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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: Order on Motion to Intervene

SO ORDERED.

/s/ Honorable Teresa L Watson, District Court Judge

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

ORDER ON MOTION TO INTERVENE

The State of Kansas, *ex rel.* Kris Kobach, Attorney General, filed a petition for mandamus and injunctive relief relating to Senate Bill 180, recently enacted by the Kansas Legislature. SB 180 is also known as the Women's Bill of Rights. Along with the petition, he filed a motion for temporary restraining order and temporary injunction and an affidavit. The Court, pursuant to K.S.A. 60-903, granted the Attorney General's request for an *ex parte* temporary restraining order. The parties later agreed to extend the temporary restraining order until the Court resolved the motion for temporary injunction.

Five individuals, Adam Kellogg, Kathryn Redman, Juliana Ophelia Gonzales-Wahl, Doe No. 1, and Doe No. 2, seek to intervene in this lawsuit. Reference to these individuals as a group

will be to "Proposed Intervenors" for purposes of this order. The motion to intervene was fully briefed and argued to the Court, and the Court is ready to rule.

THE INSTANT LAWSUIT.

SB 180 was adopted over the Governor's veto and became law on July 1, 2023. Section 1(a) says: "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. Section 1(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."

For purposes of the instant lawsuit, the Attorney General asserts that the Kansas Department of Revenue's Division of Vehicles ("Division") collects information about the sex of each person who applies for a driver's license. This information is retained in an agency database. Respondents counter that they collect information about "gender," not "sex." The Attorney General argues that "sex" and "gender" are interchangeable for purposes of driver's licensing statutes. 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) states that a driver's license must indicate, among other things, the licensee's "gender." However, this information is displayed on the driver's license itself under the heading "sex."

The Attorney General asserts that the Division has in the past allowed applicants to obtain and/or change a license to include identifying information for sex other than "biological sex, either male or female, at birth," and that this practice has not ceased with the passage of SB 180. Respondents explain that the Division provided "guidance" outlined in an internal memo to

driver's license examiners in 2011 regarding requests for gender reclassification on driver's licenses. The guidance document discusses reclassification based on a court order or a medical declaration from a licensed physician 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."

Respondents acknowledge that the Division continued to handle reclassification of gender on driver's licenses according to the 2011 guidance document even after the passage of SB 180. Respondents' motion indicates that during a 3.5-year period from July 2019 to December 2022, there were 233 requests for such reclassifications statewide. In January 2023, there were two requests, and in June 2023, there were 172 requests in one month alone.

The Attorney General asserts that the Division's actions in allowing applicants to obtain and/or change a license to include identifying information for sex other than "biological sex, either male or female, at birth" on and after the effective date of SB 180 is a violation of law. The Attorney General filed his petition for mandamus and injunctive relief against the named Respondents to obtain the Division's compliance with SB 180.

Respondents argue that SB 180 does not apply to driver's licenses because it is a general law which is superseded by the specifics of K.S.A. 8-240(c) and K.S.A. 8-243(a). Respondents further assert that SB 180 does not apply because it speaks in terms of "sex" and not "gender," the term used in K.S.A. 8-240(c) and K.S.A. 8-243(a), and the two are not interchangeable.

ISSUES RAISED BY PROPOSED INTERVENORS.

Proposed Intervenors Kellogg, Redman, Gonzales-Wahl, and Doe No. 1 all hold driver's licenses that do not reflect their sex at birth. These current Kansas driver's licenses have expiration dates between 2024 and 2027. These Proposed Intervenors are concerned about the

effects of SB 180 on their future ability to renew their driver's licenses so that the licenses continue to display something other than biological sex at birth. Doe No. 2, a minor, holds a Kansas driver's license that reflects biological sex at birth. The license is current, and Doe No. 2 provides no information about the license expiration date. Doe No. 2 states a desire to change the driver's license to reflect something other than sex at birth but does not indicate any prior attempt to do so. Doe No. 2 is concerned about the future ability to do this under SB 180.

The Attorney General's petition for mandamus and injunctive relief asks the Court to order Respondents to comply with SB 180, specifically to:

> "cease issuing driver's licenses or other documents that identify the holder thereof as a sex other than the person's sex at birth and . . . correct the data set it maintains under K.S.A. 8-249 or any other statute or regulation so that such records identify each individual therein as either male or female at birth; and . . . [s]uch other or further relief as the Court deems just and proper."

Proposed Intervenors argue that if the Court grants the Attorney General's request for relief, they will suffer violations of their rights under Section 1 of the Kansas Constitution Bill of Rights, which says: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."

MOTION TO INTERVENE.

Intervention is a matter within this Court's discretion. *Montoy v. State*, 278 Kan. 765, 766, 102 P.3d 1158 (2005). K.S.A. 60-224 guides the Court's analysis on the question of whether to allow those other than parties to the lawsuit to intervene. There are two types of intervention: 1) intervention as of right; and 2) permissive intervention. Both require a timely motion by those seeking to intervene. There is no dispute that the Proposed Intervenors filed a timely motion shortly after the inception of this lawsuit.

Intervention as of right occurs when a statute provides an unconditional right to do so. There is no such statute at issue here. It also occurs where the movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter substantially impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." K.S.A. 60-224(a)(2). These two have been referred to as "a substantial interest in the subject matter of the litigation," and "inadequate representation of the intervenor's interests by the parties." *Gannon v. State,* 302 Kan. 739, 741–42, 357 P.3d 873 (2015). Intervention as a matter of right is "liberally construed to favor intervention," but it is not absolute. *Smith v. Russell,* 274 Kan. 1076, Syl. ¶3, 58 P.3d 698 (2002).

The Court may grant permissive intervention when a statute provides a conditional right to do so. There is no such statute at issue here. Permissive intervention is also allowed where a movant "has a claim or defense that shares with the main action a common question of law or fact." K.S.A. 60-224(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." K.S.A. 60-224(b)(3).

The instant lawsuit is a mandamus action. "Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." Further, "mandamus is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business." *In re Admin. of Just. in the Eighteenth Jud. Dist.*, 269 Kan. 865, 871, 9 P.3d 28 (2000). Here, the Attorney General seeks to compel

Respondents' compliance with SB 180. Respondents dispute the Attorney General's interpretation of the recently enacted statute. The parties seek this Court's authoritative interpretation of the law for the guidance of Respondents in the administration of their duties.

Proposed Intervenors assert that their substantial interest in the subject matter of the litigation is the ability to, in the future, renew or obtain a driver's license displaying something other than biological sex at birth. The Attorney General counters that this may or may not be an issue depending on how this Court interprets SB 180, thus intervention should be denied at this time because the Proposed Intervenors' interest is contingent. There is precedent supporting this argument. See *State ex rel. Stephan v. Kansas Dept. of Revenue,* 253 Kan. 412, 420, 856 P.2d 151 (1993) (in declaratory judgment action seeking an interpretation of the law, until "some action is taken against a particular" group of intervenors, they "are not affected parties and do not have a substantial interest in the subject matter of this case.") There is somewhat less persuasive precedent to the contrary. See *Herrmann v. Bd. of Cnty. Com'rs of Butler Cnty.,* 246 Kan. 152, 154-55, 785 P.2d 1003 (1990) (where local landowners challenged the issuance of a zoning permit allowing construction of a prison, the State of Kansas allowed to intervene as a matter of right to argue the compelling state interest in building a prison); and *State ex rel. Stephan v. Parrish,* 256 Kan. 746, 887 P.2d 127 (1994) (though not a disputed issue, local Moose Lodge allowed to intervene in mandamus and quo warranto action brought by Attorney General against the Kansas Department of Revenue to test the constitutionality of instant bingo games).

Because the Court opts to allow permissive intervention, further discussion of intervention as a matter of right is unnecessary. Proposed Intervenors have "a claim or defense that shares with the main action a common question of law or fact," K.S.A. 60-224(b)(1)(B), in that they have an interest in persuading the Court to interpret SB 180 in a manner consistent with

Respondents' interpretation by raising the doctrine of constitutional avoidance. The doctrine is a canon of statutory construction that applies only if a statute is ambiguous, vague, or overbroad. It cannot be invoked to change the meaning of plain language. But if the language is ambiguous, the doctrine says that such ambiguity is resolved by selecting a statutory interpretation that is constitutionally valid. *Johnson v. U.S. Food Serv.,* 312 Kan. 597, 602, 478 P.3d 776 (2021). Proposed Intervenors plan to assert that SB 180 as interpreted by the Attorney General, and as applied to the issuance of driver's licenses, violates Section 1 of the Kansas Constitution Bill of Rights. Proposed Intervenors posit that, assuming this is true, SB 180 can be interpreted in a constitutional manner that would allow them to keep or obtain driver's licenses displaying something other than biological sex at birth.

This does not, however, end the permissive intervention analysis. "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." K.S.A. 60-224(b)(3). Counsel for the Proposed Intervenors assured the Court at the hearing that there would be no delay because they could adhere to the briefing and other deadlines currently in place under the Court's scheduling order. The Attorney General said he may need additional time for discovery if the motion to intervene was granted, given that he raised questions about Proposed Intervenors' standing, among other things. Counsel for Proposed Intervenors indicated there would be no objection to a reasonable extension of deadlines if they are allowed to intervene.

The Court is mindful that allowing private parties to intervene in a mandamus action changes the procedural landscape of the lawsuit. But this sort of reality has been overcome in other cases. See *Herrmann,* 246 Kan. at 155 ("the arrival of the [intervenor] onto the scene greatly altered the nature of the litigation, but that is no cause to deny intervention"). Proposed

Intervenors want to align themselves with Respondents. Proposed Intervenors are not government officials and not otherwise proper respondents in a mandamus action. Their entry into the case has the potential to raise other issues that may compromise the existing schedule, including the temporary injunction hearing date set for November 1, 2023. But as counsel for Proposed Intervenors said at the hearing on this motion, the parties have already agreed to an extension of the temporary restraining order until such time as the Court rules on the temporary injunction. With that agreement, and adjustments to the scheduling order to allow existing parties adequate time to conduct discovery and respond to facts and arguments introduced by the new parties, there will be minimal prejudice even if the temporary injunction ruling happens at a date later than otherwise contemplated.

The motion to intervene is granted. The parties are directed to confer about whether and how far the existing deadlines should be extended to accommodate the addition of these intervening parties and propose a revised schedule of deadlines to the Court. If the parties cannot agree to such a schedule, they are directed to contact Division 3 to set an in-person status conference.

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 filed electronically providing notice to counsel of record.

/s Angela Cox
Administrative Assistant