

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

**APPELLEE’S RESPONSE TO STUDENT ADVISORY COMMITTEE’S
APPLICATION TO FILE AMICUS CURIAE BRIEF**

Plaintiff-Appellees (“Plaintiffs”), by and through their undersigned counsel of record, respectfully request that the this Court deny the application to file an amicus curiae brief submitted by Student Advisory Committee (“SAC”) for the reasons set forth herein:

I. Introduction

Plaintiffs are sympathetic to SAC’s concern regarding the funding of higher education. The State has a responsibility to provide funding for all functions of Kansas. Yet, for years, the State has failed to properly fund important services in Kansas, including all levels of education. However, Plaintiffs disagree that the *Gannon* litigation is the appropriate forum to address the State’s failures with regard to higher education.

Procedurally, the issues raised by the SAC are not appropriate for resolution now. The *Gannon* litigation is currently in the remedial stage. This Court has already determined that K-12 public education funding levels are not at constitutional levels. It has not made any similar fact findings with regard to higher education funding levels. And, asking it to do so now will only detract from its ability to focus on the problem that has already identified: the State’s failure to fund K-12 education. Allowing an amicus brief to address the constitutionality of the State’s actions

unrelated to the deficiencies already identified here unnecessarily complicates the issue. Plaintiffs respectfully request that this Court deny the SAC's application to file an amicus curiae brief.

II. Arguments and Authority

A. SAC's application to file an amicus brief should be denied because the amicus brief will raise a new issue not addressed by the trial court.

SAC's proposed amicus brief will argue that "the Kansas Constitution includes all levels of public education, not just K-12[.]" This issue has not been raised in *Gannon*. "[A]n amicus curiae brief cannot raise issues that were not presented before the trial court." *Bussman v. Safeco Ins. Co. of Am.*, 298 Kan. 700, 729, 317 P.3d 70, 89 (2014) (quoting *Hall v. State Farm Mut. Auto. Ins. Co.*, 8 Kan. App. 2d 475, 481, 661 P.2d 402, *rev. denied* 233 Kan. 109) (1983)) (internal quotations omitted).

While the SAC's amicus curiae brief may implicate Article 6, the brief will argue an entirely new issue: does Article 6 impose obligations on the State to fund higher education at a certain level? In *Gannon*, neither the trial court nor this Court has consider whether Article 6's suitable funding provision imposes obligations upon the State with regard to higher education. Neither the Plaintiffs nor the State have raised the issue, presented evidence on the question, or briefed whether Article 6 imposes obligations related to higher education. *State ex rel. Donaldson v. Hines*, 163 Kan. 300, 323, 182 P.2d 865, 880 (1947) ("it would be highly improper for the court to pass upon questions [in an amicus brief] which were not within the issues and consequently not briefed by counsel for all parties."). No factual determinations have been made regarding the funding of higher education in Kansas. This Court has no record with which to make its determination. An amicus curiae brief should not be used to enlarge the issues to be decided on appeal, which is exactly what this amicus brief will do. *Phoenix v. Phx. Civic Auditorium & Convention Ctr. Ass'n*, 99 Ariz. 270, 274, 408

P.2d 818, 821 (1965) (“Amicus curiae will not be permitted to create, extend, or enlarge the issues.”).

While Plaintiffs are sympathetic to the SAC’s concerns, allowing the SAC to file its amicus curiae brief would “frustrate[] and undermin[e] the ability of the named parties/real parties in interest to expeditiously resolve their own dispute” and would “complicat[e] the court’s ability to perform its judicial function.” *See, e.g., United States v. Michigan*, 940 F.2d 143, 166 (6th Cir. 1991).

B. SAC’s application to file an amicus brief should be denied because it will not instruct the Court as to whether the State’s remedy is constitutional.

“The privilege of being heard amicus rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise.” *Cnty. Ass’n for Restoration of the Env’t v. Deruyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). SAC’s amicus curiae brief will not provide relevant information to the Court’s determination of an appropriate remedy in this matter.

SAC premises its application to file an amicus brief on the contention that “no consideration has been given to the impact that the Court’s decision mandating increased funding for K-12 education, and the Legislature’s response to that decision, will have on higher education.” But, the State’s constitutional duty to provide constitutional funding for K-12 education does not require the State to cut funding for higher education or any other services. Plaintiffs have never advocated for the reduction of funding of other state functions or services. To the contrary, Plaintiffs note that the State has a responsibility to fund all functions in addition to its constitutional duty to fund K-12 education. Further, this Court has never ordered the State to reduce funding to other services for the State to comply with its constitutional duty to fund K-12 education. The State can fully and adequately fund K-12 education without considering higher education funding or any other funding for that matter. Regardless, SAC has recourse if the State continues to underfund higher education:

as Plaintiffs did, SAC can sue the State. This allows SAC to address any constitutional questions and develop a record of factual findings that are relevant to its inquiries.

III. Conclusion

The State's constitutional duty to provide constitutional funding for K-12 education does not require the State to cut funding for higher education or any other services. Plaintiffs have never advocated for the reduction of funding of any other service or function of the State of Kansas nor has such action ever been directed by this Court. While Plaintiffs are sympathetic to SAC's concerns regarding funding for higher education, raising such matters at the remedial stage of this litigation is procedurally improper. Denying SAC's application to file an amicus curiae brief will not prejudice SAC and will provide SAC the opportunity to address its concerns in an appropriate forum.

WHEREFORE, Plaintiffs respectfully request that this Court deny SAC's motion to file an amicus brief in this proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2018, I electronically served the foregoing

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