Court:	Supreme Court
Case Number:	127522
Case Title:	State of Kansas, ex rel Kris Kobach, Attorney General, Petitioner/Appellee, v. David Harper, Director of Vehicles, in His Official Capacity, and Mark Burghart, Secretary of Revenue, in His Official Capacity, Respondents/Appellants, and Adam Kellogg, Kathryn Redman, Juliana Ophelia Gonzalez-Wahl, and Doe 2, Intervenor-Respondent, on Behalf of Her Minor Child, Intervenors Respondents/Appellees.
Type:	Order - Petition for Review - Denied Petition for Review by Appellee, State of Kansas

Considered by the Court and denied.

SO ORDERED,

Marla Luckert

/s/ Marla Luckert, Chief Justice

No. 24-127522-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

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

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PRAYER FOR REVIEW

The State of Kansas, *ex rel.* Kris Kobach, Attorney General requests this Court grant review and reverse the Court of Appeals' opinion vacating the temporary injunction and remanding the case to a different judge.

This Court should grant review and reverse for three reasons: (1) this is an issue of public importance; (2) the need for clarification of caselaw; and (3) the Court of Appeals reached an incorrect result. Supreme Court Rule 8.03(b)(6)(E)(i), (iii), (vi) (2025 Kan. S. Ct. R. 56-57).

DATE OF THE DECISION OF THE COURT OF APPEALS

The Court of Appeals issued its order on June 13, 2025.

STATEMENT OF THE ISSUES FOR REVIEW

I. The Court of Appeals 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.

II. The Court of Appeals 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.

III. The Court of Appeals erred by ordering the case be assigned to a new judge on remand.

STATEMENT OF FACTS

The State believes that the Court of Appeals' short factual and procedural history section is accurate. Slip Op. at *6-7. For a more thorough recounting of the facts, the State incorporates by reference its fact sections in its briefs below. (127,522 Appellee's Brief, 3-6); (127,390 Appellee's Brief, 2-7).

At the outset, two factual errors in the Court of Appeals' opinion need to be corrected. First, the Court of Appeals classified this case as a dispute between two agencies and commonly refers to Petitioner as the AG. Slip Op. at *6. This is not an interagency dispute. The Attorney General is acting on behalf of the State of Kansas. This is a dispute between the State and one of its agencies that is refusing to comply with State law.

Second, the Court of Appeals claimed that "AG … conceded during oral argument that the impetus of SB 180 had nothing to do with driver's licenses but was to address the issue of biological men competing against women in sports." Slip Op. at *12. The court offered no specific quotation for this assertion. The court's claim is incorrect. At oral argument, the Solicitor General was prompted by the court to speculate about what the Legislature hoped to address with SB 180. In response, he mentioned girls' sports, among other issues. January 27, 2025, Oral Argument, 25:33-26:00, 30:25-32:00, 37:25-38:45, 41:00-41:20.[1] In response to the court's suggestion that the Legislature did not realize there was a problem with gender being listed in the driver's license statutes, the Solicitor General responded, "Maybe. I don't think we really know for sure. . . . And maybe they didn't think that there was really a difference so they didn't see an issue." *Id.* This point about there being no "difference" referenced the fact that the Legislature believed "gender" and "sex" were synonymous, which is reflected throughout the Kansas statutes. Regardless, any speculation about girls' sports is likely mistaken, since the legislature

[1] https://www.youtube.com/watch?v=-XybIxSjN80

addressed the sports issue specifically in the same legislative session by enacting a *different* bill—HB 2238. Moreover, the Solicitor General in no way suggested that SB 180 was about girls' sports and nothing else.

ARGUMENT WHY REVIEW IS WARRANTED

I. The Court of Appeals 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.

On its own initiative, the Court of Appeals created a new standard out of whole cloth for determining a "substantial likelihood of eventually prevailing on the merits," holding that a party seeking a temporary injunction must satisfy the preponderance of the evidence standard and demonstrate at least a 51% chance of winning the lawsuit "to justify the issuance of an injunction." Slip Op. at *26.

The court cited no authority to support its novel standard. It admits "not all courts have accepted this approach." *Id.* And not a single case in the court's string cite applied this preponderance of the evidence standard. See *id.* at *26-27. In fact, some of those cases explicitly reject this approach. See *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1343 (8th Cir. 2024) ("A movant shows a likelihood of success on the merits when it demonstrates a 'fair chance,' not necessarily 'greater than fifty percent,' that it will ultimately prevail under applicable law."); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 614 (7th Cir. 2024) ("Proof of a likelihood of success by a preponderance of the evidence is not necessary.").

The Court of Appeals' new standard is flawed. As the court noted, "preponderance of the evidence (51%) is the lowest burden of proof a successful civil litigant must

establish to win a lawsuit." Slip Op. at *26. This means a litigant who files suit requiring a preponderance of the evidence standard to prevail would be required to satisfy the ultimate burden to obtain a temporary injunction. See *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007) (holding petitioner is only required to show likelihood of success on merits rather than actual success).

Whether preponderance of the evidence is an appropriate standard to determine the likelihood of success on the merits is a matter of first impression for this Court. It is also an issue likely to recur in future temporary injunction appeals. The Court of Appeals' erroneous grafting of the preponderance of the evidence burden of proof into the likelihood of success on the merits analysis infected its entire analysis and warrants reversal.

The Court of Appeals claimed it was not being asked to give its opinion as to which party's interpretation of K.S.A. 77-207 was correct. Slip Op. at *11. But this is a mandamus action seeking an authoritative interpretation of the statute, so whether the State had a reasonable likelihood of prevailing on the merits necessarily involves a determination of which interpretation is likely correct, and, though it claimed otherwise, the court clearly betrayed the fact that it disfavored the State's interpretation.

The Court of Appeals erred in holding that K.S.A. 77-207 was ambiguous. Slip Op. at *38. The statute is unambiguous in its application. The State contends that "sex" as used in K.S.A. 77-207 and "gender" as used in the driver's license statutes are synonymous. (127,522 Appellee's Brief, 10-16); (127,390 Appellee's Brief, 9-16). The court held otherwise. Slip Op. at *33-38, 41-51. In doing so, the Court of Appeals erred.

The Court of Appeals held that, when the Legislature passed K.S.A. 77-207, it should have recognized there was a difference between "sex" and "gender," and could have included "gender" within K.S.A. 77-207's reach if it had wanted to. But that is looking at the wrong time frame.

The court should have looked at 2007, when the Legislature amended the driver's license statutes changing "sex" to "gender because the question is whether "gender" as used by the Legislature in the REAL ID amendments to K.S.A. 8-240(c) and K.S.A. 8-243(a) meant the same as "sex." The Legislature used the term "gender" in order to match the federal requirements for what words must be used on a qualifying driver's license. As the Court of Appeals itself recognized: "No one seems to dispute that in common parlance, at least in 2007, the two terms were often, but not always used interchangeably." Slip Op. at *37; see also *United States v. Skrmetti*, 145 S. Ct. 1816, 1856 (2025) (explaining how "sex" and "gender" are frequently used interchangeably). This Court should grant review to clarify that a word's ordinary meaning is determined based on when the statute was enacted.

The Court of Appeals found the Legislature must have meant to change the statutes' meanings when it changed "sex" to "gender." In doing so, the court ignored that the Indiana Court of Appeals addressed a very similar issue in *Indiana Bureau of Motor Vehicles v. Simmons*, 233 N.E.3d 1016, 1025, *aff'd as modified by* 235 N.E.3d 1159 (Mem), 2024 WL 3434712 (Ind. Ct. App. 2024), and determined that the change from "sex" to "gender" was the result of the legislature trying to comply with the REAL ID Act, rather than allowing gender markers on state credentials.

The court's primary support for its holding was KDOR's practice in recent years of allowing gender marker changes. Slip Op. at *41. The court ignored the fact that KDOR uses "sex" and "gender" interchangeably, recording what the statute labels "gender" as "sex" on the licenses. KDOR's interpretation is also inconsistent with the fact that it only records "male" or "female" on driver's licenses. If "gender" really meant "gender identity" and not "sex," then KDOR would have included any of the growing number of "gender identities" or "preferred pronouns."

The Court of Appeals cited several *recently* passed statutes to assert the Legislature viewed "sex" and "gender" differently. Slip Op. at *44-51. But the court failed to recognize the difference between those statutes and K.S.A. 77-207. The statutes cited by the court are substantive statutes addressing specific issues involving sex and gender identity. Slip Op. at *44-51. K.S.A. 77-207, in contrast, is a statutory construction statute meant to guide a court's statutory interpretation, rather than specifically address issues surrounding "gender identity." In its analysis, the Court of Appeals also ignored the multiple examples of past statutes in the State's briefs that demonstrate "sex" and "gender" were undeniably intended by the Legislature to mean the same thing. (127,522 Appellee's Brief, 12); (127,390 Appellee's Brief, 11-12). See, e.g., K.S.A. 65-6710(a)(3) ("Gender, eye color and other traits are determined at fertilization."). Up until recently, "gender" was seen by many as a more polite way to refer to biological sex, without the salacious implications of the word "sex."

The Court of Appeals discussed whether KDOR engages in a mandatory or discretionary action in issuing sex designation changes on driver's licenses. Slip Op. at

*51-55. Mandamus is only appropriate for mandatory actions. *Stephens v. Van Arsdale*, 227 Kan. 676, 682, 608 P.2d 972 (1980). The Court of Appeals suggested that KDOR engages in discretionary action, but never clearly held one way or the other. Given this failure to give a clear answer, as well as any suggestion that mandamus is not available here, review by this Court is warranted.

The Court of Appeals highlighted vanishingly rare instances where a person might not fit the definition of "male" or "female" under K.S.A. 77-207. Slip Op. at *53-54. Under the court's strained reasoning, because these rare instances exist, K.S.A. 77-207 cannot require KDOR to put biological sex on licenses. In its irreparable harm section, the Court emphasized how few the modified-sex-marker driver's licenses were in general. Yet in this section, it overemphasizes a tiny number of difficult instances to cast down the State's interpretation. The existence of some difficult questions does not negate the State's interpretation. K.S.A. 77-207 anticipated this issue, in subsection (a)(7): "an individual born with a medically verifiable diagnosis of 'disorder/difference in sex development' shall be provided legal protections and accommodations afforded under the Americans with disabilities act and applicable Kansas statutes." The State's lawsuit is not directed to such rare instance here, but rather to KDOR's refusal to follow the statute's plain command in *any* cases. While it is hypothetically possible that a specific individual might require an official to exercise some discretion in determining whether his case fits under subsection (a)(7), that does not change the basic interpretation of K.S.A. 77-207 in every other case or that it requires KDOR to list a person's biological sex on the driver's license.

The Court of Appeals cast aside multiple canons of statutory construction in reaching its holding. First, the court ignored that it should not attempt to divine legislative intent when the words of a statute are unambiguous. *See Johnson v. U.S. Food Serv.*, 312 Kan. 597, 600, 478 P.3d 776 (2021). The court mentions this rule in passing, then proceeds to completely ignore it, saying "context matter [sic]." Slip Op. 29. Second, the court's contention that existing references to "sex" or "gender" in Kansas law already referred to two different things (at least with respect to the 2007 changes to K.S.A. 8-240) renders K.S.A. 77-207 a dead letter. Under the court's logic, "sex" already meant biological sex and gender meant something else. Slip. Op. 34. Thus, there would be no need to reiterate that understanding by enacting K.S.A. 77-207. This violates the canon against reading statutory text so as to create mere surplusage—words that change nothing. *American Warrior, Inc. v. Bd. of Cty. Comm'rs*, 319 Kan. 78, 82, 552 P.3d 1219 (2024) (courts have obligation to interpret legislation to not render it surplusage). It also begs the question of why the governor would take the extraordinary step of vetoing a bill, and the legislature would go to great lengths to override the veto, if the bill would have no effect on executive branch actions. The court also violated the canon against surplusage when concluding that KDOR could "identify" relevant individuals as *both* male and female—a conclusion that renders the final sentence of K.S.A. 77-207(c) a nullity. *See* Slip Op. 33.

In sum, the Court of Appeals erred in holding that K.S.A. 77-207 does not require a licensee's biological sex to be displayed on a driver's license. In doing so, it created a

new, more difficult standard and ignored common statutory interpretation principles. This Court should grant review to correct these errors.

II. The Court of Appeals employed the wrong standard by holding the State did not show it would suffer an irreparable injury, rather than showing a reasonable probability of irreparable injury.

The Court of Appeals held the State did not show it would suffer any harm in the absence of a temporary injunction. Slip Op. at *25-26. The court placed too high a burden on the State. The State does not need to prove harm will definitely occur. See *Bd. of Cty. Com'rs v. Whitson*, 281 Kan. 678, 132 P.3d 920 (2006) Instead, the State only needed to show a "reasonable probability" of an irreparable future injury exists, which is a much lower standard than the applicable burden at trial. *Steffes,* 284 Kan. at 395. This Court should grant review to correct the Court of Appeals' erroneous application of the standard.

The Court of Appeals believed the State alleged two harms, but the State raised three harms: (1) KDOR's failure to follow the law; (2) there is no mechanism to recall noncompliant driver's licenses; and (3) the harm to law enforcement. Slip Op. at *15; (127,522 Appellee's Brief, 17-20); (127,390 Appellee's Brief, 35-38). The Court of Appeals discussed all three but erred by combining the latter two. The Court of Appeals' failure to assess each harm on its own was erroneous.

The Court of Appeals claimed the State did not raise its first harm, KDOR's failure to follow the law, in its petition. Slip Op. at *15. But the State did expressly raise this harm when it asserted that KDOR failed to comply with K.S.A. 77-207. (R. I, 2, 5-7.) The district court found that this constituted irreparable harm. (R. III, 278-80.)

The Court of Appeals summarized the State's argument thusly: "In other words, the AG asks us to find, as a matter of law, that anytime an AG believes that a person or entity is violating a duly enacted law, we must find irreparable harm sufficient to support the issuance of an injunction." Slip Op. at *15, 17. The Court of Appeals misconstrued the State's argument to create a strawman to knock down. The State never argued that whenever the Attorney General believes any official failed to follow his duty, the courts must necessarily find irreparable harm exists. Rather, the State argued that, when an executive agency adopts an official policy of refusing to comply with a duly-enacted law (especially one that was enacted over a governor's veto), this willing, official refusal constitutes a harm. KDOR's admitted refusal to comply with K.S.A. 77-207 is evidence of a *reasonable probability of irreparable injury*.

Despite the court's contrary claim, the State provided support for its argument. (127,522 Appellee's Brief, 17-18); (127,390 Appellee's Brief, 30-31). The Kansas Constitution vests the Legislature with the power to make laws and vests the executive branch with the duty to enforce those duly-enacted laws. Kan. Const. Art. II, §1, Art. I, §3. It strikes at the very heart of a constitutional republic when the executive branch refuses to comply with a duly-enacted law. KDOR's failure to enforce the law constitutes an irreparable injury. See *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State."); *State by and through Office of Attorney General of Texas v. City of San Marcos*, __ S.W.3d __, 2025 WL 1142065, at *14 (Ct. App. Tex. 2025) ("[T]here is no question that a local official's violation of state law inflicts irreparable harm on the State").

The State's second harm is that driver's licenses, once issued, remain in circulation for six years and any noncompliant licenses would be virtually impossible to recall. K.S.A. 2023 Supp. 8-247(a). Kansas statutes provide no procedural mechanism to recall non-compliant licenses. Thus, any non-compliant license would remain in circulation for up to six years. The Court of Appeals failed to appreciate this argument as a separate and distinct harm, in addition to the threat non-compliant licenses pose to law enforcement.

The State's final stated harm is the reasonable probability of irreparable injury to law enforcement because driver's licenses are routinely used in law enforcement functions. The Court of Appeals emphasized the small number of changes to the sex designation of driver's licenses. Slip Op. at *21. But what the Court of Appeals ignored is that the number of driver's licenses with incongruent sex markers was increasing rapidly before the temporary injunction. Through the end of 2022, there were 380 changes, but in the first half of 2023 alone there were 172. (R. VII, 112-13.) Additionally, the Court of Appeals did not explain why a small number of driver's licenses changes mean there is not a danger to law enforcement. Danger is danger, whether it comes from one person or thousands.

The State presented extensive evidence on the harm that results when warrants are issued for individual's arrest and the person's sex in the warrant does not match the sex in the since-changed driver's license. In such a case, no arrest can occur. Sheriff Brian Hill testified that this was a problem that he and his deputies had already encountered. The Court of Appeals got the evidence wrong, asserting there was no evidence that Hill relied

on a driver's license, only the person's outward appearance. Slip Op. at *21. But Hill never testified to that. Hill testified the first thing he does in a law enforcement encounter is identify a person by asking for the person's driver's license. (R. VII, 166-67.) Hill testified he uses the name, date of birth, *sex*, and race when checking for wants and warrants and the two consistent things he relies on are sex and date of birth. (R. VII, 168.) He testified regarding a specific instance in which a perpetrator attempted to evade arrest by changing the sex designation, so that it did not match the perpetrator's sex when the crime was committed. When the perpetrator was run through the database with the new (changed) sex marker, no criminal history appeared. (R. VII, 170-71.)

Second, the Court of Appeals asserted that the State abandoned and waived its argument about the harm from misidentification at jail or prison. Slip Op. at *23. But the State preserved its argument by raising Newson's testimony about using a person's sex designation on a driver's license to determine where to house an arrestee in jail and the sex of the person who performs the strip search. (127,522 Appellee's Brief, 19); (127,390 Appellee's Brief, 36-37).

The Court of Appeals concluded that "the AG fails to show any irreparable harm. . . ," Slip Op. at *25, despite the fact that the harm of law enforcement misidentification of criminals had already occurred in the past and was therefore likely to occur in the future. The State was only required to show a "*reasonable probability*" of an irreparable further injury, which it did. See *Steffes*, 284 Kan. at 395.

III. The Court of Appeals erred by ordering the case be assigned to a new judge on remand.

With little explanation or support, in the final paragraph of its opinion, the Court of Appeals ordered that this case be assigned to a new judge on remand because Judge Watson "has already stated [her] opinion on the merits of the Intervenors' constitutional claims." Slip Op. at *55-56. The Court of Appeals' decision was error for several reasons.

First, this action was taken *sua sponte* by the Court of Appeals, without any indication that it might do so. No party, at any point in this case, has requested a new judge. There has been no indication that Judge Watson acted improperly or did not give all parties a fair hearing. And there is no reason to believe that Judge Watson could not apply the Court of Appeals holding or any holding from this Court on remand or that she could not make the permanent injunction determination in a fair and neutral manner.

Second, the Court of Appeals' reasoning was factually incorrect. Intervenors may wish to raise constitutional challenges to K.S.A. 77-207 eventually, but they did not do so below. Rather, Intervenors, while primarily arguing that the statue was unambiguous, included an alternative statutory interpretation argument raising the canon of constitutional avoidance. In other words, there are no constitutional claims that have been raised in this case.

Third, Judge Watson's findings as to whether Intervenors' stated constitutional rights were implicated were necessary in order to address Intervenors' constitutional avoidance arguments. In other words, if K.S.A. 77-207 did not implicate any

constitutional rights, then the constitutional avoidance canon would not apply. See *Johnson v. U.S. Food Service*, 312 Kan. at 603.

Moreover, the Court of Appeals earlier in its opinion recognized that temporary injunction analysis necessarily requires a court to state its initial opinion on the merits, because the first element for a temporary injunction is a substantial likelihood of prevailing on the merits. Slip Op. at *10. It is difficult to understand how a court is supposed to determine whether a party has a substantial likelihood of success on the merits without stating any opinion on the merits. Additionally, Intervenors inserted their alleged constitutional harms in two other temporary injunction factors—whether the threat of injury to the State outweighed any harm to KDOR or Intervenors and the public interest—requiring Judge Watson to address the alleged constitutional harms in adjudicating those factors too. (R. III, 55-56.)

The Court of Appeals' opinion leads to the conclusion that, if a court were to grant a temporary injunction and later be reversed, then the case would have to be remanded to a different judge because the first judge had stated an opinion on the merits. The Court of Appeals cited no case law for this radical new holding. Reviewing courts reverse and remand cases back to the same judge all the time, having faith that the judge will faithfully apply the higher court's directions.

Finally, the Court of Appeals' single citation to Chief Justice Luckert's concurrence in *In the Matter of the Estate of Lentz*, 312 Kan. 490, 476 P.3d 1151 (2020) (Luckert, C.J., concurring), provides no support. The Court of Appeals' parenthetical stated that the concurrence said "when courts opine on issues not properly before them. . .

." Slip Op. at *55-56. But Chief Justice Luckert did not say that. Rather, she said: "Simply put, one of the fundamental concepts of the rule of law is that courts should not opine on issues *over which they lack jurisdiction*." *Lentz*, 312 Kan. at 507 (Luckert, C.J., concurring) (emphasis added). That is a far cry from this case. Here, Judge Watson had jurisdiction to consider Intervenors' constitutional avoidance argument. Judge Watson addressed all of the arguments properly presented by the parties.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 14, 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:

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APPENDIX

State of Kansas ex rel. Kris Kobach v. Harper and Kellogg, et al., No. 127,390, 127,522 (Kan. App. Jun 13, 2025) (Slip. Op.)

Memorandum Decision and Order on Motion for Temporary Injunction

No. 127,390

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,
Respondents/Appellees,

and

ADAM KELLOGG, KATHRYN REDMAN, JULIANA OPHELIA GONZALES-WAHL, and DOE
INTERVENOR-RESPONDENT 2, on Behalf of Her Minor Child,
Intervenors-Respondents/Appellants.

No. 127,522

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and

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INTERVENOR-RESPONDENT 2, on Behalf of Her Minor Child,
Intervenors-Respondents/Appellees.

SYLLABUS BY THE COURT

1.

The extraordinary remedy of mandamus is available only for the purpose of compelling performance of a clearly defined duty—a duty imposed by law and not a duty involving the exercise of discretion. Mandamus is available only as a last resort and only for extraordinary causes.

2.

If the party seeking a writ of mandamus wants to stay or stop any actions by an official *pending* the determination of the mandamus proceeding, the party may combine the action with a request for preliminary temporary injunctive relief.

3.

Temporary injunctions are intended to maintain the status quo and prevent harm to a claimed right pending a final determination of the controversy on its merits. They are not meant to determine any controverted right but to prevent injury to a claimed right until a full decision can be made.

4.

While temporary injunctions serve an important role in preventing immediate harm, a full hearing on the merits by a neutral tribunal ensures that all parties have a fair opportunity to present their case and that a court's final decisions are made based on a comprehensive understanding of the issues.

5.

Before a court may issue a temporary injunction, the movant has the burden to establish five factors: (1) a substantial likelihood of eventually prevailing; (2) a reasonable probability exists that the movant will suffer irreparable injury without an

injunction; (3) the movant lacks an adequate legal remedy, such as damages; (4) the threat of injury to the movant outweighs whatever harm the injunction may cause to the respondent; and (5) the injunction will not be against public interest. All of these factors are necessary to obtain a temporary injunction. The absence of any single factor ends the inquiry.

6.

A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. The moving party must first demonstrate that such an injury is likely before the other requirements for the issuance of an injunction will be considered.

7.

The "reasonable probability" standard is a much lower burden than the applicable burden of proof at a trial. Yet purely speculative harm will not suffice.

8.

A preliminary injunction does not issue automatically and is not meant to restrain an act the injurious consequences of which are merely trifling.

9.

The mere fact that the Attorney General determines that an official or entity is violating a duly enacted law and files a mandamus action is not enough, by itself, to establish irreparable harm.

10.

When the movant fails to first show any irreparable harm in determining whether a preliminary injunction should be issued, there is no need for the court to weigh the harm to the movant with the harm to the respondent.

11.

The legal requirement that the movant has a substantial likelihood of eventually prevailing on the merits before obtaining a preliminary injunction is designed to balance the need to prevent harm before a full trial can be conducted with the recognition that the final outcome of the case remains uncertain. This standard ensures that temporary relief is granted only when there is a significant chance of success, thereby protecting the interests of both parties until a final decision can be made.

12.

Because the word substantial means "considerable in quantity" or "significantly great," there must be some amount of certainty that is more than an equally balanced scale when determining whether the movant has a substantial likelihood of eventually prevailing on the merits to support a preliminary injunction. Just because a movant does not meet this burden, does not mean that they will not be successful, or it is more probable that the respondent will prevail. It simply means that *at this preliminary stage*, at most, the movant's chances are slightly less than even. A full hearing on the merits could easily change that balance.

13.

A writ of mandamus may not be invoked to control discretion, or to enforce a right which is in substantial dispute. That does not mean that some other civil action(s) might not be available to decide the correctness of an official's interpretation of the law, but mandamus is not one of them.

No. 127,390

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Oral argument held January 27, 2025. Opinion filed June 13, 2025. Reversed and remanded with directions.

D.C. Hiegert and *Karen Leve*, of American Civil Liberties Union Foundation of Kansas, of Overland Park, *Julie A. Murray*, pro hac vice, and *Aditi Fruitwala*, pro hac vice, of the American Civil Liberties Union Foundation, of Washington, D.C., *Rose Saxe*, pro hac vice, and *Bridget Lavender*, pro hac vice, of the same firm, New York, New York, and *Scott C. Hecht* and *Douglas R. Dalgleish*, of Stinson LLP, of Kansas City, Missouri, for intervenors-respondents/appellants.

Ryan J. Ott, assistant solicitor general, *Anthony J. Powell*, solicitor general, and *Kris W. Kobach*, attorney general, for petitioner/appellee.

Patience Crozier, pro hac vice, of GLBTQ Legal Advocates & Defenders, of Boston, Massachusetts, *Sasha Buchert*, pro hac vice, of Lambda Legal Defense and Education Fund, Inc., of Washington, D.C., *Kimberly A. Havlin*, pro hac vice, of White & Case LLP, of New York, New York, and *Olawale O. Akinmoladun*, of Spencer Fane LLP, of Kansas City, Missouri, for amici curiae GLBTQ Legal Advocates & Defenders and Lambda Legal Defense and Education Fund, Inc.

Teresa A. Woody, of Kansas Appleseed Center for Law and Justice, Inc., of Lawrence, and *Priscilla J. Smith*, pro hac vice, of Law Offices of Priscilla J. Smith, of Brooklyn, New York, for amicus curie Information Society Project.

Mark P. Johnson, *Harrison M. Rosenthal*, and *Parker B. Bednasek*, of Dentons US LLP, of Kansas City, Missouri, for amici curie Professors Stephen R. McAllister and Richard E. Levy.

No. 127,522

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Oral argument held January 27, 2025. Opinion filed June 13, 2025. Reversed and remanded with directions.

Pedro L. Irigonegaray and *Nicole Revenaugh*, of Irigonegaray & Revenaugh, L.L.P., of Topeka, for respondents/appellants.

Anthony J. Powell, solicitor general, *Ryan J. Ott*, assistant solicitor general, and *Kris W. Kobach*, attorney general, for petitioner/appellee.

Before WARNER, C.J., HILL and ARNOLD-BURGER, JJ.

ARNOLD-BURGER, J.: This case is a dispute between two agencies within the executive branch of government—the Attorney General (AG) and the Department of Revenue, Division of Vehicles (KDOR)—over their competing interpretation of a new state law. The AG sought to have the district court order that the KDOR's interpretation of the statute was wrong and that his was correct. The district court granted the AG's request for an injunction pending a decision on the merits and the KDOR has appealed that decision to us.

In addition, the district court allowed several parties to intervene in the case for the sole purpose of challenging the constitutionality of the statute and the application of the statutory construction doctrine of constitutional avoidance. They join in the appeal.

Because we find that the AG has failed to establish irreparable harm to support the issuance of a temporary injunction and has failed to show a substantial likelihood that he will prevail on the merits, we reverse the district court's order and lift the temporary injunction. We find it unnecessary at this stage to address any other issues the parties raise. They will be resolved by the district court on remand.

FACTUAL AND PROCEDURAL HISTORY

In 2023, the Kansas Legislature passed Senate Bill 180, also known as the Women's Bill of Rights Act. The Act is now codified as K.S.A. 2024 Supp. 77-207. See L. 2023, ch. 84, § 1. The law became effective on July 1, 2023, and generally directs Kansas agencies and subdivisions of government to define a person's biological sex for purposes of vital statistic record-keeping in a particular way. After the law was enacted but before it became effective, a legislator sought an advisory opinion from the AG about the law's application to driver's licenses because the law does not specifically mention

driver's licenses. Attorney General Kris Kobach issued an advisory opinion that K.S.A. 2024 Supp. 77-207 applied to driver's licenses and required the KDOR to record the sex of the driver as defined in K.S.A. 2024 Supp. 77-207(a) on the front of the driver's license. See Att'y Gen. Op. No. 2023-2.

Disagreeing with the AG's interpretation, the KDOR announced its intent to continue allowing for gender reclassifications of the listed sex on the front of the license. Kansas Dept. of Revenue, https://www.ksrevenue.gov/ [https://web.archive.org/web/20230630014827/https://www.ksrevenue.gov/] ("The enactment of Senate Bill 180 on July 1 will not impact the longstanding procedures for obtaining, renewing, and updating a Kansas driver's license as they pertain to gender markers.").

The AG, on behalf of the State of Kansas, sued the KDOR for a writ of mandamus and an injunction to enforce his interpretation of the statute. The State also moved for a temporary injunction while the suit was pending. A group of intervenors sought and were granted permission to enter the case solely on the issue of the constitutionality of the statute and the statutory construction doctrine of constitutional avoidance. More details of the dispute will be provided as necessary.

After significant discovery, the district court held an evidentiary hearing on the temporary injunction. The court ultimately granted the temporary injunction, and the KDOR and the Intervenors separately appealed the judgment under different case numbers, but raising the same or similar claims and defenses.

Additional facts are provided herein as needed to analyze the legal issues raised.

ANALYSIS

To fully understand what we are being asked to decide in this appeal, it is key to look at how our system resolves disputes such as this.

I. A MANDAMUS ACTION

The ultimate relief sought by the AG in this case is a writ of mandamus. This is a legal process allowed in all state and federal courts; it is an order from a court to compel a government official to perform a specified duty. See K.S.A. 60-801.

The extraordinary remedy of mandamus is available only for the purpose of compelling performance of a clearly defined duty—a duty imposed by law and not a duty involving the exercise of discretion. Mandamus is available only as a last resort and only for extraordinary causes. *State v. Becker*, 264 Kan. 804, 807, 958 P.2d 627 (1998). It may not be invoked to control discretion, or to enforce a right which is in substantial dispute. *Ambrosier v. Brownback,* 304 Kan. 907, 911, 375 P.3d 1007 (2016) (quoting *Curless v. Board of County Commissioners*, 197 Kan. 580, 581, 419 P.2d 876 [1966]). And, like all civil disputes, it requires a full hearing in a court of law on the merits of the issue presented.

Although mandamus actions are not common, they are also not rare. And they are requested in varying situations. See *Schwab v. Klapper*, 315 Kan. 150, 505 P.3d 345 (2022) (unsuccessful mandamus action brought by State against two district court judges to force them to dismiss cases pending in their judicial districts involving allegations that the Legislature intentionally gerrymandered legislative districts to dilute the minority vote); *Board of Johnson County Comm'rs v. Jordan*, 303 Kan. 844, 370 P.3d 1170 (2016) (County filed successful mandamus action challenging the constitutionality of the method used for valuing real property for ad valorem taxation purposes.); *City of Atchison v.*

Laurie, 63 Kan. App. 2d 310, 528 P.3d 1007 (2023) (City filed a successful mandamus action to compel the county sheriff to accept prisoners committed to him by the city police.).

So here, the AG brought a mandamus action under K.S.A. 60-801 to compel the KDOR to stop its practice of allowing gender reclassification of the sex designation on a person's driver's license and to require that the sex designation on the driver's license reflect the new definition of biological sex adopted by the Legislature. He brings this action under his "common law" authority as Attorney General, and *not* at the request of the Legislature or the Governor. See K.S.A. 2024 Supp. 75-702(b) (allowing AG to be directed by the Governor or the Legislature to pursue any case in which the State may have an interest).

II. A TEMPORARY INJUNCTION

If the party seeking a writ of mandamus wants to stay or stop any actions by an official *pending* the determination of the mandamus proceeding, the party may combine the action with a request for injunctive relief. K.S.A. 60-802(a). An injunction is an order issued from the court to do or not do a particular act. Temporary injunctions, like the one requested by the AG, are provisional remedies intended to maintain the status quo and prevent harm to a claimed right pending a final determination of the controversy on its merits. They are not meant to determine any controverted right but to prevent injury to a claimed right until a full decision can be made. *Garetson Brothers v. American Warrior, Inc*., 51 Kan. App. 2d 370, 389-90, 347 P.3d 687 (2015). It preserves the relative positions of the parties until a full decision on the merits can be made. *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 619, 440 P.3d 461 (2019). Seeking injunctive relief in conjunction with a writ of mandamus is not required.

While temporary injunctions serve an important role in preventing immediate harm, a full hearing on the merits by a neutral tribunal ensures that all parties have a fair opportunity to present their case and that a court's final decisions are made based on a comprehensive understanding of the issues. As such, injunctions are considered an "extraordinary" remedy—meaning they go beyond what is "usual, regular, or customary." Merriam-Webster's Collegiate Dictionary 444 (11th ed. 2020). They allow a party to get relief before a decision has been made on the merits. It puts the judge in a position of prejudging the merits of the case before all the argument is submitted. It is, of course, not a final decision on the merits, but it often guides the litigation. So it is to be used sparingly.

Because the issuance of an injunction is contrary to delaying a decision until there is a fair opportunity to hear all the merits of the case, our courts require extraordinary evidence to support such an order. The movant, here the AG, has the burden to establish five factors: (1) a substantial likelihood of eventually prevailing; (2) a reasonable probability exists that the State will suffer irreparable injury without an injunction; (3) the State lacks an adequate legal remedy, such as damages; (4) the threat of injury to the State outweighs whatever harm the injunction may cause to the KDOR or the Intervenors; and (5) the injunction will not be against public interest. *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 791-92, 549 P.3d 363 (2024). And *all* these factors are necessary to obtain a temporary injunction. The absence of any single factor ends the inquiry. See *Steffes v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843 (2007). And for the same reasons stated above, the courts give particular emphasis to the first two of these prerequisites.

> "The likelihood of success and irreparable injury requirements are designed to protect the defendant from erroneous grants of this potent remedy. Eliminating or watering down these two elements is prejudicial to defendants and leads to excessive resort to this remedy. In short, the extraordinary become ordinary. Adhering to the likelihood of

> success and irreparable injury requirements is, moreover, not only fair to defendants, but facilitates more reliable and sound judicial decision-making. Our legal system is better served by definitive conclusions reached after a full trial, or on summary judgment, than the tentative rulings associated with preliminary injunctions." DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 Gonz. L. Rev. 51, 97-98 (2011).

We give this background to put this appeal in context. We are not being asked to decide the merits of the mandamus action. In other words, we have not been asked to give an opinion as to which interpretation of the statute is the correct one. We have only been asked to decide whether the AG has met his burden of proof to establish the prerequisites for this potent remedy.

III. THE DISPUTE

Since at least 2007, when K.S.A. 8-243 was amended to reflect the requirement that a driver's gender appear on their driver's license, the KDOR has permitted changes to the gender classification assigned to individuals obtaining driver's licenses under specific policy guidelines. It is not an automatic process but requires substantial proof and doctors' statements to support the change. In 2023, the Kansas Legislature adopted K.S.A. 77-207, effective July 1, 2023. It directs Kansas agencies to define a person's sex as their biological sex—as further defined in the statute—for purposes of vital statistic record-keeping. K.S.A. 2024 Supp. 77-207(c).

After the law was enacted but before it became effective, a legislator sought an advisory opinion from the AG about the law's application to driver's licenses because the law does not specifically mention driver's licenses. Although we would only be speculating as to the reason for the opinion request, it does not seem merely coincidental that a document printed and distributed by Independent Women's Voice, a proponent of S.B. 180, after May 10, 2023, explicitly claimed that opponents of S.B. 180 were

misrepresenting that the legislation required transgender individuals to change the gender marker on their driver's licenses.

> "SB 180 **doesn't change current law** or **create new restrictions**. It simply requires accurate data collection. Data sets have to mean something if analysts are to draw reasonable conclusions about that data.
> "SB 180 does not require Kansans to change their driver's licenses to prevent Kansas from validating gender identity on their license. The state is free to decide how to set data integrity standards, including adding new classifications to mark gender identity."

This was apparently distributed to the legislators in direct response to the testimony, on March 6, 2023, of Ellen Bertels, an attorney with Kansas Legal Services, before the Kansas House Committee on Health and Human Services warned that passage of S.B. 180 would prevent gender marker changes on state-issued identity documents, which would encompass driver's licenses. Minutes of the House Committee on Health and Human Services, March 6, 2023, attach. 5; Minutes of the Senate Committee on Public Health and Welfare, February 15, 2023, attach. 15. The AG also conceded during oral argument that the impetus of S.B. 180 had nothing to do with driver's licenses but was to address the issue of biological men competing against women in sports.

And if that were not clear enough, the testimonies of Hadley Heath Manning and Riley Gaines of the Independent Women's Voice and Jennifer C. Braceras of the Independent Women's Law Center explained that S.B. 180 did *not* apply to the Motor Vehicle Drivers' License Act (which includes K.S.A. 8-240 and K.S.A. 8-243) because, as proponents of the bill, both women stated that the Women's Bill of Rights Act did not change existing law but fortified it. Minutes of the Senate Committee on Public Health and Welfare, February 15, 2023, attach. 2 and 3; Minutes of the House Committee on Health and Human Services, March 6, 2023, attach. 15 and 16.

We do not present this evidence to support any findings of legislative intent related to the statutory language used, but merely to put in context how this dispute arose. Despite the disclaimers to the legislators from the proponents, the AG issued an advisory opinion that K.S.A. 2024 Supp. 77-207 applies to driver's licenses, thus prohibiting the sex designation on the front of the driver's license to indicate anything other than the driver's biological sex as defined in the new statute. See Att'y Gen. Op. No. 2023-2. The KDOR quickly disagreed and publicly stated its intention of continuing to maintain its gender reclassification policy

IV. OUR STANDARD OF REVIEW

Since the district court granted the AG's request for a temporary injunction, this court applies the abuse of discretion standard of review when determining whether the district court was correct. *Downtown Bar and Grill v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). A court abuses its discretion when an action taken is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *In re Spradling*, 315 Kan. 552, 590, 509 P.3d 483 (2022). We review any legal conclusions made by the district court under a de novo standard of review. *Downtown Bar and Grill*, 294 Kan. at 191-92.

> "Although abuse of discretion describes a highly deferential standard, it can refer to questions of law warranting independent appellate review. Questions of law are presented when an appellate court seeks to review the factors and considerations forming a district court's discretionary decision." *Kuhn v. Sandoz Pharmaceuticals Corp.*, 270 Kan. 443, 456, 14 P.3d 1170 (2000).

And to the extent the district court relied on statutory interpretation, our review is unlimited. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022) (statutory interpretation presents a question of law over which appellate courts have unlimited review).

With that background, we begin with a review of the evidence used to support the AG's motion for injunctive relief, particularly the first two factors: (1) the probability of irreparable injury to the State if the injunction is not granted and (2) a substantial likelihood the State will eventually prevail on the merits of its mandamus action.

V. Prerequisites to Issuance of Injunctive Relief

A. *Irreparable injury*

We begin with an examination of whether the AG established the State would suffer irreparable harm if the injunction were denied. Courts have consistently noted that "'[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.'" *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). Likewise, because "'a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.'" 356 F.3d at 1261.

In determining whether a party shows it will suffer an irreparable future injury, the party must only demonstrate that a "reasonable probability" of injury exists. *Steffes*, 284 Kan. at 395. The "reasonable probability" standard is a much lower burden than the applicable burden of proof at a trial. *Idbeis v. Wichita Surgical Specialists*, 285 Kan. 485, 492, 173 P.3d 642 (2007). Requiring proof of certainty of irreparable harm is too high of a standard for parties seeking injunctions. *Board of Leavenworth County Comm'rs v. Whitson*, 281 Kan. 678, 684, 132 P.3d 920 (2006). Yet purely speculative harm will not suffice. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Because an injunction is an equitable remedy, it does not issue automatically and is not meant "'to

restrain an act the injurious consequences of which are merely trifling.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982).

The district court found the State showed a reasonable probability of suffering an irreparable future injury in two ways: (1) the KDOR's refusal to comply with a duly enacted statute creates an "inherent" irreparable injury because the State's mandamus relief was "designed to compel a public officer's performance of a specific legal duty [under] K.S.A. 60-801"; and (2) allowing the KDOR to continue issuing driver's licenses before a final decision on the merits would cause potentially noncompliant licenses to be in circulation and unable to be recalled for up to six years, thus hindering law enforcement's ability to "identify suspects, victims, wanted persons, missing persons, and others."

We will examine the law and the evidence related to each.

1. *Inherent irreparable harm*

The AG puts most of his eggs in this basket, even though it was not part of the stated harm in his petition.

> "The primary harm here is [the] KDOR's refusal to comply with a law duly enacted by the Legislature. The Kansas Constitution empowers the Legislature to make the laws, and it is the executive branch's duty to enforce those laws. Kan. Const. Art. II, § 1, Art. I, § 3. The harm that occurs against the State here then is [the] KDOR's refusal to comply with K.S.A. 2023 Supp. 77-207 and fulfill its duty to comply with duly enacted state law, which serves as the basis for the State's mandamus action."

In other words, the AG asks us to find, as a matter of law, that anytime an AG believes that a person or entity is violating a duly enacted law, we must find irreparable harm sufficient to support the issuance of an injunction. But the problem is that neither

the AG nor the district court cite any support for this approach, nor are we able to locate any. Failure to support a point with pertinent authority or failure to show why a point is sound despite a lack of supporting authority or in the face of contrary authority is like failing to brief the issue. *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018). Issues not adequately briefed are deemed waived or abandoned. *In re Marriage of Williams*, 307 Kan. 960, 977, 417 P.3d 1033 (2018).

All the cases that the AG relies on simply state that the purpose of a mandamus action is to compel an official to perform a specified duty. See *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 1024, 686 P.2d 171 (1984) (writ of mandamus "rests upon the averred and assumed fact that the respondent is not performing or has neglected or refused to perform an act or duty, the performance of which the petitioner is owed as a clear right"); *Stephens v. Van Arsdale*, 227 Kan. 676, 682, 608 P.2d 972 (1980) ("The remedy of mandamus is available only for the purpose of compelling the performance of a clearly defined duty resulting from the office, trust, or official station of the party to whom the other is directed, or from operation of law."); see also *Manhattan Buildings, Inc. v. Hurley*, 231 Kan. 20, 26, 643 P.2d 87 (1982) ("Mandamus is also a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business . . . .").

The district court reached the same conclusion relying only on the fact that the AG may seek relief through a mandamus action.

Both positions beg the question. See Garner's Dictionary of Legal Usage 105 (3d ed. 2011) (also referred to as the logical fallacy of *petitio principii*—the act of basing "'a conclusion on an assumption that is as much in need of proof or demonstration as the conclusion itself'"). It is to assume the truth of what one seeks to prove in the effort to prove it. Aldisert, Logic for Lawyers, p. 208 (3d ed. 1997).

Here is the State's argument. The AG can file a mandamus action to force an official to perform his duty. The State is irreparably harmed when an official fails to follow his duty. Conclusion: When the AG believes the official has failed to follow his duty, the State suffers irreparable harm.

The AG's entire argument rests on a presumption that the KDOR has violated the law. But, as the State concedes, a decision on a temporary injunction is not a final determination of the merits. See *Idbeis*, 285 Kan. at 492 ("'A temporary injunction merely preserves the status quo *until a final determination of a controversy can be made*.'"). Even if the State has established a likelihood of success, it has not obtained a final determination that the KDOR is violating state law. Under the AG's reasoning, a party would be entitled to a temporary injunction as soon as that party established a substantial likelihood of prevailing in a suit because the other party's conduct would be, by definition, unlawful. This would make the irreparable injury requirement for a temporary injunction superfluous because it would merge with the first factor—substantial likelihood of prevailing on the merits. Consequently, the legality of an adverse party's conduct cannot be what is meant by irreparable harm within the meaning of a temporary injunction. Irreparable harm must mean some tangible consequence of an adverse party's continued behavior, other than the alleged violation of the law. *New Mexico Dept. of Game & Fish v. United States Dept. of the Interior*, 854 F.3d 1236, 1250 (10th Cir. 2017) ("Although irreparable harm 'does not readily lend itself to definition,' 'a plaintiff must demonstrate a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages.'").

The United States Supreme Court has made clear that a preliminary or temporary injunction is an extraordinary equitable remedy that is never awarded as of right. See *Starbucks Corp. v. McKinney*, 602 U.S. 339, 345, 144 S. Ct. 1570, 219 L. Ed. 2d 99 (2024). Likewise, no particular prerequisite to an injunction should be deemed

established as a matter of right. As stated, our system favors a decision on the merits, without prejudgment.

Instead, here we have two competing legal interpretations of a statute by two agencies within the executive branch. The AG in this case relies in part on the statutory interpretation he asserts in his own formally issued opinion. But our Supreme Court has long held that while an opinion of an attorney general regarding the proper interpretation of a statute may be persuasive, it is neither conclusive nor binding. *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, 812-13, 132 P.3d 1279 (2006). There have been situations in the past where this court and the Kansas Supreme Court disagreed with an attorney general opinion. See 281 Kan. at 812-13; *Southwest Anesthesia Serv., P.A. v. Southwest Med. Ctr.*, 23 Kan. App. 2d 950, 952, 937 P.2d 1257 (1997); *Gorup v. Kansas Public Employees Retirement System*, 3 Kan. App. 2d 676, 678-79, 600 P.2d 1161 (1979). Of course, there are also times of agreement. See *In re Tax Application of Lietz Constr. Co.*, 273 Kan. 890, 902, 47 P.3d 1275 (2002). These examples are provided to establish that we cannot assume simply because the attorney general interprets a statute in a particular way or issues a formal opinion on any number of topics that the courts will agree. Attorney general opinions are not unassailable.

The KDOR, on the other hand, argues they are not violating the statute at all. They are collecting all the information that the statute requires, and the AG is wrong in his interpretation of the statute by equating the definition of the term "sex" in K.S.A. 2024 Supp. 77-207 with the use of the term "gender" in K.S.A. 8-240 and K.S.A. 8-243. But just as we give no deference to the AG's interpretation of a statute, we give no deference to the KDOR's interpretation. See *In re Tax Appeal of Lemons*, 289 Kan. 761, 762, 217 P.3d 41 (2009) ("No significant deference is due to an agency's interpretation or construction of a statute."). Not to belabor this point, but unless the State proves that it will be irreparably harmed otherwise, the justice system favors sorting out the various arguments after a full hearing. Anything else is a carefully crafted exception.

The district court committed a legal error by concluding, without any support, that the mere fact that the AG is alleging a violation of a duly enacted state law he has established irreparable harm to support the issuance of an injunction.

2. *Circulation of noncompliant licenses and its potential effect on the identification of suspects, victims, wanted persons, missing persons, and others*

The harm alleged in the AG's memorandum in support of a temporary injunction was (1) inaccurate information on a driver's license could affect where a law enforcement officer can accurately identify a person; (2) "a mismatch between the sex on a warrant and identification could allow a wanted person to escape"; (3) housing a biological female alongside male inmates poses a risk to the female; (4) the biological sex of a donor has a documented effect on the success of a transplant operation; and (5) allowing the practice of using an identifier other than biological sex as defined in K.S.A. 2024 Supp. 77-207 on the front of the license would mean noncompliant licenses could not be clawed back for six years, resulting in continuing the harm already noted.

In contrast to the focus of the AG's position, the district court put most of its eggs in this basket. The court particularly relied on the inability to claw back what may become noncompliant licenses because a driver's license is used to identify suspects, victims, wanted persons, missing persons, and others. Although not said directly, presumably the court agreed with the argument that licenses with a designation other than one required by K.S.A. 2024 Supp. 77-207 would hinder law enforcement in identifying the listed individuals.

> "[A]nd more to the point of the instant case, the Attorney General asserts that a reasonable probability of irreparable injury will occur if [the] KDOR is allowed to issue or change driver's licenses that do not display the holder's biological sex at birth pending a final decision on the merits. This is so because most driver's licenses are valid for six years. Once issued, they are out in circulation and would be difficult to retrieve for

> correction until they expire and must be renewed. And in the two months leading up to the filing of instant action, the number of applications to change the sex designation on a driver's license spiked sharply from just a few per month historically to 71 in May 2023 and 66 in June 2023.
>
> "The Attorney General points to a reasonable probability of irreparable injury to law enforcement because driver's licenses are routinely used to identify suspects, victims, wanted persons, missing persons, and others."

The problem with the district court's finding is that the AG presented *no* evidence to support this claimed injury beyond unsubstantiated speculation.

First, to support the court's conclusion that the AG had met his burden to establish "a reasonable probability of irreparable injury" the judge found that appellate cases are "replete with such references" that driver's licenses are used to identify suspects and victims. But none of the cases the court chose to support its conclusions involved people misidentified due to the sex listed on their driver's license. Few would quibble with the fact that driver's licenses are routinely used for identification—so are passports and birth certificates. That is not the issue. The issue is whether mandatory inclusion of an individual's sex assigned at birth on a driver's license is essential to identification efforts. If so, the AG argues, irreparable harm will ensue if it is allowed to continue until a decision is made on the merits of the differing legal interpretations.

Contrary to the AG's position, the status quo has been to allow the person's gender classification on their driver's license to differ from their biological sex assigned at birth. The KDOR has been allowing this process since 2007, through 5 governors and at least 16 different legislative sessions. If the KDOR is violating the law now, it was violating it then. Yet the AG took no action to stop this alleged irreparable harm for 16 years. 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.

From 2011 to 2022, the KDOR issued 9,316,937 driver's licenses. During that same time frame, roughly 380 drivers had their sex designation on the front of their licenses changed. This means approximately .004% of driver's licenses issued were changed, assuming an original issue date in that same time period. This would be approximately 34.5 per year. 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 fact, in at least the preceding 16 years, no law enforcement officer complained to the KDOR about any problems that have resulted from the changing of the sex designation.

To support the court's conclusion of irreparable harm, the judge referenced the testimony of Sheriff Brian Hill. Sheriff Hill testified that one time—there was no indication of when—he arrested a transgender woman who told him that she was a man. Sheriff Hill relied on that information to run a records check, which failed to reveal the person's criminal history because she was in the system as a woman, not a man. The problem with the example is there was no evidence that Sheriff Hill relied on a driver's license, only the person's outward appearance.

First, we note that this same mistake could be made of a biological female who appears less feminine and more masculine than the average woman. And, second, this did not prevent the person's arrest or the immediate discovery of the correct record as a woman. Third, the jail was able to easily determine the defendant's appropriate jail placement. There was no harm from the example—real or speculative. In fact, when Sheriff Hill was asked by the AG whether he had *any* evidence of *any* specific incident in the last 32 years while an officer or sheriff, wherein an officer had an issue with

identification related to a transgender person, his answer was an unequivocal, "No." Sheriff Hill also advised that he realized that people change their names on driver's licenses so they cannot predominantly rely on the name listed either.

Other testimony that the district judge noted to support a finding of irreparable harm was that of the Detention Bureau Commander of the Johnson County Sheriff's Office, Richard Newson. But he testified that his office uses the arrest report, not the driver's license, to identify a person booked into the jail. In other words, according to Commander Newson, the driver's license was not the "major" document they used and, actually, was one "'lower in the level of importance.'" He testified that when dealing with transgender or intersex arrestees, the housing decision is made on a case-by-case basis, and they have developed special procedures in these situations based on a person's "function[al]" genitalia, not "biological sex." He stated that no one had ever escaped from custody based on their transgender sex status. This testimony was apparently elicited in response to the AG's claim in his request for an injunction that "[t]he harmful consequences are most obvious in the context of arrest warrants: a mismatch between the sex on a warrant and identification could allow a wanted person to escape." And finally, when Commander Newson's office was approached by the AG's office to give examples of problems dealing with transgender arrestees, his office informed the AG that they had "spoken to each and every officer in [the] division. At this time there are *zero* examples of the gender affecting any call for service." (Emphasis added.)

Similar testimony was provided by Lieutenant James Burger, with the Johnson County Sheriff's Office. He testified that in his 23 years of employment he had not been made aware of any officer that had a problem with a transgender person and their driver's license.

Finally, Paul Gorges, the Transportation Coordinator for the Kansas Department of Corrections, submitted an affidavit that "KDOC transportation team does not view, use

or require a driver's license to verify identity or gender of the new admits, parole violators, or interfacility transports. KDOC relies on the name, date of birth, and social security number."

This testimony was offered *by the AG* to address the AG's allegation that housing a biological female alongside male inmates posed an "outrageous risk that she will be harassed, assaulted, raped, or even murdered." *De Veloz v. Miami-Dade County*, 756 Fed. Appx. 869, 877 (11th Cir. 2018) (unpublished opinion). But relying on the *De Veloz* case illustrates the danger of cherry-picking a case because of one sentence in the opinion that may support a party's cause. *De Veloz* does not even come close to supporting the AG's allegation of irreparable harm based on an inaccurate housing decision. De Veloz sued prison medical personnel. Jail personnel on duty conducted a strip search and declared De Veloz female. Subsequently, prison medical personnel without physically examining De Veloz and "in the face of considerable information that she was a woman" decided that since she was receiving hormone replacement therapy, she was a man, and they housed her with men. 756 Fed. Appx. at 870-71. But De Veloz was a biological female her entire life, the arrest warrant which caused her to be booked into the jail listed her as a female, and she never claimed otherwise. She was receiving hormone replacement therapy prescribed by her doctor to address symptoms of menopause. She was not transgender. She only had female genitalia and she looked female, so the court concluded that she had clearly established harm and causation in the civil litigation. 756 Fed. Appx. at 880-81.

Perhaps because of the dearth of even anecdotal evidence of harm related to housing jail inmates, the district court did not specifically address harm related to misidentification at the jail, even though the AG listed it as one of the harms that would befall the State if the injunction were not issued. And the AG does not discuss it as a separate harm in his brief, so we deem the allegation of harm in jail classification as unsupported and abandoned.

And finally, the district judge noted the testimony of Captain Jim Oehm of the Kansas Highway Patrol. Captain Oehm has been a law enforcement officer for over 28 years. He testified that when making a traffic stop, he either calls in the driver's license number for identification or swipes the driver's license through a machine in his car. He uses a multifaceted approach depending on the situation, but he never relies on just one piece of information, meaning the sex designation on the front of the license would never be the sole factor relied on to identify a driver. And this makes sense.

Kent Selk, Driver Services Manager for the KDOR, testified that the KDOR has a process for allowing name changes and address changes on a driver's license. Drivers are regularly allowed to update the information on their driver's license. For example, addresses can be changed online, so the plastic copy of the license may show a different address than the one in the database. Kansas Dept. of Revenue, Kansas Real ID, https://perma.cc/ZR3Y-GMW5. The law permits such amendments because having up-to-date information on a driver's license, rather than being harmful, is useful for present-day identification. And it is common knowledge that changes are also made related to other physical characteristics. A driver's hair color may change, they may wear contact lenses that are of a different color than the color listed on their driver's license, they may gain or lose weight, or grow a beard or shave. And there is no requirement that the picture on your license "look like" a person of the same sex that is designated on your license. Finally, just as the district judge noted that driver's licenses "are routinely used to identify suspects, victims, wanted persons, missing persons, and others," so too is race. See, e.g., *State v. DeLeon*, No. 125,533, 2023 WL 6531080, at *4 (Kan. App. 2023) (unpublished opinion) (describing victim as "deceased white male"); *State v. Jones*, No. 124,699, 2023 WL 2723295, at *1 (Kan. App. 2023) (unpublished opinion) (describing defendant as "white male with dark hair"). And race is not captured on the front of the driver's license at all, except to the extent the color of one's skin may be evident from their photo.

Simply put, on any given day, the driver's license only reflects the information and the photograph provided at the time the license was issued and by the state from which it was issued. And displaying or possessing a fraudulently obtained or altered driver's license is a separate criminal offense. K.S.A. 8-260. The evidence in the record simply does not support the conclusion that gender markers on driver's licenses inhibit law enforcement's ability to identify an individual or to arrest people who violate the law.

Finally, Selk testified that in his 10 years with the KDOR, no law enforcement, customer, the public, or the Secretary of State's office had raised any issues related to the gender reclassification policy and practice. At least 45 states allow gender reclassification of the sex listed on their licenses, so an officer stopping an out-of-state driver would have no way of knowing what the person's "sex" was as defined by K.S.A. 2024 Supp. 77-207 and no reason to question it. So drivers with out-of-state licenses may have a sex listed on the front of their license different from that assigned at birth. The AG does not allege any harm by continuing to allow out-of-state drivers to drive in Kansas. Nor does he make any attempt to argue that Kansas law enforcement faces unique harm from Kansas' drivers. Any harm alleged by the State regarding misidentification would not be alleviated by injunctive relief as long as other states allow gender reclassification.

The district court committed an error of fact by concluding that there was evidence—*any* evidence beyond mere speculation—to support a finding that law enforcement would be immediately hindered in the identification of suspects, victims, wanted persons, missing persons, detainees, and others if the driver's license did not display the driver's sex assigned at birth.

Because the AG fails to first show any irreparable harm in determining whether a preliminary injunction should be issued, there is no need for the court to weigh the harm to the AG with any harm to the KDOR or the Intervenors.

In sum, because the district court committed an error of fact which led to an error of law in determining irreparable harm would result if a temporary injunction was not issued, the court abused its discretion.

B. *Substantial likelihood of eventually prevailing on the merits*

The AG contends that it possesses a substantial likelihood of prevailing on the merits because K.S.A. 2024 Supp. 77-207 applies to driver's licenses, as a matter of statutory interpretation. Before launching into whether he is correct, some background is in order.

To prevail, the AG has the burden of establishing that he has a "substantial likelihood of eventually prevailing" on the merits of his claim. *Schwab*, 318 Kan. at 791. Our Supreme Court has not elaborated on the meaning of this phrase, nor has it defined it in terms of a percentage of certainty.

But to "prevail" means to *win* a lawsuit. Black's Law Dictionary 1439 (12th ed. 2024). Because a preponderance of the evidence (51%) is the lowest burden of proof a successful civil litigant must establish to win a lawsuit, it would make sense that the court would have to find that there is at least a 51% chance that the movant will win the lawsuit to justify the issuance of an injunction. Our Supreme Court has described the preponderance of the evidence standard as a finding that "'a fact is more probably true than not true.'" *Gannon v. State*, 298 Kan. 1107, 1124, 319 P.3d 1196 (2014). "Substantial" means "considerable in quantity" or "significantly great." Merriam-Websters Collegiate Dictionary 1245 (11th ed. 2020). These definitions point to some amount of certainty that is more than an equally balanced scale.

We do recognize that not all courts have accepted this approach. In fact, courts describe this burden in a wide variety of ways. See *Winter v. Natural Resources Defense*

Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (likely to succeed on the merits); *Cigna Corporation v. Brick*er, 103 F.4th 1336, 1343 (8th Cir. 2024) ("A movant shows a likelihood of success on the merits when it demonstrates *a* '*fair chance*,' *not necessarily* '*greater than fifty percent*,' that it will ultimately prevail under applicable law." [Emphasis added.]); *K.C. v. Individual Members of Medical Licensing Board of Indiana*, 121 F.4th 604, 614 (7th Cir. 2024) (The movant must demonstrate "'how [it] proposes to prove the key elements of its case,' and evaluate its *chance of success based on this proffer*. [Citation omitted.]" [Emphasis added.]); *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 112 (10th Cir. 2024) (the movant's right to relief must be *clear and unequivocal*); *Di Biase v. SPX Corporation*, 872 F.3d 224, 235 (4th Cir. 2017) ("[S]uccess on the merits is '*likely*' rather than merely 'possible.'" [Emphasis added.]); *Issa v. School District of Lancaster*, 847 F.3d 121, 131 (3d Cir. 2017) ("[T]he movant need only prove a 'prima facie case,' not a 'certainty' she'll win."); *Dopp v. Franklin National Bank*, 461 F.2d 873, 878 (2d Cir. 1972) ("a clear showing of probable success"); *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970) (Plaintiff must establish a *reasonable certainty* that he will prevail on the merits at a final hearing.), *aff'd sub nom.* 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). But based on our Supreme Court's accepted standard, "substantial likelihood of eventually prevailing," the AG has the burden to establish that he is more likely than not to prevail.

And we would also note that just because a movant does not meet this burden, it does not mean that they will not be successful, or it is more probable that the respondent will prevail. It 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.

The legal requirement that the movant has a substantial likelihood of eventually prevailing on the merits before obtaining a preliminary injunction is designed to balance the need to prevent harm before a full trial can be conducted with the recognition that the outcome of the case remains uncertain. This standard ensures that temporary relief is

granted only when there is a significant chance of success, thereby protecting the interests of both parties until a final decision can be made.

1. *Unlimited standard of review*

The AG argues that the KDOR is violating a duly enacted state law. Whether there is a substantial likelihood that the AG will eventually prevail depends on how we interpret K.S.A. 8-243 in conjunction with K.S.A. 2024 Supp. 77-207. Statutory construction is a question of law subject to unlimited appellate review. *In re Wrongful Conviction of Spangler*, 318 Kan. 697, 701, 547 P.3d 516 (2024). Put another way, an appellate court owes no deference to the construction a district court or the parties give a statute. *League of Women Voters of Kansas v. Schwab*, 317 Kan. 805, 814, 539 P.3d 1022 (2023). We examine it with fresh eyes.

2. *Words matter*

When courts examine statutes to divine their meaning, we are first instructed to interpret the statute to give deference to the intent of the Legislature. But as the AG noted at oral argument, the legislative process is ugly and messy. In his brief he cites the United States Supreme Court opining on how to discern why legislators took a particular action.

> "Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual [legislators] often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product." *Virginia Uranium Inc. v. Warren*, 587 U.S. 761, 778, 139 S. Ct. 1894, 204 L. Ed. 2d 377 (2019).

See also Cicchini, *The New Absurdity Doctrine*, 125 Penn St. L. Rev. 353, 362 (2021) ("Legislative intent is, in many cases, an elusive concept, thus making any attempt to divine it a fool's errand.").

Because the process is at times chaotic, and there may be many reasons or no reasons why a bill passed with one word rather than another, determining legislative intent is typically ascertained through the statutory language enacted, giving common words their ordinary meanings. *Spangler*, 318 Kan. at 701. When a statute is plain and unambiguous, an appellate court does 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. *Schmidt v. Trademark, Inc.*, 315 Kan. 196, 200, 506 P.3d 267 (2022). We simply examine the words used.

But words matter and context matter. Parsing definitions of words that appear common can often seem silly to those unfamiliar with how legislation is made and interpreted.

> "Lawyers are trained to make arguments about what words mean. Because we are so trained, we can come up with a reasonable argument why *and* means *or*. But *and* does not mean *or*—at least this is so for all people who are not lawyers. Even for lawyers, *and* should never mean *or* in a carefully drafted document." Keller, *In Search of Precision*, 83 J.K.B.A. 10, 10 (November/December 2014).

For example, when trying to determine legislative intent, we consider other statutes around it, related to it, or adopted at the same time to try to reconcile them and understand the context under which the words were chosen. See *Roe v. Phillips County Hospital*, 317 Kan. 1, 5-6, 522 P.3d 277 (2023). We do this because we assume the Legislature acts with full knowledge about the subject matter, including prior and existing law and judicial decisions. *In re M.M.*, 312 Kan. 872, 875, 482 P.3d 583 (2021).

Using these rules and others have resulted in courts finding that in some contexts "shall" actually means "may," or "and" actually means "or." See *State v. Raschke*, 289 Kan. 911, 920-22, 219 P.3d 481 (2009) (recognizing "'shall'" can be either mandatory or directory depending on context); *McMechan v. Everly Roofing, Heating & Air*

Conditioning, Inc., 8 Kan. App. 2d 349, 351, 656 P.2d 797 (1983) (noting that the word "'and'" in a statute may be construed to mean "'or'" depending on the context); see also *State v. Ballard*, 320 Kan. 269, 284-85, 566 P.3d 1092 (2025) (discussing the common definition compared to the statutory definition of "'transient'"); *State v. Mendez*, 319 Kan. 718, Syl. ¶ 2, 559 P.3d 792 (2024) (when statute says taillights "shall display or reflect a red color" it means they must display only a red color, turning "a" into "only a" by looking in part at other statutes dealing with similar subjects).

In this case, we are asked to divine the definitions of the words "sex" and "gender," and "male" and "female"—four words that may at first blush seem as straightforward as "shall" or "may" or "and" or "or"—but may not be so clear when they are considered in context.

Because any statements contemporaneous or otherwise related to the passage of legislation can be unreliable, several methods have been devised to help determine legislative intent. So we will examine the statutes and apply those rules of statutory construction when the meaning is not otherwise clear.

3. *The collection of vital statistics*

Under K.S.A. 2024 Supp. 77-207, any agency that *collects* vital statistics for the purpose of gathering accurate crime and other data must identify any individual who is part of that collected data as either male or female at birth. So we first look at what meets the definition of vital statistics. If the KDOR does not collect vital statistics, then the statute would clearly not apply, making the competing definitions of sex and gender irrelevant for a decision in this case.

The Kansas Department of Health and Environment, Division of Public Health, Office of Vital Statistics (OVS) is charged with the receipt and preservation of vital

statistics for events that occur in Kansas. K.S.A. 2024 Supp. 65-2402. "Vital statistics" are statutorily defined as "data pertaining to birth, adoption, legitimation, death, stillbirth, marriage, divorce, annulment of marriage, induced termination of pregnancy, and data incidental thereto." K.S.A. 65-2401(a). The State of Kansas has no control over vital statistics collected by other states. And OVS has no responsibility for issuance of driver's licenses.

4. *The KDOR collects vital statistics.*

We have no problem finding that the KDOR is a state agency or department that *collects* vital statistics for the purpose of gathering accurate crime or other data.

Even though a driver's license itself has not been defined by the Legislature as a "vital statistic," the KDOR specifically *collects* birth certificates, death certificates, and marriage records to establish proper identification to place on a record that is used to gather crime data—particularly traffic crime. And this information regularly changes for drivers. Drivers may change their name—even if the newly chosen name does not appear on their birth certificate. Or they may need to change data on their driver's license to comply with an amended birth certificate. Up until the adoption of S.B. 180, and as the result of a federal consent decree, the OVS allowed people to amend their Kansas birth certificate to "reflect [a] sex, consistent with their gender identity, without the inclusion of information that would, directly or indirectly, disclose an individual's transgender status on the face of the birth certificate." *Foster v. Stanek*, 689 F. Supp. 3d 975, 979 (D. Kan. 2023).

And it is undisputed that whatever information the KDOR collects it retains. For example, even though a driver changes their driver's license online and the physical license does not reflect the change, the change is maintained in the KDOR's data set for easy access. The KDOR also identifies people as male or female based on their birth

certificate, and they maintain that information in addition to any requests to later change their designation and the required supporting documentation for driver's license purposes.

They also collect vital statistics provided to them from other states.

5. *Competing interpretations*

In deciding whether there is a substantial likelihood that the AG will eventually prevail on the merits, it is necessary to examine the competing statutory interpretations and whether one interpretation has a substantial likelihood of tipping the balance in favor of the AG to justify the issuance of a temporary injunction. If we were deciding the merits of the mandamus action, we would pick a side. We would determine which statutory interpretation rubric, if any, was correct. But as already stated, that is not our role here.

So we will examine the plausible approaches in interpreting the statutes to see if one reasonably rises above the rest to justify the extraordinary remedy of injunction.

Arguments claiming that the statute is not ambiguous

KDOR's position: The KDOR is not violating K.S.A 2024 Supp. 77-207, regardless of the definitions of sex or gender or male or female.

The AG claims in his petition that the KDOR is violating K.S.A. 2024 Supp. 77-207 by not placing a person's sex, as defined in K.S.A. 2024 Supp. 77-207(a), on the front of the driver's license. The provision at issue is subsection (c).

> "Any school district, or public school thereof, and any state agency, department or office or political subdivision that collects vital statistics for the purposes 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." K.S.A. 2024 Supp. 77-207(c).

The KDOR disagrees and argues that nothing in the plain language of K.S.A. 2024 Supp. 77-207(a) prevents the KDOR's data set from both identifying an individual as male or female at birth and identifying them differently on the physical driver's license. The testimony was undisputed that even for the .004% of driver's licenses where the "sex" category on the front of the licenses was appropriately changed, the KDOR still maintains records of the original designation. It is all part of the data set maintained by the KDOR and it is accessible to outside agencies such as law enforcement. This is the same with name and address changes. The KDOR even keeps a record of previous driver's license numbers.

To read the statute as the AG suggests is incorrectly reading the final sentence of K.S.A. 2024 Supp. 77-207(c) as "data shall *only* identify each individual who is part of the collected data set as either male or female at birth." And he goes further to opine that only the "sex" as defined in K.S.A. 2024 Supp. 77-207(a) is to be placed on the front of the physical driver's license. That is also not specifically required by the plain language of the statute. If we assume the statute is unambiguous, as both parties claim, an appellate court must refrain from reading something into the statute that is not readily found in its words. *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021).

> *AG's position: The KDOR is violating K.S.A. 2024 Supp. 77-207 because the words sex and gender are synonymous*.

The AG agrees the statute is unambiguous, but he claims it is because the terms "sex" and "gender" are synonymous. Accordingly, when the statute adopts a universal definition of "sex," the same definition applies to gender. So in effect, K.S.A. 2024 Supp. 77-207 requires the word "gender" in K.S.A. 8-243 is to be replaced with the word "sex" as defined in in K.S.A. 2024 Supp. 77-207.

The KDOR responds that the statute is unambiguous because K.S.A. 2024 Supp. 77-207 defines "sex" and not "gender." To say they are the same requires this court to read the term "sex" as "sex or gender." And again, we are not to read something into a statute that is not readily apparent from the words used. *State v. Gomez*, 320 Kan. 3, 13, 561 P.3d 908 (2025).

To evaluate the substantial likelihood that one of the parties will eventually prevail on the merits of this argument, we start with the presumption that when the Legislature revises an existing law, the Legislature intended to change the law as it existed before the amendment. *Stueckemann v. City of Basehor*, 301 Kan. 718, 745, 348 P.3d 526 (2015). And contrary to the AG's argument, the amendments to K.S.A. 8-240 related to the federally adopted REAL ID Act were substantive in nature. The amendments not only changed the word "sex" to "gender," it changed "name" to "full legal name" and "residence address" to "address of principal residence." The 2007 changes could result in different information being listed on a driver's license than would have been listed before the amendment. For example, Butch Smith could no longer have the name he usually uses on his driver's license but would have to list Robert James Smith. If Robert had several houses he could list, the new law would require him to list a particular house, the one that is his "principal" address. So this would suggest that the change from "sex" to "gender" was also a substantive amendment with "gender" having some distinct meaning the Legislature intended to capture beyond "sex."

If, when adopting provisions designed to implement the REAL ID Act, the Kansas Legislature had wanted to narrow the meaning of gender to limit the identification field to the applicant's biological sex assigned at birth, it could have statutorily defined "gender" that way, just as it did address and name. Or the Legislature could have included a definition of "gender" in K.S.A. 2024 Supp. 77-207. But it did not do so in either statute. Instead, K.S.A. 2024 Supp. 77-207 can reasonably be interpreted to be limited to "sex" to the exclusion of "gender." It is not the court's role to "rewrite legislation." *Dougan v.*

McGrew, 187 Kan. 410, 415, 357 P.2d 319 (1960). It is only by rewriting this statute that we arrive at the conclusion propounded by the AG, that they are identical. We must not read a statute to add something not readily found therein. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013). The district court similarly read a definition of "gender" into K.S.A. 2024 Supp. 77-207, something it could not do.

Because there are two interpretations of the statute, both leaning toward a finding that the KDOR is not violating the law, we 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.

Arguments showing the statute is ambiguous

Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *Chalmers v. Burrough*, 314 Kan. 1, 8, 494 P.3d 128 (2021).

K.S.A. 8-240 and K.S.A. 8-243 were amended in 2007 as follows:

> "[K.S.A. 2006 Supp. 8-240](c) Every application shall state the *full legal* name, date of birth, ~~sex~~ *gender* and ~~residence address~~ *address of principal residence* of the applicant, and briefly describe the applicant, and shall state whether the applicant has been licensed as a driver prior to such application, and, if so, when and by what state or country." L. 2007, ch. 160, § 4.

> "[K.S.A. 2006 Supp. 8-243](a) Upon payment of the required fee, the [KDOR] shall issue to every applicant qualifying under the provisions of this act the driver's license as applied for by the applicant. Such license shall bear the class or classes of

> motor vehicles which the licensee is entitled to drive, a distinguishing number assigned to the licensee, the *full legal* name, date of birth, ~~residence address,~~ *gender, address of principal residence* and a brief description of the licensee, a colored *digital* photograph of the licensee, a facsimile of the signature of the licensee ~~or a space upon which the licensee shall write such licensee's usual signature with pen and ink immediately upon receipt of the license~~ and the statement [related to being an organ donor]." L. 2007, ch. 160, § 5.

But since 2002, when the notation could be made on one's driver's license regarding the organ donor registry, see K.S.A. 8-247, the Legislature used the term "gender" as part of the information the KDOR needed to forward to the organ donor registry. L. 2002, ch. 60, § 2. So the term "gender" was used in the Motor Vehicle Drivers' License Act at the same time other provisions used the term "sex" and well before the amendment from "sex" to "gender" in 2007 in K.S.A. 8-240.

And, in 2023, the Legislature adopted K.S.A. 77-207:

> "(a) Notwithstanding any provision of state law to the contrary, with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations, the following shall apply:
>
> (1) An individual's 'sex' means such individual's biological sex, either male or female, at birth.
>
> (2) a 'female' is an individual whose biological reproductive system is developed to produce ova, and a 'male' is an individual whose biological reproductive system is developed to fertilize the ova of a female . . . .
>
> . . . .
>
> (7) an individual born with a medically verifiable diagnosis of 'disorder/differences in sex development' shall be provided legal protections and accommodations afforded under the Americans with disabilities act and applicable Kansas statutes." K.S.A. 2024 Supp. 77-207.

The AG argues that when the Legislature started using the term "gender" instead of "sex" in 2007 it was an amendment without a difference and was only done to comply with the REAL ID Act. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, Title II, § 202[b], 119 Stat. 311 (codified at 49 U.S.C. § 30301 Note [Improved Security for Drivers' Licenses and Personal Identification Cards, § 202]). He argues that gender and sex mean the same thing and, at least in 2007, the Legislature would not have realized there may be different definitions for the two words. And in 2023, he argued, the Legislature apparently just "didn't want to get into the weeds" and clearly did not consider every angle. So he contends, when K.S.A. 77-207 was adopted, there was no need to provide a separate definition for gender or include gender in the definition of "sex," because the Legislature believed—or wanted to believe—that they were the same thing.

No one seems to dispute that in common parlance, at least in 2007, the two terms were often, but not always, used interchangeably. No one disputes that the 2007 amendments and the replacement of the word "sex" with the word "gender" were meant to bring the state law in compliance with the REAL ID Act.

But neither of these concessions answers whether the Legislature recognized two distinct definitions when they chose to include the term "gender" in the 2007 amendments and then did not include it in the overarching definition of "sex" in 2023—a definition that is very specific. This is where the ambiguity lies. And this is why a court may be justified in resorting to our rules of statutory construction. As noted, there may be many reasons or no reasons why a bill passed with one word rather than another, and we simply cannot assume that the Legislature sloppily and hastily adopted legislation with a complete lack of awareness of the context, the other times they had used the same or similar words, and legal interpretations and agency practices that have developed. We must and do give our committed public servants in the Legislature more credit than that.

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.

> *When the Legislature revises an existing law, the court presumes that the Legislature intends to change the law as it existed before the amendment.*

When the Legislature revises an existing law, the court presumes that the Legislature intends to change the law as it existed before the amendment. *Stueckemann*, 301 Kan. at 745.

The district court held, and the State argues, that the change in terminology was simply a wholesale adoption of the terminology of the federally adopted REAL ID Act to ensure compliance with federal identification requirements. If this was so, then the court must look to the meaning ascribed to "gender" by Congress. The AG cannot accept that the change was based on the federal requirements of the REAL ID Act and then divorce himself from the specifics of the new terminology.

Although the Act required the use of the term "gender," Congress did not explicitly define "gender" but permitted each state to implement its own definition for the term. See 6 C.F.R. § 37.17(c) (2022). By doing so, Congress left the potential for "gender" to have a broader meaning than the scope of the terms "sex" or "biological sex" to accommodate states that did not define gender in purely binary terms. See, e.g., *Eknes-Tucker v. Governor of Alabama*, 114 F.4th 1241, 1265 (11th Cir. 2024) (Lagoa, J., concurring) (distinguishing "sex," an immutable characteristic, from "gender"); *Grimm v. Gloucester County School Board*, 972 F.3d 586, 594-95 (4th Cir. 2020) (discussing difference between sex assigned at birth and gender identity). Accordingly, as used in the REAL ID Act, "gender" is not equivalent to "sex" because it is not universally defined as one's biological sex assigned at birth.

While Congress left the term "gender" undefined, permitting each state to establish its own definition, the Kansas Legislature did not define it.

> *As early as 2002, our Supreme Court recognized differing definitions of the term sex.*

Courts generally presume that the Legislature acts with full knowledge about the statutory subject matter, including prior and existing law and judicial decisions interpreting the same. *In re M.M.*, 312 Kan. at 875.

Five years before the 2007 amendments to K.S.A. 8-240 were made to comply with the 2005 REAL ID Act, the Kansas Supreme Court first grappled with the issue of transgender Kansans in *In re Estate of Gardinier*, 273 Kan. 191, 42 P.3d 120 (2002). Gardinier married a post-operative male-to-female transexual, J'Noel. When Gardinier died intestate, his son moved to have the marriage declared void so he would inherit his father's estate. The issue was what was meant by K.S.A. 2001 Supp. 23-101, which said that a marriage contract, to be legal, had to be between two parties "'who are of opposite sex.'" 273 Kan. at 198. J'Noel had sex-reassignment surgery several years before the marriage and had her Wisconsin birth certificate changed to reflect her sex as female.

The court discussed cases around the country and the world that made distinctions between sex and gender. It discussed intersex conditions like chromosomal sex disorders, gonadal sex disorders, internal organ anomalies, external organ anomalies, hormonal disorders, gender identity disorder, and unintentioned amputation. It discussed whether sex was a matter of law or a matter of fact. See 273 Kan. at 208. It discussed the related Court of Appeals review of various situations which make sexual identification at birth difficult.

> "In chromosomal sex disorders, the chromosomal pattern does not fit into the XX and XY binary system. Among the chromosomal sex disorders described by Greenberg are

Klinefelter Syndrome, which affects approximately 1 in 500 to 1,000 babies identified at birth as males based on the appearance of external genitalia, in which multiple X chromosomes may become manifest in puberty with breast development. Turner Syndrome affects babies identified at birth as females, who in fact typically have only one X chromosome. As a result, a person with Turner Syndrome will have female appearing genitalia but may have unformed and nonfunctioning gonads. What the district court said about J'Noel, that '[t]here is no womb, cervix or ovaries,' also could be true for a person with Turner Syndrome who had been identified as a female at birth." 273 Kan. at 209.

The Supreme Court concluded in 2002:

"The words 'sex,' 'male,' and 'female' are words in common usage and understood by the general population. Black's Law Dictionary, 1375 (6th ed. 1999) defines 'sex' as '[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female.' Webster's New Twentieth Century Dictionary (2nd ed. 1970) states the initial definition of sex as 'either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively.' 'Male' is defined as 'designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female.*' 'Female' is defined as 'designating or of the sex that produces ova and bears offspring: opposed to *male.*'" 273 Kan. at 212-23.

The Supreme Court held that under the plain language of the statute J'Noel was not of the opposite sex as Gardinier because she did not produce ova or bear offspring under the Webster Dictionary definition at the time. But the court concluded:

"Finally, we recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male for purposes of marriage under K.S.A. 2001 Supp. 23-101. We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal.

> However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court." 273 Kan. at 215.

The statute remains the same today. See K.S.A. 23-2501. Yet after the decision in *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), this statute as well as K.S.A. 23-2508 was declared unconstitutional. *Marie v. Mosier*, 122 F. Supp. 3d 1085, 1112-13 (D. Kan. 2015).

> *After passage of the 2007 amendments, the KDOR began interpreting "gender" as different than biological sex and started allowing gender reclassifications on Kansas driver's licenses.*

In 2007, the KDOR adopted a procedure allowing drivers to change their gender classification on their driver's license. The policy was updated and refined several times over the years. This was consistent with the procedures developed by the overwhelming majority of other states. The KDOR looks to the American Association of Motor Vehicle Administrators (AAMVA) for guidance. The AAMVA has a Resource Guide on Gender Designation. By 2016, the Resource Guide listed 45 states and the District of Columbia as allowing gender reclassification on driver's licenses and identification cards. The remaining five were listed as "unknown." The majority of these policies were put in place after the adoption of the REAL ID Act in 2005. Although the word "sex" is required to be on the front of the driver's license, the sex designation can change based on gender reclassification. Selk testified that sex and gender are not considered to be the same thing.

Nothing suggests that this change in policy in 2007 was hidden from the AG or the Legislature. Yet the AG took no action at that time to file a mandamus action to force an interpretation consistent with the terms "sex" and "gender" being synonymous. Nor did the Legislature. Nor, as mentioned earlier in this opinion, was any 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 request for injunctive relief in 2023.

In 2019, the State became a signatory to a federal consent decree requiring the Office of Vital Statistics (OVS) to allow gender reclassifications on State-issued birth certificates.

On October 15, 2018, a federal lawsuit was filed against several state officials with the OVS. The plaintiffs challenged the state's birth certificate policy. They alleged that no statute or regulation prohibited the correction of the gender marker on a birth certificate in order to accurately reflect the sex of a transgender person. Plaintiffs claimed that the state's policy violated several provisions of the United States Constitution.

Subsequently, and acting on the parties' joint request, the United States District Court of Kansas adopted the parties' proposed consent decree. The parties (which included State officials) indicated that they "intend this Consent Judgment to benefit all Kansans, including transgender people born in Kansas, and to be binding on Defendants unless and until modified by the Court." In relevant part, it provides:

"1. Kansas statutes and regulations hereinafter referred to as 'Kansas's Birth Certificate Policy', which prohibit[ ] transgender people born in Kansas from obtaining birth certificates reflecting their true sex, consistent with their gender identity, violate[ ] the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

"2. Defendants, their officers, employees, and agents; all persons acting in active concert or participation with any Defendant, or under any Defendant's supervision, direction, or control; and all other persons within the scope of Federal Rule of Civil Procedure 65, are permanently enjoined from enforcing the Birth Certificate Policy, and shall provide certified copies of birth certificates to transgender individuals that accurately reflect their sex, consistent with their gender identity, without the inclusion of information that would, directly or indirectly, disclose an individual's transgender status on the face of the birth certificate;

"3. Defendants, their officers, employees, and agents; all persons acting in active concert or participation with any Defendant, or under any Defendant's supervision, direction, or control; and all other persons within the scope of Federal Rule of Civil Procedure

65, shall adopt and enforce a policy whereby a transgender person born in Kansas may obtain a certified copy of that person's birth certificate that reflects a change in sex designation, reflecting their true sex, consistent with their gender identity, by submitting a sworn statement requesting such change and accompanied by: (1) a passport that reflects the person's true sex; or (2) a driver's license that reflects the person's true sex; or (3) a certification issued by a healthcare professional or mental health professional with whom the person has a doctor-patient relationship stating that based on his or her professional opinion the true gender identity of the applicant and that it is expected that this will continue to be the gender with which the applicant will identify in the future[;]

"4. The Kansas Department of Health and Environment's Office of Vital Statistics shall issue certified copies of birth certificates that reflect the change in sex designation to plaintiffs Nyla Foster, Luc Bensimon, Jessica Hicklin, and C.K. that reflect their true sex, consistent with their gender identity, respectively.

"5. The obligations and this Consent Judgment apply to and are binding upon the Defendants and any successors charged with enforcing laws regarding birth certificates." *Foster*, 689 F. Supp. 3d at 979-80.

The consent decree was lifted in 2023, at the AG's request, because S.B. 180 changed the law in a way that could not have been foreseen when the consent decree was entered. But the federal court specifically declined to rule on the constitutionality of S.B. 180 at this time, leaving it instead to this court. 689 F. Supp. 3d at 985 ("[A] dispute about the meaning of Kansas law belongs in a Kansas state courthouse. And in parallel litigation pending right now in Kansas state court, Kansas state officials are litigating their disputes about S.B. 180's meaning.").

This history does not necessarily import any conclusive construction to the statute at issue in this case. But the 2019 federal consent decree against the State, along with the State's admissions therein, serve as an indication 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. Yet S.B. 180 did not include a definition for "gender" and remained silent on the relationship between "gender" and "sex."

In sum, by 2023, the Legislature was publicly and legally on notice of the requirements of the REAL ID Act, the Supreme Court's decision recognizing differing definitions of the term "sex," KDOR policy allowing gender reclassification on driver's licenses, and the federal consent decree requiring gender reclassification on Kansas birth certificates. Yet they chose not to include a different definition for "gender" as used in K.S.A. 8-240 and K.S.A 8-243 nor did they equate the terms "gender" and "sex" in their new overarching definitional section that became K.S.A. 77-207. This leads to a reasonable conclusion that the Legislature did not intend for the definition of "gender" to be the same as their new definition of "sex" or they would have made their intentions clear.

> *The same legislative session that saw the adoption of K.S.A. 77-207 adopted other uses of the term "gender" and competing definitions of the term "sex."*

As already stated, when trying to determine the legislative intent of a statute, we consider other statutes around it, related to it, or adopted at the same time to try to reconcile them and understand the context under which the words were chosen. See *Roe*, 317 Kan. at 5-6. So we look at what other statutes were passed in the 2023 legislative session. There were several that used the terms sex and gender in the same statute, and adopted varying definitions of biological sex, and male and female, implying different meanings.

Again, for context, let's revisit K.S.A. 2024 Supp. 77-207:

"(a) Notwithstanding any provision of state law to the contrary, with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations, the following shall apply:

(1) An individual's **'sex' means such individual's biological sex**, either male or female, at birth;

(2) a 'female' is an individual whose biological reproductive system **is developed** to produce ova, and a 'male' is an individual whose biological reproductive system **is developed** to fertilize the ova of a female." (Emphases added.)

Now, let's compare other uses of the term sex and gender in the same legislative session.

K.S.A. 2024 Supp. 75-42a01, effective July 1, 2023

The Kansas Public Investments and Contracts Protection Act was passed in the same legislative session as S.B. 180. It contains the recognition of gender in the following definitions:

"(4) 'Environmental, social and governance criteria' means any criterion that gives preferential treatment or discriminates based on whether a company meets or fails to meet one or more of the following criteria:

. . . .

(H) facilitating or assisting or not facilitating or assisting employees in obtaining abortions or **gender** reassignment services; and

. . . .

"(7)[(C)](iv) accessing abortion, **sex** or **gender** change or transgender surgery." (Emphases added.) K.S.A. 2024 Supp. 75-42a01(b).

Thus, using sex and gender in the same sentence connected by an "or" implies they are two different things.

K.S.A. 2024 Supp. 72-6286, effective July 1, 2023

This new statute dealing with overnight accommodations during school district sponsored travel contains a brand-new definition of biological sex departing from the definition in K.S.A. 2024 Supp. 77-207, adopted at the same time. It includes within its definition of "biological sex" a statement that biological sex is one thing and gender is another which is not included in the definition of sex.

> "(a) The board of education of each school district shall adopt a policy requiring that separate overnight accommodations be provided for students of each **biological sex** during school district sponsored travel that requires overnight stays by students.
>
> . . . .
>
> "(c) As used in this section:
>
> (1) 'Biological sex' means the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads and **nonambiguous internal and external genitalia** present at birth, without regard to an individual's psychological, chosen or subjective experience of **gender**." (Emphases added). K.S.A. 2024 Supp. 72-6286.

K.S.A. 2024 Supp. 60-5602, effective July 1, 2023

This new statute provides definitions for words used in the newly adopted Fairness in Women's Sports Act and contains the same definition of biological sex as that in K.S.A. 2024 Supp. 72-6286.

K.S.A. 19-1903, effective July 1, 2023

Also a new statute, dealing with separation of the sexes in jails, reverts to the same language as K.S.A. 2024 Supp. 77-207. It requires that the sheriff of the county or the

sheriff's deputy keep separate rooms for each sex, female and male. It proceeds to define the terms:

> "'[S]ex' means an individual's biological sex, either male or female, at birth. A 'female' is an individual whose biological reproductive system **is developed** to produce ova, and a 'male' is an individual whose biological reproductive system **is developed** to fertilize the ova of a female." (Emphases added.) K.S.A. 19-1903(b).

But see National PREA Resource Center, DOJ Interpretive Guidance, Frequently Asked questions, Standard 115.42 (March 24, 2016) https://www.prearesourcecenter.org/frequently-asked-questions?page=4 ("Any written policy or actual practice that assigns transgender or intersex inmates to gender-specific facilities, housing units, or programs based solely on their external genital anatomy violates the standard. . . . A policy must give 'serious consideration' to transgender or intersex inmates' own views with respect to safety. The assessment, therefore, must consider the transgender or intersex inmate's gender identity—that is, if the inmate self-identifies as either male or female. . . . [A] facility should not make determination about housing for a transgender or intersex inmate based primarily on the complaints of other inmates or staff when those complaints are based on gender identity.").

These statutes, adopted at the same time as K.S.A. 2024 Supp. 77-207, 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. 2024 Supp. 77-207.

Stated another way, if the Legislature intended the terms "sex" and "gender" to mean the same thing, why did it—during the very same legislative session—list them separately in K.S.A. 2024 Supp. 75-42a01? And if it meant "sex" to always only mean male and female as defined in K.S.A. 2024 Supp. 77-207, why did it adopt a separate

definition of "'[b]iological sex'" in K.S.A. 2024 Supp. 72-6286 and K.S.A. 2024 Supp. 60-5602 to apply to only those with the appropriate sex chromosomes and nonambiguous genitalia at birth? A reasonable conclusion is that it did so because it recognized a difference between the terms "gender" and "sex." And the specific exclusion of the term "gender" from the definition of "biological sex" means that the Legislature did *not want* them to be confused as synonymous.

The Kansas Legislature has recently adopted new and competing definitions of sex and gender.

Two legislative sessions have passed while this lawsuit has been pending. During that time, the Kansas Legislature was free to adopt language clarifying its intent regarding "sex" and "gender" in K.S.A. 2024 Supp. 77-207. But it has not done so. Instead, the Legislature has adopted new and competing definitions of sex and gender, defining sex and gender as two different things, adding to the confusion of whether "gender" in K.S.A. 8-240 and K.S.A. 8-243 should be described to mean the same as "sex" in K.S.A. 2024 Supp. 77-207. A statutory amendment may provide insight into the original enactment's legislative intent if that enactment was ambiguous. *Brennan v. Kansas Insurance Guaranty Ass'n*, 293 Kan. 446, 458, 264 P.3d 102 (2011).

S.B. 63, effective February 20, 2025

S.B. 63, effective February 20, 2025, contained many pertinent changes in the definitions to sex and gender. The statute, referred to as the Help Not Harm Act, does not amend any existing statutes; it establishes new, yet unnumbered, statutes containing the following definitions:

> "(2) 'Female' means an individual who is a member of the female sex.
>
> "(3) '**Gender**' means the psychological, behavioral, social and cultural aspects of being male or female.

"(4) 'Gender dysphoria' is the diagnosis of gender dysphoria in the fifth edition of the diagnostic and statistical manual of mental disorders.

. . . .

"(6) 'Male' means an individual who is a member of the male sex.

"(7) 'Perceived sex' is an individual's internal sense of such individual's sex.

"(8) 'Perceived gender' is an individual's internal sense of such individual's gender.

"(9) '**Sex**' means the biological indication of male and female in the context of **reproductive potential or capacity**, including sex chromosomes, naturally occurring sex hormones, gonads and **nonambiguous** internal and external genitalia present at birth, without regard to an individual's psychological, chosen or subjective experience of gender." (Emphases added.) L. 2025 , ch. 1, § 1.

And the same bill states:

"(a) A recipient of state funds shall not use such funds to provide or subsidize medication or surgery as provided in section 3, and amendments thereto, as a treatment for a child's perception of **gender** or **sex** that is inconsistent with such child's sex.

"(b) An individual or entity that receives state funds to pay for or subsidize the treatment of children for psychological conditions, including gender dysphoria, shall not prescribe, dispense or administer medication or perform surgery as provided in section 3, and amendments thereto, or provide a referral to another healthcare provider for such medication or surgery for a child whose **perceived gender** or **perceived sex** is inconsistent with such child's sex.

"(c) The Kansas program of medical assistance and its managed care organizations shall not reimburse or provide coverage for medication or surgery as provided in section 3, and amendments thereto, as a treatment for a child whose **perceived gender** or **perceived sex** is inconsistent with such child's sex.

"(d) Except to the extent required by the first amendment to the United States constitution, a state property, facility or building shall not be used to promote or advocate the use of social transitioning, medication or surgery as provided in section 3, and amendments thereto, as a treatment for a child whose **perceived gender** or **perceived sex** is inconsistent with such child's sex.

"(e) A state property, facility or building shall not be used to prescribe, dispense or administer medication or perform surgery as provided in section 3, and amendments thereto, as a treatment for a child whose **perceived gender** or **perceived sex** is inconsistent with such child's sex.

"(f) A state employee whose official duties include the care of children shall not, while engaged in those official duties, promote the use of social transitioning or provide or promote medication or surgery as provided in section 3, and amendments thereto, as a treatment for a child whose **perceived gender** or **perceived sex** is inconsistent with such child's sex." (Emphases added.) L. 2025, ch. 1, § 2.

And finally, the same bill recognizes that there may be people born with a medically verifiable disorder of sexual development.

"(c) The treatments prohibited by subsections (a) and (b) shall not apply to treatment provided for other purposes, including:

(1) Treatment for individuals born with a medically verifiable disorder of sex development, including:

(A) An individual born with external biological sex characteristics that are **irresolvably ambiguous**, including an individual born with 46 XX chromosomes with virilization, 46 XY chromosomes with under virilization or having both ovarian and testicular tissue; or

(B) an individual whom a physician has otherwise diagnosed with a disorder of sexual development that the physician has determined through genetic or biochemical testing **that such individual does not have normal sex chromosome structure, sex steroid hormone production or sex steroid hormone action for a male or female.**" (Emphases added.) L. 2025, ch. 1, § 3.

Just as in the statutory changes made in 2023, these new provisions seem to recognize that a person's internal and external genitalia present at birth could be ambiguous. "Biological sex" would only mean one assigned when the baby has nonambiguous genitalia. And if it did not before, it now makes it clear that the Legislature recognizes a difference between gender and sex. None of the bills adopted in

2025 equate gender as used in the driver's license provisions with the definition of "sex" in K.S.A. 2024 Supp. 77-207. Instead, this could reasonably be interpreted as further evidence that the definitions in K.S.A. 2024 Supp. 77-207 did not alter the KDOR's interpretation of gender in the Motor Vehicle Drivers' License Act.

But the Legislature has not enacted legislation consistent with the AG's argument that gender and sex mean the same thing. Instead it seems to be attempting to clarify the difference between those two terms, although we provide no opinion as to whether the new legislation accomplishes this imputed goal.

Again, there could be a reasonable argument made that these statutes, adopted after this litigation was filed, point to an understanding by the Legislature that the words gender and sex have different meanings. And no amendments were made to K.S.A. 8-240, K.S.A. 8-243, or K.S.A. 2024 Supp. 77-207 during the 2025 legislative session.

We find this 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 had no idea that there was a difference in the two definitions and thus unambiguously intended gender to be included in the new definition of "sex." Thus we cannot say that, at this stage, the AG has shown there is a substantial likelihood that he will eventually prevail on the merits of his interpretation. In holding otherwise, the district court abused its discretion by committing an error of law.

6. *The KDOR's argument in the district court that a writ of mandamus may not be invoked to control discretion*

Mandamus is not available to require performance of an act that involves the exercise of discretion by the public official. *Ambrosier*, 304 Kan. at 911.

> "The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus, are such acts only as are in their nature strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion." *Martin, Governor, v. Ingham*, 38 Kan. 641, 651, 17 P. 162 (1888).

That does not mean that some other civil action might not be available to decide the correctness of an official's interpretation of the law, but mandamus is not one of them.

Here the State is seeking an order requiring the KDOR to only issue driver's licenses to persons with a sex marker that meets the definition in K.S.A. 2024 Supp. 77-207. The KDOR is statutorily required to accept original applications for valid driver's licenses and approve such applications if "applicable requirements of the motor vehicle drivers' license act have been complied with . . . which license *shall* be issued as provided in this act." (Emphasis added.) K.S.A. 8-235b. The use of the term "shall" certainly connotes a mandatory or ministerial action, not a discretionary one.

But the Director of Vehicles is charged with the administration of the Division. K.S.A. 75-5110. The process of issuing a driver's license can require the review of many documents that may or may not be consistent.

There is a reasonable argument that this day-to-day application of judgment to each applicant's specific circumstances is a discretionary function. The examiner must consider and weigh contrasting identity documentation. Additionally, the driver's license examiner may have to factor in medical documentation of what constitutes sex development diagnosis or associated conditions provided by a treating physician. This is so even if the court accepts the AG's argument that "gender" in K.S.A. 8-240 and K.S.A. 8-243 means the same as "sex" in K.S.A. 2024 Supp. 77-207. Let's examine the KDOR's position further.

First, the KDOR must exercise discretion because of the unique definition of sex provided in K.S.A. 2024 Supp. 77-207(a)(2):

> "[A] 'female' is an individual whose biological reproductive system **is developed** to produce ova, and a 'male' is an individual whose biological reproductive system **is developed** to fertilize the ova of a female." (Emphases added.)

The use of present perfect tense, "is developed," versus future tense, "will develop," forces a discretionary decision from the KDOR. For example, if an applicant who would, under common usage, be known as "female" but does not have a reproductive system that *is developed* to produce ova, how will the KDOR report the applicant's sex? And what if an applicant who, under common usage, would be known as a male, but *has not developed* a reproductive system to fertilize the ova of a female? He would not be a male, and if he does not have a reproductive system that *has developed* to produce an ova, he would not be a female either. Would he simply not be entitled to a driver's license at all because he does not fit the statutory definition of male or female? The AG conceded in oral argument that this is a small subset of people and such decisions would be relegated to the KDOR's discretion. But the decision of which sex or which address or which of the other physical characteristics is on the face of a driver's license is either a discretionary decision or it is not.

The KDOR's discretion is further illustrated by the fact that K.S.A. 2024 Supp. 77-207(a)(7) seems to recognize that individuals "[may be] born with a medically verifiable diagnosis of 'disorder/differences in sex development'" although it does not appear to give any definitional significance to that concession. Is the KDOR to interpret this to mean that the Legislature recognizes that the reproduction system may not be developed at birth? Is it *only* if the reproductive system has fully developed, as the plain language of K.S.A. 2024 Supp. 77-207(a)(2) states, that it must classify a person as male or female? If

an applicant asks the examiner, "What should I put down?" is the answer a discretionary one for the examiner?

This decision is not as easy as it seems. Our Supreme Court listed a wide variety of options in *Gardinier*, 273 Kan. at 209. And, as already noted, even our Kansas statutes contain differing definitions of "sex." The KDOR will have to use its discretion to determine what sex should be listed on a driver's license in cases that are not clearcut.

Second, the KDOR exercises direction when reviewing a multitude of other documents, both state and federal, that may not define "sex" in the same way Kansas does. United States passports, documents accepted by the KDOR as proof of identity, lists sex as M, F, or X, which denotes unspecified or other gender identities. See K.S.A. 8-246 (replacement driver's licenses); K.S.A. 8-1326 (identification cards). In fact many Kansas statutes accept a United States passport as proof of identity. See K.S.A. 2024 Supp. 50-6,110 (metal dealers); K.S.A. 25-2908 and K.S.A. 25-2309 (voting); K.S.A. 2024 Supp. 53-5a07 (notary public); K.S.A. 2024 Supp. 73-1244 (veteran's benefits); K.S.A. 65-3428 (plastics dealers); K.S.A. 2024 Supp. 65-1958 (demonstration permits). And as already stated, at least 45 other states allow gender reclassification on their driver's licenses. And many states likewise allow gender reclassification on one's birth certificate. The AG indicated at oral argument that he had no idea how the KDOR would handle people seeking a Kansas license who had a valid out-of-state license from one of those states. And even recent legislation notes that biological sex may not be identifiable at birth. See S.B. 63, L. 2025, ch. 1, § 3. This all points to the necessary exercise of discretion by the KDOR, even if it interprets sex and gender to be synonymous.

If a mandamus action is not proper when the action of the official involves discretion and a reasonable interpretation of the KDOR's decisions related to the issuance of driver's licenses is that they are discretionary, then the State would not prevail on the merits. There is an equally compelling argument that the mere use of the word "shall" in

K.S.A. 8-235b makes the KDOR decision to issue a driver's license a ministerial one. We are not prepared to find that this argument tips the balance in favor of the KDOR or the AG.

CONCLUSION

Given that the State is required to meet all five prerequisites for a temporary injunction, and they have not met at least two, there is no need to examine the other three. Because we have found that the State will suffer no harm, there is no need to balance the harm the injunction will impose on the KDOR or the Intervenors. The State failed to meet its burden to establish the invocation of this extraordinary remedy. 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.

Today, we reverse the district court's issuance of the injunction. The KDOR is free to proceed as it has since at least 2007 until a determination is made on the merits of the AG's claim either in this litigation or subsequent litigation that may follow.

Likewise, because we find at least two prerequisites for an injunction have not been met, independent of any claim regarding the constitutionality of the statute and the theory of constitutional avoidance, there is no need for us to address the claims of the Intervenors. Those issues will be considered by the district court when a full hearing is provided on the merits of the claims.

And finally, because the district court has already stated its opinion on the merits of the Intervenors' constitutional claims, we remand the case for hearing before a new judge. See *In re Estate of Lentz*, 312 Kan. 490, 507, 476 P.3d 1151 (2020) (Luckert, C.J., Biles, J., and Stegall, J., concurring) (when courts opine on issues not properly before them, they tilt the playing field, and the appellate court should appoint a new judge to

consider the issue). And because any rulings regarding the admission of expert testimony related to the hearing on the merits will be at the discretion of the new judge, we need not address the failure to allow the expert testimony of Dr. Beth Oller at the injunction hearing.

Reversed and remanded with directions.

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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2023-CV-000422
PII COMPLIANT

Court:	Shawnee County District Court
Case Number:	SN-2023-CV-000422
Case Title:	State of Kansas vs. David Harper Director of Vehicles, et al
Type:	ORD: Order Originated by Judge MEMORANDUM DECISION AND ORDER

SO ORDERED,

/s/ Honorable Teresa L Watson, District Court Judge

Electronically signed on 2024-03-11 12:01:38 page 1 of 31

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

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

Petitioner

Case No. SN-2023-CV-422

vs.

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

MEMORANDUM DECISION AND ORDER ON MOTION FOR TEMPORARY INJUNCTION

The State of Kansas, *ex rel.* Kris Kobach, Attorney General, filed a petition for mandamus and injunctive relief relating to Senate Bill 180 ("SB 180"), enacted by the Kansas Legislature in 2023. SB 180 is also known as the Women's Bill of Rights. The Attorney General asked this Court to order officials of the Kansas Department of Revenue ("KDOR") to comply

with SB 180 when issuing driver's licenses and other documents with sex designations and in maintaining the corresponding information in the KDOR database.

Along with the petition, the Attorney General filed a motion for a temporary restraining order and temporary injunction. The Court, pursuant to K.S.A. 60-903, granted the Attorney General's request for a temporary restraining order. The parties later agreed to extend the temporary restraining order until the Court resolved the motion for temporary injunction. The Court allowed five transgender individuals to intervene in the lawsuit.

The parties engaged in discovery prior to the temporary injunction hearing. The Court ruled upon multiple discovery-related motions filed by all parties. These rulings will be discussed below as necessary to the temporary injunction analysis. After a two-day evidentiary hearing, this Court took the matter under advisement. Having carefully considered the voluminous briefing[1] supplied by all parties and the evidence presented at the hearing, the Court is ready to rule on the Attorney General's motion for temporary injunction.

FINDINGS OF FACT

The Kansas Legislature passed SB 180 with wide margins during the 2023 legislative session. It was enrolled and presented to Governor Laura Kelly. The Governor vetoed the bill. The House and Senate voted to override the Governor's veto in late April 2023. SB 180 became effective July 1, 2023. It is now known as K.S.A. 77-207.

K.S.A. 77-207 states:

> (a) Notwithstanding any provision of state law to the contrary, with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations, the following shall apply:

[1]All parties to this action have provided throughout the briefing of this matter links to internet news articles, surveys, websites, and other material that is outside the realm of the record in this case. For purposes of this motion, the Court will consider only facts agreed by the parties, testimony and exhibits admitted at the temporary injunction hearing, and matters judicially noticed by the Court.

(1) An individual's "sex" means such individual's biological sex, either male or female, at birth;

(2) a "female" is an individual whose biological reproductive system is developed to produce ova, and a "male" is an individual whose biological reproductive system is developed to fertilize the ova of a female;

(3) the terms "woman" and "girl" refer to human females, and the terms "man" and "boy" refer to human males;

(4) the term "mother" means a parent of the female sex, and the term "father" means a parent of the male sex;

(5) with respect to biological sex, the term "equal" does not mean "same" or "identical";

(6) with respect to biological sex, separate accommodations are not inherently unequal; and

(7) an individual born with a medically verifiable diagnosis of "disorder/differences in sex development" shall be provided legal protections and accommodations afforded under the Americans with disabilities act and applicable Kansas statutes.

(b) Laws and rules and regulations that distinguish between the sexes are subject to intermediate constitutional scrutiny. Intermediate constitutional scrutiny forbids unfair discrimination against similarly situated male and female individuals but allows the law to distinguish between the sexes where such distinctions are substantially related to important governmental objectives. Notwithstanding any provision of state law to the contrary, distinctions between the sexes with respect to athletics, prisons or other detention facilities, domestic violence shelters, rape crisis centers, locker rooms, restrooms and other areas where biology, safety or privacy are implicated that result in separate accommodations are substantially related to the important governmental objectives of protecting the health, safety and privacy of individuals in such circumstances.

(c) 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."

A few days before SB 180 was to take effect, the Attorney General issued a formal opinion that concluded, among other things, that SB 180 requires KDOR to "list the licensee's 'biological sex, either male or female, at birth' on driver's licenses that it issues" and "update its data set to reflect the licensee's sex at birth and include that sex on any licenses it issues to that individual in the future." Kan. Att'y Gen. Op. No. 2023-2 (June 26, 2023).

Prior to the adoption of SB 180, KDOR had a policy in place addressing sex designations on Kansas driver's licenses, including how to change the designation if desired. Within days after the Attorney General issued his opinion, the Governor directed KDOR to retain its existing policy allowing licensees to change the sex designation on Kansas driver's licenses. KDOR then announced on its webpage that SB 180 would not change KDOR's procedures for obtaining, renewing, or changing the sex designation on a Kansas driver's license.

The Attorney General filed a petition for mandamus and injunctive relief on July 7, 2023, along with a motion for a temporary restraining order and temporary injunction, seeking enforcement of SB 180 as it applied to driver's licenses. This Court granted a temporary restraining order against KDOR stating that:

1. Respondents and those under their direction shall immediately cease and desist from processing any requests by driver's licensees or driver's license applicants to change or display their sex in a manner that does not reflect their biological sex as defined by SB 180.

2. Respondents shall take all actions necessary to ensure that any newly issued or reissued driver's licenses reflect the licensee's biological sex as defined by SB 180.

This Court denied KDOR's subsequent motion to dissolve the temporary restraining order. The Attorney General and KDOR agreed to extend the temporary restraining order

pending a decision on the temporary injunction. Five transgender individuals sought to intervene in the lawsuit to raise constitutional concerns in the context of this Court's interpretation of the statute. They did not attempt to raise an independent, direct constitutional challenge to SB 180. This Court granted their motion to intervene, and they will be referred to collectively as "Intervenors."

This Court heard the testimony of several witnesses at the evidentiary hearing.

KENT SELK

Kent Selk is the Driver Services Manager for the Kansas Department of Revenue. He is responsible for the operation of driver's license offices statewide. He has held that position since 2018. He testified that there are several pieces of identifying information recorded on the front of a Kansas driver's license, one of which is "sex." The word "gender" does not appear on the Kansas driver's license.

In a May 10, 2011, memo to Kansas driver's license examiners, KDOR articulated its internal requirements for changing the sex designation on a Kansas driver's license. These requirements were in effect from 2011 to 2019. One option was that the applicant could submit to the examiner at a driver's license station a court order "announcing a gender reclassification" to change the sex on his or her license. The other option was that the applicant could submit a written request to KDOR along with: 1) a copy of the current Kansas license; 2) the new information desired; and 3) "a letter on official letterhead from the applicant's licensed medical, osteopathic physician stating that applicant has undergone the appropriate clinical treatment for change of sex or that the physician has re-evaluated the applicant and determined that gender reclassification based on physical criteria is appropriate." If KDOR approved the change, it

would send the applicant an approval letter that he or she could take to a driver's license station to get a new license.

The 2011 memo contained the following note: "the simple production of medical records will not suffice to justify gender reclassification. The Division requires an emphatic declaration or finding of gender classification by the applicant's attending physician – this declaration or finding need not be specifically directed to the Kansas Division of Vehicles." Further, the 2011 memo "grandfathered" any previous "gender classification change" to a license supported by a "letter from your physician or mental health care provider, court order, or other declaration" and nothing further was required to maintain the current "gender classification" on the Kansas license.

In 2019, KDOR adopted a slightly different version of these internal requirements in a document titled "Gender Reclassification Policy." It said that to change the "gender" on a Kansas license, an applicant must present one of the following: 1) a "lawful presence document showing correct gender" (Selk testified that this includes a valid United States passport); 2) a court order "announcing a gender reclassification"; or 3) a letter from KDOR authorizing the "gender change."

In order to obtain the letter from KDOR, the 2019 policy says the applicant must provide: 1) a copy of the current Kansas license or, if the applicant does not have one, a copy of a "lawful presence document"; 2) a statement from the applicant requesting the "change in gender" with name, address, phone number, and any new information to be added to or changed on the license; and 3) "A letter from the applicant's licensed medical, osteopathic physician stating the applicant has undergone the appropriate clinical treatment for change of gender or that the

physician has reevaluated the applicant and determined that gender reclassification based on physical criteria is appropriate."

Selk testified that KDOR would accept a letter from a physician at face value, reviewing it only to determine if there is some obvious indication that the letter was falsified or otherwise questionable. He said KDOR would not double check to see if the named physician exists unless there was something suspicious about the letter, and KDOR would not check to see if the physician is licensed. Selk testified that nothing in KDOR's policy prevented an applicant from changing the sex designation on a license back and forth multiple times, though to Selk's knowledge that had never happened.

Selk testified that there were more than 9.3 million Kansas driver's licenses issued between 2011 and the end of 2022. Between June 2011 and June 2023, KDOR approved 552 requests for a change in sex designation. In that same period, KDOR denied four requests for a change in sex designation because of missing paperwork. Selk was not certain exactly how many of the 552 requests were made in the first half of calendar year 2023 alone, but agreed that 172 would be "in the ballpark."

Selk said KDOR maintains a database of information for each license holder that includes the current information displayed on a Kansas license as well as historical information as it changes over time. He testified that while the word "sex" is used on the face of a Kansas license, the word "gender" is used to record the same information in the KDOR database. Agencies other than KDOR have access to some of the information in the database, but not to the database as a whole. For example, law enforcement officers can electronically access information that appears on the face of a license as well as the person's driving offense record.

Selk testified that KDOR is involved with the American Association of Motor Vehicle Administrators ("AAMVA"), and he holds its recommendations and best practices in high regard. AAMVA created a document entitled "AAMVA DL/ID Card Design Standard" dated 2020. Selk said one of the goals of the document is to help states standardize the design of driver's licenses across the country. The AAMVA standard is to display "sex" on the face of the license. Elsewhere in the document, when discussing information to be included in a database, the AAMVA standard uses the term "gender" to describe a data field for the sex designation on the face of the license.

Selk testified that while he does not work for the Office of Vital Statistics (part of the Kansas Department of Health and Environment), and he does not consider the KDOR database in general to be a "vital statistic," he does consider a person's sex designation to be a "vital statistic."

SHERIFF BRIAN HILL

Brian Hill is the Sheriff of Shawnee County, Kansas. Before he was Sheriff, he worked as a law enforcement officer for the Topeka Police Department from 1991-2018. He has made thousands of arrests and executed thousands of search warrants. His duties with both agencies involved work in the field on patrol, including stopping drivers on the road for various reasons.

Respondents and Intervenors filed a motion to strike Sheriff Hill as an expert witness because he was not designated as an expert witness in the Attorney General's initial disclosures. Respondents and Intervenors were subsequently assured by the Attorney General's office that Sheriff Hill would be utilized as a fact witness, but not an expert witness. Sheriff Hill was later listed as an expert witness. This Court granted the motion to strike Sheriff Hill as an expert witness, but allowed him to testify as a fact witness regarding his experience as a law

enforcement officer in the role of determining sex in identifying a person stopped or suspected of a crime.

Sheriff Hill said one of the first things to do when stopping someone is to identify the person, usually by asking for a driver's license. During a traffic stop he might also ask for the vehicle registration and proof of insurance. Sheriff Hill said an officer could run the driver's license through an electronic database on an in-car computer, but since he does not have an in-car computer he calls dispatch to do it for him. This allows an officer to confirm validity of the license and to check for "wants and warrants," whether someone has an outstanding arrest warrant or is wanted on suspicion of committing a crime. Sheriff Hill said he would give dispatch the name, date of birth, race, and sex to attempt to identify a person.

Sheriff Hill said he once arrested a transgender person who was trying to stab his landlord. The person told Sheriff Hill he was a man, but jail staff later indicated the person was a woman. The person showed no criminal history when run through a records check as a man, but the person's true criminal history appeared when run through a records check as a woman. Sheriff Hill also said there was a person in the community who had been arrested in the past who would dress like a woman, identify as a woman, but then dress like a man at other times. There was no problem in apprehending the person in this situation, he said, because the person was known to local law enforcement.

RICHARD NEWSON

Richard Newson is the Detention Bureau Commander at the Johnson County, Kansas, Sheriff's Office. He has been in that position for two and a half years, with 10 to 15 years' total service in the detention division. Before that he was a deputy on patrol. In his current position he oversees two jail buildings, one is central booking, and the other is a housing unit. Respondents

and Intervenors filed a motion to strike Newson for the reasons set forth above in regard to Sheriff Hill. This Court granted the motion to strike for the same reasons, but allowed Newson's testimony as a fact witness.

Newson testified that all arrestees are processed through central booking. Arrestees in custody for more than 72 hours are moved to the housing unit. Central booking identifies arrestees by using information in the arrest report. This includes name, address, date of birth, and sex, among others. Newson said the information in the arrest report comes from the arrestee's driver's license. The detention division segregates inmates by sex in central booking and in the housing unit. They do this for the safety of the arrestee to prevent assault by other arrestees. They do this for the safety of the officers as well. Arrestees are strip searched before being placed in the housing unit, and the strip searches are to be done by an officer of the same sex as the arrestee.

Newson testified that Johnson County follows federal law and has its own policies regarding how to identify an arrestee's sex or gender for purposes of booking and detention, including policies for transgender people. He did not testify regarding the content of those policies.

CAPTAIN JAMES OEHM

Captain James Oehm has worked in law enforcement for 28 years and for the Kansas Highway Patrol since 2011. He is currently the troop commander of Troop M, responsible for communications, the Kansas Criminal Justice Information System, and records including accident and arrest reports.

The Attorney General filed a motion to strike Captain Oehm as an expert witness because, after his deposition, the Respondents drafted a declaration setting forth additional opinions not included in the expert designation. Respondent shared the draft declaration with

Intervenors and Intervenors cited it in their briefing. Respondent did not share the declaration with the Attorney General until approximately one month after the deposition. The Court granted the Attorney General's motion to strike Captain Oehm and his declaration because the opinions in the declaration went beyond the scope of the Respondent's expert designation, and Respondent waited until after Captain Oehm's deposition to draft the declaration, then shared it with Intervenors but not the Attorney General. The Court allowed Captain Oehm to testify as a fact witness regarding his experience as a law enforcement officer utilizing a driver's license during a car stop.

Captain Oehm said there is a federal database called "Triple I" that is a clearinghouse for criminal histories nationwide. Individual officers generally do not have access to the "Triple I" but can request information through a dispatcher so that a record can be made of the purpose for the request. Captain Oehm said for state database queries, he would usually give the dispatcher the "K number," or Kansas driver's license number, or if no license, the name and date of birth. Captain Oehm said he if ran a driver's license in his vehicle, he would just swipe it and all the data fields would automatically populate for a query to be sent to KDOR.

DR. BETH OLLER

Dr. Beth Oller has worked as a Kansas-licensed family practice physician for 15 years. She has been a staff physician at Rooks County Health Center since 2011, also teaching medical students who are assigned to her office for a rural health rotation. She testified that Rooks County has a population of less than 5,000 people. Dr. Oller testified that she has approximately 1,000 active patients. Dr. Oller said that during her career she has treated approximately 100 transgender patients. She said she has approximately 25 active patients who are transgender. She

said she considers transgender to mean "someone whose deeply felt inherent sense of their gender does not match or is incongruent with their sex assigned at birth."

Dr. Oller said she learned about providing psychiatric care as part of her standard residency training while in medical school. She said it is important to be able to provide some level of psychiatric care to her rural patients because there are no psychiatrists in her county or nearby. She said she diagnoses mental health conditions in her practice, including gender dysphoria. She said she has read articles on gender dysphoria and is a member of organizations that focus on education and research on the topic. She advocates for state and federal policies involving health care. She testified against SB 180 before the Kansas Legislature.

The Attorney General filed a motion to strike Dr. Oller as an expert witness according to deadlines fixed well in advance of the temporary injunction hearing. The matter was fully briefed by all parties. The parties agreed that the Court should rule on this motion, among numerous others like it, the morning of the temporary injunction hearing without further argument by the parties. The Court granted the motion to strike Dr. Oller as an expert witness because her purported expert testimony did not meet the standard set forth in K.S.A. 60-456(b) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589-93 (1993). However, the Court allowed Dr. Oller to testify as a fact witness regarding her personal experience treating transgender patients.

Dr. Oller testified that, in addition to making a gender dysphoria diagnosis, she treats transgender patients for routine health issues. She said "[s]ometimes it is just helping patients go through the process of social affirmation." This includes providing them the letters required to change the sex designation on their Kansas driver's licenses. She said she has observed that her patients suffer fear and hypervigilance if they do not have the desired sex designation on their

driver's license. She said all her transgender patients have been diagnosed with anxiety or depression, and she has seen it improve when they get a driver's license with the desired sex designation.

ADAM KELLOGG

Adam Kellogg is a 20-year-old college student. Adam was born in Illinois and moved with his family to Kansas in 2008. The sex designation on Adam's birth certificate was female. In seventh grade, Adam decided to live as a male. Adam soon thereafter took a series of steps associated with this decision, including medical intervention. At 14, he changed the name on his birth certificate, social security card and learner's permit. In 2021, he changed the sex designation on his birth certificate, social security file, and driver's license to male. Adam's current Kansas driver's license expires in June 2024.

Adam was diagnosed with gender dysphoria in his early teens. Adam described gender dysphoria as "an aversion to being seen as something other than what I want to be seen as. So, for me, you know, I was assigned female at birth. And the fact that anyone saw me as female gave me the worst feelings about my body, about my self-image, about anything about myself."

Adam testified that he applied for a job at age 15. He showed his driver's license to the interviewer. The driver's license at the time indicated Adam's sex was female. The interviewer questioned whether Adam was the person pictured on the driver's license. Adam said it was him. Adam told the interviewer he was transgender. Nothing else was said, and Adam got the job. Adam had no problems while working for that employer.

Adam testified that, at age 16, he was pulled over by a police officer for running a stop sign. Adam said he was "hyperventilating" and "terrified that something is going to happen" because Adam handed his license to the officer, and it indicated Adam's sex was female. Adam

said nothing happened – the officer did not question his identity, and Adam did not get a ticket. Adam said since he had his driver's license changed to male, he is no longer concerned about showing his license to law enforcement.

Adam testified that once when he picked up a prescription, a controlled substance, the pharmacy clerk looked at Adam's license and questioned whether Adam was the person pictured on the driver's license. Adam said it was him. Adam told the clerk he was transgender. Nothing else was said, and Adam got the prescription. Adam testified that he has never been physically assaulted, verbally harassed, or fired from a job because he is transgender.

KATHRYN REDMAN

Kathryn Redman is 63 years old and retired. Kathryn was born in Ohio, lived in Kansas for a time, moved away, and ultimately returned in 2021. The sex designation on Kathryn's birth certificate was male. Kathryn was diagnosed with gender dysphoria in 1992, but did not begin living as a woman until 2018 or 2019. Kathryn thereafter sought medical intervention. Kathryn hired a law firm to help change her name and sex designation on legal documents. She changed her passport and Kansas driver's license, and her information on file with the Social Security Administration, Internal Revenue Service, her former employer, and the Department of Homeland Security. Kathryn's current Kansas driver's license lists her sex as female. The license expires in August 2027.

Kathryn testified that she lived in rural Oklahoma during her transition to living as a woman, where there were "a lot of very, very conservative people." She feared physical and verbal mistreatment there, so she moved to Kansas. Kathryn said she feels safer in Kansas and has not had those experiences here.

Kathryn said that before she changed her sex to female on her driver's license, she was subject to security pat-downs at the airport, including pat-downs of her genital area. Kathryn said this was humiliating. She said the pat-downs stopped after she changed the sex on her driver's license to female. Kathryn also testified that her insurance company initially resisted paying for her mammograms in 2019, 2020, and 2021, but did pay for them after she explained that she is transgender. Kathryn testified that she has never experienced physical harm or denial of goods, services, or privileges because she is transgender. She has not had a negative interaction with law enforcement because she is transgender.

JULIANA OPHELIA GONZALES-WAHL

Juliana Ophelia Gonzales-Wahl is 30 years old. Juliana was born in Colorado. She moved to Kansas when she was 18 to attend college. The sex designation on Juliana's birth certificate was male. In 2017, after graduating from college, Juliana decided to live as a female. She started dressing as a woman in public, and sought therapy and medical intervention. She legally changed her name in 2020 when she got married, and changed the sex designation on her Kansas driver's license from male to female in June 2023. Her license expires in April 2026.

Juliana said changing the sex designation on her driver's license made it "a little bit less awkward in social interactions," and made her feel "a lot safer." She said during her transition to female in 2018 she was working in rural Kansas and went to a hardware store to buy supplies. She said the male clerk was "staring at me weird," and when she gave him her driver's license indicating male, he stared at her with "abject disgust." He did not make any comments or stop the sale. Juliana testified to another incident in 2018 at a gas station where people were staring at her, she showed her driver's license to the clerk, and the clerk whispered that she should "hurry on." She said in 2018 she was stopped at a sobriety checkpoint while driving her partner's car.

She showed her driver's license. She passed field sobriety tests and a breathalyzer and was free to go. She said in 2019 she was subject to a pat-down of her genital area at an airport after showing her license. The security officer asked her out loud which gender of officer she would prefer to do the pat-down.

DOE 2[2]

Doe 2 is a 17-year-old high school student whose sex designation on his birth certificate is female. Doe 2's mother testified that when Doe 2 was 15 he told his parents that he was transgender and had felt that way for "quite a while." Doe 2 asked his parents to call him by a chosen male name. Doe 2 legally changed his name in August 2023. His driver's license now bears his changed name, but the sex designation is female. Doe 2's mother said if Doe 2 could change the sex designation on his driver's license he could "be authentic and be himself and live his life the way he wants to live."

CONCLUSIONS OF LAW

This matter is before the Court on the Attorney General's motion for a temporary injunction. "The movant has the burden of proof in an injunction action." *Schuck v. Rural Tel. Serv. Co.,* 286 Kan. 19, 24, 180 P.3d 571 (2008). The movant must demonstrate:

> "(1) The plaintiff has a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest." *Hodes & Nauser, MDs, P.A. v. Schmidt,* 309 Kan. 610, 619, 440 P.3d 461 (2019).

[2]This Court granted Doe 2's motion to proceed anonymously as agreed by the parties. Doe 2 is a minor and his mother testified on his behalf at the hearing. Doe 1, an Intervenor who was also allowed to proceed anonymously, withdrew as a party prior to testifying and was dismissed from the case. This Court will not consider any testimony or documentary evidence from Doe 1 as part of this lawsuit.

I. WHETHER THE ATTORNEY GENERAL, ON BEHALF OF THE STATE OF KANSAS, HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

The Attorney General asserts that the plain language of K.S.A. 77-207 requires KDOR to indicate an individual's biological sex, either male or female, at birth on driver's licenses and maintain the same information in the KDOR database. KDOR and Intervenors argue that the statute does not apply to state-issued driver's licenses, or in the alternative, it is ambiguous. Intervenors posit that the Attorney General's interpretation of the statute would result in constitutional violations and thus should be avoided in favor of the interpretation advocated by KDOR and Intervenors.

K.S.A. 77-207 APPLIES TO DRIVER'S LICENSES AND CORRESPONDING INFORMATION IN KDOR'S DRIVER'S LICENSE DATABASE.

The Attorney General asserts that K.S.A. 77-207 applies to driver's licenses and corresponding information in KDOR's driver's license database. Whether K.S.A. 77-207 applies to driver's licenses and the corresponding information in KDOR's driver's license database is a matter of statutory interpretation. This is a question of law for the Court.

> "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, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court 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." *Johnson v. U.S. Food Serv.,* 312 Kan. 597, 600–01, 478 P.3d 776 (2021) (internal citations omitted).

KDOR and Intervenors argue that the statute does not apply to driver's licenses and the corresponding information in the KDOR driver's license database, or at the very least, the statute is unclear on this point. If the statute is ambiguous, they argue, the Court should apply canons of statutory construction in its interpretation. As part of this argument, Intervenors urge the Court to

apply the doctrine of constitutional avoidance to arrive at the interpretation desired by KDOR and Intervenors.

Canons of construction are unnecessary unless there is ambiguity in the language of the statute. *Johnson,* 312 Kan. at 601. The doctrine of constitutional avoidance is a rule of statutory construction. *State v. Clark,* 313 Kan. 556, 577, 486 P.3d 591 (2021). Indeed, courts "cannot invoke this rule to impose an interpretation that changes the meaning of unambiguous language or conflicts with clear legislative intent." *Johnson,* 312 Kan. at 603.

THE PLAIN LANGUAGE OF K.S.A. 77-207.

K.S.A. 77-207(a) states: "Notwithstanding any provision of state law to the contrary, with respect to the application of an individual's biological sex pursuant to *any state law* or rules and regulations," an individual's sex means "biological sex, either male or female, at birth," and defines male and female. (Emphasis added.) K.S.A. 77-207(c) says "any state agency, department or office . . . that collects vital statistics for the purpose of gathering accurate . . . data shall identify each individual who is part of the collected data set as either male or female at birth."

The Kansas driver's license has various identifiers on the face of the card. One of these is "sex." There is a corresponding field in the KDOR database to reflect the information found under the category "sex" on the license. In the KDOR database this category is labeled "gender," but the information recorded there is taken from and is the same as the sex designation on the license. KDOR is a state agency that collects information regarding the sex of a driver's license applicant or license holder. Selk, the Driver Services Manager for KDOR, testified that a person's sex designation is a "vital statistic."[3] Thus, the plain language of K.S.A. 77-207 applies

[3]This is consistent with the statutory definition of "vital statistics" in K.S.A. 65-2401(a) to include: "the registration, preparation, transcription, collection, compilation, and preservation of data pertaining to birth, adoption,

to require the sex designation on driver's licenses and the corresponding information in KDOR's driver's license database to identify the licensee's biological sex as male or female at birth.

K.S.A. 77-207 IS NOT AMBIGUOUS.

KDOR and Intervenors attempt to create ambiguity in K.S.A. 77-207 by reference to other statutes. KDOR argues that K.S.A. 77-207 cannot be applied to driver's licenses because it addresses "sex" while the driver's license statutes speak in terms of "gender." K.S.A. 8-240(c) says that a driver's license application must state, among other things, the applicant's "gender." K.S.A. 8-243(a) says that a driver's license must indicate, among other things, the licensee's "gender." Yet KDOR's Selk testified that the face of the driver's license indicates "sex," not "gender." And the information recorded under "sex" on the driver's license is likewise recorded in the KDOR database under the heading "gender." This suggests that "sex" and "gender" are, at least in practice, interchangeable in the context of driver's license statutes.

Intervenors theorize that the Kansas Legislature purposely changed "sex" to "gender" in one driver's license statute in 2007, and this signals its recognition of the two as completely separate concepts. All parties to the instant action agree that the change to "gender" in K.S.A. 8-240(c) was made by the Kansas Legislature in 2007 via Senate Bill 9 ("SB 9"), 2007 Kansas Laws Ch. 160, §5, part of a comprehensive effort to align with the language and requirements of the federal REAL ID Act of 2005 (Pub. L. No. 109-13, div. B, Title II, §202).

The REAL ID Act was designed to set certain standards for identification documents, including those issued by the states. It requires a minimum of nine pieces of information and features to be included on a state driver's license. These include full legal name; date of birth;

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legitimation, death, stillbirth, marriage, divorce, annulment of marriage, induced termination of pregnancy, and data incidental thereto." "Sex" is a piece of data required to be collected and preserved incidental to the preparation of a birth certificate, thus it is a "vital statistic."

"gender"; a driver's license number; "address of principal residence"; cardholder signature; "[p]hysical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes"; and "common machine-readable technology with defined minimum data elements." REAL ID Act of 2005 (Pub. L. No. 109-13, div. B, Title II, §202(b)). SB 9 made changes to existing statutes and adopted new ones to conform with the Act. Among other things, it amended multiple subsections of K.S.A. 8-240. In subsection (c), it amended then-existing requirements for what information must be included in a driver's license application, changing "name" to "full legal name," "sex" to "gender," and "residence address" to "address of principal residence," all to mirror the language of the REAL ID Act. SB 9 also amended multiple subsections of K.S.A. 8-243. In subsection (a), it amended then-existing requirements for what information must appear on the face of a driver's license, changing "name" to "full legal name," "residence address" to "address of principal residence," and adding "gender."

A reading of the provisions of SB 9 does not suggest that changing "sex" to "gender" in K.S.A. 8-240(c) was anything other than an effort to true up existing statutory language with the REAL ID Act while making more substantive changes elsewhere, such as requiring licensees to submit to "mandatory facial image capture," K.S.A. 8-240(h); requiring proof of citizenship status to obtain a license, K.S.A. 8-240(b)(2); and implementing tamper-proof security and machine-readable technology on the license itself, K.S.A. 8-243(a). SB 9 was not, as Intervenors suggest, a demonstration that the Kansas Legislature recognized some qualitative difference between the terms "sex" and "gender" and changed its mind about which one it wanted included in a driver's license application or displayed on the license itself.

Finally, the Kansas Legislature did not make exceptions or otherwise narrow the application of K.S.A. 77-207 by its plain language. Instead, it made clear that there are no exceptions, and the statute applies "[n]otwithstanding any provision of state law to the contrary," including the driver's license statutes, even if they were somehow "to the contrary" of K.S.A. 77-207, which they are not.

The language of K.S.A. 77-207 is clear. Where the statute's language is clear, there is no need for the Court to apply canons of statutory construction. Indeed, the "statutory interpretation analysis could end here." *Bruce v. Kelly,* 316 Kan. 218, 232, 514 P.3d 1007 (2022). It is worth noting, though, that even if the statute was ambiguous, the doctrine of constitutional avoidance – a canon of statutory construction - would not apply.

EVEN IF THE STATUTE WAS AMBIGUOUS, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE WOULD NOT APPLY.

K.S.A. 77-207 is not ambiguous. But even if it was, the doctrine of constitutional avoidance would not apply. The doctrine of constitutional avoidance has been a hot topic in Kansas appellate decisions within the last decade. Its application can be described as follows: if the statute is ambiguous, and there are at least two different plausible interpretations, and one interpretation is constitutional and the other is not, the court should adopt the constitutional interpretation. See *Frost v. Kansas Dep't for Child. & Fams.,* 59 Kan. App. 2d 404, 413, 483 P.3d 1058 (2021), citing Eskridge, *Interpreting Law: A Primer on How to Read Statutes and the Constitution,* 310 (2016).

Intervenors assert that, if the statute was construed to be ambiguous, there are two possible interpretations of it: 1) the statute requires sex at birth to be recorded on driver's licenses and in the KDOR database, and this violates the Kansas Constitution; or 2) the statute does not require sex at birth to be recorded on driver's licenses and in the KDOR database,

which is constitutional. Thus, Intervenors urge that under the doctrine of constitutional avoidance, this Court must adopt the second interpretation – that the statute does not require sex at birth to be recorded on driver's licenses and in the KDOR database.

The crux of Intervenors' constitutional argument is that requiring KDOR to display a licensee's sex at birth on a driver's license and in the KDOR database violates Section 1 of the Kansas Constitution Bill of Rights. Section 1 says: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."

Section 1 "acknowledges rights that are distinct from and broader than the United States Constitution and . . . our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards." *Hodes,* 309 Kan. at 624. The Kansas Supreme Court, in the context of abortion, said these "broader" rights include a "right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." *Id.* at 646. "This right allows Kansans to make their own decisions regarding their bodies, their health, their family formation, and their family life," specifically including "a woman's right to make decisions about whether she will continue a pregnancy." *Id*. at 660.

The Attorney General asserts the historical truism that statutes are presumed constitutional. "But in *Hodes,* a majority of the court rejected this presumption of constitutionality when the interests protected by the Kansas Constitution are deemed fundamental interests." *State v. Carr,* 314 Kan. 615, 627, 502 P.3d 546 (2022), *cert. denied,* 143 S. Ct. 581 (2023) (internal quotations and citations omitted). This includes claims implicating Section 1 of the Kansas Constitution Bill of Rights. See *Id.*

Intervenors claim that the plain language of K.S.A. 77-207 violates three rights protected by Section 1: 1) personal autonomy; 2) informational privacy; and 3) equal protection of the law. First, Intervenors argue that K.S.A. 77-207 deprives them of personal autonomy under Section 1 because it would force them to carry a driver's license indicating a sex at birth that contradicts their expressed gender. Intervenors assert that this amounts to a forced "outing" of a transgender person which exposes that person to psychological and physical harm from others. *Hodes* defined personal autonomy in terms of "the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." Information recorded on a driver's license does not interfere with transgender persons' ability to control their own bodies or assert bodily integrity or self-determination. It does not prevent them from "mak[ing] their own decisions regarding their bodies, their health, their family formation, and their family life."

To apply *Hodes* to K.S.A. 77-207 here would be an unreasonable stretch. *Hodes* said Kansans have the right to control their own bodies. It did not say Kansans have a fundamental state constitutional right to control what information is displayed on a state-issued driver's license. And the Intervenors' testimony at the hearing was that producing a driver's license indicating a sex different than their expressed gender did not result in physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement. Rather, Intervenors testified about feeling embarrassed, humiliated, or unsafe if someone gave them a puzzled look, hesitated, or questioned their identity when looking at their driver's license. They testified to the discomfort of airport security pat downs that are a universal feature of modern travel. K.S.A. 77-207 does not violate any right to personal autonomy under Section 1.

Intervenors next argue that K.S.A. 77-207 intrudes on their right to informational privacy because it potentially "outs" them as transgender when someone else sees their driver's license. But Kansas courts have not recognized a right to informational privacy under Section 1 of the Kansas Constitution Bill of Rights. Intervenors fail to persuade this Court to do so here. The argument fails.

Finally, Intervenors assert that K.S.A. 77-207 deprives them of equal protection of the law under Section 1. There is an equal protection component in Section 2 as well, which says in pertinent part: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kansas courts have differentiated between the two sections by reasoning that Section 1 addresses "individual rights" while Section 2 addresses political matters. *Rivera v. Schwab,* 315 Kan. 877, 894, 512 P.3d 168 (2022). The Kansas Supreme Court has held that *Hodes* does not change the historical equal protection analysis, meaning that the equal protection guarantees found in the Kansas Constitution are coextensive with those described in the Fourteenth Amendment to the federal constitution. *Id.*

Equal protection guarantees are "essentially a direction that similarly situated people be treated alike." *State v. Little,* 58 Kan. App. 2d 278, 279, 469 P.3d 79 (2020). The first step of the analysis is to "determine the nature of the statutory classifications and examine whether these classifications result in disparate treatment of arguably indistinguishable classes of individuals." *Villa v. Kansas Health Pol'y Auth.,* 296 Kan. 315, 324, 291 P.3d 1056 (2013). If there is no classification or disparate treatment, there is no equal protection violation. If those elements are met, the next step is to determine the level of scrutiny to be applied to the statute and apply it. *Id.*

K.S.A. 77-207 does not create a classification. Any state agency that collects vital statistics is directed to identify every individual by "biological sex, either male or female, at birth." K.S.A. 77-207(c). KDOR collects information to display under the heading "sex" on a driver's license. Sex is a vital statistic. The statute requires KDOR to identify each person who seeks a driver's license by his or her sex at birth, male or female. There is no classification based on sex or transgender status or any other factor. The rules are the same for identifying each person who seeks a driver's license. Similarly situated people are not treated differently under the statute, thus there is no equal protection violation.

Intervenors point to *State v. Limon,* 280 Kan. 275, 283, 122 P.3d 22 (2005). There, the Kansas Supreme Court held that the "Romeo and Juliet" law violated equal protection guarantees under the federal and state constitutions because it resulted in lesser penalties for certain sexual conduct between opposite-sex teenagers, but not for same-sex teenagers. Intervenors claim this is "somewhat analogous" to the instant situation involving driver's licenses, but it is not. There is no such classification here, and no disparate criminal penalties for the same conduct depending on whether it occurred between same-sex or opposite-sex partners.

Absent the required classification, there is no equal protection violation, and no need to discuss level of scrutiny or its application.

In sum, the language of the statute is clear. K.S.A. 77-207 applies to require the sex designation on driver's licenses and the corresponding information in the KDOR database to identify the licensee's biological sex as male or female at birth. The statute is not ambiguous, so there is no reason to consider the doctrine of constitutional avoidance, and even so, it would not apply here because Intervenors have demonstrated no constitutional infirmity. The Attorney

General, on behalf of the State of Kansas, has shown a substantial likelihood of prevailing on the merits.

II. THERE IS A REASONABLE PROBABILITY THAT THE STATE OF KANSAS WILL SUFFER IRREPARABLE FUTURE INJURY WITHOUT A TEMPORARY INJUNCTION.

"[A] party seeking a temporary injunction need only show that there is a reasonable probability of irreparable future injury," and "demand[ing] proof of the *certainty* of irreparable harm rather than the mere probability of it" sets "too high a standard for parties seeking injunctions." *Board of Leavenworth County Com'rs v. Whitson,* 281 Kan. 678, 683-84, 132 P.3d 920 (2006) (internal quotes omitted and emphasis original); *Steffes v. City of Lawrence,* 284 Kan. 380, 395, 160 P.3d 843 (2007) (reaffirming *Whitson*).

The Attorney General describes the irreparable injury to the State of Kansas as two-fold. First, in the general sense, he asserts that there is irreparable injury inherent in a state agency's refusal to comply with a duly enacted state statute. Indeed, the Kansas Constitution dictates that the legislature makes the laws and the executive branch enforces them. Kan. Const. Art. II, §1, Art. I, §3. This is the basis for the Attorney General's request for relief in mandamus, which is designed to compel a public officer's performance of a specific legal duty. *See* K.S.A. 60-801.

Second, and more to the point of the instant case, the Attorney General asserts that a reasonable probability of irreparable injury will occur if KDOR is allowed to issue or change driver's licenses that do not display the holder's biological sex at birth pending a final decision on the merits. This is so because most driver's licenses are valid for six years. Once issued, they are out in circulation and would be difficult to retrieve for correction until they expire and must be renewed. And in the two months leading up to the filing of instant action, the number of applications to change the sex designation on a driver's license spiked sharply from just a few per month historically to 71 in May 2023 and 66 in June 2023.

The Attorney General points to a reasonable probability of irreparable injury to law enforcement because driver's licenses are routinely used to identify suspects, victims, wanted persons, missing persons, and others. Kansas criminal cases are replete with such references. See, e.g., *State v. Owens,* 2023 WL 404588, *2 (Kan.App. 2023) (unpublished) (police used driver's license to identify crash victim and used the address to locate his family to notify them of his death); *State v. Smith,* 59 Kan.App.2d 28, 37, 476 P.3d 847 (2020) (police used driver's license to identify woman in a medical emergency and to look up whether she had any specific medical conditions in order to help paramedics render aid); *State v. Manwarren,* 56 Kan.App.2d 939, 948, 440 P.3d 606 (2019) (with legal grounds to conduct investigatory detention, it is permissible for an officer to ask for a driver's license to identify the person and check for outstanding warrants); *State v. Jones,* 2010 WL 3732019, *2 (Kan.App. 2010) (unpublished) (police looked at driver's license of man found asleep in a running car to identify him before arresting him for DUI).

KDOR and Intervenors' insistence that there are other ways to identify a person without reference to biological sex at birth does not change this. Sheriff Hill testified that he relies on the sex designation on a driver's license to identify the subject of a stop and to check for "wants and warrants." He described a time when he arrested a transgender person who was trying to stab his landlord. The person told Sheriff Hill he was a man, but jail staff later indicated the person was a woman. The person showed no criminal history when run through a records check as a man, but the person's true criminal history appeared when run through a records check as a woman. Further, Newson testified that a person's sex designation is one item of information used to help determine where to hold or house an arrestee and assign personnel for strip searches.

For these reasons, the Attorney General has demonstrated that there is a reasonable probability of irreparable injury to the State of Kansas absent the temporary injunction.

III. THE STATE OF KANSAS LACKS AN ADEQUATE LEGAL REMEDY.

An injunction is an equitable remedy designed to prevent irreparable injury by prohibiting or commanding certain acts where no adequate legal remedy is available. *Bd. of Cnty. Com'rs of Reno Cnty. v. Asset Mgmt. & Mktg. L.L.C.,* 28 Kan. App. 2d 501, 506, 18 P.3d 286 (2001). There is no dispute that the State has no adequate legal remedy, such as calculable damages, as a means to enforce SB 180. KDOR suggests that the Attorney General could persuade the Kansas Legislature to support his interpretation of the law through a clarifying amendment to the statute, but this, by definition, is not a legal remedy. See Black's Law Dictionary (11th ed. 2019) (defining a legal remedy as one "historically available in a court of law"). The Attorney General has met the burden to prove this element.

IV. THE THREAT OF INJURY TO THE STATE OF KANSAS OUTWEIGHS ANY HARM THE INJUNCTION MAY CAUSE THE OPPOSING PARTY.

The Attorney General asserts that the threat of injury to the State of Kansas pending a final decision on the merits is that driver's licenses are issued for a period of six years and are difficult to take back or out of circulation once issued. Licenses are used by law enforcement to identify criminal suspects, crime victims, wanted persons, missing persons, and others. Compliance with stated legal requirements for identifying license holders is a public safety concern. Allowing KDOR to issue non-compliant driver's licenses pending a final decision on the merits is an immediate and irreparable injury. The immediacy is supported by information from KDOR that in the first six months of 2023 alone, there were 172 requests for "gender

reclassification" on driver's licenses.[4] Contrast this with approximately 350 such requests in the 11.5 years from May 2011 to the end of 2022.

This is weighed against the harm claimed by KDOR, which is the specter of lawsuits – pending a final decision on the merits - from transgender persons seeking a driver's license with a sex designation other than biological sex at birth. This is speculative at best, considering the procedural status of the instant lawsuit, and the fact that KDOR did not cite any such cases already on file. The Intervenors claim harm in that those who do not have a sex designation to match their expressed gender on their driver's license cannot change it pending a final decision on the merits of this case, and those seeking a license for the first time may not be able to obtain a sex designation to match their expressed gender. This scenario does not apply to three of the four Intervenors. Only Doe 2, a minor, does not have a license with the desired sex designation.

Further, Intervenors testified that producing a driver's license indicating a sex different than their expressed gender did not result in physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement. Rather, Intervenors testified about feeling embarrassed, humiliated, or unsafe. None testified to any actual threat to their personal safety; rather, some talked in general terms about hearing of harm that had come to unnamed others in unnamed places in unspecified situations. The threat of injury to the State of Kansas outweighs any harm the temporary injunction may cause KDOR or Intervenors.

V. THE INJUNCTION WILL NOT BE AGAINST THE PUBLIC INTEREST.

KDOR and Intervenors have little to say about the public interest, other than suggesting it is against the public's interest for the Court to enforce an unconstitutional law. But this Court has

[4]There were two requests in January 2023, four in February 2023, six in March 2023, 23 in April 2023, 71 in May 2023, and 66 in June 2023.

concluded that there is a substantial likelihood the Attorney General will prevail in his effort to enforce K.S.A. 77-207(a) and (c) in the context of driver's licenses and corresponding information in the KDOR database. A temporary injunction will not be against the public interest.

CONCLUSION

For the reasons set forth above, the Attorney General's request for a temporary injunction is granted on the terms previously set forth in this Court's temporary restraining order.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was electronically filed, providing notice to counsel of record.

/s Angela Cox
Administrative Assistant

2025 WL 1142065
Only the Westlaw citation is currently available.
Court of Appeals of Texas (15th Dist.).

The STATE of Texas, BY AND THROUGH the OFFICE OF the ATTORNEY GENERAL OF TEXAS, Appellant
v.
CITY OF SAN MARCOS; Jane Hughson, Mayor of San Marcos; Matthew Mendoza, Saul Gonzales, Alyssa Garza, Shane Scott, Lorenzo Gonzalez, and Amanda Rodriguez, Members of the City Council of San Marcos; Stephanie Reyes, City Manager of San Marcos; and Stan Standridge, Chief of Police of San Marcos; in Their Official Capacities, Appellees

NO. 15-24-00084-CV
|
Opinion filed April 17, 2025

Synopsis

Background: State filed suit for declaratory judgment and injunctive relief against home-rule city, city's mayor, city council members, city manager, and police chief, seeking declaratory judgment that state law preempted city ordinance prohibiting police officers from issuing citations and making arrests for low-level marijuana offenses, and asserting claims under the Uniform Declaratory Judgments Act (UDJA) and the ultra vires doctrine. The 207th District Court, Hays County, Sherri Tibbe, J., granted defendants' plea to the jurisdiction and denied state's application for temporary injunction prohibiting enforcement of the ordinance. State appealed.

Holdings: The Court of Appeals, Farris, J., held that:

ordinance was preempted by statute prohibiting municipal entities from adopting policies under which entity would not fully enforce laws relating to drugs;

state sufficiently alleged claim under ultra vires exception to governmental immunity that mayor and council members acted without legal authority in adopting and approving ordinance;

state's failure to plead or present evidence of any act taken by city manager to implement or enforce ordinance precluded state's ultra vires claim against city manager;

state had valid declaratory-judgment cause of action against city regarding ordinance, as required to obtain temporary injunction;

state established a probable right to relief in form of enjoining enforcement of ordinance, as element for temporary injunction to prevent enforcement of ordinance;

state established probable, imminent, and irreparable injury, as element for temporary injunction to prevent enforcement of ordinance; and

lack of enforcement of misdemeanor marijuana-possession laws due to ordinance did not constitute status quo that could preclude issuance of temporary injunction.

Affirmed as modified in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction; Plea to the Jurisdiction.

On Appeal from the 207th District Court, Hays County, Texas, Trial Court Cause No. 24-0267, Honorable Sherri Tibbe, Judge

Attorneys and Law Firms

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Johnathan Stone, Jacob Przada, Cory A. Scanlon, Kyle Tebo, for Appellant.

Before Chief Justice Brister and Justices Field and Farris.

OPINION

April Farris, Justice

***1** A fundamental principle of Texas constitutional law is that state law preempts contrary city ordinances. Tex. Const. art. XI, § 5(a) ("[N]o ... ordinance passed under [a city] charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by

the Legislature of this State."). The Texas Local Government Code prohibits the "governing body of a municipality, ... municipal police department, municipal attorney, county attorney, district attorney, or criminal district attorney" from "adopt[ing] a policy under which the entity will not fully enforce laws relating to drugs, including Chapters 481 and 483, Health and Safety Code, and federal law." Tex. Loc. Gov't Code § 370.003. San Marcos, however, has passed a local ordinance prohibiting its police officers from issuing citations and making arrests for certain low level marijuana offenses.

The State of Texas sued the City of San Marcos and various City officials under the Uniform Declaratory Judgments Act (UDJA) for a declaration that state law preempts the ordinance and for injunctive relief. In two issues, the State of Texas appeals the trial court's dismissal of its suit for lack of jurisdiction and the trial court's denial of the State's request for a temporary injunction. We hold that Appellees, with the exception of Stephanie Reyes, the City Manager, are not immune from the State's declaratory judgment action. We further hold that the trial court abused its discretion in denying some—but not all—of the relief sought in the State's request for a temporary injunction, and we remand for entry of an appropriate temporary injunction.

BACKGROUND

San Marcos's City Charter reserves for the people of the city the "power of direct legislation by initiative" to "propose any ordinance or repeal any ordinance not in conflict with this Charter, the State Constitution, or the state laws." Through a ballot initiative process, the citizens of the City of San Marcos placed Proposition A on the November 8, 2022 general election ballot. After the voters approved the proposition with 81.86 percent voting in favor, the City Council canvassed and confirmed the vote totals.

The City of San Marcos, through its City Council, then codified and published the ordinance as Article 4, Section 54.101–.107 of the city ordinances (the Ordinance). In pertinent part, the Ordinance reads as follows:

> Sec. 54.101. – Ending citations and arrests for misdemeanor possession of marijuana.
>
> (a) San Marcos police officers shall not issue citations or make arrests for class A or class B misdemeanor possession of marijuana offenses, except in the limited circumstances described in subsection (b).
>
> (b) The only circumstances in which San Marcos police officers are permitted to issue citations or make arrests for class A or class B misdemeanor possession of marijuana are when such citations or arrests are part of (1) the investigation of a felony level narcotics case that has been designated as a high priority investigation by [a] San Marcos police commander, assistant chief of police, or chief of police; and/or (2) the investigation of a violent felony.
>
> ***2** (c) In every instance other than those described in subsection (b), if a San Marcos police officer has probable cause to believe that a substance is marijuana, an officer may seize the marijuana. If the officer seizes the marijuana, they must write a detailed report and release the individual if possession of marijuana is the sole charge.
>
> (d) San Marcos police officers shall not issue any charge for possession of marijuana unless it meets one or both of the factors described in subsection (b).

The Ordinance further restricts (1) issuance of citations for possession of "drug residue" or drug paraphernalia; (2) use of city funds to test the level of tetrahydrocannabinol (THC) of cannabis; and (3) the use of the odor of marijuana or hemp as probable cause for search or seizure. The Ordinance requires the City Manager and Police Chief to ensure that San Marcos police officers receive training concerning the provisions of the Ordinance. The Ordinance states that any San Marcos police officer found in violation of the Ordinance may be subjected to discipline as provided by the Local Government Code or city policy. The Ordinance also requires the City Manager or their designee to present to the City Council a report concerning the City's implementation of the Ordinance.

After the City Council "considered, approved, and adopted" the Ordinance, Chief of Police Stan Standridge issued a "Memorandum Regarding Misdemeanor Marijuana Enforcement" (Memorandum) to provide guidance regarding the Ordinance to police employees. The Police Chief noted that the Ordinance does not "discriminate based on age, so it presumably exempts juveniles found to be in possession of marijuana," and instructed officers to investigate potential felonies for certain amounts of marijuana possessed in drug free zones or in other circumstances.

Continuing, the Memorandum stated that although "Texas law has long considered the odor of marijuana sufficient to constitute probable cause to search a person ... If a misdemeanor amount of marijuana is solely discovered, the voter-approved ordinance would not permit officers to issue citations or make arrests." As to police officer discipline, the Memorandum quoted the Ordinance stating that a police officer may be subject to discipline for violating the Ordinance.

The Police Chief later reported to the City Council that despite recognizing that the Ordinance was in "conflict with State law ([Tex. Local Govt Code] Sec. 370.003)" the Police Department nonetheless "operated in compliance with [the Ordinance]."

The State of Texas filed suit for declaratory judgment and injunctive relief against the City of San Marcos, its Mayor and City Council members, its City Manager, and its Police Chief.[1] The State asserted claims under the UDJA and the *ultra vires* doctrine, alleging that the adoption and enforcement of the Ordinance violated Article XI, section 5 of the Texas Constitution and Section 370.003 of the Local Government Code. The State further sought a temporary injunction to preserve the status quo while its claims proceeded and asked the trial court to issue a declaratory judgment that the Ordinance and any corresponding police department general order or directive are *ultra vires* and void.

Specifically, the State alleged the Ordinance conflicts with Section 370.003 of the Local Government Code:

> ***3** The governing body of a municipality, the commissioners court of a county, or a sheriff, municipal police department, municipal attorney, county attorney, district attorney, or criminal district attorney may not adopt a policy under which the entity will not fully enforce laws relating to drugs, including Chapters 481 and 483, Health and Safety Code, and federal law.[2]

Tex. Loc. Gov't Code § 370.003.

Appellees filed a plea to the jurisdiction in which they asserted the trial court lacked jurisdiction over the State's claims. Appellees asserted that governmental immunity shielded the City from suit and the individually named City Officials were protected by governmental immunity. Specifically, Appellees asserted the State had not pleaded a viable constitutional claim under the UDJA because the State could not meet its burden to demonstrate that Section 370.003 of the Local Government Code preempts or conflicts with the Ordinance. Appellees further asserted that the State did not adequately plead an *ultra vires* claim against the individual defendants because the State identified no unlawful act taken by the individuals. Appellees alleged the Ordinance was passed by the voters of San Marcos without any action by City Officials. Appellees further asserted that Section 370.003 prohibits a governing body from adopting a policy to "fully enforce" drug laws. According to Appellees, because neither the City Council, nor the Police Chief, have adopted a policy not to fully enforce drug laws, Appellees have not violated Section 370.003 or the Texas Constitution.

At a hearing on Appellees' plea to the jurisdiction and the State's application for temporary injunction, Police Chief Standridge testified that he was the final arbiter of policy for the San Marcos Police Department. He acknowledged that his policy-making authority prohibited promulgation of any policy that would conflict with the City's charter, the Constitution, or state law. Before the Ordinance was adopted, the City of San Marcos had adopted a "cite and release" procedure for low level marijuana possession.[3] Standridge explained that he wrote the Memorandum to inform police officers of the Ordinance's language and to provide guidance on how to proceed under the Ordinance. Because the cite and release practice was still in force in Hays County, Standridge wanted to clarify to police officers that the Ordinance no longer allowed a citation to be issued for misdemeanor amounts of marijuana.

Standridge testified that no other law enforcement agency in Hays County follows a similar procedure to that required by the Ordinance. Standridge opined that the Ordinance conflicts with Local Government Code Section 370.003. However, San Marcos police officers are not permitted to ignore the Ordinance. If police officers ignore the Ordinance, they could be subject to disciplinary proceedings. Standridge did not believe he had the authority to issue a directive telling police officers they did not have to comply with the Ordinance.

***4** Following the hearing, the trial court granted the Appellees' plea to the jurisdiction and denied the State's application for temporary injunction.

ANALYSIS

In two issues, the State challenges (1) whether Appellees have immunity from the State's UDJA action challenging the City's adoption and implementation of the Ordinance; and (2) whether the trial court abused its discretion in denying the State's request for temporary injunction.

I. Standard of Review

A plea questioning the trial court's jurisdiction raises a question of law, which is reviewed de novo. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). When considering a plea to the jurisdiction, our analysis begins with the live pleadings. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). We first determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Tex. Dep't. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In doing so, we construe the pleadings liberally in favor of the plaintiff, and unless challenged with evidence, we accept all allegations as true. *Id.* at 226–27. The plea must be granted if the plaintiff's pleadings affirmatively negate the existence of jurisdiction or if the defendant presents undisputed evidence that negates the existence of the court's jurisdiction. *Heckman*, 369 S.W.3d at 150.

When a "jurisdictional challenge implicates the merits of the [plaintiff's] cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists." *Miranda*, 133 S.W.3d at 227. In evaluating an evidentiary plea to the jurisdiction, the standard of review "generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)." *Id.* at 228. The plaintiff has the burden to adduce evidence to "raise a fact question on the jurisdictional issue." *Id.* The evidence is reviewed in the light most favorable to the nonmovant to determine whether a genuine issue of material fact exists. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

We review an order denying a temporary injunction for abuse of discretion. *State v. Hollins*, 620 S.W.3d 400, 405 (Tex. 2020). A failure by the trial court, however, to analyze or apply the law correctly will constitute an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). "To establish its right to a temporary injunction, the State must 'prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.' " *Hollins*, 620 S.W.3d at 405 (quoting *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)). We review an order denying a temporary injunction for abuse of discretion, mindful that the lower court has " 'no discretion to determine what the law is.' " *Id.* (*quoting In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006) (orig. proceeding)).

II. Dismissal of UDJA Claim Against the City

In its first issue, the State of Texas argues that the trial court erred by dismissing its UDJA claim against the City of San Marcos because the City has no governmental immunity from a claim to declare an ordinance preempted. The UDJA contains a waiver of immunity from suit "[i]n any proceeding that involves the validity of a municipal ordinance or franchise" and requires that "the municipality must be made a party and is entitled to be heard[.]" Tex. Civ. Prac. & Rem. Code § 37.006(b). Where, as here, the Legislature requires that the City be joined in a lawsuit for which "immunity would otherwise attach," the Legislature has intentionally waived the City's governmental immunity. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697–98 (Tex. 2003); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) ("For claims challenging the validity of ordinances or statutes ... the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity.").

***5** The City acknowledges this general rule but defends the dismissal on the ground that the State's UDJA claim is not viable. Although the UDJA generally waives immunity for declaratory judgment claims challenging the validity of ordinances, the Texas Supreme Court has recognized that immunity from suit is not waived if the claim challenging the law or ordinance is invalid. *Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives*, 647 S.W.3d 681, 698 (Tex. 2022); *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015). Accordingly, we first determine whether the State's UDJA claim is invalid in order to resolve the issue.

Ordinarily, when reviewing a plea to the jurisdiction, we delve no further than necessary into the merits to dispel notions that the State's preemption claim is implausible. *See Klumb*,

458 S.W.3d at 13. But here, we are also reviewing the trial court's denial of the State's request for a temporary injunction. This latter inquiry requires us to determine whether the State demonstrated a "probable right to relief" on its preemption theory—a question that involves a deeper merits inquiry. *Hollins*, 620 S.W.3d at 405. For convenience, we analyze both questions together.

A. Principles of Preemption

It is undisputed that the City of San Marcos is a home-rule municipality. As a home-rule municipality, the City of San Marcos possesses the "full power of local self-government." Tex. Loc. Gov't Code § 51.072(a). But that power is not unlimited. Article XI, Section 5(a) of the Texas Constitution provides that home-rule city ordinances must not "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5(a). Although home-rule cities have all powers not denied by federal law, the Constitution, or state law, and thus need not look to the Legislature for grants of authority, the Legislature can limit or withdraw that power by general law. *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016). On any given issue, choosing whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations ultimately "is the Legislature's prerogative." *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 592–93 (Tex. 2018).

To win a preemption claim, the party asserting preemption must prove that state law preempts the local ordinance. *City of Houston v. Houston Pro. Fire Fighters' Ass'n, Local 341*, 664 S.W.3d 790, 804 (Tex. 2023). To preempt an ordinance of a home-rule city, the "Legislature must demonstrate its intent to preempt local law 'with unmistakable clarity.' " *Id.* (quoting *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993)); *see also City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964). If the statute makes that legislative intent clear, then the local ordinance "is unenforceable to the extent it conflicts with the state statute." *Id.* Where a conflict is present, local regulations that are "inconsistent with a statutory standard are not saved from preemption merely because some applications produce consistent results." *Id.* at 806.

B. Statutory Construction

Examining the Ordinance and the relevant provision of the Texas Local Government Code, we conclude that the State's UDJA preemption claim is not invalid. On the contrary, the State has demonstrated a probable right to relief on that claim. *See infra*, Part IV. B.

***6** We review issues of statutory construction de novo. *Chambers-Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019). Our objective in construing a statute is to determine and give effect to the Legislature's intent, and we begin by examining the plain meaning of the language used in the statute. *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502, 509 (Tex. 2022). "A statute's unambiguous language controls." *City of Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 261 (Tex. 2018).

The State contends that Sections 54.101 through 54.107 of the Ordinance are preempted:

> (1) Section 54.101 prohibiting San Marcos police officers from issuing citations or making arrests for Class A or Class B misdemeanor possession of marijuana;
>
> (2) Section 54.102 prohibiting San Marcos police officers from issuing Class C misdemeanor citations for possession of drug residue[4] or drug paraphernalia in lieu of a marijuana charge;
>
> (3) Section 54.103 prohibiting use of city funds and personnel to request, conduct, or obtain THC testing;
>
> (4) Section 54.105 requiring San Marcos police officers to receive adequate training concerning each provision of the Ordinance;
>
> (5) Section 54.106 permitting San Marcos police officers to be disciplined for failure to comply with the Ordinance; and
>
> (6) Section 54.107 requiring the City Manager to submit regular reports to the City Council concerning implementation of the Ordinance.

In this case, legislative intent to preempt local policy is unmistakably clear. Section 370.003 states that "[t]he governing body of a municipality, ... may not adopt a policy under which the entity will not fully enforce laws relating to drugs[.]" Tex. Loc. Gov't Code § 370.003. The issue is whether the Ordinance falls within the ambit of the statute. *See In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (orig. proceeding) (stating that an ordinance is preempted only "to the extent it conflicts with the state statute"). To decide that, we look to the statutory text and the ordinary meanings of its words. *See Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex.

2011) ("The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.").

In 1997, the Texas Legislature enacted Section 370.003 of the Local Government Code, prohibiting various entities—including the "governing body of a municipality"—from adopting "a policy under which the entity will not fully enforce laws relating to drugs, including Chapters 481 and 483, Health and Safety Code, and federal law." Tex. Loc. Gov't Code § 370.003. This is not a mandate that local governments actually enforce all laws related to drugs. Rather, the statute prohibits local governments from putting up any *barrier* to the full enforcement of drug-related laws. Texas law gives local governments and law enforcement officers a panoply of tools—such as the authority to issue citations and arrests—to enforce drug laws. Section 370.003 prohibits the City of San Marcos from making a policy that takes any of those tools off the table.

Applying the plain meaning of Section 370.003, we hold that the Legislature's intent to preempt the Ordinance is unmistakably clear. Marijuana offenses are defined in Chapter 481 of the Health and Safety Code. *See, e.g.*, Tex. Health & Safety Code § 481.120 (delivery of marijuana); Tex. Health & Safety Code § 481.121 (possession of marijuana). The Ordinance's stated purpose is to "[e]nd citations and arrests for misdemeanor possession of marijuana." Texas law authorizes police officers to issue citations and make arrests for Chapter 481 offenses, but Ordinance Section 54.101 prohibits them from doing so. *See* Tex. Health & Safety Code § 481.120-.122. Texas law also authorizes police officers to issue citations and make arrests for Class C misdemeanor citations for possession of drug paraphernalia in lieu of a marijuana charge, but Ordinance Section 54.102 prevents them from doing so. Tex. Health & Safety Code 481.125(a), (d). Texas law gives cities the power to use city funds and personnel to request, conduct, or obtain THC testing, but Ordinance Section 54.103 prevents them from doing so. *See* Tex. Loc. Gov't Code § 51.072 (giving municipality full power of local self-government); Tex. Loc. Gov't Code § 101.002 ("municipality may manage and control the finances of the municipality"). All of these Ordinance prohibitions are barriers to the full enforcement of Texas drug laws and thus conflict with Local Government Code Section 370.003. Sections 105-107 of the Ordinance effectuate the provisions of the Ordinance that conflict with Section 370.003 and thus are preempted as well.

***7** The City attempts to refute the State's preemption claim with several arguments, which we address in turn.

1. Express Preemption of an Ordinance.

The City first argues that Section 370.003 does not contain language that demonstrates the Legislature's intent to preempt local law with "unmistakable clarity" because it bars the governing body of a municipality from "adopt[ing] a policy"—as opposed to an "ordinance"—under which the entity will not fully enforce laws relating to drugs. The City argues that if a state statute "expressly preempted" the City from "enact[ing] an ordinance," the Ordinance would be preempted. According to the City, an ordinance is not policy, so its Ordinance is not in conflict with Section 370.003.

We interpret statutes by discerning the "*fair meaning* of the text, not 'the hyperliteral meaning of each word in the text.' " *In re Dallas County*, 697 S.W.3d 142, 158 (Tex. 2024) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 356 (2012)) (emphasis in original). The Legislature's use of the term "policy" fairly encompasses an ordinance. After all, the Texas Supreme Court has recognized that "[ ]statutes and ordinances express the public policy of the state as it existed at the time of their adoption." *State v. City of Austin*, 331 S.W.2d 737, 741 (Tex. 1960); *see also Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 673 n.11 (Tex. 2008) (Hecht, J. concurring); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000) ("[C]ommentators have defined legislative power as the power to make rules and determine public policy."). In this case, the City, by its own terms, "considered, approved, and adopted" the Ordinance. The Ordinance's stated purpose is to end enforcement of misdemeanor marijuana possession, which Section 370.003 preempts.

Relatedly, the City argues that the Legislature did not preempt the Ordinance with "unmistakable clarity" because the Legislature did not use the term "is expressly preempted" or the like in the text of Section 370.003. The City cites the Legislature's ban on municipal fracking and its establishment of a minimum wage as examples of effective preemptive language. *See* Tex. Nat. Res. Code § 81.0523 ("The authority of a municipality or other political subdivision to regulate an oil and gas operation is *expressly* preempted[.]") (emphasis added); *see also* Tex. Labor Code § 62.0515 ("[T]he minimum wage provided by this chapter *supersedes* a wage established

in an ordinance, order, or charter provision governing wages in private employment ...") (emphasis added).

No magic words were necessary for the Legislature to preempt the Ordinance with unmistakable clarity. A plain and fair reading of the Ordinance presents irreconcilable inconsistency with Section 370.003. For example, the Ordinance prohibits police officers from "issu[ing] citations or mak[ing] arrests for class A or class B misdemeanor possession of marijuana offenses, except in the limited circumstances[.]" Although courts will adopt "reasonable" interpretations of a home-rule city's ordinance to avoid preemption, in this instance, there is no reasonable way to read the Ordinance that does not directly conflict with the state statute prohibiting the adoption of policies under which the entity will not fully enforce such laws. *See Hotze v. Turner*, 672 S.W.3d 380, 387 (Tex. 2023); *See Dallas Merch.'s*, 852 S.W.2d at 491.

2. Fully Enforce

***8** The Texas Supreme Court has held that "a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect, can be reached." *Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. [Comm'n Op.] 1927). Invoking this authority, the City argues that Section 370.003 can be harmonized with the Ordinance because the Ordinance does not prohibit police officers from "fully enforcing" the state's drug laws. According to the City, no police force could "fully enforce" all drug laws, so the Ordinance simply allows San Marcos police discretion to focus their efforts on drug offenses involving other drugs and larger amounts of marijuana in addition to violent offenses. The City contends the term "fully enforce" in Section 370.003 cannot "reasonably and workably mean that the City is required to enforce drug laws in every single possible situation."

To be sure, police forces cannot "fully enforce" every violation of crime that occurs. But, the text of the Ordinance removes a category of offenses from the police officer's enforcement discretion. The mere fact that the goal of achieving full enforcement is unattainable does not mean that a municipality can ban citations and arrests for certain offenses.

The City also argues that the Ordinance is not preempted because the Ordinance will operate in many circumstances just like the ordinary exercise of crime prioritization and prosecutorial discretion. In other words, officers could have exercised their discretion in choosing not to issue citations or make arrests in the same categories of cases even in absence of the Ordinance. This does not save the Ordinance. We find guidance in a similar preemption argument rejected by the Texas Supreme Court. In *BCCA Appeal Group, Inc. v. City of Houston*, the City of Houston sought to avoid preemption and to enforce its locally enacted air-quality regulatory regime. 496 S.W.3d 1, 5 (Tex. 2016). The Texas Supreme Court held that the Clean Air Act preempted the local ordinance because the local "enforcement provisions *authorize* the City to enforce the state's air-quality standards in a manner that is inconsistent with the statutory enforcement provisions." *Id.* at 16 (emphasis added). The Court rejected the argument that hypothetical convergence of the two enforcement regimes saved the ordinance from preemption. *Id.* That a City might choose to enforce its ordinance "in a way that does not violate the statutory requirements," *id.* at 17, did not mean that the ordinance was consistent with state law. Local regulations that authorize enforcement based on standards that are inconsistent with a statutory standard are not saved from preemption merely because some applications may produce consistent results. *City of Houston*, 664 S.W.3d at 806.

The City also argues that there is no actual conflict with state law because the Ordinance does not order police officers to stop enforcing drug laws. The text of the Ordinance belies that reading. The Ordinance plainly states that officers "shall not issue citations or make arrests for class A or class B misdemeanor possession of marijuana offenses, except in ... limited circumstances[.]" The Ordinance makes any such citation or arrest a ground for "subject[ing] a San Marcos police officer to discipline." This directly conflicts with Section 481.134's codification of marijuana possession as a crime subject to law enforcement by arrest or citation. *See* Tex. Health & Safety Code § 481.120–.122. The fact that the Ordinance prohibits enforcement of only some drug laws—while leaving the enforcement of other drug laws to the officers' discretion—does not save the Ordinance from preemption.

We therefore sustain the State's first issue. The trial court had jurisdiction over the State's UDJA claim for a declaration that the Ordinance is preempted by state law. *See* Tex. Civ. Prac. & Rem. Code § 37.006(b). The State pleaded a viable claim that the Ordinance is preempted by Section 370.003 of the Local Government Code. Consequently, the UDJA waives the City's governmental immunity from the State's declaratory judgment action. *See Heinrich*, 284 S.W.3d at

373 n.6 ("For claims challenging the validity of ordinances or statutes ... the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity.").

III. Dismissal of *Ultra Vires* Activity Claims Against City Officials

***9** In its second issue, the State challenges the trial court's grant of the plea to the jurisdiction on its *ultra vires* action claims against the various City Officials. The State seeks a declaration that the Ordinance and any corresponding police department general order or directive are *ultra vires* and void.

In this case, whether the State has sufficiently pleaded facts or presented evidence to demonstrate subject matter jurisdiction over an *ultra vires* claim overlaps with the substantive issue of whether the State has established a probable right to relief to obtain a temporary injunction. For the reasons stated below, we conclude the State's pleadings, when liberally construed, and the evidence submitted, when viewed in the light most favorable to the State, allege facts sufficient to show that the City Officials acted without authority in adopting the Ordinance and implementing police procedures in compliance with the Ordinance.

The State's petition alleged that the City Officials lacked legal authority to adopt the Ordinance and any corresponding police department general order or directive. Governmental immunity does not bar a suit that seeks to bring local government officials into compliance with state law. *In re State*, No. 24-0325, —— S.W.3d ——, ——, 2024 WL 2983176, at *4 (Tex. June 14, 2024); *Hollins*, 620 S.W.3d at 410; *Chambers-Liberty Cntys. Navigation Dist.*, 575 S.W.3d at 348. To fall within this *ultra vires* exception, a suit "must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *See Heinrich*, 284 S.W.3d at 372; *see also Hall v. McRaven*, 508 S.W.3d 232, 240–41 (Tex. 2017).

"[A]ctions taken 'without legal authority' ha[ve] two fundamental components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority." *McRaven*, 508 S.W.3d at 239. A government officer acts without legal authority if he or she exceeds the bounds of the granted authority or if his or her acts conflict with the law itself. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016). A preempted law has no effect. *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001). With these principles in mind, we examine the *ultra vires* claim as to each defendant.

A. The City Council Members and the Mayor

The Texas Constitution deprives home-rule cities of the power to enact ordinances that conflict with state law. Tex. Const. art. XI § 5. Here, the State pleaded that the Local Government Code forbids the "governing body of a municipality"—here, the City Council members and the Mayor—from adopting a policy that "will not fully enforce laws relating to drugs." Tex. Loc. Gov't Code § 370.003. According to the State, the City Council members and the Mayor committed an *ultra vires* act when they approved and adopted the unlawful Ordinance that conflicts with Section 370.003 of the Government Code.

These allegations were borne out by the evidentiary record, which shows that the City Council adopted the Ordinance without discussion after canvassing the election and certifying the results. The Mayor signed the resolution that "CONSIDERED, APPROVED, and ADOPTED" the Ordinance. The State, therefore, has sufficiently alleged an *ultra vires* claim that the City Council members and Mayor acted without legal authority.

***10** The City Officials allege their actions were not *ultra vires* because they were required to adopt the Ordinance as approved by the voters. The authority on which the City Officials rely, however, does not apply to the adoption of citizen-initiated ordinances. Each case relied on by the City Officials requires a city to hold an election once citizens have properly exercised their initiative rights. But these cases do not speak to the City Officials' discretion to adopt an ordinance that conflicts with state law. *See In re Rogers*, 690 S.W.3d 296, 301 (Tex. 2024) (orig. proceeding) ("[O]ur precedents reflect a strong preference in favor of holding elections on qualified ballot measures even where there is some question about whether the measure, if passed, would be subject to valid legal challenge."); *see also Glass v. Smith*, 244 S.W.2d 645, 653 (Tex. 1951) (holding that when citizens exercise their rights under the initiative provisions of a city charter the city must perform its duties and carry out the initiative procedure).

The City Officials further assert they would be subject to *ultra vires* liability if they had not adopted the Ordinance after it was approved by the voters. While the authority cited by the City Officials may require a citizen-initiated proposition to be placed on the ballot, that authority does not translate into a ministerial duty for the City Officials to adopt and

enforce an illegal Ordinance. The Texas Supreme Court has distinguished between these two circumstances: "[t]he right to call and hold a void election is a political right that the courts have no jurisdiction to interfere with, ... [ ] the right to enforce a void election in such a way as to violate the laws of this state would present a matter that the judicial power of the government would have the right to give relief from." *In re Morris*, 663 S.W.3d 589, 596 (Tex. 2023) (orig. proceeding).

The State alleged that the City Council members and Mayor violated state law by "adopt[ing] a policy under which the [City] will not fully enforce laws relating to drugs[.]" As such, the State has pleaded a valid *ultra vires* claim by pleading that the City Officials acted without legal authority. *See Hollins*, 620 S.W.3d at 410 ("[a]s a sovereign entity, the State has an intrinsic right to ... enforce its own laws." (alteration in original)). To be sure, the City Officials challenge their authority to invalidate a citizen-initiated ordinance. They assert the Ordinance was "self-enacting" and that all the City Council did was certify the election. The City Officials further assert that their vote to adopt the Ordinance was merely a vote to certify the tabulation of votes. This argument presents a fact issue that goes to the merits of the State's *ultra vires* claims that we do not resolve at this juncture. Because the evidence creates a fact question on whether the City Council members and the Mayor acted *ultra vires* in contravention of the Local Government Code, the trial court could not grant the plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 228. We sustain the State's first appellate issue with respect to the City Council members and the Mayor.

B. The Police Chief

The State argues that the trial court erred by dismissing its *ultra vires* claim against the Police Chief.

The State argues that it has pleaded a valid claim that falls within the exception to governmental immunity. It is undisputed that the Ordinance tasks Reyes, the City Manager, and the Police Chief with enforcement and implementation of its requirements. The State presented evidence that the Police Chief issued the Memorandum as a "written directive" instructing the police force regarding the requirements of the Ordinance, and that he used the Memorandum to provide "training concerning each of the provisions of this ordinance." The Memorandum advises officers on how to act in accordance with the Ordinance on topics including juveniles, destruction of marijuana, and police officers' inability to use odor to support probable cause. The Memorandum closed by reiterating the Ordinance's warning that violating the ordinance "may subject" officers to discipline and explaining the department's disciplinary process. The Police Chief also instructed his police force that juveniles were "exempt" from misdemeanor marijuana possession charges.

***11** The City Officials respond that the Memorandum did no more than communicate the requirements of the Ordinance itself, which does not prevent the full enforcement of the state's drug laws. Because the State's evidence raises a fact issue on the question of whether the Police Chief has committed an *ultra vires* act, we sustain the State's first appellate issue with respect to the State's claim against the Police Chief.

C. The City Manager

The State also appeals the trial court's grant of the plea to the jurisdiction on its *ultra vires* action claim against Reyes, the City Manager.

The State argues that jurisdiction is waived because the Ordinance tasks Reyes and the Police Chief with enforcement and implementation of its requirements. The State also presented evidence that Reyes is responsible for executing the laws and administering the government of the City. The Police Chief also testified that Reyes, for whom he works, did not provide him with authority to refuse to enforce the Ordinance.

The City Officials argue that although the Ordinance may task Reyes, the City Manager, with enforcement and implementation, there is no evidence that Reyes has actually taken an action that could constitute an *ultra vires* act. We agree with the City Officials that the State has not pleaded or presented evidence of an act taken by Reyes to implement or enforce the Ordinance, so the trial court did not err by granting the plea to the jurisdiction. When upholding a plea to the jurisdiction on governmental immunity grounds, we give the plaintiff an opportunity to replead if the defect can be cured. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 623 (Tex. 2011); *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). Here neither the pleadings nor the record refute jurisdiction, so we give the State an opportunity to replead. We overrule the State's first issue with respect to its claim against Reyes, the City Manager, but modify the order to reflect that dismissal is without prejudice to allow the State an opportunity to replead.

IV. Temporary Injunction

In its second issue the State argues the trial court erred in denying its application for temporary injunction. To be entitled to a temporary injunction, the State must "prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Hollins*, 620 S.W.3d at 405.

A. Cause of Action

The State has a valid declaratory judgment cause of action against the City to establish that the Ordinance in question is preempted. *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 76–77 (Tex. 2015). The adoption of an ordinance which is contrary to state law gives rise to a cause of action against the City on behalf of the State. *See id.* Not only does the Texas Constitution prohibit a city from acting in a manner inconsistent with the general laws of the state, Tex. Const. art. XI, § 5, but "the [L]egislature may, by general law, withdraw a particular subject from a home rule city's domain." *Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991). And, for the reasons explained in Part II, the City is not entitled to governmental immunity on the State's claim.

Appellees dispute the existence of a cause of action against the City on the ground that its governing body did not choose in its discretion to adopt the ordinance, the voters did. This argument is untenable. The Constitution states that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5(a). Predictably, this constitutional prohibition contains no carveouts for ordinances resulting from local voter initiative processes. The City's own charter recognizes these limitations in directing that "[t]he people of the city ... may propose any ordinance or repeal any ordinance not in conflict with ... the State Constitution, or the state laws." The carveout proposed by Appellees would subvert the power of the State over its municipalities, which "exist solely by virtue of the State Constitution and legislative enactments," *Willis v. Potts*, 377 S.W.2d 622, 625 (Tex. 1964), and are best characterized as having a "principal-agent" relationship with the State. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 643 (Tex. 2004).

***12** The State further satisfied the first requirement by pleading a valid *ultra vires* claim against the City Officials, with the exception of Reyes, the City Manager. Section 370.003 explicitly removes from all municipalities the power to "adopt a policy under which the entity will not fully enforce laws relating to drugs[.]" Tex. Loc. Gov't Code § 370.003. For nearly a century, Texas courts have recognized the "elementary" rule that the "state may maintain an action to prevent abuse of power by public officers." *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926) (orig. proceeding); *Hollins*, 620 S.W.3d at 405. "[T]he State has an intrinsic right to ... enforce its own laws [and] where those laws are being defied or misapplied by a local official, an *ultra vires* suit is a tool 'to reassert the control of the state.' " *Hollins*, 620 S.W.3d at 410.

There is no governmental immunity bar to a lawsuit to require local officials to comply with Section 370.003. Accordingly, the first requirement is satisfied with the exception of the claim against Reyes, the City Manager.

B. Probable Right to the Relief Sought

Turning to the second requirement, we find that the State established a probable right to relief with respect to some of the relief sought in its temporary injunction request, but not all of the relief sought in its temporary injunction request. [5]

The State established a probable right to prevail on its theory that Local Government Code Section 370.003 preempts the Ordinance, depriving that law of effect. This theory lies at the heart of the State's requests for temporary relief. The Legislature can "withdraw a particular subject from a home rule city's domain" "by general law." *Tyra*, 822 S.W.2d at 628. Section 370.003 explicitly removes from all municipalities the power to "adopt a policy under which the entity will not fully enforce laws relating to drugs[.]" Tex. Loc. Gov't Code § 370.003. As explained in Part II, the Ordinance is preempted because it erects multiple barriers that prevent the City of San Marcos and its police officers from fully enforcing the state's drug laws. The City's argument that Texas's suit is an invalid attempt to control prosecutorial discretion fails. The Ordinance's prohibition on prosecuting certain criminal offenses is not an exercise in the discretion of law enforcement officials. Under the Ordinance, law enforcement officials and prosecutors, who act as the agents of Texas in enforcing State drug laws, *Wilkerson v. State*, 173 S.W.3d 521, 528 (Tex. Crim. App. 2005), lose their discretion to enforce the laws because they have no choice but to categorically excuse crimes.

The State's demonstration that the Ordinance is preempted justifies the relief that the State requests in the prayer of its opening brief: a temporary injunction prohibiting the

enforcement of the Ordinance pending a final trial on the merits. This relief encapsulates one of the requests for relief that the State requested in its motion for temporary relief—a temporary injunction enjoining the enforcement of the Ordinance and any corresponding San Marcos Police Department general order or directive. Such a temporary injunction adequately protects the State's " 'justiciable interest in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law' " while the appeal is pending. *Hollins*, 620 S.W.3d at 410 (quoting *Yett*, 281 S.W. at 842).

***13** The State has also challenged the trial court's denial of its request for a temporary injunction ordering the repeal of the Ordinance, but the State cites no authority establishing that a state appellate court can order repeal of a preempted ordinance. [6] On the contrary, the Texas Supreme Court has held that when "a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017). The same is necessarily true when an ordinance is held to be preempted—it is unenforceable, but it does not disappear.

Ordering the repeal of an ordinance would present grave separation-of-powers problems. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018). Courts have "no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute. The power of judicial review is more limited: It permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute—though only while the court's injunction remains in effect." *Id.* (citations omitted); *Steffel v. Thompson*, 415 U.S. 452, 469, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("Of course, a favorable declaratory judgment ... cannot make even an unconstitutional statute disappear."); *see Ex parte E.H.*, 602 S.W.3d 486, 502 (Tex. 2020) (Blacklock, J., dissenting) ("Courts are not legislatures. The Texas Constitution reserves the law-making and law-rescinding powers to the Legislature, and it prohibits the judiciary from 'exercis[ing] any power properly attached to either of the other [ ] [branches].' " (quoting Tex. Const. art. II, § 1)). The Texas Constitution vests the City of San Marcos, not the Court, with authority to adopt and repeal ordinances. In any event, ordering a repeal would constitute permanent relief that is unavailable at the temporary injunction stage. [7] Temporary injunctions are issued "to prevent only harm that cannot be prevented after a final determination on the merits," and that can be accomplished here short of repeal. *NMTC Corp. v. Conarroe*, 99 S.W.3d 865, 868 (Tex. App.—Beaumont 2003, no pet.).

Furthermore, the State is not entitled to—or necessarily still seeking—a temporary injunction requiring that the City and City Officials "fully enforce the drug laws in Chapter 481." The State acknowledges that Section 370.003 does not mandate that cities fully enforce the State's drug laws; it prohibits them from adopting policies that would frustrate their ability to do so. *See 31 Holdings I, LLC v. Argonaut Ins. Co.*, 640 S.W.3d 915, 922 (Tex. App.—Dallas 2022, no pet.) (distinguishing prohibitive and mandatory injunctive relief). Accordingly, we find that the State has established its right to a temporary injunction enjoining Appellees from enforcing the Ordinance.

C. Probable, Imminent, and Irreparable Injury in the Interim

***14** The final requirement for a temporary injunction is that the State demonstrate a "a probable, imminent, and irreparable injury in the interim." *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet. denied). The State has satisfied the requirement of demonstrating probable, imminent, and irreparable injury. The Texas Supreme Court has repeatedly reaffirmed the fundamental rule that the State has an "intrinsic right to ... enforce its own laws." *Hollins*, 620 S.W.3d at 410 (quoting *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015)); *Printz v. United States*, 521 U.S. 898, 912 n.5, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *Yett*, 281 S.W. at 842. Given this authority, there is no question that a local official's violation of state law inflicts irreparable harm on the State. *In re State*, —— S.W.3d at —— ("Indeed, the violation of duly enacted state law by local government officials clearly inflicts irreparable harm on the State." (citations and internal quotation marks omitted)); *Abbott v. Perez*, 585 U.S. 579, 602 n.17, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) (The "inability [of a state] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State."); *see also Tex. Ass'n of Bus.*, 565 S.W.3d at 441.

In *Hollins*, the Texas Supreme Court held that the State's "justiciable interest in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law" supported a temporary injunction. *Hollins*, 620 S.W.3d at 410. In reaching that conclusion, the Court emphasized that the sovereign "would be impotent to

'enforce its own laws' if it could not temporarily enjoin those breaking them pending trial." *Id.* Thus, "[w]hen the State files suit to enjoin *ultra vires* action by a local official, a showing of likely success on the merits is sufficient to satisfy the irreparable-injury requirement for a temporary injunction." *Id.* For the reasons explained above, the State made that showing.

D. Status Quo, Preservation of Equity, and Compliance with Rules of Civil Procedure

In addition to the three required elements for a temporary injunction, Appellees make several arguments in favor of the trial court's denial. Appellees first argue the requested relief would not "preserve the status quo." Appellees assert that because the Ordinance has been in effect since 2022, "the last uncontested status quo" was no enforcement of misdemeanor marijuana possession laws.

The "status quo" is the "last, actual, peaceable, non-contested status which preceded the pending controversy." *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016). The continuation of illegal conduct, however, "cannot be justified as preservation of the status quo." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). Where the acts sought to be enjoined constitute violation of the law—or, in this case, a continued failure to enforce state law—the status quo to be preserved cannot be a continuation of those acts. It is undisputed that possession of marijuana is illegal in Texas. *See* Tex. Health & Safety Code § 481.121 Therefore, we cannot justify allowing state law to continue to be violated. We further note that the record reflects that other jurisdictions, such as the Hays County Sheriff's Department and the Texas Department of Public Safety, are not bound by the Ordinance and, therefore, have been permitted to issue citations and arrest violators for misdemeanor possession of marijuana.

Finally, Appellees challenge the State's request for a temporary injunction on the grounds that it does not comply with Rule 683 of the Rules of Civil Procedure. Rule 683 governs injunctions and provides in relevant part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

***15** Tex. R. Civ. P. 683.

"The requirements of Rule 683 are mandatory and must be strictly followed." *InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986) (per curiam). The rule, however, mandates the contents of the trial court's temporary injunction, not the contents of the requesting party's application. Compliance with Rule 683 is an issue for the trial court on remand. Because there is no temporary injunction in place, any Rule 683 challenge is premature.

We sustain the State's second issue in part with respect to its request for a temporary injunction prohibiting enforcement of the Ordinance pending a final trial on the merits. We overrule the State's second issue with respect to the other relief that the State requested, and as to all relief requested against Reyes, the City Manager.

CONCLUSION

We reverse the trial court's order granting the plea to the jurisdiction with the exception of the State's claim against Reyes, the City Manager. We modify the trial court's order to reflect that dismissal of the State's claims against Stephanie Reyes, the City Manager, is without prejudice and affirm that portion of the trial court's order as modified. When we uphold a plea to the jurisdiction on sovereign immunity grounds, we allow the plaintiff the opportunity to replead if the defect can be cured. Although the State's pleadings against Reyes, the City Manager, do not affirmatively demonstrate jurisdiction, neither do they refute jurisdiction, and the State should have an opportunity to replead in an attempt to cure the jurisdictional defects. Therefore, we modify the order to dismiss without prejudice to allow the State the opportunity to replead. We reverse the order denying the State's request for temporary injunction prohibiting enforcement of the Ordinance. We remand the case to the trial court for proceedings consistent with this opinion and to

enter a temporary injunction prohibiting the enforcement of the Ordinance pending a final trial on the merits.

All Citations

--- S.W.3d ----, 2025 WL 1142065

Footnotes

1 The State sued the individuals in their official capacities.

2 Possession of between two and four ounces of marijuana is a Class A misdemeanor and possession of less than two ounces is a Class B misdemeanor. Tex. Health & Safety Code § 481.121. Possession of drug paraphernalia is a Class C misdemeanor. Tex. Health & Safety Code § 481.125(d).

3 Peace officers may issue a citation instead of taking a person before a magistrate if a person is accused of committing a Class C misdemeanor. Tex. Code Crim. Pro. art. 14.06(b).

4 The Health and Safety Code does not contain a provision prohibiting possession of "drug residue."

5 The State requested a temporary injunction enjoining Appellees from enforcing the Ordinance and ordering Appellees to (a) repeal the Ordinance; (b) cancel any corresponding San Marcos Police Department general order or directive; (c) fully enforce the drug laws in Chapter 481; (d) not discipline any employee of the City of San Marcos for enforcing the drug laws in Chapter 481; and (e) modify city policies and internal operating procedures to the extent that they have been updated in response to the Ordinance. On appeal, the State requests only an injunction enjoining Appellees from enforcing the ordinance and ordering Appellees to repeal the Ordinance.

6 The authorities cited in the State's post-submission briefing do not hold that a Court may order repeal of a preempted statute. *In re Woodfill* addressed a situation where Houston residents "filed a referendum petition requesting the City Council to reconsider and repeal its equal rights ordinance and, if it did not repeal the ordinance, to put it to popular vote." *In re Woodfill*, 470 S.W.3d 473, 475 (Tex. 2015). Because the petition obtained the required number of signatures, the Court granted conditional mandamus relief requiring that Houston officials either "repeal the ordinance" or "submit it to popular vote," as the city charter required. *Id.* at 476, 481. There was no preemption claim at issue. The Court issued conditional mandamus relief requiring the Houston City Council to comply with its own laws regarding the handling of a referendum petition in *In re Williams*, 470 S.W.3d 819, 820 (Tex. 2015).

7 The State's requests for the cancellation of Police Department general orders or directives and the modification of city policies also go beyond the scope of permissible temporary relief, the purpose of which is to "preserve the status quo of the litigation's subject matter pending a trial on the merits." *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).