ELECTRONICALLY FILED
2023 Aug 07 PM 4:36
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2023-CV-000422
PII COMPLIANT

IN THE THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

STATE OF KANSAS, *ex rel.* KRIS KOBACH, Attorney General, Petitioner, v. DAVID HARPER, Director of Vehicles, Department of Revenue, in his official capacity, and MARK BURGHART, Secretary of Revenue, in his official capacity, Respondents.	Case No. 23-CV-000422 Div. No. 3

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

This case concerns whether the Court should adopt the Attorney General's personal interpretation of a newly enacted state law, and order a policy change in the Kansas Department of Revenue that would (1) directly conflict with our state Constitution and (2) needlessly subject all driving-age transgender Kansans to violations of their fundamental rights to privacy, autonomy, and dignity. Proposed Intervenors are five such Kansans. That the Attorney General does not want to contend with the fact that his erroneous interpretation of SB 180 would violate the Kansas Constitution, and would rather kick this important question down the road for future costly, protracted litigation, is no reason to deny intervention. The Attorney General brought this lawsuit seeking adoption of his interpretation of SB 180 by this Court. Accordingly, he must be prepared to justify the relief he seeks statutorily *and* constitutionally. Proposed Intervenors clearly meet the standard for intervention as of right, and in the alternative, should be granted permissive intervention under K.S.A. 60-224. Because the Attorney General's arguments otherwise are unavailing, as set forth below, Proposed Intervenors respectfully request that the Court grant their motion to intervene.

ARGUMENT

A. The Attorney General's argument concerning ripeness and justiciability is misplaced and unsupported.

The Attorney General argues that the Proposed Intervenors should not be allowed to intervene in this case because they will not suffer any deprivation of constitutional rights unless he loses. Petitioner's Memorandum in Opposition to Motion to Intervene, 1-2 ¶ 1, and 3-4, § B, *see also id*. at 5 (Hereinafter "Opp. Memo."). Taken at face value, this argument amounts to an important concession: the Attorney General recognizes that the Proposed Intervenors would have standing to challenge any change in policy enacted by KDOR as a result of the Attorney General prevailing in this mandamus action. Those same Intervenors therefore have a justiciable *defense* at issue in this action—they are asking the Court not to adopt a reading of SB 180 that would necessarily implicate their constitutional rights. The Attorney General's arguments otherwise insert a nonexistent requirement into the statutory intervention standard that Proposed Intervenors need not meet.

This case, which the Attorney General himself filed and continues to prosecute, is justiciable. The "ripeness" requirement raised by the Attorney General applies to claims, not defenses. The Proposed Intervenors seek to intervene to assert *defenses* to the Attorney General's justiciable claims, not to assert affirmative claims against the Attorney General, KDOR, or anyone else. Importantly, the Attorney General has cited no authority applying justiciability doctrines such as ripeness to *defenses* asserted by putative intervenors. The propriety of intervention is governed solely by K.S.A. 60-224(a)(2)'s requirements of timeliness—which the Attorney General concedes (*see* Opp. Memo. 3)—and substantial interest and adequacy of representation, which we address below.

Relatedly, contrary to the Attorney General's implicit contention, K.S.A. 60-224(a)(2) does not impose a requirement that intervention to *defend against* justiciable claims is authorized only if every possible outcome of the case is adverse to the interests of the putative intervenors. In fact, the plain language of K.S.A. 60-224(a)(2) forecloses the Attorney General's argument, as it provides that intervention is required if "disposing of the action ***may*** as a practical matter substantially impair or impede the movant's ability to protect its interest…" K.S.A. 2022 Supp. 60-224(a)(2) (emphasis added). The statute recognizes that in some instances, the putative intervenors' desired result may be achieved, intervention notwithstanding.

Importantly, courts have held that "intervention may be based on an interest that is contingent upon the outcome of the litigation." *N.M. Off-Highway Vehicle Alliance v. United States Forest Serv.*, 540 F. App'x 877, 880 (10th Cir. 2013) (citing *San Juan Cty. v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007)).[1] The fact that a case may be resolved in the putative intervenor's favor, even absent intervention, is not a consideration in determining whether intervention is proper. *See*, *e.g.*, *Herrman v. Board of County Commissioners of Butler County*, 246 Kan. 152, 155, 785 P.2d 1003, 1006 (1990). Otherwise, intervention could be granted only if the putative intervenor is certain to lose. But that is plainly not the correct standard—the Court must consider the issues of timeliness, substantial interest, and adequate representation when evaluating whether to grant permission to intervene.

Herrman is instructive. There, the Kansas Supreme Court affirmed an applicant's right to intervene and defend against the plaintiffs' claims, even though, depending on the outcome of the

[1] Federal Rule 24 is materially identical to K.S.A. 60-224, and federal case law under Fed. R. Civ. P. 24 is authoritative when construing K.S.A. 60-224. *See Leslie J. Campbell American Legion Post v. Wade*, 210 Kan. 537, 539, 502 P.2d 773, 775-76 (1972) (holding that the liberal application afforded to Rule 24 by the federal courts should be applied to K.S.A. 60-224); *Farmers Ins. Co. v. Tucker*, No. 59,242, 1986 Kan. App. LEXIS 1631, at *2 (Kan. Ct. App. Dec. 24, 1986) (unpublished opinion) ("[F]ederal decisional law construing Rule 24 is authoritative in construing K.S.A. 60-224.").

case, the applicant's interests may not have been adversely affected. There, two landowner plaintiffs filed a lawsuit challenging "the issuance by Butler County Board of County Commissioners (Board) of a special use permit allowing construction of a state-owned prison facility." 246 Kan. at 153-54, 785 P.2d at 1005. "The Board answered that the Butler County zoning regulations authorized a special use permit within an A–2 zoning district for 'public buildings erected [on] land used by any agency of a city or the county or state government.'" *Id.* Had the Board prevailed in the lawsuit, the construction of the state-owned prison facility would have proceeded. Nevertheless, the trial court allowed the State of Kansas to intervene in the lawsuit for the purpose of pursuing "a compelling public and state interest in the construction of the prison," 246 Kan. at 154; 785 P.2d at 1006, and the Kansas Supreme Court held that the intervention was appropriate under K.S.A. 60-224(a)(2). *Id*. *See also N.M. Off-Highway Vehicle All.*, 540 F. App'x at 880 (holding that environmental group was entitled to intervene as of right because they would be impaired if the outcome of the district court litigation does not maintain the current implemented policy that the group favored).

Proposed Intervenors' constitutional defenses are ripe because the underlying mandamus action is ripe. So long as the Attorney General continues to seek an order interpreting SB 180 in a manner that conflicts with the constitution, intervention to assert a defense premised on the constitutional rights of transgender Kansans is proper, and no controlling authority holds otherwise. The Attorney General's arguments attempt to recharacterize Proposed Intervenors' role in this litigation so as to avoid constitutional scrutiny of his legal interpretation and should be rejected.

B. The Proposed Intervenors have a substantial interest in the subject matter of the litigation.

The Attorney General does not dispute the facts showing the Proposed Intervenors' substantial interest in the subject matter of the litigation. Namely, if the Attorney General prevails, Proposed Intervenor Doe 2 will be deprived of the ability to secure a driver's license with a gender marker consistent with their gender,[2] and the other four Proposed Intervenors will be deprived of the opportunity to secure driver's licenses with consistent gender markers when their current licenses expire. Likewise, the Attorney General has not disputed the injuries that the Proposed Intervenors suffer by virtue of being issued driver's licenses with gender markers inconsistent with their gender. The Proposed Intervenors would suffer violations of their constitutional rights if the Attorney General's requested interpretation of SB 180 is adopted by this Court, forcing KDOR to change its driver's license policies. "Potential violations of constitutional rights can warrant intervention." *Farmers Grp. v. Lee*, 29 Kan. App. 2d 382, 386, 28 P.3d 413, 417 (2001) (finding intervenors had a substantial interest in the subject matter of the action when their due process rights were threatened by an injunction) (citing *Johnson v. Mortham*, 915 F. Supp. 1529, 1536 (N.D. Fla. 1995) (registered voters have standing to intervene to challenge voting district in which registered)). As a result, the Proposed Intervenors' interest is substantial and sufficient to entitle them to intervene as of right under K.S.A. 60-224(a)(2).

Relying on *State ex rel. Stephan v. Kansas Dept. of Revenue*, 253 Kan. 412, 856 P.2d 151 (1993), the Attorney General asserts that the Proposed Intervenors will only have their interests affected "once this Court rules and provides an authoritative interpretation of SB 180 that requires a driver's license to contain the licensee's biological sex." Opp. Memo. 8. Though it involves the

[2] In fact, Doe 2 has already been deprived of the opportunity to secure a driver's license with a gender marker that is consistent with his gender, as the Court effectively changed KDOR's current driver's license policy by entering the temporary restraining order.

same parties, *State ex rel. Stephan* is plainly inapposite. In that case, the Supreme Court considered whether the putative intervenors, certain boards of county commissioners, had a substantial interest in a lawsuit brought by the Attorney General against KDOR. There, the Attorney General sought to compel KDOR to conduct "a statewide reappraisal to ensure all real property is appraised at fair market value on a uniform and equal basis" and to enjoin permanently KDOR from imposing taxes based on any "appraisal system [that] is not in substantial compliance with the Constitutional requirement of uniform and equal fair market appraisal." 253 Kan. at 413, 856 P.2d at 153. The Attorney General and KDOR ultimately agreed to a resolution of the case, made effective by an order entered by the court. "It appears the trial judge, with the parties' consent and by agreement, ordered the defendants to follow legislative direction, *i.e.*, to follow the law." 253 Kan. at 415, 856 P.2d at 153. *After* the court entered the order resolving the case, the putative intervenors filed their motion to intervene, which the court denied. *Id.* Before the Supreme Court, the putative intervenors argued that they had a substantial interest as required by K.S.A. 60-224(a)(2), because "it is the county officials whose action will be scrutinized and who will have to defend against allegations of substantial noncompliance with the law. Corrective action, if any will be directed toward county appraisers, and the county is responsible for funding such corrective action." 253 Kan. at 420, 856 P.2d at 157. The Supreme Court rejected that argument and ruled that the putative intervenors did not have a substantial interest, because the effect on the putative intervenors was speculative and not supported by any evidence in the record on appeal:

> The problem with this claim is that it is academic and not supported by the record on appeal, which contains no allegations concerning any particular county or county appraiser. Until some action is taken against a particular county or county official, the proposed intervenors are not affected parties and do not have a substantial interest in the subject matter of this case. County officials will have a remedy if and when action is taken against them.

Id.

State ex rel. Stephan is inapposite because, in that case, the Attorney General had already secured his requested remedies by settlement with KDOR (253 Kan. at 415, 856 P.2d at 153), and the potential effect on the putative intervenors was still another step removed, speculative, and not supported by the record. 253 Kan. at 420, 856 P.2d at 157. In this case, the Proposed Intervenors have provided declarations demonstrating the types of injuries that they will suffer if the Attorney General prevails in this case—injuries that the Attorney General has not disputed. Those injuries are not speculative. Moreover, the deprivation of the opportunity of transgender Kansans, including the Proposed Intervenors, to have driver's licenses with markers that match their gender is the objective of the Attorney General's mandamus petition. It strains credulity for him to claim that the Proposed Intervenors, who would suffer harm from this deprivation if the Court allows it, have no substantial interest in the litigation, when the deprivation is the very object of the litigation.[3] *See also Herrman*, 246 Kan. at 155, 785 P.2d at 1006 (affirming intervention by State of Kansas to ensure continuing efficacy of zoning decision which would facilitate construction of state-owned prison); *Kane Cty. v. United States*, 928 F.3d 877, 891 (10th Cir. 2019) ("We apply 'practical judgment' when determining whether the strength of the interest and the potential risk of injury to that interest justify intervention. Establishing the potential impairment of such an interest presents a minimal burden, and such an impairment may be contingent upon the outcome of litigation.") (internal quotes and citations omitted); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246 (10th Cir. 2001) (holding that the risk of future environmental degradation as a result of the lawsuit was an interest sufficiently related to the subject of the action to support intervention as of right).

[3] The Attorney General also claims that the Proposed Intervenors face "no immediate injuries." *See* Opp. Memo. 8. While this claim is untrue (*see supra* p. 5, fn. 2), the Proposed Intervenors need only have a "substantial interest" under K.S.A. 60-224(a)(2), not "immediate injuries."

The Attorney General also makes several other arguments under the heading of "substantial interest" that have no relationship to substantial interest under K.S.A. 60-224, and are not persuasive.

First, the Attorney General once again deploys his ripeness argument. *See* Opp. Memo. 8. But as noted above, Proposed Intervenors do not propose to assert any affirmative constitutional claims, only defenses to the Attorney General's claims. *See* discussion *supra*, p. 2. Ripeness is not at issue.

Second, the Attorney General claims that the Proposed Intervenors' rights would not be prejudiced if intervention is denied because they can simply file another lawsuit later. *See* Opp. Memo. 8. Again, this attempts to read a requirement into the intervention statute that is not there. The option to file a future lawsuit does not justify denying Proposed Intervenors the right to intervene. *See W. Energy All. v. Zinke*, 877 F.3d 1157, 1167 (10th Cir. 2017) ("Where a proposed intervenor's interest will be prejudiced if it does not participate in the main action, the mere availability of alternative forums is not sufficient to justify denial of a motion to intervene.") (internal citation excluded). In addition, there is no reasonable dispute that the Proposed Intervenors would suffer prejudice if their Motion is denied. "[T]he *stare decisis* effect of the district court's judgment is sufficient impairment for intervention." *Utah Ass'n of Ctys.*, 255 F.3d at 1254 (quoting *Coal. of Ariz./New Mexico Ctys. for Stable Econ. Growth v. DOI*, 100 F.3d 837, 844 (10th Cir. 1996)).

By arguing that the Proposed Intervenors should await the resolution of this litigation and sue later, the Attorney General essentially has invited the Court to risk entering an order in violation of the constitutional rights of transgender Kansans, including Proposed Intervenors. Apart from inviting constitutional violations, from a judicial economy standpoint, it makes no

sense to defer to additional litigation a question that can and should be resolved now. In fact, the Kansas Supreme Court has held that the avoidance of a second lawsuit is a good reason to grant a motion to intervene. *McDaniel v. Jones*, 235 Kan. 93, 109, 679 P.2d 682, 696 (1984) ("The defendants argue, however, that the United States should have been required to file another action seeking a determination of its rights…This argument holds no persuasive merit where compelling reasons cannot be advanced for requiring the duplication of lawsuits when the interests of the parties can be resolved in an existing lawsuit and intervention does not result in any prejudice to the parties."); *see also Coal. of Ariz./New Mexico Ctys.*, 100 F.3d at 844 (holding that the purpose of intervention is to prevent "a multiplicity of suits where common questions of law or fact are involved").

Finally, the Attorney General claims that if intervention were allowed, he would be put in the "awkward" position of having to prosecute the mandamus action against KDOR while at the same time defending KDOR against Proposed Intervenors' constitutional "claims." Opp. Memo. 8-9. Similarly, he claims that the Proposed Intervenors must be joined to the case, if at all, as third-party plaintiffs. Opp. Memo 2, ¶ 3. This is nothing more than smoke and mirrors and should be disregarded. Once again, if allowed, the Proposed Intervenors would assert *defenses* to the Attorney General's claims based on the Kansas Constitution, which are defenses that KDOR has not asserted.[4] The Proposed Intervenors have not proposed to assert any claims against KDOR in this action, based on the Kansas Constitution or otherwise. Rather, the Attorney General must defend *his own interpretation* of SB 180 against both statutory and constitutional defenses. That is his responsibility as Petitioner in this action. He is not free to request entry of an order by this

[4] Perhaps for this reason, KDOR has consented to the Motion to Intervene and asked the Court to grant the Motion. *See generally,* Respondent's Response to Motion to Intervene.

Court adopting his legal opinion without due consideration of the Proposed Intervenors' legitimate defenses that said opinion directly violates the Kansas Constitution. Far from needing to "defend" KDOR in this action if intervention is granted, the Attorney General must do only that which what he is required to do already: prove that his interpretation of SB 180 and its effect on the issuance of driver's licenses is statutorily—*and constitutionally*—sound.[5]

C. The Proposed Intervenors' interests are not adequately represented by the Respondent.

It is well-established that "[t]he provisions of 60–224(a) are to be liberally construed, and to avoid intervention the opposing party has the burden of showing the applicant's interest is adequately represented by the existing parties." *McDaniel*, 235 Kan. at 106-07. The Attorney General's argument that KDOR and Proposed Intervenors' interests are "wholly aligned" is contrary to the facts of the case thus far. Opp. Memo. 5 ("As to the issues *actually in front of the court*, the interest of KDOR and Proposed Intervenors are wholly aligned," and thus the Proposed Intervenors' interests are adequately represented).

The precise reason that the Proposed Intervenors' interests are not adequately represented is that Respondent has not defended its interpretation of SB 180 on constitutional grounds. In fact, the Attorney General himself maintains that the Respondent *cannot make such an argument*. *See* Opp. Memo. 6 (KDOR "cannot assert any harm in complying with a validly enacted statute, nor can it assert perceived injuries on behalf of third parties."). The constitutionality of the statutory interpretation sought by the Attorney General *is* properly before this Court, because the Attorney General put it there by filing this action; but there is no party currently making, or capable of

[5] The only way the Attorney General conceivably would have to defend KDOR would be in a future separate action, which the Attorney General himself has invited, if the Court denies the Motion to Intervene and grants the Attorney General's prayer for relief.

making (if the Attorney General is correct), that particular argument. The Respondent's failure to pursue the constitutional defenses to the relief sought by the Attorney General therefore constitutes inadequate representation of Proposed Intervenors' interests. *See Leslie J. Campbell American Legion Post v. Wade,* 210 Kan. 537, 539, 502 P.2d 773, 775-75 (1972) (holding that the rights of proposed intervenor were not adequately represented by the same-sided party because they could not claim the same rights as intervenors).

Case law is also clear that *partial* alignment of interests between Proposed Intervenors and KDOR does not justify denying the Motion to Intervene. *McDaniel*, 235 Kan. at 109, 07, 679 at 695 ("the interests of the existing parties and the party seeking intervention need not be wholly adverse before there is a basis for concluding that existing representation of a different interest may be inadequate.").[6] The litmus test for adequate representation of intervenors' interests is not whether the parties seek the same outcome; it is whether the parties' individual interests in reaching that jointly desired outcome are of a different character or type.

In sum, Proposed Intervenors seek intervention to argue that the Attorney General's requested interpretation of SB 180 violates their constitutional rights, and that the Court can and should interpret SB 180 in a way that does not cause this inherent, irreparable harm. "If a court can genuinely, reasonably, plausibly, or fairly interpret and construe statutory language consistent with legislative intent in a manner that also preserves it from impermissibly encroaching on constitutional limits, the court must do so." *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.2d 776, 780 (2021) (internal quotations and citation omitted). KDOR, however, has not made

[6] Contrary to the Attorney General's contention, the Proposed Intervenors have never complained that the Respondent's interests are "incompatible" with theirs. *Cf.* Opp. Memo. 6. The Proposed Intervenors have, in fact, acknowledged that the Respondent's opposition to the Attorney General's requested relief is in alignment with their interests, but that alignment still does not constitute adequate representation. *See* Memorandum in Support of Motion to Intervene 11-12.

this constitutional avoidance argument, which is understandable: its interest lies in the administration of the agency, rather than the constitutional rights of the clientele the agency serves. But this divergence lays bare that the Proposed Intervenors' *interests* are not adequately represented by KDOR, even if the parties seek the same *outcome*. Intervention is therefore warranted.

D. The Attorney General's arguments against permissive intervention are unfounded.

The Attorney General argues that permissive intervention should be denied because it would delay resolution and prejudice the adjudication of the mandamus action. Opp. Memo. 2, ¶ 4; *id.* at 9-10. He claims that the Proposed Intervenors "raise constitutional claims," "that are completely separate," would cause a "procedural morass," and could be brought in a different future lawsuit. Opp. Memo. 2, ¶ 4; *id*. at 9-10. These arguments are baseless. If the Court were not inclined to grant the Proposed Intervenors' Motion as of right, the Court should grant it as a permissive matter.

While there are no facts supporting the Attorney General's argument of delay, there are ample facts to the contrary. The Attorney General concedes that the Proposed Intervenors' Motion is timely (Opp. Memo. 3)—appropriately so, as the Proposed Intervenors could not have moved to intervene any earlier. After they filed their Motion to Intervene, the Proposed Intervenors sought *expedited briefing* on this Motion, which, notably, the Attorney General opposed. While this Motion has been pending, the Court issued a scheduling order, considering the input of the Attorney General and KDOR. Among other things, that scheduling order sets deadlines for discovery and a temporary injunction hearing in the near term. The Proposed Intervenors have not proposed any extensions to the scheduling order, and they will abide by the deadlines set by the Court.

Similarly, intervention would not create a "procedural morass." As noted above, the Attorney General will need to justify his requested relief on constitutional grounds; he will not be called on to defend KDOR, only his own interpretation of the law. The Attorney General's interpretation of SB 180, and whether it is correct, create the common issues of law and fact in this lawsuit. Intervention would not force litigation of ancillary issues or otherwise prejudice the parties. In fact, quite the opposite: it would permit this Court to issue a definitive ruling regarding the proper interpretation and effect of SB 180, with due consideration for the constitutional implications of the Attorney General's requested relief. As much as he might want to sidestep those considerations, statutory interpretation in this case must include the Proposed Intervenor's argument that SB 180 should be interpreted in a manner that avoids infringing upon transgender Kansans' constitutional rights. Permissive intervention is proper.

As a result, if the Court were not inclined to grant the Proposed Intervenors' Motion as of right, the Court should grant it as a permissive matter.

CONCLUSION

For the foregoing reasons, the Proposed Intervenors respectfully request that the Court grant their Motion to Intervene.

Respectfully submitted,

By: /s/ Sharon Brett

Sharon Brett, KS Bar 28696
D.C. Hiegert, KS Bar 29045
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF KANSAS
10561 Barkley St., Suite 500
Overland Park, KS 66212
Telephone (913) 303-3641
Facsimile (913) 490-4119
sbrett@aclukansas.org
dhiegert@aclukansas.org

Rose Saxe*
Aditi Fruitwala*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
Rsaxe@aclu.org
afruitwala@aclu.org

Scott C. Hecht, KS Bar 16492
Douglas R. Dalgleish, KS Bar 22328
Paulina Escobar *
STINSON LLP
Telephone 816-842-8600
Facsimile 816-691-3495
1201 Walnut St., Suite 2900
Kansas City, MO 64106
scott.hecht@stinson.com
doug.dalgleish@stinson.com
paulina.escobar@stinson.com

ATTORNEYS FOR INTERVENOR-RESPONDENTS

* *Pro Hac Vice* application forthcoming

Certificate of Service

On August 7, 2023, I caused a copy of the foregoing to be electronically filed using the Court's electronic filing system and also caused a copy to be served on counsel via email.

/s/ Sharon Brett
Sharon Brett