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

OPPOSITION TO PETITION FOR REVIEW

Petition for Review of the decision of 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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Since 2007, the Kansas Department of Revenue ("KDOR") has issued driver's licenses to all Kansans in accordance with their "gender," consistent with the Kansas driver's license statute, K.S.A. 8-240(c), 8-243(a). That has allowed transgender Kansans—whose sex assigned at birth does not match the gender they live as—to obtain licenses consistent with their gender. There is no evidence that KDOR's practice, consistent with Kansas law, has resulted in any harm to the State of Kansas.

In 2023, the Kansas Legislature adopted Senate Bill ("SB") 180, now codified as K.S.A. 77-207, to define the term "sex" for some portions of the Kansas code to mean "biological sex, either male or female, at birth." The Attorney General ("AG"), believing that K.S.A. 77-207 applies to the Kansas driver's license statute, brought this mandamus action against KDOR to compel the agency to include on all new and renewed licenses a person's sex assigned at birth. Although the plain text of K.S.A. 77-207 forecloses its application to licenses, and although the AG failed to present any evidence to support the threat of an irreparable injury, the district court granted the AG's request for a temporary injunction. For more than a year now, that injunction has forced transgender Kansans, including Intervenor-Respondents, to display a driver's license with a gender marker that does not match the gender they live as, effectively outing their transgender status to government officials, businesses, and other private parties in countless interactions.[1]

[1] Intervenor Respondents-Appellees accept the facts as laid out by the Court of Appeals at pages 6–12 of its slip opinion.

For at least three reasons, this Court should deny the AG's request to review the Court of Appeals' careful opinion reversing that unjustified injunction and remanding the case to a new trial judge.

First, the Court of Appeals applied the correct legal standards for reviewing a temporary injunction. The AG suggests otherwise only by mischaracterizing the Court of Appeals' opinion, and this Court should not grant review of a conjured up appealable issue where none exists.

Second, this Court should not take review of an issue—the construction of K.S.A. 77-207—that would not change the result below. Even if the AG's interpretation of K.S.A. 77-207 were correct (and it is not), the Court of Appeals rightly concluded that the AG had not provided "*any* evidence beyond mere speculation" to support a finding of irreparable harm. Slip Op. 25 (emphasis in original).[2] The absence of such evidence is enough to require affirmance of the Court of Appeals' judgment.

And in any event, the Court of Appeals' reading of K.S.A. 77-207 is correct. The driver's license statute and KDOR policy address the collection of information about "gender," and the driver's license statute was amended in 2007 to remove the term "sex." In contrast, K.S.A. 77-207 defines "sex" only for portions of the code involving "the application of biological sex . . . at birth," and it says nothing whatsoever about "gender." In addition, the Court of Appeals' decision likewise requires affirmance under the doctrine

[2] Citations to the Court of Appeals' June 13, 2025, decision are made to "Slip Op." and the page number. The opinion is available electronically at https://searchdro.kscourts.gov/documents/pdf/caseDecisions/fe46ec4e-b9ce-468d-ae30-e4e6e4fc96d1_127390.pdf.

of constitutional avoidance, an argument not reached by the Court of Appeals but consistently pressed by Intervenors-Respondents.

Third, the Court should deny review of the Court of Appeals' unremarkable order remanding to a new trial judge. That condition on remand was well within the Court of Appeals' broad discretion and is consistent with its practice in numerous other cases.

REASONS TO DENY THE PETITION FOR REVIEW

Kansas Rule of Appellate Procedure 8.03 recognizes several non-exhaustive grounds on which this Court may grant petitions for review, including where an underlying decision conflicts with this Court's precedent or is plainly incorrect. But with few exceptions, whether the Court grants review is "a matter of judicial discretion, not a matter of right." Kan. R. App. Pro. 8.03(g)(2).

Here, the AG seeks review on three questions: whether the Court of Appeals (1) "erred in creating a new standard to determine whether a party showed a substantial likelihood of prevailing on the merits and in holding K.S.A. 77-207 was ambiguous," (2) "employed the wrong standard by holding the State did not show it would suffer an irreparable injury, rather than showing a reasonable probability of an irreparable injury," and (3) "erred by ordering the case be assigned to a new judge on remand." Pet. 1. For the reasons set out below, none of these questions merits the Court's review.

I. The Court should deny the first two issues presented—those addressing standards for likelihood of success and irreparable harm—because they are based on a mischaracterization of the Court of Appeals' decision.

The first two of the AG's proposed issues for review rest on an inaccurate representation of the Court of Appeals' opinion. Because the existence of these purported "issues" is belied by the actual language of the underlying decision, review is unwarranted.

First, the AG asks this Court to review the "new standard" that the intermediate appellate court applied in considering the likelihood-of-success factor pertinent to a temporary injunction. Pet. 1, 3. But the Court of Appeals did not apply a new standard or otherwise break new precedential ground in this respect. While it acknowledged that federal courts have described the likelihood-of-success factor under federal law "in a wide variety of ways," Slip Op. 26, it ultimately focused on "our Supreme Court's accepted standard," which requires a "substantial likelihood of eventually prevailing," *id.* at 27. And far from conflicting with this Court's established precedent, the Court of Appeals opinion relied on multiple Kansas Supreme Court decisions to construe what a substantial likelihood means. *See id.* at 26–27 (citing *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 791, 549 P.3d 363 (2024), and *Gannon v. State*, 298 Kan. 1107, 1124, 319 P.3d 1196 (2014)).

The AG is wrong to contend (at Pet. 3–4) that the Court of Appeals conflated the likelihood-of-success standard with a showing that one *will* prevail at trial based on a preponderance of the evidence. In fact, the Court of Appeals repeatedly recognized that a failure to show a substantial likelihood of success for a temporary injunction "simply means that *at this stage*, at most, the movant's chances are slightly less than even. A full

hearing on the merits could easily change that balance." Slip Op. 27 (emphasis in original); *see also id.* (noting "that just because a movant does not meet this burden, it does not mean that they will not be successful").

Second, the AG contends that the Court of Appeals wrongly required it to show that the State would suffer irreparable harm absent an injunction, rather than a reasonable probability of irreparable injury. Pet. 9. Again, that misstates the court's opinion. The Court of Appeals made clear that a party seeking an injunction "must only demonstrate that a 'reasonable probability' of injury exists." Slip Op. 14 (citing *Steffes v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843 (2007)). And to make its meaning even plainer, the Court of Appeals emphasized that "[r]equiring proof of certainty of irreparable harm is too high of a standard for parties seeking injunctions." *Id.* (citing *Bd. of Leavenworth Cnty. Comm'rs v. Whitson*, 281 Kan. 678, 684, 132 P.3d 920 (2006)).

To argue otherwise, the AG points to portions of the Court of Appeals' opinion concluding that the State had not already suffered harms of the kind that the AG predicted. But the AG's argument must fail because 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. *Cf. Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 341 P.3d 607 (2014) (affirming finding of irreparable harm from City's refusal to negotiate with union, citing in part evidence of irreparable harm in the form of changed wages and work conditions).

And the Court of Appeals' assessment regarding the facts surrounding irreparable harm was the only possible one supported by the record. As the court explained, KDOR

began issuing changes to gender markers on Kansans' licenses in 2007, yet there was no "evidence presented that this gender reclassification policy was causing harm to the State or hindering law enforcement in the 16 years between 2007 and the [AG's] request for injunctive relief in 2023." Slip Op. 41; *see also id.* at 20–21 ("No one was able to bring forward *any* instance of the feared harm of misidentification of criminals in the last 16 years or even the potential that it could be a problem. Instead, the evidence was overwhelming that there was no harm." (emphasis in original)); *id.* at 21 (recognizing that despite KDOR's longstanding gender marker policy, the "AG was not able to come up with a single incident in which a person who had the sex designation on their physical driver's license changed evaded arrest, posed a danger to a law enforcement officer, or was not housed appropriately in jail"). In light of this record, which was developed through extensive discovery and a multi-day evidentiary hearing on the temporary injunction, the Court of Appeals correctly held that the "district court committed an error of fact by concluding that there was evidence—*any* evidence beyond mere speculation"—to support a likelihood of irreparable harm going forward. Slip Op. 25.[3]

[3] *See also, e.g.*, R. II, 407–10 (lieutenant stating he never had an issue with a transgender person's driver's license and did not know of any officer who had); R. II, 414 (sheriff testifying he knew of no instances where officer in chain of command had an issue identifying a transgender person during law enforcement encounter); R. II, 443 (law enforcement official stating he had spoken to "every officer in [his] division" and found "zero examples of [a person's] gender affecting any call for service"); R. II, 403 (KDOR confirming it had not received law enforcement complaints "regarding [an] inability to identify criminal suspects due to" KDOR's gender-marker policy).

The same one-sided evidentiary record exists as to the use of licenses to determine where to house people in jails and prisons, (*see* R. VII, 190–91; R. II, 403, 456–59, 462, 465, 469), an allegation that was in any event abandoned by the AG in the Court of Appeals, *see* Slip Op. 23 (noting that the district court did not address this harm, nor did the AG

II. The Court should deny the petition to the extent it asks the Court to interpret K.S.A. 77-207 because doing so would not change the judgment of the Court of Appeals, whose statutory analysis was in any event correct.

While primarily focusing on the legal standard that the Court of Appeals used to evaluate a likelihood of success, the AG also tacks onto his first issue presented a request that this Court review whether the Court of Appeals "erred in . . . holding K.S.A. 77-207 was ambiguous." Pet. 1. The proper meaning of K.S.A. 77-207 is clearly an issue of public importance, with far-reaching consequences for transgender Kansans. *See* Intervenors' Mot. to Transfer Appeal 1–2, 9–11. However, as discussed below, consideration of the specific issue presented by the AG, particularly at this juncture, is unwarranted for at least three reasons.

A. The State's failure to show irreparable harm requires this Court to affirm the Court of Appeals' judgment, regardless of what K.S.A. 77-207 means.

A movant for a temporary injunction has the burden to establish all five factors relevant to that extraordinary relief. *Schwab*, 318 Kan. at 791–92. Every one of the temporary injunction factors is necessary, and the absence of any single one ends the inquiry. *See Steffes*, 284 Kan. at 395.

In this case, the Court of Appeals reversed the temporary injunction order because (1) it concluded, after considering the proper interpretation of K.S.A. 77-207, that the AG did not show a substantial likelihood of prevailing on the merits, *and* (2) it determined the AG did not show any probability of irreparable injury. Slip Op. 25, 51. Because the Court

"discuss it as a separate harm in his brief," and thus "deem[ing] the allegation of harm in jail classification as unsupported and abandoned").

of Appeals' holding regarding irreparable harm is correct, *see* Part I, a decision regarding the AG's likelihood of success on the merits, including his view of K.S.A. 77-207, could not make up for his failure to show irreparable injury, a necessary prerequisite for a temporary injunction.

In contrast, were this Court to grant review to determine K.S.A. 77-207's meaning—particularly if it did so without staying the underlying injunction—the parties would be forced to comply with a trial court order unsupported by any basis to find irreparable harm. *See* Kan. R. App. Pro. 8.03(k) ("The timely filing of a petition for review stays the issuance of the mandate of the Court of Appeals."). In that case, transgender Kansans, not the State, would suffer the burden of irreparable harm. Slip Op. 55 ("Because of the district court's abuse of discretion the KDOR has been unable to issue reclassifications of gender designations on Kansas driver's licenses for two years while this litigation languished."). If this Court believes it may be necessary to address a statutory interpretation question, the Court should at this point wait to opine until after final judgment. *Cf. Kansas Med. Mut. Inst. Co. v. Svaty*, 291 Kan. 597, 617, 244 P.3d 642, 656 (2010) ("Kansas has a clear policy to avoid piecemeal appeals."); *In re Adoption of Baby Girl P.*, 291 Kan. 424, 429, 242 P.3d 1168, 1172 ("[P]iecemeal appeals are discouraged and are considered exceptional."). Far from serving justice and promoting judicial efficiency, granting review at this time would undermine those important goals.

B. The Court of Appeals did *not*, as the AG contends, hold that K.S.A. 77-207 is ambiguous.

Review of the AG's statutory interpretation issue should also be denied because the AG seeks review of a holding that the Court of Appeals did not actually make.

Contrary to the AG's assertion, the intermediate court did *not* hold as a matter of law that K.S.A. 77-207 is ambiguous. *See* Pet. 1. To be sure, it held that on remand the trial 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. 38. But it did so only after considering the parties' competing arguments that the statute is *un*ambiguous in their favor. *See id.* at 35 ("[W]e cannot say that, at this stage, there is a substantial likelihood that the AG will eventually prevail on the merits even if the district court, after conducting a hearing on the merits of the AG's mandamus action, finds the statute to be unambiguous."). And as to that dispute, the Court of Appeals concluded that—if the statute is ultimately held unambiguous, a possibility that remains open to the trial court on remand—that holding is more likely to favor the position of KDOR and Intervenors, not the AG. *See id.* Put another way, a district court on remand could still hold at final judgment that K.S.A. 77-207's plain text unambiguously precludes the statute's application to driver's licenses.

C. The Court of Appeals' preliminary holdings as to K.S.A. 77-207's meaning are correct.

Review should likewise be denied because the Court of Appeals' rationale interpreting K.S.A. 77-207 is undoubtedly correct.

First, a court could on remand—and in Intervenors' view, must—hold that K.S.A. 77-207's plain text precludes its application to driver's licenses. K.S.A. 77-207 supplies a definition for "sex." In contrast, the driver's license statute and KDOR policy address the collection of information about "gender," and the driver's license statute was amended in 2007 to remove the term "sex." *Compare* K.S.A. 77-207 (defining "sex" to mean "biological sex . . . at birth"), *with* K.S.A. 8-240(c), 8-243(a) (requiring that license applications include, and licenses bear, a driver's "gender"). Given this distinction, reading K.S.A. 77-207's definition of "sex" to refer to "gender" is not only at odds with K.S.A. 77-207's clear language, but it would also effect an implied repeal of the Legislature's 2007 amendments to K.S.A. 8-243(a), which intentionally replaced "sex" with "gender" in the licensing regime. *See* Slip Op. 35–37. Such repeals by implication are heavily disfavored. *In re Joint Application of Westar Energy, Inc.*, 311 Kan. 320, 329, 460 P.3d 821, 826 (2020); *see* Slip Op. 34 (explaining why this change in the statutory text of the licensing scheme should be considered substantive); *id.* at 51 (finding the conclusion "that the Legislature knew the two words were not synonymous and chose not to legislatively make them so . . . to be a more reasonable construction than the AG's conclusion . . . that the Legislature . . . unambiguously intended gender to be included in the new definition of 'sex'").

Second, even putting aside the fact that the driver's license statute and KDOR policy refer to an applicant's "gender" rather than "sex," K.S.A. 77-207 does not state that all references to "sex" under Kansas statutes, rules, or regulations are governed by its particular definition of "sex." Instead, it provides that its definition of sex only applies to parts of the code involving "the application of an individual's biological sex," and neither

the driver's license statute nor KDOR's policy refer to or involve the application of "biological sex." *See* K.S.A. 8-240(c), 8-243(a); (R. II, 220–24). Because courts must try to give "[m]eaning to every word in the statute," the AG's interpretation of K.S.A. 77-207 is foreclosed. *State v. Just.-Puett*, 57 Kan. App. 2d 227, 233, 450 P.3d 368, 373 (2019).

Third, even if a court on remand disagreed with Intervenors and KDOR that K.S.A. 77-207 unambiguously favors their position, the court would at least have to conclude that K.S.A. 77-207 is ambiguous, and that any ambiguity must be resolved against applying the statute to licenses.

For example, the legislative history and circumstances surrounding K.S.A. 77-207's adoption confirm that the law does not apply to the driver's license statute or to KDOR's gender reclassification policies. During debate over SB 180, not a single lawmaker who voted for the bill stated that it would impact driver's licenses or require transgender Kansans to carry a license with a gender marker that discloses the sex they were assigned at birth. (R. II, 532–33). In fact, representatives from Independent Women's Voice, the original proponent of the bill, testified in the Kansas legislature "that S.B. 180 did *not* apply to the Motor Vehicle Drivers' License Act." Slip. Op. 12.

As the Court of Appeals also observed, in 2019 the state and several state officials entered into a federal consent decree that required them to provide Kansans with birth certificates that accurately reflect their gender identity instead of their sex assigned at birth. *Id.* at 42. This federal consent decree demonstrates "that the AG and legislators knew of this issue of gender reclassification and differing definitions of 'sex' and 'gender' years before S.B. 180 was passed," and yet the statute "did not include a definition for 'gender'

and remained silent on the relationship between 'gender' and 'sex.' *Id.* at 43. Further, the very same legislature that adopted K.S.A. 77-207 "adopted other uses of the term 'gender' and competing definitions of the term 'sex.'" *Id.* at 44 (collecting four examples). These statutes "point to an understanding by the Legislature that gender and sex are not the same thing and a recognition that the terms 'male' and 'female' can have different meanings than the meanings assigned" in K.S.A. 77-207. *Id.* at 47.

Had the Legislature intended K.S.A. 77-207's definition of "sex" to apply to all state laws that reference "sex" or "gender," the drafters could easily have said so. Instead, the Kansas Legislature adopted narrower language providing that K.S.A. 77-207 applies only "with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations," K.S.A. 77-207, and said nary a word about driver's licenses. And since this lawsuit has been pending, two legislative sessions have passed during which the Legislature could have adopted clarifying language regarding the use of "sex" or K.S.A. 77-207's reference to "gender." Not only did it not do so, it actually adopted "new and competing definitions of sex and gender," defining them "as two different things." Slip Op. 48.

Finally, although the Court of Appeals did not reach the issue, any ambiguity in K.S.A. 77-207's scope would have to be resolved to avoid the substantial constitutional concerns created by applying the statute to driver's licenses. *See* Slip Op. 55 (expressly reserving this question presented to it). As Intervenors have argued consistently throughout this litigation, applying K.S.A. 77-207 to the licensing regime would burden Kansans' constitutional rights to personal autonomy, informational privacy, and equal treatment, all

of which are protected by the Kansas Bill of Rights. Kan. Const. Bill of Rights §§ 1, 2. For a thorough recounting of this argument, Intervenor's incorporate by reference the constitutional avoidance arguments in their briefs below. COA Br. of Intervenor-Appellants 22–35; Reply Br. of Intervenor-Appellants 3–9. *See also* Br. of GLBTQ Legal Advocates and Defenders and Lambda as Amici Curiae; Br. of Amicus Curiae Information Society Project; Amicus Curiae Br. of Professors McAllister and Levy.

III. The Court should deny the petition because the Court of Appeals did not err in determining that a new trial judge is appropriate on remand.

The AG contends that this Court should grant review on whether the Court of Appeals erred by ordering the case be assigned to a new judge on remand. This Court should decline review for two reasons.

First, the AG in his petition cites no case law to support his claim that the Court of Appeals' reassignment was error. Nor could he since providing a "clean slate" is well within the Kansas Court of Appeals' broad discretion. In fact, that court regularly determines that cases should be reassigned to a new district court judge on remand. It has done so to avoid "even the appearance" of bias or partiality, *see St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 22 Kan. App. 2d 537, 556, 921 P.2d 821, 834 (1996), and to otherwise ensure fairness to both parties on remand and best protect the interests of justice. *See, e.g.*, *In re Marriage of Shelhamer*, 50 Kan. App. 2d 152, 323 P.3d 184 (2014). The court has also reassigned cases without stating its rationale. *See, e.g.*, *In re L.C.*, 18 Kan. App. 2d 627, 857 P.2d 1375 (1993); *State v. McNett*, 15 Kan. App. 2d 291, 807 P.2d 171 (1991). And contrary to the AG's contention, it is clear that the Court of

Appeals may make this determination *sua sponte*, without any request from a party. *See, e.g.*, *In re L.C.*, 18 Kan. App. 2d at 634; *Shelhamer*, 50 Kan. App. 2d at 157; *McNett*, 15 Kan. App. 2d at 295.

Second, the district court judge's pre-judgment of key issues in this case is a specific circumstance warranting remand to a new judge, even though mere reversal and remand is not automatically a reason for reassignment. Here, the Court of Appeals' conclusion that the district court judge had prejudged key issues is well supported by the record. Because the district court found that K.S.A. 77-207 was unambiguous, it did not need to consider the constitutional avoidance arguments Intervenors made below. But the Court did consider them and, in fact, purported to resolve whether the Attorney General's interpretation of K.S.A. 77-207 would *actually* violate the Kansas Constitution—had Intervenors or anyone else directly raised such claims. (*E.g.*, R. III, 275 ("K.S.A. 77-207 does not violate any right to personal autonomy under Section 1."); R. III, 276 (rejecting the existence of an informational privacy right); R. III, 277 ("Similarly situated people are not treated differently under the statute, thus there is no equal protection violation.")). In other words, the district court stated its opinion on the merits of—and went far beyond—Intervenors' constitutional arguments. The Court of Appeals did not err by remanding the case to be tried before a new judge.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and remand the case to a new trial court judge for further proceedings.

Respectfully submitted,

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Dated: August 12, 2025

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2025, I filed this document via this Court's e-flex filing system, and courtesy copies were sent via email to:

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