ELECTRONICALLY FILED
2024 Apr 15 PM 1:58
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2023-CV-000422
PII COMPLIANT

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIV. 3

STATE OF KANSAS, ex rel. KRIS KOBACH, Attorney General, Petitioner, v. DAVID HARPER, Director of Vehicles, Department of Revenue, in his official capacity, and MARK BURGHART, Secretary of Revenue, in his official capacity, Respondents.	)	Case No. 2023-CV-000422

Pursuant to K.S.A. Chapter 60

RESPONSE BY RESPONDENTS HARPER AND BURGHART TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

COMES NOW the Respondents, David Harper, Director of Vehicles of the Kansas Department of Revenue, and Mark Burghart, Secretary of the Kansas Department of Revenue (hereinafter "KDR Respondents" or "Respondents"[1]), by and through their attorney, Jason A. Zavadil, and for their Response to the Petitioner's Motion for Summary Judgment and Memorandum in Support (hereinafter "MSJ"), state as follows:

[1] The Kansas Department of Revenue is generally referred to below as "KDR."

I. STATEMENT OF THE NATURE OF THE MATTER PRESENTED

The matter presently before the Court is the Petitioner's ill-timed MSJ (filed March 25, 2024), following the Court's (March 11) Memorandum Decision and Order on Motion for Temporary Injunction (hereinafter "Mem. Dec."). That MSJ was filed at a time at which Petitioner knew that both adverse parties had filed notices of appeal of that decision to the Kansas Court of Appeals (KDR Respondents on March 15, and Intervenors on March 11).

The current status of the case bears noting: the only substantive matters presented to the Court thus far have been the Petitioner's *ex parte* Temporary Restraining Order[2], and his July 7, 2023, Motion for Temporary Restraining Order; *see also* Transcript of Temporary Injunction Hearing at 451 (lines 15-21) (Court corrects counsel, and states that the hearing was "the temporary injunction hearing only"). These are the only two matters litigated to date, the only matters on which any discovery has been sought, and the only matters decided. As the Petitioner implicitly recognizes by the filing of his MSJ, the ultimate determination of his request for a (final) injunction and an order of mandamus, remain, and the undersigned does not see that there was any agreement that the entire case would be submitted at the January 10, 11, 2024, hearing. *See, e.g.*, Mem.

[2] As Respondents note in their additional issues below, this action is subject to the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.*, and thereunder, ex parte restraining orders are prohibited (unless permitted by a Kansas Supreme Court rule (and there is no such rule)). K.S.A. 77-616(f).

Dec. at 2 (Court states at hearing that it is ruling on motion for temporary injunction); at 30 (Court grants temporary injunction) (no mention of the mandamus relief also prayed for by Petitioner); no final judgment pursuant to K.S.A. 60-254 has been entered.

II. RESPONDENTS' RESPONSE TO PETITIONER'S STATEMENT OF THE FACTS.

The Petitioner has set out a statement of facts in his MSJ at 2-5 and Respondents respond thereto, pursuant to K.S.A. 60-256 and Kan. Sup. Ct. rule No. 141(b), and also include additional uncontroverted facts concerning which summary judgment should be denied pursuant to Kan. Sup. Ct. Rule no. 141(b)(1)(C), as follows:

1. Petitioner's paragraph 1 is admitted.

2. Petitioner's paragraph 2 is admitted.

3. Petitioner's paragraph 3 is admitted in part and denied in part. There was no testimony offered that KDR's driver's license information, including its databases, is a "collected data set," the term used in K.S.A. 2023 Supp. 77-207(c). And, there was no testimony offered that KDR's driver's license information, including its databases, are "vital statistics," the term used in K.S.A. 2023 Supp. 77-207(c).

4. Petitioner's paragraph 4 is denied because the witness did not definitively so testify in the transcript pages noted, nor do the references to the Court's decision definitively so state. Further, KDR also collects information concerning an applicant's gender. *E.g.*, TI TR at 96 (lines 14-16); at 97-98; at 99-108.

5. Petitioner's paragraph 5 denied. First, Petitioner refers to a Kansas Department of Health and Environment statute whose relevance here is doubtful. As to the reference to the testimony, Selk, a lay person, merely opined that, as a general matter sex is a vital statistic; he most assuredly did not opine as to the meaning of the term for purposes of K.S.A. 2023 Supp. 77-207 or that KDR collects such as a vital statistic. *See* Transcript of Temporary Injunction Hearing at 162 (lines 6-19).

In fact, the testimony of KDR's Kent Selk was that:

> [by KDR Chief Counsel Smith]:
>
> Q. Do you consider the documents or the driver's license database that you maintain to be a vital statistic?
>
> A. No.

Transcript of Temporary Injunction Hearing at 143 (lines 16-18).

> [by General Kobach]:
>
> Q. Earlier you were asked by opposing counsel whether something was a vital statistic and you gave an answer. Could you please define vital statistic?
>
> A. I don't have a definition for vital statistics.
>
> ….
>
> Q. And is a person's sex a vital statistic?
>
> A. I would say yes.

Transcript of Temporary Injunction Hearing at 162 (lines 6-19).

6. Petitioner's paragraph 6 is admitted.

7. Petitioner's paragraph 7 is admitted.

8. Petitioner's paragraph 8 is admitted.

9. Petitioner's paragraph 9 is admitted in part and denied in part. Respondents add that a driver's license credential is not intended to be a static monolith, but merely a snapshot of a moment in time which will necessarily vary over time. *See, e.g.,* Transcript of Temporary Injunction Hearing at 99 (lines 2-11) (a person's gender can change over time as reported to KDR) (testimony of Selk); at 133-34 (a driver's information changes over time, *e.g.,* photograph, address; KDR's "[p]rimary role is to give accurate information of the individual at the most current time that we have it, depending, obviously, you know, with the difference of the renewal cycles"; witness agrees that the "data fields are always changing"); at 145 (the only thing that doesn't change in the system is the driver's license number).

Further, while Kansas driver's licenses – until this case – display gender identity – the underlying database retains historical information on the applicant, including biological sex at birth. Transcript of Temporary Injunction Hearing at 131-32; at 136-37; at 140-41; at 140-41 (person can change their gender on their license or in the system, but KDR maintains a record of prior changes); at 141 (lines 10-12) (KDR's system keeps track of "changes in the person's history"); at 144-45 (testimony of Selk).

10. Petitioner's paragraph 10 is denied, the Motion to Dissolve does not so state at the cited page 6, the testimony cited does not so state at the pages indicated, nor does the Court's decision at the indicated page so indicate, so this paragraph is denied. Indeed, to the extent that the reference here is to *biological* sex, this whole case is about the difference between that and gender.

In fact, KDR's Kent Selk testified as follows:

[by General Kobach]:

> Q. Okay. Now I want to talk about one of the issues at the center of this case. Is it KDOR's position that there's a difference between the word sex and the word gender?
>
> A. Sex is indicated on the driver's license, actual card. So the card that you are presented or that you carry with you, it is -- I want to say -- I'm trying to say this correctly. That is part of the AAMVA card standard for all of the states to display. Sex is what they display.
>
> Gender -- I am not also an expert in this either. But gender is not in the same breath as sex. However, you're going to probably move to talk about if you're going to do a gender change, then there is a sex change on your driver's license card. I'm assuming that's where you're going with that. And I don't have an answer specifically to that. Other than I know that sex is the universal marker for driver's license cards per the AAMVA standard. Gender, as it speaks to an individual's gender, is seen as different to change the information.
>
> Q. So with respect to what KDOR puts on the card, are the words sex and gender used more or less interchangeably?
>
> A. They are not. Only sex is shown in the system and shown on the card.

Transcript of Temporary Injunction Hearing at 116-17.

11. Petitioner's paragraph 11 is admitted.

12. Petitioner's paragraph 12, is admitted, however, Kansas Attorney General Opinions are advisory merely.

13. Petitioner's paragraph 13 is admitted.

14. Petitioner's paragraph 14 is admitted.

III. RESPONDENTS' RESPONSE TO PETITIONER'S ARGUMENTS.

A. *Introduction*

The Petitioner has raised three (3) discrete issues why his MSJ lies and should be granted: 1. That Summary Judgment is appropriate at this juncture; 2. that "K.S.A. 77-207 Unambiguously Requires KDOR to List Biological Sex Rather than Gender Identity on Driver's Licenses"; and 3. The intervenor's "constitutional avoidance argument fails."[3]

These (first two) issues are without merit and the MSJ as such should be denied. In addition, although KDR Respondents have not moved for summary judgment, Kansas law is that where all the parties have been heard on an issue and the facts are not in controversy, the court may properly grant a summary judgment *against the movant*. *E.g.*,

[3] As KDR Respondents raised no constitutional argument in this case, this third point will not be argued.

Wilcox v. Wyandotte World-Wide, Inc., 208 Kan. 563, 572, 493 P.2d 251 (1972).[4] Respondents so request. Moreover, the KDR Respondents have also previously raised jurisdictional bars to the Petitioner's action and those are renewed here and discussed below, and are sufficient cause for the Court to deny the MSJ and ultimately, to dismiss this action.

B. Petitioner is not entitled to summary judgment.

KDR Respondents do not disagree with the bulk of what the Petitioner has alleged in this portion of his MSJ, and certainly agree that the matter presented to the Court, *i.e.* the meaning of K.S.A. 77-207, is a question of law. Otherwise, a bit more needs to be said.

Importantly, KDR Respondents (and Intervenors) have appealed this matter (*i.e.* the Court's grant of a temporary injunction) to the Kansas Court of Appeals, and did so "as a matter *of right*" as per K.S.A. 60-2102(a)(1), (2).[5] The entertaining of the instant

[4] "Under K.S.A. 60-256 a court may enter summary judgment in favor of the non-moving party on its own motion where there remains no genuine issue as to any material fact and on the evidentiary record judgment must be for one of the parties as a matter of law" (citing *Green v. Kaesler-Allen Lumber Co*., 197 Kan. 788, 420 P.2d 1019 (1966)).

[5] (a) *Appeal to court of appeals as matter of right.* … the appellate jurisdiction of the court of appeals may be invoked by appeal as a matter of right from:

(1) An order that discharges, vacates or modifies a provisional remedy.

motion at this point can only have the effect of *diluting* that right, if not downright eviscerating it, because if such an improper motion as this is granted, such will entirely moot the present rightful appeals which have been taken. It bears noting that the Petitioner is the master of his own case[6] and, rather than seeking judgment on the entire case at once, he has chosen to proceed piecemeal, taking up the limited resources of the parties and the Court (*i.e.* from restraining order, to temporary injunction, to merits).

Indeed, it readily appears that, when those appeals are docketed, this Court will lose all jurisdiction over this case. *E.g.*, *Matter of Robinson's Est.*, 232 Kan. 752, 754, 659 P.2d 172, 175 (1983) ("A trial court does not have jurisdiction to modify a judgment after it has been appealed and the appeal docketed at the appellate level.") (citing *Darnall v. Lowe,* 5 Kan. App. 2d 240, Syl. ¶ 8, 615 P.2d 786 (1980)).

Further, as noted, Revenue Respondents have raised several issues (discussed below) – all preserved in their (July 28, 2023) Answer – that are *jurisdictional* in nature,

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> (2) An order that grants, continues, modifies, refuses or dissolves an injunction, or an order that grants or refuses relief in the form of mandamus, quo warranto or habeas corpus. ….

KDR Respondents understand that K.S.A. 60-262 provides that the appeal of an interlocutory injunction (presumably meaning a temporary injunction), may be stayed by motion but is not automatically stayed. But that is a very good reason for this Court – or the Court of Appeals – to stay further proceedings.

[6] *See, e.g., Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1414 (9th Cir. 1990) ("The plaintiff is the 'master' of his complaint ...").

that is, they go to the Court's power to entertain this case at all, and as such, necessarily, to entertain the instant motion, indeed require that judgment should be granted in their favor. As noted herein, the Court must determine its own jurisdiction and if it finds it has none, in whole or in part, its only recourse is to dismiss the action.

1. Mandamus relief is not available here.

A brief point might be made here about the type of relief sought here, mandamus and injunction, and the difference between the two. Under Kansas law, the former looks forward, that is to compel action, and the latter looks backward, that is, to restrain action. *Collins v. York*, 175 Kan. 511, 511, 265 P.2d 313 (1954). Petitioner has had partial and now seeks full injunctive relief. His Petition's "Prayer for Relief" appears to seek mandamus relief in the form of an order to Respondents to "correct the data set it [Division of Vehicles] maintains under K.S.A. 8-249 or any other statute or regulation so that such records identify each individual therein as either male or female at birth …." This appears to be *forward*-looking relief, and as such, is subject to some procedural hurdles.

Importantly, mandamus relief does not lie if the obligation claimed to exist is not certain. "[M]andamus is not a common means of obtaining redress but is available only in rare cases and, as a last resort, for causes which are really extraordinary." *State v. Becker*, 264 Kan. 804, Syl. ¶ 2, 958 P.2d 627 (1998); *see also Willis v. Kansas Highway*

Patrol, 273 Kan. 123, 126, 127, 41 P.3d 824 (2002). Petitioner agrees. MSJ at 7 (mandamus lies only to compel clearly defined duty). For the many reasons shown in the briefing, it is not certain that K.S.A. 77-207 applies here, and this is no extraordinary case, and as such, mandamus does not lie.[7]

C. *K.S.A. 77-207 Does Not Unambiguously Requires KDOR to List Biological Sex Rather than Gender Identity on Driver's Licenses*.

1. K.S.A. 77-207 does not apply to driver's licenses.

KDR Respondents agree that K.S.A. 77-207 is unambiguous, but not in the sense that Petitioner thinks. Indeed, this statute is unambiguous in that it does *not* refer to or apply to drivers' licensing activities undertaken by Respondents or KDR. Alternatively, the statute is ambiguous whether it applies to Respondents at all and so must be held *not* to because it is Petitioner's burden to so prove (and persuade), and he has not done so.

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[7] Further, to gain mandamus relief, Petitioner must first exhaust administrative remedies, *Tri-County Public Airport Authority v. Morris County Bd. of County Com'rs*, 233 Kan. 960, 666 P.2d 698, 703 (1983), something he has neither alleged nor actually done (a point also discussed at length below).

In addition, mandamus does not lie where the proponent has a plain and adequate remedy at law, *Willis v. Kansas Highway Patrol*, 273 Kan. 123, 128, 41 P.3d 824 (2002), and as also discussed at length below, Petitioner has such a remedy in the form of an action under the KJRA which as there noted, he has not pursued.

Finally, mandamus relief does not lie for alleged *past violations*. *Stevens v. City of Hutchinson*, 11 Kan. App. 2d 290, 291, 726 P.2d 279 (1986). To the extent that the Petitioner seeks to compel KDR Defendants to correct records, such is for past conduct and therefore not actionable in mandamus.

2. Alternatively, K.S.A. 77-207(a) is wholly ambiguous whether it applies to Respondents.

Petitioner claims, and the Court found, that K.S.A. 77-207 is unambiguous. *E.g.*, MSJ at 7; Mem. Dec. at 19. KDR Respondents disagree. Rather, K.S.A. 77-207(a) is wholly ambiguous whether it applies to KDR Respondents and their driver's licensing activities. The Petitioner does not address this ambiguity in subsection(a) but the Court generally found it unambiguous. Mem. Dec. at 21 (first paragraph).

But, how can this statutory language be reasonably read: "with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations …." K.S.A. 77-207(a). Perhaps the Legislature meant – but did not state – the opposite, *i.e* "with respect to the application of any state law or rules and regulations to an individual's biological sex."[8] That is, in any attempted application of the Petitioner's thinking on this statute to the instant issues, it is the *application of this statute to such status*, and not – as the statute plainly, but confusingly states – the *application of such person's status to the law*. Indeed, the latter scenario is not how the law works – laws are applied to facts with certain consequences; the facts do not apply to the law. That is precisely what the Legislature has provided, but it is not the function or duty of the Court

[8] Or, perhaps, it meant something else entirely. But, "[a] court will not speculate on legislative intent and will not read the provision to add something not readily found in it." *Robinson v. City of Wichita Employees' Ret. Bd. of Trustees*, 291 Kan. 266, Syl. ¶ 6, 241 P.3d 15 (2010) (in pertinent part).

to rewrite a statute to add something which is not plainly found there.[9] Neither the Petitioner nor the Court address this precise defect in the language of 77-207.

In short, as the Petitioner is the party seeking affirmative relief in this action, he bears the burden of proof (and of persuasion), and failing to show the Court an unambiguous statute which applies to Respondents and their licensing activities, he has failed in that burden, and this MSJ should be denied, and, indeed, judgment rendered in their favor.

3. <u>The meaning and reach of collecting "vital statistics" does not apply to Respondents.</u>

The real "teeth" or enforcing language of K.S.A. 77-207 is in its last subsection:

> Any … any state agency, department or office …
> 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

[9] "We will not read or rewrite such a statute to add something not readily found within it." ***Martin v. Kansas Dept. of Revenue***, 285 Kan. 625, 629, 176 P.3d 938 (2008), *overruled on other grounds*, *City of Atwood v. Pianalto*, 301 Kan. 1008, 350 P.3d 1048 (2015).

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

K.S.A. 77-207(c) (reformatting supplied). There are several patent ambiguities in this provision and other problems which render it wholly inapplicable to Respondents, and the Court and the Petitioner both got this point wrong. MSJ at 8; Mem. Dec. at 18-19.

a. Witness Selk did not and could not testify that KDR collects "vital statistics."

Respondents do not collect "vital statistics." The Court in attempting to find meaning for the term "vital statistics" as used in subsection(c), relied on the lay testimony of Kent Selk that a person's sex designation is such a vital statistic, and analogized to the definition of the term in a Kansas Department of Health and Environment statute, K.S.A. 65-2401. Mem. Dec. at 18 (last paragraph) and n.3. The Petitioner also relies on Selk's testimony. MSJ at 8. Both of these conclusions are erroneous.

First, as noted above, Selk merely opined as a general proposition that sex is a vital statistic; he did not testify that KDR collects a person's sex or anything else as a vital statistic for purposes of K.S.A. 77-207(c), nor could he, as noted immediately below.

Second, the meaning of a statutory term, especially a term of art, is a *legal* determination and not proper fodder for a layperson's testimony.[10] It is one thing for a lay witness to testify as to facts or actions taken or things done, such as the collection of certain information, but it is quite another for that witness to opine that such information constitutes "vital statistics."

b. What are "vital statistics"?

Indeed, what are "vital statistics"? An on-line dictionary defines the term as "statistics relating to births, deaths, marriages, health, and disease …." Vital statistics Definition & Meaning - Merriam-Webster. That same dictionary defines the noun "statistics" as "a collection of quantitative data." Statistics Definition & Meaning - Merriam-Webster. It is a considerable stretch to conclude that KDR collects "quantitative data" on any of these topics in receiving applications for driver's licenses.

c. *The vital statistics at issue here must be collected for a particular purpose.*

[10] *See, e.g.*, *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 809-10, 975 P.2d 807 (998) ("the interpretation of a statute … is a question of law"; "It is the function of a court to interpret a statute to give it the effect intended by the legislature.") (internal quotes omitted); K.S.A. 60-419 (before opining, witness must have "personal knowledge thereof, or experience, training or education if such be required").

It is not just any "vital statistics" which are at issue in K.S.A. 77-207. Rather, the statute requires that such be collected for a particular purpose.[11] Absent making that determination, K.S.A. 77-207 becomes wholly inapplicable. Neither the Court nor the Petitioner dove into these murky waters.

The statutorily-required purposes

The first of these required purposes is for purposes of complying with anti-discrimination laws, and no one makes that claim.

The other statutorily-required purposes – *i.e.* "for the purpose of gathering accurate public health, crime, economic or other data …," also do not apply here although a more extended explanation is necessary. Some of these stated purposes may be readily discarded as irrelevant here, as Respondents do not collect driver's license information because such is "public health" information, or "crime" information, or "economic" information, the three (3) specific categories included.

"Public health" has been specifically defined *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 665, 308 P.2d 537, 548 (1957) ("The term 'public health' is not susceptible to accurate definition since it takes on new definitions when new conditions arise, but,

[11] "In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and *every part thereof*." *State v. Adee*, 241 Kan. 825, 829, 740 P.2d 611, 614 (1987) (emphasis supplied).

generally speaking, it means *the wholesome sanitary condition of the community at large*. 39 C.J.S., Health, § 1, p. 811.") (emphasis supplied). Such may be what KDHE or other agencies do but is certainly not what Respondents do. This term may clearly be distinguished from public *safety*, as to which the Respondents are clearly concerned.

"Public" information is required

It might also be that this statute's use of the general, prefatory term "public" modifies each of the terms which follow, which means that it covers "*public* health data," "*public* crime data," and "*public* economic data," and necessarily, it must also mean that the final category of "other data" must also be *public* data.[12] But such most assuredly does not apply to KDR's collection of data on drivers because much of that is simply not public because the law restricts its disclosure. *See, e.g.*, K.S.A. 74-2012(a), (b) (general rules on disclosure of Kansas driver's license information); 18 U.S.C. §§ 2721 *et seq*.

[12] This relevant rule of statutory construction was stated in *State v. Toliver*, 306 Kan. 146, Syl. ¶ 4, 392 P.3d 119 (2017) ("When a court construes language that involves all the nouns or verbs in a series and there is a straightforward, parallel construction, a prepositive or postpositive modifier normally applies to the entire series unless context indicates a different construction or the resulting construction would be irrational or absurd.").

In context here, the term "public" is the "prepositive modifier." *See, e.g.*, PREPOSITIVE Definition & Meaning | Dictionary.com ("*adjective* (of a word) placed before another word to modify it or to show its relation to other parts of the sentence. In *red book, red* is a prepositive adjective. *John's* in *John's book* is a prepositive genitive.").

(federal Driver's License Privacy Protection Act which overrides any contrary Kansas law).

Collecting "other data" just to be collecting it

The final or fourth, "catch-all" category is "other data" and KDR certainly collects that – as a very general proposition – in recording a person's gender. But there is a very significant problem here: this provision by its terms covers the "collect[ing of] vital statistics … for the purpose of gathering accurate … other data," in short, as read, this provision effectively says that it is the collection of such other data *just to be collecting it*. But it is undoubtedly not the case that State agencies have the time, money, manpower, or other resources to just be collecting information, accurate or not, because it is out there, and KDR certainly does not do so.

What is this "other data"?

But just what can this term – "*other* data" – mean? As an inarguably imprecise term, resort to rules of statutory construction is necessary to find its meaning. Two are particularly apropos here given that the statute includes a listing of precise items followed by a final imprecise one.

The first such rule of statutory construction is that a statutory term is known by its associates,[13] and the second, allied rule is that where there is an enumeration of specific things followed by a general thing, the latter must be interpreted in light of those specific things.[14] Both of these rules dictate that the imprecise term – "other data" – must be interpreted in light of the other terms, *i.e. health* information, *crime* information, and *economic* information.

But the recording of gender information is plainly not even closely connected to these specific types of information, and neither the Court nor the Petitioner attempted to make that connection.

d. What is a "collected data set"?

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[13] *Farm Bureau Mutual Ins. Co. v. Carr*, 215 Kan. 591, Syl. ¶ 3, 528 P.2d 134 (1974) ("The ancient and well known maxim noscitur a sociis, literally "it is known from its associates," is a common sense aid to the construction of doubtful language. Its effect is that the meaning of a word or phrase which may be obscure or doubtful when considered in isolation may be clarified or ascertained by reference to those words or phrases with which it is associated. It simply means that, taken in context, a word may have a broader or narrower meaning than it might have if used alone.").

[14] *Trego WaKeeney State Bank v. Maier*, 214 Kan. 169, Syl. ¶ 4, 519 P.2d 743 (1974) ("The rule of *ejusdem generis* is a well known maxim of construction to aid in ascertaining the meaning of a statute or other written instrument which is ambiguous. Under the maxim, where enumeration of specific things is followed by a more general word or phrase, such general word or phrase is held to refer to things of the same kind, or things that fall within the classification of the specific terms.").

In addition, such information must be part of a "collected data set." K.S.A. 77-207(c). Again, neither the Petitioner nor the Court attempted to parse this term. The stilted language of this term certainly suggests that it is a term of art, but what that term was intended by the Kansas Legislature to mean is anyone's guess.

The Merriam-Webster on-line dictionary states that a "data set" or "dataset" means " a collection of data taken from a single source or intended for a single project." *See* Dataset Definition & Meaning - Merriam-Webster. Driver's license information ultimately intended or actually used for a driver's license is none of that because there is no single source or project involved; at the least, this statutory term is so ambiguous as to its meaning that it cannot apply at all.

Importantly, as noted above, the hearing testimony was that Kansas driver's license information may fluctuate over time; a person's weight and height can change, addresses can change, restrictions can change, names can change, and gender identity can, of course, change. In short, such is not a static set of information but rather something which clearly and necessarily evolves over time, an evolving document intended to present a picture at a particular moment in time. It is wholly ambiguous and entirely speculative whether the Legislature in fact intended this term to apply to such driver's license information.

4. K.S.A. 8-243 and 8-240 are relevant here.

The Petitioner argues and the Court determined that neither K.S.A. 8-243(a) (issued licenses) nor 8-240(c) (license applications) – both using and adding the term gender – are relevant in the mix, arguing that the Legislative changes to include such term made in 2007 were merely cosmetic changes to line up with the federal REAL ID Act. MSJ at 8; Mem. Dec. at 19-20.[15]

But even so, the end point reached by this process – *i.e.* that KDR was merely "truing up" with federal requirements – is that the relevant description in the latter is *gender*, not *sex*. And no one has argued that the federal government for REAL ID purposes equates the term gender with biological sex, as does K.S.A. 77-207.[16]

Moreover, this interpretation of the 2007 amendments wholly dilutes another longstanding Kansas rule of statutory construction that a change in statutory language typically means that the Legislature intended a change in the law, or at its weakest, that

[15] K.S.A. 8-240 changed "sex" to "gender" and 8-243 added "gender."

[16] *Cf.* Florida's rule keeping trans people from updating licenses may violate the Real ID Act (19thnews.org) (noting that Florida defines gender as "biological sex," and that "These [Florida-issued REAL ID's], beholden to federal rules that allow gender marker changes, may reflect a gender identity that Florida has now elected to ignore when it issues replacement licenses.").

the change was intended to "clarify the ambiguities in the statute."[17] And even were the amendment so intended, that proves nothing that aids Petitioner's case.

a. Other Kansas statutes' uses of the terms gender and sex.

In addition, the term "gender" was used in other driver's license statutes long prior to or long after 2007:

> 1. K.S.A. 8-247(g)(1)(D), (g)(3)), relating to organ donation, refers to the forwarding of the applicant's personal information on the organ donation registry list, refers to *gender* and was added in 2002;
>
> 2. K.S.A. 8-1325(b)(4), (b)(6), relating to organ donation, refers to the forwarding of the ID card applicant's personal information on the organ donation registry list, refers to *gender* and was added in 2002;
>
> 3. K.S.A. 8-1,180(e), dealing with ID cards, *etc*. for persons with cognition difficulties, refers to *gender*, and was added in 2017

And so, the Legislature must have recognized the utility of the term gender separate and apart from the REAL ID law, and separate and apart from the term sex.

Other driver's license statutes refer to "sex" as opposed to gender, a point not factored in by either the Petitioner or the Court. K.S.A. 8-1,125(e) refers to the recording of the "sex" of a person to whom an identification card is issued. That requirement was

[17] *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, Syl. ¶ 5, 69 P.3d 1087 (2003) ("Although courts ordinarily presume that by changing the language of a statute the legislature intended to change its effect, this presumption may be strong or weak, according to the circumstances, and may be wanting altogether in a particular case. When a statute is ambiguous, amendment of the statute may indicate a legislative purpose to clarify the ambiguities in the statute rather than to change the law.").

added in 1999, Kan. Sess. L. chapt. 68, section 2. In addition, K.S.A. 8-1001(k) requires that a law enforcement officer collecting a urine sample be of the same "sex" as the arrested person. That requirement was added at some point prior to 1991. Perhaps these statutory references were simply not updated to reflect the 2007 changes to "gender" in the more comprehensive provisions in K.S.A. 8-240, -243.

But if even if that is not the case, the use of different terms in different statutes, certainly suggests that the Legislature intended a *different meaning* between the two. And that means that the term "gender" in K.S.A. 8-243 and -240 (and elsewhere) was intended to have a meaning different than "sex" as used in K.S.A. 8-1,125(e) and K.S.A. 8-1001(k),[18] and, indeed, in K.S.A. 77-207.

b. Newer statutes v. older statutes

The Petitioner also predictably argues that K.S.A. 77-207 is the newer of the several statutes and therefore under Kansas rules of construction, "[o]lder statutes are subordinate to new enactments, as the newer statutes are the later expression of the legislative intent and so will control if there is a possible conflict between the two." *State*

[18] *See, e.g., Boatright v. Kansas Racing Com'n*, 251 Kan. 240, 245-46, 834 P.2d 368 (1992) ("[i]t is presumed … that the legislature intended a different meaning when it used different language in the same connection in different parts of a statute.") (citing *Rogers v. Shanahan*, 221 Kan. 221, 223-24, 565 P.2d 1384 (1976).

ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas, 264 Kan. 293, Syl. ¶ 8, 955 P.2d 1136 (1998). MSJ at 9-10.

However, it is important to add into the mix that both K.S.A. 8-240 and 8-243 have been amended numerous times since 2007[19] –K.S.A. 77-207 not once – and as such, that signals legislative approval of the use of the term "gender" – as opposed to sex or some variant thereof – as used in both of those statutes. The Petitioner and the Court overlook this proposition. *Cf. Zion Lutheran Church v. Comm's on Civil Rights,* 16 Kan. App. 2d 237, 242, 821 P.2d 334 (1991) (that Legislature amends statute several times following a court decision with no change indicates "legislative satisfaction" with that decision).

In addition, the cited rule obtains only where there is a *conflict* between the two competing (sets of) statutes, and as Respondents have posited on multiple bases herein,

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[19] As to K.S.A. 8-240, *see* Laws 2012, ch. 15, § 1, eff. July 1, 2012; Laws 2015, ch. 47, § 5, eff. July 1, 2015; Laws 2016, ch. 73, § 1, eff. July 1, 2016; Laws 2018, ch. 53, § 1, eff. July 1, 2018; Laws 2018, ch. 102, § 1, eff. July 1, 2018; Laws 2021, ch. 89, § 1, eff. May 6, 2021. Such includes the 2016, 2018 (second one), and 2021 amendments which specifically amended subsection(c) wherein is the reference to gender.

And as to K.S.A. 8-243, *see* Laws 2008, ch. 138, § 1, eff. Jan. 1, 2009; Laws 2013, ch. 74, § 1, eff. July 1, 2014; Laws 2016, ch. 73, § 2, eff. July 1, 2016; Laws 2017, ch. 26, § 2, eff. July 1, 2017; Laws 2018, ch. 31, § 2, eff. July 1, 2018. Such includes the 2008 and 2016 amendments which specifically amended subsection(a) wherein is the reference to gender.

there is no conflict between these statutes, because K.S.A. 77-207 simply does not apply to Respondent's licensing statutes.

c. More general statute prevails over more specific

The Petitioner also argues that the Legislature intended the more general statute to prevail over the more specific, echoing the district court's conclusion. MSJ at 10; Mem. Dec. at 21 (Court theorizes that K.S.A. 77-207 contains "no exceptions, and the statute applies [n]otwithstanding any provision of state law to the contrary," including the driver's license statutes …").

But rather than this case being about a search for exceptions to what is said to be a general rule, the case is about whether K.S.A. 77-207 applies at all, which it clearly does not, for the reasons stated by Respondents herein.[20]

5. KDR's alleged practice is not relevant to the issue.

The Petitioner urges and the Court has held that how KDR interprets Kansas law, including that the face of the driver's license indicates "sex," not "gender," and that the information recorded on that driver's license is recorded in KDR's database under

[20] In addition, all of Petitioner's arguments, insofar as they suggest that K.S.A. 77-207 overrides K.S.A. 8-243, -240, violate another rule of statutory construction which is that the "[r]epeal of [a] statute by implication is not favored." *Wolff v. Rife*, 140 Kan. 584, Syl. ¶ 1, 38 P.2d 102, 102 (1934). Such result would obtain "only when [the] later enactment is so repugnant to [the] provisions of [the] first act that both cannot be given force." *Id.* Syl. ¶ 2. But as Respondents have shown herein, there is simply no such repugnancy here.

"gender," are relevant concerns in finding the meaning of K.S.A. 77-207. MSJ at 8-9; Mem. Dec. at 19. But Kansas law, cited by neither, is that how an agency interprets its statutes is no longer to be given deference and determination of the issue is, rather, a legal determination for the Court.[21] In short, the Court makes that call, not Respondents. And it is illogical to conclude or to argue that KDR's (allegedly) getting this matter wrong supports that the Petitioner is right. Moreover, if the statute is plain and unambiguous, as the Petitioner urges and the Court has found, then resort to matters beyond that statutory language itself are wholly unnecessary.

6. Other issues

The Legislature (and the Petitioner) may have wished that the former had properly drafted K.S.A. 77-207 to provide what the Court has held but it did not and "the court cannot delete vital portions or supply vital omissions in a statute [and n]o matter what the legislature may have intended to do, if it did not in fact do so under any reasonable interpretation of the language used, the defect is one that the legislature alone can correct," *Kenyon v. Kansas Power & Light Co.*, 254 Kan. 287, Syl. ¶ 4, 864 P.2d 1161, 1162 (1993), nor does the Court have power to create the public policy of the state

[21] *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010) (construction of statute by Kansas Civil Service Board; "to the extent any statutory interpretation is required, our review is unlimited, with deference no longer being given to the agency's interpretation) (citing *Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs.*, 290 Kan. 446, Syl. ¶ 2, 228 P.3d 403 (2010)).

because such power resides in the Legislature, *Kansas Human Rights Com'n v. Topeka Golf Ass'n*, 18 Kan. App. 2d 581, Syl. ¶ 1, 856 P.2d 515 (1993).

In fact, the various definitions in K.S.A. 77-207 support Respondents' claim rather than the Petitioner's because, for example, where subsection (a)(1) refers to "[a]n individual's "sex" mean[ing] such individual's biological sex, either male or female, at birth …," the relevant driver's license statutes – K.S.A. 8-243, 8-240 – use the term "gender," as opposed to sex. This is a statutory directive to look to another statute's *use* of the term "sex," not another statute where a different term has allegedly been *interpreted* as referring to sex (*i.e.* "gender"). *E.g.*, *State v. Coley*, 236 Kan. 672, 675, 694 P.2d 479 (1985) ("It is presumed that the legislature, in amending a statute, acted with full knowledge and information as to the subject matter of the statute …."). As such, K.S.A. 77-207 has no relevance here at all.

A related point which goes to the alleged applicability of 77-207(a) to Kansas' driver's license information, is that its mooring point is *biological sex*, meaning *sex at birth*, terms or close variations thereof which appear in the statute at least five (5) times. *Id.* at (a); (a)(1); (a)(2); (a)(5); and (a)(6). But KDR's recording of a person's gender identity is obviously not that, a point to which doubtless even the Petitioner would accede, rendering the statute, certainly subsection(a), wholly inapplicable.

a. Respondent's practice of retaining historical information on driver's license holders is consistent with K.S.A. 77-207(c).

As Respondents have shown above, K.S.A. 77-207(a) is hopelessly confusing and therefore so ambiguous that it can have no application to Respondents here. But the real "teeth" of this statute, K.S.A. 77-207(c), deals only with the "*collect[ing* of] vital statistics," not their *display*, as on a driver's license credential. But it is clear that Respondents do collect information on applicants' biological sex at birth, even if, due to a subsequent documented gender change request, such is not what is recorded on the actual issued credential, *i.e.* the driver's license itself. The collection of such information is a positive legislative command, s*ee* K.S.A. 8-249[22], and KDR does so. And that is wholly consistent and harmonious with K.S.A. 77-207(c)[23], and no cause for the Petitioner's

[22] "(a) The division [of Vehicles] shall file every application for a driver's license received by it and *shall maintain suitable records* from which information showing the following may be obtained: (1) All applications denied and the reason for such denial; (2) all applications granted; (3) the name of every licensee whose driver's license has been suspended or revoked by the division and after each such name note the reasons for such action; and (4) all data fields printed on drivers' licenses and identification cards issued by the state" (emphasis supplied).

[23] *McGranahan v. McGough*, 249 Kan. 328, Syl. ¶ 1, 820 P.2d 403 (1991) ("The fundamental rule of statutory construction is that the purpose and intent of the legislature governs if the intent can be ascertained from the statute. In construing statutes, the legislative intention is determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. … To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so they are *consistent, harmonious, and sensible*.") (emphasis supplied).

concern here. And if this constitutes the "collected data set" referenced in the latter, it fully complies.

IV. ADDITIONAL ISSUES PRESENTED BY KDR RESPONDENTS

KDR Respondents have raised the following additional issues:

1. The district court has not resolved Respondents' quo warranto claim raising the issue whether the Kansas Attorney General's office has legal standing to bring the instant action;

2. The Court lacks jurisdiction over this matter due to Petitioner's failure to comply with the Kansas Judicial Review Act, K.S.A. 77-601 *et seq*.

KDR Respondents discuss these issues sequentially below:

A. *The district court has not resolved Respondents' quo warranto claim raising the issue whether the Kansas Attorney General's office has legal standing to bring the instant action*

A challenge to the adverse party's authority, including a party in the executive branch, to bring an action is properly questioned by quo warranto, and the Petitioner KSAG is part of that branch, *see e.g.*, *Sw. Bell Tel. Co. v. Miller*, 2 Kan. App. 2d 558, 561, 583 P.2d 1042, 1045 (1978) (referring to AG as being in executive branch).

KDR Respondents claimed in their answer that the Petitioner lacks legal standing to bring this action alleging that he can act *sui juris* only in certain limited circumstances, K.S.A. 75-702, including being required to do so by the Governor or the Legislature, and alluded to certain common law power to so act when doing so at the invitation of a

county or district attorney, *see State v. Abu-Isba*, 235 Kan. 851, 856–57, 685 P.2d 856, 862 (1984). And indeed, they counterclaimed in quo warranto seeking an explanation of such usurpation of power. This claim was never waived by Respondents. But there has been no decision on the point as yet. Clearly, if the Petitioner lacked standing to bring this action, then the instant motion does not lie, and judgment must be for KDR Respondents.

"Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Kansas Bldg. Indus. Workers Comp. Fund v. State,* 302 Kan. 656, SP 6, 359 P.3d 33, 37 (2015). "Standing is … a component of subject matter jurisdiction." *Id.* at 678 (citing *Gannon v. State,* 298 Kan. 1107, 1122, 319 P.3d 1196 (2014)).

"Subject matter jurisdiction is vested by statute and establishes the court's authority to hear and decide a particular type of action. Parties cannot confer subject matter jurisdiction by consent, waiver, or estoppel, nor can parties convey jurisdiction on a court by failing to object to its lack of jurisdiction." *Bruch v. Kansas Dept. of Revenue*, 282 Kan. 764, Syl. ¶ 1, 148 P.3d 538 (2006).

The Court has a duty to determine its jurisdiction, *e.g.*, *Little v. State*, 34 Kan. App. 2d 557, Syl. ¶ 11, 121 P.3d 990 (2005) ("Whether the parties raise the issue or not, it is the duty of a court on its own motion to determine whether it has subject matter jurisdiction. When the record discloses a lack of subject matter jurisdiction, it is the duty

of the court to dismiss the action."), and "[w]hen a court is without jurisdiction of the subject matter of an action, its authority in respect thereto extends no further than to dismiss the action," *Minter-Wilson Drilling Co., Inc. v. Randle*, 234 Kan. 624, Syl. ¶ 2, 675 P.2d 365 (1984) (citing *In re Miller*, 228 Kan. 606, Syl. ¶ 2, 620 P.2d 800 (1980); *see also* K.S.A. 60-212(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").

The Petitioner has claimed that he has common law powers to bring such actions,[24] but such a claim has already been rejected given Kansas law that "the Attorney General's powers are as broad as the common law *unless restricted or modified by statute*." *State v. Finch*, 128 Kan. 665, 280 P. 910 (1929) (emphasis supplied). That modification exists in K.S.A. 75-702. There has been no requirement of the Governor or the Legislature that the Petitioner bring this action, nor is there any evidence that the Shawnee County District Attorney has invited him to do, or acquiesced in his doing so. In short, the Petitioner lacked standing to bring this action when it was filed many months ago.[25] Absent standing to bring this action, the present motion should be denied, and this action dismissed.

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[24] Petition at 3, ¶ 4 ("The Attorney General has standing to bring this action in the name of the State of Kansas under the common law of this State.").

[25] Importantly, Kansas law provides other limitations on the power of the KSAG. In Kansas, the "[t]he supreme executive power of this state shall be vested in a governor,

B. The Court lacks jurisdiction over this matter due to Petitioner's failure to comply with the Kansas Judicial Review Act, K.S.A. 77-601 et seq.

As KDR Respondents detailed in their Answer, the Court lacks subject matter jurisdiction over the Petition because it plainly seeks review of agency action and therefore is subject to the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.* ("KJRA").[26]

"Agency action" is defined in the KJRA inter alia as: "an agency's performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise." K.S.A. 77-602(b)(3). "Agency" means a "state agency." *Id.* at (b). Respondents' recording of driver's license information clearly is covered.[27]

That the Petitioner seeks mandamus and injunctive relief does not take the action beyond the reach of the KJRA; if otherwise appropriate, he can have such relief but must

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who shall be responsible for the enforcement of the laws of this state." Kansas Const. Art. 1, section 3. No such supreme power is vested in the Kansas Attorney General, constitutionally or by statute. Kansas law has long been that "[t]he Attorney General is the state's chief law officer, *subject only to direction of the Governor* or either branch of the Legislature." *Finch*, 128 Kan. 665, Syl. ¶ 1 (emphasis supplied). And

[26] Respondents also preserved the point in their Motion to Dissolve Temporary Restraining Order at 14, ¶ 17.

[27] Official capacity suits, as here, are generally treated as suits against the entity – KDR here – itself. *E.g.*, *Swearingen v. Pleasanton Unified Sch. Dist. 344*, 641 F. Supp. 3d 1141, 1162 (D. Kan. 2022).

comply with the procedural requirements of the same. *E.g.*, *Midwest Crane and Rigging, Inc. v. Kansas Corp. Com'n*, 38 Kan. App. 2d 269, 163 P.3d 1244 (2007).

a. No KJRA petition for judicial review has been filed by the Petitioner

One of those requirements is that the Petitioner must in fact have filed a petition for judicial review of agency action. K.S.A. 77-610. However, the Petitioner has not filed such an action inter alia because there are no allegations as to the mailing address of the agency whose actions are at issue, K.S.A. 77-614; not all claims to entitlement to judicial review are alleged, *e.g.*, K.S.A. 77-614(b)(5), including for example that the Petitioner has exhausted all administrative remedies within the agency, K.S.A. 77-607(a)(2)). The failure to file such a petition for judicial review renders the court without subject matter jurisdiction over the same. *E.g.*, *Gen. Muscle v. Stotts*, No. 106,073, 2013 WL 1339868, at *3, (Kan. Ct. App. March 29, 2013) (unpubl., copy attached hereto)[28].

b. Petitioner's Petition does not allege entitlement to judicial review

[28] "We could end our opinion at this point because what we have said is sufficient to demonstrate that we lack subject-matter jurisdiction over the plaintiffs' petition. The Department of Revenue issued investigative subpoenas, which is an agency action. The KJRA provides the exclusive means to review agency action. The plaintiffs did not purport to file a KJRA petition, so we have no jurisdiction to review the Department's issuance of the subpoenas."

The KJRA contains certain requirements concerning entitlement to judicial review, including such jurisprudential matters as finality, timeliness, exhaustion, and standing. As to the latter, *see* K.S.A. 77-611. Unlike allegations as to the underlying merits of an action, which KDR Respondents concede that the Petition accomplishes, these wholly separate matters of entitlement to judicial review must be set forth in the petition for judicial review with "facts" so demonstrating. K.S.A. 77-614(b)(5). But as noted in the section next preceding this, the Petitioner alleged merely the conclusion that some unspecified common law allowed him to bring this action. *Such are not facts* and as such, the claim is wholly insufficient.

c. Petitioner's Petition does not allege exhaustion of administrative remedies

Exhaustion of administrative remedies is a "mandatory jurisdictional prerequisite." *Expert Environmental Control, Inc. v. Walker*, 13 Kan. App. 2d 56, 57, 761 P.2d 320 (1988) (agreeing with statement by district court). The failure to exhaust administrative remedies – without more – deprives the court of subject matter jurisdiction over the same. While it is clear that KDR has no power to decide questions concerning the constitutionality or, as here, the legality of a statute, it is also clear that the raising of such an issue does not excuse the petitioner's failure to exhaust. This precise point was decided in *State ex rel. Smith v. Miller*, 239 Kan. 187, 718 P.2d 1298 (1986), where the

Court explained that even constitutional issues must be raised during administrative proceedings:

> Appellant maintains that it has no adequate administrative remedy because the relief prayed for in its petition is beyond the scope of the authority of either the County Board of Equalization or State Board of Tax Appeals. *Linn Valley postulates that the doctrine that requires exhaustion of administrative remedies does not apply in this situation because such procedure would be clearly futile in that the BOTA does not have the authority to rule upon the constitutionality of statutes* or provide the relief sought by way of mandamus and quo warranto. We do not agree with appellant's arguments. A party aggrieved by an administrative ruling is not free to pick and choose a procedure in an action in the district court in order to avoid the necessity of pursuing his remedy through administrative channels. Since the adoption of the act for judicial review and civil enforcement of agency action (K.S.A. 77–601 *et seq.*), *it would appear that relief such as is sought here should be raised as new issues in the district court on appeal from the BOTA. See K.S.A. 77–617.*

239 Kan. at 190.[29]

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[29] To the extent that *Kansas Bldg. Indus. Workers Comp. Fund v. State,* 49 Kan. App. 2d 354, 310 P.3d 404 (2013), *aff'd,* 302 Kan. 656, 359 P.3d 33 (2015), is to the contrary, it is of no force given the controlling decision in *Smith*, in text above. Although the *Kansas Bldg. Indus*. decision in the Court of Appeals was affirmed, the exhaustion question was not therein considered by the Supreme Court and therefore it must be taken as a given that it was therefore decided by it.

In any event, the facts in *Kansas Bldg*. are distinguishable from those here because there, "the Plaintiffs are challenging the legislation which resulted in the increased fees and assessments." *Id*. at 381. By contrast, Petitioner here does not challenge legislation; indeed, he champions legislation (K.S.A. 77-207) but complains that Respondents have failed to follow it. Further, "[i]t is well settled in this state that when an issue requires interpretation of a statute administered by an agency …, exhaustion of administrative remedies is required." *Midwest Crane & Rigging, Inc. v. Kansas Corp. Comm'n*, 38 Kan. App. 2d 269, Syl. ¶ 1, 163 P.3d 1244 (2007).

Importantly, the failure to *allege* exhaustion justifies the court in concluding that no such exhaustion has taken place. *E.g.*, *Little v. State*, 34 Kan. App. 2d 557, 558, 121 P.3d 990 (2005), *rev. denied* (2006). Petitioner made no such allegation.

3. Additional points

KDR Respondents also respectfully incorporate all other arguments made by them in their previous briefing in this case.

Respectfully submitted,

/s/ Jason A. Zavadil

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APPENDIX:

1. Unpublished Kansas Court of Appeals decisions:

Gen. Muscle v. Stotts, No. 106,073, 2013 WL 1339868, at *3, (Kan. Ct. App. March 29, 2013) (unpubl.)

2. Relevant Kansas statutes:

K.S.A. 77-207:

> (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) 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.

K.S.A. 8-240(c):

(c) Every application shall state the full legal name, date of birth, *gender* and address of principal residence of the applicant, and briefly describe the applicant, and shall state whether the applicant has been licensed as a driver prior to such application, and, if so, when and by what state or country.

K.S.A. 8-243(a):

"Such license shall bear the class or classes of motor vehicles which the licensee is entitled to drive, a distinguishing number assigned to the licensee, the full legal name, date of birth, gender, address of principal residence and a brief description of the licensee, either …."

Gen. Muscle, TRC, Inc. v. Stotts

Court of Appeals of Kansas

March 29, 2013, Opinion Filed

No. 106,073

Reporter
2013 Kan. App. Unpub. LEXIS 263 *; 297 P.3d 1194; 2013 WL 1339868

GENERAL MUSCLE, TRC, INC., KANSAS CABARET, INC., CABARET MANAGEMENT, INC., JOHN SAMPLES, MILANO'S INC., and KAN BUILD INC., Appellants, v. STEVE STOTTS, in his capacity as the DIRECTOR OF TAXATION, KANSAS DEPARTMENT OF REVENUE et al., Appellees.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Prior History: [*1] Appeal from Sedgwick District Court; DOUGLAS R. ROTH, judge.

Disposition: Affirmed.

Counsel: Gerald N. Capps, of Wichita, for appellants.

J. Brian Cox, Senior Litigation Attorney, Kansas Department of Revenue, for appellees.

Judges: Before LEBEN, P.J., PIERRON and STANDRIDGE, JJ.

Opinion by: LEBEN

Opinion

MEMORANDUM OPINION

LEBEN, J.: John Samples and some business entities learned that the Kansas Department of Revenue had issued administrative subpoenas to several parties seeking information about Samples and those businesses. So Samples and the entities filed a civil lawsuit asking that the district court order the Department of Revenue to stop issuing subpoenas without notice to them. But the district court dismissed the suit because it wasn't brought under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. Samples and the business entities have appealed, contending that their suit was proper. But the legislature has made the KJRA the exclusive means for court review of agency action, and the issuance of administrative subpoenas as part of an agency investigation is agency action. We therefore affirm the district court's dismissal of the civil lawsuit.

FACTUAL AND PROCEDURAL BACKGROUND

In May and June 2010, a tax-fraud investigator **[*2]** for the Department of Revenue issued 21 subpoenas for documents to several banks as well as some other business entities and some individuals. Most of them requested financial or residential information about Samples, though some asked for financial information about 19 different individuals or businesses. In addition, each subpoena directed that the recipient not disclose its existence to others.

In October 2010, Samples and six business entities (the plaintiffs) filed suit against several Department of Revenue officials. The petition cited several sections of the Kansas Rules of Civil Procedure (found in K.S.A. Chapter 60) as the jurisdictional basis for the lawsuit, not the KJRA (found in K.S.A. Chapter 77). The plaintiffs sought a declaratory judgment that the Department of Revenue couldn't issue subpoenas like these and asked the court to order the Department of Revenue to stop issuing subpoenas without prior notice.

The Department of Revenue responded by filing a motion to dismiss the lawsuit for lack of jurisdiction, contending that its actions may only be challenged under the KJRA. The district court agreed, and the plaintiffs have appealed to this court.

ANALYSIS

The plaintiffs **[*3]** contend that courts, not administrative agencies, have exclusive jurisdiction over

subpoenas, so a suit related to subpoenas may be brought without a need to resort to the KJRA. The Department of Revenue contends that its issuance of subpoenas is an agency action under KJRA definitions, and such actions may be challenged in court only under the KJRA.

To settle this dispute, we first should note that court review of agency decisions is generally available only as provided by statute. See *Olathe Community Hospital v. Kansas Corporation Comm'n, 232 Kan. 161, 166-67, 652 P.2d 726 (1982)*; *Vaughn v. Nadel, 228 Kan. 469, 475-76, 618 P.2d 778 (1980)*. It follows that the review is limited by the authority provided by statute. And the KJRA provides that it "establishes the exclusive means of judicial review of agency action." *K.S.A. 77-606*.

So the key question is whether the Department of Revenue's issuance of investigative subpoenas is an agency action. Clearly, it is.

K.S.A. 77-602(b) defines "agency action" to include "an agency's performance of, or failure to perform, any . . . duty, function or activity." Even if we assume that the agency has no "duty" to issue investigative subpoenas, it **[*4]** surely performs a "function" or an "activity" by doing so.

This conclusion was accepted by the Kansas Supreme Court in a recent case involving the Kansas Board of Healing Arts, *Ryser v. State, 295 Kan. 452, 284 P.3d 337 (2012)*. There, the court said that the Board's "act of issuing an investigative subpoena is an agency action." *295 Kan. at 458*. In *Ryser*, that wasn't the end of the analysis because a statute separate from the KJRA provided for judicial review of Board-issued subpoenas. No one in this case has cited or suggested the existence of a similar statute related to Department of Revenue subpoenas. Accordingly, there is no statutory authority to hear a traditional civil lawsuit over these subpoenas. Without such authority, the courts lack subject-matter jurisdiction over the matter and the case must be dismissed. See *Chelf v. State, 46 Kan. App. 2d 522, 529, 263 P.3d 852 (2011)*.

We could end our opinion at this point because what we have said is sufficient to demonstrate that we lack subject-matter jurisdiction over the plaintiffs' petition. The Department of Revenue issued investigative subpoenas, which is an agency action. The KJRA provides the exclusive means to review agency **[*5]** action. The plaintiffs did not purport to file a KJRA petition, so we have no jurisdiction to review the Department's issuance of the subpoenas.

We will nonetheless make one further point since the plaintiffs' primary argument for court jurisdiction is their claim that the district court "has exclusive jurisdiction over matters concerning the [Department's] issuance of subpoenas." It's true that district courts have a potential role with such subpoenas, but it's not an exclusive one. While agencies like the Department of Revenue have been given statutory authority to *issue* such subpoenas, agencies don't have the power to *enforce* them. Thus, if a party to whom a subpoena is issued doesn't respond, only the district court—which has contempt powers at its disposal—can enforce the subpoena. So *K.S.A. 2011 Supp. 79-3233(a)* gives the Department of Revenue authority to issue subpoenas and gives the district court the power to enforce them, by contempt orders if necessary. The plaintiffs' contention that subpoenas are the exclusive prerogative of the district court is wrong: the statute provides for agency issuance and court enforcement. As far as our record shows, no court-enforcement action **[*6]** involving the subpoenas at issue in our case had taken place before the plaintiffs sued.

The plaintiffs have cited one case from our court that arguably provides some support for their position. In *Hines, Inc. v. State ex rel. Beyer, 28 Kan. App. 2d 181, 183-84, 12 P.3d 897 (2000)*, our court held that a party to which an agency subpoena had been issued could bring a suit to challenge the subpoena without first having to exhaust its administrative remedies. Our court held that no administrative remedy was available "[b]ecause only the courts may enforce a subpoena," so the action could be filed in the district court. *Hines, Inc., 28 Kan. App. 2d at 183*. But there was no discussion in the *Hines* case of the KJRA, and we do not find it persuasive as applied to our case. Unlike *Hines*, of course, our plaintiffs are not the parties to which the subpoenas were issued. In addition, it's not a foregone conclusion that attempting to exhaust administrative remedies—by resorting to them before going to court—wouldn't have been successful. According to our record, the subpoenas still outstanding were withdrawn by the Department of Revenue shortly after the suit was filed, so it's not clear that a **[*7]** request to the agency to withdraw them would have been futile. In addition, the Department's refusal to withdraw the subpoenas might be subject to administrative appeal to the Court of Tax Appeals. See *K.S.A. 2011 Supp. 74-2438*; *In re Tax Appeal of Collingwood Grain, Inc., 257 Kan. 237, 253, 891 P.2d 422 (1995)*. But we find *Hines* unpersuasive here mainly because it did not address the question of

subject-matter jurisdiction given the provisions of the KJRA.

The plaintiffs have raised several other arguments in their appellate brief, but we simply have no jurisdiction to address them. We are unable to construe the plaintiffs' petition as one filed under the KJRA as it clearly does not comply with *K.S.A. 2011 Supp. 77-614(b)*, and the plaintiffs have made no argument on appeal that their petition should be treated as if it had been filed under the KJRA. Instead, the plaintiffs have argued on appeal that the KJRA doesn't apply, an argument we have rejected.

The district court's judgment, which dismissed the plaintiffs' petition for lack of jurisdiction, is affirmed.

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CERTIFICATE OF SERVICE

I, Jason A. Zavadil, do hereby certify that a copy of the above and foregoing document was sent by NEF to all counsel of record.

/s/ Jason A. Zavadil
Jason A. Zavadil, #26808