

IN THE SUPREME COURT OF THE STATE OF KANSAS

15-113267-S

LUKE GANNON, BY HIS NEXT FRIENDS AND GUARDIANS, *et al.*,

*Plaintiffs-Appellees,*

v.

STATE OF KANSAS, *et al.*,

*Defendants-Appellants.*

Appeal from Appointed Panel  
Presiding in the District Court of Shawnee County, Kansas

Honorable Franklin R. Theis  
Honorable Robert J. Fleming  
Honorable Jack L. Burr

District Court Case No. 2010-CV-1569

**MOTION TO RECONSIDER ORDER DENYING APPLICATION TO FILE  
AMICUS CURIAE BRIEF OF THE STUDENTS' ADVISORY COMMITTEE TO  
THE KANSAS BOARD OF REGENTS**

Mark P. Johnson    KS # 22289  
Wade P. K. Carr    KS # 25105  
Dentons US LLP  
4520 Main Street  
Suite 1100  
Kansas City, Missouri 64111  
816/460-2400 - Tel  
816/531-7545 - Fax  
[mark.johnson@dentons.com](mailto:mark.johnson@dentons.com)  
[wade.carr@dentons.com](mailto:wade.carr@dentons.com)

ATTORNEYS FOR AMICUS CURIAE  
THE STUDENTS' ADVISORY  
COMMITTEE TO THE KANSAS  
BOARD OF REGENTS

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 113,267

LUKE GANNON, BY HIS NEXT FRIENDS AND GUARDIANS, *et al.*,  
*Appellees,*

v.

STATE OF KANSAS,  
*Appellant.*

**MOTION TO RECONSIDER ORDER DENYING APPLICATION TO FILE  
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THE KANSAS BOARD OF REGENTS**

Pursuant to Supreme Court Rules 6.06 and 7.06, the Students' Advisory Committee to the Kansas Board of Regents (the "SAC") respectfully moves this Court to reconsider its March 22, 2018 Order denying the SAC's application for leave to file an *amicus curiae* brief in this matter. In support, the SAC states as follows:

1. The SAC filed its application for leave to file an *amicus curiae* brief in this matter on March 7, 2018.
2. On March 13, 2018, Plaintiffs-Appellees ("Plaintiffs") filed a response in opposition, arguing that the SAC should not be allowed to file an *amicus curiae* brief because it would raise new issues not previously addressed by the trial court in this case.
3. The Court issued an Order on March 22, 2018, denying the SAC's application, relying on Plaintiffs' argument that SAC's proposed *amicus* brief would "raise issues not raised to the trial court."
4. SAC files this motion to clarify the apparent misconceptions about its proposed *amicus* brief and ask this Court to reconsider its decision.

5. Plaintiffs and the Court are correct that the courts and parties involved in this litigation have not considered the adequacy of funding levels for public education other than K–12 education. To be clear, however, the SAC’s brief will *not* ask the Court to address whether “Article 6 [of the Kansas Constitution] impose[s] obligations on the State to fund higher education *at a certain level.*” Pls.’ Opp. at 2 (emphasis added). In other words, the SAC will not argue whether current funding levels are inadequate or ask the Court to define what levels of higher education funding would be adequate.

6. Instead, the SAC’s *amicus* brief would simply serve to widen the lens through which the Court will examine the remedial stage of the existing litigation. As this Court is well aware, Article 6, Section 1(b) of the Constitution requires the legislature to “make suitable provision for finance of the educational interests of the state.” While other provisions of Article 6 distinguish between higher education and other education (e.g., K–12), this provision does not. Thus, the SAC’s *amicus* brief would urge the Court to be mindful of the legislature’s concurrent obligation to adequately fund higher education, in the course of addressing the remedial issues related to K–12 education in this case. Put differently, the remedy crafted for K–12 should not come at the expense of higher education. Far from *raising* a new issue itself, the SAC would urge the Court to address and define the remedy for K-12 education in a way that avoids *creating* a new constitutional issue.

7. Plaintiffs argued that the SAC’s proposed *amicus* brief would be unnecessary and inappropriate because Plaintiffs “have never advocated for the reduction of funding of other state functions or services” and have argued that “the State has a responsibility to fund all functions.” Pls.’ Opp. at 3. While the SAC agrees with Plaintiffs’ sentiment, it does not go far enough. Given the Constitutional protections for

*all* “educational interests of the state,” higher public education is not just another “state function.” And despite Plaintiffs’ admirable (and sound) sentiment, the SAC’s brief would provide the Court with information showing how, over the past decade, funding of higher education has been systematically and dramatically reduced to make up for budget shortfalls in other areas, including (inadvertently or not) K-12 education.

8. Again, the SAC’s *amicus* brief would *not* ask the Court for any remedy whatsoever. The SAC is mindful that its role at this stage in the litigation must be a limited one. But providing the Court with additional perspective and facts that would aid in the Court’s resolution of the issues already presented (i.e., the remedy for K–12 education) is a well-recognized and important function of *amicus curiae* in any case. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016), *as revised* (June 27, 2016) (noting that the Court has previously “relied heavily” on “the research-based submissions of *amici*” to analyze a constitutional question); *Binkley v. Allina Health Sys.*, 877 N.W.2d 547, 555 (Minn. 2016) (Lillehaug, J., concurring) (noting the helpfulness of *amicus* briefs in bringing an issue to the court’s attention that neither party had addressed); *cf. Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873, 877 (2015) (noting that even though non-party U.S.D. 512 could not intervene, “nothing shall prevent U.S.D. 512 from filing a brief as an *amicus curiae* in the equity portion of the main Gannon appeal”).

9. The *possibility* that the SAC might raise new issues does not justify preventing the SAC from even filing its *amicus* brief. Notably, in the cases cited by Plaintiffs and the Court, the Court allowed *amici* to file their briefs *before* refusing to address those briefs on the grounds that they had raised new issues for appellate review. *Bussman v. Safeco Ins. Co. of Am.*, 298 Kan. 700, 703, 728–29, 317 P.3d 70, 75, 89

(2014); *Sierra Club v. Moser*, 298 Kan. 22, 87–88, 310 P.3d 360, 399 (2013); *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 558, 561, 186 P.3d 183, 186, 188 (2008). None of those cases refused to allow *amici* to file their briefs. If the Court reviews the SAC’s brief and decides that SAC has raised a new issue, the proper recourse is to refuse to consider the SAC’s arguments. The Court should not, however, prevent the SAC from filing its *amicus* brief in the first instance.

Wherefore, the Students’ Advisory Committee moves the Kansas Supreme Court to grant its motion for reconsideration and grant the Students’ Advisory Committee leave to file an *amicus* brief in this proceeding.

Dated: April 5, 2018

Respectfully submitted,

/s/ Mark P. Johnson  
Mark P. Johnson    KS # 22289  
Wade P. K. Carr    KS # 25105  
Dentons US LLP  
4520 Main Street  
Suite 1100  
Kansas City, Missouri 64111  
816/460-2400 - Tel  
816/531-7545 - Fax  
[mark.johnson@dentons.com](mailto:mark.johnson@dentons.com)  
[wade.carr@dentons.com](mailto:wade.carr@dentons.com)

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BOARD OF REGENTS

**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 2018, I served a copy of the foregoing via electronic mail on the following counsel of record:

Alan L. Rupe  
Jessica L. Skladzien  
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

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**

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**

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**

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**

/s/ Mark P. Johnson  
Mark P. Johnson