IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

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. _____

Pursuant to K.S.A. Chapter 60

MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION, AND MEMORANDUM IN SUPPORT THEREOF

Petitioner, pursuant to K.S.A. 60-903 and 60-905, hereby requests that the Court grant both a temporary injunction and an immediate temporary restraining order (until such temporary injunction can be adjudicated) compelling Respondents to execute and comply with the provisions of recently enacted Senate Bill 180. Specifically, Petitioner requests an order that:

1. KDOR shall immediately cease and desist from processing any requests by licensees or license applicants to change or display their "sex" or "gender" in a manner that does not reflect their biological sex.
2. Any newly issued or reissued driver's licenses shall reflect the licensee's biological sex.

In support of this request, Petitioner states as follows:

LEGAL & FACTUAL BACKGROUND

SB 180, establishing the Women's Bill of Rights, was adopted over the Governor's veto on April 27, 2023 and became law on July 1, 2023. Section 1(a) of SB 180 provides that:

> 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.

2023 Kan. Sess. Laws 1230, 1230. In addition, section 1(c) requires that:

> 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.

Id. at 1230–31.

These provisions each independently require that driver's licenses, instructional permits, and non-driver identification issued by the Department of Revenue's (KDOR's) Division of Vehicles list a person's sex at birth, not some other

self-chosen identifier. The same is true of the driver's license data set maintained internally by the Division. *See* Kan. Att'y Gen. Op. 2023-2, at 3–4, *available at* https://shorturl.at/amDIO.

The Division, however, is refusing to comply with the law. It has allowed people to change the sex identifiers on licenses (or otherwise obtain documents reflecting something other than sex at birth) for several years. The current administration likes that policy and sees no need to change it. And the Division is open about its refusal: KDOR's webpage says, "The enactment [*sic*] of Senate Bill 180 on July 1 will not impact the longstanding procedures for obtaining, renewing, and updating a Kansas driver's license as they pertain to gender markers." Kan. Dep't of Revenue, https://www.ksrevenue.gov/ (last visited July 6, 2023). In fact, the Governor herself announced that she has instructed the Division to "keep in place [its] policies regarding gender markers on . . . driver's licenses." John Hanna, *Transgender Kansas Residents Can Keep Updating Their Documents Despite a New Law, Governor Says*, Associated Press, June 29, 2023, *available at* https://apnews.com/article/kansas-law-transgender-birth-certificates-driver-licenses-d5d3631b6e624f24733d0dbdedc9c35e.

Thus, the Attorney General brought this lawsuit to ensure that the Division and its employees comply with the laws the Legislature has passed.

ARGUMENT

1. *The State Is Entitled to a Temporary Injunction*

The purpose of a temporary injunction is to preserve the relative position of the parties until a final decision on the merits can be made. *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843, 853 (2007); *accord* K.S.A. 60-902. Courts analyze five factors when deciding whether to issue a temporary injunction:

> (1) a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability of suffering irreparable future injury; (3) the lack of obtaining an adequate remedy at law; (4) the threat of suffering injury outweighs whatever damage the propose injunction may cause the opposing party; (5) and the impact of issuing the injunction will not be adverse to the public interest.

Downtown Bar & Grill, LLC v. State, 294 Kan. 188, 191, 273 P.3d 709, 713 (2012).

1.1. *The State has a substantial likelihood of prevailing on the merits.*

The State has a substantial likelihood of prevailing on the merits of its suit for mandamus and injunctive relief against Respondents.

Mandamus is "a proceeding to compel some . . . person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." K.S.A. 60-801. Mandamus provides the remedy of "compelling a public officer to perform a clearly defined duty, one imposed by law and not involving the exercise of discretion." *Manhattan Bldgs., Inc. v. Hurley*, 231 Kan. 20, 26, 643 P.2d 87, 93 (1982). Mandamus is also an appropriate path "to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business." *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 916, 128 P.3d 364, 375 (2006). This can be invoked even "when an official has not performed a duty because of questions about

whether the duty exists or the scope of that duty." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 908, 179 P.3d 366, 388 (2008).

SB 180 plainly requires the driver's license database maintained by Respondents and the physical driver's licenses issued to applicants to reflect the license holder's biological sex. That SB 180 requires these actions can be shown by a review of the plain language of SB 180 and relevant statutes involving driver's licenses.

Two separate provisions of SB 180 compel the Division to cease changing driver's licenses such that they no longer reflect the license-holder's sex at birth. First, section 1(c) controls the data set that is to be maintained by the agency. That section commands that "[a]ny … state agency … that collects vital statistics … 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*." SB 180, § 1(c) (emphasis added). The Division of Vehicles collects and maintains in its database vital statistics, including each licensee's name, date of birth (age), sex, height, weight, and eye color. According to the plain language of SB 180, that data set must reflect a person's sex as "male or female at birth," not male or female (or anything else) as chosen by the licensee. Section 1(c), in and of itself, is enough to compel the Division of Vehicles to cease changing licensee's sex to something other than sex at birth.

However, the legislature reinforced this requirement in another section of the law as well: section 1(a) (in conjunction with K.S.A. 8-243(a)). Section 1(a) defines

the term "sex" throughout Kansas law: "An individual's 'sex' means such individual's biological sex, either male or female, at birth." SB 180, § 1(a)(1). Alongside this definition sits K.S.A. 8-243(a), which requires that driver's licenses issued by the Division "shall bear" the licensee's "gender," among other details. While this statute uses the term "gender," not "sex," gender and sex are used interchangeably throughout Kansas law. This is evidenced by other Kansas statues and confirmed by contemporary dictionaries. While some people have recently begun to use "gender" to refer to a person's chosen "gender identity" as separate from one's biological sex, this evidence shows that the common usage, as used by the Legislature in SB 180, is that "gender" and "sex" mean the same thing—a person's biological sex.

For example, K.S.A. 65-6710(a)(3) states unequivocally that "[g]ender, eye color and other traits are determined at fertilization," a clear reference to biological sex rather than chosen gender identity. And K.S.A. 77-201—a statute concerning statutory interpretation—states: "Words importing the masculine gender only may be extended to females." Plainly, the statute is referring to biological sex, not chosen gender identity. Indeed, the use of "gender" and "sex" to mean the same thing holds true throughout our laws; other examples abound. Consider K.S.A. 48-292, which governs insurance, stating "Such resident will have the right to reinstatement … subject to payment of the current premium charged to other persons of the same age and gender." Insurance premiums vary according to biological sex, not gender identity. And K.S.A. 65-6726, which prohibits abortion based on the "sex of the

unborn child," is titled "Abortion based on gender; prohibited." While that title was editorially supplied by the Office of Revisor of Statutes, which drafts bills for the Legislature, this indicates that both the Legislature and the office that performs the service of legislative drafting for the Legislature use "gender" and "sex" synonymously.

This usage of "gender" and "sex" is confirmed by modern dictionaries, which almost universally treat the terms as synonyms. *See, e.g.*, *Gender*, American Heritage Dictionary of the English Language (5th ed. 2015); *Gender*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003); *Gender*, Webster's Third New International Dictionary (1993); *see also Gender*, Webster's New World College Dictionary (5th ed. 2014) ("either of the two sexual divisions, male or female, into which human beings are divided"). *See generally Gender*, Garner's Dictionary of Legal Usage (3d ed. 2011) (attributing the rise of "gender" as a synonym for "sex" to the "distracting duality" of the latter word; "'When men see or hear the word sex, they think of only one thing.'" (quoting Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, 70 Ohio St. L.J. 805, 817 (2009))).

Not surprisingly then, KDOR itself uses "gender" and "sex" interchangeably. In carrying out K.S.A. 8-243's gender-identification requirement, KDOR uses the word "sex" on physical driver's licenses.[1] This practice shows that KDOR has always understood "gender" as used in K.S.A. 8-243 to mean "sex."

[1] *See* Kan. Dep't of Revenue, Kansas Real ID, https://www.ksrevenue.gov/dovrealid.html (last visited July 6, 2023) (providing sample images of REAL ID-compliant and non-REAL ID-compliant documents).

The Legislature adopted SB 180 against this linguistic backdrop, showing it understood the definition of "sex" in SB 180 governed the meaning of "gender" as used in K.S.A. 8-243. As a result, section 1(a) of SB 180, in conjunction with K.S.A. 8-243(a), requires a licensee's "biological sex, either male or female, at birth" to be listed on driver's licenses issued by KDOR.

For these reasons, the State has shown it is substantially likely that it would prevail on the merits, as SB 180 requires KDOR to maintain an accurate data set, including a licensee's biological sex at birth, and that information must be reflected on driver's licenses that it issues.

1.2. *The State can show irreparable injury because once inaccurate driver's licenses are issued, the recipient will hold and utilize it for up to six years.*

When alleging irreparable harm, a party need only show a reasonable probability of injury. *See Steffes*, 284 Kan. at 395. Here, the irreparable injury is the effect on law enforcement and lifesaving health activities in Kansas.

Driver's licenses are commonly used by law enforcement officers to identify suspects, victims, wanted persons, missing persons, and others encountered on a daily basis. *See, e.g.*, *Hiibel v. 6th Judicial Dist. Ct.*, 542 U.S. 177, 181 (2004); *State v. Doelz*, 309 Kan. 133, 139, 432 P.3d 669, 674 (2019); *State v. Manwarren*, 56 Kan. App. 2d 939, 947–49, 440 P.3d 606, 613–14 (2019); *State v. Lees*, 56 Kan. App. 2d 542, 544, 432 P.3d 1020, 1022 (2019). Inaccurate information could obviously affect whether a law enforcement officer would be able to accurately identify a person. The harmful consequences are most obvious in the context of arrest warrants: a mismatch between the sex on a warrant and identification could allow a wanted

person to escape. *Cf. Simmons v. City of Chicago*, No. 14 C 9087, 2017 WL 497755, at *13 (N.D. Ill. Feb. 7, 2017) (mismatch between height listed on warrant and actual person arrested made arrest improper). But it could also be a problem in, for example, jail or prison operations. *See generally De Veloz v. Miami-Dade County*, 756 F. App'x 869 (11th Cir. 2018) (stating, in case where biological female was placed in male pretrial confinement, "[i]t is abundantly clear to us that housing a biological female alongside 40 male inmates poses an outrageous risk that she will be harassed, assaulted, raped, or even murdered").

Also, driver's licenses are used to record a person's status as an organ donor. K.S.A. 65-3224(a)(1). Several studies show that the biological sex of a donor has a documented effect on the success of a transplant operation. Francesca Puoti et al., *Organ Transplantation and Gender Differences: A Paradigmatic Example of Intertwining Between Biological and Sociocultural Determinants*, 7:35 Biol. of Sex Differences 2–4 (2016); Haley Bridger, *Sex Differences Influence Organ Transplant Rejection Rate*, The Harvard Gazette, Mar. 22, 2018, https://news.harvard.edu/gazette/story/2018/03/gender-may-play-key-role-in-rejection-of-transplanted-organs/. A mismatch between the recorded and the actual sex of a donor could deleteriously affect outcomes for the recipient.

These harms are irreparable—the Court cannot come back at the end of the case and fix the problem of fleeing criminals or botched organ transplants. Furthermore, once a driver's license is issued, the State cannot realistically take the physical license back. Although the data set maintained by the Division can be

corrected in a shorter time frame, the information printed on the physical license cannot be readily corrected until any issued licenses expire and must be renewed. Consequently, if the Division continues issuing noncompliant licenses, those licenses could remain in circulation—continuing to present a reasonable probability of irreparable harm—for up to six years. *See* K.S.A. 8-247(a) (setting expiration dates for driver's licenses). A TRO and Temporary Injunction are necessary in order to preserve the status quo during this litigation and prevent further irreparable injury as more individuals seek to change the sex on their driver's licenses.

1.3. *There is no remedy at law for Respondents' refusal to enforce SB 180.*

There is no adequate remedy at law for this issue. SB 180 does not provide any remedy at law for failure to comply with its requirements. Respondents cannot be sued for damages in their official capacity. *See Prager v. State*, 271 Kan. 1, 33, 20 P.3d 39, 62 (2001). Equitable relief is the only method available to the State to ensure Respondents comply with SB 180.

1.4. *Respondents cannot assert any harm in complying with validly enacted statutes.*

The threat of injury outweighs any damage the requested injunction may cause Respondents. That threat has already been detailed. But there is no harm to Respondents that would occur from complying with SB 180. If anything, declining to make additional changes to sex based on licensees' gender-identity preferences is the easiest course of action. Also, the requested injunction would still allow Respondents to *receive* requests for sex-designation changes; it simply would prohibit them from processing such requests. If, in the end, it turned out

Respondents were wrongly enjoined, they could simply begin processing the change applications then. Finally, as a state agency, Respondents cannot assert any harm in complying with a validly enacted statute. *See generally Kan. Bldg. Indus. Workers Compensation Fund v. State*, 49 Kan. App. 2d 354, 382, 310 P.3d 404, 421 (2013) ("It defies the logic of the separation of powers doctrine to believe that a state agency, a creation of the legislature, charged by law with the enforcement of a certain set of laws, has any power to declare the enactments of its creator unconstitutional and unenforceable.").[2]

1.5. *The public will benefit from ensuring the information contained on a driver's license is accurate.*

Finally, any impact of issuing the injunction will not be adverse to the public interest. A supermajority of the Kansas Legislature has concluded that having immutable biological sex reflected in the driver's license data set and in other data sets is in the public interest. This should settle the matter as far as the Court is concerned. Once a bill becomes a law, it is improper for either the judiciary or the executive branch to second-guess the wisdom of that decision. *Le Vier v. State*, 214 Kan. 287, 292, 520 P.2d 1325, 1330 (1974). The Legislature's determination of how to best serve the public interest is final. *See City of Wichita v. Wallace*, 246 Kan. 253, 257–58, 788 P.2d 270, 273–74 (1990).

[2] Nor can Respondents assert perceived injuries on behalf of third parties (such as those licensees who desire to change the sex indicated on their driver's licenses). *See Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370, 390, 347 P.3d 687, 699 (2015) (noting relevant question for temporary injunctive relief is whether "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause *the opposing party*" (emphasis added)).

Moreover, the public would benefit from ensuring everyone's driver's license information is accurate. Driver's licenses are used for many common activities—voting, purchasing age-restricted products such as alcohol or tobacco, checking into hotels, or renting cars. They are used by law enforcement for identification and inform those who need to know that the possessor is an organ donor. The prevalence of the use of driver's licenses in our society increases the importance that those licenses contain accurate information to allow everyone to have confidence that the information is correct.

2. *The State Is Also Entitled to a Temporary Restraining Order.*

Because time is of the essence, and assuming that this Court cannot immediately rule on the State's request for a temporary injunction, it should issue a temporary restraining order. K.S.A. 60-903 authorizes the issuance of a temporary restraining order "without notice or bond." "The purpose of such an order is to restrain a defendant for a very brief period, pending a hearing on the application for a temporary injunction." *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860, 865 (1984). The temporary restraining order can go no further than to preserve the status quo until a hearing is held for the temporary injunction. *Id.* For the reasons explained above, if the Court cannot act immediately on the State's temporary injunction request, it should immediately grant a temporary restraining order until it can have a hearing on the temporary injunction motion. Although the State is not requesting a hearing on its motion for a temporary restraining order,

counsel is prepared to appear on the Court's call and could do so the same day this motion is filed.

PRAYER FOR RELIEF

In light of the above, the State respectfully requests this Court grant the requested temporary restraining order and temporary injunction, and any other relief the Court deems appropriate.

Respectfully submitted this 7th day of July, 2023.

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CERTIFICATE OF SERVICE

I certify that on July 7, 2023, the above document was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants. A copy will be personally served on Respondents by serving Assistant Attorney General Jordan Brewer pursuant to K.S.A. 60-304(d)(5). In addition, copies were electronically mailed to:

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