

COURT OF APPEALS, STATE OF COLORADO
101 West Colfax Ave., Suite 800
Denver, CO 80202

Office of Administrative Courts
Honorable Judge Robert N. Spencer
Office of Administrative Courts
Case No. OS 2010-0009

IN THE MATTER OF COMPLAINT FILED BY
COLORADO ETHICS WATCH REGARDING
ALLEGED CAMPAIGN AND POLITICAL
FINANCE VIOLATIONS BY CLEAR THE BENCH
COLORADO

Complainant-Appellee: COLORADO ETHICS
WATCH

v.

Respondent-Appellant: CLEAR THE BENCH
COLORADO

FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

APR 29 2011

Clerk, Court of Appeals

▲ COURT USE ONLY ▲

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Case No. 2010 CA 2291

**RESPONSE IN OPPOSITION TO COLORADO SECRETARY OF STATE'S
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF
CLEAR THE BENCH**

Colorado Ethics Watch (“Ethics Watch”), by and through its undersigned counsel, hereby respectfully submits its Opposition to the Colorado Secretary of State’s Motion for Leave to File Brief in Support of Clear The Bench (“Clear The Bench”) as an amicus curiae.

ARGUMENT

I. Because The Secretary Of State Is Not A True Amicus In This Matter, His Amicus Brief Is Improper, And The Motion For Leave To File Should Be Denied.

As a general matter, there is no prohibition on an appearance by a Secretary of State as amicus curiae. Under the circumstances of this case, however, the purported amicus brief submitted by Secretary of State Scott Gessler (“Gessler”) on behalf of his former client, Clear The Bench, is improper for three reasons. First, Gessler, in essence, files on behalf of a party, and, thus, his brief cannot qualify as an appropriate amicus submission. Second, Gessler’s brief, even if not a thinly-disguised brief on behalf of Clear The Bench, does not properly serve the purposes of an amicus curiae. Third, Gessler’s submission constitutes an improper attempt to use state resources for the gain of a private entity. Accordingly, Ethics Watch respectfully requests that Gessler’s motion for leave to file an amicus brief be denied.

Moreover, Ethics Watch disagrees with Gessler's contention that the Secretary of State's decision cannot be overturned by an administrative law judge. Ethics Watch will address this issue in its response to Gessler's amicus brief, should Gessler be permitted to proceed as an amicus.

A. Gessler Improperly Seeks To Submit A Brief On Behalf Of A Party Under The Guise Of An Amicus Curiae.

A "clear precondition of appearing as an *amicus curiae* or for such a brief being filed is that the movant not be a party to the dispute in issue." *U.S. v. Smith*, 686 F. Supp. 847, 853 (D. Colo. 1988). This tenet follows the principle that "[a]mici curiae perform a valuable role for the judiciary *precisely because* they are nonparties who often have different perspective[sic] from the principal litigants[.]" *See* Am. Jur. Amicus § 1 (emphasis added).

Here, Gessler's motion for leave to file an amicus brief is nothing more than an improper attempt to obtain a second chance for a party, Clear The Bench, to argue an issue on which Clear The Bench previously lost. Secretary of State Gessler previously served as counsel for Clear The Bench – the party he now seeks to affirmatively support (with taxpayer funds) as amicus curiae. As such, his proposed amicus brief is not independent, but, rather reiterates the same affirmative arguments Gessler previously

advocated in his role as counsel for Clear The Bench, and includes the same arguments Clear The Bench asserts now. Gessler's proposed amicus brief, thus, constitutes continued advocacy on behalf of his former client, and, a transparent attempt to submit additional pleading in excess of the page limits set forth in the Colorado Rules of Appellate Procedure on behalf of Clear The Bench. This Gessler cannot do under the guise of an amicus curiae. *E.g., Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Chief Judge Posner, in chambers) (amicus briefs filed by allies of litigants which duplicate the arguments made in the litigant's briefs, in effect merely extending the length of the litigant's brief are an abuse and should not be allowed.) Because Clear The Bench, as a party, may not also appear as amicus, Gessler's Motion is improper and should be denied.

B. Gessler's Brief Is Not An Appropriate Amicus Brief Because Gessler Is Not A Neutral, Dispassionate Friend Of The Court.

Moreover, even if Gessler had not previously served as counsel for Clear The Bench, and even if his purported amicus brief were not a thinly-disguised pleading on behalf of his former client, Gessler's brief is still improper.

“Amicus Curiae” means friend of the court, not friend of a party. *Ryan*, 125 F.3d at 1063. It is well-established that the appropriate role of an amicus is to “provide the court with an objective, dispassionate, neutral discussion of the issues[.]” *See, e.g., U.S. v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (denying motion for leave to file an amicus brief); *see also Paradigm Ins. Co. v. Walters Diving & Marine, Inc.*, No. CIV. A. 98-1617, 1999 WL 232669, at *2 (E.D. La. April 20, 1999), citing *Gotti*, 755 F. Supp. at 1159 (“Other courts have rejected such briefs when, as here, they are filed by parties which are not ‘objective, dispassionate [and] neutral.’”).

As a result, “[a] true amicus curiae is without interest in the proceeding in which he or she appears” but, rather, is a bystander whose mission is to aid the court. *Am. Jur. Amicus* § 1, citing *In re Wingfield*, 171 S.W.3d 374 (Tex. App.-Tyler 2005); *see also Simmonds v. TDCJ*, No. 10-07-00361-CV, 2010 WL 654498, at *10 (Tex.App.-Waco Feb. 24, 2010) (agreeing with inmate’s assertion that Office of the Attorney General was not that of a true amicus curiae because Attorney General’s Office represented defendants in the same action “and always represents the defendants in inmate litigation against TDCJ officials and employees”).

By contrast, where a party, rather than filing an amicus brief in an effort to “serve as an objective, neutral, dispassionate ‘friend of the court’” comes as a pure advocate for one side, that party’s attempt to enter the case as an amicus “does the court, itself and fundamental notions of fairness a disservice.” *Gotti*, 755 F. Supp. at 1159. Moreover, “it ‘may be thought particularly questionable’ for the court to accept an *amicus* when it appears that the parties are well represented and that their counsel do not need supplemental assistance and where the joint consent of the parties to the submission by the *amicus* is lacking.” *Id.*, citing *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).

Here, given Gessler’s previous representation of Clear The Bench in this action, Gessler is simply not an objective, neutral, dispassionate ‘friend of the court’ without any interest in the proceeding. *See Gotti*, 755 F. Supp. at 1159. Gessler is not merely a “bystander whose mission is to aid the court to act only for the personal benefit of the court.” *See id.*; *see In re Wingfield*, 171 S.W.3d at 381. Nor does (or could) Gessler contend that Clear The Bench is insufficiently represented by competent counsel. Finally, Gessler’s purported amicus submission is also “particularly questionable” because “the joint consent of the parties to the submission by the *amicus* is lacking”

here. *Gotti*, 755 F. Supp. at 1159; *Strasser*, 432 F.2d at 569. For these reasons, Gessler's motion for leave to file an amicus curiae brief should be denied.

C. Gessler's Brief Constitutes Improper Use Of Public Resources For The Gain Of A Private Entity.

Finally, it is a long-standing principle of Colorado law that “[t]he objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute.” *City and County of Denver v. Hallett*, 83 P. 1066, 1070 (Colo. 1905). As explained above, Gessler's amicus curiae submission is a piece of advocacy submitted on behalf of his former client, a private party, containing the same general arguments which the party itself makes, and on which that party has previously lost. As such, Gessler's alleged amicus brief serves no public purpose whatsoever and does not advance the common interest and well-being of the community. *See Hallett*, 83 P. at 1070. Nonetheless, Gessler is using the Attorney General's office and taxpayer funds to advocate on behalf of his former client, a private entity. For this reason as well, the brief should be disallowed, and Gessler's motion for leave to file should be denied.

CONCLUSION

For the foregoing reasons, Ethics Watch respectfully requests that the Secretary of State's Motion For Leave To File Amicus Brief In Support Of Clear The Bench be denied.

Respectfully submitted this 29th day of April, 2011.

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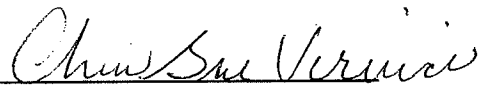
CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2011 a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO COLORADO SECRETARY OF STATE'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF CLEAR THE BENCH** was served by placing same in the United States mail, first class postage prepaid, addressed to the following:

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