

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.

And

ADAM KELLOGG, KATHRYN REDMAN,
JULIANA OPHELIA GONZALES-WAHL,
and DOE INTERVENOR 2, on behalf of her
minor child,

Intervenor-Respondents.

Case No. 23-CV-000422

Div. No. 3

**INTERVENOR-RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM OF LAW IN SUPPORT**

Pursuant to Kansas Supreme Court Rule 141, Intervenor-Respondents move this Court to grant them summary judgment and dismiss this mandamus action because SB 180, codified at K.S.A. 77-207, does not apply to the issuance of Kansas driver's licenses and, in the alternative, is at most ambiguous and should be construed to avoid the serious constitutional implications of granting the relief sought by Petitioner in this action.

The unrebutted evidence in this matter shows that requiring transgender Kansans to carry a driver's license that outs them as transgender serves no legitimate government purpose and puts

individuals like Intervenor-Respondents in grave risk of serious harm. Although this Court granted Petitioner’s request for a temporary injunction, that decision is independent from the merits of this action. Accordingly, Intervenor-Respondents respectfully ask this Court to grant their motion for summary judgment for the reasons set forth below (and to deny summary judgment to Petitioner).

INTERVENOR-RESPONDENTS’ UNCONTROVERTED CONTENTIONS OF FACT

Transgender People, Gender, and Gender Dysphoria

1. Transgender people are people who have a gender identity different from their sex assigned at birth. Temporary Inj. Hr’g Tr. (“TI Hr’g Tr.”) 315:6-8 (attached as **Exhibit 1**); Intervenor-Resp’ts’ Offer of Proof for Dr. Beth Oller’s Expert Testimony on Gender Identity, Gender Dysphoria, and The Impact of Incongruent Driver’s Licenses on Gender Dysphoria, filed Jan. 17, 2024 (hereinafter “Offer of Proof”) ¶ 33¹. Gender identity refers to a person’s fundamental, internal sense of belonging to a particular gender. Ex 1, TI Hr’g Tr. 315:20-316:1. It is a significant part of human identity and may or may not be concordant with sex assigned at birth. Ex. 1, TI Hr’g Tr. 316:1-3. Gender identity cannot be changed at will as gender identity is an interplay of biological factors and environmental influences. Offer of Proof ¶ 35 & Ex. C; *see also* Offer of Proof ¶ 22 (noting Dr. Oller has treated over 100 transgender patients, informing her clinical opinions on gender dysphoria).

2. The term “biological sex” is not a medical term, and the term “sex” is made up of many different components, including external genitalia, chromosomes, gonads, hormones,

¹ Intervenor-Respondents acknowledge that this Court previously excluded Dr. Oller as an expert. Ex. 1, TI Hr’g Tr. 46:1-8. On consent of all parties, Intervenor-Respondents submitted an Offer of Proof outlining Dr. Oller’s expert testimony had this Court concluded she was qualified. Ex. 1, TI Hr’g Tr. 46: 9-16; 48:21-49:4. As discussed in greater detail below, Intervenor-Respondents continue to contest Dr. Oller’s exclusion as an expert in this case. *See also* Appellate Case No. 24-127390 A. (appeal from Court’s issuance of the Temporary Injunction on March 11, 2024). Intervenor-Respondents thus urge this Court to reconsider its earlier view and hold that Dr. Oller’s proposed expert testimony could be made admissible at trial and therefore is properly considered at summary judgment. *See* Kan. S. Ct. Rule 141(d).

secondary sex characteristics, internal genitalia, gene expression, brain structure, hormone receptor sensitivity, and gender identity. Offer of Proof ¶ 28.

3. The term “sex assigned at birth” refers to the sex designation that physicians put on an infant’s birth certificate and is determined solely by viewing an infant’s external genitalia, unless there is ambiguity that would prompt a physician to explore other aspects of sex. *Id.* ¶ 29.

4. For cisgender people (those who are not transgender), their sex assigned at birth matches their gender identity. *Id.* at ¶ 32. For transgender people, their sex assigned at birth does not match their gender identity. *Id.* at ¶ 33.

5. Gender dysphoria is a medically recognized condition defined by a marked incongruence between a person’s gender identity and the sex they were assigned at birth, when accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning. *Id.* at ¶ 39. Gender dysphoria is a serious medical condition that, if left untreated, can lead to debilitating depression and even suicidal thoughts and acts. Ex. 1, TI Hr’g Tr. 229:24-230:5.

6. The treatment of gender dysphoria is guided by the Standards of Care set forth by the World Professional Association for Transgender Health (WPATH). Offer of Proof ¶ 45. These standards were developed by global professionals in medicine, psychology, law, social work, counseling, psychotherapy, family studies, sociology, anthropology, sexology, speech and voice therapy, and other fields. Decl. of Dr. Beth Oller (“Oller Decl.”) ¶ 25 (attached as **Exhibit 2**); *see also* Oller Decl. Ex. 20, at 58 (attached as **Exhibit 3**). They are the recognized standard of care to address gender dysphoria. Offer of Proof ¶ 45.

7. Treatment under the WPATH standards may include bringing a person’s social interactions, appearance, and body into greater alignment with the person’s already-existing

gender identity, which in turn helps to alleviate the distress associated with gender dysphoria. Ex. 2, Oller Decl. ¶¶ 26-28. Treatment can include hormonal and surgical treatments, voice and communication therapy, primary care, reproductive and sexual health care, mental health care, and social transition. Ex. 1, TI Hr’g Tr. 318:15-319:23; Offer of Proof ¶ 48.

8. Social transition means living one’s life consistently with one’s gender identity, including using identity documents such as a driver’s license that reflect one’s gender identity. Ex. 1, TI Hr’g Tr. 308:10-20; Offer of Proof ¶ 52. Changing one’s name or pronouns, dressing in ways that align with one’s gender identity, and amending legal documents to accurately reflect one’s gender identity are often the first—and sometimes the only—form of gender affirmation engaged in by transgender individuals. Offer of Proof ¶ 52; *see also* Ex. 2, Oller Decl. ¶ 28; Oller Decl. Ex. 3, at 5 (attached as **Exhibit 4**); Oller Decl. Ex. 8, at 10 (attached as **Exhibit 5**); Oller Decl. Ex. 15, at 2-4 (attached as **Exhibit 6**).

9. Untreated gender dysphoria can cause harm to a person’s physical and mental health and can cause depression, anxiety, and suicidality. Offer of Proof ¶ 51. Proper treatment leads to improvements in mental health including a reduction in anxiety, depression, and hyper vigilance. Ex. 1, TI Hr’g Tr. 317:16-318:13; *see also* Offer of Proof, Ex. D, at 2, 7-9.

10. Age-appropriate, individualized treatment for transgender youth and adults is supported by every major medical and mental health organization, including the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the Endocrine Society, the Pediatric Endocrine Society, the Society for Adolescent Health and Medicine, the World Medical Association, and the World Health Organization. Offer of Proof ¶ 46.

Harms Faced by the Transgender Community

11. The transgender community is more likely to suffer abuse, harassment, discrimination, and violence than the population at large. Ex. 2, Oller Decl. ¶ 36; *see also* Oller Decl. Ex. 9, at 11-12 (attached as **Exhibit 7**); Oller Decl. Ex. 12, at 103-107 (attached as **Exhibit 8**); Oller Decl., Ex. 17, at 8 (attached as **Exhibit 9**); Oller Decl. Ex. 18, at 5-6, 12-15 (attached as **Exhibit 10**); Oller Decl. Ex. 21 at 6-7 (attached as **Exhibit 11**).

12. For example, in Kansas, 59 percent of transgender youth have been verbally harassed in school, 27 percent have been physically attacked, and 12 percent have been sexually assaulted because of their gender identity. Offer of Proof, Ex. F, at 1. Eleven percent of transgender youth in Kansas continued to face mistreatment after they left a K-12 school. *Id.*

13. Among transgender people nationwide who had interacted with police, 58 percent experienced some form of mistreatment. Offer of Proof, Ex. E, at 14. Rates were higher for American Indian (74 percent), multiracial (71 percent), Latino/a (66 percent), Black (61 percent), and disabled (68 percent) people. *Id.* at 186, 187. Of transgender Kansans who have interacted with the police, 53 percent experienced some form of mistreatment, including verbal harassment, physical assault, or sexual assault. Offer of Proof, Ex. F, at 2.

14. As a result, transgender people are more likely to struggle with adverse mental health effects. Forty percent of transgender people have attempted suicide in their lifetime—nearly nine times the attempted suicide rate in the U.S. population (4.6 percent). Offer of Proof, Ex. E, at 112.

15. Having a driver's license that does not align with their gender identity puts individuals at greater risk of verbal harassment, denial of service, being asked to leave an establishment, and assault. *Id.* at 89.

Identity Documents for Transgender People

16. The ability to change the gender marker on an identity document has significant social, legal, and safety implications for transgender persons. Ex. 1, TI Hr’g Tr. 319:25-321:6; Offer of Proof ¶¶ 56-66, 92; *see, e.g.*, Offer of Proof, Exs. D, E, F. It has been found to be significantly associated with lower reports of depression, anxiety, global psychiatric distress, and upsetting responses to gender-based mistreatment. *Compare* Offer of Proof ¶¶ 67, 68, 72-76, 83-86, 88; Offer of Proof, Exs. D, G, I, J; *with* Offer of Proof ¶¶ 69-71, 77-82, 87-89; Offer of Proof, Exs. H and J. Access to accurate identification documents is a structural determinant of health for transgender people. Offer of Proof ¶ 92.

17. Prior to the injunction entered in this action, Kansas joined virtually every other U.S. state and territory in allowing at least some transgender people to align the gender marker listed on their driver’s licenses with the gender they live as every day. While states have differing standards regarding what supporting evidence must be produced to support a gender marker change, only three states--Kansas (as a result of this Court’s orders), Florida, and Tennessee--bar all transgender people from updating their license entirely. *See Equality Maps: Identity Documents Laws and Policies*, Movement Advancement Project (last updated March 30, 2024), https://www.lgbtmap.org/equality-maps/identity_document_laws/drivers_license (citing current state policies and regulations).

18. The federal government allows transgender people to obtain a passport with a gender marker that reflects their gender identity. *See, e.g.*, 8 Foreign Affairs Manual 403.3 Gender Designation (April 5, 2023), https://fam.state.gov/FAM/08FAM/08FAM040303.html#M403_3_1 (passport rules). Other federal agencies have similar policies allowing updating gender markers on government records.

19. Forcing transgender people to use identity documents that do not match their gender identity, or forcing them to go without identity documents, is inconsistent with medical best practices. Ex. 2, Oller Decl. ¶¶ 12, 34, 39.

20. It can cause anxiety and distress to the transgender person, cause them to isolate, and may result in discrimination and violence against them when others learn that they are transgender. Ex. 1, TI Hr'g Tr. 321:8-17; Offer of Proof ¶ 71.

21. Transgender people are likely to experience depression, anxiety, and increased symptoms of gender dysphoria when they are unable to have an updated gender marker on their driver's license. Offer of Proof ¶ 69; Offer of Proof, Exs. D and G. Having an incongruent identification document can have an impact on suicidality for transgender people. Offer of Proof ¶¶ 81- 85, 88; Offer of Proof, Exs. H, I, J. Conversely, transgender people experience health benefits when they can update the gender marker on their driver's license. Offer of Proof ¶ 68.

22. Showing a license with an incongruent gender marker discloses private, intimate information about one's transgender status and can lead to physical harm, harassment, discrimination, or groundless accusations of fraud. Ex. 1, TI Hr'g Tr. 236:18-237:15; 242:10-22; 265:12-18; 269:14-271:15; Adam Kellogg Dep. Tr. ("Kellogg Tr.") 22:14-23:10 (attached as **Exhibit 12**) (filed with redactions pursuant to Protective Order); *see also* Ex.1, TI Hr'g Tr. 235:25-236:9; 240:7-10; 267:21-268:16.

23. Individuals with incongruent gender markers may experience difficulty accessing housing, education, employment, banking, and traveling because their license does not align with their gender identity and discloses their transgender status. Offer of Proof ¶ 57.

24. A driver's license is the most common form of identity verification. Many people use a driver's license for identification when requesting government records, voting, starting a new

job, applying for loans, qualifying for professional licenses, buying alcohol, picking up prescriptions, checking in to a hotel, traveling by plane, and more. Ex. 1, TI Hr’g Tr. 341:22-25; 151:16-152:8; Decl. of Adam Kellogg (“Kellogg Decl.”) ¶ 13 (attached as **Exhibit 13**); Decl. of Katherine Redman (“Redman Decl.”) ¶ 12 (attached as **Exhibit 14**); Decl. of Juliana Ophelia Gonzales-Wahl (“Gonzales-Wahl Decl.”) ¶ 11 (attached as **Exhibit 15**); Decl. of Doe Intervenor-Resp’t 2 (“Doe 2 Decl.”) ¶ 8 (attached as **Exhibit 16**).

25. Forcing a transgender person to give up a license that shows their gender identity and resume carrying a license that shows the sex they were assigned at birth will likely cause them to experience symptoms of gender dysphoria that had been previously alleviated, including anxiety and depression. Offer of Proof ¶ 89.

26. Having an updated gender marker on a driver’s license is a crucial part of a social transition. Transgender people with updated identification documents are able to engage with others more authentically and have higher levels functioning in their personal and professional lives. *Id.* at ¶ 92.

Kansas Driver’s License Policy and Senate Bill 9

27. KDOR is responsible for issuing and updating Kansas driver’s licenses. K.S.A. 2022 Supp. 8-240, K.S.A. 2022 Supp. 8-243.

28. Kansas driver’s licenses display, among other things, a licensee’s full legal name, gender, date of birth, address, and a brief description. Prior to 2007, state law mandated that the license applicants provide information about their “sex,” not gender. *See* K.S.A. 8-240I; 8.243(a) (2007 Supp.) (amending prior code).

29. The physical licenses issued by KDOR are printed with the word “sex” labeling the gender field. KDOR relies on the American Association of Motor Vehicle Administrators’

(AAMVA) standards for card design, which reference “sex” of the cardholder as a data field. KDOR’s Resp. to Pet’r’s First Set of Interrogs. (“KDOR Interrog. Resp.”), No. 10 (Petitioner’s Ex. 12 at TI Hearing) (attached as **Exhibit 17**). KDOR’s “alignment with AAMVA standards is rooted in best practice considerations and a desire to maintain a level of consistency and interoperability with motor vehicle agencies nationwide and to comply with Federal REAL ID public laws and regulations.” KDOR’s Resp. to Pet’r’s Second Set of Interrogs., No. 1 (attached as **Exhibit 18**); *see* Ex. 1, TI Hr’g Tr. 109:18-110:6. The Federal REAL ID Act itself requires each license list “[t]he person’s gender.” REAL ID Act of 2005, 119 P.L. 13, 119 Stat. 231.

30. In 2007, Kansas Senate Bill 9 (“SB 9”) was passed in response to the federal REAL ID Act of 2005, to expand and formalize processes for verifying identity for driver’s license applicants. Among other things, SB 9 changed the information statutorily required for license applications to include the applicant’s “gender” rather than “sex,” and it explicitly required KDOR to display the applicant’s “full legal name” and “gender.” K.S.A. 8-240(c); 8.243(a) (2007. Supp.); Ex. 1, TI Hr’g Tr. 127:19-25.

31. In order to comply with the verification requirements of REAL ID, to “incorporate physical scanning and pdf capture of documentation provided to a driver’s license examiner that was used as the primary source for identification and lawful presence,” and to determine “how to harmonize submitted, inconsistent but valid documentation” (such as passports and birth certificates), KDOR took steps to formalize its process for reviewing and approving requests to update gender markers on a driver’s licenses. Ex. 17, KDOR Interrog. Resp., No. 9.

32. In 2011, KDOR adopted the formal policy that has remained in place until this litigation, albeit with some changes in 2019. Ex. 1, TI Hr’g Tr. 97:18-98:5; 102:17-103:3; Ex. 17,

KDOR Interrog. Resp., No. 9.; *see also* Gender Reclassification Policy – User Guide (attached as **Exhibit 19**).

33. Under KDOR policies, when a transgender person seeks to update the gender marker on their license, they are directed by their local DMV office to apply to the Topeka central office. Ex. 1, TI Hr’g Tr. 104:3-24; Ex. 17, KDOR Interrog. Resp., Nos. 2, 9; Ex. 19, Gender Reclassification Policy – User Guide.

34. The application process requires several steps of approval, including review of a court order recognizing the updated gender or documentation from a licensed medical or osteopathic physician stating that updating the gender marker is appropriate. Ex. 1, TI Hr’g Tr. 98:17-23;99:2-11; Ex. 17, KDOR Interrog. Resp., Nos. 2, 3; Requests for Gender Reclassification on Kansas Driver’s Licenses and Identification Cards (KDOR 0001-0002) (attached as **Exhibit 20**); KDOR’s Gender Reclassification Policy (KDOR 0003-0004) (attached as **Exhibit 21**).

35. KDOR also accepts U.S. passports, in-state birth certificates, out-of-state birth certificates, USCIS immigration and/or citizenship documents, and other government documents as proof of gender. Ex. 1, TI Hr’g Tr. 148:19-149:2; KDOR’s Mot. to Dissolve TRO ¶ 7; *see also* Ex. 17, KDOR Interrog. Resp., No. 9 (U.S. passports, out-of-state licenses); Ex. 21, KDOR’s Gender Reclassification Policy (KDOR 0003-0004).

36. Between 2011 and 2023, more than 550 Kansans relied on the policy to change the gender markers on their licenses. Ex. 1, TI Hr’g Tr. 112:17–18.

KDOR’s Record Keeping Practices

37. KDOR maintains public-facing information that is visible on the face of the driver’s license card itself. It also maintains additional information about licensees that is kept in a

database. *Id.* at 131:22-133:2. The database is used by employees of KDOR and law enforcement. *Id.* at 132:5-9.

38. The database is capable of retaining changes made over time, including changes of address, name, and gender designations. *Id.* at 140:25-141:12. Regardless of any changes made to an individual's record, the individual's driver's license number will remain consistent. *Id.* at 145:5-9. Should the need arise for a driver's license number to be changed, the prior record is merged with the new number to ensure that all the collected data tracks the individual. *Id.* at 145:9-146:1.

Senate Bill 180

39. On April 4, 2023, the Kansas legislature adopted Senate Bill 180, now codified at K.S.A. 77-207, which provides that “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.” K.S.A. 77-207(a). The law further states that “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.” K.S.A. 77-207(c).

40. SB 180's legislative history suggests that it was not intended to have any impact on driver's licenses. The authors of the model legislation that formed the foundation for SB 180 explicitly stated that legislation like SB 180 does *not* have any impact on driver's licenses. SB 180 was based on model legislation from a non-Kansan, third-party entity, the “Independent Women's Forum,” a 501(c)(3) organization connected with Independent Women's Voice, a 501(c)(4) lobbying organization. *See* Independent Women's Forum, *Women's Bill of Rights*, <https://womensbillofrights.com/>. A document titled “Debunking Misperceptions about SB 180”

prepared by Independent Women’s Voice—one of the original proponents of the legislation (shared with the Kansas Attorney General’s office to lobby in support of SB 180) states that SB 180 was intended only to impact a definition of “sex” and *not* “gender,” and that it was never intended to have any impact on driver’s licenses. *See* Debunking Misperceptions about SB 180, OAG 000594 (“Misperception: SB 180 will require people to change their driver’s licenses”; “SB 180 does not require Kansans to change their driver’s licenses or prevent Kansas from validating gender identity on their license”) (attached as **Exhibit 22**).

41. Eighty-three people testified against SB 180, and only ten testified in favor. *See generally* Kansas 2023- 2024 Legislative Session, House Committee on Health and Human Services, (July 12, 2023), http://www.kslegislature.org/li/b2023_24/committees/ctte_h_hhs_1/committee_testimony/?selected_date=03%2F06%2F2023; Kansas 2023-2024 Legislative Session, Senate Committee on Public Health and Welfare, (July 12, 2023), http://www.kslegislature.org/li/b2023_24/committees/ctte_s_phw_1/committee_testimony/?selected_date=02%2F15%2F2023.

42. KDOR officials were not contacted by the House or Senate committees for input with regard to SB 180. Ex. 1, TI Hr’g Tr. 130:12-21; 131:17-20; 130:22-131:16.

43. The individual Kansas legislators who advocated for passage of SB 180 testified that it would provide “legal and linguistic clarity,” and made no reference to driver’s licenses and no indication that KDOR’s existing policy was unclear or complicated. *See* K.S. Legislature, Senate Chamber Proceedings 04/26/2023, YouTube (April 26, 2023, at 4:42:25), https://www.youtube.com/watch?v=HyTnWwdtF_U&t=16949s&pp=ygUna2Fuc2FzIHN0YXRlIGxlZ2lzbGF0dXJlIHNIbmF0ZSA0LzI2LzIz; K.S. House Veto Debate on SB 180, YouTube

(April 27, 2023, at 00:11:28), https://www.youtube.com/watch?v=mqB_yGN4Cpg&list=PLGnUWv2THZAi2p9iHJ2REOOB2zfmHSxQe&index=69&pp=iAQB. Other lawmakers expressed concerns about “biological men” using women’s facilities, in reference to transgender women. *See, e.g.*, K.S. House Debate on SB 180, YouTube (March 28, 2023, at 8:44:37), https://www.youtube.com/watch?v=pzwsOs_q_i0&list=PLGnUWv2THZAi2p9iHJ2REOOB2zfmHSxQe&index=55&pp=iAQB. No lawmaker discussed any harm flowing from KDOR’s current driver’s license policy, or indeed, driver’s licenses at all, nor did anyone voting for the bill justify it by reference to the purported harms to law enforcement.

Intervenor-Respondents

44. Intervenor-Respondents are three transgender Kansans and the parent of a transgender minor. Intervenor-Respondents have all updated the gender markers on their driver’s licenses except for Doe 2’s son. Ex. 1, TI Hr’g Tr. 230:24-231:9; 262:23-263:3; 340:16-20; 374:23-375:4; Doe Intervenor-Resp’t 2 Dep. Tr. (“Doe 2 Tr.”) 14:14-18 (attached as **Exhibit 23**) (filed with redactions pursuant to Protective Order).

45. All Intervenor-Respondents have received gender-affirming medical treatment. Ex. 1, TI Hr’g Tr. 225:10-18; 228:4-16; 228:19-229:12; 261:15-24; 339:2-12; 379:2-12; 379:4-8; Ex. 23, Doe 2 Tr. 18:15-22.

46. Intervenor-Respondents wish to obtain or maintain a Kansas driver’s license with a gender marker that matches their gender identity. Ex. 1, TI Hr’g Tr. 246:10-18; 277:8-278:3; 357:4-18; 379:16-20.

Adam Kellogg

47. Adam Kellogg is a 20-year-old transgender man and student at the University of Kansas. *Id.* at 219:17-220:2.

48. Prior to changing the gender marker on his license to male in 2021, he was accused of providing a false identity document and forced to disclose his transgender identity during a job interview because his license did not reflect his gender. *Id.* at 236:18-237:21; Ex. 12, Kellogg Tr. 22:14–23:10.

49. Mr. Kellogg experienced a negative interaction with a law enforcement officer during a traffic stop because his license did not reflect his gender. During this stop, Mr. Kellogg experienced feelings of fear and panic at being forced to disclose his transgender status. Ex. 1, TI Hr’g Tr. 238:18-240:4; 240:7-10; Ex. 12, Kellogg Tr. 22:14–23:10 ; 40:14–43:15.

50. When Mr. Kellogg’s driver’s license inaccurately listed an “F” gender marker, he was outed as transgender when seeking medical treatment and picking up prescriptions—leading to public questioning about whether he was presenting a fake document and uncomfortable and invasive questions about his genitalia and causing him to be mis-gendered publicly. Ex. 1, TI Hr’g Tr. 241:21- 243:13; 243:15-25; Ex. 12, Kellogg Tr. 44:3–46:17; 46:21-47:13; 47:20-51:10.

51. Forced outing of Mr. Kellogg’s transgender status by showing a driver’s license with an “F” gender marker caused him to feel embarrassed and like “less of a person.” Ex. 1, TI Hr’g Tr. 244:12-25. With his updated license reflecting his accurate gender marker, Mr. Kellogg no longer feels embarrassed or afraid when showing his identification. *Id.* at 244:1-8. He does not want to disclose the fact that he is transgender every time he goes to the bank, interacts with law enforcement, rents a car, votes, applies for jobs, or enters government buildings. *Id.* at 245:16-246:18.

52. Mr. Kellogg's current driver's license, with the updated "M" gender marker, will expire on June 20, 2024. *Id.* at 231:19-24. He understands that as a result of this litigation, KDOR will renew his license with an inaccurate "F" gender marker—making him fear discrimination or violence and forcing him to "have to go back to feeling like less than a person." Ex. 1, TI Hr'g Tr. 245:5-246:18; Ex. 13, Kellogg Decl. ¶ 16.

Kathryn Redman

53. Kathryn Redman is a 62-year-old transgender woman who lives in Johnson County, Kansas. Ex. 1, TI Hrg' Tr. 256:4-14. She frequently received rude and harassing comments when she had to show her driver's license before she was able to update the gender marker, because the male gender marker on her license did not match her female appearance. Katherine Redman Dep. Tr. ("Redman Tr.") 19:3-18; 21:15–22:13 (attached as **Exhibit 24**) (filed with redactions pursuant to Protective Order).

54. Whenever Ms. Redman flew between 2019 and 2020 with a license that inaccurately listed an "M" gender marker, she was required to do supplemental screening with the Transportation Security Administration. The screening involved invasive questions, pat downs of the genital area of her body, and forced disclosure of her transgender identity in a public setting. Ex. 1, TI Hr'g Tr. 269:17- 271:4; Ex. 24, Redman Tr. 24:22–30:21.

55. These experiences caused Ms. Redman to feel humiliated and demeaned. In one instance she was brought to tears because of the embarrassment she experienced. Ex. 1, TI Hr'g Tr. 269:17- 271:4.

56. Ms. Redman followed all applicable Kansas laws and obtained an order from the Johnson County District Court changing her legal gender. *Id.* at 262:7-22. She subsequently updated the gender marker on her license. *Id.* at 262:23- 263:3.

57. With her updated license, Ms. Redman no longer feels embarrassed, ashamed, or afraid when she shows her license, and she has not been forced to undergo genital pat downs while flying. *Id.* at 272:4-13; Ex. 24, Redman Tr. 25:21-22.

58. The inaccurate “M” gender marker in Ms. Redman’s identity documents resulted in improper insurance denials for her prescribed mammograms, requiring her to disclose her transgender identity to her insurer and appeal her denials before receiving reimbursement. Ex. 1, TI Hr’g Tr. 272:16-274:18. Ex. 24, Redman Tr. 35:12–39:12.

59. These denials cause Ms. Redman to feel “less than human” and aggravated her feelings of gender dysphoria. Ex. 1, TI Hr’g Tr. 275:19-276:3.

60. Ms. Redman’s current driver’s license, with the updated “F” gender marker, will expire on June 20, 2024. *Id.* at 264:3-8.

Juliana Ophelia Gonzales-Wahl

61. Juliana Ophelia Gonzales-Wahl is a 30-year-old Latina transgender woman living in Lawrence, Kansas. *Id.* at 332:17-333:8.

62. She has been living as a woman since 2018 and has known she was female for as long as she can remember. *Id.* at 336:16-337:1; Juliana Ophelia Gonzales-Wahl Dep. Tr. (“Gonzales-Wahl Tr.”) 18:23–19:20; 20:1-9 (attached as **Exhibit 25**) (filed with redactions pursuant to Protective Order).

63. When Ms. Gonzales-Wahl had an inaccurate gender marker on her license, she felt concerned for her safety. She is aware of the harassment and violence that transgender people, especially transgender women of color, experience, which made her fearful of driving within the state. Ex. 25, Gonzales-Wahl Tr. 42:1-11.

64. Prior to receiving her corrected license, she avoided leaving Lawrence as much as possible. Ex. 15, Gonzales-Wahl Decl. ¶¶ 7-8.

65. Ms. Gonzales-Wahl was outed as transgender when she was pulled over and required to perform a field sobriety test. She had to show the officer her license that inaccurately listed an “M” gender marker. The interaction instilled fear and anxiety in her and caused her to further avoid travel in the state. Ex. 1, TI Hr’g Tr. 353:13-18, 353:20-354:10; 354:20-25; 355:3-23; 356:4-9; Ex. 25, Gonzales-Wahl Tr. 40:23–46:3.

66. Ms. Gonzales-Wahl was previously employed by the Kansas Geological Society. Ex. 1, TI Hr’g Tr. 344:5-6. As part of her role, she had to travel to rural parts of Kansas. *Id.* at 334:6-7. During this time, she experienced multiple incidents of harm. In one instance, she had to show her inaccurate license that outed her as transgender to a gas station employee. After she did, the clerk ordered Ms. Gonzales-Wahl to leave the store. *Id.* at 350:5- 351:5. Ms. Gonzales- Wahl felt uncomfortable and immediately left the setting for her safety. *Id.* at 351:5-8.

67. In another instance, Ms. Gonzales-Wahl was in a hardware store and had to show her inaccurate license that outed her as transgender to the attendant. *Id.* at 347:25-348:22. Upon displaying the license, the clerk gave her a look of disgust that caused Ms. Gonzales-Wahl to feel scared for her safety. She immediately left the store and returned to Lawrence, unable to fulfil the rest of her work obligations. *Id.* at 348:19-22; 349:4-8.

68. When flying in 2019 with a license that inaccurately listed her gender as male, Ms. Gonzales-Wahl was subjected to supplemental security screening that involved a pat down of her genitals and loud and invasive questioning. *Id.* at 352:6-23; Ex. 25, Gonzales-Wahl Tr. 38:2–39:16.

69. Prior to updating her license gender marker, Ms. Gonzales-Wahl would decline social invitations to avoid having to show an ID that did not match her gender identity. Ex. 1, TI Hr’g Tr. 346:24-347:7; Ex. 15, Gonzales-Wahl Decl. ¶¶ 7-8.

70. She fears what will happen to her if she is forced to renew her license with an inaccurate gender marker and what that might mean for her ability to move safely and securely in the state and access public services. Ex. 1, TI Hr’g Tr. 357:9-16.

71. Ms. Gonzales-Wahl’s current driver’s license, with the updated “F” gender marker, will expire in April 2026. *Id.* at 341:16-18.

Doe 2

72. Doe Intervenor-Respondent 2 (hereinafter Doe 2), is the parent of a 17-year-old young man who is transgender. *Id.* at 372:2-6 (filed with redactions pursuant to the Protective Order).

73. Doe 2’s son was assigned female at birth but has known he is male since he was 11 years old, and he began living as a boy two years ago. *Id.* at 376:21-25; Ex. 23, Doe 2 Tr. 13:17–14:10 .

74. Doe 2’s son has a female gender marker on his birth certificate, which he intended to change to a male gender marker so that he has an ID that accurately reflects his gender and gender presentation. But by the time their family was able to pursue Doe 2’s legal name change and gender marker update, a court order had already been issued barring them from being able to obtain an accurate “M” gender marker on Doe 2’s birth certificate. Ex. 16, Doe 2 Decl. ¶ 3; Ex. 1, TI Hr’g Tr. 374:18-375:4.

75. Doe 2’s son is perceived as a boy in his everyday life, including at school, with acquaintances and friends, and in the community. *Id.* at 378:24-379:1; 380:5-8.

76. He petitioned for a name change order, which was granted in August 2023. Ex. 1, TI Hr'g Tr. 373:13-16; 373:18-374:3; Ex. 23, Doe 2 Tr. 20:3–21:2. Like the other Intervenor-Respondents, he is afraid that his current license, and the inability to get an accurate license because of this litigation, will negatively impact him by forcing him to disclose his transgender identity every time he shows his license. Ex. 1, TI Hr'g Tr. 380:19-381:1; Ex. 16, Doe 2 Decl. ¶¶ 12-13.

77. He only selectively discloses his transgender identity and does not want to be targeted for harassment or discrimination because he is transgender. Ex. 1, TI Hr'g Tr. 382:23-383:9; Ex. 23, Doe 2 Tr. 14:19–15:8; *see also* Ex. 1, TI Hr'g Tr. 375:12-14.

Gender Markers on Driver's Licenses and Law Enforcement Safety and Efficacy

78. KDOR has not received any complaints from any local, state, or federal law enforcement agencies regarding the inability to identify criminal suspects as a result of its 2011 Gender Marker Change policy. Ex. 1, TI Hr'g Tr. 137:5-138:5; KDOR Resp'ts Resp. to Intervenor-Resp'ts Req. for Produc. ("KDOR Resp. to Intervenor's RFPs"), No. 6 (attached as **Exhibit 26**).

79. KDOR has not received any complaints from the Kansas Department of Corrections regarding the inability to safely house individuals as a result of its 2011 gender marker change policy. Ex. 26, KDOR Resp. to Intervenor's RFPs, No. 8.

80. Kansas law enforcement officers have not encountered a situation where a transgender person in Kansas has eluded arrest or caused harm to law enforcement officers because their driver's license listed the gender they live as rather than their sex assigned at birth. Ex. 1, TI Hr'g Tr. 174:11-23; 188:23- 189:1; 192:9-194:21; 206:16-21; *see also* Lt. James Lee Burge Dep. Tr. ("Burge Tr.") 15:24-16:8; 33:10-21; 38:10-21 (attached as **Exhibit 27**); Sheriff Brian Hill Dep. Tr. ("Hill Tr.") 27:10-21 (attached as **Exhibit 28**); Sgt. Erika Jo Simpson Dep. Tr. ("Simpson Tr.")

14:22-25; 22:21-23:3; 27:14-14 (attached as **Exhibit 29**); Pet. Resp. to Intervenors' First Req. for Produc., No. 15 (attached as **Exhibit 30**); Pet. Resp. to Intervenors' First Set of Interrogs., No. 11 (attached as **Exhibit 31**); Email from Lt. Theron Chaulk to Assistant Attorney General Jesse Burris dated Aug. 17, 2023 (OAG003364) (attached as **Exhibit 32**).²

81. KDOR's gender marker change policies have had no impact on the ability of Kansas law enforcement officers to fulfil their duties. Ex. 1, TI Hr'g Tr. 206:16-21.

82. The gender marker on a driver's license is not used to make placement decisions in sex-based housing in Kansas correctional facilities. *Id.* at 190:13-191:4; Major Richard Newson Dep. Tr. ("Newson Tr.") 44:10-45:7; 52:13-22; 56:15-57:9; 58:16-24; 63:7-10 (attached as **Exhibit 34**); E-mail from Raymond Nuss to Richard Newson dated Aug. 3, 2023 (MRN0000289) (attached as **Exhibit 35**); *see also* Ex. 1, TI Hr'g Tr. 191:6-14; Decl. of Paul Gorges (attached as **Exhibit 36**). County jails rely on multiple systems and processes to ensure safety when housing individuals. Ex. 1, TI Hr'g Tr. 185:10-14; 185:21-186:1; 186:20-22; 187:20-188:3; 188:18-190:8; *see also* Johnson County Sheriff's Office Intake Procedures (MRN0000262-266) (attached as **Exhibit 37**); Johnson County Sheriff's Office Inmate Classification Policy (MRN0000189-201) (attached as **Exhibit 38**); Johnson County Sheriff's Office PREA Policy (MRN0000211-228) (attached as **Exhibit 39**); Johnson County Sheriff's Office LGBTI Policy (MRN0000229-234) (attached as **Exhibit 40**); Johnson County Adult Detention Center Initial Custody Assessment Scale (MRN0000109-11) (attached as **Exhibit 41**).

83. In the case of housing transgender or intersex individuals, placement is assessed on a case by case basis. For example, the Johnson County policy for safely housing transgender and

² Petitioner stipulated "as to foundation" with respect to documents produced outside the close of discovery, including the email from Lt. Theron Chaulk to Jesse Burris cited above. *See* Email from Jesse Burris, Assistant Attorney General to Counsel for Intervenor-Respondents and Respondents, dated Nov. 14, 2023 (attached as **Exhibit 33**).

intersex individuals says that housing placements “should *not* be determined solely based on the [individuals’] birth sex, identity documents, or physical anatomy.” *See* Ex. 40, Johnson County Sheriff’s Office LGBTI Policy (MRN0000232), at 4; Ex. 1, TI Hr’g Tr. 186:2-19; 187:20-188:3; 188:13-22; 186:20-22; 188:7-12.

84. As confirmed by Major Richard Newson from the Johnson County Sherriff’s Department, the information contained on a driver’s license “is much lower in the level of importance than other information to determine one’s gender” for purposes of making housing determinations based on gender. *Id.* at 191: 5-14.

85. An individual has never evaded detention or escaped from central booking in Kansas as a result of their transgender status. *Id.* at 188:23- 189:1.

86. The gender marker on a driver’s license is not the sole piece of identifying information used to run a search of an individual’s name during a traffic stop. *Id.* at 208:19-24. Law enforcement relies on a combination of factors to identify someone. *Id.* at 208:19-24, 213:3-214:4, 214: 5-10; Ex. 29, Simpson Tr. 14:22-25; 22:21-23:3.

ARGUMENT

I. This Court’s Prior Ruling on the Temporary Injunction Does Not Preclude Granting Summary Judgment to Intervenor-Respondents.

On March 11, 2024, this Court issued an Order on Petitioner’s Motion for Temporary Injunction holding that SB 180 barred Respondents from issuing driver’s licenses with corrected gender markers to transgender Kansans and rejecting arguments that the statute was ambiguous and should be construed to avoid an unconstitutional result. TI Order at 18-19, 21-25. However, a district court’s findings of fact, conclusions of law, and application of law to fact at the temporary-injunction stage do not bind it at final judgment. *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 229, 689 P.2d 860, 866 (1984) (recognizing that a final judgment is

independent of the ruling on a temporary injunction). Intervenor-Respondents thus reassert the legal arguments and evidence that they introduced or sought to introduce at the temporary injunction stage. Doing so is necessary to ensure that this Court has an opportunity to address these questions of law and fact in the more considered posture of the pending cross-motions for summary judgment.

Accordingly, Intervenor-Respondents also continue to rely on the evidence offered by medical expert witness Dr. Oller, while acknowledging that this Court declined to allow Dr. Oller's to testify as an expert previously. Intervenor-Resp'ts' Counter-Statement of Facts (hereinafter "SOF") ¶ 1, n1. As noted above, a district court's findings and conclusions prior to issuing final judgment do not bind it for final judgment. *McKinney*, 236 Kan. at 229. The exclusion of Dr. Oller's testimony on the temporary injunction was erroneous because her clinical experience treating over 100 transgender Kansans with gender dysphoria gave her the "knowledge, skill, experience, training, or education" required by K.S.A. 60-456(b) to testify as an expert. *See* SOF ¶ 1. Considering the expert witness rule disfavors rejection of expert testimony, especially in a bench trial where K.S.A. 60-456's function of keeping unreliable testimony away from the trier of fact is "largely irrelevant," Dr. Oller's expert testimony should have been included. *See Daubert v Merrel Dow Pharms., Inc.*, 509 U.S. 579 at 588 (1993); Fed. R. Evid. 702 advisory committee's note; *Lawson v. Spirit Aerosystems, Inc.*, No. 18-1100-EFM, 2021 WL 2290822, at *4 (D. Kan. June 4, 2021). Intervenor-Respondents submitted an Offer of Proof detailing the testimony Dr. Oller would have given had the Court permitted and reference Dr. Oller's proffered testimony herein to ensure this Court has a comprehensive record for summary judgment and to maintain their arguments for appeal.

II. Standard for Summary Judgment.

Summary judgment is appropriate when “the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” K.S.A. 60-256(c)(2). When considering a summary judgment motion, the trial court “is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought,” including any evidence that arises from preliminary hearings. *Cent. Kan. Med. Ctr. v. Hatesohl*, 308 Kan. 992, 1001, 425 P.3d 1253 (2018) (quoting *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 24, 378 P.3d 1090 (2016)); see *Orizon Aerostructures, LLC v. Crumley*, No. 2:23-CV-02069-EFM, 2023 U.S. Dist. LEXIS 83183*, *11 (D. Kan. 2023) (acknowledging district courts consider evidence from preliminary hearings when making summary judgment determinations).

As set forth in Intervenor-Respondents’ statement of facts above, the material undisputed facts—from hearing testimony, interrogatory answers, declarations, and depositions regarding the KDOR’s driver’s license gender marker processes and transgender Kansans’ personal experiences of harm from carrying a driver’s license with an inaccurate gender marker—show that not only is Petitioner not entitled to summary judgment, but summary judgment should be granted to Intervenor-Respondents as a matter of law.

III. K.S.A. 77-207 is at Most Ambiguous as to its Application to Kansas Driver’s Licenses.

Petitioner asserts, and this Court previously found, that the plain language of K.S.A. 77-207 requires KDOR to issue driver’s licenses with gender markers reflecting the driver’s sex assigned at birth. With respect, that position is erroneous. On its face, the definition of “sex” in K.S.A. 77-207(a) does not apply to all Kansas statutes or regulations referring to “sex” or “gender.”

Nor does it plainly apply to either the specific statute applicable to driver's licenses, K.S.A. 8-243, which since 2007 has required that a license application supply, and that a state license display, an individual's "gender," or to KDOR policies permitting transgender Kansans to update the gender marker on their driver's licenses since at least 2011.

A. KDOR's gender marker policy is not an "application of an individual's biological sex," as required for K.S.A. 77-2077 to apply.

"[T]he fundamental rule governing the interpretation of statutes is that the intent of the legislature governs if that intent can be ascertained." *Haddock v. State*, 295 Kan. 738, 754, 286 P.3d 837 (2012) (quotations and citations omitted). Intent is presumed to be expressed through the plain language of a statute. *Id.* For that reason, "[i]f the statute's language is clear, there is no need to resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly." *O'Brien v. Leegin Creative Leather Prods.*, 294 Kan. 318, 333, 277 P.3d 1062 (2012) (citations and quotations omitted).

Section 1 of K.S.A. 77-207 states that:

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

³ K.S.A. 77-207(c) requires "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" to "identify each individual who is part of the collected data set as either male or female at birth." As KDOR has explained, it can comply with this requirement without changing its longstanding practice of allowing transgender license applicants to have a gender marker that reflects the gender they live as, rather than their sex assigned at birth. *See* KDOR Mot. To Dissolve TRO, Dkt 5, at 9. Accordingly, Intervenor focus their arguments on the implications of Section 1 of SB 180, codified as K.S.A. 77-207(a).

When K.S.A. 77-207 was enacted, KDOR had long been issuing licenses with gender markers that reflected transgender individuals' gender identity, rather than their sex assigned at birth. Consequently, it must be presumed the legislature was aware of KDOR's practice of respecting an individual's gender identity, and if it had intended to change the practice, would have drafted K.S.A. 77-207 to make clear that it applied to licenses. Instead, the legislature did the opposite, writing a definition that applies *only* "with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations." This is a far cry from specifying that all state statutes that reference an applicant's "gender" would be impacted by the narrow definition of "sex" in K.S.A. 77-207.

The Kansas driver's license statute and regulations do not refer to "sex." Instead, K.S.A. 8-243(a) requires that driver's licenses issued by KDOR "shall bear" the licensee's "gender." And putting aside the fact that the license statutes refer to an applicant's "gender" rather than "sex," K.S.A. 77-207 does *not even* state that all references to "sex" under Kansas statutes, rules or regulations must be governed by its particular definition of sex. Neither the driver's license statute nor a Kansas driver's license refer to or require "the application of an individual's biological sex," as that phrase is used in K.S.A. 77-207. Yet that is the only context in which K.S.A. 77-207's 's definition of sex applies to state laws and policies. This limiting language in K.S.A. 77-207(a) ("*with respect to the application of an individual's biological sex* pursuant to any state law or rules and regulations") must be given effect. *State v. Just.-Puett*, 57 Kan. App. 2d 227, 233, 450 P.3d 368, 373 (2019) ("Ordinarily, . . . we try to give meaning to every word in the statute."). Petitioner's argument that SB 180's definition of "sex" applies to *all* state laws referring to "sex" ignores this limiting language and would render it entirely superfluous.

The Court must assume the legislature meant what it said when drafting the bill, because “the clear intent of the legislature is reflected in the language it chooses to use.” *State v. Mishmash*, 295 Kan. 1140, 1144, 290 P.3d 243, 246 (2012). This Court need not resolve precisely which state laws are governed by the definition of sex in K.S.A. 77-207 to determine that the driver’s license statute and KDOR regulations governing gender marker changes are not among them.

B. The Kansas Legislature uniquely modified the text of the bill to narrow its scope.

SB 180 differs from both the model bill on which it is based and from measures enacted in Montana and Tennessee earlier in 2023 in significant ways that foreclose Petitioner’s reading of the statute. The model “Women’s Bill of Rights” provides plainly that “[f]or purposes of state/federal law, a person’s ‘sex’ is defined as his or her biological sex (either male or female) at birth.” <https://womensbillofrights.com/>. Similarly, unlike SB 180, the Tennessee law amends the definitions section of the state code and states explicitly: “*As used in this code*, unless the context otherwise requires, ‘sex’ means a person’s immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person’s biological sex.” H. 239, 113th Sess. (Tenn. 2023). Montana took an even more direct approach and passed a bill that added both a definition that expressly applies across the entire state code to all references to “sex” (Sec. 1), *and* explicitly amended multiple sections of the state code, including the statute governing driver’s license applications (Sec. 40), to incorporate the new definition. S. 458, 68th Sess. (Mont. 2023).

Had the Kansas legislature intended SB 180’s definition of “sex” to apply to all state laws that reference sex the drafters could have used the model language verbatim, specified that the definition applied across the code like Tennessee, or enumerated those statutes where the new definition is intended to apply like Montana. But the Kansas legislature did none of those things. Instead, the Kansas legislature deliberately *narrowed* the application of SB 180 to apply only “with

respect to the application of an individual’s biological sex pursuant to any state law or rules and regulations,” meaning that the statute does not apply to all code provisions that refer to “sex,” much less to code provisions like the Kansas driver’s license statute, which refer only to “gender.”

C. The Kansas Legislature knows how to state clearly that a specific definition of “sex” applies, and it did not do so here.

A different bill passed by the Kansas legislature during the same session as SB 180 regarding housing incarcerated individuals in county jails on the basis of their sex assigned at birth further illustrates that the legislature would have used different language had it intended the scope of SB 180 to reach as far as Petitioner urges. In enacting Senate Bill 228 (2023), the legislature stated clearly, “*As used in this section, ‘sex’ 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.*” Consequently, SB 228 directly and clearly indicates that the definition is intended to apply in the specific context covered by the bill.

The contrast between SB 180 and SB 228 offers yet another reason to conclude that if the Kansas legislature intended the definition of sex offered by SB 180 to apply to every single Kansas statute that refers to “sex” or “gender,” it would have done so directly. *Cf. Mishmash*, 295 Kan. at 1143-44 (interpreting “personal use” exception for drug offender registration statute to apply even if the drugs were not *solely* for personal use, because “[w]hen the legislature intends to limit a category, it clearly understands how to insert the necessary language” and noting that a different section of the registration scheme stated that funds shall be used “solely for law enforcement and criminal prosecution purposes”).

D. The legislative history of SB 180 does not support Petitioner’s interpretation.

Finally, the legislative history of SB 180 belies any intent that this definition would be used to demand that transgender Kansans carry a driver’s license with a gender marker that displays the sex they were assigned at birth. No lawmaker who voted for SB 180 stated that it would impact driver’s licenses at all or require transgender Kansans to carry a license with a gender marker that discloses the sex they were assigned at birth. SOF ¶ 43.

In addition, not only did Independent Women’s Voice, the original proponent of the bill and a major voice in favor of its passage, prepare talking points indicating that it would not impact any definition of “gender” under state law, it went further to state explicitly that the bill would not impact current law about driver’s licenses: “SB 180 does not require Kansans to change their driver’s licenses or prevent Kansas from validating gender identity on their license.” SOF ¶ 40.

E. Petitioner’s erroneous interpretation of K.S.A. 77-207 would effect an implied repeal of K.S.A. 8-243(a).

Alternatively, *even if* the text of K.S.A. 77-207 is read to have any bearing on the driver’s license statute—which it should not—such an interpretation would function as a heavily disfavored implied repeal of the previous law that required display of a licensee’s “gender.” An implied repeal “‘is one which takes place when a new law contains provisions which are contrary to, but do not expressly repeal, those of a former law.’” *Sch. Dist. v. Bod. of Cty. Comm’rs*, 141 Kan. 108, 112, 40 P.2d 334, 336 (1935) (citing 59 C.J. 904, 905). “Whether it has been so repealed is a question of legislative intent.” *Id.* Such repeals by implication are disfavored. *See, e.g., id.; In re Joint Application of Westar Energy, Inc.*, 311 Kan. 320, 329, 460 P.3d 821, 826-27 (2020).

The fact that K.S.A. 77-207 and K.S.A. 8-243(a) can be read to “operate independently without conflict,” *In re City of Wichita*, 274 Kan. 915, 929, 59, P.3d 336, 347 (2002), provides an alternate basis for construing K.S.A. 77-207(a) narrowly in light of the plain language of the statute

limiting its relevance “to the application of an individual’s biological sex pursuant to any state law or rules and regulations.”

IV. Granting the Relief Sought by Petitioner Would Violate the State Constitutional Rights of Intervenor-respondents and Other Transgender Kansans.

As explained above, the plain language of K.S.A. 77-207 is inconsistent with Petitioner’s position that the statute applies to the state driver’s license regime. At minimum, however, the language is ambiguous in its application to licenses, and in light of that ambiguity, this Court should construe K.S.A. 77-207 narrowly to avoid an unconstitutional result. *See State v. Stevens*, 26 Kan. App. 2d 606, 609–10, 992 P.2d 1244, 1248 (1999) (“If there is any reasonable way to construe the statute as constitutionally valid, that should be done.”) (quoting *State v. Scott*, 265 Kan. 1, 4, 961 P.2d 667, 670 (1998)).

A driver’s license is a commonly used form of government identification. Prior to this Court’s order granting Petitioner preliminary relief in this action, Kansas, like nearly every other state, allowed transgender people to carry a state driver’s license with a gender marker that reflected the gender they live as and know themselves to be. SOF ¶ 17. Employers, businesses, and landlords frequently require proof of identity and age, which often results in a request to disclose a driver’s license. SOF ¶ 24. Intervenor-Respondents and other transgender Kansans frequently use driver’s licenses as identification when traveling, including when renting a car, checking into a hotel, or boarding an airplane. *Id.* Forcing transgender people either to go without a driver’s license and be unable to drive, or to use and display a driver’s license that bears an inaccurate gender marker and thereby involuntarily discloses that they are transgender, violates their right to personal autonomy and privacy and denies them equal protection of the laws under the Kansas Constitution.

A. Petitioner’s interpretation of K.S.A. 77-207 would burden Intervenors’ right to personal autonomy.

Section 1 of the Kansas Constitution’s Bill of Rights encompasses a “right of personal autonomy, which includes the ability to control one’s own body, to assert bodily integrity, and to exercise self-determination.” *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 646, 440 P.3d 461, 484 (2019). In deciding that the Kansas Constitution independently protects the right to decide whether to continue a pregnancy or have an abortion, the Kansas Supreme Court held that the state Constitution “acknowledges rights that are distinct from and broader than the United States Constitution and that our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards.” *Id.* at 624.

Applying K.S.A. 77-207 to compel transgender Kansans to carry a driver’s license that contradicts their gender and involuntarily discloses that they are transgender whenever they show someone their license would violate their right to self-determination and personal autonomy because it burdens their “right to make self-defining and self-governing decisions.” *Hodes*, 309 Kan. at 646.

Because it is not possible to tell whether someone is transgender by looking at them, carrying a license with a gender marker that does not match their physical appearance is likely to disclose the fact that they are transgender, which outs them and puts them at further risk of harassment, discrimination, and violence from others. SOF ¶¶ 16, 22, 23. Carrying a license with the wrong gender marker can also cause serious psychological, dignitary, and even physical harm to transgender people. SOF ¶¶ 16, 19-21, 25; *see also* SOF ¶ 26.

Intervenor-Respondents have experienced harms from carrying a license with the wrong gender marker including harassment; negative interactions with law enforcement; being asked embarrassing questions about their genitalia when filling a prescription at the pharmacy; being told

to leave a public establishment; and fearing for their own safety. SOF ¶¶ 48-50, 52-54, 63, 65-68, 77, They have changed their behavior to avoid situations where they might have to present an ID that discloses their transgender status. SOF ¶¶ 64-65, 69.

Autonomy and self-determination include the ability to control one’s own deeply personal information and the ability to live as one’s true self. Transgender people deserve the dignity and autonomy to decide who they share their transgender status with, rather than being forced to do so by the State. They should not be forced to choose between having a license and forced outing. Nor should they be forced to carry a license showing the government’s mis-classification of their gender in contraindication to the gender they know themselves to be. Because the driver’s license policy change sought by Petitioner burdens core natural rights to autonomy and self-determination, it would be subject to strict scrutiny, and—as discussed in subsection D—could not possibly survive that review.⁴

In the temporary injunction order, this Court concluded that K.S.A. 77-207 could not violate Kansans’ right to personal autonomy because Intervenors have not demonstrated that they have been subjected to “physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement.” TI Order at 23. Respectfully, the Court’s earlier conclusion in this respect was incorrect and does not entitle Petitioner to mandamus relief. Nothing in Section 1, or the Kansas Supreme Court’s decision in *Hodes*, requires such specific harms have already occurred to make out a constitutional violation. *See Hodes*, 309 Kan. at 660-61, 671 (observing that the Kansas Constitution begins with the Bill of Rights,

⁴ The fact that transgender people in Kansas have only had a formal mechanism to update the gender marker on their licenses since 2011 does not undermine their argument that denying accurate gender markers on licenses is an impairment of the fundamental right to personal autonomy. In *Hodes & Nauser*, the Kansas Supreme Court expressly rejected arguments that the existence of criminal prohibitions on abortion at the time of ratification of the constitution was relevant to the Court’s determination, noting that “rather than rely on historical prejudices in our analysis, we look to natural rights and apply them equally to protect all individuals.” 309 Kan. at 659–60.

“demonstrating...preservation of these rights is given precedence over the establishment of government” and holding “*any* government infringement of the inalienable natural right of personal autonomy requires the State to establish a compelling state interest and to show that...[it is] narrowly tailored to promote it”—without additional requirements of proving harm). Requiring such a showing in the context of applying the canon of constitutional avoidance is even less justified: the purpose of the canon is to avoid difficult questions of constitutionality in favor of, where possible given a statute’s language, an interpretation that steers far clear of the constitutional line.

Moreover, even if Intervenors were required, as a condition of applying the canon of constitutional avoidance, to show that they have already been harmed in one or more ways described by Petitioner and this Court, the unrefuted facts show that *they have been*. SOF ¶¶ 48-50; 54-55; 58-59; 65-68 (summarizing testimony of Intervenor-Respondents regarding harms from carrying a license that discloses their transgender status, like being outed and accused of providing a fake identity document when applying for a job or picking up prescriptions or being improperly denied health insurance payments because of the inaccurate gender marker).

B. Petitioner’s interpretation of K.S.A. 77-207 would burden Intervenors’ right to informational privacy.

Interpreting K.S.A. 77-207 to force repeated involuntary disclosure of a person’s transgender status every time they are required to show their driver’s license would also violate the Kansas state constitutional right to informational privacy. This Court previously found that the Kansas appellate courts have not yet recognized a right to informational privacy, and it declined to do so at the temporary-injunction stage. Appellate courts need not expressly have stated that Section 1 encompasses a right to privacy, however, for this Court to recognize that such a right

exists under Kansas law and would cast serious doubt on the application of K.S.A. 77-207 to driver's licenses.

Kansas courts “customarily interpret [the state constitution’s] provisions to echo federal standards,” *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006), except, of course, where the Kansas Supreme Court has interpreted the state constitution to provide greater protections. *Hodes*, 309 Kan. at 621; *see also State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22, 28 (2005) (“Sections 1 and 2 of the Kansas Constitution Bill of Rights are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.”) (internal quotation marks omitted). Federal law has long recognized that a “constitutionally protected ‘zone of privacy’” includes an “individual interest in avoiding disclosure of personal matters.” *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977). Other states, too, have recognized that a right to informational privacy is one of the most basic reserved to the people in their constitutions, and is echoed, for example, in tort law that has long imposed liability on individuals for the unlawful disclosure of private information. *See, e.g. Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 349-50 (2002) (holding that “a fundamental right to privacy is implicit in the Arkansas Constitution,” flowing from the state’s inalienable rights of “life and liberty” and “pursuing . . . happiness”); *Powell v. State*, 270 Ga. 327, 329, 510 S.E.2d 18, 21 (1998) (holding Georgia has an implied right to privacy stemming from the state constitution’s provision declaring “no person shall be deprived of liberty except by due process of law”); *Commonwealth v. Wasson*, 842 S.W.2d 487, 494-95 (Ky. 1993) (noting the Kentucky Supreme Court has “interpreted the Kentucky Bill of Rights as defining a right of privacy, even though the constitution did not say so in that terminology”); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (noting that certain

intangible harms have “traditionally [been] recognized as providing a basis for [a] lawsuit[],” including “disclosure of private information”).

Specifically, federal courts have recognized that the right to informational privacy encompasses information that is sexual, medical, or about mental health, because such information has long been recognized as deeply private. *See, e.g., United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013) (medical, mental health); *United States v. Brice*, 649 F.3d 793, 796 (D.C. Cir. 2011) (medical, mental health); *Aid for Women v. Foulston*, 441 F.3d 1101, 1124 (10th Cir. 2006) (Herrera, J., concurring) (sexual, medical); *Livsey v. Salt Lake Cty.*, 275 F.3d 952, 956 (10th Cir. 2001) (sexual, medical).

Courts that have addressed whether identifying one’s transgender status on a driver’s license is protected information under a constitutional right to privacy consistently have answered yes, in significant part because of the potential harmful consequences of disclosing such information. *See, Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (holding that denying gender marker changes on driver’s licenses “forces [transgender people] to disclose their transgender status in violation of their [federal] constitutional right to informational privacy”); *Love v. Johnson*, 146 F. Supp. 3d 848, 855 (D. Mich. 2015) (holding that state policy denying driver’s licenses to transgender residents implicated fundamental due process privacy rights) (citation omitted); *K.L. v. State, Dep’t of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012) (“The Court agrees that one’s transgender[] status is private, sensitive personal information While Alaska law does not require anyone to obtain a driver’s license, such a license is necessary to enjoy the benefits of operating a motor vehicle in the state. Furthermore, individuals are often required to furnish their driver’s license to third parties as a form of identification. When a person such as K.L. furnishes a

driver's license bearing a male sex designation, the discrepancy between the license and their physical appearance can lead to the forced disclosure of the person's transgender[] status.”).

“Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, ‘there are few areas which more closely intimate facts of a personal nature’ than one's transgender status.” *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (citation omitted). Where “disclosure of this [highly intimate] information may fall into the hands of persons’ harboring such negative feelings, [denial of a license with an accurate gender marker] creates a very real threat to Plaintiffs’ personal security and bodily integrity.” *Love*, 146 F. Supp. 3d at 856 (first alteration in original) (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998)).

As Intervenor-Respondents have personally experienced, the disclosure of the mere fact that they are transgender may “provoke . . . hostility and intolerance from others.” *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); see SOF ¶¶ 48-50; 54-55; 58-59; 65-68 (summarizing testimony of Intervenor-Respondents regarding harms from carrying a license that discloses their transgender status); SOF ¶¶ 11-15 (describing harms from forced disclosure of transgender status). For example, Intervenor-Respondent Gonzales-Wahl was purchasing an item at a store in rural Kansas and, after she provided a license with a male gender marker, was told to leave in a way that made her fear for her safety. SOF ¶ 66. Intervenor-Respondent Kellogg experienced harassment and humiliation while picking up medical prescriptions after showing a license that displayed his sex assigned at birth. SOF ¶ 50.

In addition to the privacy interest in not disclosing their transgender status to employers, law enforcement, or business owners who might view their driver's licenses, granting the relief Petitioner seeks in this action would pose an additional and unjustified burden on the right to

informational privacy by requiring KDOR and its agents to ask invasive and deeply personal questions about genitalia at birth and reproductive capacity as part of a license application. Adopting Petitioner’s interpretation of SB 180 would create myriad administrative issues and potentially expose all Kansans to continued invasive questioning about their medical status, medical history, and more.

Requiring transgender people to carry a license that displays a gender marker reflecting their sex assigned at birth—and which may conflict with other forms of valid legal identification they hold or even contradict legal court orders reflecting their gender change—puts them in an untenable position of being forced to out themselves to others as transgender against their will. The right to informational privacy protects precisely this kind of personal information from forced disclosure.

C. Petitioner’s interpretation of K.S.A. 77-207 would result in denial of equal protection of the laws.

In addition to implicating the fundamental rights to personal autonomy and privacy, Petitioner’s interpretation of K.S.A. 77-207 risks violating the state constitutional equal protection rights of transgender Kansans, who alone would be unable to receive a license that matches their gender identity, for at least two reasons.

First, K.S.A. 77-207 is a facial sex-based classification, in that the four corners of the statute rely on reproductive organs to classify people under state laws “with respect to the application of an individual’s biological sex”:

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”; “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.

If the legislature cannot “writ[e] out instructions” for determining whether how the law applies “without using the words man, woman, or sex (or some synonym),” the law classifies based on sex. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1746 (2020).

Second, K.S.A. 77-207 operates in its application as a classification that discriminates against transgender Kansans. A woman who was assigned female at birth can receive a license that reflects her female gender identity, while a transgender woman who was assigned male at birth cannot. Classifications based on transgender status are premised on transgender people’s identification with a sex other than their assigned sex at birth, and nonconformance with sex stereotypes. *Cf. Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ‘[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.’”) (alteration in original) (citation omitted).⁵

The fact that the law does not specifically reference transgender individuals does not mean it does not classify based on transgender status. The Kansas Supreme Court in *Limon* held that a state criminal law punishing consensual sexual activity between teenagers of the same sex far more severely than consensual sexual activity between teenagers of different sexes was based on sexual orientation. *Limon*, 280 Kan. at 283, 286. The Court acknowledged that “there is no per se classification of homosexuals, bisexuals, or heterosexuals in the statute,” but found that because the statute imposed a greater burden on conduct engaged in by people who were gay or bisexual, it nonetheless was “a discriminatory classification.” *Id.* at 284-86.

⁵ While the Tenth Circuit has not held that classifications based on transgender status are themselves suspect for purposes of federal equal protection analysis, *see, e.g., Druley v. Patton*, 601 F. App’x 632, 635 (10th Cir. 2015) (citing *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995)), that does not mean that sex discrimination equal protection claims cannot be brought by transgender individuals, particularly as a matter of state constitutional law.

Under Petitioner’s reading of K.S.A. 77-207, transgender people, and transgender people alone, cannot have a gender marker on their license that matches the gender they live as and know themselves to be; instead, they will be forced to carry a license that reveals their transgender status and sex assigned at birth. People who are not transgender can access a license that reflects their gender in Kansas—but under Petitioner’s reading, people who are transgender cannot. Accordingly, the classifications inherent in the relief sought by Petitioner are subject to heightened scrutiny. *See In the Interest of K.M.H.*, 285 Kan. 53, 73-74, 169 P.3d 1025, 1039 (2007) (“In Kansas, as before the United States Supreme Court, statutory gender classifications . . . are subject to intermediate, or heightened, scrutiny,” such that “a classification that treats otherwise similarly situated individuals differently based solely on the individual’s genders must substantially further a legitimate legislative purpose; the government’s objective must be important, and the classification substantially related to achievement of it.”).

D. If K.S.A. 77-207 were interpreted to apply to driver’s licenses, it would fail heightened scrutiny, and indeed any level of constitutional review.

Because issuing a driver’s license with a gender marker that reflects transgender Kansans’ sex assigned at birth would burden fundamental rights of personal autonomy and privacy, and because it classifies based on sex and transgender status, K.S.A. 77-207 as interpreted by Petitioner would be subject to—and would fail—heightened review.

As an initial matter, “in cases involving ‘suspect classifications’ or ‘fundamental interests’ . . . the presumption of constitutionality [is] displaced.” *Limon*, 280 Kan. at 284 (quoting *Farley v. Engleken*, 241 Kan. 663, 667, 740 P.2d 1058, 1061 (1987)). Instead, it is the *state’s* burden to justify the constitutionality of a statute. *Id.* Under strict scrutiny, the state is required to show that “the enactment serve[s] some compelling state interest and be narrowly tailored to further that interest.” *Hodes*, 309 Kan. at 663. Similarly, under intermediate scrutiny, the state must still

provide an “exceedingly persuasive justification” for a challenged law, along with a showing that it “substantially further[s] an important state interest.” *Id.* Finally, rational basis review, while deferential, still requires consideration of the relationship between the legislative goals and the means adopted to pursue those goals. *See Mudd v. Neosha Mem. Regional Med. Center*, 275 Kan. 187, 198, 62 P.3d 236, 244 (2003).

If K.S.A. 77-207 applies to the driver’s licensing regime, it cannot survive heightened scrutiny, or even rational basis review. State and federal courts across the country have held that policies barring transgender people from obtaining identity documents matching their gender identity lack sufficient government justification to withstand constitutional review. *See Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1323 (M.D. Ala 2021), appeal docketed, No. 21-10486 (11th Cir. Feb. 12, 2021) (driver’s licenses); *Ray v. McCloud*, 507 F. Supp.3d 925 (S.D. Ohio 2020) (birth certificates); *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (driver’s licenses); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142 (D. Idaho 2018) (birth certificates); *Love*, 146 F. Supp. 3d at 856 (driver’s licenses); *K.L.*, 2012 WL 2685183 at *6-8 (driver’s licenses).⁶ The Court should do so here as well.

K.S.A. 77-207 cannot be justified, as Petitioner argued earlier in the case, as serving an important or substantial law enforcement objective. It is undisputed that neither this general objective nor more specific law enforcement related rationales were advanced in the legislative record, let alone as contemporaneous justification for applying K.S.A. 77-207 to KDOR’s driver’s license policy. SOF ¶¶ 40, 43 *see also* SOF ¶ 42. For that reason alone, they cannot satisfy the

⁶ *But see Fowler v. Stitt*, slip op., No. 4:22-cv-115-JWB-MTS (N.D. Okla. June 8, 2023); *Gore v. Lee*, slip. op., No. 3:19-cv-328 (M.D. Tenn. June 22, 2023). These cases found that the states had a sufficient justification for refusing to update the gender marker on *birth certificates*, relying on an asserted state interest in preserving birth certificates as historical documents. That interest does not apply in the context of driver’s licenses, nor has Petitioner—or the Kansas Legislature—asserted it.

government's burden under heightened scrutiny. *See VMI*, 518 U.S. at 533 (under heightened scrutiny for laws that discriminate on the basis of sex, the government's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation").

But even if these were not *post hoc* justifications, no harm to any legitimate state interest has been demonstrated from the longstanding KDOR policy despite extensive discovery and a hearing on the temporary injunction. Although KDOR has allowed transgender individuals to update their gender marker on their license since at least 2011, there is no evidence that any of the alleged harms to which Petitioner pointed earlier in this case have ever occurred, and similarly, no support to show that K.S.A. 77-207 is tailored to advance—or even rationally related to—any of these government interests.

a. K.S.A. 77-207 does not advance an interest in law enforcement operations.

Requiring transgender people to carry driver's licenses that reflect sex assigned at birth does not advance any law enforcement interest. When asked in discovery to identify all instances where a person's license reflecting their gender identity created a law enforcement problem, Petitioner responded "none." SOF ¶ 80. Indeed, Petitioner offers no evidence that any transgender person in Kansas has ever eluded arrest or caused any issues for officer safety because their driver's license listed the gender they live as rather than their sex assigned at birth. SOF ¶¶ 80-81. And there are multiple ways to confirm a person's identity during a law enforcement encounter, apart from a driver's license. SOF ¶ 86.

Nor is there evidence of any other harm to law enforcement operations or officer safety due to a transgender person's license reflecting their gender. For example, Lieutenant Chaulk, who works in the Civil Division of the Johnson County Sheriff's Office and is in charge of traffic offenses, service of civil paperwork, and warrant confirmation, told the Attorney General's office:

“I have spoken to each and every officer in my division and, at this time, there are zero examples of the gender [on driver’s licenses] affecting any call for service[.]” SOF ¶ 80.

In reality, Petitioner is arguing for a KDOR policy change that would work *against* any law enforcement interest in accurate identification—because it prevents transgender people from updating their licenses with a gender marker that is consistent with their identity and other people’s perceptions. *See e.g., Love*, 146 F. Supp. 3d at 856 (holding that the state’s refusal to correct the sex designation on transgender plaintiffs’ driver’s licenses “[bore] little, if any, connection to Defendant’s purported interests” in maintaining accurate identity documents); *K.L.*, 2012 WL 2685183, at *7 (holding that the state’s refusal to correct a trans woman’s sex designation on her driver’s license not only failed to “further[] . . . the state’s interest in accurate document[s] and identification” but, in fact, created a risk of “inaccurate and inconsistent identification documents”).

b. Petitioner’s interpretation of K.S.A. 77-207 would not advance any interest in jail and prison operations.

K.S.A. 77-207 also serves no legitimate interest in making housing determinations for jails and prisons. Those determinations are a product of numerous interconnected policies at either the state Department of Corrections or county level, not the gender markers on individual driver’s licenses. Petitioner’s own witness repeatedly noted that his jail does not use driver’s licenses during booking into correctional facilities. SOF ¶ 82.

K.S.A. 19-1903(a) instructs Kansas sheriffs how to house individuals in Kansas county jails. K.S.A. 75-5206(a) grants the secretary of the Kansas Department of Corrections (KDOC) the authority to make facility determinations for any individual sentenced to the secretary’s custody. These state laws merely instruct the KDOC and county sheriffs to develop their own policies that

meet the needs of their facilities and operations.⁷ None of these statutes mandates reliance on driver's licenses or other state-issued identification during booking proceedings.

Nor does any evidence suggest that Kansas jails and prisons indeed rely on this information. *See* SOF ¶¶ 82, 84 (summarizing procedures for Johnson County jail and recognizing individualized determinations for placement of transgender inmates). Along these lines, Major Rick Newson with the Johnson County Sheriff's Office repeatedly testified at deposition and at the temporary injunction hearing that his staff rarely use driver's licenses during the booking process, and that assignments to either male or female housing units are not based on the gender marker on a person's driver's license, or even their sex at birth. SOF ¶¶ 82-84. In fact, when the Attorney General's office drafted an affidavit for Major Newson in conjunction with this litigation, Major Newson asked that it be edited because he believed the Attorney General incorrectly placed too much emphasis on the importance of driver's licenses in the booking process, when driver's licenses are not commonly used to identify appropriate housing placements. *See* SOF ¶ 82. Employees of the Johnson County Sheriff's office likewise confirmed to Major Newson via email that in the very small number of instances where a transgender person was booked into the jail, the jail "did not have to use ID to identify sex." *See* SOF ¶ 82. In short, there is no evidence of any instance where a transgender person's driver's license created an issue for any Kansas jail in determining where to safely house an individual.

⁷ As amended by Senate Bill 228, K.S.A. § 19-1903 does now require county sheriffs to house males and females separately, based on reproductive capacity (in practice, more likely sex assigned at birth). As noted below, automatic placement based on sex assigned at birth is inconsistent with the requirements of the Prison Rape Elimination Act (PREA) and implementing regulations requiring an individualized assessment for placement of incarcerated transgender individuals. Even if the gender marker on a license were relevant to determining placement for incarcerated people, which the evidence produced shows it is not, requiring licenses to list sex assigned at birth to further a *subsequently enacted* jail placement policy that is inconstant with federal law cannot provide even a legitimate government interest for K.S.A. 77-207.

This asserted interest is also contrary to the state’s obligations under the National Prison Rape Elimination Act. *See* Prison Rape Elimination Act National (“PREA”) Standards, 28 C.F.R. 115 (2023); *see also* 28 C.F.R. 115.42(b)-(e) (2023) (providing specific procedures for handling housing determinations for transgender individuals held in prisons and jails). The PREA regulations specifically require that jail staff make individualized determinations regarding appropriate housing assignments for transgender individuals, giving “serious consideration” to the individual’s preferences about where they can safely be housed. 28 C.F.R. 115.42(b)-(e) (2023). Making housing decisions solely based on external genitalia or sex assigned at birth would violate PREA regulations. *See* Nat’l PREA Resource Ctr., DOJ Interpretive Guidance, Standard 115.42, <https://www.prearesourcecenter.org/frequently-asked-questions/does-policy-houses-transgender-or-intersex-inmates-based-exclusively>.

If jails were to do what Petitioner suggests they do—that is, look at an individual’s driver’s license to determine the individual’s sex at birth and then house the individual according to sex at birth—the facility would be in direct violation of federal law, and risk losing a portion of its federal funding. It would also create a significant safety risk for transgender individuals who may be at increased risk for sexual abuse if placed in a housing unit that matches their sex assigned at birth, but not their gender identity and gender presentation.

This purported justification for interpreting SB 180 to apply to driver’s licenses is therefore completely unsupported and contradictory and cannot provide even a rational justification under any standard of constitutional review.

c. K.S.A. 77-207 is impermissibly motivated by animus against transgender people.

The only actual justification for K.S.A. 77-207 and applying its narrow definition of “sex” to driver’s licenses is an illegitimate one: animus. Insisting that transgender people carry a license

with a gender marker that reveals their sex assigned at birth (and their transgender status), solely because the legislature has declared that transgender women are not female, and transgender men are not male, to further a purported government interest in “linguistic clarity” does not advance a proper governmental interest. *See, e.g., Limon*, 280 Kan. at 290-91 (“[D]esire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”) (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

As the Kansas Supreme Court explained in *Limon*:

[A]lthough the rational basis test is “the most deferential of standards, we insist on knowing the relation between the classification adopted and the object obtained.” *Romer*, 517 U.S. at 632. The Court observed that the “search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature ...; and it marks the limits of our own authority.” 517 U.S. at 632. The Court continued: “By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.... ‘If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.’” 517 U.S. at 633 (quoting *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181, 101 S. Ct. 453, 462 (1980)) (Stevens, J., concurring).

280 Kan. at 288. As discussed above, there is simply no rational relationship between requiring transgender people to carry a driver’s license that reveals their sex assigned at birth and discloses their transgender status and the interests asserted for the law at issue here.

“[D]iscriminations of an unusual character such as this one especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Petitioner’s interpretation of K.S.A. 77-207 aims to bar transgender people from “seek[ing] specific protection from the law,” *id.*, which is “unprecedented in our jurisprudence,” *id.*, and “is strong evidence of a law having the purpose and effect of disapproval of that class,” *Bishop v. Smith*, 760 F.3d 1070, 1103 (10th Cir. 2014) (Holmes, J., concurring).

The legislative history demonstrates that the explicit purpose of the law was to discriminate against transgender people, based on a stated desire to exclude them from public spaces like restrooms or locker rooms. SOF ¶¶ 40, 43. When the apparent aim of the legislature is to harm a disfavored class, the law’s impartiality is called into question. *Limon*, 280 Kan. at 288. Here, the “interference with the equal dignity” of transgender people is “more than an incidental effect of the . . . statute.” *United States v. Windsor*, 570 U.S. 744, 770, 133 S. Ct. 2675, 2693 (2013). Indeed, as interpreted by Petitioner, K.S.A. 77-207’s “sheer breadth is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects.” *Romer*, 517 U.S. at 632. Despite a nominal gesture at the protection of women in its title, K.S.A. 77-207 actually operates *solely* by discriminating against transgender people. This, the legislature cannot do under the Kansas Constitution.

CONCLUSION

Petitioner’s interpretation of K.S.A. 77-207 is foreclosed by the plain text of the statute. Even if the statute were ambiguous in permitting Petitioner’s interpretation, it must be interpreted to avoid the clear constitutional doubts created by applying K.S.A. 77-207 to driver’s licenses. To the extent record evidence is necessary to confirm those doubts, the material uncontroverted evidence here has done so. The Court should therefore grant Intervenor-Respondents’ motion for summary judgment (and deny Petitioner’s motion for summary judgment).

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on April 16, 2024, a true and correct copy of the above and foregoing 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.

By: /s/ Karen Leve
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