

IN THE THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

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. 23-CV-000422
Div. No. 3

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Kansans expect the State of Kansas, and the Attorney General, to protect them, not persecute them. After all, the Kansas Constitution, based on which the State of Kansas was admitted to the Union as a free state on January 29, 1861, acknowledges in Section 1 of the Bill of Rights that all persons "are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." The State and associated state actors must respect, and are prohibited from infringing, those equal and inalienable rights. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 633-38, 440, P.3d 461, 476-81; *State v. Wilson*, 101 Kan. 789, 168 P.679, 682 (1917); *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 759-60, 408 P.2d 877, 887 (1965); *Chamberlain v. Missouri Pac. R. Co.*, 107 Kan. 341, 191 P. 261, 262 (1920); *State v. Wilson*, 101 Kan. 789, 168 P.679, 682 (1917); *Coffeyville Vitriified Brick & Tile Co. v. Perry*, 69, Kan. 297, 76 P. 848 (1904). In fact, the Kansas Supreme Court and district courts, established and empowered by Article III, Section 1 of the Kansas Constitution, have repeatedly stricken laws and repudiated actions of the State and associated actors infringing on rights granted by the Kansas Constitution.

See Hodes, 309 Kan. at 633-38; *Henry v. Bauder*, 213 Kan. 751, 762, 518 P.2d 362, 371 (1974) (overruling a Kansas "guest statute" because it violated "the equal protection guarantees of the United States and Kansas Constitutions," by creating classifications that are "arbitrary and discriminatory and ha[d] no rational basis."); *Chamberlain*, 191 P. at 262 (holding that a legislative act "when applied to railroads whose rights of way were acquired, and paid for, and in use long prior to that enactment" violated Sections 1 and 2 of the Kansas Constitution.); *Coffeyville* 76 P. at 849 (holding that an act which made it illegal to fire an employee for union participation was a violation of the "right to terminate a contract," and violated Section 1 of the Bill of Rights).

Transgender people or "trans people" are people whose gender identity is different from the sex they were assigned when they were born. Trans people exist. Some trans people are Kansans. The Kansas Constitution guarantees Kansans who are transgender the same rights as Kansans who are not transgender. Those rights include those guaranteed by Section 1 of the Bill of Rights, such as rights of personal autonomy, privacy, and equality.

Petitioner has asked the Court, in the case of certain Kansans who are transgender, (1) to prohibit the Respondents prospectively from issuing driver's licenses or other documents that show the driver's correct gender marker, and (2) upon the renewal date for licenses that have previously been updated to reflect the correct gender marker, require Respondents to revert the gender marker back to its original, inaccurate marker. If the Court were to grant the Petitioner's requested relief, the Proposed Intervenors, five transgender Kansans who rely on their state issued driver's licenses for their livelihood and day-to-day activities, would suffer violations of their rights under Section 1 of the Bill of Rights of the Kansas Constitution and other associated injuries.

The Proposed Intervenors ask the Court to grant them leave to intervene as respondents in this action pursuant to K.S.A. 60-224. As described in detail below, the Proposed Intervenors are

entitled to intervene as of right because they satisfy all of the conditions required under K.S.A. 60-224(a)(2). But briefly, this motion is timely; the Proposed Intervenors would suffer a violation of their rights under the Kansas Constitution and associated injuries if the Court grants the relief requested by the Petitioner; and, the current parties to the action do not adequately represent the Proposed Intervenors' interests. In the alternative, the Proposed Intervenors should be allowed to intervene as a permissive matter under K.S.A. 60-224(b)(1)(B). Their defenses in opposing the Petitioner's attempts to violate their rights share common questions of law and fact with the issues otherwise to be adjudicated in this action. Furthermore, intervention by the Proposed Intervenors will not unduly delay or prejudice the adjudication of the original parties' rights.

STATEMENT OF FACTS

Proposed Intervenors

1. Proposed Intervenors are five transgender individuals who wish to obtain or maintain a Kansas Driver's License with a gender marker that matches their gender identity.

2. Adam Kellogg is a 20-year-old student at the University of Kansas. Although he was assigned female at birth, he has known that he is male since at least 12 years old. Kellogg Decl. at ¶¶ 1-2 (Ex. A). Mr. Kellogg lives as a man and has undergone gender affirming surgery. *Id.* at ¶ 7.

3. Mr. Kellogg was born in Illinois. In 2021, he changed his Illinois birth certificate to include a "male" gender marker and updated his license with the Kansas Department of Revenue (KDOR) to include a "male" gender marker. *Id.* at ¶¶ 3-5.

4. Mr. Kellogg's license expires in June of 2024, at which time he will need to seek a renewal through KDOR. *Id.* at ¶ 6.

5. If Mr. Kellogg’s driver’s license is renewed with a “female” gender marker, rather than “male,” he will experience significant harm. Prior to changing the gender marker on his license in 2021, Mr. Kellogg was forced to disclose his transgender identity to an employer against his will, because his license did not match his gender presentation. *Id.* at ¶ 9. He also experienced a negative interaction with a law enforcement officer during a speeding stop, because his license did not match his gender presentation. *Id.* at ¶ 10. With his updated license reflecting his accurate gender marker, Mr. Kellogg no longer feels embarrassed or afraid when showing his identification. *Id.* at ¶ 10. He does not want to disclose the fact that he is transgender every time he goes to the bank, interacts with law enforcement, rents a car, votes, applies for jobs, or enters government buildings. *Id.* at ¶ 13.

6. Mr. Kellogg also fears having a birth certificate and federal identification documents that conflict with the gender marker on his Kansas Driver’s License, and the problems that might create for him in the future. *Id.* at ¶ 15.

7. Kathryn Redman is a 62-year-old transgender woman who lives in Lenexa, Kansas. She was assigned male at birth, but has known she was female since approximately 3 years old. She has lived openly as a woman since she was 59 years old. Redman Decl. at ¶¶ 1-2 (Ex. B).

8. Ms. Redman was born in Cincinnati, Ohio, and originally had an Ohio birth certificate with a “male” gender marker. In 2021, she changed her birth certificate pursuant to Ohio law, so it now reflects a “female” gender marker. She has also updated her Kansas Driver’s License to include a female gender marker. *Id.* at ¶¶ 4-6.

9. Ms. Redman’s current license will expire on August 6, 2027, at which time she will need to seek renewal with KDOR. *Id.* at ¶ 6.

10. Prior to changing the gender marker on her license, Ms. Redman frequently received rude and harassing comments when she appeared as female but was forced to show an ID with a male gender marker. Whenever she flew, the mismatch between her physical appearance and the gender marker on her license resulted in the Transportation Security Administration conducting invasive pat downs of the genital area of her body. *Id.* at ¶ 8-9.

11. With her updated license, Ms. Redman no longer feels embarrassed, ashamed, or afraid when she has to show her license. She no longer experiences rude or harassing comments for showing her ID. She wants a license that accurately reflects her gender identity so she will not be forced to disclose the fact that she is transgender every time she needs to show ID, including while voting, at bars or restaurants, when entering government buildings, and more. *Id.* at ¶¶ 12-13.

12. Ms. Redman also fears having a birth certificate and federal identification documents that conflict with her Kansas Driver's License, and the problems that might create for her in the future. *Id.* at ¶ 15.

13. Juliana Ophelia Gonzales-Wahl is a 30 year-old Latina transgender woman living in Lawrence, Kansas. Gonzales-Wahl Decl. at ¶¶ 1-2 (Ex. C). Although assigned male at birth, she has been living as a woman in 2018 and has known she was female since she was 6 years old. *Id.* at 2.

14. Ms. Gonzales-Wahl has been on hormone replacement therapy for five years and has pursued gender affirming surgery. She lives as a woman and is perceived as a woman in her day-to-day life. *Id.* at ¶ 7.

15. Ms. Gonzales-Wahl has updated the gender marker on her Kansas Driver's License to include a "female" gender marker. Her current license expires in April of 2026. At that time, she will need to renew her license with KDOR. *Id.* at ¶ 6.

16. When Ms. Gonzales-Wahl had an inaccurate gender marker on her license, she felt concerned for her public safety. She is aware of the harassment and violence that transgender people, especially women of color, experience, which made her fearful of driving within the state. She would avoid leaving Lawrence as much as possible. *Id.* at ¶ 8. She would also decline social invitations, so she could avoid having to show an ID that did not match her gender identity, which would out her as transgender.

17. With her updated, accurate license, Ms. Gonzales-Wahl no longer feels unsafe traveling across the state, accessing medical care, and being in public spaces where she is required to show her ID. *Id.* at ¶ 10. She fears what will happen to her if she is forced to renew her license with an inaccurate gender marker and what that might mean for her ability to move safely and securely in the state and access public services. *Id.* at ¶ 13.

18. Doe Intervenor-Respondent 1 (hereinafter "Doe 1") is a transgender man who lives in a small rural community in southwest Kansas. *See Doe Intervenor-Respondent 1 Decl.* at ¶¶ 2-3 (hereinafter "Doe 1 Decl.") (Ex. D).

19. Doe 1 was assigned female at birth but has known he is male for many years. He began transitioning two years ago after realizing he needs to live his life as his authentic self. *Id.* at ¶ 2. Doe 1 lives as a man and is perceived as a man in his day-to-day life. He has pursued and continued to receive gender affirming healthcare. *Id.* at ¶ 7.

20. Doe 1 was born in Kansas and had a female gender marker on his birth certificate because that was the sex he was assigned at birth. In 2021, he changed his birth certificate to now

reflect a “male” gender marker. *Id.* at ¶ 4. That same year he updated his driver’s license with KDOR to have a male gender marker. *Id.* at ¶ 5.

21. Doe 1’s license is valid through December 2024. At that time, he will need to renew his license with KDOR. *Id.* at ¶ 6.

22. Doe 1 is aware that transgender people experience significant harassment, discrimination and even violence solely because they are transgender. He has a young child and fears that negative community backlash against himself and his child might result if his transgender identity is made public through this litigation. *Id.* at ¶ 8. He has not publicly disclosed his transgender identity to his broader community and does not wish to do so.

23. Prior to changing his gender marker, Doe 1 was afraid every time he needed to show his license to the police, at the bank, and in other locations where he did not want to reveal his transgender identity. He has had experiences in the past where he has been treated negatively because he is transgender. *Id.* at ¶ 9-10. This has caused him significant anxiety. *Id.* at ¶ 11. He would avoid going to restaurants, bars, and other places where he had to show his ID. *Id.* at ¶ 12.

24. With his updated license, Doe 1 no longer feels embarrassed, ashamed, or afraid when showing his ID. He is now registered to vote—something he was afraid to do when he had an inaccurate gender marker on his license—and attends social events without fear of being outed, harassed, or discriminated against. *Id.* at ¶ 14.

25. Doe 1 is also very concerned about how public outing of his transgender identity through an inaccurate ID will affect his minor child. Because he lives in a small community, he is concerned that his child will be subjected to harassment or differential treatment because he is transgender. *Id.* at ¶ 17.

26. Doe Intervenor-Respondent 2, (hereinafter Doe 2), intervenes on behalf of her minor son, who is 17-years-old. Doe Intervenor-Respondent 2 Decl. (hereinafter “Doe 2 Decl.”) at ¶¶ 1-2 (Ex. E). Doe 2’s son is a transgender male. He was assigned female at birth but has known he is male since he was 11 years old, and began living as a boy two years ago. *Id.* at ¶ 2.

27. Doe 2’s son has a female gender marker on his birth certificate, which he intends to change to a male gender marker. He currently has a driver’s license with a female gender maker and would like to change it to a male gender marker so that he has an ID that accurately reflects his gender and gender presentation. *Id.* at ¶ 3.

28. Doe 2’s son is perceived as a boy in his every day life, including at school, with friends, and in the community. He only selectively discloses his transgender identity and does not want to be targeted for harassment or discrimination because he is transgender. *Id.* at ¶ 5. He is petitioning for a name change as well. *Id.* at ¶ 7. He is afraid that his current license, and the inability to get an accurate license if Petitioner prevails in this suit, will negatively impact him by forcing him to disclose his transgender identity every time he shows his license. *Id.* at ¶¶ 12-13.

History of this Litigation

29. Senate Bill 180 was enacted into law over the Governor’s veto on April 27, 2023. It became effective on July 1, 2023.

30. The Petitioner filed this Mandamus action on July 7, 2023. That same day, he moved for a Temporary Restraining Order and a Temporary Injunction.

31. On July 10, 2023, the Court granted the Temporary Restraining Order for a period of fourteen days.

32. Respondents filed a Motion to Dissolve the Temporary Restraining Order that afternoon.

33. Respondents' Motion argues that Petitioner's requested relief was procedurally improper and not warranted. Respondents did not raise arguments regarding the constitutional protections implicated by the Petitioner's filings or his interpretation of SB 180. Instead, Respondents focused exclusively on statutory arguments and the interests of KDOR in providing efficient and accurate licensing services.

34. The important privacy, autonomy, and equal protection implications inherent in the Petitioner's position were not addressed at all by Respondent.

35. Respondent also does not purport to represent the interests of those most affected by SB 180, namely, the transgender community in Kansas who seek to lose an important, affirming pathway to legal documentation of their correct gender identity.

LEGAL STANDARD

K.S.A. 60-224 enables intervention through alternate pathways. K.S.A. 60-224(a)(2) provides for intervention as of right under to anyone who, on timely motion, "claims an interest relating to the property or transaction that is subject of the action, and is so situated that disposing of the action may as a practical matter substantially impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." K.S.A. 60-224(b)(1)(B) provides for permissive intervention to anyone that "has a claim or defense that shares with the main action a common question of law or fact." K.S.A. 60-224(b)(1). The party opposing intervention has the ultimate burden to show the Proposed Intervenors' interests would be adequately represented in the absence of the intervention. *See McDaniel v. Jones*, 235 Kan. 93, 106-07, 679 P.2d 682, 694 (1984).

ARGUMENT

A. Intervention as of Right is appropriate under K.S.A. 60-224(a)(2).

K.S.A. 60-224(a), which provides for intervention as a matter of right, "is to be liberally construed in favor of intervention." *Gannon v. State*, 302 Kan. 739, 742, 357 P.3d 873, 875 (2015). The Kansas Supreme Court has held that intervention must be allowed "on the concurrence of three factors: (1) timely application, (2) a substantial interest in the subject matter of the litigation, and (3) inadequate representation of the intervenor's interests by the parties." *Id.* at 741-42, 357 P.3d at 875. This Court is obligated to grant the Motion to Intervene because the circumstances concerning the Proposed Intervenors satisfy these three factors.

First, the Motion to Intervene is timely. Timeliness is determined based on all of the circumstances under a "flexible standard," measured beginning at the time the intervenor is on notice that their interests are not adequately represented. *Gannon*, 302 Kan. at 743, 357 P.3d at 876. Kansas courts generally consider motions for intervention timely when such a motion is filed within a month after the petition is filed and before any discovery is conducted. *See, e.g., Herrmann v. Bd. Of Cnty. Comm'rs of Butler Cnty.*, 246 Kan. 152, 155, 785 P.2d 1003, 1006 (1990) (affirming trial court's order granting a motion to intervene where the motion was filed less than a month after the petition was filed); *McDaniel v. Jones*, 235 Kan. at 107-08, 679 P.2d at 694-95 (holding that a motion to intervene was timely filed when it was filed within a month after intervenors had actual notice of the lawsuit).

In this case, the Petitioner filed the Petition less than one week ago on July 7, 2023, and no discovery has been conducted. The Respondents first identified the bases on which it intended to defend against the Petition in its Motion to Dissolve Temporary Restraining Order filed on July 10, 2023. The Proposed Intervenors have sought to intervene within a matter of days of those filings. Neither the Petitioner nor the Respondents would be prejudiced by the timing of the Motion to

Intervene, and the Motion was filed sufficiently early not to affect the efficient administration of the action.

Second, the Proposed Intervenors have a substantial interest in the subject matter of the litigation. As described above, all Proposed Intervenors would be harmed by the issuance of a driver's license with a gender marker that does not match the gender they live as. *See* Statement of Facts ("SOF") ¶¶ 1-28. Some of the Proposed Intervenors will face having the gender marker on their license changed back to the sex they were assigned at birth at the time when their licenses are renewed if the Attorney General prevails in this action, and Doe 2's minor child will be unable to change the gender marker on his license prospectively. SOF ¶¶ 5, 8, 15, 20, 27.

Third, neither the Petitioner nor the Respondents adequately represent the Proposed Intervenors' interests. It is evident from the face of their Petition that the Petitioner is adverse to the Proposed Intervenors, questions the legitimacy of their circumstances, has zero interest in protecting their rights, and is committed to the proposition that none of them should have a driver's license that correctly reflects their gender. In contrast, the Respondents oppose the Petitioner's claims and requested relief. While the Respondents' opposition aligns with the Proposed Intervenors' interests, a partial alignment and representation of interests is insufficient to justify denying the Motion to Intervene. *McDaniel v. Jones*, 235 Kan. 93, 109, 679 P.2d 682, 695 (1984).

The Respondents' interests here primarily pertain to compliance with applicable Kansas Statutes, K.S.A. 8-240 and K.S.A. 8-243, and issues of efficient governmental administration, while the Proposed Intervenors' interests pertain to the personal Constitutional violations and related injuries that they will suffer if the Petitioner prevails. The Respondents cannot adequately represent the Proposed Intervenors' interests, because they are not directly impacted in the way that Proposed Intervenors – and indeed, all transgender people in Kansas – will be by the outcome

of this action. The Respondents are not advancing the Proposed Intervenors' primary argument and defense, which is that the Petitioner's requested relief would violate Section 1 of the Bill of Rights of the Kansas Constitution. That argument and defense is of critical importance, and the interests are complementary but not identical.

Indeed, the Respondents have already advanced an argument that is contrary to the interests of the Proposed Intervenors. In their Motion to Dissolve Temporary Restraining Order, the Respondents asserted that that the Kansas Legislature could address the competing interests of the Petitioner and Respondents by amending K.S.A. 8-240 and K.S.A. 8-243(a). While this might address some of the procedural issues that Respondents have rightly raised, that sort of resolution would not address, but only would compound, the personal Constitutional violations and related injuries that the Proposed Intervenors would suffer if the relief sought in the petition is granted.

B. Alternatively, the Court Should Grant the Motion to Intervene in the Exercise of Its Discretion under K.S.A. 60-224(b)(1).

The Court has the discretion to grant permissive intervention under K.S.A. 60-224(b)(1)(B). *See Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 533, 216 P.3d 158, 162 (2009). The Court is within its discretion to grant permissive intervention to any person that "has a claim or defense that shares with the main action a common question of law or fact" when the granting of which will not "delay or prejudice the adjudication of the original parties' rights." K.S.A. 60-224(b)(1)(B), (b)(3); *see also R. D. Andersen Constr. Co. v. City of Topeka*, 228 Kan. 73, 82, 612 P.2d 595, 603 (1980) (trial court properly "exercised discretion in granting . . . permissive intervention" as the joining party "sought resolution of the same issue . . . raised no new issues . . . caused no delay . . . and no prejudice resulted."). In the unlikely event the Court determines that the Proposed Intervenors are not entitled by right to intervention under K.S.A. 60-224(a)(2), then

the Court should exercise its discretion to permit intervention by the Proposed Intervenors under K.S.A. 60-224(b)(1)(B).

In this action, the Petitioner has asked the Court, in the case of transgender people (1) to prohibit the Respondents prospectively from issuing driver's licenses or other documents that reflect the driver's gender, and (2) upon the renewal date for licenses that have previously been updated to reflect the correct gender marker, require Respondents to revert the gender marker back to its original, inaccurate marker. The Respondents and the Proposed Intervenors both oppose the Petitioner's requested relief and maintain that the Petitioner's claim to relief is not well-founded. The Respondents' interests and arguments against the Petitioner's claim primarily pertain to compliance with applicable Kansas Statutes, K.S.A. 8-240 and K.S.A. 8-243, and issues of efficient governmental administration. In advancing those interests and arguments, the Respondents have already introduced facts and advanced arguments concerning the spurious nature of the Petitioner's justification for a change in the way gender markers are reflected on driver's licenses. Those same facts and arguments will support the Proposed Intervenors' defense that the relief requested by the Petitioner will not withstand the scrutiny required to justify the deprivation of the Proposed Intervenors rights under the Kansas Constitution. Other common issues of fact and law involved in the action may concern the meaning of "gender" and "sex," and the effect of the Petitioners' claimed relief on Kansans, among others.

Once again, it would "not delay or prejudice the adjudication of the original parties' rights," as required by K.S.A. 60-224(c), if the Court were to grant the Motion to Intervene. The Petitioner filed the Petition less than one week ago, on July 7, 2023. The Respondents made their first substantive filings on July 10, 2023. Discovery has not begun; there is no trial date. The intervention would introduce no cognizable or non-negligible delay or prejudice.

C. The Proposed Intervenors Have Complied with K.S.A. 60-224(c).

As indicated above, K.S.A. 60-224(c) requires that "any motion to intervene must be served on the parties as provided in K.S.A. 60-205," and "[t]he motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." The Proposed Intervenors have filed and served their Motion to Intervene, with such service in compliance with K.S.A. 60-205. The Motion, which incorporates this Memorandum, states the grounds for intervention, and is accompanied by a pleading that sets out the claim or defense for which intervention is sought.

CONCLUSION

For the reasons discussed above, the Proposed Intervenors request that the Court grant their Motion to Intervene.¹

¹ If granted permission to intervene, Proposed Intervenors intent to file a brief in opposition to the Petitioner's request for a temporary injunction and will do so according to the briefing schedule set by the local rules and/or the Court.

Respectfully submitted,

By: /s/ Sharon Brett

Sharon Brett, KS Bar 28696

D.C. Hiegert, KS Bar 29045

AMERICAN CIVIL LIBERTIES UNION

FOUNDATION OF KANSAS

10561 Barkley St., Suite 500

Overland Park, KS 66212

Tel: (913) 303-3641

Fax: (913) 490-4119

sbrett@aclukansas.org

dhiegert@aclukansas.org

Rose Saxe*

Aditi Fruitwala*

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

125 Broad St.

New York, NY 10004

Rsaxe@aclu.org

afruitwala@aclu.org

Scott C. Hecht, KS Bar 16492

Douglas R. Dalgleish, KS Bar 22328

Paulina Escobar *

STINSON LLP

1201 Walnut St., Suite 2900

Kansas City, MO 64106

Scott.hecht@stinson.com

Paulina.escobar@stinson.com

ATTORNEYS FOR INTERVENOR-RESPONDENTS

* *Pro Hac Vice* application forthcoming

Certificate of Service

On July 11, 2023, I caused a copy of the foregoing to be electronically filed using the Court's electronic filing system and also caused a copy to be served on counsel via email, at ted.smith@ks.gov, Anthony.powell@ag.ks.gov; Dwight.carswell@ag.ks.gov; and jesse.burris@ag.ks.gov.

/s/ Sharon Brett

Sharon Brett