

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.

Pursuant to Chapter 60

PETITIONER’S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE

COMES NOW Petitioner, the State of Kansas, and hereby submits its memorandum in opposition to the motion to intervene. For the reasons explained more fully below, the State respectfully requests that the motion be denied.

On July 11, 2023, Adam Kellogg, Kathryn Redman, Juliana Ophelia Gonzales-Wahl, Doe Intervenor #1, and Doe Intervenor #2 on behalf of her minor child, filed their motion to intervene as respondents in this action. They principally seek to intervene as a matter of right under K.S.A. 60-224(a)(2). Alternatively, they seek permissive intervention under K.S.A. 60-224(b)(1)(B).

The State opposes Proposed Intervenor’s motion for four main reasons:

1. Proposed Intervenor’s constitutional challenge to SB 180 will not be ripe until this Court settles the question of what SB 180 requires of the Department of Revenue’s Division of Vehicles (KDOR) with respect to the

- issuance of driver's licenses. If this Court issues a writ of mandamus compelling Respondents to record only biological sex at birth in the driver's license database, then their challenge would be justiciable at that time.
2. Proposed Intervenors face no immediate possible injury as four of the Proposed Intervenors already have driver's licenses issued in their preferred "gender identity" and the fifth Proposed Intervenor, the minor child of Doe Intervenor #2, has to date taken no steps to change the sex designator on said person's driver's license despite publicly identifying as transgender for two years. As such, they lack standing.
 3. Proposed Intervenors, at a minimum, should not be allowed to intervene as *respondents* since the State is bringing this mandamus action solely against two officers of KDOR in order to resolve a question of statutory interpretation concerning the meaning of SB 180 and KDOR's obligation thereunder. No mandamus or injunctive relief is being sought against Proposed Intervenors, who are not proper respondents in a mandamus action. If proposed Intervenors are allowed to intervene, they should only do so as third-party plaintiffs.
 4. Permissive intervention should also be denied because intervention will delay the resolution of the case. This case, as brought by the State, is a straightforward statutory interpretation case concerning the mandates contained in SB 180. Proposed Intervenors raise constitutional claims that

are completely separate and would take substantially more time to resolve. They may bring those claims in a subsequent action if the State prevails in the instant matter.

A. Background

K.S.A. 60-224 grants interested persons the ability to intervene, either as a matter of right or permissively. Proposed Intervenors seek intervention as a matter of right under K.S.A. 60-224(a)(2), claiming that intervention is required to protect their rights. Alternatively, Proposed Intervenors seek permissive intervention on the grounds that they have a claim or defense that shares with the main action a common question of law or fact. K.S.A. 60-224(b)(1)(B).

Intervention of right depends 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 intervenors' interests by the parties. *Gannon v. State*, 302 Kan. 739, 741-42, 357 P.3d 873 (2015). Moreover, a party seeking intervention must be "so situated that disposing of the action may as a practical matter substantially impair or impede the movant's ability to protect its interest." K.S.A. 60-224(a)(2). The decision whether to grant intervention lies within this Court's sound discretion. *Gannon*, 302 Kan. at 741; *Montoy v. State*, 278 Kan. 765, 766, 102 P.3d 1158 (2005).

B. The motion to intervene is not ripe

The State acknowledges that the motion to intervene is timely, it having been filed only days after the filing of the action. But Proposed Intervenors' claims

appear to involve constitutional challenges to SB 180, and such claims are not yet ripe. “The doctrine of ripeness is designed to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 892, 179 P.3d 366 (2008).

The State brought this mandamus action against KDOR seeking to enforce the provisions of SB 180, which the State alleges requires driver’s licenses, instructional permits, and non-driver identification issued by KDOR to list a person’s sex at birth, not some self-chosen identifier. The same is also true of the data set maintained by KDOR. The agency disagrees with this interpretation, thus prompting the present mandamus action. (Pet. ¶¶ 23-27).

Proposed Intervenors’ desire to intervene is predicated on the notion that this Court will agree with the State’s interpretation of SB 180. (*See* Mem. In Supp. Of Mot. 11, 13.) However, that has not been determined. Should this Court adopt KDOR’s interpretation of SB 180, Proposed Intervenors’ constitutional claims presumably would then evaporate. Thus, an authoritative interpretation of SB 180 is required before Proposed Intervenors may pursue their constitutional claims.

C. Proposed Intervenors’ interests are adequately represented by KDOR

The third prong of the three-part test for intervention requires that proposed Intervenors’ interests not be adequately represented by the parties. “Mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of the governor in his administration of the public business of the state.” *State ex rel. Stephan v. Kansas*

House of Representatives, 236 Kan. 45, 58, 687 P.2d 622 (1984). The State brought this action to do exactly that—obtain an authoritative interpretation of SB 180 in order to guide KDOR in its obligations under that Act. Given that Proposed Intervenor presumably agree with KDOR’s interpretation of SB 180, KDOR can adequately represent their interests in the litigation concerning the statutory interpretation of SB 180. It is a straightforward question of statutory interpretation.

Proposed Intervenor’s claims of incompatibility between their position and KDOR’s do not withstand scrutiny. Proposed Intervenor’s claim that, because KDOR has argued that further legislation is necessary to effect the change the State argues was enacted by SB 180, is “advance[ing] arguments that [are] contrary to the interests of the Proposed intervenors.” (Mem. 12). But this is a bit of misdirection. As to the issues *actually in front of the court*, the interests of KDOR and Proposed Intervenor are wholly aligned: Proposed Intervenor want to be able to change the sex designator on their licenses however they desire, and KDOR wants to maintain Proposed Intervenor’s ability to do so. The supposed incompatibility Proposed Intervenor have seized upon deals with an entirely different issue—whether such changes must be permitted as a *constitutional* matter, regardless of what statutes the legislature passes—that is presently foreign to this litigation, and cannot and could not be decided in this litigation as currently configured. As explained above, it is unripe until the statutory issue is settled.

Thus, there is no risk that KDOR's argument on the statutory issue will affect or prejudice Proposed Intervenors' constitutional arguments.

**D. Proposed Intervenors do not have a substantial interest
in the subject matter of the litigation**

Concerning the second prong of the three-part test, Proposed Intervenors claim to have a substantial interest in the subject matter of this litigation on the grounds that their constitutional rights will be violated if driver's licenses are required to reflect their biological sex. (Mem. 11.) But, that is not the issue in this case. The State is bringing a mandamus action to obtain an authoritative interpretation of SB 180 so KDOR knows what its obligations are under the Act as it pertains to driver's licenses. The litigation is not about the impact such an interpretation may have. As the State pointed out in its motion for a temporary restraining order, KDOR cannot assert any harm in complying with a validly enacted statute, nor can it assert perceived injuries on behalf of third parties. *See Kan. Bldg. Indus. Workers Comp. Fund v. State*, 49 Kan. App. 2d 354, 382, 310 P.3d. 404 (2013) ("It defies the logic of the separation of powers doctrine to believe that a state agency, a creation of the legislature, charged by law with the enforcement of a certain set of laws, has any power to declare the enactments of its creator unconstitutional and unenforceable."); *Garetson Bros. v. Am. Warrior, Inc.*, 51 Kan. App. 2d 370, 390, 347 P.3d 687 (2015) (relevant question for TRO is whether threatened injury to the movant outweighs damage to *opposing party*). Thus, whatever injuries or grievances third parties may have respective to the application of SB 180, such matters are simply not relevant to this mandamus

action. Proposed Intervenor play no role in the implementation of SB 180 or the issuance of driver's licenses generally. A mandamus action concerns the statutory obligation of the Governor and her administrative officials to act, not the claims of third parties who do not wish to see the statute implemented.

An analogous case illustrates the point. In *State ex rel. Stephan v. Kansas Dept. of Revenue*, 253 Kan. 412, 856 P.2d 151 (1993), the Attorney General brought a declaratory judgment action asserting that the system of valuation and assessment of real property was not in compliance with the law and that KDOR had failed to administer and adequately supervise the statewide reappraisal program. 253 Kan. at 413. Several county officials, including county appraisers, sought to intervene in the case but the district court denied the intervention. 253 Kan. at 414. The court reasoned that because the Attorney General had only sued state officers responsible for enforcing property taxation, had not alleged wrongdoing on the part of any county official, and because the legislature had exclusively delegated all powers relating to property taxation to KDOR, the intervenors had no substantial interest in the subject matter of the litigation. 253 Kan. at 415.

On appeal, the Kansas Supreme Court agreed. It held that the proper parties to defend the property tax appraisal system were those entities charged with administering and enforcing such a system, not any political subdivision. 253 Kan. at 419. Although the counties argued that they had a substantial interest in the subject matter of the litigation because county officials would be scrutinized through enforcement of the property tax system, the Court rejected the argument because no

enforcement action had been undertaken against any county official, and that the intervenors would not be affected parties until such action was taken. 253 Kan. at 420.

The same is true here. Proposed Intervenors will only be affected parties once this Court rules and provides an authoritative interpretation of SB 180 that requires a driver's license to contain the licensee's biological sex. Thus, Proposed Intervenors' substantial interest in the subject matter of this litigation only potentially comes into play once the litigation is complete (and not before).

Moreover, Proposed Intervenors' alleged injuries may not occur even upon the resolution of this present mandamus action. As previously noted, four of the five Proposed Intervenors already have driver's licenses that display their chosen "gender identity," and their driver's licenses are not set to expire for nearly a year at the earliest. The fifth Proposed Intervenor's minor child has not even applied to have that child's driver's license reflect the child's "gender identity" despite that fact that this child has disclosed being "transgender" for two years.

Finally, Proposed Intervenors' purported rights are not prejudiced by a denial of their motion to intervene. *See* K.S.A. 60-224(a)(2) (to intervene as a matter of right, a movant must be "so situated that disposing of the action may as a practical matter substantially impair or impede the movant's ability to protect its interest"). Once a ruling by this Court is made that Proposed Intervenors believe is contrary to their interests, they are free to file suit to vindicate their purported rights. To allow them to intervene in this matter is procedurally problematic as they seek to

intervene as respondents (even though they are not being sued and they have no authority to enforce state law). Proposed Intervenors claim constitutional deprivations of their purported rights should SB 180 be enforced consistent with the State's position. But to assert those purported rights, Proposed Intervenors must bring their claims against KDOR, the entity charged with enforcing SB 180 as it pertains to driver's licenses, either in a separate lawsuit or as third-party plaintiffs. Allowing intervention would put the Attorney General in the awkward position of both having to prosecute a mandamus action against KDOR while at the same time defending KDOR against Proposed Intervenors' constitutional claims. Such a scenario is unworkable.

E. Proposed Intervenors not entitled to permissive intervention

In the alternative, Proposed Intervenors seek permissive intervention on the grounds that they have claims that share with the main action a common question of law or fact. *See* K.S.A. 60-224(b)(1)(B). In addition to the reasons discussed above, the State opposes permissive intervention on the grounds that allowing intervention will unduly delay and prejudice the adjudication of the mandamus action. *See* K.S.A. 60-224(b)(3) (court's exercise of discretion must consider whether intervention will delay or prejudice current proceeding).

First, proposed Intervenors' claims are not shared with the questions raised in this mandamus action. Proposed Intervenors' claims rest upon alleged constitutional violations while the mandamus action is limited to the statutory interpretation question of the meaning of SB 180. The adjudication of those

constitutional questions would require argument and briefing for more extensive than that necessary to resolve the statutory interpretation question at issue in this mandamus action.

Second, as the State has already explained, allowing intervention will create a procedural morass as the Attorney General, which is prosecuting this mandamus action against KDOR, will be forced to also defend KDOR against Proposed Intervenors' constitutional claims in the same action. Such a scenario is untenable and will greatly delay the proceedings and prejudice the parties' efforts to resolve the statutory interpretation question at issue.

Third, if this Court determines that intervention is proper, it should only allow intervention at the end of the case once the meaning of SB 180 is determined. Once that is done, and should Proposed Intervenors still desire to pursue their motion, then Proposed Intervenors could intervene as third-party plaintiffs and adjudicate their constitutional claims against KDOR. In other words, should this Court permit intervention, the mandamus claims and constitutional claims should be bifurcated and serially litigated.

Conclusion

For the reasons set forth above, the State respectfully requests that the motion to intervene be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 25, 2023, 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/Anthony J. Powell