

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 GOVERNOR KELLY'S
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Plaintiff-Appellees (“Plaintiffs”), by and through their undersigned counsel of record, respond to Governor Laura Kelly’s motion to file an *amicus curiae* brief as follows:

A. **Governor Kelly is a represented party in this matter.**

Plaintiffs have concerns whether it is appropriate for Governor Kelly, a represented party in this matter, to file an *amicus* brief. 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).

Governor Kelly is not a *nonparty*. Plaintiffs filed this matter against the State of Kansas. As Attorney General, Mr. Schmidt represents the Legislature and Governor’s interest in this matter. *See K.S.A. 75-702* (“The attorney general shall also, when required *by the governor or either branch of the legislature*, appear for the state . . . in which this state may be a party or interested or when the constitutionality of any law of this state is at issue[.]”). And, Mr. Schmidt has already filed a brief on behalf of the State of Kansas.

Here, Governor Kelly’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 Governor Kelly to file an *amicus* brief would create precedent allowing all individual members, past and present, of the Legislature and Executive branch to file *amicus curiae* briefs anytime the State of Kansas is sued. Plaintiffs have serious doubts as to whether this is the intended purpose of an *amicus* brief.

As Governor of the State of Kansas, Governor Kelly represents the Defendant in this matter: the State of Kansas. Governor Kelly’s interests are adequately represented in the State’s brief.

B. The untimeliness of Governor Kelly’s motion creates an inequitable briefing schedule.

In addition to Plaintiffs’ concerns that a represented party should not be allowed to file an *amicus* brief, Plaintiffs are further concerned by the inequitable briefing schedule that would result if Plaintiffs’ motion is granted.

Governor Kelly filed her motion on April 15, 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. And, in lieu of attaching her proposed *amicus* brief, as the rules require, she requests that she be allowed to file her brief on or before April 26, 2019. 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.” Here, as a result of Governor Kelly’s late

request, Plaintiffs will not have the full 21 days to respond and would be required to respond to the *amicus* brief while simultaneously preparing for oral argument.

In her motion, Governor Kelly argues that she could not comply with the Kansas Supreme Court rules because “the Legislature passed Senate Bill 16 on April 5, 2019, and because oral argument is set for May 9, 2019[.]” However, Governor Kelly could have filed her motion on April 5, 2019, when the bill passed. Governor Kelly could have filed her motion on April 6, 2019, when she signed S.B. 16 into law. Governor Kelly could have filed her motion on April 9, 2019, 30 days prior to oral arguments. Governor Kelly did not. Instead, Governor Kelly delayed until minutes before opening briefs were filed by the parties to file her motion for leave. And, her proposed deadline of April 26, 2019 allows her to file a brief *after* all briefing is supposed to be complete. Even if this Court agrees that Governor Kelly should have the opportunity to file an *amicus* brief, Plaintiffs contend that they should not be prejudiced by the timing of the brief.

Governor Kelly’s request to file an additional brief less than two weeks before oral argument diverts Plaintiffs’ attention from oral argument preparation, and requires Plaintiffs to instead respond to an *amicus* brief that merely re-argues the State’s position. Further, Plaintiffs are aware that at least one other State entity intends to request permission to file an *amicus* brief. Plaintiffs will be significantly prejudiced if the multiple entities are allowed to file *amicus* briefs in the time between the April 25, 2019 deadline to file response briefs and the May 9, 2019 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. To allow Plaintiffs this opportunity, the specifically request that – if this Court finds it appropriate to allow a represented party to file an *amicus* brief – the following schedule apply:

- Governor Kelly’s *amicus* brief is due to the Court on Monday, April 22, 2019;
- Plaintiffs have until Monday, April 29, 2019 to respond.

This would allow Plaintiffs the opportunity to both adequately address the brief and prepare for oral arguments.

II. Conclusion

Plaintiffs respectfully request that this Court deny Governor Kelly’s motion to file an *amicus brief* in this proceeding since she is already a represented party. If this Court finds it appropriate to allow a represented party to file an *amicus* brief, Plaintiffs request that the following schedule apply:

- Governor Kelly’s *amicus* brief is due to the Court on Monday, April 22, 2019;
- Plaintiffs’ response to the *amicus* brief is due to the Court on Monday, April 29, 2019.

Dated this 16th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2019, I electronically served the foregoing to:

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