No. 24-127390-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

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

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-Appellees

REPLY TO OPPOSITION TO PETITION FOR REVIEW

Appeal from the Court of Appeals of the State of Kansas
Memorandum Opinion No. 127,390; 127,522
Appeal from the District Court of Shawnee County, Kansas
Honorable Theresa L. Watson, Judge
District Court Case No. 23CV422

Kris W. Kobach, Bar No. 17280
Attorney General
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
Telephone: (785) 296-2215
Fax: (785) 291-3131
Email: kris.kobach@ag.ks.gov
Attorney for Petitioner-Appellant

TABLE OF CONTENTS

STATEMENT OF THE ISSUES FOR REVIEW

I. The Court of Appeals' novel imposition of the preponderance of the evidence standard into the substantial likelihood of prevailing on the merits element was not based on this Court's precedent, and Intervenors' arguments against reviewing the Court of Appeals' holding on this element lacks merit.

II. The Court of Appeals, in its analysis, incorrectly required the State to show that it suffered an irreparable injury, rather than a reasonable probability of an irreparable injury, and the record shows the State satisfied this burden.

III. The Court of Appeals made both a factual error and a legal error in *sua sponte* ordering this case reassigned to a new judge on remand.

ARGUMENTS AND AUTHORITIES

Intervenors response to the State's[1] petition for review misunderstands and mischaracterizes what the State said in its petition and what the Court of Appeals held in its opinion.

I. The Court of Appeals' novel imposition of the preponderance of the evidence standard into the substantial likelihood of prevailing on the merits element was not based on this Court's precedent, and Intervenors' arguments against reviewing the Court of Appeals' holding on this element lacks merit.

Intervenors claim "the Court of Appeals did not apply a new standard or otherwise break new procedural ground" in its analysis of the substantial likelihood of success on the merits element. (Intervenors' Opposition to Petition for Review, 4.) Intervenors claim that the Court of Appeals relied on this Court's established precedent. (Intervenors' Opposition to Petition for Review, 4.) The State agrees that substantial likelihood of prevailing on the merits is the appropriate standard. But the court did not just rely on that

[1] Intervenors refer to Petitioner as the "AG." As explained in the petition for review, Petitioner is not the Attorney General, but the State of Kansas. Thus, presumably, whenever Intervenors refer to "the AG," they mean the Petitioner, the State.

standard. Instead, it grafted preponderance of the evidence onto substantial likelihood of prevailing on the merits. Slip Op. at *26-27. Despite Intervenors' claim that the Court of Appeals broke no new ground and relied on this Court's precedent, neither the Court of Appeals nor Intervenors could cite a single Kansas case that applied preponderance of the evidence to determine a substantial likelihood of prevailing on the merits. The Court of Appeals created a new standard for this case. This erroneous creation warrants review and reversal by this Court. Instead, courts should determine a substantial likelihood of prevailing on the merits by using this Court's longstanding caselaw on the factor. See *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 199, 273 P.3d 709 (2012); *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007).

Additionally, the State does not claim that the Court of Appeals conflated the likelihood of success standard with ultimately prevailing at trial. (See Intervenors' Opposition to Petition for Review, 4-5.) Rather, the State provided an example that shows the obvious flaw in the Court of Appeals' new standard. (Petition for Review, 3-4.) Anytime litigation requires a preponderance of the evidence standard to prevail, a litigant would be required to meet that standard to obtain a temporary injunction before having to meet that same standard to ultimately prevail. (Petition for Review, 3-4.) This would collapse the temporary injunction standard into an ultimate determination of the merits. (Petition for Review, 3-4.) It also goes against the Court of Appeals' own statement that its role on review was not to determine the ultimate the merits of the State's arguments. Slip Op. at *32.

Intervenors argue this Court should deny review of the State's substantial likelihood of success on the merits argument because would have made no difference since the Court of Appeals correctly held the State could not show an irreparable injury. (Intervenor's Opposition to Petition for Review, 7-8.) Intervenors' argument is circular. Obviously, if the Court of Appeals was correct in its irreparable injury analysis, any reversal on the substantial likelihood of prevailing on the merits would make no difference. See *Downtown Bar & Grill*, 294 Kan. at 191. And the opposite would be true as well. But both holdings were incorrect, which is why the State petitioned this Court for review on both issues. Additionally, Intervenors' claim that it would be transgender Kansans who would be suffering irreparable harm if this Court granted review is not relevant to the question before this Court. (Intervenor's Opposition to Petition for Review, 8.) There has been no claim, nor any factual findings of irreparable harm as it applies to Intervenors or to the diverse group of transgender Kansans as a whole. These arguments have no merit and are an attempt to distract from the real issues in this case.

Intervenors claim that the State is incorrect to state the Court of Appeals held K.S.A. 77-207 was ambiguous. (Intervenor's Opposition to Petition for Review, 9.) But Intervenors acknowledge that the Court of Appeals in fact stated: "Accordingly, we find that when ruling on the merits of the AG's mandamus action, a court could reasonably find K.S.A. 2024 Supp. 77-207 ambiguous and resort to our canons of statutory construction to determine legislative intent." Slip Op. at *38; (Intervenor's Opposition to Petition for Review, 9). The Court of Appeals then proceeded to apply multiple canons of construction and other suppositions to divine what it thought "the Legislature

intended. . . .” Slip Op. at *47. The Court of Appeals plainly concluded that the statute is ambiguous. As a final note, Intervenors maintain that K.S.A. 77-207 is unambiguous. (Intervenor’s Opposition to Petition for Review, 11.) Thus, though Intervenors defend the Court of Appeals’ holding, it is notable that no party agrees with the Court of Appeals’ ambiguity analysis.

Finally, Intervenors assert that the Court of Appeals’ statutory analysis is correct. (Intervenor’s Opposition to Petition for Review, 9-13.) Intervenors claim that the State’s interpretation of K.S.A. 77-207 implicitly repeals K.S.A. 8-243(a), which is disfavored in our law. (Intervenor’s Opposition to Petition for Review, 10.) K.S.A. 77-207 does not repeal anything. Rather, in relevant part, it is a statutory interpretation statute meant to guide our courts in interpreting other statutes, including K.S.A. 8-243(a).

Intervenors raise the 2019 federal consent decree regarding birth certificates. (Intervenor’s Opposition to Petition for Review, 11); Slip Op. at *42-44; see *Foster v. Stanek*, 686 F. Supp. 3d 975 (D. Kan. 2023). Intervenors argue that the consent decree shows the Attorney General and the Legislature knew about the differing definitions between “sex” and “gender” but chose not to act. (Intervenor’s Opposition to Petition for Review, 11-12); Slip Op. at *43-44. What Intervenors fail to mention is that the consent judgment was recently lifted by the federal district court because the court found that K.S.A. 77-207 materially *changed* the law so much so that it was no longer possible to comply both with the consent decree (by changing sex markers on birth certificates) and comply with Kansas law. *Stanek*, 689 F. Supp. 3d at 984-89; see Slip Op. at *43. It raises another point—K.S.A. 77-207 is evidence that the legislators decided to take action on

the matter. Through K.S.A. 77-207, the Legislature made clear that "sex" means "biological sex at birth." And Kansas law views "sex" and "gender" synonymously.

Intervenors' claim that, if the Legislature intended K.S.A. 77-207's definition of "sex" to apply to all laws that reference "sex" or "gender," then they could have done so begs the question. The Legislature made its intent clear through the plain language of the statute. See *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021). Likewise, the fact that two legislative sessions passed without the Legislature adopting "clarifying language" means little. Why would the Legislature do so? Not only did it speak unambiguously through K.S.A. 77-207, but the district court's temporary injunction judgment recognized that interpretation. The Court of Appeals' opinion holding otherwise was not issued until June 13, 2025, after the legislative session ended. To the extent that one can divine legislative intent from legislative inaction, that inaction supports the State's position. The Legislature has had no reason to think that it needed to clarify K.S.A. 77-207, since both the opinion issued by the attorney general and order of the district court were exactly correct in interpreting the law. See *Virginia Uranium Inc. v. Warren*, 587 U.S. 761, 778 (2019) (explaining the difficulties and dangers of attempting to discern legislative intent).

Finally, Intervenors suggest to this Court that it can resolve any ambiguity in K.S.A. 77-207 through application of the constitutional avoidance canon. (Intervenor's Opposition to Petition for Review, 12-13.) However, the Court of Appeals did not reach Intervenors' appeal of the district court's rulings on Intervenors' constitutional avoidance arguments. Intervenors did not file a cross-appeal or conditional cross-appeal on that

issue. Supreme Court Rule 8.03(c)(3)(B), (C), (4)(B)(C) (2025 Kan. S. Ct. R. 57-58.) As such, Intervenors have failed to preserve that argument for this Court's consideration. Rule 8.03(b)(6)(C)(i).

II. The Court of Appeals, in its analysis, incorrectly required the State to show that it suffered an irreparable injury, rather than a reasonable probability of an irreparable injury, and the record shows the State satisfied its burden.

Intervenors claim that the State misstates the standard the Court of Appeals applied to the reasonable probability of future harm requirement. (Intervenor's Opposition to Petition for Review, 5.) Intervenors rely on the Court of Appeals' discussion of the standard at the beginning of its analysis. (Intervenor's Opposition to Petition for Review, 5.) The Court of Appeals did list the correct standard, but it did not actually apply it to this case. See Slip Op. at *25 ("Because the AG fails to first show any irreparable harm . . . ."); *id.* at *26 ("In sum, because the district court committed an error of fact which led to an error of law in determining irreparable harm would result. . . ."). As this Court has made clear, the correct standard is a *reasonable probability* of irreparable *future* harm. *Downtown Bar & Grill*, 294 Kan. at 191. The Court of Appeals may have recognized the correct standard, but it did not apply it in this case.

Intervenors argue the Court of Appeals "was legally justified in concluding that the absence of evidence of past harm was relevant to determining the likelihood of future harm in this case," citing to a Kansas Court of Appeals case, *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 341 P.3d 607 (2014). (Intervenor's Opposition to Petition for Review, 5.) Intervenors provide no pincite as to where the Court of Appeals held this. The State could not find this principle in the court's reasonable probability of

irreparable future harm analysis. Indeed, the Court of Appeals in *Wing* found a reasonable probability of irreparable future harm was shown. *Wing*, 51 Kan. App. 2d at 64-65. Moreover, as explained below, evidence of past harm *was* presented in the district court.

Intervenors erroneously claim that the Court of Appeals' assessment of the facts is "the only possible one supported by the record." (Intervenor's Opposition to Petition for Review, 5-6.) However, as explained in the State's petition for review, the Court of Appeals got the evidence wrong. (Petition for Review, 11-12.) In the district court, Sheriff Brian Hill testified to both the importance of the accuracy of the sex marker on driver's licenses and to a specific instance when a changed sex designation on a driver's license hid the person's true criminal history from him. (Petition for Review, 11-12); (R. VII, 166-71). Judge Watson concluded that this testimony, among other things, supported a finding of reasonable probability of irreparable injury to the state. (R. III, 279.) In its attempt to sweep aside this testimony, the Court of Appeals completely ignored Sheriff Hill's statement that he relies on the information on a suspect's driver's license when checking for outstanding warrants. (R. VII, 168.)

Intervenors repeat the Court of Appeals' mistaken reliance on KDOR changing the sex designation on driver's licenses since 2007 without harm. (Intervenor's Opposition to Petition for Review, 5-6); Slip Op. at *20, *25. This overlooks both the evidence in the record that showed harm to law enforcement and that a small number of people with incorrect sex designations on their licenses mean a smaller number of examples of harm. (R. VII, 166-71.) There is no requirement for a certain number of examples of harm. The

requirement is to demonstrate a reasonable probability of irreparable future harm. *Downtown Bar & Grill*, 294 Kan. at 191. This was clearly done before the district court

Finally, Intervenors ignore the fact that the State also showed a reasonable probability of future harm in that there is no mechanism to recall inaccurate driver's licenses once issued. See K.S.A. 2023 Supp. 8-247(a). Any licenses containing incorrect sex designations issued while this litigation is pending would remain in circulation without any mechanism to recall them.

III. The Court of Appeals made both a factual error and a legal error in *sua sponte* ordering this case reassigned to a new judge on remand.

Intervenors also disagree with the State's argument regarding the Court of Appeals' *sua sponte* determination to reassign this case to a new district judge. (Intervenor's Opposition to Petition for Review, 13-14.) Though Intervenors cite several Kansas Court of Appeals cases where reassignment was ordered, (Intervenor's Opposition to Petition for Review, 13-14), none provide any authority for the Court of Appeals to do so *sue sponte*. *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 22 Kan. App. 2d 537, 554-55, 921 P.2d 821 (1996), involved an appeal of the denial of a request for a change in judge. Though the other cited cases do not explain why reassignment was necessary, this does not mean that such practice is proper.

Intervenors also misunderstand why the State pointed out that the Court of Appeals issued this order *sua sponte*. Neither party asked for reassignment, and, as such, neither party was able to provide arguments on whether this was necessary or proper. Given the Court's errors in its ruling, such argument would have proven beneficial.

And, no matter whether the Court of Appeals had the inherent authority to *sua sponte* reassign this case on remand, that would not shield an erroneous reassignment from this Court's review. The Court of Appeals' decision was based on two errors—one legal and one factual. The legal error came from relying on Chief Justice Luckert's concurrence in *In the Matter of the Estate of Lentz*, 312 Kan. 490, 476 P.3d 1151 (2020); Slip Op. at *55-56. Chief Justice Luckert would have reassigned that case because the lower court opined on issues over which it lacked jurisdiction. *Lentz*, 312 Kan. at 507 (Luckert, C.J., concurring). Here, there is no question that Judge Watson had jurisdiction. The factual error derives from the Court of Appeals' erroneous claim that Judge Watson opined on the merits of Intervenor's constitutional claims. Slip Op. at 55. Intervenors raised no constitutional claims. Rather, they raised a statutory interpretation constitutional avoidance argument, for which Judge Watson was required to determine whether the asserted constitutional rights existed. The constitutional avoidance canon cannot apply if no constitutional rights are at risk of being violated. *Johnson*, 312 Kan. at 603.

Additionally, the Court of Appeals wrongly faulted Judge Watson for addressing arguments that the Court of Appeals found it unnecessary to address because it disagreed with Judge Watson's opinion on other issues. But it was necessary for Judge Watson to address both Intervenors' and KDOR's arguments before granting a temporary injunction. And, in any event, appellate courts frequently address alternative arguments—as the Court of Appeals did here. A complete analysis of all properly raised arguments is something that should be encouraged to prevent piecemeal litigation. Rather than acting

inappropriately, Judge Watson provided a thorough ruling for our appellate courts to review.

If an appellate court is going to order reassignment to a new judge on remand, then it should provide a proper and full explanation to the parties, rather than a single, conclusory sentence. Parties should be able to understand a court's rationale in its decisions and be able to challenge such rationale if they believe it to be incorrect.

The Court of Appeals' errors in remanding to a new judge highlight why the parties should have been given the opportunity to brief and argue the issue. The Court of Appeals erred in *sua sponte* ordering the case reassigned on remand. This Court should review and reverse.

CONCLUSION

This Court should grant review and vacate the Court of Appeals' opinion.

Respectfully submitted,

By: */s/ Kris W. Kobach*
Kris W. Kobach, Bar No. 17280
Attorney General
Anthony J. Powell, Bar No. 14981
Solicitor General
Ryan J. Ott, Bar No. 28236
Assistant Solicitor General
Office of the Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 296-3131
Email: kris.kobach@ag.ks.gov
anthony.powell@ag.ks.gov
ryan.ott@ag.ks.gov
Attorneys for Petitioner-Appellee

CERTIFICATE OF SERVICE

I certify that on August 26, 2025, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was emailed to:

Counsel for Respondent/Intervenor-Appellees

Karen Leve
Monica Bennett
kleve@aclukansas.org

Rose Saxe
Bridget Lavender
rsaxe@aclu.org
blavender@aclu.org

Julie A. Murray
Aditi Fruitwala
jmurray@aclu.org
afruitwala@aclu.org

Scott Hecht
Douglas R. Dalgleish
scott.hecht@stinson.com
doug.dalgleish@stinson.com

Counsel for Respondent-Appellees

Pedro Irigonegaray
Jason Zavadil
John Turney
Nicole Revenaugh
pedro@itrlaw.com
jason@itrlaw.com

Ted Smith
ted.smith@ks.org

/s/ *Kris W. Kobach*
Kris W. Kobach