Topeka, KS 66612-1597
Steve.Phillips@ag.ks.gov
*Attorney for State Treasurer Ron
Estes*

Philip R. Michael
Daniel J. Carroll
Kansas Dept. of Administration
1000 SW Jackson, Suite 500
Topeka, KS 66612
philip.michael@da.ks.gov
dan.carroll@da.ks.gov
*Attorneys for Secretary of
Administration Jim Clark*

Mark A. Ferguson
Gates Shields Ferguson Swall
Hammond, P.A.
10990 Quivira, Suite 200, Overland
Park, KS 66210
113 Blue Jay Drive, Suite 100,
Liberty, MO 64068
MarkFerguson@KanMoLegal.com
*Attorney for Kansas State Board of
Education*

/s/ Alan L. Rupe
Alan L. Rupe