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CASE NUMBER: SN-2023-CV-000422
PII COMPLIANT

Court:	Shawnee County District Court
Case Number:	SN-2023-CV-000422
Case Title:	State of Kansas vs. David Harper Director of Vehicles, et al
Type:	ORD: Order Originated by Judge MEMORANDUM DECISION AND ORDER

SO ORDERED,



/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

STATE OF KANSAS, *ex rel.*
KRIS KOBACH, Attorney General,

Petitioner

Case No. SN-2023-CV-422

vs.

DAVID HARPER, Director of Vehicles,
Department of Revenue, in his official capacity, and
MARK BURGHART, Secretary of Revenue,
in his official capacity,

Respondents

and

ADAM KELLOGG, KATHRYN REDMAN,
JULIANA OPHELIA GONZALES-WAHL,
and DOE INTERVENOR-RESPONDENT 2,
on behalf of her minor child,

Intervenor-Respondents

MEMORANDUM DECISION AND ORDER ON MOTION FOR TEMPORARY INJUNCTION

The State of Kansas, *ex rel.* Kris Kobach, Attorney General, filed a petition for mandamus and injunctive relief relating to Senate Bill 180 ("SB 180"), enacted by the Kansas Legislature in 2023. SB 180 is also known as the Women's Bill of Rights. The Attorney General asked this Court to order officials of the Kansas Department of Revenue ("KDOR") to comply

with SB 180 when issuing driver's licenses and other documents with sex designations and in maintaining the corresponding information in the KDOR database.

Along with the petition, the Attorney General filed a motion for a temporary restraining order and temporary injunction. The Court, pursuant to K.S.A. 60-903, granted the Attorney General's request for a temporary restraining order. The parties later agreed to extend the temporary restraining order until the Court resolved the motion for temporary injunction. The Court allowed five transgender individuals to intervene in the lawsuit.

The parties engaged in discovery prior to the temporary injunction hearing. The Court ruled upon multiple discovery-related motions filed by all parties. These rulings will be discussed below as necessary to the temporary injunction analysis. After a two-day evidentiary hearing, this Court took the matter under advisement. Having carefully considered the voluminous briefing[1] supplied by all parties and the evidence presented at the hearing, the Court is ready to rule on the Attorney General's motion for temporary injunction.

FINDINGS OF FACT

The Kansas Legislature passed SB 180 with wide margins during the 2023 legislative session. It was enrolled and presented to Governor Laura Kelly. The Governor vetoed the bill. The House and Senate voted to override the Governor's veto in late April 2023. SB 180 became effective July 1, 2023. It is now known as K.S.A. 77-207.

K.S.A. 77-207 states:

> (a) Notwithstanding any provision of state law to the contrary, with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations, the following shall apply:

[1]All parties to this action have provided throughout the briefing of this matter links to internet news articles, surveys, websites, and other material that is outside the realm of the record in this case. For purposes of this motion, the Court will consider only facts agreed by the parties, testimony and exhibits admitted at the temporary injunction hearing, and matters judicially noticed by the Court.

(1) An individual's “sex” means such individual's biological sex, either male or female, at birth;

(2) a “female” is an individual whose biological reproductive system is developed to produce ova, and a “male” is an individual whose biological reproductive system is developed to fertilize the ova of a female;

(3) the terms “woman” and “girl” refer to human females, and the terms “man” and “boy” refer to human males;

(4) the term “mother” means a parent of the female sex, and the term “father” means a parent of the male sex;

(5) with respect to biological sex, the term “equal” does not mean “same” or “identical”;

(6) with respect to biological sex, separate accommodations are not inherently unequal; and

(7) an individual born with a medically verifiable diagnosis of “disorder/differences in sex development” shall be provided legal protections and accommodations afforded under the Americans with disabilities act and applicable Kansas statutes.

(b) Laws and rules and regulations that distinguish between the sexes are subject to intermediate constitutional scrutiny. Intermediate constitutional scrutiny forbids unfair discrimination against similarly situated male and female individuals but allows the law to distinguish between the sexes where such distinctions are substantially related to important governmental objectives. Notwithstanding any provision of state law to the contrary, distinctions between the sexes with respect to athletics, prisons or other detention facilities, domestic violence shelters, rape crisis centers, locker rooms, restrooms and other areas where biology, safety or privacy are implicated that result in separate accommodations are substantially related to the important governmental objectives of protecting the health, safety and privacy of individuals in such circumstances.

(c) Any school district, or public school thereof, and any state agency, department or office or political subdivision that collects vital statistics for the purpose of complying with anti-discrimination laws or for the purpose of gathering accurate public health, crime,

> economic or other data shall identify each individual who is part of the collected data set as either male or female at birth."

A few days before SB 180 was to take effect, the Attorney General issued a formal opinion that concluded, among other things, that SB 180 requires KDOR to "list the licensee's 'biological sex, either male or female, at birth' on driver's licenses that it issues" and "update its data set to reflect the licensee's sex at birth and include that sex on any licenses it issues to that individual in the future." Kan. Att'y Gen. Op. No. 2023-2 (June 26, 2023).

Prior to the adoption of SB 180, KDOR had a policy in place addressing sex designations on Kansas driver's licenses, including how to change the designation if desired. Within days after the Attorney General issued his opinion, the Governor directed KDOR to retain its existing policy allowing licensees to change the sex designation on Kansas driver's licenses. KDOR then announced on its webpage that SB 180 would not change KDOR's procedures for obtaining, renewing, or changing the sex designation on a Kansas driver's license.

The Attorney General filed a petition for mandamus and injunctive relief on July 7, 2023, along with a motion for a temporary restraining order and temporary injunction, seeking enforcement of SB 180 as it applied to driver's licenses. This Court granted a temporary restraining order against KDOR stating that:

1. Respondents and those under their direction shall immediately cease and desist from processing any requests by driver's licensees or driver's license applicants to change or display their sex in a manner that does not reflect their biological sex as defined by SB 180.

2. Respondents shall take all actions necessary to ensure that any newly issued or reissued driver's licenses reflect the licensee's biological sex as defined by SB 180.

This Court denied KDOR's subsequent motion to dissolve the temporary restraining order. The Attorney General and KDOR agreed to extend the temporary restraining order

pending a decision on the temporary injunction. Five transgender individuals sought to intervene in the lawsuit to raise constitutional concerns in the context of this Court's interpretation of the statute. They did not attempt to raise an independent, direct constitutional challenge to SB 180. This Court granted their motion to intervene, and they will be referred to collectively as "Intervenors."

This Court heard the testimony of several witnesses at the evidentiary hearing.

KENT SELK

Kent Selk is the Driver Services Manager for the Kansas Department of Revenue. He is responsible for the operation of driver's license offices statewide. He has held that position since 2018. He testified that there are several pieces of identifying information recorded on the front of a Kansas driver's license, one of which is "sex." The word "gender" does not appear on the Kansas driver's license.

In a May 10, 2011, memo to Kansas driver's license examiners, KDOR articulated its internal requirements for changing the sex designation on a Kansas driver's license. These requirements were in effect from 2011 to 2019. One option was that the applicant could submit to the examiner at a driver's license station a court order "announcing a gender reclassification" to change the sex on his or her license. The other option was that the applicant could submit a written request to KDOR along with: 1) a copy of the current Kansas license; 2) the new information desired; and 3) "a letter on official letterhead from the applicant's licensed medical, osteopathic physician stating that applicant has undergone the appropriate clinical treatment for change of sex or that the physician has re-evaluated the applicant and determined that gender reclassification based on physical criteria is appropriate." If KDOR approved the change, it

would send the applicant an approval letter that he or she could take to a driver's license station to get a new license.

The 2011 memo contained the following note: "the simple production of medical records will not suffice to justify gender reclassification. The Division requires an emphatic declaration or finding of gender classification by the applicant's attending physician – this declaration or finding need not be specifically directed to the Kansas Division of Vehicles." Further, the 2011 memo "grandfathered" any previous "gender classification change" to a license supported by a "letter from your physician or mental health care provider, court order, or other declaration" and nothing further was required to maintain the current "gender classification" on the Kansas license.

In 2019, KDOR adopted a slightly different version of these internal requirements in a document titled "Gender Reclassification Policy." It said that to change the "gender" on a Kansas license, an applicant must present one of the following: 1) a "lawful presence document showing correct gender" (Selk testified that this includes a valid United States passport); 2) a court order "announcing a gender reclassification"; or 3) a letter from KDOR authorizing the "gender change."

In order to obtain the letter from KDOR, the 2019 policy says the applicant must provide: 1) a copy of the current Kansas license or, if the applicant does not have one, a copy of a "lawful presence document"; 2) a statement from the applicant requesting the "change in gender" with name, address, phone number, and any new information to be added to or changed on the license; and 3) "A letter from the applicant's licensed medical, osteopathic physician stating the applicant has undergone the appropriate clinical treatment for change of gender or that the

physician has reevaluated the applicant and determined that gender reclassification based on physical criteria is appropriate."

Selk testified that KDOR would accept a letter from a physician at face value, reviewing it only to determine if there is some obvious indication that the letter was falsified or otherwise questionable. He said KDOR would not double check to see if the named physician exists unless there was something suspicious about the letter, and KDOR would not check to see if the physician is licensed. Selk testified that nothing in KDOR's policy prevented an applicant from changing the sex designation on a license back and forth multiple times, though to Selk's knowledge that had never happened.

Selk testified that there were more than 9.3 million Kansas driver's licenses issued between 2011 and the end of 2022. Between June 2011 and June 2023, KDOR approved 552 requests for a change in sex designation. In that same period, KDOR denied four requests for a change in sex designation because of missing paperwork. Selk was not certain exactly how many of the 552 requests were made in the first half of calendar year 2023 alone, but agreed that 172 would be "in the ballpark."

Selk said KDOR maintains a database of information for each license holder that includes the current information displayed on a Kansas license as well as historical information as it changes over time. He testified that while the word "sex" is used on the face of a Kansas license, the word "gender" is used to record the same information in the KDOR database. Agencies other than KDOR have access to some of the information in the database, but not to the database as a whole. For example, law enforcement officers can electronically access information that appears on the face of a license as well as the person's driving offense record.

Selk testified that KDOR is involved with the American Association of Motor Vehicle Administrators ("AAMVA"), and he holds its recommendations and best practices in high regard. AAMVA created a document entitled "AAMVA DL/ID Card Design Standard" dated 2020. Selk said one of the goals of the document is to help states standardize the design of driver's licenses across the country. The AAMVA standard is to display "sex" on the face of the license. Elsewhere in the document, when discussing information to be included in a database, the AAMVA standard uses the term "gender" to describe a data field for the sex designation on the face of the license.

Selk testified that while he does not work for the Office of Vital Statistics (part of the Kansas Department of Health and Environment), and he does not consider the KDOR database in general to be a "vital statistic," he does consider a person's sex designation to be a "vital statistic."

SHERIFF BRIAN HILL

Brian Hill is the Sheriff of Shawnee County, Kansas. Before he was Sheriff, he worked as a law enforcement officer for the Topeka Police Department from 1991-2018. He has made thousands of arrests and executed thousands of search warrants. His duties with both agencies involved work in the field on patrol, including stopping drivers on the road for various reasons.

Respondents and Intervenors filed a motion to strike Sheriff Hill as an expert witness because he was not designated as an expert witness in the Attorney General's initial disclosures. Respondents and Intervenors were subsequently assured by the Attorney General's office that Sheriff Hill would be utilized as a fact witness, but not an expert witness. Sheriff Hill was later listed as an expert witness. This Court granted the motion to strike Sheriff Hill as an expert witness, but allowed him to testify as a fact witness regarding his experience as a law

enforcement officer in the role of determining sex in identifying a person stopped or suspected of a crime.

Sheriff Hill said one of the first things to do when stopping someone is to identify the person, usually by asking for a driver's license. During a traffic stop he might also ask for the vehicle registration and proof of insurance. Sheriff Hill said an officer could run the driver's license through an electronic database on an in-car computer, but since he does not have an in-car computer he calls dispatch to do it for him. This allows an officer to confirm validity of the license and to check for "wants and warrants," whether someone has an outstanding arrest warrant or is wanted on suspicion of committing a crime. Sheriff Hill said he would give dispatch the name, date of birth, race, and sex to attempt to identify a person.

Sheriff Hill said he once arrested a transgender person who was trying to stab his landlord. The person told Sheriff Hill he was a man, but jail staff later indicated the person was a woman. The person showed no criminal history when run through a records check as a man, but the person's true criminal history appeared when run through a records check as a woman. Sheriff Hill also said there was a person in the community who had been arrested in the past who would dress like a woman, identify as a woman, but then dress like a man at other times. There was no problem in apprehending the person in this situation, he said, because the person was known to local law enforcement.

RICHARD NEWSON

Richard Newson is the Detention Bureau Commander at the Johnson County, Kansas, Sheriff's Office. He has been in that position for two and a half years, with 10 to 15 years' total service in the detention division. Before that he was a deputy on patrol. In his current position he oversees two jail buildings, one is central booking, and the other is a housing unit. Respondents

and Intervenors filed a motion to strike Newson for the reasons set forth above in regard to Sheriff Hill. This Court granted the motion to strike for the same reasons, but allowed Newson's testimony as a fact witness.

Newson testified that all arrestees are processed through central booking. Arrestees in custody for more than 72 hours are moved to the housing unit. Central booking identifies arrestees by using information in the arrest report. This includes name, address, date of birth, and sex, among others. Newson said the information in the arrest report comes from the arrestee's driver's license. The detention division segregates inmates by sex in central booking and in the housing unit. They do this for the safety of the arrestee to prevent assault by other arrestees. They do this for the safety of the officers as well. Arrestees are strip searched before being placed in the housing unit, and the strip searches are to be done by an officer of the same sex as the arrestee.

Newson testified that Johnson County follows federal law and has its own policies regarding how to identify an arrestee's sex or gender for purposes of booking and detention, including policies for transgender people. He did not testify regarding the content of those policies.

CAPTAIN JAMES OEHM

Captain James Oehm has worked in law enforcement for 28 years and for the Kansas Highway Patrol since 2011. He is currently the troop commander of Troop M, responsible for communications, the Kansas Criminal Justice Information System, and records including accident and arrest reports.

The Attorney General filed a motion to strike Captain Oehm as an expert witness because, after his deposition, the Respondents drafted a declaration setting forth additional opinions not included in the expert designation. Respondent shared the draft declaration with

Intervenors and Intervenors cited it in their briefing. Respondent did not share the declaration with the Attorney General until approximately one month after the deposition. The Court granted the Attorney General's motion to strike Captain Oehm and his declaration because the opinions in the declaration went beyond the scope of the Respondent's expert designation, and Respondent waited until after Captain Oehm's deposition to draft the declaration, then shared it with Intervenors but not the Attorney General. The Court allowed Captain Oehm to testify as a fact witness regarding his experience as a law enforcement officer utilizing a driver's license during a car stop.

Captain Oehm said there is a federal database called "Triple I" that is a clearinghouse for criminal histories nationwide. Individual officers generally do not have access to the "Triple I" but can request information through a dispatcher so that a record can be made of the purpose for the request. Captain Oehm said for state database queries, he would usually give the dispatcher the "K number," or Kansas driver's license number, or if no license, the name and date of birth. Captain Oehm said he if ran a driver's license in his vehicle, he would just swipe it and all the data fields would automatically populate for a query to be sent to KDOR.

DR. BETH OLLER

Dr. Beth Oller has worked as a Kansas-licensed family practice physician for 15 years. She has been a staff physician at Rooks County Health Center since 2011, also teaching medical students who are assigned to her office for a rural health rotation. She testified that Rooks County has a population of less than 5,000 people. Dr. Oller testified that she has approximately 1,000 active patients. Dr. Oller said that during her career she has treated approximately 100 transgender patients. She said she has approximately 25 active patients who are transgender. She

said she considers transgender to mean "someone whose deeply felt inherent sense of their gender does not match or is incongruent with their sex assigned at birth."

Dr. Oller said she learned about providing psychiatric care as part of her standard residency training while in medical school. She said it is important to be able to provide some level of psychiatric care to her rural patients because there are no psychiatrists in her county or nearby. She said she diagnoses mental health conditions in her practice, including gender dysphoria. She said she has read articles on gender dysphoria and is a member of organizations that focus on education and research on the topic. She advocates for state and federal policies involving health care. She testified against SB 180 before the Kansas Legislature.

The Attorney General filed a motion to strike Dr. Oller as an expert witness according to deadlines fixed well in advance of the temporary injunction hearing. The matter was fully briefed by all parties. The parties agreed that the Court should rule on this motion, among numerous others like it, the morning of the temporary injunction hearing without further argument by the parties. The Court granted the motion to strike Dr. Oller as an expert witness because her purported expert testimony did not meet the standard set forth in K.S.A. 60-456(b) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-93 (1993). However, the Court allowed Dr. Oller to testify as a fact witness regarding her personal experience treating transgender patients.

Dr. Oller testified that, in addition to making a gender dysphoria diagnosis, she treats transgender patients for routine health issues. She said "[s]ometimes it is just helping patients go through the process of social affirmation." This includes providing them the letters required to change the sex designation on their Kansas driver's licenses. She said she has observed that her patients suffer fear and hypervigilance if they do not have the desired sex designation on their

driver's license. She said all her transgender patients have been diagnosed with anxiety or depression, and she has seen it improve when they get a driver's license with the desired sex designation.

ADAM KELLOGG

Adam Kellogg is a 20-year-old college student. Adam was born in Illinois and moved with his family to Kansas in 2008. The sex designation on Adam's birth certificate was female. In seventh grade, Adam decided to live as a male. Adam soon thereafter took a series of steps associated with this decision, including medical intervention. At 14, he changed the name on his birth certificate, social security card and learner's permit. In 2021, he changed the sex designation on his birth certificate, social security file, and driver's license to male. Adam's current Kansas driver's license expires in June 2024.

Adam was diagnosed with gender dysphoria in his early teens. Adam described gender dysphoria as "an aversion to being seen as something other than what I want to be seen as. So, for me, you know, I was assigned female at birth. And the fact that anyone saw me as female gave me the worst feelings about my body, about my self-image, about anything about myself."

Adam testified that he applied for a job at age 15. He showed his driver's license to the interviewer. The driver's license at the time indicated Adam's sex was female. The interviewer questioned whether Adam was the person pictured on the driver's license. Adam said it was him. Adam told the interviewer he was transgender. Nothing else was said, and Adam got the job. Adam had no problems while working for that employer.

Adam testified that, at age 16, he was pulled over by a police officer for running a stop sign. Adam said he was "hyperventilating" and "terrified that something is going to happen" because Adam handed his license to the officer, and it indicated Adam's sex was female. Adam

said nothing happened – the officer did not question his identity, and Adam did not get a ticket. Adam said since he had his driver's license changed to male, he is no longer concerned about showing his license to law enforcement.

Adam testified that once when he picked up a prescription, a controlled substance, the pharmacy clerk looked at Adam's license and questioned whether Adam was the person pictured on the driver's license. Adam said it was him. Adam told the clerk he was transgender. Nothing else was said, and Adam got the prescription. Adam testified that he has never been physically assaulted, verbally harassed, or fired from a job because he is transgender.

KATHRYN REDMAN

Kathryn Redman is 63 years old and retired. Kathryn was born in Ohio, lived in Kansas for a time, moved away, and ultimately returned in 2021. The sex designation on Kathryn's birth certificate was male. Kathryn was diagnosed with gender dysphoria in 1992, but did not begin living as a woman until 2018 or 2019. Kathryn thereafter sought medical intervention. Kathryn hired a law firm to help change her name and sex designation on legal documents. She changed her passport and Kansas driver's license, and her information on file with the Social Security Administration, Internal Revenue Service, her former employer, and the Department of Homeland Security. Kathryn's current Kansas driver's license lists her sex as female. The license expires in August 2027.

Kathryn testified that she lived in rural Oklahoma during her transition to living as a woman, where there were "a lot of very, very conservative people." She feared physical and verbal mistreatment there, so she moved to Kansas. Kathryn said she feels safer in Kansas and has not had those experiences here.

Kathryn said that before she changed her sex to female on her driver's license, she was subject to security pat-downs at the airport, including pat-downs of her genital area. Kathryn said this was humiliating. She said the pat-downs stopped after she changed the sex on her driver's license to female. Kathryn also testified that her insurance company initially resisted paying for her mammograms in 2019, 2020, and 2021, but did pay for them after she explained that she is transgender. Kathryn testified that she has never experienced physical harm or denial of goods, services, or privileges because she is transgender. She has not had a negative interaction with law enforcement because she is transgender.

JULIANA OPHELIA GONZALES-WAHL

Juliana Ophelia Gonzales-Wahl is 30 years old. Juliana was born in Colorado. She moved to Kansas when she was 18 to attend college. The sex designation on Juliana's birth certificate was male. In 2017, after graduating from college, Juliana decided to live as a female. She started dressing as a woman in public, and sought therapy and medical intervention. She legally changed her name in 2020 when she got married, and changed the sex designation on her Kansas driver's license from male to female in June 2023. Her license expires in April 2026.

Juliana said changing the sex designation on her driver's license made it "a little bit less awkward in social interactions," and made her feel "a lot safer." She said during her transition to female in 2018 she was working in rural Kansas and went to a hardware store to buy supplies. She said the male clerk was "staring at me weird," and when she gave him her driver's license indicating male, he stared at her with "abject disgust." He did not make any comments or stop the sale. Juliana testified to another incident in 2018 at a gas station where people were staring at her, she showed her driver's license to the clerk, and the clerk whispered that she should "hurry on." She said in 2018 she was stopped at a sobriety checkpoint while driving her partner's car.

She showed her driver's license. She passed field sobriety tests and a breathalyzer and was free to go. She said in 2019 she was subject to a pat-down of her genital area at an airport after showing her license. The security officer asked her out loud which gender of officer she would prefer to do the pat-down.

DOE 2[2]

Doe 2 is a 17-year-old high school student whose sex designation on his birth certificate is female. Doe 2's mother testified that when Doe 2 was 15 he told his parents that he was transgender and had felt that way for "quite a while." Doe 2 asked his parents to call him by a chosen male name. Doe 2 legally changed his name in August 2023. His driver's license now bears his changed name, but the sex designation is female. Doe 2's mother said if Doe 2 could change the sex designation on his driver's license he could "be authentic and be himself and live his life the way he wants to live."

CONCLUSIONS OF LAW

This matter is before the Court on the Attorney General's motion for a temporary injunction. "The movant has the burden of proof in an injunction action." *Schuck v. Rural Tel. Serv. Co.*, 286 Kan. 19, 24, 180 P.3d 571 (2008). The movant must demonstrate:

> "(1) The plaintiff has a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 619, 440 P.3d 461 (2019).

[2]This Court granted Doe 2's motion to proceed anonymously as agreed by the parties. Doe 2 is a minor and his mother testified on his behalf at the hearing. Doe 1, an Intervenor who was also allowed to proceed anonymously, withdrew as a party prior to testifying and was dismissed from the case. This Court will not consider any testimony or documentary evidence from Doe 1 as part of this lawsuit.

I. WHETHER THE ATTORNEY GENERAL, ON BEHALF OF THE STATE OF KANSAS, HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

The Attorney General asserts that the plain language of K.S.A. 77-207 requires KDOR to indicate an individual's biological sex, either male or female, at birth on driver's licenses and maintain the same information in the KDOR database. KDOR and Intervenors argue that the statute does not apply to state-issued driver's licenses, or in the alternative, it is ambiguous. Intervenors posit that the Attorney General's interpretation of the statute would result in constitutional violations and thus should be avoided in favor of the interpretation advocated by KDOR and Intervenors.

K.S.A. 77-207 APPLIES TO DRIVER'S LICENSES AND CORRESPONDING INFORMATION IN KDOR'S DRIVER'S LICENSE DATABASE.

The Attorney General asserts that K.S.A. 77-207 applies to driver's licenses and corresponding information in KDOR's driver's license database. Whether K.S.A. 77-207 applies to driver's licenses and the corresponding information in KDOR's driver's license database is a matter of statutory interpretation. This is a question of law for the Court.

> "The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words." *Johnson v. U.S. Food Serv.,* 312 Kan. 597, 600–01, 478 P.3d 776 (2021) (internal citations omitted).

KDOR and Intervenors argue that the statute does not apply to driver's licenses and the corresponding information in the KDOR driver's license database, or at the very least, the statute is unclear on this point. If the statute is ambiguous, they argue, the Court should apply canons of statutory construction in its interpretation. As part of this argument, Intervenors urge the Court to

apply the doctrine of constitutional avoidance to arrive at the interpretation desired by KDOR and Intervenors.

Canons of construction are unnecessary unless there is ambiguity in the language of the statute. *Johnson,* 312 Kan. at 601. The doctrine of constitutional avoidance is a rule of statutory construction. *State v. Clark,* 313 Kan. 556, 577, 486 P.3d 591 (2021). Indeed, courts "cannot invoke this rule to impose an interpretation that changes the meaning of unambiguous language or conflicts with clear legislative intent." *Johnson,* 312 Kan. at 603.

THE PLAIN LANGUAGE OF K.S.A. 77-207.

K.S.A. 77-207(a) states: "Notwithstanding any provision of state law to the contrary, with respect to the application of an individual's biological sex pursuant to *any state law* or rules and regulations," an individual's sex means "biological sex, either male or female, at birth," and defines male and female. (Emphasis added.) K.S.A. 77-207(c) says "any state agency, department or office . . . that collects vital statistics for the purpose of gathering accurate . . . data shall identify each individual who is part of the collected data set as either male or female at birth."

The Kansas driver's license has various identifiers on the face of the card. One of these is "sex." There is a corresponding field in the KDOR database to reflect the information found under the category "sex" on the license. In the KDOR database this category is labeled "gender," but the information recorded there is taken from and is the same as the sex designation on the license. KDOR is a state agency that collects information regarding the sex of a driver's license applicant or license holder. Selk, the Driver Services Manager for KDOR, testified that a person's sex designation is a "vital statistic."[3] Thus, the plain language of K.S.A. 77-207 applies

[3]This is consistent with the statutory definition of "vital statistics" in K.S.A. 65-2401(a) to include: "the registration, preparation, transcription, collection, compilation, and preservation of data pertaining to birth, adoption,

to require the sex designation on driver's licenses and the corresponding information in KDOR's driver's license database to identify the licensee's biological sex as male or female at birth.

K.S.A. 77-207 IS NOT AMBIGUOUS.

KDOR and Intervenors attempt to create ambiguity in K.S.A. 77-207 by reference to other statutes. KDOR argues that K.S.A. 77-207 cannot be applied to driver's licenses because it addresses "sex" while the driver's license statutes speak in terms of "gender." K.S.A. 8-240(c) says that a driver's license application must state, among other things, the applicant's "gender." K.S.A. 8-243(a) says that a driver's license must indicate, among other things, the licensee's "gender." Yet KDOR's Selk testified that the face of the driver's license indicates "sex," not "gender." And the information recorded under "sex" on the driver's license is likewise recorded in the KDOR database under the heading "gender." This suggests that "sex" and "gender" are, at least in practice, interchangeable in the context of driver's license statutes.

Intervenors theorize that the Kansas Legislature purposely changed "sex" to "gender" in one driver's license statute in 2007, and this signals its recognition of the two as completely separate concepts. All parties to the instant action agree that the change to "gender" in K.S.A. 8-240(c) was made by the Kansas Legislature in 2007 via Senate Bill 9 ("SB 9"), 2007 Kansas Laws Ch. 160, §5, part of a comprehensive effort to align with the language and requirements of the federal REAL ID Act of 2005 (Pub. L. No. 109-13, div. B, Title II, §202).

The REAL ID Act was designed to set certain standards for identification documents, including those issued by the states. It requires a minimum of nine pieces of information and features to be included on a state driver's license. These include full legal name; date of birth;

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legitimation, death, stillbirth, marriage, divorce, annulment of marriage, induced termination of pregnancy, and data incidental thereto." "Sex" is a piece of data required to be collected and preserved incidental to the preparation of a birth certificate, thus it is a "vital statistic."

"gender"; a driver's license number; "address of principal residence"; cardholder signature; "[p]hysical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes"; and "common machine-readable technology with defined minimum data elements." REAL ID Act of 2005 (Pub. L. No. 109-13, div. B, Title II, §202(b)). SB 9 made changes to existing statutes and adopted new ones to conform with the Act. Among other things, it amended multiple subsections of K.S.A. 8-240. In subsection (c), it amended then-existing requirements for what information must be included in a driver's license application, changing "name" to "full legal name," "sex" to "gender," and "residence address" to "address of principal residence," all to mirror the language of the REAL ID Act. SB 9 also amended multiple subsections of K.S.A. 8-243. In subsection (a), it amended then-existing requirements for what information must appear on the face of a driver's license, changing "name" to "full legal name," "residence address" to "address of principal residence," and adding "gender."

A reading of the provisions of SB 9 does not suggest that changing "sex" to "gender" in K.S.A. 8-240(c) was anything other than an effort to true up existing statutory language with the REAL ID Act while making more substantive changes elsewhere, such as requiring licensees to submit to "mandatory facial image capture," K.S.A. 8-240(h); requiring proof of citizenship status to obtain a license, K.S.A. 8-240(b)(2); and implementing tamper-proof security and machine-readable technology on the license itself, K.S.A. 8-243(a). SB 9 was not, as Intervenors suggest, a demonstration that the Kansas Legislature recognized some qualitative difference between the terms "sex" and "gender" and changed its mind about which one it wanted included in a driver's license application or displayed on the license itself.

Finally, the Kansas Legislature did not make exceptions or otherwise narrow the application of K.S.A. 77-207 by its plain language. Instead, it made clear that there are no exceptions, and the statute applies "[n]otwithstanding any provision of state law to the contrary," including the driver's license statutes, even if they were somehow "to the contrary" of K.S.A. 77-207, which they are not.

The language of K.S.A. 77-207 is clear. Where the statute's language is clear, there is no need for the Court to apply canons of statutory construction. Indeed, the "statutory interpretation analysis could end here." *Bruce v. Kelly,* 316 Kan. 218, 232, 514 P.3d 1007 (2022). It is worth noting, though, that even if the statute was ambiguous, the doctrine of constitutional avoidance – a canon of statutory construction - would not apply.

EVEN IF THE STATUTE WAS AMBIGUOUS, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE WOULD NOT APPLY.

K.S.A. 77-207 is not ambiguous. But even if it was, the doctrine of constitutional avoidance would not apply. The doctrine of constitutional avoidance has been a hot topic in Kansas appellate decisions within the last decade. Its application can be described as follows: if the statute is ambiguous, and there are at least two different plausible interpretations, and one interpretation is constitutional and the other is not, the court should adopt the constitutional interpretation. See *Frost v. Kansas Dep't for Child. & Fams.,* 59 Kan. App. 2d 404, 413, 483 P.3d 1058 (2021), citing Eskridge, *Interpreting Law: A Primer on How to Read Statutes and the Constitution,* 310 (2016).

Intervenors assert that, if the statute was construed to be ambiguous, there are two possible interpretations of it: 1) the statute requires sex at birth to be recorded on driver's licenses and in the KDOR database, and this violates the Kansas Constitution; or 2) the statute does not require sex at birth to be recorded on driver's licenses and in the KDOR database,

which is constitutional. Thus, Intervenors urge that under the doctrine of constitutional avoidance, this Court must adopt the second interpretation – that the statute does not require sex at birth to be recorded on driver's licenses and in the KDOR database.

The crux of Intervenors' constitutional argument is that requiring KDOR to display a licensee's sex at birth on a driver's license and in the KDOR database violates Section 1 of the Kansas Constitution Bill of Rights. Section 1 says: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."

Section 1 "acknowledges rights that are distinct from and broader than the United States Constitution and . . . our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards." *Hodes,* 309 Kan. at 624. The Kansas Supreme Court, in the context of abortion, said these "broader" rights include a "right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." *Id.* at 646. "This right allows Kansans to make their own decisions regarding their bodies, their health, their family formation, and their family life," specifically including "a woman's right to make decisions about whether she will continue a pregnancy." *Id*. at 660.

The Attorney General asserts the historical truism that statutes are presumed constitutional. "But in *Hodes,* a majority of the court rejected this presumption of constitutionality when the interests protected by the Kansas Constitution are deemed fundamental interests." *State v. Carr,* 314 Kan. 615, 627, 502 P.3d 546 (2022), *cert. denied,* 143 S. Ct. 581 (2023) (internal quotations and citations omitted). This includes claims implicating Section 1 of the Kansas Constitution Bill of Rights. See *Id.*

Intervenors claim that the plain language of K.S.A. 77-207 violates three rights protected by Section 1: 1) personal autonomy; 2) informational privacy; and 3) equal protection of the law. First, Intervenors argue that K.S.A. 77-207 deprives them of personal autonomy under Section 1 because it would force them to carry a driver's license indicating a sex at birth that contradicts their expressed gender. Intervenors assert that this amounts to a forced "outing" of a transgender person which exposes that person to psychological and physical harm from others. *Hodes* defined personal autonomy in terms of "the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." Information recorded on a driver's license does not interfere with transgender persons' ability to control their own bodies or assert bodily integrity or self-determination. It does not prevent them from "mak[ing] their own decisions regarding their bodies, their health, their family formation, and their family life."

To apply *Hodes* to K.S.A. 77-207 here would be an unreasonable stretch. *Hodes* said Kansans have the right to control their own bodies. It did not say Kansans have a fundamental state constitutional right to control what information is displayed on a state-issued driver's license. And the Intervenors' testimony at the hearing was that producing a driver's license indicating a sex different than their expressed gender did not result in physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement. Rather, Intervenors testified about feeling embarrassed, humiliated, or unsafe if someone gave them a puzzled look, hesitated, or questioned their identity when looking at their driver's license. They testified to the discomfort of airport security pat downs that are a universal feature of modern travel. K.S.A. 77-207 does not violate any right to personal autonomy under Section 1.

Intervenors next argue that K.S.A. 77-207 intrudes on their right to informational privacy because it potentially "outs" them as transgender when someone else sees their driver's license. But Kansas courts have not recognized a right to informational privacy under Section 1 of the Kansas Constitution Bill of Rights. Intervenors fail to persuade this Court to do so here. The argument fails.

Finally, Intervenors assert that K.S.A. 77-207 deprives them of equal protection of the law under Section 1. There is an equal protection component in Section 2 as well, which says in pertinent part: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kansas courts have differentiated between the two sections by reasoning that Section 1 addresses "individual rights" while Section 2 addresses political matters. *Rivera v. Schwab,* 315 Kan. 877, 894, 512 P.3d 168 (2022). The Kansas Supreme Court has held that *Hodes* does not change the historical equal protection analysis, meaning that the equal protection guarantees found in the Kansas Constitution are coextensive with those described in the Fourteenth Amendment to the federal constitution. *Id.*

Equal protection guarantees are "essentially a direction that similarly situated people be treated alike." *State v. Little,* 58 Kan. App. 2d 278, 279, 469 P.3d 79 (2020). The first step of the analysis is to "determine the nature of the statutory classifications and examine whether these classifications result in disparate treatment of arguably indistinguishable classes of individuals." *Villa v. Kansas Health Pol'y Auth.*, 296 Kan. 315, 324, 291 P.3d 1056 (2013). If there is no classification or disparate treatment, there is no equal protection violation. If those elements are met, the next step is to determine the level of scrutiny to be applied to the statute and apply it. *Id.*

K.S.A. 77-207 does not create a classification. Any state agency that collects vital statistics is directed to identify every individual by "biological sex, either male or female, at birth." K.S.A. 77-207(c). KDOR collects information to display under the heading "sex" on a driver's license. Sex is a vital statistic. The statute requires KDOR to identify each person who seeks a driver's license by his or her sex at birth, male or female. There is no classification based on sex or transgender status or any other factor. The rules are the same for identifying each person who seeks a driver's license. Similarly situated people are not treated differently under the statute, thus there is no equal protection violation.

Intervenors point to *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005). There, the Kansas Supreme Court held that the "Romeo and Juliet" law violated equal protection guarantees under the federal and state constitutions because it resulted in lesser penalties for certain sexual conduct between opposite-sex teenagers, but not for same-sex teenagers. Intervenors claim this is "somewhat analogous" to the instant situation involving driver's licenses, but it is not. There is no such classification here, and no disparate criminal penalties for the same conduct depending on whether it occurred between same-sex or opposite-sex partners.

Absent the required classification, there is no equal protection violation, and no need to discuss level of scrutiny or its application.

In sum, the language of the statute is clear. K.S.A. 77-207 applies to require the sex designation on driver's licenses and the corresponding information in the KDOR database to identify the licensee's biological sex as male or female at birth. The statute is not ambiguous, so there is no reason to consider the doctrine of constitutional avoidance, and even so, it would not apply here because Intervenors have demonstrated no constitutional infirmity. The Attorney

General, on behalf of the State of Kansas, has shown a substantial likelihood of prevailing on the merits.

II. THERE IS A REASONABLE PROBABILITY THAT THE STATE OF KANSAS WILL SUFFER IRREPARABLE FUTURE INJURY WITHOUT A TEMPORARY INJUNCTION.

"[A] party seeking a temporary injunction need only show that there is a reasonable probability of irreparable future injury," and "demand[ing] proof of the *certainty* of irreparable harm rather than the mere probability of it" sets "too high a standard for parties seeking injunctions." *Board of Leavenworth County Com'rs v. Whitson*, 281 Kan. 678, 683-84, 132 P.3d 920 (2006) (internal quotes omitted and emphasis original); *Steffes v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843 (2007) (reaffirming *Whitson*).

The Attorney General describes the irreparable injury to the State of Kansas as two-fold. First, in the general sense, he asserts that there is irreparable injury inherent in a state agency's refusal to comply with a duly enacted state statute. Indeed, the Kansas Constitution dictates that the legislature makes the laws and the executive branch enforces them. Kan. Const. Art. II, §1, Art. I, §3. This is the basis for the Attorney General's request for relief in mandamus, which is designed to compel a public officer's performance of a specific legal duty. *See* K.S.A. 60-801.

Second, and more to the point of the instant case, the Attorney General asserts that a reasonable probability of irreparable injury will occur if KDOR is allowed to issue or change driver's licenses that do not display the holder's biological sex at birth pending a final decision on the merits. This is so because most driver's licenses are valid for six years. Once issued, they are out in circulation and would be difficult to retrieve for correction until they expire and must be renewed. And in the two months leading up to the filing of instant action, the number of applications to change the sex designation on a driver's license spiked sharply from just a few per month historically to 71 in May 2023 and 66 in June 2023.

The Attorney General points to a reasonable probability of irreparable injury to law enforcement because driver's licenses are routinely used to identify suspects, victims, wanted persons, missing persons, and others. Kansas criminal cases are replete with such references. See, e.g., *State v. Owens,* 2023 WL 404588, *2 (Kan.App. 2023) (unpublished) (police used driver's license to identify crash victim and used the address to locate his family to notify them of his death); *State v. Smith,* 59 Kan.App.2d 28, 37, 476 P.3d 847 (2020) (police used driver's license to identify woman in a medical emergency and to look up whether she had any specific medical conditions in order to help paramedics render aid); *State v. Manwarren,* 56 Kan.App.2d 939, 948, 440 P.3d 606 (2019) (with legal grounds to conduct investigatory detention, it is permissible for an officer to ask for a driver's license to identify the person and check for outstanding warrants); *State v. Jones*, 2010 WL 3732019, *2 (Kan.App. 2010) (unpublished) (police looked at driver's license of man found asleep in a running car to identify him before arresting him for DUI).

KDOR and Intervenors' insistence that there are other ways to identify a person without reference to biological sex at birth does not change this. Sheriff Hill testified that he relies on the sex designation on a driver's license to identify the subject of a stop and to check for "wants and warrants." He described a time when he arrested a transgender person who was trying to stab his landlord. The person told Sheriff Hill he was a man, but jail staff later indicated the person was a woman. The person showed no criminal history when run through a records check as a man, but the person's true criminal history appeared when run through a records check as a woman. Further, Newson testified that a person's sex designation is one item of information used to help determine where to hold or house an arrestee and assign personnel for strip searches.

For these reasons, the Attorney General has demonstrated that there is a reasonable probability of irreparable injury to the State of Kansas absent the temporary injunction.

III. THE STATE OF KANSAS LACKS AN ADEQUATE LEGAL REMEDY.

An injunction is an equitable remedy designed to prevent irreparable injury by prohibiting or commanding certain acts where no adequate legal remedy is available. *Bd. of Cnty. Com'rs of Reno Cnty. v. Asset Mgmt. & Mktg. L.L.C.*, 28 Kan. App. 2d 501, 506, 18 P.3d 286 (2001). There is no dispute that the State has no adequate legal remedy, such as calculable damages, as a means to enforce SB 180. KDOR suggests that the Attorney General could persuade the Kansas Legislature to support his interpretation of the law through a clarifying amendment to the statute, but this, by definition, is not a legal remedy. See Black's Law Dictionary (11th ed. 2019) (defining a legal remedy as one "historically available in a court of law"). The Attorney General has met the burden to prove this element.

IV. THE THREAT OF INJURY TO THE STATE OF KANSAS OUTWEIGHS ANY HARM THE INJUNCTION MAY CAUSE THE OPPOSING PARTY.

The Attorney General asserts that the threat of injury to the State of Kansas pending a final decision on the merits is that driver's licenses are issued for a period of six years and are difficult to take back or out of circulation once issued. Licenses are used by law enforcement to identify criminal suspects, crime victims, wanted persons, missing persons, and others. Compliance with stated legal requirements for identifying license holders is a public safety concern. Allowing KDOR to issue non-compliant driver's licenses pending a final decision on the merits is an immediate and irreparable injury. The immediacy is supported by information from KDOR that in the first six months of 2023 alone, there were 172 requests for "gender

reclassification" on driver's licenses.[4] Contrast this with approximately 350 such requests in the 11.5 years from May 2011 to the end of 2022.

This is weighed against the harm claimed by KDOR, which is the specter of lawsuits – pending a final decision on the merits - from transgender persons seeking a driver's license with a sex designation other than biological sex at birth. This is speculative at best, considering the procedural status of the instant lawsuit, and the fact that KDOR did not cite any such cases already on file. The Intervenors claim harm in that those who do not have a sex designation to match their expressed gender on their driver's license cannot change it pending a final decision on the merits of this case, and those seeking a license for the first time may not be able to obtain a sex designation to match their expressed gender. This scenario does not apply to three of the four Intervenors. Only Doe 2, a minor, does not have a license with the desired sex designation.

Further, Intervenors testified that producing a driver's license indicating a sex different than their expressed gender did not result in physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement. Rather, Intervenors testified about feeling embarrassed, humiliated, or unsafe. None testified to any actual threat to their personal safety; rather, some talked in general terms about hearing of harm that had come to unnamed others in unnamed places in unspecified situations. The threat of injury to the State of Kansas outweighs any harm the temporary injunction may cause KDOR or Intervenors.

V. THE INJUNCTION WILL NOT BE AGAINST THE PUBLIC INTEREST.

KDOR and Intervenors have little to say about the public interest, other than suggesting it is against the public's interest for the Court to enforce an unconstitutional law. But this Court has

[4]There were two requests in January 2023, four in February 2023, six in March 2023, 23 in April 2023, 71 in May 2023, and 66 in June 2023.

concluded that there is a substantial likelihood the Attorney General will prevail in his effort to enforce K.S.A. 77-207(a) and (c) in the context of driver's licenses and corresponding information in the KDOR database. A temporary injunction will not be against the public interest.

CONCLUSION

For the reasons set forth above, the Attorney General's request for a temporary injunction is granted on the terms previously set forth in this Court's temporary restraining order.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was electronically filed, providing notice to counsel of record.

/s Angela Cox
Administrative Assistant