

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' REPLY IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT**

Under Petitioner's reading of K.S.A. 77-207, Kansas must issue driver's licenses with a gender marker that reveals transgender Kansans' sex assigned at birth, thereby outing them as transgender anytime they show their license. This result is contrary to the plain statutory language, and it would have to be rejected even if the statute were ambiguous. In addition, Petitioner's interpretation would pose serious constitutional concerns without advancing any compelling (or

even legitimate) governmental interest. For these reasons, summary judgment should be granted to Intervenors.

ARGUMENT

I. **PETITIONER’S RESPONSES TO INTERVENORS’ STATEMENTS OF FACT ARE INSUFFICIENT TO CREATE A GENUINE DISPUTE OF MATERIAL FACT**

Petitioner unsuccessfully attempts to generate issues of material fact in his opposition to summary judgment. His immaterial assertions of fact and claims should be seen for what they are—a distraction. None of these alleged factual disputes are material to resolution of the legal issues presented in this case.

A. **Petitioner’s Attempt to Create Issues of Material Fact Regarding Intervenors’ Lived Experiences Are Immaterial.**

In his discussion of Intervenors’ Uncontroverted Contentions of Fact paragraphs 47–77, Petitioner devotes pages of argument to immaterial matters that do not create genuine issues of disputed fact and that misunderstand the relevance of the harms asserted here. This is not a damages case. Intervenors’ constitutional-avoidance argument rests on a doctrine that *preemptively* protects against potential constitutional infringements where the text of a statute is ambiguous and susceptible to differing interpretations. *See State v. Stevens*, 26 Kan. App. 2d 606, 609–10, 992 P.2d 1244, 1247–48 (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 (1998))). Intervenors do not need to show their constitutional rights have already been violated, or even that they *will* be violated in the future. Rather, the facts cited provide evidence about the harms that Intervenors experienced while using driver’s licenses with discordant gender markers and thus give context to the constitutional concerns raised by Intervenors’ statutory construction argument.

The statutory interpretation that Petitioner seeks would force transgender people to either go without a driver's license and forego associated rights and privileges, including driving, or to use and show a driver's license bearing a gender marker that does not reflect the gender they live as. Showing a license that does not reflect their gender entails disclosure they are transgender, thereby burdening their right to personal autonomy and privacy and denying them equal protection of the laws under the Kansas Constitution. Petitioner seeks to distract from this by insisting that Intervenors must demonstrate that they have already experienced violations of their Constitutional rights and then faulting Intervenors' lived experiences for not meeting *Petitioner's* definition of cognizable harm. This hairsplitting of the experiences of the Intervenors is not only dismissive of their lived experiences, but it is also immaterial. Whether transgender Kansans, including but not limited to Intervenors, face *the risk* of their constitutionally protected rights being violated under Petitioner's reading of the statute is what is at issue under Intervenors' constitutional avoidance argument, and Petitioner's attempt to distract from this should be disregarded.

Petitioner further attempts, and fails, to create an issue of material fact objecting to paragraphs 47–77 about the Intervenors' gender identity. *See* Petitioner's Response in Opposition to Intervenors' Motion for Summary Judgment, 13–14 (hereinafter "Pet'r's Resp. to Intervenors' Mot. for Summ. J."). Neither Intervenors nor Petitioner dispute that Intervenors' gender identity is different from their sex assigned at birth.

B. Dr. Beth Oller's Testimony and Offer of Proof May Be Considered for Summary Judgment.

Petitioner also takes issue with certain factual assertions in Intervenors' summary judgment motion regarding gender dysphoria to the extent that they rely on Dr. Beth Oller's testimony. *See* Pet'r's Resp. to Intervenor's Mot. for Summ. J. at 5–7 (discussing Paragraphs 1–26). To the extent these paragraphs rely on Dr. Oller's expert testimony, this Court is not bound by previous ruling,

at the preliminary injunction stage, to exclude Dr. Oller as an expert. The Court’s earlier evidentiary holding—unless and until its correctness is resolved on appeal—is not binding law of the case. *State v. Morton*, 283 Kan. 464, 473, 153 P.3d 532, 540 (2007) (holding that “district court had the discretion and perhaps even the duty, to consider . . . anew” an earlier evidentiary ruling after remand from appeal that did not address that ruling); *see also* K.S.A. 60-254 (confirming that court’s “decision[s], however designated, . . . may be revised at any time before the entry of a judgment”).

In any event, Dr. Oller is qualified to offer expert testimony throughout this case, as Intervenor contend in their ongoing appeal from this Court’s grant of a preliminary injunction. In addition, Petitioner offered no conflicting expert testimony to create a dispute of fact, nor did he challenge Dr. Oller’s *fact* testimony at the preliminary injunction hearing and on which Intervenor also rely in their cross-motion for summary judgment. For this reason, Dr. Oller’s testimony properly forms a portion of the record at summary judgment to be considered by the Court.

C. Petitioner Is Unable to Create a Disputed Issue of Material Fact Regarding Law Enforcement Interests.

Testimony from multiple law enforcement officers demonstrated that neither Kansas law enforcement nor jail and prison operations have been impacted by allowing transgender people to use driver’s licenses listing the gender that they live as rather than their sex assigned at birth, and Petitioner’s responses to these factual assertions do not create a material dispute of fact. Specifically, the testimony from multiple law enforcement officers was unequivocal that a transgender person had never eluded arrest, caused an issue for officer safety, or caused issues with placement determinations in prison facilities because of the gender marker on their license.

In his discussion of paragraphs 78–86 of Intervenor’s Uncontroverted Contentions of Fact, Petitioner quibbles with how broadly the testimony of multiple officers should be applied. *See*

Pet’r’s Resp. to Intervenor’s Mot. for Summ. J. at 23–27. In addressing the testimony of Lieutenant Chaulk (¶ 80), Captain Oehm (¶ 81), and Major Newson (¶ 85), Petitioner repeatedly minimizes the applicability of this testimony, arguing it is specific to only that officer and not the experience of law enforcement more broadly. *Id.* at 24–26, 27. This argument is not supported by any evidence and is unconvincing. There is undisputed evidence that law enforcement operations have not been impacted by a transgender individual having a license that listed the gender that they live as. *See* Intervenor-Respondent’s Motion for Summary Judgment and Memorandum in Support (hereinafter “Intervenor’s Mot. for Summ. J.”), 19–21, ¶¶ 78–86. Petitioner’s speculation that there are other ways in which law enforcement has been, or may be, impacted, is insufficient to defeat summary judgment because Petitioner cannot point to any evidence that forcing transgender people to carry a driver’s license that shows their sex assigned at birth advances important law enforcement interests.

Petitioner also attempts to create an issue of material fact regarding the testimony of Sheriff Brian Hill and his arrest of a transgender individual. Pet’r’s Resp. to Intervenor’s Mot. for Summ. J. at 24–25, ¶ 80. In this situation the individual in question did not evade arrest and was in police custody at the time of the realization. That Sheriff Hill was later able to learn of the individual’s criminal history after searching for this individual as a female in their data system is wholly immaterial.

Petitioner also draws erroneous conclusions from the preliminary injunction hearing testimony in a failed attempt to create an issue of material fact. For example, Petitioner claims that “Major Newson seemed to indicate that ‘functioning genitalia corresponds with ‘biological sex.’” Pet’r’s Resp. to Intervenor’s Mot. for Summ. J. at 26–27, ¶ 83. But in the cited portion of the transcript, Major Newson is asking the questioning attorney whether or not biological sex and

functioning genitalia were the same for purposes of answering the question. Major Newson himself twice states that he does not know if they are the same. Temporary Inj. Hr’g Tr. (hereinafter “TI Hr’g Tr.”) at 188:7-12. At most, this demonstrates that Major Newson, a non-expert witness, was not sure whether functioning genitalia and biological sex were interchangeable or distinct terms. This attempt to create a material issue of fact should be rejected.

D. K.S.A. 77-207’s Legislative History Supports Intervenors’ Statutory Construction Argument.

Petitioner takes issue with three of Intervenors’ fact paragraphs discussing K.S.A. 77-207’s legislative history and intent. *See* Pet’r’s Resp. to Intervenors’ Mot. for Summ. J. at 11–12, ¶¶ 40, 42–43. Intervenors agree that the intent of the legislature governs statutory interpretation “if that intent can be ascertained.” *Haddock v. State*, 295 Kan. 738, 754, 286 P.3d 837 (2012) (quotations and citations omitted). Intent can be presumed from the plain text of a statute only if the statute’s language is clear and unambiguous—otherwise, courts must ascertain the Legislature’s intent by consulting other indicia, including legislative history. *See State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019).

Petitioner’s claim that lawmakers’ statements (or lack thereof) are irrelevant to interpreting K.S.A. 77-207 is not a dispute of fact, but rather a legal question. As Intervenors have explained, the language of K.S.A. 77-207 is unambiguous in foreclosing the statute’s application to driver’s licenses, and if this Court agreed, resort to legislative history would be unnecessary to resolve the legal question as to the statute’s meaning. But if the statute is ambiguous, legislative history—including revisions to the language of the bill and statements made by lawmakers in support of this bill—may be relevant to K.S.A. 77-207’s proper interpretation. And the statute’s legislative history provides *no* evidence of lawmakers referring to driver’s licenses or taking issue with the Kansas Department of Revenue’s (KDOR’s) then-active policy of allowing for gender marker

changes on driver's licenses. 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 driver's licenses and their connection to law enforcement efforts. *See* Intervenor's Mot. for Summ. J. at 11–13, ¶¶ 40–43.

E. Reply to Petitioner's Additional Fact Objections

Petitioner objects to Intervenor's fact paragraphs that utilize the terms "gender," "gender field," and "gender designation" when referring to Kansas's statutory code, KDOR policies regarding gender classification on driver's licenses, and the federal REAL ID Act of 2005. *See* Pet'r's Resp. to Intervenor's Mot. for Summ. J. at 8–23 ¶¶ 28–30, 33, 36, 38, 44, 46–77. But Intervenor's agree that the relevant Kansas and federal statutory code sections and KDOR policies speak for themselves. There is no disputed issue of material fact in this respect.

Petitioner also objects to paragraph 34 of Intervenor's fact statements, alleging that KDOR does not "review" the letters it receives from medical providers attesting to driver's gender identity and instead "accepts a doctor's letter at face value." Pet'r's Resp. to Intervenor's Mot. for Summ. J. at 10. But Petitioner relies on a portion of Mr. Selk's testimony that offers no support for Petitioner's allegation. When asked whether KDOR scrutinizes medical letters, Mr. Selk testified that the agency treats them "no different" from other documentation provided to KDOR and accepts these letters "unless the letter from the doctor looks erroneous or looks like something's afoul or was not presented correctly," and that KDOR employees are "trained to make sure we're kind of looking at something that wouldn't be . . . falsified or not natural." TI Hr'g Tr. at 107:14-21. In any event, any dispute regarding KDOR's existing process for reviewing medical letters is not material to the resolution of this case: The meaning of K.S.A. 77-207 does not hinge on any

such review process, and Petitioner has never even attempted to connect this process to the government interests he asserts, much less explain how the process hinders those interests.

II. Petitioner’s Construction of K.S.A. 77-207 Is Foreclosed by the Statute’s Plain Language and Must Be Rejected Even if the Statute Were Ambiguous.

Rather than engage with the statutory argument that Intervenors actually assert, Petitioner continues to argue that the statute unambiguously requires treating both sex and gender as synonymous with sex assigned at birth in all Kansas statutory references. But nowhere does the Petitioner attempt to explain what the limiting phrase “with respect to the application of an individual’s biological sex pursuant to any state law or rules and regulations” used in K.S.A. 77-207(a) means. For all the unrebutted reasons provided by Intervenors in their summary judgment papers, this language clearly forecloses applying K.S.A. 77-207 to driver’s licenses (which are not an application of an individual’s biological sex). *See* Intervenor’s Mot. for Summ. J. at 24–27. At most, K.S.A. 77-207(a) is ambiguous, and if that were the case, Petitioner’s proposed construction of the statute would still be meritless. *See* Intervenor’s Mot. for Summ. J. at 23–24, 29–45.

Petitioner is equally wrong in contending that K.S.A. 77-207(c), a subsection about vital statistics data collection, mandates listing sex assigned at birth on a physical license. That language refers to the information that is recorded in databases, and as KDOR has explained, the data need not be identical to the information displayed on the license itself. *See* Respondent’s Response to Temporary Injunction and Memorandum in Support, 11–12 (explaining that KDOR can comply with K.S.A. 77-207(c)’s requirements for their internal data sets while allowing for licenses to still reflect the driver’s present gender identity, just as KDOR allows updates to height and weight). Accordingly, even assuming K.S.A. 77-207(c) applies to KDOR’s collection of information in its databases, it does not require the result urged by Petitioner here.

III. Preventing Intervenors and Other Transgender Kansans from Obtaining a Gender Marker that Reflects Their Gender Identity Would Pose Serious Constitutional Concerns

Finally, Petitioner repeats the arguments advanced in support of his preliminary injunction and in favor of summary judgment and does not engage meaningfully with Intervenors' legal arguments as to the constitutional concerns created by his position. As explained above, under a constitutional avoidance theory, Intervenors do not need to prove their constitutional rights have already been violated, or even that they *will* be violated in the future. Rather, if the statutory construction urged by Petitioner would pose constitutional doubts in its application to transgender Kansans, including but not limited to Intervenors, the Court must adopt the reading that does not pose those concerns. *See, e.g., Butler v. Shawnee Mission Sch. Dist. Bd. of Ed.*, 314 Kan. 553, 574, 502 P.3d 89, 102 (2022) (constitutional avoidance doctrine includes “a preference for construing a statute to avoid constitutional doubts if there is another reasonable way to do so”). Indeed, under this doctrine, the Court should “refrain[] from deciding constitutional questions unless it is necessary to do so.” *Id.*

As Intervenors have explained, *see* Intervenor's Mot. for Summ. J. at 38–45, Petitioner's reading of K.S.A. 77-207 classifies people based on sex and transgender status, singling out transgender individuals for discriminatory treatment. Under Petitioner's construction, K.S.A. 77-207 facially classifies the sex that will be listed on a person's Kansas driver's license. Moreover, transgender people alone cannot obtain a license with a gender marker that matches the gender they live as every day, indicating the law in its operation imposes a discriminatory classification as well. It is non-responsive to assert, as Petitioner does, that there is no classification. Pet'r's Resp. to Intervenor's Mot. for Summ. J. at 31–32.

In the same vein, asserting that there is no constitutional right to informational privacy under the Kansas Constitution, *see* Pet'r's Resp. to Intervenor's Mot. for Summ. J. at 31, does not make that true. Kansas courts have consistently recognized that the Kansas Constitution is *at least* as protective as the federal bill of rights when it comes to individual liberties. *See, e.g., Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 461 (2019). As Intervenors have explained, multiple other courts have already recognized that denying transgender people a license with a gender marker that reflects their gender identity would impinge on a right to privacy. *See* Intervenor's Mot. for Summ. J. at 34–35.

Finally, if Petitioner's reading of K.S.A. 77-207 were accepted, the burden of the statute on the right to personal autonomy is plain. Petitioner does not dispute that driver's licenses are used for driving, along with all sorts of other activities. Requiring transgender people to use a license that outs them every time they show it takes away their ability to determine with whom and how they want to share this deeply personal information. This burden would raise constitutional doubts under any meaningful understanding of the right to personal autonomy described in *Hodes*, 309 Kan. at 646.

CONCLUSION

The material facts are not in dispute. The parties' dispute centers around the legal significance of those facts. For the reasons set forth in Intervenors' motion for summary judgment, this Court should grant their cross-motion and deny Petitioner's motion for summary judgment.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on June 13, 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.

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