Appellate Case 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,
Respondent-Appellants,

ADAM KELLOGG, *et. al*,
Respondent/Intervenor-Appellants.

Served on Attorney General as required by K.S.A. 75-764

Appeal from District Court of Shawnee County
Hon. Theresa L. Watson, Judge
District Court Case No. SN-2023-CV-000422

REPLY BRIEF OF INTERVENOR-APPELLANTS

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I. The Attorney General cannot show he is likely to prevail on his claim.

A. The clear text of K.S.A. 77-207 bars its application to driver's licenses.

The Attorney General ("AG")—like the lower court—ignores half of Intervenors' plain-text argument. K.S.A. 77-207 states that its definition of "sex" 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(a) (emphasis added). Because neither the licensing statutes nor KDOR's gender-marker policy refer to "biological sex" or involve the "application of biological sex pursuant to" a state law, rule or regulation, K.S.A. 77-207 does not apply to them. Intervenors' Br. 15–19. Nowhere in his 51-page brief does the AG address this limiting language in K.S.A. 77-207. And even setting aside the limiting language, the term "sex" in K.S.A. 77-207 is not equivalent with "gender" in the licensing statutes. The AG's argument to the contrary would require this Court to "read[] something into the statute not readily found in its words," an interpretive outcome the AG rejects. State Br. 10 (internal quotation marks omitted).

The AG points to dictionary definitions, but his cherrypicked cites do not support finding that "gender" means "sex," particularly sex assigned at birth. For example, he cites to one definition of "sex" and "gender" in the American Heritage Dictionary but ignores others; "sex" is also defined there as "[t]he genitals," and "gender" as "one's identity as either female or male or as neither entirely female nor entirely male." American Heritage Dictionary of the English Language 730, 1605 (5th ed. 2011). He similarly ignores definitions from the Webster's New World College Dictionary, which defines "sex" as "the attributes by which males and females are distinguished"

or "the genitalia," while also defining "gender" as "the fact or condition of being a male or a female human being, esp. with regard to how this affects or determines a person's self-image, social status, goals, etc." Webster's New World College Dictionary 603, 1331 (5th ed. 2014). In fact, the dictionary's first "gender" entry (as opposed to the second, cited by the AG) states that "in most Indo-European languages, as well as in many others, gender is not necessarily correlated with sex." *Id.*

Although the AG claims that this Court should not consider the 2007 amendment to the licensing statutes if the current text of K.S.A. 77-207 is clear, *see* State Br. 12–14, textual changes made through an amendment speak to more than legislative purpose. They reveal the plain meaning of the later text itself. *See Bruce v. Kelly*, 316 Kan. 218, 233–34, 514 P.3d 1007 (2022) (considering separately "legislative amendments and related history supporting those amendments"); *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1194, 221 P.3d 1130 (2009) (analyzing a statutory amendment that changed "intentional" to "willful" as part of textual analysis). In this case, far from confirming that "sex" and "gender" are interchangeable, the 2007 amendment confirms that "gender" in the licensing statutes is *not* interchangeable with "sex."

The REAL ID regulations invoked by the AG also undermine his claim that the terms "sex" and "gender" were commonly understood as equivalent, either in 2007 when the licensing statutes were amended, or in 2023, when K.S.A. 77-207 was enacted. As the AG recognizes, *see* State Br. 13 n.13, federal REAL ID regulations adopted in 2008 implemented that law's requirement for states to issue licenses with a person's "gender," *see* 6 C.F.R. § 37.17. The regulatory preamble noted that "[t]wo States raised issues

about how gender is determined for transgender individuals." 73 Fed. Reg. 5272, 5301 (2008). The U.S. Department of Homeland Security notably did not demand listing "sex" assigned at birth or otherwise, instead recognizing that "different States have different requirements concerning when, and under what circumstances, a transgendered [sic] individual should be identified as another gender." *Id.*

Finally, the AG's reliance on *Indiana Bureau of Motor Vehicles v. Simmons* is misplaced. State Br. 13 (citing 233 N.E.3d 1016, *aff'd as modified by* 236 N.E.3d 1159 (Mem) (Ind. Ct. App. 2024)). That case questioned whether a licensing statute's use of the term "gender" required the licensing agency to permit an "X" designation for non-binary licensees. The court of appeals held that a third designation need not be provided, explaining that the agency charged with enforcing the statute interpreted "gender" as equivalent to "sex," and relying on its view that "sex" encompassed only binary male/female. *See Simmons*, 233 N.E.3d at 1026. If relevant, such deference weighs *against* the AG here given KDOR's views.

B. To the extent K.S.A. 77-207 is ambiguous, the canon of constitutional avoidance requires interpreting the statute not to apply to driver's licenses.

The AG erroneously asserts that "finding that the State's interpretation of K.S.A. [] 77-207 does not violate the Kansas Constitution, as the district court did, also forecloses application of the constitutional avoidance canon." State Br. 18. That is incorrect. By narrowly focusing on whether the Intervenors' evidence—at the temporary-injunction stage, no less—demonstrated a constitutional violation of their own rights, the district court ignored the constitutional concerns that K.S.A. 77-207 raises for all other

transgender Kansans, who might well have factual testimony and circumstances that differ from Intervenors'. (*See* R.III, 281). Moreover, by insisting on proof of a constitutional violation, the district court fell into the trap of deciding unnecessary questions that the canon was intended to sidestep. *See* Intervenors' Br. 24.

In any event, the AG, like the district court, is wrong about the constitutional stakes of applying K.S.A. 77-207 to driver's licenses. The AG argues that applying K.S.A. 77-207 to driver's licenses affects only "what appears on" the face of a government document. State Br. 23. But operationally, it also affects what intimate personal information transgender people are forced to convey to the government and private entities. *See* Intervenors' Br. 28–29. While the State does not control "[h]ow a third party may react to" transgender Kansans in light of the information, State Br. 25, it *can* control—and is responsible for—forced disclosure of information that places transgender Kansans in harm's way in the first place.

The AG also ignores decisions around the country holding that policies barring transgender people from obtaining identity documents matching their gender identity cannot withstand constitutional review. *See* Intervenors' Br. 22. Instead, he relies on *Gore v. Lee*, 107 F.4th 548 (6th Cir. 2024), an outlier case in which the Sixth Circuit upheld a Tennessee law that prevented transgender people from changing the sex listed on their birth certificates. *Id.* at 565–66. That case is distinguishable. *Gore* held that transgender people's privacy rights were not violated by the birth certificate policy because "Tennessee's amendment policy [did] not disclose their transgender status. It simply maintain[ed] a uniform meaning of 'sex' on . . . records of birth." *Id.* at 563. In

fact, the court concluded that Tennessee law prevented the unwanted disclosure of this information. *Id.* Not so with Kansas's driver's licenses, which are subject to compelled disclosure in a range of day-to-day circumstances. Additionally, *Gore* found that Tennessee's policy did not discriminate based on sex because the policy concerned a "historical fact: the sex of each newborn." *Id.* at 556. It did not "enforce any notion about how Tennesseeans should dress or speak, what pronouns they should use, or . . . [how] they should present themselves." *Id.* at 557. In the court's view, the policy memorialized a doctor's historical decision. *Id.* at 555. In contrast, Kansas's driver's licenses identify individuals in the present, and they do signal how those being identified "should" act.

In any event, *Gore* does not undermine Intervenors' central point: the constitutional doubts raised by the AG's interpretation could require resolution of hard constitutional questions that should be avoided through statutory interpretation. And *Gore*'s outcome is inconsistent with several other cases, including a recent Tenth Circuit decision holding that plaintiffs challenging a law requiring birth certificates to display transgender people's sex assigned at birth stated a plausible equal protection violation. *Fowler v. Stitt*, 104 F.4th 770, 800 (10th Cir. 2024) (en banc review denied Sept. 9, 2024).

The AG equally errs in addressing the specific rights at stake, as explained below.

1. *Right to personal autonomy*

The AG first argues that the Kansas Supreme Court recently limited *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019) ("*Hodes*") to the specific context of abortion, "rather than a more general right to personal autonomy." State Br. 20–21. But *Hodes & Nauser, MDs, P.A. v. Stanek*, 318 Kan. 995, 551 P.3d 62

(2024) ("*Stanek*"), on which the AG relies, said no such thing. In fact, *Stanek* recognized the holding in *Hodes* that "section 1 of the Kansas Constitution Bill of Rights protects an inalienable natural right to personal autonomy," including abortion, and that the personal autonomy right is "fundamental." *Id.* at 1005.

Second, the AG suggests that "[t]here 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." State Br. 23. But if that simplistic standard were the law, *Hodes* would have come out differently, given that the dilation-and-evacuation abortion procedure protected in that case also did not exist in this "state of nature." *Hodes*, 309 Kan. at 722–23. Moreover, as discussed above, this case is about whether transgender Kansans should be forced to present themselves in a way that is inconsistent with the gender they live as, in interactions with governmental and private entities through the mandatory and ubiquitous use of an official document in daily life. The right to determine how and to what extent to share private information about one's body has a long historical pedigree. *See Kunz v. Allen*, 102 Kan. 883, 884, 172 P. 532 (1918) (explaining that the "right of privacy has its foundations in the instincts of nature" and is "therefore derived from natural law" (cleaned up)). And this right to decide how and whether to disclose information about oneself directly impacts transgender Kansans' Lockean natural rights of personhood and self-determination.

Third, the AG claims that applying K.S.A. 77-207 to licenses does not implicate a personal autonomy right because transgender people "remain free to identify, dress, and present themselves in a manner in accordance with their self-determined gender

identity." State Br. 24. But a requirement to carry and present a document with one's sex assigned at birth *does* limit transgender people's ability to "present themselves" consistent with their gender identity.

Fourth, the AG contends that because Intervenors did not demonstrate that they suffered specific adverse consequences, such as arrests, from presenting prior incongruent identification documents, applying K.S.A. 77-207 to licenses cannot implicate personal autonomy. State Br. 24. However, the canon of constitutional avoidance does not hinge on what proof Intervenors could offer in a suit involving a constitutional challenge to K.S.A. 77-207, or whether their rights have already been violated. *See supra* 3–4. Intervenors' experiences, such as negative interactions with law enforcement, *see* Intervenors' Br. 26, are relevant to the impact of applying K.S.A. 77-207 to licenses, as is Dr. Oller's admitted fact testimony, which the AG ignores.

2. *Right to informational privacy*

The AG claims that because the state supreme court has not expressly held that an informational privacy right exists under the state constitution, no constitutional concerns exist in this case. State Br. 26–29. But the AG ignores cases demonstrating that a privacy interest in one's information is among the oldest enjoyed by Kansans and their neighbors in sister states, and that forced disclosure of sensitive, personal information is, by itself, a constitutionally cognizable harm. *See* Intervenors' Br. 29.

The AG disputes only whether applying K.S.A. 77-207 to licenses would require KDOR to ask transgender Kansans invasive questions about genitalia at birth and reproductive capacity. *See* State Br. 28. Tellingly, the AG still does not disavow such

an outcome, instead stating only that "[t]here is no evidence *at this point* that KDOR" would need to engage in such practices. *Id.* at 29 (emphasis added). Yet he does not explain how KDOR could carry out its alleged duty to comply with K.S.A. 77-207 without asking such questions, at least when a person seeking a license presents federal or out-of-state documents reflecting their gender identity, not sex assigned at birth.

3. *Right to equal protection*

The AG recognizes that the Bill of Rights guarantees equal treatment under the law. But he claims that K.S.A. 77-207 creates no classification relevant to this right, and that the law does not treat similarly situated people differently. He is wrong.

First, K.S.A. 77-207 creates facial classifications by placing Kansans in two boxes depending on their reproductive organs at birth and then attaching that classification "to any state law or rules and regulations" that have to do with "the application of an individual's biological sex." Of course, K.S.A. 77-207 requires another law, rule, or regulation to operationalize its classifications—here a driver's licensing regime—but it still facially classifies based on sex. Intervenors' Br. 31–32 (discussing case law, including *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746 (2020)); *see also Fowler*, 104 F.4th at 800 (federal equal-protection case explaining why denial of updated gender markers on identity documents may constitute sex discrimination). As a result, licenses will say something different depending on K.S.A. 77-207's classifications.

And the classifications that K.S.A. 77-207 creates treat similarly situated individuals differently. Even assuming the AG were correct that the law does not confer benefits to those who can produce ova over those who can fertilize ova or vice

versa, State Br. 31, the law still provides benefits to those whose gender identity matches their sex assigned at birth while denying those benefits to transgender people. It treats those who live their lives as women (or men) differently depending on their sex assigned at birth, forcing them to receive driver's licenses with different designations. The AG's assertion that the law applies evenly to all Kansans "without regard to an individual's sex or gender identity" is thus misguided.

In addition, K.S.A. 77-207 *operates* discriminatorily through the AG's proposed license regime; the AG does not argue otherwise. Instead, he claims that *Limon*, which recognized that a classification can discriminate by operation of law, does not apply here because it involved "distinct classifications and different severity of punishments based on . . . sex." State Br. 30. But Intervenors already showed why these distinctions are legally irrelevant, Intervenors' Br. 32 n.14; the AG offers no response.

4. *The absence of a legitimate, much less compelling, state interest*

The AG points to no purpose or legislative history leading to K.S.A. 77-207's adoption that would supply a compelling or important state interest for applying the law to licenses. That dooms the AG's position under any form of heightened review.

And the AG is wrong to contend that K.S.A. 77-207's application to licenses could survive rational-basis review based on the "State's interest in preserving a consistent definition of sex and of maintaining an accurate data set." State Br. 33–34. This post hoc justification makes no sense, as consistency for its own sake does not explain why the new definitions were chosen. KDOR's prior use of gender identity on licenses was also a "consistent" system, and as Intervenors demonstrated, that system was far more likely

than sex assigned at birth to reflect a person's "accurate" "gender," as used in the Kansas licensing statutes. Intervenors' Br. 16.

II. The district court abused its discretion in finding that the AG otherwise meets the temporary-injunction factors.

A. The AG has not demonstrated irreparable harm.

In a remarkable shift in position, the AG now claims that the "primary" irreparable harm to the State is not law-enforcement related, as the district court held, but instead "KDOR's refusal to comply with a law duly enacted by the Legislature." State Br. 35. Although the AG suggests this generalized theory of harm was adopted by the district court, *id.*, that is incorrect, (*see* R. III, 278–80). And without more, this cannot possibly suffice to warrant an injunction sought by one governmental actor against another.

As to the lack of harm to law enforcement absent an injunction, the AG concedes that "[t]here 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," given the small share of the population that is transgender. State Br. 37. Intervenors addressed in their opening brief the "instances" he describes and demonstrated why his characterization is not supported by the record. *See* Intervenors' Br. 37–38; *see also* (R.VII, 170) (officer testimony regarding arrest of transgender person without any reference to requesting or viewing the person's license). And while Intervenors agree with the AG that transgender people make up a small share of licensed Kansas drivers, that does not excuse a showing of irreparable harm.

B. The AG ignores and misconstrues harms to other parties.

The AG, like the district court, wrongly ignores the unrebutted evidence that Intervenors—after being outed by displaying earlier licenses with the wrong gender marker—have *already had* harmful experiences that are likely to reoccur to at least some of them under the temporary injunction. Intervenors' Br. 26, 39–40.

And it is not true, as the AG argues, that "the specter of . . . future lawsuits" against KDOR for refusing gender-marker changes "is entirely contingent on the final disposition of this case." State Br. 39. Under the injunction, KDOR is *currently* forced to issue licenses to transgender Kansans that do not reflect their gender identity. This is a current and ongoing harm to KDOR.

C. The AG turns the public interest inquiry on its head.

The AG contends that because the district court addressed harms to Intervenors in considering constitutional avoidance arguments, it necessarily found these harms do not rise to constitutional violations for purposes of considering the public interest. First, as discussed, this is an incorrect assessment of the constitutional concerns. Second, for both the privacy and equal protection concerns, the district court did not consider harms to Intervenors, or transgender Kansans more generally, because it concluded as a matter of law that no informational privacy right exists in Kansas and that the equal-protection guarantee is not implicated by K.S.A. 77-207. (R. III, 276–77). Third, harms relevant to the public interest are not limited to constitutional ones. In assessing the public interest, the district court was required to consider all harms to which both Intervenors and Dr. Oller testified. Its failure to do so warrants reversal.

The AG argues, on the other side of the scale, that the State has an interest in "officials enforc[ing] laws passed by the Legislature," and that it is improper for the judiciary "to second-guess the wisdom" of the Legislature. State Br. 42. But if the public-interest inquiry turned on this view of unfettered legislative power, a temporary injunction blocking a state law would never be proper. That is clearly not consistent with Kansas precedent. *See, e.g.*, *Hodes*, 309 Kan. at 614; *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 780, 549 P.3d 363 (2024).

Finally, the AG is wrong to claim the temporary injunction maintains the status quo, State Br. 41 n.5, which in this case would have been KDOR's longstanding gender-marker policy. The AG's argument that K.S.A. 77-207's application to licenses became the status quo when the statute became effective is at odds with precedent, which looks to the last peaceable status between the parties before the dispute arose. *See U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860 (1984). It is also at odds with practice: "[I]t is not uncommon for district courts to enjoin enforcement" of new laws pending resolution of litigation. *ACLU of Kansas v. Praeger*, 815 F. Supp. 2d 1204, 1208 (D. Kan. 2011) (citation omitted); *see Blue v. McBride*, 252 Kan. 894, 898, 850 P.2d 852 (1993), *as modified on denial of reh'g* (July 21, 1993).

III. The district court erred in excluding Dr. Oller's expert testimony.

Although the district court's rationale in excluding Dr. Oller as an expert is far from clear, it appears the court found she had not relied on reliable principles and facts to arrive at her conclusions. *See* Intervenors' Br. 45. The AG disagrees, arguing that the district court excluded Dr. Oller as an expert at the threshold because she was

unqualified "by knowledge, skill, experience, training or education." State Br. 43. Under either standard, the district court's decision is manifestly erroneous.

The AG contends that Dr. Oller did not have sufficient experience to be an expert because she "has only treated 100 transgender patients, and not all of those patients were seen for issues relating to their transgender identity." State Br. 43–44. But Dr. Oller testified that she uses her background and expertise in gender dysphoria and its treatment in every interaction with a transgender patient. (R. II, 585; R. VIII, 25–26). And, in a portion of the record ignored by the AG, Dr. Oller testified that she has helped approximately 40 patients with medical letters to update the gender marker on their licenses and has referred patients for gender-confirming surgeries. (R. II, 585; R. VIII, 34, 39–40; R. IX, 63; R. IX, 226–27). In any event, the AG ignores that experience is not the only way to qualify as an expert; Dr. Oller is qualified based on her knowledge, skill, training, and education as well.

The AG also argues that the district court excluded Dr. Oller's expert testimony because she "was unable to summarize or explain a lot of these articles that she relied upon . . ., even in the most basic way." State Br. 44 (citation and internal quotation marks omitted). However, that consideration goes not to qualifications but to the weight a factfinder might accord the expert's testimony. *See* Intervenors' Br. 47.

Dr. Oller's expert declaration cited 25 different sources—over 2000 pages—and she was not given time to re-review those materials before answering narrow, technical questions about them in her deposition. Intervenors' Br. 46–47. Early in the questioning to which the AG now points, Intervenors' counsel told the AG's counsel

that "if you're going to ask [Dr. Oller] to opine on this study you're going to have to give her time to read the full exhibit again." (R. IX, 90). Intervenor's counsel asked, "Would you like her to do that?" *Id.* The AG's counsel said, "Not right now, that's fine" and continued questioning—thus denying Dr. Oller the opportunity to review the studies.

K.S.A. 60-456(b) does not require a memory test for expert witnesses. Dr. Oller consistently testified that she read every cited study before submitting her declaration, (R. IX, 87, 108, 110); that the research informed, but was not alone the basis for, her expert opinion, (R. IX, 102, 104–05); and that she would be able to answer the questions if she were to re-review the studies, which counsel did not want her to do. (R. IX, 83, 87–92, 107–110). This showing satisfied K.S.A. 60-456(b)'s "minimal" standard. *State v. Claerhout*, 310 Kan. 924, 934, 453 P.3d 855 (2019).

Moreover, excluding Dr. Oller's expert testimony was not harmless. She would have addressed (1) medical understandings of sex, gender, "biological sex," and other terms; (2) the role of social transition—including through license updates—in treating gender dysphoria; (3) the impact of carrying a license incongruent with gender identity, and (4) the reversal of negative health consequences when a person is able to update their license to reflect their gender identity. (*See* R. IX, 221–40). This testimony bears on key issues here, including the nature and strength of the constitutional privacy and autonomy interests, and whether a temporary injunction serves the public interest.

CONCLUSION

For the foregoing reasons, the injunction order should be reversed.

Respectfully submitted,

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Dated: September 11, 2024

CERTIFICATE OF SERVICE

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