No. 24-127390-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS, ex rel. KRIS KOBACH, Attorney General,
Petitioner-Appellee

v.

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

and

ADAM KELLOGG, et. al,
Intervenor Respondents-Appellants

BRIEF OF PETITIONER-APPELLEE

Appeal from the District Court of Shawnee County, Kansas
Honorable Theresa L. Watson, Judge
District Court Case No. 23CV422

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NATURE OF THE CASE

The Kansas Department of Revenue (KDOR) refused to display a driver's licensee's biological sex at birth on a driver's license as required by K.S.A. 2023 Supp. 77-207, leading the Attorney General to file this action on behalf of the State against David Harper, Director of Vehicles, and Mark Burghart, Secretary of Revenue (collectively "KDOR"), seeking mandamus and injunctive relief. The State sought a determinative interpretation of K.S.A. 2023 Supp. 77-207, as well as an order requiring KDOR to comply with the statute. The State asserted that K.S.A. 2023 Supp. 77-207 applies to driver's licenses. The State sought a temporary injunction to prevent KDOR from processing new licensing requests or renewals that did not reflect a licensee's biological sex at birth on the driver's license. The district court granted a group of transgender individuals' request for permissive intervention. Intervenors argued the statutory text was ambiguous and that the constitutional avoidance canon foreclosed the State's interpretation.

Finding the State showed a substantial likelihood of prevailing on the merits, as well as having satisfied the other temporary injunction requirements, the district court found K.S.A. 2023 Supp. 77-207 was unambiguous and required KDOR to display a licensee's biological sex at birth on a driver's license. Intervenors appeal this decision. KDOR appeals the same ruling in a separate appeal.

For the reasons below, this Court should affirm the temporary injunction.

STATEMENT OF THE ISSUES

I. **Did the State satisfy each element to merit a temporary injunction to preserve the status quo as this litigation progresses?**

II. **Did the district court err in finding Dr. Oller did not qualify as an expert witness because Dr. Oller could not summarize or explain the scholarly articles she purported to rely on to support her testimony?**

STATEMENT OF FACTS[1]

In 2023, the Legislature passed Senate Bill 180 over the Governor's veto. (R. I, 4, 10; III, 254.) SB 180, now codified as K.S.A. 2023 Supp. 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) 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;
>
> . . . .
>
> (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.

[1] Intervenors cite to several internet articles, websites, and other materials. The district court stated it only considered "facts agreed by the parties, testimony and exhibits admitted at the temporary injunction hearing, and matters judicially noticed by the Court." (R. III, 254.) Intervenors also frequently cite to Dr. Oller's offer of proof for factual support. Dr. Oller was not permitted to testify as an expert, and the district court did not rely on her offer of proof. As such, the State will confine its facts to the record relied on by the district court.

Shortly before SB 180 took effect, the Attorney General issued a formal opinion that, among other things, concluded SB 180 required KDOR to list a licensee's biological sex at birth, either male or female, on all state-issued driver's licenses and to update its data set to reflect the licensee's biological sex at birth. Att'y Gen. Op. 2023-2; (see R. I, 27). The Governor disagreed with the opinion and directed KDOR to keep in place its policy directing how and when individuals may change the sex designation on their driver's license. (R. I, 27.) KDOR announced it would not follow the Attorney General's opinion. (R. I, 28.)

On July 7, 2023, the Attorney General filed this lawsuit on behalf of the State of Kansas against Harper and Burghart in their official capacities as Director of Vehicles and Secretary of Revenue respectively, seeking mandamus and injunctive relief, as well as a motion for a temporary restraining order and temporary injunction. (R. I, 1-8, 11-23.) The district court granted the temporary restraining order against KDOR, ordering that (1) KDOR and those under KDOR's direction shall immediately stop processing any requests by licensees or applicants to change or display their sex in a way that does not reflect their biological sex as defined by SB 180; and (2) KDOR and those under KDOR's direction shall take all steps necessary to ensure that any newly issued or reissued driver's licenses reflect the licensee's biological sex as defined by SB 180. (R. I, 31-34.)

The district court later granted five transgender individuals' request for permissive intervention as respondents in the case to argue that the district court should reject the State's interpretation under the constitutional avoidance doctrine.

(R. I, 163-71.) At the temporary injunction hearing, one intervenor, Doe 1, was voluntarily dismissed from the case. (R. III, 249-51; VIII, 290-91.)

The district court held a temporary injunction hearing on January 10 and 11, 2024, at which several witnesses testified. (R. VII; VIII.) Kent Selk, the Driver Services Manager for KDOR, testified that Kansas driver's licenses contain several pieces of identifying information, including "sex." (R. VII, 92, 117.) The word "gender" is not found on a Kansas driver's license. (R. VII, 117.) When someone changes his or her gender with KDOR, the sex designation on his or her license is also changed. (R. VII, 118-20.) Selk explained KDOR's policy regarding changes of the "sex" designation of driver's licenses before SB 180 took effect. (R. VII, 95-110.) Selk testified there were 9.3 million Kansas driver's licenses issued between 2011 and the end of 2022. (R. VII, 111.) Between June 2011 and June 2023, KDOR approved 552 requests for a change in the sex designation. (R. VII, 111-12.) Selk agreed that around 172 of those requests probably occurred in the first half of 2023 alone. (R. VII, 112.) Selk also testified that KDOR maintains a database of information of each license holder that contains current, as well as historic, information. (R. VII, 140-41.)

Shawnee County Sheriff Brian Hill testified that one of the first things law enforcement does when stopping someone is to identify that person, usually by asking for his or her driver's license. (R. VII, 166-67.) Hill testified that officers can run a driver's license through a database that allows them to check for wants and warrants. (R. VII, 167.) Hill said he provides dispatch with the name, date of birth,

race, and sex to identify a person. (R. VII, 168-69.) Hill once arrested a transgender person, who identified as male to Hill. (R. VII, 170.) A "wants and warrants" check based on the individual's driver's license displaying "male" revealed no criminal history. (R. VII, 170.) Jail staff later identified the person as female, and a records check revealed the person's true criminal history. (R. VII, 170-71.)

Richard Newson, the Detention Bureau Commander at the Johnson County Sheriff's Office, testified that central booking identifies arrestees by using the information in the arrest report, which includes name, address, date of birth, and sex. (R. VII, 180-81.) Inmates are segregated by sex in central booking and in the housing unit. (R. VII, 182.) Arrestees are also strip searched before being placed in the housing unit, and those searches are done by an officer of the same sex as the arrestee. (R. VII, 183.)

Captain James Oehm, a Kansas Highway Patrol Officer, testified that he usually provided a Kansas driver's license number or, if there was no license, the name, and date of birth of the person when looking for an individual's criminal history. (R. VII, 206-08.)

Intervenors listed Dr. Beth Oller as an expert witness. (R. II, 584-95.) Dr. Oller is a family practitioner in Rooks County. (R. II, 585; VIII, 300.) The district court denied Dr. Oller as an expert witness because it found (1) Dr. Oller only treated 100 transgender patients and not all of her treatment of them was related to gender dysphoria issues; and (2) Dr. Oller was unable at her deposition to answer even the most basic questions asked by the State about the articles and studies that

she relied upon in forming her expert opinion. (R. VII, 37-38, 44.) But the district court allowed Dr. Oller to testify as a fact witness about her personal experiences in treating transgender patients. (R. VIII, 299-331.) Dr. Oller testified that she has observed her patients suffer from fear and hypervigilance when they do not have the correct sex designation on their driver's licenses. (R. VIII, 323.) Dr. Oller said all of her transgender patients have diagnosed anxiety or depression, and she has seen those conditions improve when they get their desired sex designation on their driver's licenses. (R. VIII, 323.)

Intervenors testified, describing the various perceived negative experiences they had when they possessed a driver's license differing from their gender identity, as well as their fear as to what would happen if they had to return to a driver's license that did not match their gender identity in the future. (R. VII, 232-51, 265-80; VIII, 342-62, 372-83.)

The district court granted the State's requested temporary injunction. (R. III, 253-82.) The district court found K.S.A. 2023 Supp. 77-207 was unambiguous as applied to driver's licenses. (R. III, 271-73.) The district court found the doctrine of constitutional avoidance did not apply, even if K.S.A. 2023 Supp. 77-207 was ambiguous, because Intervenors had not demonstrated any constitutional infirmity. (R. III, 273-77.) The district court found the State had satisfied all the temporary injunction elements and ordered KDOR to stop processing any new requests to change a driver's license to not reflect a licensee's biological sex at birth and to take

all action necessary to ensure any newly issued or reissued driver's licenses reflect the licensee's biological sex at birth. (R. III, 282.)

Intervenors appeal the temporary injunction order. (R. III, 283.) KDOR appeals in a separate case, No. 127,522. (R. III, 286.)

ARGUMENT AND AUTHORITIES

I. Did the State satisfy each element to merit a temporary injunction to preserve the status quo as this litigation progresses?

Standard of Review

Appellate courts review the grant of a temporary injunction for an abuse of discretion. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). A trial court abuses its discretion if its decision is: (1) arbitrary, fanciful, or unreasonable; (2) based on a legal error; or (3) based on a factual error. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 619, 440 P.3d 461 (2019). The party alleging an abuse of discretion bears the burden to demonstrate to this Court such an abuse occurred. *Steffes v. City of Lawrence*, 284 Kan. 380, 393, 160 P.3d 843 (2007).

Intervenors argue the district court abused its discretion by committing a legal error. (Intervenors' Brief, 15, 35.) Appellate courts review a district court's legal conclusions de novo. See *Einsel v. Einsel*, 304 Kan. 567, 579, 374 P.3d 612 (2016).

Analysis

To succeed on a motion for a temporary injunction, the movant has the burden to show:

> "(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 proposed injunction may cause the opposing party; (5) and the impact of issuing the injunction will not be adverse the public interest."

Downtown Bar & Grill, 294 Kan. at 191.

The purpose of a temporary injunction is to preserve the status quo until a final determination on the merits can be made by the court. *Steffes*, 284 Kan. at 394.

A. The State showed K.S.A. 2023 Supp. 77-207 unambiguously applies to driver's licenses, giving the State a substantial likelihood of prevailing on the merits.

The first requirement for a temporary injunction is that the party has a substantial likelihood of eventually prevailing on the merits. *Downtown Bar & Grill*, 294 Kan. at 199. This factor is an essential predicate to obtain a temporary injunction. *Id.* "The factor exists because '[t]he purpose of a temporary or preliminary injunction is not to determine any controverted right, but to prevent injury to a claimed right pending a final determination of the controversy on its merits.'" *Steffes*, 284 Kan. at 394. A petitioner is only required to show a likelihood of success on the merits rather than actual success. *Id.*

The district court here found the State demonstrated a likelihood of success on the merits based on its interpretation that K.S.A. 2023 Supp. 77-207 is unambiguous and that, by its plain meaning, its definition of "sex" applies to the word "gender" in the driver's license statutes. (R. III, 269-73.) The district court also addressed Intervenors' constitutional avoidance arguments, finding first that the

constitutional avoidance canon did not apply because K.S.A. 2023 Supp. 77-207 is unambiguous, but, even if the statute was ambiguous, constitutional avoidance would not apply because K.S.A. 2023 Supp. 77-207 does not implicate any constitutional rights. (R. III, 273-77.)

The district court correctly interpreted K.S.A. 2023 Supp. 77-207 and appropriately employed our State's statutory interpretation caselaw. K.S.A. 2023 Supp. 77-207 applies to the sex designation on driver's licenses. Under K.S.A. 2023 Supp. 77-207, KDOR must place a licensee's biological sex, not his or her gender identity, on a driver's license.

1. K.S.A. 2023 Supp. 77-207 is unambiguous and applies to the driver's license statutes, requiring KDOR to include a person's biological sex at birth on driver's licenses.

K.S.A. 2023 Supp. 77-207 instructs:

> (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. . . .

In their brief, Intervenors argue K.S.A. 2023 Supp. 77-207 by its plain language does not apply to driver's licenses because the driver's license statutes use the word "gender" instead of "sex." (Intervenors' Brief, 15-19.)

Our appellate courts exercise plenary review over statutory meaning. *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 600, 478 P.3d 776 (2021). In interpreting

statutes, courts "begin with the plain language of the statute, giving common words their ordinary meaning." *Id.* When a statute is plain and unambiguous, a court should not speculate at the legislative intent behind the clear language and should refrain from reading something into the statute not readily found in its words. *Id.* at 600-01. Only if a statute's language is ambiguous do courts consult legislative history or utilize canons of construction to resolve the ambiguity. *Johnson*, 312 Kan. at 601; *State v. Justice-Puett*, 57 Kan. App. 2d 227, 231, 450 P.3d 368 (2019).

Kansas driver's licenses contain various identifying information on the face of the card, including the licensee's "sex."[2] While the driver's license displays sex, the statutes use "gender" instead of "sex" in describing that category. See K.S.A. 2023 Supp. 8-240(c); K.S.A. 2023 Supp. 8-243(a). Intervenors claim that since the driver's license statutes use "gender" instead of "sex," K.S.A. 2023 Supp. 77-207 does not apply. (Intervenors' Brief, 16-18.) When one looks at the plain language of all the statutes involved, Intervenors' arguments are not persuasive. Gender in K.S.A. 2023 Supp. 8-240(c) and K.S.A. 2023 Supp. 8-243(a) means the same thing as "sex" in K.S.A. 2023 Supp. 77-207.

Dictionaries are a good source for the "'ordinary, contemporary, common; meaning of words." *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017). Webster's New College World Dictionary provides almost identical definitions for "gender" and "sex." Gender's second

[2] See Kan. Dep't of Revenue, Kansas Real ID, https://www.ksrevenue.gov/dovrealid.html (last visited August 26, 2024) (providing sample images of real ID compliant and non-REAL ID complaint documents).

definition is "either of the two sexual divisions, male or female into which human beings, or sometimes animals, are divided." Webster's New World College Dictionary 603 (5th ed. 2014). Sex is defined as "either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions." *Id.* at 1331. The American Heritage Dictionary of the English Language provides similar definitions of "gender" and "sex." See American Heritage Dictionary of the English Language 730 (5th ed. 2011) (defining "gender" as "[2a.] Either of the two divisions designated female and male by which most organisms are classified on the basis of their reproductive organs and functions; sex."); *id.* at 1605 (defining sex as "[2a.] Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions."). While a modern trend exists in some corners to define "gender" as its own separate category based on one's "gender identity," the common public understanding of "gender" is to use it as a synonym for "sex."

KDOR's own practice reflects that "sex" and gender" are often used interchangeably. While the statutes use "gender," rather than "sex," Selk testified that KDOR uses the word "sex" in displaying this information on driver's licenses. (R. VII, 117.) KDOR records the same information as a person's "gender" in its database, recognizing that the words are synonyms. (R. VII, 117.)

Other Kansas statues also support interpreting "sex" and "gender" to mean the same thing. First, K.S.A. 2023 Supp. 77-201 directs that "[w]ords importing the masculine gender only may be extended to females," a rule that "shall be observed"

in "the construction of the statutes of this state." In other words, K.S.A. 2023 Supp. 77-201 must be followed when interpreting statutes. This statute has directed the interpretation of our laws for over 70 years without amendment. K.S.A. 65-6710(a)(3) states "[g]ender, eye color and traits are determined at fertilization." As no one claims a newly fertilized egg possess the ability to determine an "inner sense of being a particular gender," (see R. III, 5), it only makes sense in this statute that "gender" means "sex." Additionally, K.S.A. 65-6726 is entitled "Abortion based on gender; prohibited" but states: "No person shall perform or induce an abortion or attempt to perform or induce an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the unborn child." While the Revisor of Statutes creates the statutory title, and the title is not dispositive, it strengthens the State's argument. The Revisor of Statutes could have used "sex" to reflect the statutory language. Instead, the Revisor chose "gender." Because "sex" and "gender" carry the same meaning.

Intervenors rely on the Legislature's amendment of the driver's license statutes in 2007 via Senate Bill 9, which replaced the word "sex" with "gender." (Intervenors' Brief, 17-19.) But this change was part of a comprehensive effort to align Kansas law with the language and requirements of the federal REAL ID Act of 2005. The REAL ID Act set certain standards for identification documents, including state-issued driver's licenses. REAL ID Act, Pub. L. No. 109-13, 119 Stat. 311. It requires a minimum of nine pieces of information, including full legal name, date of birth, *gender*, a driver's license number, address of principle residence,

cardholder signature, physical security features, and machine-readable technology. REAL ID Act, § 202(b), (c). Senate Bill 9 amended some statutes and adopted new ones to conform to the REAL ID Act. L. 2007, ch. 160. One amendment was to change "sex" to "gender" in K.S.A. 8-240(c). L. 2007, ch. 160, § 4. It also added "gender" to the text of K.S.A. 8-243(a). *Id.* at § 5. Senate Bill 9 also changed "name" to "full legal name" and "residence address" to "address of principal residence" in both statutes. *Id.* at § 4, 5. These changes mirrored the language of the REAL ID Act. Compare REAL ID Act, § 202 and L. 2007, ch. 160. The changes brought Kansas into alignment with the federal language, rather than substantially changing Kansas law.[3]

The Indiana Court of Appeals recently addressed a similar issue in *Indiana Bureau of Motor Vehicles v. Simmons*, 233 N.E.3d 1016, *aff'd as modified by* 236 N.E.3d 1159 (Mem), 2024 WL 3434712 (Ind. Ct. App. 2024). The Indiana General Assembly also amended their driver's license statutes to comply with the REAL ID Act but did not define "gender." *Id.* at 1025. The Indiana Court of Appeals noted the Indiana legislature's amendment "is not necessarily indicative of an intention to allow additional gender markers on state credentials but rather simply a result of implementing the federal requirements under the REAL ID Act." *Id.* The Indiana Court of Appeals held the legislature used "gender" "simply to comply with the federal REAL ID Act, and it has not embarked on creating a new gender

[3] The Real ID regulations specify that gender means "[g]ender as determined by the State," and thus do not require the States to use "gender identity" and opposed to "sex." 6 C.F.R. § 37.17.

designation, which it alone has the authority to do." *Id.* at 1026. The Indiana Court of Appeals also relied on general-language dictionaries, which defined "gender" as synonymous with "sex." *Id.*

Like the Indiana Court, this Court should recognize the amendments here merely brought the State into compliance with the REAL ID Act. Dictionary definitions show the common understanding of "gender" is the same as "sex." Our Legislature is the only governmental entity with the authority to create a new gender identity designation on driver's licenses. It has not done so. Neither KDOR nor this Court can do so on its own initiative.

Further, KDOR's position that K.S.A. 2023 Supp. 77-207 does not apply to driver's licenses because the driver's license statutes refer to "gender," which is based on one's "gender identity," rather than "sex" is inconsistent with the fact that it only records "male" or "female" on driver's licenses. If "gender identity" was the legal standard as KDOR and Intervenors assert, then KDOR would have included alternatives like "nonbinary," "ze/zie," "they/them," or any other options of the growing number of "gender identities" or "preferred pronouns." See *United States v. Varner*, 948 F.3d 250, 256-57 (5th Cir. 2020) (relying on the fact that "a dysphoric person's '[e]xperienced gender may include alternative gender identities beyond binary stereotypes" as reason not to order use of litigant's preferred pronouns).

Intervenors try to raise K.S.A. 2023 Supp. 77-207's legislative history to support their arguments on appeal. But K.S.A. 2023 Supp. 77-207 is unambiguous, and courts do not consider legislative history when interpreting unambiguous

statutes. *Johnson*, 312 Kan. at 601. In any event, Intervenors' use of legislative history is unpersuasive for several reasons.

First, Intervenors state that during the debate over SB 180, no legislator who voted for the bill said it would impact driver's licenses. (Intervenors' Brief, 19-20.) Intervenors fail to explain how that demonstrates that the law does not impact driver's licenses. Intervenors also do not point to any legislator who said SB 180 did *not* impact driver's licenses. The argument cuts both ways. See *Virginia Uranium Inc. v. Warren*, 587 U.S. 761, 778 (2019) ("Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual [legislators] often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product."); Scalia & Garner, Reading Law: The Interpretation of Legal Texts 376 (2012) ("[T]he use of legislative history to find 'purpose' in a statute is a legal fiction that provides great potential for manipulation and distortion."). Intervenors' only support is talking points prepared by an interest group supporting the bill suggesting that SB 180 did not prevent Kansans from displaying their gender identity on their driver's licenses. (Intervenors' Brief, 20); (R. III, 14, 33.) But the belief of an interest group is not evidence of the Legislature's intent in passing the bill. See *Davis v. City of Leawood*, 257 Kan. 512, 526, 893 P.2d 233 (1995); *McCarthy v. City of Leawood*, 257 Kan. 566, 575, 894 P.2d 836 (1995).

Second, Intervenors point to model legislation that K.S.A. 2023 Supp. 77-207 was based on, as well as to similar statutes passed in Montana and Tennessee as

evidence that, if the Kansas Legislature had wanted K.S.A. 2023 Supp. 77-207 to apply to driver's licenses, it would have adopted different language. (Intervenors' Brief, 20-21.) But neither statutes from other states' nor model legislation explain our Legislature's language choice. The fact the Legislature could have taken other language to achieve a goal does not alter the meaning of the language it did enact.

Finally, Intervenors raise Senate Bill 228, which dealt with the housing of incarcerated individuals in county jails based on their biological sex at birth. L. 2023, ch. 83; K.S.A. 2023 Supp. 19-1903. According to Intervenors, SB 228 shows the Legislature knew how to make its definition of sex applicable to the driver's license statutes specifically, but it chose not to. (Intervenors' Brief, 21.) But there is good reason housing in county jails was specifically addressed. Up until that point, there was no general requirement to house incarcerated individuals based on sex. See generally L. 2023, ch. 83. The driver's license statutes, by contrast, already included this distinction. Further, Intervenors' logic would turn K.S.A. 2023 Supp. 77-207 into a paper tiger, as the same argument could be made to any area of the law the statute affects.

K.S.A. 2023 Supp. 77-207 is unambiguous. As KDOR's own actions demonstrate, "sex" and "gender" mean the same thing. K.S.A. 2023 Supp. 77-207 applies to the driver's license statutes. The statutory interpretation analysis can and should end here. See *Bruce v. Kelly*, 316 Kan. 218, 232, 514 P.3d 1007 (2022).

2. Because K.S.A. 2023 Supp. 77-207 is unambiguous, the constitutional avoidance canon does not apply. But even if it did, Intervenors fail to show that the State's interpretation of the statute would violate any constitutional rights.

Seeking an alternative way to achieve their desired interpretation of K.S.A. 2023 Supp. 77-207, Intervenors raise the constitutional avoidance canon. (Intervenors' Brief, 22-35.)

Constitutional avoidance is a rule of statutory construction. *State v. Clark*, 313 Kan. 566, 577, 486 P.3d 591 (2021). "It imposes a duty on the court to 'construe a statute as constitutionally valid when it is faced with more than one reasonable interpretation.'" *Id.* (quoting *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 367-68, 361 P.3d 504 (2015))." "In other words, 'if a court can genuinely, reasonably, plausibly, or fairly interpret and construe statutory language consistent with legislative intent in a manner that also preserved it from impermissibly encroaching on constitutional limits, the court must do so.'" *Johnson*, 312 Kan. at 602. This rule is only invoked when the statutory language is ambiguous. *Id.* at 603 ("Of course, we cannot invoke this rule to impose an interpretation that changes the meaning of unambiguous language or conflicts with clear legislative intent.").

Intervenors claim the district court "misapprehended" how the constitutional avoidance canon works because the district court decided the question of whether the State's interpretation of K.S.A. 2023 Supp. 77-207 would actually violate the Kansas Constitution rather than whether the State's interpretation raises serious doubts about the statute's constitutionality. (Intervenors' Brief, 22-24.) This argument is a red herring. If K.S.A. 2023 Supp. 77-207 does not violate any

constitutional rights, then there are no "serious doubts" about its constitutionality. So the district court's finding that the State's interpretation of K.S.A. 2023 Supp. 77-207 does not violate the Kansas Constitution also forecloses application of the constitutional avoidance canon. See *Johnson*, 312 Kan. at 603.

The district court found the statute was unambiguous. (R. III, 273.) Thus, constitutional avoidance is inapplicable. Even if it did apply here, there is no reason for this court to avoid the State's interpretation of K.S.A. 2023 Supp. 77-207 because it does not implicate any constitutional rights under the Kansas Constitution.

Intervenors allege the State's interpretation of K.S.A. 2023 Supp. 77-207 violates three constitutional rights under § 1 of the Kansas Constitution. (Intervenors' Brief, 24-32.) Intervenors rely on the Kansas Supreme Court's opinion in *Hodes* to support their interpretation of § 1. Section 1 states: "All men are possessed of equal and inalienable rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights, § 1. The Supreme Court in *Hodes* held that § 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. In the context of its discussion on abortion, the Court held these "broader" rights include the "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, according to the Supreme Court, a woman's right to obtain an abortion. *Id.* at 660.

The *Hodes* Court approached its interpretation of § 1 by grounding its constitutional interpretation in the plain language of the Constitution because "'in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and note omitted without a design for so doing.' (citations omitted)." *Id.* at 622-23. Only when the words themselves do not display the drafters' intent, the *Hodes* Court said, do courts look to the historical record, remembering "the polestar" is the drafters' intent. *Id.* at 623.

Intervenors allege the plain language interpretation of K.S.A. 2023 Supp. 77-207 would violate three rights protected by § 1: (1) personal autonomy; (2) informational privacy; and (3) equal protection. (R. III, 35-44.) The district court found Intervenors failed to demonstrate any constitutional infirmity in the statute. (R. III, 277-78.)

Under *Hodes*, courts employ a two-step framework to determine whether an asserted right or declared interest is enforceable under § 1: (1) determining whether the right is protected by § 1; and (2) if it is protected, determining whether governmental action unconstitutionally infringes on that right. *State v. Carr*, 314 Kan. 615, 628, 502 P.3d 546 (2022). Under the first part, courts must remember that the doctrine of judicial self-restraint requires the court to begin with "'a careful

description of the asserted right.'" *Id.* (citation omitted). This ensures a proper nexus exists between the asserted right and its constitutional foundation within § 1. *Id.* "Once properly defined, [courts] examine whether that asserted right or declared interest is protected under section 1 by looking to the language of the Kansas Constitution." *Id.*

Our Supreme Court recently opined on rights asserted under § 1 in the voting context. See *League of Women Voters of Kansas v. Schwab*, __ Kan. __, 549 P.3d 363 (2024). In *League of Women Voters*, the Kansas Supreme Court held "the 'right to vote' is not an unenumerated 'natural right' protected by section 1 of the Kansas Constitution Bill of Rights." 549 P.3d at 376. The Supreme Court also held it was error then for the Court of Appeals to analyze the asserted rights in that case under the Supreme Court's existing § 1 jurisprudence. *Id.*

League of Women Voters shows our Supreme Court takes a narrow view of unenumerated rights under § 1 that Intervenors argue for (and need for their constitutional avoidance argument to work). Rather, unenumerated rights under § 1 apply to a very limited and narrow category of asserted rights that exist in our state's history and tradition. As demonstrated below, none of Intervenors asserted rights fall into this category.

The Kansas Supreme Court again cautioned against an expansive view of fundamental rights under § 1 in *Hodes & Nauser, MDs, P.A. v. Stanek*, __ Kan. __, 551 P.3d 62, 75-77 (2024) (*Stanek*). In *Stanek*, the court made clear that *Hodes* focused on the right for a woman to obtain an abortion, rather than a more general

right to personal autonomy. *Id.* at 71-73, 75-76. The majority explained that "we performed our section 1 analysis in *Hodes* in the specific context of deeply personal reproductive health decisions, the profound significance of which directly affects a woman's entire lifespan." *Id.* at 76. The court explained *Hodes*'s analysis focused on "the inalienable natural right to personal autonomy in the specific context of abortion, which necessarily limited the scope of its holding." *Id.* In explaining the limits of *Hodes*'s holding, the majority explained its new test: "As the *Hodes* court demonstrated of the right to abortion, each asserted right must be carefully examined and evaluated independently in the context of its own unique implications on an inalienable natural right found under section 1." *Id.* The focus then under § 1 is whether a purported right possessed "unique and profound attributes." *Id.*

Admittedly, there is some confusion over how much *Stanek* changed the evaluation of rights claimed under § 1. See *id.* at 75-77; *id.* at *87-88 (Rosen, J., concurring); *id.* at *95-98 (Wilson, J., concurring); *id.* at 106-15 (Stegall, J., dissenting). But this Court need not wade into this confusing morass without more guidance from the Supreme Court, especially not in a situation where the purported rights are not raised as a constitutional challenge, but within the framework of statutory interpretation.

a. Right to Personal Autonomy

Intervenors first argue K.S.A. 2023 Supp. 77-207 violates their right to personal autonomy under § 1 because it would force them to carry a driver's license

containing their biological sex. (Intervenors' Brief, 24-26.) Intervenors claim this amounts to a forced outing of their transgender identity. (Intervenors' Brief, 24.) The district court found that applying *Hodes* to K.S.A. 2023 Supp. 77-207 in the manner Intervenors requested would unreasonably stretch *Hodes*'s holding. (R. III, 275.) The district court found *Hodes* did not apply because it held Kansans have a right to control their own bodies, not a right to control what information a state-issued driver's license displays. (R. III, 275.) Further, the district court found that Intervenor's testimony at the hearing to "feeling embarrassed, humiliated, or unsafe if someone gave them a puzzled look, hesitated or questioned their identity when looking at their driver's license" but did not testify that a driver's license indicating their biological sex at birth rather than their professed gender identity resulted in "physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement." (R. III, 275.)

Intervenors assert the district court erred in three ways: First, that its factual findings are legally irrelevant to the application of constitutional avoidance. (Intervenors' Brief, 25-26.) Second, that nothing in *Hodes* suggested that the harms listed by the district court here are the only cognizable harms under this personal autonomy right. (Intervenors' Brief, 26.) Third, that the district court was incorrect to state Intervenors' evidence did not demonstrate harms reaching the level of a constitutional violation to the right to personal autonomy. (Intervenors' Brief, 26.)

Intervenors first point, that the district court's factual findings are legally irrelevant to applying constitutional avoidance, has already been addressed above.

Intervenors assertion that "[i]t is enough that K.S.A. 77-207's application to licenses would raise serious doubts about its constitutionality given Kansans' right to personal autonomy" is an incorrect reading of the constitutional avoidance canon. (See Intervenors' Brief, 25.) The district court's factual findings showed that no right to personal autonomy was implicated. For the reasons previously discussed, the district court did not err. K.S.A. 2023 Supp. 77-207 does not violate Intervenors' right to personal autonomy.

Second, the district court correctly found that extending *Hodes* to this case would stretch it far beyond its actual holding. First, *Hodes* noted that the right of personal autonomy was a "limited right," which included "the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." *Hodes*, 309 Kan. at 614. *Hodes* itself specifically focused on the right of women to obtain an abortion. *Id.* at 614, 619. And in *Stanek*, the Supreme Court reiterated that it takes a narrow interpretation of fundamental rights under § 1. See *Stanek*, 551 P.3d at 75-77.

Ultimately, this case is about statutory interpretation and what information state-issued driver's licenses must display. There is no "natural right" to what appears on a person's driver's license because there were no driver's licenses in the Lockean state of nature. Cf. *State v. Bowie*, 268 Kan. 794,800, 999 P.2d 947 (2000) ("[D]riving a motor vehicle in Kansas is not a natural right but a privilege. That privilege is granted by the State and, pursuant to 8-235(a), the privilege to drive is granted only to those drivers with a valid license . . ." (internal citation omitted).)

Neither § 1, *Hodes*, nor anything else in Kansas law state that Intervenors have a right to control what information is contained on their state-issued driver's licenses. K.S.A. 2023 Supp. 77-207 does not implicate Intervenors' right to control their own bodies or exercise self-determination. See *Hodes*, 309 Kan. at 646. Intervenors remain free to identify, dress, and present themselves in a manner in accordance with their self-determined gender identity.

Finally, the district court did not err by finding Intervenors did not demonstrate harms that implicated their right to personal autonomy. Intervenors state that unrebutted testimony showed Intervenors had experienced harassment and negative interactions with law enforcement. (Intervenors' Brief, 26.) Intervenors provide no further explanation in their brief as to what those specific incidents were or how they prove the district court wrong. Intervenors never testified to any specific incidents with their driver's licenses displaying biological sex that resulted in physical violence, verbal harassment, loss of employment, loss of benefits, or refusal of service. Intervenors' testimony about negative interactions with law enforcement were heavily colored by their own apprehensive perceptions, not law enforcement actions. (R. VII, 238-40, 250-51; VIII, 353-55, 361-62.) Those "negative interactions" with law enforcement did not result in any tickets or arrests. (R. VII, 250; VIII, 362.) Law enforcement never raised with them the issue of the sex marker on the driver's license being incongruent with their biological sex at birth. (R. VII, 250; VIII, 362.)

Intervenors' testimony as to their own subjective self-conscious perceptions of other people's intentions are insufficient to establish an extension of the right to personal autonomy to information presented on driver's licenses. See *Gore v. Lee*, 107 F.4th 548, 564-65 (6th Cir. 2024) (explaining that generalized risks stated by transgendered individuals of verbal harassment, denial of benefits or service, being asked to leave, or being assaulted, as well as an "'aware[ness] of the high incidence of violence' against transgender individuals" falls "well short of the substantial, direct, and individualized risk of bodily harm" necessary to show they suffered harm from a violation of their alleged privacy rights). How a third party may react to Intervenors is not the *State* interfering with Intervenors' personal autonomy.

In *Gore*, the Sixth Circuit, while noting that the plaintiffs defined gender identity as "a 'person's core internal sense of their own gender,'" addressed this "forced outing" argument as it applied to birth certificates, pointing out that it would be difficult to show how Tennessee's birth certificate amendment policy amounted to a forced outing when the policy of maintaining a record of a person's biological sex "does not disclose any mismatch with their gender identity." 107 F.4th at 564. A person's gender identity is a matter of that person's internal thoughts and thus cannot be considered obvious to anyone based on external appearances. See *id.* at 557. ("But the policy does not enforce any notion about how Tennesseans should dress or speak, what pronouns they should use, or whether they should present themselves as male or female (or neither)."). "This being a free society, persons generally are allowed to appear, dress, behave, and be denominated however they

want—irrespective of (and untethered to) not only their sex designation on their birth certificate, but also their gender ideology." *Gore v. Lee*, 2023 WL 4141665, at *29 (M.D. Tenn. 2023), aff'd by *Gore*, 107 F.4th 548 (2024).

Intervenors have no constitutional right to decide what information appears on their state-issued licenses. K.S.A. 2023 Supp. 77-207's requirement that a person's biological sex at birth be designated on driver's licenses does not implicate Intervenors' right to personal autonomy. As there is no constitutional right implicated by the statutory text, the constitutional avoidance canon is not applicable.

b. Right to Informational Privacy

Intervenors next allege the State's interpretation of K.S.A. 2023 Supp. 77-207 violates their right to informational privacy. (Intervenors' Brief, 27-30.) Intervenors note the Kansas Supreme Court has recognized a federal right to information privacy in certain situations, and surmise that the Kansas Constitution also protects a right to informational privacy under § 1. (Intervenors' Brief, 27.) The district court declined to be the first to recognize this right of informational privacy under § 1. (R. III, 276.)

The federal courts have indeed recognized a limited federal "right to privacy," though the extent of this right has been questioned. See *Whalen v. Roe*, 429 U.S. 589, 599-600, 602 (1977); but see *Leiser v. Moore*, 903 F.3d 1137 (10th Cir. 2018) ("Much more importantly, in 2011 the Supreme Court made clear that any statements in its precedents regarding a constitutional protection against

government disclosure of personal information were dicta."). The Kansas Supreme Court recognized this right under the federal Constitution in *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 919-20, 128 P.3d 364 (2006). This Court should follow the district court's path and not recognize a right to informational privacy under § 1.

The Supreme Court in *Alpha Medical Clinic* expressly declined to hold whether such a right exists in the Kansas Constitution. *Alpha Med. Clinic*, 280 Kan. at 920 ("We have not previously recognized—and need not recognize in this case despite petitioners' invitation to do so—that such rights also exist under the Kansas Constitution."). This case is not the proper vehicle to find this unenumerated right in the Kansas Constitution for the first time. This case is not a constitutional challenge to K.S.A. 2023 Supp. 77-207. Courts should reserve questions about the existence of unenumerated rights for instances when a party actually raises a constitutional challenge. Intervenors presume § 1 includes this right to informational privacy; that the state right to informational privacy is more expansive than the federal right; and that this right covers a designation of biological sex on a transgender individual's government-issued driver's license, all without taking the time to explain to the Court why these arguments are correct.

Intervenors once again rely on abortion case law. *Alpha Medical Clinic* relied heavily on federal abortion law to reach its holding. 280 Kan. at 919-25. Federal abortion caselaw is no longer good law. See *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 302, (2022). Thus, it is even more unclear whether this informational privacy right, as Intervenors portray it, to have their transgender

identity listed on their driver's licenses is present in any part of the Kansas Constitution, including § 1. See *Gore*, 107 F.4th at 562 ("The right to a birth certificate conforming to one's gender identity is not 'deeply rooted' in our history and 'implicit in the concept of ordered liberty.'").

Even considering Intervenors arguments on the alleged infringement of this right, there was no violation of their right to informational privacy. Intervenors again claim the State's interpretation of K.S.A. 2023 Supp. 77-207 would forcibly out transgender Kansans. (Intervenors' Brief, 28-29.) As discussed above, this case is about what identifying information must appear on Kansas driver's licenses. Intervenors have no constitutional right to dictate what information appears on a state-issued driver's license.

Intervenors claim the State's interpretation of K.S.A. 2023 Supp. 77-207 could force KDOR to ask "invasive and deeply personal questions about genitalia at birth and reproductive capacity." (Intervenors' Brief, 29.) Intervenors provide no support for this speculative claim, citing to non-Kansas employment-law cases that have little to do with driver's licenses or other forms of government-issued identification or vital records. Intervenors also claim the Attorney General refused to explain how KDOR's staff could determine a person's biological sex, but a look at their record cite shows the actual response from the Attorney General was an objection to the interrogatory. (Intervenors' Brief, 30); (II, 435). Intervenors apparently chose not to pursue an answer to their query. Kansas law provides the required documents an individual must present to obtain or renew a driver's

license. See K.S.A. 2023 Supp. 8-240. It is KDOR's duty to comply with the law. There is no evidence at this point that KDOR would have "to ask invasive questions about genitalia at birth and reproductive capacity to all applicants." This Court should not entertain such baseless allegations absent some record support.

This Court should not recognize a right to informational privacy under § 1 for the first time in addressing a constitutional avoidance argument. Even considering Intervenors' arguments, the State's interpretation of K.S.A. 2023 Supp. 77-207 does not implicate Intervenors' right to informational privacy.

c. Right to Equal Treatment

Intervenors' final constitutional avoidance argument is that the State's interpretation of K.S.A. 2023 Supp. 77-207 violates Intervenors' constitutional right to equal treatment. (Intervenors' Brief, 31-32.) Intervenors allege K.S.A. 2023 Supp. 77-207 imposes a facial sex-based classification because it relies on reproductive organs to classify people under state laws with respect to the individual's biological sex. (Intervenors' Brief, 31.) The district court rejected this contention, finding K.S.A. 2023 Supp. 77-207 did not create any classification because the law applied the same for each person no matter his or her sex. (R. III, 277.)

On appeal, Intervenors do not explain where they locate their equal protection claims in the Kansas Constitution. Before the district court, Intervenors claimed K.S.A. 2023 Supp. 77-207 deprived them of equal protection of the law under § 1. (R. III, 42-44.) However, our Supreme Court has recently explained that "it is clear that the textual grounding of equal protection guarantees contained in

the Kansas Constitution Bill of Rights is firmly rooted in the language of section 2." *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022). The *Rivera* Court also noted *Hodes* did not change "our historical and fundamental interpretation of the scope of equal protection found in section 2." *Id.* In other words, § 2 holds our State's equal protection guarantees and is interpreted the same as the Fourteenth Amendment. See *id.*

Equal protection applies only "to those who really are similarly situated in light of the purpose of the governmental provision that's involved." *State v. Little*, 58 Kan. App. 2d 278, 279, 469 P.3d 79 (2020). Equal protection means that "all who are similarly situated be treated alike." *Id.* at 280. The party asserting an equal-protection violation bears the burden to show a violation, including showing that he or she is similarly situated to members of a differently-treated class. *Id.*

Intervenors' argument relies heavily on *State v. Limon*, 280 Kan. 275, 122 P.3d 22 (2005). In *Limon*, the court held the State's "Romeo and Juliet" law violated equal protection because it resulted in lower penalties for certain sexual conduct between opposite-sex teenagers but greater punishment for same-sex teenagers. 280 Kan. at 306-07.

Limon is inapplicable here. *Limon* involved distinct classifications and different severity of punishments based on the sex of the individuals involved. 280 Kan. at 283-85. Both of those elements are not present here. K.S.A. 2023 Supp. 77-207 requires driver's licenses to designate the licensee's sex, which "means such individual's biological sex, either male or female, at birth." In contrast, K.S.A. 2023

Supp. 77-207 applies evenly across the board to any individual possessing a Kansas driver's license, without regard to an individual's sex or gender identity. See *Gore*, 107 F.4th at 555 ("The distinction also treats the sexes identically. . . . That policy does not impose any special restraints on, and does not provide any special benefits to, applicants due to their sex. It does not impose 'one rule for' males and 'another for' females. . . . The amendment application does not ask for the sex of the individual, and eligibility for it does not turn on the sex of the individual. The policy treats the sexes equally." (internal citations omitted)); see also *L.W. by and through Williams v. Skrmetti*, 83 F.4th 460, 480 (6th Cir. 2023) ("Under each law, no minor may receive puberty blockers or hormones or surgery in order to transition from one sex to another. Such an across-the-board regulation lacks any of the hallmarks of sex discrimination. It does not prefer one sex over the other. It does not include one sex and exclude the other." (internal citations omitted)).

While the Tenth Circuit Court of Appeals recently held an Oklahoma requirement requiring birth certificates to display an individual's biological sex classified based on transgender status and sex and violated the federal equal protection clause, see *Fowler v. Stitt*, 104 F.4th 770, 800 (10th Cir. 2024), its decision is wrong and readily distinguishable.

Fowler is distinguishable from this case for several reasons. The Tenth Circuit found Oklahoma was not harmed by changing birth certificates because the state continued to possess the original birth certificates. *Fowler*, 104 F.4th at 795-96. While KDOR might keep a record of licensee's biological sex, the license used by

the licensee will be altered and others viewing the license will not readily be able to obtain that information. Thus, the State here would indeed be harmed by KDOR allowing licensees to alter the sex designation on their driver's licenses. And, though the State believes the Governor of Oklahoma was entitled to make the statements he did, the Tenth Circuit relied on the Governor's statements that he believed God created people male and female to be evidence of his intent to discriminate against transgender individuals. *Id.* at 787-88. Intervenors have not pointed to similar statements made by legislators in their argument to this Court or the court below.

Fowler was also wrongly decided. The Tenth Circuit relied heavily on the United States Supreme Court opinion in *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020), which involved a specific interpretation of Title VII, not a state constitutional challenge. 590 at 788-94. The Tenth Circuit was wrong to do so. See *Gore*, 107 F.4th at 556 ("Even so, the plaintiffs point out, had they 'been assigned female at birth, they would be able to have certificates matching their identity,' and they allege that necessarily amounts to a form of sex discrimination. But this contention, premised on Title VII cases, does not apply to equal protection claims, as we and others have explained." (internal citations omitted)). This Court should not follow the Tenth Circuit in this erroneous application. Intervenors do not rely on *Bostock* here, only making a passing reference to the opinion. *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (point raised incidentally in brief and not argued therein deemed waived or abandoned). Additionally, the birth certificate

policy did not create any classification. See *Gore*, 107 F.4th at 555-56. It required a recording of a simple fact—a person's biological sex at birth. See *id.* at 556 ("When a law does not ascribe different benefits and burdens to the sexes, that law does not discriminate based on sex, even if sex 'factors into' the law's application."); *Skrmetti*, 83 F.4th at 484.

Intervenors claim K.S.A. 2023 Supp. 77-207 could not pass any level of constitutional scrutiny. (Intervenors' Brief, 32-35.) As K.S.A. 2023 Supp. 77-207 makes no classifications, its requirement of biological sex being designated on driver's licenses is not a denial of the equal protection of laws. *Skrmetti*, 83 F.4th at 480-81. Thus, the district court was correct that there was no reason to discuss or apply any level of scrutiny. See *id.* at 481.

Intervenors claim that, in a case challenging K.S.A. 2023 Supp. 77-207's constitutionality, a court would have to apply heightened constitutional scrutiny. (Intervenors' Brief, 33.) Not so. Though the district court did not apply any level of scrutiny, because K.S.A. 2023 Supp. 77-207 creates no classifications, even if a level of scrutiny was applied, that scrutiny should be rational basis review. *Gore*, 107 F.4th at 558-59 (explaining that transgender status is not a suspect class). *Limon* only applied the rational basis test based on the statute's exclusion of homosexual conduct. 280 Kan. at 287. Intervenors ask for a higher level of scrutiny than the case they rely on. The State's interest in preserving a consistent definition of sex and of maintaining an accurate data set easily satisfies rational basis review. See *Gore*, 107 F.4th at 560-61. Given the large and expanding number of "gender

identities" and the complications with including them all, a State's desire to limit state-issued documents to biological sex at birth also satisfies rational basis. See *Varner*, 948 F.3d at 257 ("If a court orders one litigant referred to as 'her' (instead of 'him'), then the court can hardly refuse when the next litigant moves to be referred to as 'xemself' (instead of 'himself'). Deploying such neologisms could hinder communication among the parties and the court."); *id.* ("When local governments have sought to enforce pronoun usage, they have had to make refined distinctions based on matters such as the types of allowable pronouns and the intent of the 'misgendering' offender.").

As K.S.A. 2023 Supp. 77-207 is unambiguous, there is no reason for this Court to apply, or even consider, the constitutional avoidance canon. See *Johnson*, 312 Kan. at 602. Even considering this limited canon of statutory construction, K.S.A. 2023 Supp. 77-207 does not implicate any of Intervenors' claimed constitutional rights. Intervenors are trying to create new constitutional rights in this case under § 1. This Court should reject Intervenors' attempts to muddy the statutory waters.

B. KDOR's failure to comply with K.S.A. 2023 Supp. 77-207 in issuing driver's licenses establishes a reasonable probability of the State suffering an irreparable future injury.

Turning to the remaining temporary injunction factors, the State must also show a reasonable probability exists that it will suffer an irreparable future injury. In determining whether a party shows it will suffer an irreparable future injury, the party must only demonstrate a "reasonable probability" exists. *Steffes*, 284 Kan. at 395. The "reasonable probability" standard is a much lower burden than the

applicable burden of proof at a trial. See *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 492, 173 P.3d 642 (2007). Requiring proof of certainty of an irreparable harm is too high of a standard for parties seeking injunctions. *Bd. of Cty. Com'rs of Leavenworth Cty. v. Whitson*, 281 Kan. 678, 684, 132 P.3d 920 (2006).

Intervenors ignore the State's primary irreparable future injury assertion—that the failure by KDOR to comply with the law is an irreparable future injury itself. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issues not briefed deemed waived or abandoned). Intervenors instead focus on the injury to law enforcement. (Intervenors' Brief, 36-38.) The district court did devote most of its analysis in its order to the law enforcement issue, but the State raised, and the district court also found, that KDOR's refusal to comply with the statute was an irreparable injury. (R. I, 2, 5-6, 19-20; III, 98-99, 160-61, 278-280.)

The primary harm here is KDOR's refusal to comply with a law duly enacted by the Legislature. The Kansas Constitution empowers the Legislature to make the laws, and it is the executive branch's duty to enforce those laws. Kan. Const. Art. II, § 1, Art. I, § 3. The harm that occurs against the State here then is KDOR's refusal to comply with K.S.A. 2023 Supp. 77-207 and fulfill its duty to comply with duly-enacted state law, which serves as the basis for the State's mandamus action. K.S.A. 60-801 ("Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or 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."); *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 1024, 686 P.2d 171 (1984) (writ of mandamus "rests upon the averred and assumed fact that the respondent is not performing or has neglected or refused to perform an act or duty, the performance of which the petitioner is owed as a clear right"); *Stephens v. Van Arsdale*, 227 Kan. 676, 682, 608 P.2d 972 (1980) ("The remedy of mandamus is available only for the purpose of compelling the performance of a clearly defined duty resulting from the office, trust, or official station of the party to whom the other is directed, or from operation of law."); see also *Manhattan Bldgs. Inc. v. Hurley*, 231 Kan. 20, 26, 643 P.2d 87 (1982) ("Mandamus is also a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business. . . .").

Additionally, driver's licenses remain in circulation for six years. K.S.A. 2023 Supp. 8-247(a). The State would also suffer an irreparable injury if KDOR was permitted to issue non-K.S.A. 2023 Supp. 77-207 compliant licenses while this litigation is pending because those licenses would be almost impossible to recall. Kansas statutes provide ways to suspend or revoke driver's licenses, see K.S.A. 8-245; K.S.A. 8-254; K.S.A. 8-255, but offer no procedural mechanism to recall non-compliant licenses.

Finally, the district court was correct to find a reasonable probability of irreparable injury to law enforcement existed "because driver's licenses are routinely used to identify suspects, victims, wanted persons, missing persons, and

others." (R. III, 279.) Hill testified that he relies on a driver's license's sex designation to identify individuals at a stop and to check for wants and warrants. (R. VII, 166-69.) Hill testified about one incident where an individual had a driver's license with a male sex designation. (R. VII, 170.) A check using that designation revealed no criminal history, but jail staff later identified the person as female and a criminal history check with the correct sex designation revealed the person's true criminal history. (R. VII, 170.) Newson also testified a person's sex designation is one piece of information used to determine where to house an arrestee and the sex of the personnel assigned to perform the strip search. (R. VII, 182-83.)

There were indeed few instances of an incorrect sex designation on a driver's license causing problems for law enforcement testified to at trial. But there is a good reason for that. By Intervenor's own account, transgender individuals are a minute portion of Kansas's population. (R. IX, 181, 184, 188); (Intervenors' Brief, 46). Among those who identify as transgender, the number who have changed the sex designation on their driver's licenses would represent an even smaller share of the population. Thus, it is unsurprising these incidents are few in number. But this does not mean it does not harm or present a danger to law enforcement. In fact, absent K.S.A. 2023 Supp. 77-207, it is likely these situations would become more common, increasing the risk of harm to law enforcement. (See VII, 112-13) (explaining the increasing number of applications to change the sex designation on driver's licenses).

The State has demonstrated a reasonable probability of several irreparable harms absent the temporary injunction.

C. The State has no adequate legal remedy.

The district court found the State had no adequate legal remedy to enforce K.S.A. 2023 Supp. 77-207. (R. III, 280); see *Prager v. State, Dept. of Revenue*, 271 Kan. 1, 13, 20, 20 P.3d 39 (2001) (no adequate remedy at law exists where respondents cannot be sued for damages in their official capacity). Intervenors do not challenge that finding. See *Davis*, 313 Kan. at 248 (issues not briefed deemed waived or abandoned). The only available remedies are equitable. The State has satisfied this element.

D. The threat of injury to the State outweighs the speculative harm to KDOR or Intervenors.

Intervenors claim the district court erred in weighing the threat of injury to the State against the harm the injunction may cause to KDOR or Intervenors. (Intervenors' Brief, 39-40.) Intervenors argue the district court was wrong to disregard KDOR's fear of lawsuits and consider the State's interest a unitary one. (Intervenors' Brief, 39.) Intervenors also claim the district court failed to account for the harm an injunction would cause to Intervenors. (Intervenors' Brief, 39-40.)

The district court found KDOR's alleged harm—the specter of lawsuits from transgendered persons—was 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." (R. III, 281.) Intervenors do not explain how this was treating the State's interest as a unitary one. The district court, and the State here, recognize that

KDOR is a state agency. That is the very reason for bringing this suit—KDOR, as a state agency, refuses to comply with a valid state law.

This harm claimed by KDOR is entirely speculative. KDOR is not harmed by complying with a validly enacted statute.[4] See generally *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 49 Kan. App. 2d 354, 382, 310 P.3d 404 (2012). Neither KDOR or Intervenors can point to pending litigation filed against KDOR. Even if there is a potential for suits against KDOR for implanting K.S.A. 2023 Supp. 77-207, it is KDOR's duty as an organ of the executive branch to enforce our State's laws. Additionally, the specter of these future lawsuits is entirely contingent on the final disposition of this case. Only if the State prevails will KDOR have to comply with the statutory requirements as it applies to driver's licenses. If that is the case, KDOR will have no choice but to comply with the law, even in the face of actual (rather than speculated) lawsuits. If KDOR prevails, this purported threat dissipates. Finally, and as an aside, the Attorney General has the duty to defend KDOR in these potential lawsuits. See K.S.A. 75-6108(a), (e). The Attorney General is cognizant of the time and resources it takes to defend against constitutional challenges but also takes seriously the duty to defend the validly enacted laws of this State and has no concerns about defending agencies that are complying with K.S.A. 2023 Supp. 77-207.

[4] It is questionable whether Intervenors can even raise KDOR's harm on appeal, as these alleged harms are not the Intervenors'. Whether KDOR is harmed by the threat of potential lawsuits at the end of this action has no effect on Intervenors.

Intervenors also claim the district court failed to account for the harm to Intervenors. (Intervenors' Brief, 39-40.) The district court, in fact, did account for Intervenors claimed harms, finding that only one of the intervenors, Doe 2, was unable to acquire a license with the desired sex definition. (R. III, 281.) The district court also noted that no Intervenors 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." (R. III, 281.) The district court explained that Intervenors provided no testimony of instances of "physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement." (R. III, 281.) The district court noted that, instead, Intervenors' testimony was filled their perceptions of incidents that left them "feeling embarrassed, humiliated, or unsafe." (R. III, 281.) The district court adequately considered Intervenors' alleged harms.

These alleged injuries to KDOR and Intervenors are speculative or nonexistent. When compared to the State's injury absent a temporary injunction, they do not rise to the level where denying the request for a temporary injunction is appropriate. Driver's licenses are issued for six-year periods and are difficult to rescind or remove from circulation once issued. K.S.A. 2023 Supp. 8-247(a). Driver's licenses are used by law enforcement and others for a wide variety of identification purposes. (R. VII, 167-68, 182-83.) Removing the temporary injunction would allow any person seeking to switch the sex designation on their licenses to do so before a final disposition in this case. Unlike KDOR or Intervenors, this injury is concrete,

not speculative. In the first half of 2023 alone, there were 172 requests to change the sex on driver's license, a steep increase from the approximately 350 requests the previous 11.5 years. (R. VII, 112-13.) Allowing KDOR to issue noncompliant driver's licenses pending a final decision is an "immediate and irreparable injury." (R. III, 280.)

The threat of injury to the State outweighs any claimed harm the temporary injunction may cause KDOR or Intervenors.

E. The public has a strong interest in its state agencies complying with validly enacted laws.

The district court discounted KDOR and Intervenors' claims that it is against the public interest for the district court to enforce an unconstitutional law, noting that it had already found there was a substantial likelihood the State would prevail. (R. III, 281-82.) Though not in the same words, Intervenors dip back into the same well, arguing the harm to transgendered individuals by the invasion of their privacy and autonomy. (Intervenors' Brief, 40.)[5] Intervenors call the district court's finding "arbitrary." (Intervenors' Brief, 40.)

But the district court addressed these constitutional issues when it addressed Intervenors' constitutional avoidance arguments and found there was no harm to Intervenors constitutional rights. (R. III, 277-78.) So, although Intervenors disagree with it, the district court's finding that the State is substantially likely to prevail on

[5] Intervenors claim this "invasion" of their rights "tips the scales sharply against an injunction to disrupt the status quo." (Intervenors' Brief, 40.) This injunction does not "disrupt the status quo." Once K.S.A. 2023 Supp. 77-207 became effective, it became the status quo. The temporary injunction, then, *preserves* the status quo by preventing KDOR and applicants from violating the law while this case proceeds.

the merits also demonstrates the temporary injunction is not against the public interest.

The public interest favors having state officials enforce laws passed by the Legislature. 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 (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 (1990).

The State met its burden to obtain a temporary injunction. This Court should affirm the order.

II. Did the district court err in finding Dr. Oller did not qualify as an expert witness because Dr. Oller could not summarize or explain the scholarly articles she purported to rely on to support her testimony?

Standard of Review

A district court's determination on whether to permit a witness to testify as an expert is reviewed for an abuse of discretion. *State v. Lyman*, 311 Kan. 1, 21, 455 P.3d 393 (2020). A district court abuses its discretion when its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on a legal error; or (3) based on a factual error. *Id.* To the extent statutory interpretation is required, review is de novo. *Id.*

Courts consider two components when reviewing a challenge to the admission or denial of expert witness testimony. *State v. Aguirre*, 313 Kan. 189, 197, 485 P.3d 576 (2021). First, whether the district court actually performed its gatekeeping function using the proper standard is reviewed for an error of law. *Id.* at 197-98.

Second, how a district court applied the standard is a question of whether a district court committed an error of fact or acted arbitrarily or unreasonably. *Id.* at 198. Here, Intervenors claims the district court's decision to exclude Dr. Oller's testimony was arbitrary. (Intervenors' Brief, 41, 47.)

Analysis

K.S.A. 2023 Supp. 60-456(b) provides the standard for expert witness testimony:

> "(b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or date; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case."

K.S.A. 2023 Supp. 60-456(b) adopted the standard articulated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Lyman*, 311 Kan. at 21.

Under the *Daubert* standard, trial courts perform an evidentiary gatekeeping function. *Lyman*, 311 Kan. at 22. A district court's first function is to assess whether an expert is qualified by "'knowledge, skill, experience, training or education.'" *Aguirre*, 313 Kan. at 197.

Here, the district court performed its gatekeeping function concluding Dr. Oller did not meet the standard. (R. VII, 46.) Intervenors claim the district court's rational for excluding Dr. Oller as an expert is not entirely clear (Intervenors' Brief, 45), but the record shows the district court articulated two reasons. First, Dr. Oller has only treated 100 transgender patients, and not all of those patients were seen

for issues relating to their transgender identity. (R. VII, 37, 44.) Second, Dr. Oller was unable "to summarize or explain a lot of these articles that she relied upon as part of her knowledge base, even in the most basic way." (R. VII, 37-38.) The district court highlighted Dr. Oller's repeated deposition testimony that she could not define a term or discuss anything without rereading an entire article. (R. VII, 38.)

Intervenors argue Dr. Oller's experience in caring for more than 100 transgender patients and her treatment of their gender dysphoria "confirms the reliability of her expert testimony." (Intervenors' Brief, 46.) Intervenors claim that, due to the small percentage of the population that is transgender, that would mean, under the district court's reasoning, every rural family physician would be disqualified from providing expert testimony, as would many doctors offering testimony on rare medical conditions. (Intervenors' Brief, 46.)

The State disagrees with Intervenors' reading of the district court's finding. The problem with Dr. Oller as an expert is not just that she only had 100 transgender patients. It is that Dr. Oller did not even treat all of those 100 patients for gender dysphoria or other transgender issues, and, even for those for whom she did, she often saw those individuals for reasons unrelated to their transgender identity. (R. VIII, 309-11.) Dr. Oller was a general practitioner, so she treated patients for a variety of conditions. (R. VIII, 300, 309-11; IX, 60, 63.)

Intervenors attempt to circumvent this fact by repeating Dr. Oller's claim that a patient's transgender identity affects all aspects of treating a patient, even those issues that are not directly related to a patient's gender dysphoria.

(Intervenors' Brief, 43-44); (R. VIII, 309-11). But this attempt to bolster Dr. Oller makes little sense in the context of whether she is qualified to testify as an expert on the effect of an incongruent sex designation on a driver's license.

Intervenors also highlight Dr. Oller's memberships in several organizations to show her knowledge and expertise. But, as the district court found, those organizations are either general medical organizations like the American Academy of Family Physicians and the Kansas Academy of Family Physicians or a transgender advocacy group like the World Professional Association for Transgender Health. (R. VII, 42-44; IX, 44-45.) While Dr. Oller may have good reasons to be a part of these organizations to assist in her general practice, they do not show she qualifies as an expert witness on this matter.

Dr. Oller was not completely prevented from testifying about her patients. The district court permitted her to testify about her personal experience based on her treatment of these transgender individuals, which she did, including about the sex designation on her patients' driver's licenses. (R. VIII, 346.)

Intervenors also disagree with the district court's finding that Dr. Oller, in her deposition, could not summarize or explain the articles she relied on in her expert declaration. (Intervenors' Brief, 46-47.) Intervenors repeat their claim that the State did not provide Dr. Oller with any copies of those articles to her deposition. (Intervenors' Brief, 46.) In doing so, Intervenors omit a key detail—Dr. Oller testified at her deposition that she had access to everything she cited to. (R. IX, 82.) Dr. Oller could have reviewed any of those articles at any time, and, in fact,

she did so on at least one occasion. (R. IX, 95-96.) Yet, she was still unable to answer the State's questions. (R. IX, 96-98.)

But even though Dr. Oller had the opportunity to review those articles, the fact that she was unable to answer even the most basic questions about them supports the district court's determination. She could not opine on any research methods without rereading each article. (R. IX, 85.) Dr. Oller could not explain what recall bias or self-selection bias meant and was unable to describe the difference between "association" and "causation." (R. IX, 89-91.) When asked how "gender identity" has evolved in the DSM-5, Dr. Oller testified she could not answer without reading all the chapters in the DSM-5 regarding gender identity. (R. IX, 91.) Dr. Oller could not differentiate between "standard of care" and "guideline." (R. IX, 99.) Dr. Oller could not explain the difference between "mental health" and "sexual health." (R. IX, 115-16.)

Dr. Oller could not say which of the documents cited in her declaration that she had read before preparing for this litigation. (R. IX, 105.) At her deposition, Dr. Oller could not recall when she last read the studies she cited to in her declaration, nor could she summarize those studies. (R. IX, 108.) This line of questioning continued until Dr. Oller stipulated this was true for all the studies that she cited. (R. IX, 109-10.) Dr. Oller also acknowledged she had not authored or published any peer-review publication, and any scientific research she had performed did not involve transgender issues. (R. IX, 66-67.)

Dr. Oller was unable to answer even the most basic questions about the studies and articles that she purported to rely on in forming her expert declaration. Intervenors assert this should go towards the credibility of her testimony rather than her qualification as an expert, but when a purported expert is unable to even answer any questions or provide any details about the information she is relying on to qualify as an expert, a district court's decision to exclude this "expert" testimony is not arbitrary.

Harmless Error

Kansas appellate courts review the erroneous admission of expert testimony for harmless error. *State v. Gaona*, 293 Kan. 930, 940, 270 P.3d 1165 (2012). Where, as here, an offer of proof of the expert's purported testimony is provided, courts should also conduct the same harmless error review for the exclusion of expert testimony. As the party benefitting from the alleged error, the State would bear the burden to show that "there was no reasonable probability that the district court's erroneous [exclusion] of expert testimony affected the trial, in light of the entire record. See *Aguirre*, 313 Kan. at 208.

Any error in excluding Oller's testimony as an expert witness is harmless. Dr. Oller's offer of proof explained why she thought it was important for transgender individuals to have driver's licenses that match their gender identity and the harm it could cause if they do not. (R. IX, 232-39.) While these factors might be relevant to whether it is good policy for the Legislature to pass such a law, the offer of proof has no bearing on the meaning of the statutory text. The district court found K.S.A.

2023 Supp. 77-207's meaning is unambiguous, and that unambiguous text requires driver's licenses to display a licensee's biological sex at birth. Nothing in Dr. Oller's offer of proof affects that conclusion. Thus, any error in excluding her expert testimony was harmless.

CONCLUSION

K.S.A. 2023 Supp. 77-207's meaning is unambiguous. It requires KDOR to place a licensee's "biological sex, either male or female, at birth" on licenses." The State is substantially likely to prevail on the merits and also satisfied the other temporary injunction elements. The district court's denial of Dr. Oller testify as an expert witness was also correct. This Court should affirm the temporary injunction, preserving the status quo as this litigation unfolds.[6]

[6] In their conclusion, Intervenors ask for this Court to direct an immediate entry of the mandate upon issuing the opinion under Supreme Court Rule 7.03(b)(1)(B) (2024 Kan. S. Ct. R. 46). This is not an appropriate application of the rule. After an opinion is issued, the non-prevailing party has 30 days to file a petition for review. Rule 8.03(b)(1). Timely filing a petition for review stays the mandate until disposition of the petition. Rule 7.03(b)(2). Intervenors' request seeks to cut off the State's right to appeal a possible adverse decision. No matter which party prevails, this Court should not participate in Intervenors' attempt to short circuit the judicial process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 28, 2024, the above brief was filed with the Clerk of the Court, and a copy was electronically mailed to:

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