

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

STATE OF KANSAS, *ex rel.* KRIS KOBACH,
Attorney General,

Petitioner,

vs.

Case No. 23 CV 422

Division No. 3

DAVID HARPER, Director of Vehicles,
Department of Revenue, in his official
capacity, and

MARK BURGHART, Secretary of Revenue,
in his official capacity,

Respondents,

and

ADAM KELLOGG, KATHRYN REDMAN,
JULIANA OPHELIA GONZALES-WAHL,
and DOE INTERVENOR-RESPONDENT 2,
on behalf of her minor child,

Intervenor-Respondents.

Pursuant to K.S.A. Chapter 60

**PETITIONER'S REPLY TO KDOR RESPONDENTS' OPPOSITION TO
PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

The un rebutted facts in this case show that the placement of their sex-at-birth on their driver's licenses in accordance with K.S.A. 77-207—the Women's Bill of Rights—is required. Consequently, in this case there is no genuine issue as to any material fact and Petitioner is entitled to judgment as a matter of law. Instead of following the law, KDOR

Respondents continue to search for post-hoc rationalizations that this court has already rejected. It is time to end that once in for all by granting Petitioner’s motion for summary judgment.

Although KDOR Respondents quibble with some of the contentions of fact stated in Petitioner’s motion, none of their denials ultimately have bearing on the ultimate issue which is whether SB 180 prohibits KDOR from putting gender identities on or otherwise changing the sex markers on driver’s licenses to anything other than male or female at birth. It does.

In KDOR Respondents’ motion in opposition they primarily recycle arguments made at the temporary injunction phase that were already rejected and should be given no weight¹. Therefore, this reply brief will not address each and every one of those arguments. The primary assumption that KDOR Respondents rely on for their statutory ambiguity argument is that the term “vital statistics” does not apply to them and that that the Legislature’s 2007 amendments to K.S.A. 8-240 and 8-243 were more than cosmetic changes². Respondents’ Resp. to Petitioner’s MSJ at pp. 11-25. But their arguments are

¹ KDOR Respondents also raised the issue of the matter being up for appeal but that is irrelevant to summary judgment. *Matter of Robinson's Est.*, 232 Kan. 752, 754, 659 P.2d 172, 175 (1983), does not support Respondents’ assertion that “this Court will lose all jurisdiction over this case.” Respondents have appealed *not* this Court’s ruling on Petitioner’s motion for summary judgment—because there is, of course, no such ruling—but rather this Court’s ruling on Petitioner’s motion for temporary injunction. Indeed, Respondents’ and Intervenors’ respective appeals of the District Court’s grant of Petitioner’s request for temporary injunction do not prevent Petitioner from moving for summary judgment in the case. See *Hernandez v. Pistotnik*, 60 Kan. App. 2d 393, 405, 494 P.3d 203, 214-15 (2021). In addition, neither the Court of Appeals nor the Supreme Court has issued an order staying lower court proceedings. There is no reason to delay summary judgment based on that.

² KDOR Respondents provide a one sentence argument that K.S.A. 77-207 unambiguously does not apply to them. MSJ at p. 11. Given that KDOR Respondents abandon this argument after that one sentence it does not warrant further response.

deeply flawed in numerous respects. Indeed, as this Court explained, the Women’s Bill of Rights is not ambiguous and it plainly applies to KDOR as well as the driver’s licenses KDOR issues. *See* TI Order at pp. 17-21.

Additionally, a straightforward, interpretation of K.S.A. 77-207 confirms this.

Consider 77-207(c). It provides as follows:

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.

The Supreme Court’s “framework” for statutory interpretation “is well known[.]”

State v. Ruiz, 317 Kan. 669, 672, 538 P.3d 828, 832 (2023).

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, [the Court] begin[s] with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, [the] [C]ourt should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute’s language is ambiguous, [the Court] will consult . . . canons of construction to resolve the ambiguity.

Id. at 672, 538 P.3d at 832-33; *see also State v. Adee*, 241 Kan. 825, 829, 740 P.2d 611, 614

(1987) (“In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof.”).

First, sex is a vital statistic. K.S.A. 65-2401(a) defines “vital statistics” as follows: “Vital statistics’ *includes* the registration, preparation, transcription, collection, compilation, *and* preservation of data *pertaining to birth*, adoption, legitimation, death, stillbirth, marriage, divorce, annulment of marriage, induced termination of pregnancy, and data incidental thereto.” *Id.* (emphasis added). Sex noted at the time of birth in birth certificate and there is no argument that it does not pertain to birth.

And KDOR is certainly an agency that “collects” vital statistics. KDOR admits collecting information from every driver’s license applicant, including the pieces of information specified by K.S.A. 8-240(c). *E.g.*, Respondents’ Resp. to Petitioner’s MSJ at pp. 3, 16-18, 28; Motion to Dissolve at p. 9; TI Transcript Hearing at 121:17-123:10; 131:21-136:19. More importantly, KDOR has collected, and continues to collect, every driver’s license applicant’s “sex.” As KDOR Respondents admitted, State law prior to 2007 required KDOR “to maintain and associate an applicant’s ‘sex’ with the driver’s license record.” Motion to Dissolve at 3. Indeed, State law from 1937 through 2006 explicitly required them to collect the “sex” of every driver’s license applicant. *See* 2006 Kan. Sess. Laws 222; 1986 Kan. Sess. Laws 251; 1982 Kan. Sess. Laws 271; 1975 Kan. Sess. Laws 217; 1973 Kan. Sess. Laws 214-15; 1969 Kan. Sess. Laws 181; 1963 Kan. Sess. Laws 962; 1959 Kan. Sess. Laws 174; 1938 Kan. Sess. Laws 18; 1937 Kan. Sess. Laws 135. There is no doubt that KDOR is an agency that collects information about someone’s “sex” which is a vital

statistic. Therefore, they have a clearly defined duty under K.S.A. 77-207 to identify that data set as male or female at birth.

In an attempt to confuse the issues, Respondents fall back on the argument that because of 2007 SB 9's amendment of K.S.A. 8-240 and 8-243, KDOR since 2007 has collected driver's license applicants' "gender." Respondents' Resp. to Petitioner's MSJ at 3, 20-22, 27, 38. This argument is entirely without merit for the reasons that were extensively briefed in the temporary injunction and Petitioner's motion for summary judgment. Petitioner will not rehash the arguments here as the court has previously rejected them and nothing presented in KDOR Respondents' Response changes that.

Realizing their statutory arguments carry no weight, Respondents' fall back on puzzling jurisdictional arguments. First, they argue that the Attorney General has no standing to bring this claim. Respondents' Resp. to Petitioner's MSJ at 31. That is absurd. "We conclude that the Attorney General's powers are as broad as the common law unless restricted or modified by statute." *State v. Finch*, 128 Kan. 665, 280 P. 910 (1929). KDOR Respondents' arguments that K.S.A. 75-702(b) modifies that power but not so. That provision provided instances where the "attorney general shall also" appear for the state. *Id.* It is not a provision that limits the Attorney General's power to bring a suit but simply spells out when he is in fact required to. For context, if the tables were turned and the Attorney General refused to defend K.S.A. 77-207 in court, the Governor can require him

to do so. Nothing in that provision prohibits the Attorney General from affirmatively bringing a case, including this one.

Second, KDOR Respondents' contend that the court does not have jurisdiction under the Kansas Judicial Review Act, K.S.A. 77-601. First, it is questionable whether refusal of a state agency to comply with the law is an agency action subject to the K.S.A. 77-601. Regardless, it does not matter in this instance because this is not a lawsuit brought under the Kansas Judicial Review Act. And contrary to KDOR Respondents' odd suggestion, there is no requirement that such a lawsuit is required. K.S.A. 77-603(b) states "[t]his act creates only procedural rights and imposes only procedural duties. They are *in addition to those created and imposed by other statutes.*" Effectively, it creates an option for bringing action against a state agency but there is no argument that it is the only manner in which a lawsuit can be brought against an agency. The hold otherwise would mean that state agencies do not have an obligation to legally comply with anything other than "procedural duties." That is not plausible. This is ultimately a mandamus action brought under K.S.A. 60-801. Nothing in the Kansas Judicial Review Act provides a shield to an agency from mandamus.

K.S.A. 77-207 clearly obligates KDOR to record a licensee's sex at birth on the driver's license yet KDOR Respondents refuse to do their duty and follow the law. Instead they take the approach that they know better than the voters who put the legislature in power and decide for themselves which laws they want to follow. That

cannot be allowed. KDOR Respondents have a clearly defined duty they must follow. Their refusal to do so is the exact situation why the remedy of mandamus exists. The court should apply that remedy in this case and grant Petitioner's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2024, the above document was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants.

s/ Abhishek S. Kambli _____

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