

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

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

Petitioner,

vs.

Case No. 23 CV 422

Division No. 3

DAVID HARPER, Director of Vehicles,
Department of Revenue, in his official
capacity, and

MARK BURGHART, Secretary of Revenue,
in his official capacity,

Respondents,

and

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

Intervenor-Respondents.

Pursuant to K.S.A. Chapter 60

**PETITIONER'S REPLY TO INTERVENORS' RESPONSE TO PETITIONER'S
MOTION FOR SUMMARY JUDGMENT**

This case presents a pure and simple question of law: Does K.S.A. 77-207—the Women's Bill of Rights—require the Kansas Department of Revenue ("KDOR") to put people's sex-at-birth on their driver's licenses? As this Court has already held, it unambiguously does. TI Order at p. 21 ("The language of K.S.A. 77-207 is clear.").

Intervenors may quibble over details as much as they want, but none of their handwaving affects the outcome.

Even if the Court reverses course and entertains Intervenors' argument that K.S.A. 77-207 is somehow ambiguous and its meaning could be changed because of their personal experiences, their disputed facts would still not be relevant. As this Court has already held, the rights they claim either do not exist at all or are not implicated by the statute. The Kansas Constitution does not contain a "right to informational privacy." TI Order at p. 24; Petitioner's MSJ at pp. 12–13. That a state-issued driver's license displays a person's sex-at-birth does not implicate any "right to personal autonomy." TI Order at p. 23; Petitioner's MSJ at p. 12. The law neither creates classifications nor treats similar groups differently, so there is no equal protection violation. TI Order at pp. 24–25; Petitioner's MSJ at pp. 13–14. And Intervenors have suffered no real harm. *See* TI Order at p. 29.

Petitioner has shown that K.S.A. 77-207 unambiguously applies to driver's licenses and unambiguously requires KDOR to display sex-at-birth on a driver's license. Nothing in Intervenors' motion changes that. Therefore, Petitioner is entitled to summary judgment, and the writ of mandamus should be granted.

I. The Only Arguably Material Facts are Undisputed

A. KDOR keeps records of vital statistics, which include sex

K.S.A. 77-207 requires that, “[n]otwithstanding any provision of state law to the contrary,” “any state agency, department or office or political subdivision that collects vital statistics for the purpose of complying with anti-discrimination laws or for the purpose of gathering accurate public health, crime, economic or other data shall identify each individual who is part of the collected data set as either male or female at birth.” It has never been disputed that KDOR is a state agency. It has never been disputed that KDOR displays “sex” on driver’s licenses. The record is uncontroverted that KDOR collects records of “sex.” The record is uncontroverted that “sex” is a vital statistic. It has never been disputed that the data KDOR collects is “for the purpose of gathering accurate public health, crime, economic or other data.” Therefore, K.S.A. 77-207 applies to KDOR and requires KDOR to display sex at birth on driver’s licenses. As this Court found, K.S.A. 77-207 is clear and it applies to KDOR as well as to KDOR’s issuance of driver’s licenses. TI Order at pp. 17-26. K.S.A. 77-207(a)(1) and (c) are reproduced in Petitioner’s MSJ. *See* Petitioner’s MSJ at pp. 2-3.

K.S.A. 8-240(c) and 8-243(a) use “gender” as a synonym of “sex.” For one thing, “gender” can be—and often is—used as a synonym of “sex,” including in Kansas law. *E.g.*, Petitioner’s TRO-TI Motion at pp. 6-8. Notably, in certain official documents, including its guidance on changing driver’s license sex designations, KDOR treats “sex” and “gender” as synonyms. *See* TI Hearing Transcript at 117:25-120:3, 121:3-127:8

Further, the legislative history of 2007 SB 9 confirms that the Legislature intended nothing more through 2007 SB 9 than to align driver’s license statutes like K.S.A. 8-240 and 8-243 with the REAL ID Act of 2005. *E.g.*, Petitioner’s Reply to Respondents’ Response to Temporary Injunction at pp. 7-8 (Dec. 20, 2023); Lastly, Intervenors provide no evidence, *e.g.*, legislative history, showing that Congress either used “gender” in the sense of “gender identity” or meant “gender” as distinct from “sex” in the REAL ID Act of 2005. *See* Intervenors’ Resp. to Petitioner’s MSJ at PDF pp. 14, 33-34.

B. Intervenors do not meaningfully controvert these facts

Intervenors do not controvert Petitioner’s contentions of fact nos. 1, 2, 5, 6, 7, and 12. Intervenors’ Resp. to Petitioner’s MSJ at PDF pp. 2-7.¹ They purport to controvert all

¹ In a footnote to their first non-heading statement in the part they headed “Facts,” Intervenors objected “to Petitioner’s citations throughout [its] Statement of Facts to the extent that they [presumably the fact statements] do not rely upon evidence. Petitioner instead relies upon the Temporary Injunction Order and briefing, which is not evidence pursuant to Kan. Sup. Ct. Rule 141(d).” Intervenors’ Resp. to Petitioner’s MSJ at PDF p. 2 n.1. First, as is obvious, Petitioner never relied only on this Court’s TI Order. *See* Petitioner’s MSJ at pp. 2-5. Rather, every time it did cite this Court’s TI Order, Petitioner always cited it last, and usually after citing multiple other documents. *See id.* Also, Intervenors mischaracterize Kansas Supreme Court Rule 141. In relevant part, that rule requires that, “for each fact, [a motion for summary judgment must] contain[] precise references to pages, lines and/or paragraphs . . . of the portion of *the record* on which the movant relies[.]” Kan. Sup. Ct. Rule 141(a)(2) (emphasis added). The opposing parties’ pre-TI Order briefing—including their pleadings and statements they made therein in response to Petitioner’s contentions—are surely part of the record. *See* K.S.A. 60-256(c)(2) (“The judgment sought should be rendered if,” among other items, “the pleadings . . . 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.”); *Sperry v. McKune*, 305 Kan. 469, 481, 384 P.3d 1003, 1011-12 (2016); *Acord v. Porter*, 58 Kan. App. 2d 747, 757-58, 475 P.3d 665, 676-77 (2020); *Elstun v. Spangles, Inc.*, 40 Kan. App. 2d 458, 461, 193 P.3d 478, 480-81 (2008) (observing that prior version of Rule 141 required movant to support contentions of fact by citing to “transcripts, depositions, interrogatories, admissions, affidavits, exhibits, or other supporting documents contained in the court file and otherwise included in the record”); *DeLapp v. City of Topeka*, No. 87,759, 2002 WL 35657856, at *2 (Kan. Ct. App. Sept. 13, 2002) (not designated for publication) (“Our review of plaintiff’s response to the summary judgment motion leads us to agree with the district court’s implicit determination that plaintiff’s response failed to substantially comply with Rule 141. Plaintiff controverted some of the defendants’ facts without citing to any pleadings, depositions, or other appropriate part of the record.”); *Murray v. Miracorp, Inc.*, 545 P.3d 1009, 1020 (Kan. 2024) (Wall, J.,

others—i.e., Petitioner’s contentions of fact nos. 3, 4, 8, 9, 10, 11, 13, and 14. *See id.*

Petitioner replies as follows:

Petitioner’s Contention of Fact 3: Petitioner observes that Intervenor’s did not contend Petitioner inaccurately quoted K.S.A. 77-207(a)(1) or (c). Further, and contrary to Intervenor’s contention, Petitioner did not say that those provisions “are the only relevant portions of the statute.” *See* Petitioner’s MSJ at pp. 2-3. Notably, that statement could be taken as an implied admission that those provisions are relevant to this case.

Petitioner’s Contention of Fact 4: Petitioner’s fourth statement of fact says that “KDOR collects information *pertaining to* the sex of a driver’s license applicant or holder” and then cites the TI hearing transcript as well as the TI Order. Petitioner’s MSJ at 3 (emphasis added). At the TI hearing, Petitioner’s counsel asked KDOR’s Kent Selk to read the first two lines of K.S.A. 8-240(c). TI Hearing Transcript (“TI Transcript”) at 121:17-122:24. Selk did so:

A. Every application shall state the full legal name, date of birth, gender and address of principal residence of the applicant, and briefly describe the applicant, and briefly describe -- and shall state whether the applicant has been licensed as a driver prior to such application, and, if so, when and by which state or what country.

Id. at 122:25-123:6. The following exchange then took place between Selk and Petitioner’s counsel:

concurring in part, joined by Stegall, J.); *cf. Moses v. Bojangles Hauling, LLC*, No. 125,889, 2023 WL 5662773, *2 (Kan. Ct. App. Sept. 1, 2023) (534 P.3d 122) (unpublished).

Q. So am I correct in assuming that this is the information that your agency is to obtain from the applicant when he's applying for a driver's license?

A. Yes.

Q. Okay. And it uses the word gender; is that correct?

A. Yes.

Q. But the driver's license, does it use the word gender or sex?

A. The physical license uses sex.

Id. at 123:7-15. Given the foregoing, KDOR undeniably collects the “sex,” or at least information that “pertains to” the sex, of a driver’s license applicant or holder. As Selk testified, KDOR obtains, among other things, a license applicant’s “gender” and places that information on the applicant’s license where it says “sex.” TI Transcript at 122:25-123:15.

Regardless, “gender” can be—and often is—used as a synonym of “sex,” including in Kansas law. *E.g.*, Petitioner’s TRO-TI Motion at pp. 6-8. And in certain official documents, including its guidance on changing driver’s license sex designations, KDOR has treated “sex” and “gender” as synonymous. *See* TI Transcript at 117:25-120:3, 121:3-127:8.

Further, the legislative history of 2007 SB 9 confirms the Legislature intended nothing more through 2007 SB 9 than to align driver’s license statutes like K.S.A. 8-240 and 8-243 with the REAL ID Act of 2005. *E.g.*, Petitioner’s Reply to Respondents’ Response to Temporary Injunction at pp. 7-8 (Dec. 20, 2023);

Petitioner’s Contention of Fact 8: Petitioner did not contend “that the term ‘sex’ when used on a driver’s license means an individual’s assigned sex at birth[.]”

Petitioner's MSJ at p. 3. Petitioner simply said, among other things, that "sex" is recorded on the face of a Kansas driver's license. *See id.* This Intervenor does not controvert. Intervenor's Resp. to Petitioner's MSJ at PDF p. 4 ("Uncontroverted that the term 'sex' appears on the face of a Kansas driver's license[.]"). Rather, Petitioner contends that K.S.A. 77-207(a)(1) and (c) require KDOR to state, under the "sex" designation, the licensee's sex at birth. *E.g.*, Petition at pp. 5-7. Lastly, and as Petitioner observed in the preceding paragraph, KDOR often treats "sex" and "gender" as synonyms, and the legislative history of 2007 SB 9 undermines Intervenor's contentions vis-à-vis K.S.A. 8-240(c) and 8-243(a).

Petitioner's Contention of Fact 9: It appears to Petitioner that Intervenor did not meaningfully controvert Petitioner's ninth statement of fact. Regardless, in response thereto, Intervenor did not controvert "that KDOR maintains a database," that that "database . . . includes information," that that "information [is] about each licensee," and that that database "capture[s] and preserve[s]" "information about each licensee." *See* Intervenor's Resp. to Petitioner's MSJ at PDF p. 5.

Petitioner's Contention of Fact 10: Petitioner did not contend "that the terms 'gender' or 'sex' as used [on the face of the driver's license] necessarily refer to an individual's assigned sex at birth." *See* Petitioner's MSJ at p. 4. Thus, Intervenor arguably controverted something Petitioner did not specifically contend in its tenth statement of fact. Further, as Petitioner observed in its reply to Intervenor's response to Petitioner's

fourth statement of fact, KDOR often treats “sex” and “gender” as synonyms, and the legislative history of 2007 SB 9 confirms the Legislature intended nothing more through 2007 SB 9 than to align driver’s license statutes like K.S.A. 8-240 and 8-243 with the REAL ID Act of 2005.

Petitioner’s Contention of Fact 11: Intervenors do not controvert that “sex,” not “gender,” appears on the face of a driver’s license card. Intervenors’ Resp. to Petitioner’s MSJ at PDF p. 4. Further, as Petitioner observed in its reply to Intervenors’ response to Petitioner’s fourth statement of fact, KDOR often treats “sex” and “gender” as synonyms, and the legislative history of 2007 SB 9 confirms the Legislature intended nothing more through 2007 SB 9 than to align driver’s license statutes like K.S.A. 8-240 and 8-243 with the REAL ID Act of 2005.

Petitioner’s Contention of Fact 13: It is not clear to Petitioner whether Intervenors meaningfully controverted Petitioner’s thirteenth statement of fact. Regardless, Petitioner incorporates by reference here its reply to Intervenors’ response to Petitioner’s eleventh statement of fact. Petitioner also observes that Intervenors do not controvert that KDOR maintained a policy pertaining to changing the “sex” designation on driver’s licenses. *See* Intervenors’ Resp. to Petitioner’s MSJ at PDF p. 6. Petitioner furthermore observes that Intervenors do not controvert either that “the Governor directed KDOR to maintain its pre-existing policy” or “that KDOR announced that it would not alter its pre-existing policy.” *Id.*

Petitioner's Contention of Fact 14: Intervenor's do not meaningfully controvert Petitioner's fourteenth statement of fact. Ultimately, they do not controvert either that Petitioner proceeded against the KDOR Respondents in mandamus or Petitioner's contention that the Intervenor's intervened to raise a "constitutional avoidance" theory in support of the KDOR Respondents' position. *See* Intervenor's Resp. to Petitioner's MSJ at PDF pp. 6-7. And Petitioner did not say "that Intervenor-Respondents intervened solely for the 'purpose of raising a 'constitutional avoidance' theory to defend KDOR's position.'" *See* Petitioner's MSJ at p. 5. The remainder of Intervenor's response consists of their assertion of their constitutional claims that Petitioner rejects for the reasons set forth in pp. 11-14 of its MSJ (and which this Court has already rejected—*see* TI Order at pp. 21-25, 28-29).

II. Intervenor's Counter-Statement of Facts is Inappropriate, Duplicative, and a Distraction

Intervenor's included in their response to Petitioner's MSJ an counter-statement of facts consisting of 86 paragraphs spanning approximately 20 pages. Intervenor's Resp. to Petitioner's MSJ at PDF pp. 7-26. Petitioner objects to this. Neither Kan. Sup. Ct. Rule 141 nor local rule explicitly contemplate this in a response to a motion for summary judgment. *See* Kan. Sup. Ct. 141; DCR 3.202. Kansas Supreme Court Rule 141 does, however, explicitly contemplate responding to the movant's contentions of fact. Kan. Sup. Ct. 141(b)(1).

Also, as the Court is no doubt aware, Intervenors filed a cross motion for summary judgment on or about April 17, 2024, and included therein a statement of their contentions of fact. *See* Intervenors' MSJ at pp. 2-21. The contentions of fact Intervenors state in their MSJ appear to be a verbatim recitation of the counter-statement of facts they state in their response to Petitioner's MSJ. *Compare* Intervenors' MSJ at pp. 2-21 (paragraphs 1-86) *with* Intervenors' Response to Petitioner's MSJ at PDF pp. 7-26 (paragraphs 1-86).

Thus, Intervenors' inclusion in their response to Petitioner's MSJ is inappropriate and duplicative. Petitioner responds to the contentions of fact Intervenors include in their MSJ in its response to Intervenors' MSJ and incorporates by reference its responses thereto here.

Lastly, as noted in the preceding part, the question before this Court ultimately is whether K.S.A. 77-207 applies to driver's licenses and KDOR's issuance thereof. The facts arguably are irrelevant to that question, as it is purely legal. And the Court has answered it in the affirmative. *See* TI Order at pp. 17-21. Intervenors' attempt to add their own facts—which affect neither the Court's answer to the purely legal question before it nor Petitioner's contentions of fact—is therefore ultimately a distraction.

III. Argument

A. Intervenors' Alleged "Facts" that Rely on Expert Testimony Should be Given no Weight

Intervenor-Respondents attempt to create an issue of material fact by reciting "facts" related to Dr. Beth Oller and other seemingly expert testimony. *See* Intervenor-

Respondents Response at 7–26. The Court should completely disregard these “facts” and any argument that relies on them because: (1) Dr. Oller is not an expert and cannot offer expert testimony; (2) fact testimony is not expert testimony; and (3) most importantly, none of it changes the plain language of K.S.A. 77-207.

Intervenors’ assertions that rely on Dr. Oller’s alleged expertise should be given no weight. Intervenors characterize Dr. Oller as a “medical expert witness.” Intervenors’ Resp. to Petitioner’s MSJ at PDF p. 27. However, as they admit, the Court found Dr. Oller is not qualified to offer expert testimony in this case and any “expert” testimony she could have offered is outside of the record. *Id.* at 7 n.2.² Any expert opinion (and any associated exhibit) cannot properly support this motion and cannot be used to create a “disputed” “material” fact. The only facts the Court may consider are those that relate to Dr. Oller’s limited personal experiences with the few transgender people she has treated.

Perhaps recognizing this, Intervenor-Respondents attempt to squeeze in expert opinions by citing to Dr. Oller’s testimony the hearing. For example, they cite Dr. Oller’s hearing testimony for the proposition that “Social transition means living one’s life consistently with one’s gender identity, including using identity documents such as a

² In the same footnote, Intervenor-Respondents “urge” the court to reconsider this determination. Intervenor-Respondents response at 9 n.2 . An “urge” in a footnote is not a proper motion for reconsideration, and Intervenor-Respondents advance no argument in support of it. If it is a motion, Petitioner objects for the same reasons raised in its Motion to Disqualify Dr. Oller as an Expert. Regardless, unless the Court does reconsider this ruling, Dr. Oller is not an expert and none of this “evidence” is part of the record.

driver's license that reflect one's gender identity." Intervenor-Respondents Response at 9. But when Dr. Oller tried to offer this testimony at the hearing, Petitioner objected on the grounds that it called for expert testimony, and the Court sustained the objection. This statement is not part of the record and cannot be used to create a disputed fact.

Elsewhere, Intervenor-Respondents attempt to massage expert testimony out of their own fact testimony. For example, they cite Adam Kellogg's testimony for the proposition that "Gender dysphoria is a serious medical condition that, if left untreated, can lead to debilitating depression and even suicidal thoughts and acts." Intervenor-Respondents Response at 8. This is an expert opinion, and Kellogg is not an expert. The same trick is repeated throughout the brief. Fortunately, none of this is relevant because it does not change the plain meaning of the statute.

Intervenor-Respondents also repeatedly cite the Offer of Proof they created for Dr. Oller for the purposes of appealing the Court's ruling that she is not an expert. This too is not part of the record and cannot be used to create an issue of material fact. Further, as Petitioner noted, *see* Pet. Resp. to Intervenor-Respondents Offer of Proof, much of this testimony would have been inadmissible even if the Court had allowed Dr. Oller to speak as an expert.

Consequently, the Court should not consider any argument Intervenor-Respondents make that relies on any evidence the Court deemed inadmissible, is outside the record, or is an attempt to create expert testimony out of fact testimony. And none of

these “facts” or related arguments change the fact that K.S.A. 77-207 is unambiguous or affects the outcome here.

B. The Placement of their Sex-At-Birth on Their Driver’s Licenses Has Done the Intervenors No Real Harm

Intervenors assert that placing sex-at-birth on their—as well as other transgender individuals’—driver’s licenses cause physical harm, harassment, or discrimination. Intervenors’ Resp. to Petitioner’s MSJ at PDF pp. 12, 35-36. But Intervenors provide no record evidence in support of this assertion.

Intervenors cite in support of their assertion their counter-statement of facts, excerpts of the testimony of Intervenors Kellogg and Redman at the TI hearing, and an excerpt of Intervenor Kellogg’s deposition transcript. *See id.* But Intervenors’ counter-statement of facts, including the paragraphs Intervenors cite, rely heavily on statements of, or material from, Dr. Oller. But this Court found that Dr. Oller is not qualified to serve as an expert witness in this case. *See id.* Thus, Intervenors’ counter-statement of facts arguably are largely assertions not based on any credible evidence. Consequently, Intervenors arguments that rely on their counter-statement of facts should be given no weight or are inherently suspect.

C. The Placement of their Sex-At-Birth on Driver’s Licenses Violates No Constitutional Rights

Intervenors assert that the placement of their sex-at-birth on their driver’s licenses violates the following rights they contend are protected by Section 1 of the Kansas

Constitution's Bill of Rights: bodily autonomy, informational privacy, and the right to equal protection of the laws. *Intervenors' Resp. to Petitioner's MSJ at PDF pp. 35-43.* Intervenors' arguments are unpersuasive.

1. Bodily Autonomy

As Intervenors concede, the Kansas Supreme Court concluded that "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)." Whether or not certain information is displayed on Intervenors' driver's licenses—other than age—does not prevent Intervenors from controlling their bodies, asserting bodily integrity, or exercising self-determination vis-à-vis, for example, identifying themselves to others as they choose. *See* TI Order at p. 23.

2. Informational Privacy

Petitioner simply reiterates this Court's finding that "Kansas courts have not recognized a right to informational privacy," whether in the context of driver's licenses or otherwise, "under Section 1 of the Kansas Constitution Bill of Rights." TI Order at p. 24.

3. Equal Protection

K.S.A. 77-207 does not create a classification: "[t]here is no classification based on sex or transgender status or any other factor" under the statute because "[t]he rules are

the same for identifying each person who seeks a driver's license." TI Order at p. 25. In other words, K.S.A. 77-207 does not treat "[s]imilarly situated people. . . differently." *Id.* Therefore, "there is no equal protection violation." *Id.*

4. **Judicial Scrutiny**

Intervenors contend that heightened judicial scrutiny should be applied to K.S.A. 77-207 and that the statute would fail under the application of such scrutiny. Intervenors' Resp. to Petitioner's MSJ at PDF pp. 44-51. But because K.S.A. 77-207 does not violate any of Intervenors' rights need not be subjected] to any judicial scrutiny. *See* TI Order at p. 25.

Conclusion

K.S.A. 77-207 clearly obligates KDOR to record a licensee's sex at birth on the driver's license. Intervenors have suffered no real harm from the placement of their sex-at-birth on their driver's licenses. K.S.A. 77-207 does not violate any of the Intervenors' constitutional rights. Consequently, the Court should grant summary judgment in favor of the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2024, the above document was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants.

s/ Abhishek S. Kambli _____

Abhishek S. Kambli
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