No. 24-127390 A

In the Court of Appeals of the State of Kansas

State of Kansas *ex rel.* Kris Kobach, Attorney General
Petitioner/Appellee,

versus

David Harper, Director of Vehicles, Department of Revenue, in his official capacity and Mark Burghart, Secretary of Revenue, in his official capacity
Respondents/Appellants,
&
Adam Kellogg et al.
Respondents/Intervenor-Appellants.

Appeal from the District Court of Shawnee County
Honorable Teresa L. Watson, Judge
District Court Case No. SN-2023-CV-000422

Amici Curiae Brief of Professors Stephen R. McAllister & Richard E. Levy

Served on Attorney General Pursuant to K.S.A. 75-764

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Interest of Amici Curiae

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Argument

I. Section 1 of the Kansas Constitution's Bill of Rights protects the right of transgender Kansans to carry a driver's license that reflects their gender identity.

The Kansas Constitution reflects the wisdom and tolerance characteristic of Kansas. Our early prairie citizens firmly believed "that legislatures and officials cannot be trusted." Farinacci-Fernós, *Progressive State Constitutionalism*, 71 Buff. L. Rev. 425, 433 (2023) (internal quotations omitted). Thus, state constitutions of that era include "a dynamic set of substantive

[1] Institutional affiliations are provided for identification purposes only.

instructions and limitations on government that is adopted and jealously maintained by the people themselves." *Id.* Section 1 of the Kansas Bill of Rights is one such provision: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights, § 1. K.S.A. 77-207 burdens Kansans' Section 1 rights; therefore, it triggers the highest levels of constitutional scrutiny.

Section 1's natural rights guarantee is substantive, not aspirational. Since 1859, it has been "widely accepted as guaranteeing natural rights enforceable via court proceedings." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 613, 440 P.3d 461 (2019) (*Hodes I*); *see also Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 660, 3 P. 284 (1884) (Brewer, J.) (the Kansas Bill of Rights and the "political truths" it embodies "cannot be ignored in any valid enactment."). The Kansas Bill of Rights "protect[s] every citizen, including a person who has no clout, and the little guy on the block." *Kansas Malpractice Victims Coal. v. Bell*, 243 Kan. 333, 342, 757 P.2d 251 (1988), *disapproved on other grounds by Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991).

The Kansas Supreme Court has repeatedly held that Section 1 affords "separate, adequate, and greater rights than the federal Constitution." *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058 (1987). Indeed, this principle was recently reaffirmed in *Hodes & Nauser, MDs, P.A. v. Kobach*, 318 Kan.

940, 943, 551 P.3d 37 (2024) (*Hodes II*) (Section 1 "identifies rights distinct from and broader than those listed in the Fourteenth Amendment").[2]

A. The Kansas Supreme Court recognized Section 1's broad scope in *Hodes I* and has reaffirmed that scope.

Hodes I held that Section 1 protects the right of personal autonomy. Personal autonomy encompasses "the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." 309 Kan. at 646. Section 1 thus prohibits or significantly limits government interference in "decision-making about issues that affect one's physical health, family formation, and family life." *Id.* The Kansas Supreme Court recognized that protected decisions under Section 1 include a woman's personal reproductive decisions. *Id.* at 660.

The fundamental right of personal autonomy is related to the right of privacy, *see id.* at 649–50, another natural right. *See Kunz v. Allen*, 102 Kan. 883, 884, 172 P. 532 (1918) ("'The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. . . . A right of privacy in matters purely private is therefore derived from natural law.'"); *see also Johnson v.*

[2] Because these are personal autonomy claims that arise under Section 1 of the Kansas Bill of Rights, the Kansas Supreme Court's holding that equal protection claims under Section 2 of the Kansas Constitution should be analyzed in lockstep with federal doctrine is not applicable. *See Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022) ("[T]he equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution.").

Boeing Airplane Co., 175 Kan. 275, 280, 262 P.2d 808 (1953) ("The right of privacy is concisely defined as the right to be let alone.").

Hodes I adopted a clear framework to analyze the scope of Section 1's protections. First, a court must examine the asserted right and determine whether it falls within personal autonomy. 309 Kan. at 660. If so, a court must then decide whether the challenged law infringes on the plaintiff's protected right.[3] The final step is to apply strict scrutiny, with the burden on the state to meet that high standard. *Id.* at 663.[4]

The Kansas Supreme Court adheres to the *Hodes I* framework. *See Hodes & Nauser, MDs v. Kobach* (*Hodes II*), 318 Kan. 940, 551 P.3d 37 (2024); *Hodes & Nauser, MDs v. Stanek* (*Stanek*), 318 Kan. 995, 551 P.3d 62 (2024).

B. Section 1's personal autonomy principle—which includes considerations of privacy and self-determination—protects Kansans' right to live as transgender individuals.

1. *Privacy.* Section 1 incorporates privacy rights. Natural law recognizes personal privacy and generally prohibits government-compelled disclosure of

[3] "[O]nce a plaintiff proves an infringement—regardless of degree—the government's action is presumed unconstitutional." *Id.* at 669–70.

[4] Strict scrutiny "applies when a fundamental right is implicated." *Hodes I*, 309 Kan. at 663. Under strict scrutiny, the government must demonstrate that (1) a compelling interest supports the law, (2) the law furthers such an interest, and (3) the law is narrowly tailored to serve that compelling interest by utilizing the least restrictive means to achieve the government's purpose. *Id.* at 669. The strict scrutiny test is generally fatal in fact.

intimate medical information. Under the *Hodes I* framework, the government must, at a minimum, satisfy strict scrutiny to justify such intrusions.

The inclusion of transgender persons' sex assigned at birth on their driver's licenses would compel revelation of their transgender status every time they must produce their driver's license for anyone's inspection. This could include a host of common situations, including making retail purchases, gaining admission to venues, airport security, and entering government buildings, including the Attorney General's building. Unless the State can satisfy strict scrutiny, Section 1 does not permit such intrusive state measures. Requiring Kansans to reveal intimate personal information on a regular basis to all kinds of people in numerous situations is a massive government intrusion into the right of privacy protected by Section 1, especially when the required disclosures have no legal relevance to any legitimate interest of the State.

In *Alpha Medical Clinic v. Anderson*, the Kansas Supreme Court considered the right of privacy under the U.S. Constitution, which includes "the right to maintain the privacy of certain information" (such as medical information). 280 Kan. 903, 919, 128 P.3d 364 (2006). The compelled disclosure of transgender status involves the disclosure of the most sensitive personal information imaginable—not only medical information, but also fundamental matters related to the core of a transgender person's identity. It therefore implicates the right of privacy recognized in *Alpha Medical*. Indeed, because Section

1 provides more privacy protection than federal law, the application of *Alpha Medical* to this case follows *a fortiori* from *Hodes I*.

Embracing one's gender identity and living as a transgender man or woman, including being able to carry a driver's license that accurately reflects that identity, is a quintessential and undeniably intimate, personal matter. "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 Gonalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (citation omitted); *Foster v. Andersen*, No. 18-2552-DDC-KGG, 2019 WL 329548, at *2 (D. Kan. Jan. 25, 2019) (unpublished) (recognizing "the highly personal and sensitive nature of a person's transgender status.").

Repeated and unnecessary compelled public disclosure of transgender status would subject transgender Kansans to harassment, humiliation, hostility, and even violence. Under the *Hodes I* framework, the State bears the burden to satisfy strict scrutiny before it can require such disclosure.

2. *Self-Determination.* Section 1 protects transgender Kansans' rights to exercise self-determination based on Lockean principles. Broadly speaking, the Kansas Bill of Rights guarantees individual and societal self-determination. *Cf. Natanson v. Kline*, 186 Kan. 393, 406, 350 P.2d 1093 (1960) ("Anglo-American law starts with the premise of thorough-going self determination.").

The right of self-determination guarantees that individuals may make decisions regarding "one's physical health, family formation, and family life," *Hodes I*, 309 Kan. at 640, without interference unless the State can satisfy strict scrutiny. Because Section 1 protects the right "to make self-defining and self-governing decisions," *id.*, at 646, "[i]t follows that each man is considered to be master of his own body." *Natanson*, 186 Kan. at 406.

The Attorney General would deny transgender Kansans this right. Like laws prohibiting same-sex couples from marrying or participating fully in society and government benefits for marriage, or prohibiting women from making reproductive choices, K.S.A. 77-207 will interfere with the essential life choices of transgender Kansans. Forcing transgender Kansans to publicly bear an identity that does not reflect who they are will deprive them of the personal autonomy and dignity that Section 1 protects. Indeed, the inevitable effect of this law is to demean, facilitate harassment of, and perhaps even encourage attacks on transgender Kansas so as to discourage them from living in accordance with their gender identity. The statute unnecessarily and quite harmfully interferes with Section 1 rights.

Further, the Attorney General's reasoning in support of the law could reach much more than gender identity. The Attorney General wants the courts to give the State control over fundamental aspects of personhood. He would

have the courts permit the State to identify and classify Kansans on their driver's licenses and potentially other state records based on a host of factors.

The Attorney General's view could give State the power to insist on inclusion (on driver's licenses and other state records) of all sorts of deeply personal information, such as medical history, family history, genetic markers or any number of topics so long as the government could articulate some remotely rational reason for doing so. But it would violate Section 1 if the State, for example, required driver's licenses to include whether the bearer had had an abortion or used birth control. K.S.A. 77-207 has the same effect. Section 1 prohibits such government overreach into Kansans' lives.

C. History and tradition support broad Section 1 rights.

Courts interpreting Section 1 may consider history and tradition in determining that provision's scope. But, importantly, Section 1 is not interpreted based on biased, prejudiced, or intolerant notions of "original intent." In other words, Section 1 is not frozen in time by the prejudices and limitations of its mid-1800s' authors or the society in which they lived. To the contrary, the Framers explicitly wrote into Section 1 a forward-looking perspective that allows courts to account for changes in society, knowledge, and understanding.

Personal autonomy principles, such as self-determination and privacy, are fundamental Section 1 principles—inherent in the Section's adoption of natural rights as a constitutional imperative—but they are not limited to the

understanding of the 1850s as to who deserves such protection. *See Hodes I*, 309 Kan. at 660. The *Hodes I* Court made clear that historical prejudice and lack of knowledge have no place in our constitutional system under Section 1. *Id*. at 659 ("True equality of opportunity in the full range of human endeavor is a Kansas constitutional value, and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago."). There is no denying that societies around the world have held prejudicial views towards some groups, including the LGBTQ+ community.

Just as the *Hodes I* Court recognized stereotypical opinions of women did not control the meaning of Section 1, the same is true of old attitudes towards and prejudices against transgender people. Indeed, "history teaches that respect for transgender people is a tradition far more deeply rooted, with individuals whom today we might call transgender[ ] . . . play[ing] prominent roles in many societies, including our own." Levi & Barry, *Transgender Tropes & Constitutional Review*, 37 Yale L. & Pol'y Rev. 589, 595 (2019) (internal quotations omitted).

There have been transgender people in Kansas since it was a territory. These fellow citizens always have been and are very much a part of Kansas history; they are entitled to Section 1's protection. Since 1861 until the adoption of K.S.A. 77-207,there is no comparable Kansas statute which dictates how Kansans must make fundamental choices concerning their identity.

For a concrete example, a transgender Kansan spearheaded the effort to combat tuberculosis during the beginning of the 20th century. Dr. Alan Hart—born Alberta Lucille Hart—was a physician and radiologist who pioneered the use of x-rays to detect tuberculosis, allowing doctors to screen patients early and prevent the disease from spreading to others. His procedure, known as "Hart's Method," saved countless lives in the early twentieth century.[5]

Kansas benefits from the contributions of transgender Kansans. Section 1 protects *all* Kansans, including "the little guy on the block," *Kansas Malpractice Victims Coal.*, 243 Kan. at 342, regardless of societal prejudices,

II. K.S.A. 77-207 violates Section 2 of the Kansas Constitution because it is based on bare animus against transgender Kansans.

Section 2 guarantees that "[a]ll political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Kan. Const. Bill of Rights, § 2. This guarantee reflects the Kansas commitment to protecting all Kansans from laws motivated by prejudice or discriminatory intent. K.S.A. 77-207 treats transgender Kansas differently from other similarly situated Kansans. Only transgender Kansans are required to list a sex assigned at birth that is different from their

[5] DeLuca, *Trailblazing Transgender Doctor Saved Countless Lives*, Scientific American (June 10, 2021), https://www.scientificamerican.com/article/trailblazing-transgender-doctor-saved-countless-lives/.

gender identity. That differential treatment is unconstitutional if motivated by animus against an unpopular group.

The Kansas Supreme Court has made clear that "the equal protection guarantees found in Section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution." *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022). Thus, Kansas courts are "guided by United States Supreme Court precedent" interpreting the Fourteenth Amendment's Equal Protection Clause. *Id.* Federal equal protection jurisprudence recognizes that laws enacted with the purpose of disadvantaging politically unpopular groups are constitutionally unsound. A statute motivated by a "bare desire to harm" a particular group does not withstand even rational basis review. *See, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Windsor v. United States*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015). In determining whether the law is motivated by animus, courts look to whether the law imposes burdens that appear to have been "drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, at 632–33, 635.

A. K.S.A. 77-207's text and legislative history demonstrate bare animus against transgender Kansans.

K.S.A. 77-207's text and legislative history demonstrate improper legislative intent. The statute only affects transgender Kansans because they are

the only group whose gender identity will not match their sex assigned at birth. Legislative history confirms the law's purpose.

For example, testimonial proponents of the law (SB 180) stated the bill rejected those "who want to redefine common sex-based words in a manner that separates sex from biology."[6] Further, in explaining the House vote to override the Governor's veto, proponents "welcome[d the law] in an era where some claim they can change their sex by a simple act of the will." Kan. H.R. Jour., 2023 Reg. Sess. No. 62 (Apr. 27, 2023). But, like being lesbian or gay, being transgender is not "an act of will." It is how one is born. K.S.A. 77-207 was enacted with animus towards transgender Kansans.

B. K.S.A. 77-207 serves no legitimate governmental interest.

K.S.A. 77-207 fails even the lowest level of equal protection scrutiny because it has no rational relationship to a legitimate state interest. Proponents suggest the law ensures the accuracy of state records, but they do not demonstrate any specific government interest at risk, only a generic interest in "accuracy." "Accuracy" standing alone is not a legitimate interest, and the State has not identified any independent interest that this accuracy serves.

In any event, maintaining "accurate" records does not require the public disclosure of personal, intimate, medical information. Indeed, state laws

[6] Kan. Legis. Rsch. Dep't, Supplemental Notes on Senate Bill 180, https://www.kslegislature.gov/li/b2023_24/measures/documents/supp_note_sb180_00_0000.pdf.

routinely permit (and often require) accommodations with respect to personal information, including withholding sensitive information. Importantly, Kansas law allows its citizens to legally adopt any name they choose. Kansans are not required to use "birth names" on state records, including drivers' licenses.

As many federal cases recognize,[7] when a State's asserted interests are implausible, the logical inference is that the asserted interests are pretextual and mask animus. A law that harms an identifiable group while serving no state interest fails even the rational basis test.

C. K.S.A. 77-207's harmful consequences confirm its animus.

The effects of K.S.A. 77-207 further support the conclusion that it was motivated by animus. The practical impact of the statute is to stigmatize transgender Kansans, deny their personal dignity, and encourage their social marginalization. Laws that impose "a broad and undifferentiated disability on a single named group" are invalid. *Romer*, 517 U.S. at 632.

Requiring transgender individuals to disclose their transgender status each time they present their driver's license causes profound harm. The law demeans their personhood by declaring their gender identity to be legally nonexistent. *See, e.g., Obergefell*, 576 U.S., at 681 (2015) (State bans on same-sex

[7] *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (striking down zoning restrictions used to discriminate against intellectually disabled individuals); *Windsor*, 570 U.S., at 770 (invalidating a law withholding federal benefits from same-sex married couples).

marriage "demean" same-sex couples and deny them "equal dignity in the eyes of the law"). In addition, the law risks their safety—subjecting them to possible discrimination, harassment, and violence. Such stigmatizing measures violate constitutional equal protection guarantees.

III. The constitutional avoidance canon could be applied here.

One form of the Kansas constitutional avoidance doctrine "is as a canon of statutory construction expressing a preference for construing a statute to avoid constitutional doubts if there is another reasonable way to do so." *Butler v. Shawnee Mission Sch. Dist. Bd. of Educ.*, 314 Kan. 553, 574, 502 P.3d 89 (2022).[8] The doctrine has "an early Kansas pedigree." *Butler*, 314 Kan. at 574 (citing *Chicago, K. & W. R. Co. v. Abilene Town-Site Co.*, 42 Kan. 97, 111, 21 P. 1112 (1889) and quoting Cooley, A Treatise on the Constitutional Limitations 159 (1868)). If K.S.A. 77-207 is interpreted as the Attorney General asks, there is at least substantial doubt the law passes muster under Sections 1 and 2 of the Kansas Constitution's Bill of Rights.

At a minimum, this Court should reject the Attorney General's aggressive and unnecessary statutory interpretation.

Conclusion

The Court should reverse the district court's decision.

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[8] This is a mainstream principle of statutory construction under both federal and state law: "A statute should be interpreted in a way that avoids placing its constitutionality in doubt." Scalia & Garner, Reading Law 247 (2012).

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Respectfully,

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