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Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

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By AS Deputy

Attorneys for Amici Certain Named Legislators in their Individual Capacities

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE ALASKA LEGISLATIVE
COUNCIL, on behalf of THE ALASKA
STATE LEGISLATURE,

Plaintiff,

v.

HONORABLE MICHAEL J.
DUNLEAVY, in his official capacity as
Governor for the State of Alaska,
KELLY TSHIBAKA, in her official
capacity as Commissioner of
Administration for the State of Alaska,
and MICHAEL JOHNSON, in his
official capacity as Commissioner of
Education and Early Development for
the State of Alaska,

Defendants.

COALITION FOR EDUCATION
EQUITY,

Intervenor.

**REPLY IN SUPPORT OF MOTION
FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE**

Superior Court No.: 1JU-19-00753CI

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The Governor opposes this court granting leave to twenty individual legislators to file an Amici Brief in support of the Legislative Council's Motion for Summary Judgment on a constitutional issue of the utmost importance to our state. Obviously, if a group of legislators had wanted to file a brief in support of the Governor, he would not oppose leave. The Governor simply does not like what these twenty legislators from across the political spectrum have to say. The Governor's opposition reads like an opposition to an intervention motion, arguing about the party status of the legislature versus individual legislators. But the individual legislators are not seeking leave to intervene in this case as parties, and merely seek leave to file a friend of the court brief to weigh in on the critical constitutional issue of the legislature's appropriation power. Because their arguments are not duplicative and provide additional legal analysis that may be helpful to this Court, leave should be granted.

The Governor is correct that the Legislative Council as the committee charged with bringing claims on behalf of the legislature is the proper party to litigate the legislature's claims. But contrary to the argument made in the opposition, individual legislators are not the legislature—an organization comprised of many members with differing viewpoints—and no one legislator can speak for or bind the entire legislature in litigation or otherwise. Amici include legislators from both the Democratic Party and Republican Party, as well as legislators who are part of the majority house caucus, as well as those who are not. To give one example, Representative LeDoux is a minority house member and is not a member of

the Legislative Council. While we agree that intervention or party status for each of the twenty legislators would be inappropriate, intervention is not sought.

While the Alaska Supreme Court has not addressed this exact issue, it has intimated that leave should be freely given when intervention as a party would be inappropriate.¹ Rather than party status, the primary consideration is whether the brief would be helpful to the court, or as the Delaware Supreme Court said, whether the assistance the brief offers “is advisable to protect the court in the consideration of the case, i.e., ‘for the honor of a court of justice to avoid error.’ ”²

Amicus briefs are especially warranted in cases involving issues of great public interest, such as this one where the court must decide constitutional issues involving the power of appropriation and the separation of powers doctrine:

It is now generally recognized that amicus curie are called upon for the purpose of (1) assisting the court in a case of general public interest by providing adversarial presentations when neither side is represented; (2) assisting the court in a case of general public interest, by providing an adversarial presentation when only one view is represented; (3) assisting the court by supplementing the efforts of counsel, even when both sides are represented, in a case of general public interest; and (4) drawing the court’s attention to

¹ *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 916 (Alaska 2000) (“We recognize that ‘additional parties are always the source of additional questions, briefs, objections, arguments, and motions [and] where no new issues are presented, the most effective and expeditious way to participate is by a brief amicus curiae and not by intervention.’ ”). Of course, leave should be denied where the amicus brief seeks to make new arguments not raised by the parties or where granting leave would unduly delay proceedings. *State v. Alaska Civil Liberties Union*, 159 P.3d 513, 514 (Alaska 2006) (granting leave in part “to extent that the amicus response addresses the issues raised by the parties of record,” but denying leave to extent that the brief seeks “relief beyond the scope of relief sought by the parties of record” and seeks a stay of proceedings). Neither exists here.

² *Giammalvo v. Sunshine Min. Co.*, 644 A.2d 407, 409 (Del. 1994).

broader legal or policy implications that might otherwise escape its consideration in the narrow context of a specific case.³

Amici's arguments are not duplicative of those made in Plaintiff's Motion for Summary Judgment and provide additional legal analysis that should be helpful to this court's constitutional analysis, including without limitation:

- Unlike the Legislative Council memorandum, the Amici Brief foresaw the Governor's argument that the power of appropriation is a shared power, and rebuts that argument by clearly laying out the case law establishing that only the legislature has the power of appropriation, which must be broadly construed, and the Governor has only a check on that power, which must be narrowly construed.⁴
- The Amici Brief covers the three limitations on the legislature's power of appropriation actually in the constitution;⁵ the Legislative Council memorandum does not.
- The Amici Brief argues against a temporal limitation based on the language of the constitution; the Legislative Council memorandum does not.⁶
- The Amici Brief points out that the Governor introduced legislation this past session that has the same alleged constitutional infirmity at issue here: his

³ *Id.* (internal citations omitted); *Empire State Assoc. of Assisted Living, Inc. v. Daines*, 887 NYS.2d 452, 455-56 (N.Y. Sup. 2009) ("Where a case involves 'questions of important public interest leave is generally granted to file a brief as amicus curie.' "); 3B C.J.S. Amicus Curiae § 3 ("Where matter of public concern are involved, the court exercise great liberality in granting leave to appear.").

⁴ Amici Brief, pp. 6-8.

⁵ *Id.* at 8-12.

⁶ *Id.* at 13-16.

PFD repayment legislation has effective dates in future years.⁷ The Legislative Council memorandum provides no such example.

- The Amici Brief argues the Governor violates the separation of powers doctrine by infringing on the legislature's power of appropriation;⁸ the Legislative Council argues separation of powers in the context of the Governor's obligation to faithfully execute the law.⁹
- Both briefs argue that the appropriations do not violate the dedicated funds clause, but the arguments differ significantly in approach.¹⁰
- The Legislative Council memorandum covers the history of the legislature forward-funding education;¹¹ the Amici Brief does not.
- The Legislative Council memorandum focused on the Governor's duty to execute the law;¹² the Amici Brief does not.

It is no surprise the Governor does not want this court to consider the arguments in the Amici Brief. They are not helpful to him as he attempts to shift power from the legislature to the executive branch. Just as a group of legislators could have filed a brief in support of the Governor's arguments, individual legislators are fully within their rights to submit a brief approaching the constitutional issues in this case differently than the

⁷ *Id.* at pp. 16-17.

⁸ *Id.* at pp. 21-24.

⁹ Plaintiffs' Memorandum in Support of Motion for Summary Judgment, pp. 16-17.

¹⁰ *Id.* at pp. 18-30; Amici Brief at pp. 17-21.

¹¹ Plaintiffs' Memorandum in Support of Motion for Summary Judgment, pp. 3-10.


¹² *Id.* at pp. 13-18.

Legislative Council, who represents the legislature's interests as an organization, but not the interests of each individual legislator.

In summary, the briefs are complementary of one another, and the Amici Brief provides additional constitutional analysis that will be helpful to this Court fully considering all arguments and reaching the right decision on this important matter of legislative power. The Motion for Leave should be granted.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 23 day of September 2019.

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CERTIFICATE OF SERVICE

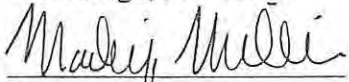
I hereby certify that on this 23rd day
of September 2019, a true and correct
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