IN THE DISTRICT COURT OF
DOUGLAS COUNTY, KANSAS

DANIEL DOE and MATTHEW MOE,)
----------Plaintiffs,)
)
vs.)Case Number
)2026 CV 112
KRIS KOBACH, STATE OF KANSAS,)
et al.,)
---------- Defendants.)

TRANSCRIPT OF CLOSING ARGUMENT ON
TEMPORARY INJUNCTION

PROCEEDINGS had before the Honorable James R. McCabria, District Court Judge, Division 4, District Court of Douglas County, Kansas, at Lawrence, Kansas on the 7th day of October, 2026.

A P P E A R A N C E S

The Plaintiffs appeared by Mr. Harper Seldin, Senior Staff Attorney and Mr. Joshua Block, Senior Counsel, American Civil Liberties Union, 125 Broad Street, New York, New York 10004.

Also appearing for the Plaintiffs, Mr. Douglas R. Dalgleish, Stinson, LLP, 1201 Walnut Street, Suite 2900, Kansas City, Missouri 64106; Ms. Jocelyn A. Sitton, Ballard Spahr, LLP,

1800 Larimer Street, Suite 1600, Denver, Colorado 80202; and, Ms. Heather St. Clair, Ballard Spahr, LLP, 601 SW 2nd Avenue, Suite 2100, Portland, Oregon 97204.

The Defendant State of Kansas appears by Attorney General Kris W. Kobach; Mr. Jay Rodriguez, Deputy Attorney General, and Mr. Dwight Carswell, Acting Solicitor General, 120 SW 10th Avenue, Topeka, Kansas 66612.

The Defendants Kansas Department of Revenue, Kansas Division of Vehicles, Deann Williams and Mark Burghart appears by Mr. Ted E. Smith, Chief Counsel, Legal Services, 109 SW 9th Street, PO Box 3506, Topeka, Kansas 66601.

The Defendants Kansas Department of Administration and Adam Proffitt appears by Ms. Lynette Bakker, Staff Attorney, 1000 SW Jackson, Suite 500, Topeka, Kansas 66612.

THE COURT: Good morning, everyone. We're on the record in Daniel Doe vs. State of Kansas. 26 CV 112.

State the appearances.

MR. SELDIN: Good morning, Your Honor. Harper Seldin for plaintiffs.

MR. BLOCK: Joshua Block for plaintiffs.

MS. ST. CLAIR: Good morning, Your Honor. Heather St. Clair and Jocelyn Sitton from Ballard for the plaintiffs.

MR. DALGLEISH: Doug Dalgleish for plaintiffs.

MR. KOBACH: Kris Kobach for the State.

MR. RODRIGUEZ: Jay Rodriguez for the State.

MR. CARSWELL: Dwight Carsell for the State.

MR. SMITH: Ted Smith for the Kansas Department of Revenue.

MS. BAKKER: Lynette Bakker for Kansas Department of Administration and Secretary Proffitt.

THE COURT: Thank you. We completed

evidence last week and scheduled today for closing argument. I just ask counsel who are going to be speaking if your microphones are green rather than red since we are on Zoom. We do have counsel, I think at least one media outlet and some of the parties attending via Zoom.

Are there preliminary matters before we begin?

Mr. Seldin, proceed.

MR. SELDIN: Thank you, Your Honor, and good morning.

Section 1 of the Kansas Bill of Rights reads, "All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness."

The legal question here is exactly what Kyle Koe asked, does this include me. Why am I not considered one of the people of Kansas.

That is, does Section 1 of the Kansas Bill of Rights protect Cameron, Daniel, Kyle, Matthew, Nicholas and Dakota from a State law that infringes their personal autonomy by treating their gender as less real than any other man's or woman's, and in the process degrades and humiliates them. Does every Kansan have a natural

right to live life in accordance with their gender.

Based on the testimony you heard last week, the answer must be yes. It cannot be that the right to personal autonomy is afforded only to those who fit the government's definition of a man or a woman.

Which leads to the question, why did we have the hearing last week. The hearing last week was because facts matter. And how the law actually is working with respect to SB 244 and the plaintiffs is essential for the Court's next decision. We took very seriously that the Court could not decide the TRO based on speculation. We have now learned a lot in the last few months about how SB 244 is operating. We've learned both the harm to the plaintiffs and also we've seen is this actually addressing the State's articulated interests.

Here's what we learned at the hearing last week: We learned that with respect to restrooms, there's no evidence that justifies excluding transgender men from men's restrooms. Even the State's expert, Dr. Cantor, agrees that for binary transgender individuals it makes sense for them to

use the restroom that matches their gender because there are no nudity concerns.

Cross-examination showed it's just speculation about this idea that some people may pretend to be transgender in order to commit crimes in restrooms. You heard unrebutted, expert testimony from Dr. Calkins that that's just not the phenomenon that we see, and there's no evidence that that's been happening in Kansas ever and certainly not since the law went into effect.

Again, the fact witnesses that the Attorney General brought report discomfort at the idea that they might share the restroom with someone who's transgender, but no actual misconduct, no nudity, and they even admit that they may not even know. For the plaintiffs -- the witnesses who are women, they might not even know that it's a transgender woman in the restroom and certainly the same for transgender men in men's rooms.

So what we see there is that the way that this -- the way that restroom separation operates in Kansas is it's via gender and gender expression. It's not your sex assigned at birth; it's not biological sex.

So with respect to driver's licenses, again, heard of no evidence that justifies the need for law enforcement officers to have sex assigned at birth or biological sex on a license. The State has had months to find anyone in Kansas from law enforcement who could articulate a problem that they encountered because someone's driver's license had their gender identity instead of their sex assigned at birth, and there's nothing.

None of the incidents you heard turned on the driver's license had in gender instead sex assigned at birth. All we heard were hypotheticals about things that might happen. And, frankly, the law enforcement officers who testified were frank that they had many ways to identify people and that they were sure that they could resolve any issues that might come up. But in terms of what is on the face of the driver's license itself, there's no -- it wasn't furthering any State interest to have sex assigned at birth there instead of gender identity.

The AG's expert witness Dr. McGregor, even she freely said that medical professionals have to confirm everything about everyone in medical

settings. That even for people who are not transgender, you have to ask questions like have you had surgeries, what organs do you have, what medications are you taking. So, again, no particular State interest is furthered with respect to the medical profession on driver's licenses.

And I'll talk about this a little bit more when we talk about likelihood of success on the merits, but the other set of facts that this Court heard was the profound depth of feeling and identity that the transgender plaintiffs and Ms. Dakota West, how to understand themselves is deeply intertwined with their gender. It is essential to their core. I think that that is clear that we're not talking about a preference. We're not talking about an inconvenience. We're talking about an impediment to everyday life because it cuts to the heart of how people choose to walk in the world.

To prevail on this temporary injunction, plaintiffs must demonstrate five things: The likelihood of success on the merits on at least one claim, which is what I hope to spend the bulk of my time talking about today.

A reasonable probability of irreparable injury. Again, that goes to the testimony the Court heard last week.

The lack of an alternative -- adequate alternative remedy. Again, the evidence from last week shows that plaintiffs have been trying to make this work and there just isn't a solution for them other than an injunction.

That the threat to plaintiffs outweighs the harm to the government.

And that an injunction is not against the public interest.

I hope to walk through these prongs today, but certainly welcome the Court's questions and happy to direct my attention where it would be most helpful.

But I think beginning with the first claim with respect to likelihood of success on the merits, I want to start with personal autonomy. I also think that this -- where we are now procedurally is actually much smaller and much more narrow than where we were in February and March with a TRO.

The TRO that we sought was going to be broad, it was facial in the amended petition. And

in our renewed TI, we've made clear this is an as-applied challenge to restrooms and driver's licenses only with respect to binary identified people. So transgender men who live in every aspect of their lives as men, transgender women who live every aspect of their lives as women and intersex men who live in every aspect of their life as men, intersex women like Dakota West who live their life as women. So it is smaller, it is narrower, and so I think what the Court is looking at is more discrete with respect to both the facts and the law than where we were in February.

THE COURT: Help me understand what you just said about the binary aspect of your request for the temporary injunction. Is that referenced or specified in some motion or pleading with the Court? And are you asking me to -- what I'm hearing is to carveout a temporary injunction that applies only in the manner in which you've just described and leave other questions open for a final...

MR. SELDIN: Yes, Your Honor.

THE COURT: Okay.

MR. SELDIN: And I think that this will be crystalized more cleanly in the proposed

findings of fact and conclusions of law which we're looking forward to submitting next week, but I think it reflects the testimony that you heard is the change, which is --

THE COURT: Okay.

MR. SELDIN: -- you heard from Dr. Turpin that, for example, 95 percent of her patients fall into this category of binary identified. They are transgender men who are always living as men, transgender women who are always living as women. She has a small subset of individuals who are nonbinary, but, as she testified, they typically use the restroom associated with their sex assigned at birth. They typically don't ask to change their driver's licenses. There's no X on a driver's license in Kansas. We're not asking for anything like that.

And so to the extent that the injunctive relief that is going to be more narrow it would cover transgender men who are living as men who want to use men's restrooms, have male on their driver's license; same for transgender women. So to the extent that the State has articulated concerns about people flip-flopping or going back and forth, we're not asking for injunction -- one,

that's not a phenomenon that we see in Kansas, but even if we did, we're not asking for injunction that covers that.

THE COURT: Okay.

MR. SELDIN: And then, again, with respect to restrooms, this is not addressing locker rooms, it's not addressing showers. It's just addressing, you know, restrooms like you heard the plaintiffs talk about --

THE COURT: Okay.

MR. SELDIN: -- over the course of last week.

So with respect to personal autonomy. You know, it's sort of a three-step, right. The first step is what's the right. The second step is, is it infringed, and then under Kansas law if it's infringed, even a little bit, you then get into strict severe tailoring.

I want to start with what is the right. And here there's a right of personal autonomy with respect to living in the world as your gender. Now, I think, you know, the AG has in various briefings and arguments said that we're trying to have this Court invent a right out of whole cloth. That is not what we're asking. We are just asking

this Court to follow the playbook that was very clearly laid out in *Hodes*.

And *Hodes* makes clear that, you know, self-discrimination, you know, you have to carefully examine and evaluate a certain right -- assertive right, independently in the context of its own unique implications, right. You have to look at it. What does this really mean. What is this alleged personal autonomy, right.

And one of the things that we know from the Rosen concurrence in *Hodes II* is what you're looking for is you're looking for profound and unique attributes, right. You're not, as one defendant said, you're not looking for I want this different barber to cut my hair, or I don't want to trim the beard. You're not looking for that. You're looking for things that cut into the core of how people walk in the world.

And the *Hodes* court was clear, well, how do you figure that out. Well, you can figure that out by you can look in Lockean principles, you can look at Kansas case law, you can look at decisions from other jurisdictions that also have Lockean natural rights guarantees. You know, there are places that you can look to understand, like, is

what I'm looking at a right of personal autonomy or is it something lesser that falls outside the scope of *Hodes*.

And, again, you'll hear *Hodes* is just about abortion. Personal autonomy only covers abortion. It cannot be that when Lockean natural rights was encoded into the Kansas Constitution, that the only thing meant and the only thing that would ever cover is abortion because there's so much more to life in personal autonomy and self-direction than just that. Momentous decision but not the only decision that certainly someone makes in their lives.

And so if we look about how *Hodes* talks about enabling all of natural rights, it's controlling your body, it's bodily integrity, it's self-determination, it's deeply personal context that affect your entire life span. And I think what you heard from plaintiffs last week that these are -- gender absolutely falls into this category. What you heard from the transgender men who spoke in this courtroom is that they have moved heaven and earth to live their lives in accordance with their gender. They have done everything in their power to socially transition,

to medically transition, to legally transition. They have done so sometimes at great personal cost.

I think the other way to look at this deep sense of how profound this is, is that in response to SB 244, none of them said, I guess I'll just live my life as a woman, right. None of them said that. Instead, this became how do I maintain my dignity as a man even though I am being treated this way.

And the same with Ms. West; her response to this law was not to say I guess I'll live my life as a man because that's how I was raised and that's what was on my birth certificate; Instead, she left the State.

So, again, this is not a preference. This is not an inconvenience. This cuts to the core of how plaintiffs live in the world, and so that's why I think last week's hearing is helpful because to understand is this personal autonomy right that falls within the scope of section 1. You have to hear how people live their lives, and the way they live them is profoundly influenced by gender.

THE COURT: Help me understand your perspective. You've done a good job, as you

should have, of articulating the breadth of these Lockean principles, but don't those Lockean principles include a way to analyze what are the limiting factors. Because to me, Lockean starts with the individual sort of in a state of nature unrestrained and untouched by any consideration of living in a unit.

So what are the restraining principles or limiting principles that the Lockean analysis tells a court to consider.

MR. SELDIN: So I think, you know, I think actually that *Hodes* I is helpful in this regard. I think the pincite is 659 to 660 and it is talking about, you know, the paragraph begins, like, we no longer live in a world of separate spheres of men and women, and it sort of then talks about, like, how since the -- since the Constitution was framed that, you know, we look to natural rights and we sort of apply what we know about society now, right. It's not like the federal context where you're sort of locked into history and tradition that the framers found it. It's understanding that what our understanding of what it means to move from nature to being in society, that can change over time as society

changes.

So I think it's helpful that in *Hodes* they talk about this idea of separate spheres of men and women because part of the way that our society is structured, as you heard Dr. Turpin and, frankly, the plaintiffs talk about, is that we live in a gendered society, right. We have men's rooms and women's rooms. We have M and F on the licenses. When you're teaching children to be polite, you tell them to say sir or ma'am, right.

And so, you know, what we're not -- I think the limiting principle here is all our plaintiffs want is to be able to, in this binary world that we live in, if they are men, if their self-conception is that I'm a man, they just want to live as other men. They are not asking for men's restrooms to be torn down. They're not asking to put X's on driver's licenses. They are just asking that to the extent we have structured our society to be gendered in this particular way, that if the way that they are, the core of their being is to be a man, that they be allowed to be men like other men.

So that's, I think, the limiting principle here especially with respect to the belief but

also, you know, what the right that we're looking for is that when the government essentially hales these people in public, right, when the government says, you need to identify yourself on your driver's license so we can find you and so that when you show your license, everyone can recognize that it's you. That in that context they should be haled, they should be seen, they should be understood as men.

We're not asking, again, for, like, the records to be expunged. It's just in that daily interaction. Similarly with restrooms. So the right is just to not have the government say to you, you're not really a man in context where the difference between Kyle Koe and any other man is immaterial for purposes of things like what restroom he uses at the state capitol.

So I think the limit of the right here is not anything and anything related to gender is fair game and the government can't do anything about it. That is not what we are talking about. We are talking about the specific context where the government has set up two chutes for gender, that the government can't then tell you, you're in the wrong chute. We think you're in the wrong

chute and you need to start living your life and being the other way.

So, again, I will say as profound as the concept of gender is to personal autonomy and as broad as that protection is in *Hodes,* the actual implementation of that right here is it's smaller. It's not -- we're not asking for, you know, the legs to be cut out of how we understand society as gender. It's just that the plaintiffs be allowed to live as they were living before, so, again, it's -- I think it's both profound and narrow in that respect about the rights that we're talking about.

THE COURT: Okay.

MR. SELDIN: I think, too, what's helpful about *Hodes* I is that they do talk about the history of Lockean natural rights and things that, you know, even pre-America philosophers talked about it, like, might be approaching some kind of infringement. And if you look at it, it has a lot to do with things like creating classes of people based on status.

And so there's something about from Sir Edward Coke in 1642, this ordinance about, you know, if you're a merchant, you have to wear this

clothing and that's offensive. You know, we're talking about more than clothing here, but I do think it is this intuitive sense that there's something about how you present yourself in the world and what the government -- if the government makes you present yourself in a way that is either limiting or an anthema to who you actually are, that at least you need to start the conversation about is there personal autonomy here.

THE COURT: I mean, if I remember right, that was 1642 and *Coke* is talking about can the government tell you how to dress based on whether you're a merchant, certain type of merchant, and he seems to indicate that is not a right that the government can interfere with. And so...

MR. SELDIN: And I think this is a good example about how Lockean natural rights move with society. In 1642, you know, if you think about economic circumstances and how society was structured, it probably really mattered what kind of merchant you were, right. And so, you know, that was something that could really matter to a lot of people and yet was not for the government to tell you, you have to, you have to dress this

way.

And so here, again, I think that it's not perfect but I think it shows that there is some malleability and it has to be attuned to current circumstances, but it doesn't mean it's a free-for-all, right. And so I think that that's why the testimony that you heard last week matters because these are things that are deeply held to the core and also interfere in daily life in ways that are profound, and I think that that is...

Another way to think about, like, is this profound enough to be a -- to fall within personal autonomy is honestly the reactions of other people that plaintiffs told you about when they were thwarted, right. When Kyle Koe went to the DMV a second time, he said, you know, we saw each other. And I think the way that he was treated at that DMV shows that the other people there understood that what was happening to him was unspeakable. They literally didn't make him say what he was doing because that's how profound it was.

Nicholas Noe told you that when he explained to his instructors, you know, one way to frame that is he had a very bad day at school, right. Instead, his instructors understood that

what had happened to him was humiliating and degrading in a way that made them angry and made them cry. That's not -- and so I think that that's just another example. That's like this law casts shadows big and small across plaintiffs' lives, and they're not the only ones who think this is important to how you live your life. Other people see them and understand that what they are being asked to do is offensive to their core and not sort of a disagreement about scorekeeping on the back end in a database; it's more than that.

I will also say that, you know, this Court would not be going out on a limb in understanding gender this way. I think the *Grimm* decision is helpful. It's cited in our briefs. There's a concurring opinion by Judge Wynn, it's at 972 F.3d at 624. And it's just simply this idea that, you know, your sense of self is male or female. It's no less foundational to transgender and intersex people than to anyone else. And that is, I think, a bookend to what Dr. Turpin said which is that everybody has a gender identity.

Now, transgender and some intersex people may have a little bit more of a time and a journey

to articulating that. I think you heard that from Mr. Broyles. We talked about his experience as a young person, not wanting to stand in the girls' line and not understanding why that was such a conflict.

You heard that from Daniel telling his parents that I'm a boy. I'm supposed to be a boy.

You heard that from Nicholas Noe talking about not being listened to.

And so I think, you know, if you are assigned male at birth and you live your life as a boy, you don't have to spend a lot of time telling people that. You just do it. I think what you see though is that it does take some time sometimes for transgender and intersex people like Ms. West who always understood herself as a woman but it took some time to understand what about her history made that make profound sense to her.

And so I think this idea that, you know, you can't directly observe gender identity so it's not real, you can observe it. You observe it in the behavior of people who strenuously object to being put into what, for them, is the wrong box. In the same way that a man who is not transgender I think would object vigorously to being forced

into women's spaces where he did not feel he belonged and where he was not welcome. So I think that's part of the understanding of why this is profound and then also why it is protected with a personal autonomy.

THE COURT: How do I measure profundity for purposes of constitutional analysis?

MR. SELDIN: You know, I think, I think *Hodes* explains how to do that. *Hodes* looked at, you know, what is the effect on a woman's life if she can or she can't have an abortion, and it talked about the personal implications, the economic implications, the life-long medical implications that, you know, her decision either way was going to have a profound influence on her life. And both by virtue of the pregnancy and then by carrying to term, both of those things have profound effect.

And so I think this Court can look to those things to understand that what you heard from plaintiffs like Kyle Koe is that before he transitioned, before he lived his life as a man, he was fading out his own life. He had dropped out of school. He could not hold down a job. And

after he could live his life as a man, he's a civil servant. He's married. He is living his life, and same -- every plaintiff had that story.

Mr. Broyles told you about how essentially his whole life now is his kids and it's because he's a dad, right. It's not just that he's a parent, he's a dad, and so I think you can measure how profound this is both in terms of what plaintiffs have done to get to this point, how profound and meaningful it is to live as men and then the unspeakable horror of being forced to live otherwise.

I think in *Hodes* they talk also about, you know, sort of what is, what is so horrific and terrible about being forced to carry a pregnancy that you no longer want to carry. And so I think in the same way that *Hodes* looked at what does this do to your life, how profound is it, how much of an effect does it have both in your every day and life long, I think the Court has enough from last week to understand certainly at this temporary injunction stage that the gender isn't one of those things.

THE COURT: Okay.

MR. SELDIN: And, again, I think

that's what's held about *Hodes* is that it's a playbook. It's a playbook that says we don't know the exact destination. It's probably not going to be a lot of paths to this because it's going to be limited, but there's not no path. There is a path for the courts to walk to understand.

I think what's also relevant is that this, like, we haven't seen this kind of thing from the government before, right. Like this is new and different. It changes what has been happening with KDOR since 2007. It changes how individuals have been sorting themselves into restrooms before that which was largely based on gender presentation, and as the plaintiffs themselves testified not wanting to make other people uncomfortable. And so it may be that that's why all the sudden we're confronting this is because all the sudden the government has decided to step in and say actually we have some very strong opinions about who gets to be a man or a woman and we're going to enforce those with criminal statutes and with overnight invalidation.

So some of this is this is the moment that we're just at because of where the law is, but that doesn't mean that just because we haven't

seen this kind of infringement on those rights before, it doesn't mean the right doesn't exist. It just means it's never been called -- until it becomes salient because we've never seen a government intend to intrude on it in the way that we have seen the Kansas Legislature done with this.

And, again, I think -- thinking again about *Hodes* and how it talks about what's the effect of being forced to carry pregnancy to term, you know, the plaintiffs told you about how, based on their driver's licenses and based on their inability to assess restrooms, it affects going to the bank. Ms. West told you about that at the Wells Fargo.

It affects Mr. Broyles who can't fill out a rental application for a unit that's better for him, better for his kids, better for his commute because he's unwilling to be outed again in his small town.

It affects work. You heard that from Mr. Doe and Mr. Koe about how this is affecting their ability to be at work with dignity as in Mr. Koe's case as a civil servant.

It affects their education. You heard

that from Mr. Noe about missing class, about worrying, about being unable to embark on a new career, turning over a new leaf because now his transgender status is following him.

You heard it's even small things. It's a small shadow, right. Mr. Noe is sitting in a parking lot looking at his driver's license thinking is a potential confrontation worth it so I can make this gift for my girlfriend, and that's a small moment, but it's one of any number of moments where it's just interwoven into daily life.

And I think that's where Dr. Scheim's testimony is helpful because, you know, I think one of the State's theories is that something bad has to happen every time you have a restroom need or show your driver's license for this law to be offensive, and that's just not the case because part of the -- a front, part of the injury, part of the offense to personal autonomy is you have to structure your whole life around trying to avoid circumstances where you are called into question.

Dr. Scheim, I think, explained what that harm is and also that it's not as though we found the only six people in Kansas who are having a

problem with this, right. Like, this is predictable and to be expected when you tell a class of people you can no longer function in society as a man or a woman. You have to function in a way that we have told you to function.

I think if the Court doesn't have any further questions about personal autonomy specifically, I'd like to shift to talking about informational privacy, but happy to dwell here if there's more that the Court would like to discuss.

THE COURT: Well, I think it was 2d 147, but it's not really -- yeah, I'm just -- one seven, part of the way the *Hodes* court explained their analysis was, an analysis of natural rights, Lockean principles, the case law of Kansas, the rationale and holdings of court decisions from other jurisdictions, reviewing broad constitutional natural rights provisions or other provisions similar to ours.

And I haven't read all of the briefing by both sides, but is there any case law from other jurisdictions where challenges to similar types of statutes at issue here were analyzed under similar broad state constitution provisions?

MR. SELDIN: Yes. Again, this

court --

THE COURT: And I'm asking in particular in the context of the personal autonomy but it may be broader than that.

MR. SELDIN: I would say it's yes and for this. I think a good place to start would be *Kalarchick*, which is from Montana at 427 Montana. The pincite is 348 for this particular part but the full case is in the briefing, and that's about identity documents. And the Court there was very clear that identity documents are necessary to access public life and to live a self-directed life as other people do.

The *Hodes* opinion cites to Montana Supreme Court decisions in other respects because this is a feature of a lot of western states, right. This Lockean natural rights which is all kind of germinating around the same time. That's why *Hodes* is using them in discussing other courts and how this goes. So I think Montana is a good example.

I think, you know, another aspect of Lockean natural rights is privacy. Those sort of go hand in hand. And so in addition to *Kalarchick*, you know, there are a number of cases

on privacy.

I would say the other place that you could go with this, Your Honor, is there's a large body of case law that dealt with state sodomy statutes, which is not exactly on point. I think *Kalarchick* is much more on point because it's a one-to-one comparison of transgender people and identity documents.

But if you look at -- there's a case *Jegley v. Picado*, it's 349 Arkansas 600. It's a 2002 case. In there the Arkansas Supreme Court found that a state sodomy statute had violated a fundamental right to privacy. They have an all men are created equal, freely and independent and have certain inherent inalienable rights. They have a very similar clause. Their section 2 looks a lot like Kansas's section 2. And it talks about how this is privacy for private consensual noncommercial acts of sexual intimacy, that was bundled into that.

I think *Gryczan v. State*, it's G-R-Y-C-Z-A-N. It's 283 Montana 433. It's a 1997 case. Same thing. It's striking down anti-sodomy statute based on the rights of individual privacy.

And part of that opinion was talking about, you know, the protection of privacy. It's discussed in the context of personal autonomy. It's not sort of free standing. It's like if you have a personal autonomy right, that inherently have some privacy from the government from prying eyes, so they are locked together.

And I think what's also helpful about the state sodomy cases, and I would also include *Powell v. State*, which is 510 S.E.2d 18 from Georgia. It's this idea that social morality legislation is subject to judicial scrutiny. I think there's a helpful quote in *Powell* where they talk about how repugnance alone does not create a compelling justification for state regulation.

I think also the Montana case I was just talking about had some text in there where they talk about how even if a legislative enactment is enacting the will of the majority, and even if it's responding to perceived silent notions of what's acceptable conduct in a moral sense, some fundamental rights which is we don't strip away from minorities even.

And so I think that that's relevant because what you heard from the AG's witnesses is

that a number of them are uncomfortable conceptually with sharing a restroom with transgender people, either transgender women or transgender men, because the transgender men will appear as men, and that is a view that people get to have, right. We are not here to argue that that view is wrong or that people need to feel a certain way. It's just can that become a lynch pin for the government excluding men, certain men and only certain men from men's restrooms and similarly for women.

So I would say that in addition to the Montana cases and the anti-sodomy cases, I think there's a number of other privacy cases that are helpful here, too, for understanding what we mean when we're talking about Lockean natural rights. And, you know, it goes to not every private thing you do in your home but certainly to the most private things you do in your home, and so, you know, personal autonomy doesn't go to every aspect of who you are but it certainly goes to the core one that you hold deep in your heart and that other people recognize in you as part of your identity.

I think, you know, the informational

privacy place is, like, I think, another place where following the road map of *Hodes* I think we've got good directions on informational privacy, if you will.

You know, one of the things that we were just talking about was other states but there's actually a good case in Kansas that deals with informational privacy. It's *Kunz v. Allen*. It's 102 Kan. 883.

The facts there was sort of an unconsenting video of a woman that was then used as an advertisement. And in that case the court talked about how the right of privacy has its foundation in that instincts of nature it's recognized intuitively and it's because individuals resent encroachment by the public on their private nature.

And so what was interesting in that case, too, is that, you know, one of the arguments made I think by the store was well, not everyone who saw the video of this woman thought poorly of her, right. They didn't think less of her because they saw her in this ad. But the point was that she became the common talk of the people in the community and that's not what she wanted and that

was done against her will.

And so I think that shows you that -- that's a 1918 case, I believe. That shows you this is a long-standing idea that you have some natural rights to privacy that the State cannot take away from you. And I think that's another place where, you know, this idea of well, it's intuitively understood. That's tricky, right. What's intuitive and what's not. It's less tricky with the evidence you heard last week from the plaintiffs where they talk about how they are understood in society and how people also understood this intrusion on their privacy to be so harmful to them.

I think, you know, that would be the *Hodes* methodology of, like, all right, what do we have in our state to teach us that this is within Lockean natural rights.

Because the informational privacy we also have other state cases that are helpful. There's an Alaska case, K.L. -- it's 2012 Westlaw 2685183. It's a 2012 case.

THE COURT: I'm sorry, give me the citation again.

MR. SELDIN: I apologize. It's 2012

Westlaw 2685183, and I think the best pincite I've got here is *6. And so there Alaska's Constitution it has a specific right to privacy, which includes this interesting personal autonomy and decisionmaking, so it's sort of bundled together.

And the way that the Alaska court conceptualized this, is they said, this is -- it covers intimate information which, even if disclosed to a friend, could cause embarrassment or anxiety. And in that particular case they were actually talking about transgender people. The word that they used was "transsexualism" and what they said was, the excruciatingly private and intimate nature of transsexualism for persons who wish to preserve privacy in the matter, is really beyond debate, and then they compared it to being HIV positive. And they said it's the unusual condition that is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others.

And I think if we're trying to understand why this is so profound and it has a privacy instinct in it, you know, because the State has

argued in some of its papers that essentially if you tell anyone that you're transgender ever in person or on-line, you suddenly have no informational privacy interest.

In order to fully implement that, in order to then fully have that privacy right, what Daniel Doe should have done when he was 21 and realized he wanted to live as a man, that he needed to leave town. He needed to change his name. He needed to cut off all contact with his family and his friends. And if they saw him again, he had to deny who he was because how else was he supposed to tell people I'm living as a man now. You have to say something, right.

And so but what you heard from plaintiffs is that what is very important to them is the where, the when and the who have they disclosed, right. They tell people when they're coming out because they're proud that they get to live their lives and they also literally need to inform people.

You hear from Mr. Broyles he wanted to get ahead of the talk in his small town so that he controlled the narrative about being transgender and transitioning.

And then you heard that as they got older, as they matured, that Nicholas Noe said he was no longer a teenager. Mr. Broyles said when I was a dad and not a young man. And also as they took in a little bit of the world around them and realized that maybe things with transgender people were not trending the way they wanted in terms of social acceptance, that they changed their behavior to become more private. And so I think that that's helpful for understanding how this privacy right is understood.

I think also if you look at what happened to plaintiffs when people learned that they were transgender. It reveals the truth of what they're talking about in K.L. about this nature of what they had said was transsexualism, you know, the kinds of questions it provoked.

You heard from Sergeant Stammer that if he encountered someone who looked to be a woman and saw an M on her license, his questions, even though he doesn't ask at traffic stops what kind of genitals you have, he's going to start asking questions about what's happening here, what do I need to do, how am I supposed to be patting you down. He even said, at the end of the day, like,

we're taking you down to the station and we're strip searching you in front of a camera.

You heard from Mr. Noe that even though he wants to give the benefit of the doubt to his instructor, you know, the first thing that happened after he indicated that he needed an accommodation under SB 244 is that another classmate was told to give him a pelvic assessment, right.

And there's a reason that that was uniquely horrific for Nicholas Noe, right. He's the EMT. He knows part of his job is going to be dealing with people who are injured, some of that's going to be in private areas, that's just part of the ball game. But what he didn't sign up for was to have his transgender status be something that was a leverage in an intention to target him in intimate ways on his body.

So I think that that demonstrates why plaintiffs are reasonable when they are cautious about who and under what circumstances they disclose their transgender status and why it is covered with an informational privacy because I think other cases have made clear that this is not -- the right of privacy is not one of secrecy.

It's about who you bring into your circle of intimates.

And the case there is *In re MT.* That's 106 Cal.App.5th 322, so 106 Cal.App.5th 322. We can provide any of these cases to the Court. We're happy to.

But in that case it was a transgender woman who wanted to seal her court record of her name and gender marker change. She had kept her transgender identity private. She didn't tell people at work. She didn't tell people at school, she took pains not to, but if you search her for the court docket you could find out that she was transgender. And that, you know, came out at work, it came out in her community to her detriment.

And so there the courts said all right, well, privacy is protected in California Constitution. It's this right to be left alone. That sounds in Lockean natural rights. It's not a right of total secrecy but it's to define her circle of intimacy, and so it includes information regarding limiting disclosure of confidential information about your body condition.

And so I think that that's important here

because, you know, I think one of the arguments the State has made is that you don't have some kind of privacy right in gender identity because everybody can sort of see your gender. But for transgender plaintiffs and for intersex plaintiffs like Ms. West, what is being revealed is their transgender both intersex that is being revealed because when you see a man like Kyle Koe who lives his life as a man, who looks like a man, who walks in the world as a man, and then you hand a law enforcement officer a license and it has an F on it, that's not revealing that he's a man. It's revealing that he's transgender. That's the problem. And so that is what plaintiffs are trying to avoid. That is what they have a privacy interest in.

I think also, you know, you heard a lot of cross-examination about social media. I think there are courts that have already sort of considered that argument and rejected it. And that's *Ray v. McCloud*. That's 507 F.Supp 925. It's a southern district of Ohio case from 2020. I think the good pincite there is 934.

THE COURT: Give me the citation again.

MR. SELDIN: I'm sorry. It's 507 F.Supp.3d 925, and then it's SD Ohio 2020 *Ray v. McCloud*.

And in that case the Court was very clear that even if you shared with pride, you know, that you're transgender with your friends and your family and on social media, it doesn't negate your right not to be forced to disclose it except on your own terms. And that was a case about sort of stealing or redacting documents in the light of an overriding privacy interest.

So, again, I think there's always this question of the world of social media and how does that change or not change what we're dealing with, and it is complicated. But I think *Ray v. McCloud* makes clear that it's still the same idea that even as technology evolves, the question is still are you in the driver's seat or are you in the passenger's seat or, you know, you could be locked in the trunk, right. Do you have any autonomy with how this information is shared and spread under what circumstances.

I think another way to look at this is if you look at *Powell v. Schriver,* which is a federal case. It's 175 F.3d 107. It's a second circuit

case from 1999. Again, this is a case that talks about transsexualism. And in there they said that even the federal courts have recognized that the federal constitution protects the right to maintain confidentiality of transsexualism. And that was a case about people who were incarcerated, which is a place where obviously you have no privacy. And yet even there, there's a recognition that there is something about being transsexual, about being transgender, about living your life in a gender that does not match your sex assigned at birth, there is something uniquely intimate and private about it that is not for the government to circulate against your will without, you know, very compelling reasons at a minimum.

So, again, I think that that's -- it's sort of if you look at personal autonomy and informational privacy together, and I think it's important to look at them together because the Lockean natural rights hook and the universe I think is more fully flushed out when you look at those cases together.

I think we can understand that other courts have also grappled with, like, what does this cover, what doesn't it cover. It's kind of

tricky because you live your life in a gender that you got private information about your journey and how you got there, and the idea is that you still have an interest in maintaining that privacy of your journey and how you got there even if you have necessarily had to communicate that fact to other people as part of living their life in the context of your community and your family and not just starting over once you realize, you know, this to be true about yourself and to be true about how you need to be in the world.

I had intended now to move to speech but, again, I'm very happy to talk more about privacy and personal autonomy if that would assist the Court. I could talk about it all day but...

THE COURT: Yeah. Well, I can certainly think of questions, but go ahead and I'll reserve those until I hear from both sides if I have them left after that.

MR. SELDIN: Okay. Again, I'm happy to circle back to whatever is the most helpful to the Court.

I think on compelled speech, I think where I'd like to start on this is that if you looked at -- before we get into whose speech is it and

how is it operating, if you look at the government's articulation of their interests, all of the interests that they have that they allege they have in the driver's license are all about communications to third parties. It's all about well, when you hand the highway patrol officer your license, what's he going to see. Is he going to know what to do. It's all about if you show up in a doctor's office, what's the doctor going to do with that information.

All of those interests are about telling other people information, so this idea that there's no communication and it's just like currency, it slips in your purse, that's just not -- one, not how a driver's license operates. You have them in your pocket so that you can, when someone says who are you, you can prove who you are. You can say, this is who I am, right. That's the communication when you hand over your driver's license. This is who I am. This is who the government recognizes that I am.

And so in terms of what is the communicative effect of handing over a license. In the State's own words, yeah, we want you to communicate to highway patrol, you know, I might

look like a man, but, you know, I'm different from other men in this very specific way.

They want you to tell the doctor, I might look like a woman but I am different from other women in this very specific way.

And then what you heard is that those very specific ways don't actually matter for law enforcement interests or for doctors, that there are other ways to deal with that. And the net effect of those instances is that when you go to the bank, you fill out a rental application, those are not people who need to know that about you and yet they also know because the driver's license is carried with you, you know, in your day so that you can show that you are, you know, you are a person who has an identity that isn't recognized by the government. And so I think it's important to start there because divorcing, you know, whose information is whose on the license ignores what the State is saying the license is meant to be doing which is communicating to third parties someone's transgender status.

And so I think even if under the First Amendment, you know, I mean, we're looking at the Kansas Constitution but similar principles apply.

Even if the license is government speech it can still violate the right against compelled speech if you're forced to convey it. And the plaintiffs all cleanly testified that the message that they feel that they are providing and that other people are receiving is not only revealing the transgender status but it's also untrue.

Kyle Koe told you about how he's at the DMV, he's swearing his oath that everything on this license is true and he felt like he was lying. He felt like he was lying because -- not just because, like, in the core of his being he knows he's not a woman, he knows he's a man. It's because other states and other government entities have recognized that his legal sex is male, and so it's just -- it's not -- it's just not true. It's just not true and it's forcing him to communicate a message about himself that is to his detriment and that is false.

THE COURT: Getting ahead of the argument that I expect I'm going to hear, which is this is a gender marker that the government has defined to mean only one thing, this was your biological sex at birth. So the government is not saying anything about your gender identity when

they want this information on this identification document. And to make it into something that it's not is not a reason this Court should pay much weight to when it comes to, you know, the speech aspect of it. This license is only speaking to one aspect of who I am and this is -- and it doesn't stop me from saying anything else or communicating anything else or take away from anything else because -- how do we respond to that?

MR. SELDIN: No. And I think if we interrogate that a little bit more deeply, I think it's helpful to look at two other contexts. It's helpful to look at birth certificates and it's helpful to look at passports.

If you look at birth certificates, which is not something that we are challenging here, you know, even though you can amend those for name and adoption, there's something to be said about it's a historical record. That doesn't mean that transgender folks shouldn't be able to change it. It's just like how -- you heard from the plaintiffs how the birth certificates function. It's in the mother's fire safe, right. They can't even find it. They see it, they learn fascinating

information like Kyle Koe was born in Missouri. Like, that's how important in the day-to-day birth certificates are, right, because you don't typically carry them in your pocket to prove who you are, and so that is one context.

I think another context, and I think the State will probably make much of this as they did in their briefing, is you look at *Orr*. *Orr v. Trump* is a federal case. It's a stay decision, it's not a merits decision. But the thing that the Court talked about in *Orr* is that, you know, passports have a lot of information about the circumstances of your birth, right, including what was your sex assigned at birth.

And as a historical fact, the plaintiffs freely admitted to what their sex assigned at birth was. I think it's important that Dakota West notes that that was probably incorrect at the moment it was placed there. You heard from Dr. Turpin how further analysis of what had happened may have, you know, she may have understood that she had -- was intersex earlier in life and so there's some question about whether that was ever right to begin with. But, you know, for the transgender male plaintiffs they acknowledge that

when the doctor pulled them out, doctor said it's a girl and that's what got on the license -- that's what got on the birth certificate.

But that's not what driver's licenses are for. Driver's licenses are who you are now. What are you communicating now. Where do you live now. What's your name now.

THE COURT: Who says what driver's licenses are for?

MR. SELDIN: I mean, I think the State did when they said that they need driver's licenses to conduct ongoing investigations for law enforcement and then trying to find people. They are trying to use them based on identity.

I think, you know, there's reasons that there are rules about updating your photo and changing your name and changing your address. And I don't have a Kansas driver's license but in my pocket I've got a little slip sheet that says my address is different from my license and that's because the State really wants to know where I live now, not where I lived, you know, four years ago.

And I think most states are similar in that way, right, and so I think both in terms of

just how they function in society, how the State says what their State interests are, you know. In an emergent medicine context, what's happening to you now is important. How well you were breathing at birth, your weight at birth, that doesn't tell anyone anything about those things. It's how well you are breathing now, what do you weigh now; what sex organs do you have now; what medicine are you on now; what surgeries have you had now. Driver's licenses are a present tense, right, and so to the extent that you're looking at passports, the articulation there from the Supreme Court, the State posture is this is about historical facts relating to citizenship and things like that.

I think when you compare it to driver's licenses -- every example here is for Kyle Koe, if you were looking at the circumstances of his birth, you'd say female and from Missouri. He works at the state capitol in Kansas. He's a man. That doesn't make any sense to have that on a document that's supposed to be in his pocket to tell tellers, to tell highway patrolmen, to tell other folks, like, this is who I am now. It's not that just what we're saying it's for. It's I think the State's articulation of this only makes

sense if you only understand is it a present tense document and just, you know, how we use them in the world, right. The expectations that KDOR has about updating. All of that is a what's happening now, not what's happened then. And so I think that that's part of the driver's licenses speech issue is the communication now.

And I understand that -- I think the other thing about this case that -- you know, stepping outside the compelled speech argument for a moment -- is that I do not believe that this Court needs to decide on the definition of sex for us to prevail. You know, I think you heard testimony from Dr. Turpin and Dr. McGregor that we know a lot about the different aspects that go into sex. We know a lot about chromosomes. We know a lot about hormones. We know a lot about intersex conditions which children reveal, how nuance and complicated this is.

You heard from Dr. McGregor that we are also now learning that gender identity is the new frontier on this. We are learning a lot. What you heard both from her and from Dr. Turpin is that there is strong evidence that there's a biological basis for this. We don't know exactly

how. We don't know, you know, we can't follow the path exactly the way that we can with eye color. But this is not something that materializes out of thin air, right. This is something that is interwoven without people knowing themselves, and so I think that's why Dr. Turpin's testimony about intersex conditions and what we know about the race of people ultimately realizing the sex assigned at birth was not right for them, we see that for many conditions it's higher than the general rate of being transgender in the population. And that, you know, I think what Dr. Turpin was communicating there is that there is something real and integral in you that causes something that then people later express is gender. We don't know exactly the mechanism but we know that it's in there and it's important.

And so to the extent that the State is saying all we've done here is define sex in this one limited way and it's really easy, I think it's more complicated than that. But, again, you don't need to have a decision that says I'm deciding that biological sex does or doesn't include gender identity. That's not how the Lockean natural rights work. That's not how speech works. This

is the intuitive sense of how you live your life as a man and is the driver's license forcing you to communicate something that is one, both untrue in the present sense, and also reveals your transgender status in a way that is not narrowly tailored to a compelling government interest.

So I just want to make clear that, like, that is not what needs to be part of your decision for us to prevail. It's a little easier than that because this is about how we live in the world. It's not so much the why we live in the world. We just know that it's profound and to the extent that it gives assurances that there is something neither arbitrary nor surface level. I think the science of what we know about gender and sex repel understanding, like, this is something that people really live in their bodies, it is in them, they express it and that is equally true for people who are transgender, intersex and people who are neither.

So I think with speech again, much of this is covered in the briefing and we hope to certainly crystalize it in the proposed conclusions of law. But, you know, I think driver's licenses are not like currency. They're

not even really like license plates. They have a unique and specific function in the way that the interaction of speech is understood as between the government and plaintiffs is helpful.

I think another -- I'm reluctant to make this comparison but I think it is helpful. If you look at cases that deal with sex offender branding on driver's licenses, a number of courts have said that putting in big red letters "sex offender" on a driver's license, that might be true. You might be a sex offender, you might be on that registry, that's a fact. Government has an interest in certain people knowing that fact. It is nonetheless a constitutional problem to have that because it's not narrowly tailored. And that's why when we see cases like *McGuire* from the middle district of Alabama, that's 741 F.Supp.3d 1112.

If you look at *Nelson v. Landry* from the middle district of Louisiana, that's 714 F.Supp.3d 790. It says that the sex offender brand is compelled speech. It's not narrowly tailored because you could put a little code on there that was more discrete so that law enforcement who saw the license or who ran the license could know a person is on the registry.

But that's not information that the bank teller needs to know, right. I'm not saying that this would be okay if they just had a little T on the back. I'm saying that to the extent the State is saying we have an interest in law enforcement knowing your sex assigned at birth or your biological sex or there's interest there. There are ways to communicate that, that don't tell the bank teller, right, that don't tell the landlord whose house you want to rent.

So the question -- with speech the question doesn't end with whose speech. At the end of the day it's what's the tailoring and so that's what's important.

THE COURT: Well, much easier to tailor because that brand is wholly disconnected from your sex, right? I mean, whether you're male or female you can be a sex offender and it doesn't -- so there's no -- there's only one interest that we have to analyze in the government side of the equation there, but I think -- it's an interesting thing to help me think about it.

MR. SELDIN: I think also this is where, you know, because we're under the Kansas Constitution, I think Section 1 is permeating what

we're talking about. And let's think about sort of the dignitary interest. You know, let's think about the mistakes that people make that, you know, the plaintiffs told you about when people either recognize them as the men they are, that it was revealed they were transgender or earlier in their lives where there was some confusion about where they were supposed to be.

You know, think about Nicholas Noe telling you how upset that mom was when her daughter asked what's a boy doing in here. And, like, everyone got upset. Like, the mom got upset. The kid got upset. Nicholas Noe was certainly upset. That would have been different if it had been something like eye color, right. It's sort of children are known to point and ask questions in public. But, you know, something like is that a boy or a girl, or what's a boy doing in here is different than are your eyes blue or green, right. That's still a question about your body, but I think we all sort of get that that, you know -- so that is not the kind of thing that cuts at the core of your dignity of who you are as a person if someone were to make a mistake or to tell you no, your eyes are actually green, they're not blue. I think what

you heard from plaintiffs is that it is very different when that question is both your sex assigned at birth because the questions don't become like let's get out the Pantone color wheel and see what color your eyes are. Their questions becomes what genitals do you have now, what did you have then, what's your story, what's your deal, and that is, you know, uniquely horrifying to be quizzed about your genitals by anyone and certainly by a law enforcement officer who at that stage probably doesn't need to know.

I think the other thing, too, is that there could be any number of ways to let law enforcement know about sex assigned at birth. It doesn't have to be displayed to anyone. I think you heard testimony about scanning licenses in the car, hauling things in. We are not seeking relief in the form of expunging those records. It's just when it's on the face of the license, you know, that that really needs to be there.

So I think that's the other aspect of this that's important is what is it used for, what's it needed for and what are the collateral consequences of, you know, a sex offender brand instead of something more discrete.

THE COURT: Well, I think I'm thinking about the collateral consequences because to what degree does it matter that I determine what the State's intention was in requiring this information on an identity document distinct from what are either the foreseeable or unforeseeable consequences of that decision.

MR. SELDIN: So I want to make two, I think, very important distinctions. You don't need to decide what the Legislature was thinking for these claims. That's, as my mother-in-law says, we're past that. That's not what we're talking about with these claims.

What we are instead talking about is that when the State came into your courtroom and told you this is why we need that information, this is what we're doing, these are our State interests, the questions that may come, is that a legitimate or a compelling interest? Is what you're doing actually furthering that?

And that's where the tailoring matters, right. Is it a snug fit. Is it, like, wow, you really want to accomplish this and you're doing that exactly right. Is it you are trying to do this and you're pretty close, or is it wow,

there's a really big disconnect here between what you say your interests are and what you say you're trying to do and then what's actually happening.

And so, you know, I think you can take the State at their word when they say, like, this is our law enforcement interest, this is what we need. And then you look at the evidence and say okay, do the law enforcement officers in front of me tell me that this is something they need and this is how it's operating in the world or have they told me something different. And so that's what you're deciding. You are deciding is this something different, is this actually working, is this actually necessary. It is not about the Legislature in this respect, and you could take the State at their word when they tell you this is what they're worried about.

THE COURT: Well, I asked for two reasons: One is because I generally agree but I wanted to see if you had a different take on the analysis I will do here, which is, Judge, we've given you -- you know, I'll let them make their arguments -- but Judge, here's why -- here's reasons we've given you why this legislative action makes sense. And I'm specifically being

general in my statement I think because I don't want to say what the standard is at this point because that's something I have to decide, and the standard by which I will judge it will change.

But early on, there was some at least intimation that there was a nefarious intent or that the actual desire was to -- I guess that's your argument. The only thing it does is compel disclosure of private information. It doesn't serve any other legitimate State interest, whatever level of analysis we give to it. So...

MR. SELDIN: And I want to be very clear about how animus operates and it doesn't in this case with respect to our arguments. None of anything we have just talked about requires any intimation of animus by anyone.

THE COURT: Okay.

MR. SELDIN: What is important though is how the law is operating. And I think there are some aspects of our equal protection argument we'll -- if by the way the law operates it really only seems to put transgender and intersex people in a jam, the Court can then take a look at and say, under *State v. Limon*, say okay, you wrote a law, it doesn't say transgender. Just like in

Limon, the law didn't say homosexual. You can say all right, but it's really only operating to punish or to make life harder or to treat more harshly a subset of people based on their conduct even if you don't trigger heightened scrutiny, even if it's just rational basis, *State v. Limon* tells you, like, you don't need to ignore. That you are only really affecting transgender and intersex people. You don't ignore that and, in fact, even at the lowest tier of scrutiny, you say hmm, are you accomplishing the goals that you say you are accomplishing. Are you anywhere in the ballpark, or are we really talking about two different things.

And the other question then becomes for tailoring if you do look at higher levels of scrutiny is could you accomplish the same goal with less harm, right. And that's the whole point of the sex offender cases, right, is that could you accomplish the same goal of making sure that law enforcement looking at a license know this to be true about someone. Could you do it in a way that causes less harm to that individual at the bank. And the answer is yeah, you definitely can.

And so that's what the Court is looking at

here is that to the extent the State says they have an interest in certain people knowing information about biological sex, about transgender people or intersex people, you know, could they accomplish that goal in a way that is like a better fit, a more snug fit because the looseness of this law, the lack of fit is causing enormous harm, right. It's that lack of fit that is casting the shadow because it's Nicholas Noe buying wine for his girlfriend, it doesn't matter if he's a man or woman. He does it but he can't do it because of his license, right.

And so I think that's part of -- and so I just want to be very clear that you do not need to make any findings about animus to understand that this law is specifically affecting a smaller group of people in a way that requires the Court like in *State v. Limon* to look at with generous intent towards the Legislature with looking at okay, if you say this is what you're trying to do, are you really doing it and is that the kind of thing that, you know, we let the government have opinions about. And sometimes yes and sometimes no, but even at that lower tier it's still something you can look at about who is this -- I

think targeting has sort of a negative connotation but who is it affecting.

I also think there's a federal case here that is helpful. It's *Cleburne*, which is cited in our briefs. I apologize I don't have the pincite on me. But it talks about --

THE COURT: Spell.

MR. SELDIN: Cleburne, C-L-E-B-U-R-N-E.

THE COURT: Thank you.

MR. SELDIN: And it's a case about individuals with disabilities. And there it talks about how, you know, animus isn't always malice. It's not hatred. It's not anathema. Sometimes it's like a genuine misunderstanding because that's not a human experience you've encountered before, or, as a society, we're just not quite there in our understanding, and so I think that that -- as I think you heard from plaintiffs themselves and Ms. West, you know, in their lives they have encountered a number of people who have curiosity, who have empathy for their journey, who, you know, are not hostile to them but have questions.

And as you heard from Mr. Broyles, like,

that's not a conversation he wants to have in the hallway at work when he's trying to be a charge nurse, right. That's not a conversation that Nicholas Noe is trying to have when he just wants to go to class. And so I think to the extent that what you end up looking at about how the law operates, you can also say that, you know what, this law, it's not because anybody hates trans people, it's not because anyone has ill will towards intersex people, but maybe it's just from this is a new experience for lots of folks, the transgender, intersex individuals and people have questions and concerns. And maybe sometimes the Legislature, you know, in the process of trying to address what it believes is an issue has run afoul of the Kansas Constitution because under Lockean natural rights you get to be weird. Like, you just do. You do not have to conform to broad sense of morality.

THE COURT: All right. I appreciate that answer to the Court's question.

Let me just take a step back for a moment. It's 10:15. I don't know how soon the court reporter may want a break. I know we discussed trying to finish up before noon today. So I'm

certainly going to give both sides all the time that they can convince me is reasonable to make their arguments.

Do you have any sense of how much time you have left, Mr. Seldin?

MR. SELDIN: I think I have one or two more quick things and then, you know, I know we're sort of in this weird posture of we have a motion and they have a motion. I don't know if you want to see me again at the podium but I'm happy to do it all now or I can stop now and wait to get in the last word after --

THE COURT: Yeah.

MR. SELDIN: -- the State.

THE COURT: I do think it makes sense to take up the motion, argument and response separately.

So why don't we do this: Let's take ten minutes. Everybody can kind of think about what they want to get done. I don't know what -- I don't have to stop at noon, so if we need to go a little bit past, we can accommodate that as well.

Let's just take ten minutes. We'll come back, I'll hear from counsel on what they -- if want to tell me anything about the time that we're

at and then we'll proceed from there.

MR. SELDIN: Thank you, Your Honor.

THE COURT: Okay.

(Thereupon, a break was had after which the following proceedings continued:)

THE COURT: Okay. We are back on the record in 26 CV 112. The appearances are the same as before the recess.

Any thoughts on timing?

MR. SELDIN: I need maybe five more minutes; truly not much.

THE COURT: Okay. Helpful. Thank you. And I don't want you to feel rushed, I really do not. I'm going to take the time that it takes to get through things this morning.

I will note that the court reporter mentioned to me her machine shows 370 words per minute. You're going fast and you're giving me a lot. So I just make that -- make you aware of that and you can proceed.

MR. SELDIN: I think that's my second warning in this proceeding so I'll expect a ticket next time. All right, I'll slow down.

Your Honor, just a couple brief points. I think much of this is covered in our existing

briefing and will be further covered next week. And so first things that I think are better addressed on the papers, I'll indicate where I'm resting.

But I did want to draw out one specific additional federal case that Your Honor relied on in the TRO briefing that I think is worth explaining how it can be distinguished here, and that's the *Critchfield* case. I think that that's an important distinction because there what the 9th circuit court of appeals did is that they rejected a facial challenge to strike down an entire law including as applied to locker rooms. And the 9th circuit there was very clear that a narrower challenge would have been a different story.

And so we have that different story here. On a TI, this is just meant to return things to the status quo the way they were before the law went into effect. It's just about restrooms. It's just about driver's licenses. I think also, you know, the *Critchfield* context was limited to schools. What we're talking about here is being affected in all aspects of life throughout the State, including in peoples' work and in other

public buildings, so I think that this is a markedly different context than that one and that's why the presentation of evidence you heard is about those spaces.

I think also what's important is that the law in *Critchfield* specifically required an alternative accomodation. They baked that into the cake that you had to have this other option for folks. This law by contrast does not have that requirement, and so the practical effect is causing Kyle Koe to run across the street, causing Nicholas Noe to walk across campus in the rain. The way that that law adjusted for that problem changed the kind of relief that was necessary. Here we have a narrower challenge on a TI that is tailored to the specific consequences related to our plaintiffs being unable to use the restroom in places that they have to be.

I think with respect to due process and single subject, we will rest on our papers. I think that that's been briefed.

I would just note that for the due process, that's not part of the temporary injunction briefing, that's just the motion to dismiss and so I think it's even harder to kick

that claim out entirely as opposed to dealing with likelihood of success on the merits here, but with single subject, Your Honor, I believe, can decide that based on the papers.

I think then, Your Honor, I'd just like to -- if Your Honor doesn't have any questions, I'd just like to close briefly.

The Kansas Constitution does not tolerate classes among people based on the circumstances of their birth. Cameron Broyles is just as much of a man and a father as Tim Tanner. Dakota West is no less of a woman than Bailey Boe. Kyle Koe's job as a civil servant should not come at the cost of his dignity. No man, including Daniel Doe, should be standing in a hallway waiting to relieve himself, looking at the entrance to the men's room and wondering, what did I do to deserve being treated like a criminal.

Nicholas Noe is not a problem. He is not the barbed wire in his stomach. He has never done anything so bad in his life to be treated this way. He has now just gotten to the point in his life where he wants to live, and under Section 1 of the Kansas Bill of Rights he has a natural right to do that in Kansas as a man.

All of the plaintiffs have a right to be left alone as they were before SB 244 went into effect, to choose when and to whom to disclose that they are transgender or that they are intersex and to be treated as the men and women that they are in the world.

The question here is not whether the government can keep records about who he used to be or what's in a database, it's about whether the government can make you hang a sign around your neck that you wear to the restroom, that you wear to the bank, that you wear to work in the state capitol that reveals deeply intimate personal information about you and your past. All we are asking in this context on a temporary injunction is a temporary return to the way that things were in Kansas prior to SB 244, and that is why plaintiffs respectfully request that this Court grant a temporary injunction against SB 244 with respect to driver's licenses and restrooms as applied to transgender men, transgender women, intersex men and intersex women, and, moreover, deny the State's motion to dismiss. Thank you.

THE COURT: Thank you.

MR. KOBACH: May it please the Court.

The plaintiffs' temporary injunction motion depends entirely on the likelihood of success on the merits.

As you know, all five of the temporary injunction requirements must be met for injunction to issue. No matter what harms plaintiffs have presented last week or what they assert today or what the balancing of equities yields, they still must demonstrate a likelihood of success on the merits, and that's where this case is going to rise or fall. They simply cannot do so no matter what the facts are.

And for the same reason, the State's motion to dismiss should be granted as well even if the Court were to assert -- assume that all of the facts are as plaintiffs have alleged in their petition.

So before I get into each of the constitutional claims I want to begin with four decisive observations.

Observation number 1, positive rights. I've mentioned this before and we've mentioned it in our briefing, the Kansas Bill of Rights contains only negative rights, which means rights that prevent the government from acting,

preventing the government from restricting speech, denying the right to worship, prohibiting the bearing of arms, etc. There are no positive rights in the Kansas Bill of Rights which are individual rights to compel the government to do something.

Plaintiff asks the Court to trade two unprecedented positive rights in the Kansas Bill of Rights. Number 1, a right to compel the government to put desired information on government documents.

And number 2, the right to compel the government to configure access to government restrooms in a certain way. These rights appear no where in the constitutional text.

During the Court's discussion with opposing counsel, opposing counsel started talking about Lockean natural rights. Well, let's talk about Lockean natural rights if we really want to go there. All Lockean natural rights existed in the state of nature. Government was brought into existence to protect those rights. In the state of nature government does not exist. So there can be no Lockean right to compel the government to put something on government identity documents

because government identity documents don't exist in the state of nature.

There can be no Lockean right to compel the government to allow access to its restrooms in a certain way because the government and government buildings don't exist in the state of nature. These are by definition not Lockean rights.

Legal observation number 2. Facial challenge. This is something we didn't hear anything about either in the briefing or in the oral argument from opposing counsel. Success on the merits depends on them getting over the very high hurdle of a facial challenge. It is not an as applied challenge in this case. And as Your Honor knows and mentioned in the TRO order, the standard for succeeding on a facial challenge is very demanding. Plaintiffs must prove that, "no set of circumstances exists," in which the law would be valid. And that's from *Injured Workers of Kansas v. Franklin*, 262 Kan. at 850.

Plaintiffs presentation of witnesses didn't even explore the question of whether a conceivable case exists in which the statute operated constitutionally, and plaintiffs briefing

does not do so either. They cannot prove that SB 244 is unconstitutional in every instance, even if you assume for the sake of argument that plaintiffs' newly minted constitutional rights do exist in the Kansas Constitution.

But just for the sake of argument, let me give you many, many cases where conceivably SB 244 would operate constitutionally even if their rights did exist in the Kansas Constitution.

Let's look at the driver's license context. Here are some hypothetical examples where there could be no constitutional violation: One, when a hotel clerk or a bartender doesn't even look at the sex marker when the driver's license is provided, so no message was conveyed and no alleged impact could occur.

Two, when a transgender individual doesn't care what their gender marker is on the license and doesn't bother to change it, as is the case with the vast majority of transgender people in Kansas, and I'll give you the numbers on that later.

Three, when a transgender individual is completely public about their transgender status as every one of the plaintiffs was in the recent

past. And each of those isn't just three -- isn't a single individual, there are thousands of people who fit into those categories.

Second, the State can give you countless examples of where there was no conceivable constitutional violation in the bathroom context.

Number 1, when certain transgender individuals use gender neutral single occupancy bathrooms all the time by choice because they prefer to do so. Gender neutral bathrooms are preferable for millions of people, transgender or not, because there's maximum privacy. The single occupancy bathrooms that the Court has on this floor are really nice and most people would probably prefer to use a bathroom where it's just them and there's maximal privacy. People who choose to do that would see no violation and no imposition in any way by SB 244.

Another example, when a transgender person uses a bathroom matching one's biological sex and it results in no one caring or even noticing.

Those are just five scenarios where undeniably operate constitutionally each which happens every day with thousands of people, but to defeat a facial challenge the existence of only

one is necessary.

Observation number 3, rational basis review. Because SB 244 doesn't make sex based classifications, it doesn't rise to intermediate scrutiny, and because it doesn't make -- infringe upon a fundamental right, it doesn't rise to strict scrutiny, therefore it must be reviewed under the rational basis standard and upheld if any conceivable rationale supports it.

As the Kansas Supreme Court said, the State, "has no obligation to produce evidence or empirical data," and plaintiffs must, "negative every conceivable basis," for the law and that's from *State v. Genson* and that's 59 Kan.App.2d at 212 and then it was affirmed by the Supreme Court at 316 Kan. 130.

Nevertheless, the State has provided evidence backing up these rational bases. We could just simply assert them and that would be enough. But because we had the witness testimony and the opportunity to provide more than just our assertion, we did bring evidence behind the State's rational bases.

Okay. So let's look at the restroom requirements of SB 244. The State has at least

three rational bases.

Number 1, complying with Title IX. Title IX of the Civil Rights Act, that portion of which was enacted more than 50 years ago in 1972 and 1974, established equal educational opportunities for women, but nonetheless authorized separate living facilities for the different sexes. And as the Federal District Court of Kansas held in 2024 in Title IX, "It is clear from the statutory language that the term 'sex' refers to the traditional binary concept of biological sex." And that's from *Kansas vs. U.S. Department of Education*, 739 F.Supp. at Page 920.

Just like Title IX, SB 244 rationally separates facilities by biological sex. Both laws are justified under the government's rational interest in maintaining sex segregated facilities to protect personal, privacy and intimate spaces.

If SB 244 were deemed irrational, then Title IX would be irrational, too, highly unlikely. And regardless, complying with federal law is a rational basis for a state statute in and of itself regardless of the rationality of the federal law.

Rational basis number 2, protecting women

and girls from discomfort and danger presented by biological males in women's bathrooms. The State's witnesses Soe, Doe, Boe and Tanner all testified to the obvious fact that biological women are less comfortable and feel less safe when biological men have access the women facilities.

Number 3, protecting the privacy of biological females when undertaking private activities in restrooms, whether it be to change clothes, nurse or deal with menstruation. It was rational for the Legislature to address these concerns reported by girls, women and families all over Kansas when SB 244 was enacted.

And plaintiffs' counsel attempted to gloss over this just now and say well, there's no nudity in bathrooms. No, our witnesses testified there is partial nudity. Jane Doe testified about changing clothes in the bathrooms at school, not locker rooms, in the bathrooms. Sally Soe testified about needing privacy with respect to menstruation concerns, and also nursing was mentioned by the plaintiffs -- by the defense witnesses.

Plaintiffs failed to offer any evidence that any of these are irrational. They do attempt

in vein regarding their expert testimony that sexual assault in restrooms is rare. To say that perhaps that is irrational, they didn't say it's irrational but that was clearly the gist of the expert testimony.

But never mind the fact that there was a nationally publicized case in Loudoun County, Virginia, in 2021 where a Virginia judge ruled that a biological male sexually assaulted a female in a school bathroom. So we know there are cases.

The fact that it's rare, let's assume that plaintiffs' expert is right and it's rare. The fact that it's rare does not make it irrational to be concerned about it. It's rare for anyone to get struck by lightening, really, really rare. That's why we have the phrase it's like getting struck by lightening. But that doesn't make it irrational for us to take steps to avoid getting struck by lightening. Rarity does not equal irrationality.

Now, let's look at the driver's license requirements of SB 244. The State has six rational bases for consistent biological sex markers on driver's licenses.

Number 1, maximizing the amount of

unchangeable information for identifying individuals in government data bases. This reduces discrepancies between the data bases, maximizes the number of golden records, as KBI Director Jacobs described in law enforcement databases, and courts have independently recognized State's interest in maintaining accurate records.

In *Barrett vs. Virginia,* which is cited in our briefs, that's at 689 F.2d. 503 coming from the fourth circuit. How prison -- "How prison officials choose to organize their records is quintessentially an administrative matter in which courts should not intervene." And no court has ever held that accurate sex identification requirements fail rational basis review.

Number 2, administrability of other state records. Dr. Turpin testified that gender identity has no scientific meaning, and the Court saw when plaintiff cross-examined Dr. Cantor, no one could understand what plaintiffs' counsel meant. Biological sex is fixed and objective. It's easy to understand what someone means when they say biological sex at birth. The State records are easy to administer using that

objective, easy, unchanging criterion.

Number 3, reducing the probability of wanted individuals not being arrested because the gender marker causing the warrant not to pop up in NCIC would result in that happening, as Sheriff Hill explained.

Number 4, reducing the probability of felons in possession of a firearm not being arrested because the criminal history does not match the sex marker entered by the officer as Sheriff Hill explained.

Number 5, maximizing the safety and effectiveness of officers patting down arrestees for weapons or contraband as Sergeant Stammer explained.

Number 6, minimizing the chance that emergency medical personnel will give the wrong dosage or wrong treatment to unconscious individuals. As Dr. McGregor explained, accurate information about biological sex is needed in an emergency situation. And that information on the driver's license, even when the person is conscious, is used to populate other medical records as well.

Opposing counsel said in argument just

now, well, you can ask questions to the patient. Sure, if the patient is checking in to a hospital. But if the patient comes in on a gurney unconscious or is found at the side of the road at a traffic accident unconscious, you can't ask the patient for the full history of any transgender or other operations that they might have gone through. And that's where the driver's license provides the information.

Again, the standard here is rational basis. All the State interests are rationally conceivably served by SB 244 and that's all the State needs to show.

Plaintiffs presented no evidence to rebut the fact that these are rational bases, in other words, establishing that any of them are irrational.

I would then quickly note on the motion to dismiss there are some additional rational bases or the rational bases are elevated. So the motion to dismiss, of course, concerns the law's application to locker rooms. All of the same interests that were present with respect to restrooms are also present in locker rooms but even more so because nudity almost always occurs

when someone's going into a locker room to change clothes or take a shower.

And with respect to birth certificates, the same two interests and consistent data presented by a driver's license are present in the birth certificates, plus a third interest in recording true historical events which I think opposing counsel would agree is something that specifically that a birth certificate does. Unlike a driver's license, a birth certificate is a certification of something that actually happened in history. It's undeniable that on a certain day a biological male or female was born to a certain mother and weighed a certain amount. To go back and change that true record is to replace a verifiable historical fact with a statement about subjective expression of personal belief. The State has an interest in maintaining and keeping consistent historical factual certificates. And again, those are not irrational bases.

Okay, and the final legal observation number 4 is Dakota West. Her case clearly falls under the expressed state accommodation provided for in SB 244. It is the position of the State

that she unquestionably qualifies for it based on the evidence presented in this case and that she's absolutely entitled to the female marker on her driver's license if ever she returns to Kansas, and that she may use female restrooms in government buildings if she returns to Kansas.

If she still lived in Kansas now, she'd probably already have the female marker on her driver's license and would have received the accomodation. It's unclear why her initial e-mail was missed by the agency and she had no answer as to why she didn't follow up on that e-mail. Ted Smith is here from the Department of Revenue. If the Court has questions into that, he may be able to offer some insight.

But regardless, she's now a resident of Tennessee and at this point she's not entitled to any Kansas driver's license until some future date if she ever decides to move back. And arguably, indeed I would say certainly she no longer has standing in this case.

Okay. Now let's get to the actual individual rights claims.

Claim number 1 from plaintiffs is that there is a *Hodes* based right to a personal

autonomy. The problem with that claim is it applies only to abortion and not to restrooms and driver's licenses. SB 244 does not infringe upon the *Hodes* defined right to personal autonomy. Those rights, as the *Hodes* court described them *Hodes I*, are natural rights rooted in the history and tradition of the state. And the only right *Hodes* recognized is the right of women, "to make decisions about whether to bear or beget a child." And that's from 309 Kan. at 649 to 650.

SB 244 doesn't in any way touch upon abortion or anything even similar to abortion. It doesn't regulate bodies of people. It doesn't forbid medical treatments. Plaintiffs' theoretical right is exactly what *Hodes II* rejected.

In *Hodes II*, Justice Stegall said that this autonomy right could conceivably be broadened in future cases and by future plaintiffs to include all sorts of things outside of the abortion context. The majority squarely rejected Justice Stegall's contention in their argument writing at 318 Kan. Page 1013, or it might be Page 1062. In doing -- this is the quote. "In doing so the descent completely ignores the fact

that this court's analysis in *Hodes I* examined the inalienable natural right to personal autonomy in the specific context of abortion, which necessarily limited the scope of its holding." Any creation of a new fundamental right of personal autonomy outside of the abortion context would require the Court to do the historical analysis. And the way the Court described it was, quote, and this is at Page 1012, "An exhaustive review of our founding documents, the historical record and relevant scholarship on the meaning and scope of natural rights." That has not occurred in this case. That has not occurred in the briefing.

Plaintiffs attempted to just do a sort of off-the-cuff quick discussion of it when we got into Lockean rights, but it would be impossible anyway. There was no -- transsexuality was not discussed at the framing of the Kansas Constitution in 1859. It didn't exist in any of the territorial statutes or State statutes. It wasn't in the public discourse of 1859. Driver's licenses didn't exist in 1859. So finding discussion of this specific new positive right would be virtually impossible if they tried.

Plaintiffs just mentioned the Rosen concurrence in *Hodes* and the profound personal decision that a person -- the emphasis on the word profound. Well, there's a couple of problems. One is that's in the concurrence. That's not part of the *Hodes* decision. And the concurrence didn't establish a new constitutional standard. And that would be one that the majority I think certainly would have rejected. They didn't include profundity in the majority opinion. Profundity is nothing more than the word significant or important. It has no boundaries.

And Your Honor, you asked a very good question and that was, what is the limiting principle of this Lockean natural right you're suggesting I create. And opposing counsel didn't give you a limiting principle. Opposing counsel just said well, our right's narrower than you might think, but didn't actually give you a principle by which you limit any newly created rights.

The answer is found in *Hodes*. The answer is that historical understanding of the founding documents and the historical record must reflect the right in order to confirm the existence of the

right. And that's on Page 318 Kan. 1012.

Now, plaintiffs' counsel also made an off-the-cuff attempt to bring in *Coke* from 1642 concerning the reference to that about how a merchant could dress or could not dress in England or actually how a subject could not dress in the merchant context.

The question here is the founding documents of Kansas in 1859. Yes, the Court did mention in passing when it talked about Lockean rights. It also mentioned the case from *Coke*. But the framers of the Kansas Constitution did not mention, probably had never read *Coke's* commentary, second commentaries on the Magna Carta. At most, would discuss there was a freedom of dress, not a positive right to compel the government to put things on documents or a positive right to compel the government to do things with government buildings.

The Court also asked is there a case that conducts this historical study. And plaintiff said, well, look at *Kalarchick* from Montana. Well, *Kalarchick* from Montana is an equal protection case, not a personal autonomy case. So in *Kalarchick* they are not creating a new

substantive right. It's an equal protection case.

Secondly, the Montana equal protection clause interpretation expressly goes beyond the U.S. Constitution in contrast to Kansas where our Supreme Court has repeatedly said our equal protection clause in the Kansas Constitution is concurrent with the equal protection clause of the U.S. Constitution.

Here's the quote from that Montana opinion that opposing counsel cited. It's at 427 Montana 347. "Montana's individual dignity provision allows for even more individual protection than the equal protection clause of the 14th Amendment of the U.S. Constitution." That's not Kansas.

Let's now look at the right to informational privacy which plaintiffs assert. Again, not a constitutional right recognized in the Kansas Constitution's text or in the Kansas Supreme Court's interpretation of the Kansas Constitution. Remember, the Kansas Constitution does not contain the word "privacy" and this novel right has never been recognized under the Kansas Constitution.

In Kansas, plaintiffs cannot offer a single Kansas Supreme Court precedent expressly

supporting their contrived right. They do in their briefing cite *Alpha Medical Clinic*, but that case expressly declined to recognize any privacy right from the Kansas Constitution.

This is from 280 Kan. at Page 920. "We have not previously recognized and need not recognize in this case, despite petitioner's invitation to do so, that such rights also exist under the Kansas Constitution."

Likewise, the federal case law that plaintiffs attempt to draw some support from doesn't establish a federal constitutional right to informational privacy, and the U.S. Supreme Court has never expressly recognized a right to informational privacy. And in his concurrence, Justice Scalia noted that, that there's never been any U.S. Supreme Court case. That was Scalia's concurrence, *NASA v. Nelson*, 562 U.S. at 161.

In the few cases where lower federal courts have recognized something that looks like an informational privacy right, those involve instances of government collecting personal information from a specific individual and then the government disseminating that information to the public without any legitimate reason. Again,

that is a more of -- that is a negative right because you're prohibiting the government from doing something as opposed to compelling the government to do something. And that was *Herington [sic.] Vs. Keenan*, 218 F.3d 1171.

These cases don't establish a right to privacy that prevents the State from specifying what information about biological sex is on a state document, specifically the driver's license, or, again, configuring state buildings and restrooms.

Plaintiff then proceeded to look at the other states' privacy clauses just now in oral argument. But those states include the word "privacy" in the constitution. The Kansas Supreme Court doesn't direct us to look at other states' constitutions to determine if there's a privacy right in the Kansas Constitution.

Opposing counsel specifically mentioned *K.L. vs. Alaska Division of Vehicles*. That is an unpublished district court opinion, but if you want to look at it anyway, this is what the Court said at Page 4, "Unlike the federal constitution, Alaska's provides for an explicit right to privacy." That's at Page *4 of the opinion.

Again, not relevant here.

But let's just assume for the sake of argument that the Kansas Constitution didn't include the right to privacy and the Kansas Supreme Court had said that this right to privacy is extremely broad and includes a broad right to informational privacy. They still wouldn't be able to prevail in this claim for two reasons:

Number 1, the information plaintiffs seek to conceal is not on the license, and I think Your Honor touched on this in some of your questions. According to their briefs, plaintiffs seek to conceal, "private personal information about being transgender or intersex." But that information is not printed on the driver's license and need not be disclosed when using a restroom. Because gender identity cannot be objectively verified by a third party. As Dr. Cantor explained, it's not possible that showing a license or using a restroom discloses whether anyone is transgender or not.

The second reason this would still fail is as a factual matter the information is not private. In cross-examination every individual, every plaintiff revealed that they had disclosed

this information on social media, the information specifically that they had -- that they were transgender. In most cases, to thousands or millions of people, 2 million in Plaintiff West's case. And once it's on the internet, it's forever. It can be shared or reposted infinitely. So as a factual matter it can no longer be considered private information. The fact that a few of the plaintiffs years later decided that they would have preferred to keep that information private if they could go back in time and they don't want to disclose that information today, does not change the fact that it's now in the public domain. There's no reversing that. So the very plaintiffs in this case provide examples of the statute operating constitutionally with respect to their newly created privacy claim.

Now, the plaintiff mentioned the case of *Ray vs. McCloud* from the southern district of Ohio. That case is asserting a federal privacy right, not a state law based privacy right. The plaintiffs here are asserting a state, unwritten privacy right. Now, if the Court were to be tempted to create such a privacy right in issuing its decision, the only case law it can conceivably

rest on would be a federal district court decision interpreting the federal constitution or state courts interpreting state constitutions that contain the word "privacy." There just isn't enough case law support to create this newfangled right.

Let's move to the third claim. Compelled speech. Plaintiffs argue that SB 244's driver's license requirements violate their freedom of speech.

But a driver's license is the State's speech. It is the State speaking. It is a document created by the State, containing information determined by the State to serve the purposes of the State. It is not created by the individual. It is not intended to serve the purposes of the individual. The only input an individual gets into what is contained on the license is what he decides to wear and how he decides to portray himself in the photograph. That's it. Everything else is information required by the State and even the photograph is information required by the State.

And no plaintiff can ever explain or was able to explain under -- in the testimony how she

was forced to state or express anything. And that's an absolute requirement in a compelled speech claim. The individual has to say I was compelled to express this. I was compelled to say it to someone.

There are two U.S. Supreme Court precedents that the Court needs to be aware of, which I'm sure you already are, which are the closest to this novel constitutional right asserted by plaintiffs concerning driver's licenses. Both of those concern license plates on cars, and I want to walk through them.

The first one is *Walker v. Texas Division, Sons of the Confederate Veterans*. That's the 2015 case from the U.S. Supreme Court at 576 U.S. 200.

The Supreme Court held that State-issued license plates are government speech and that even though the public could submit designs for consideration for specialty plates, like we have here in Kansas, KU plates and whatnot, it was up to the government to decide whether they wanted to create a specialty plate. And the State of Texas said, in this case, no, we're not going to create a specialty plate with a Confederate flag on it

even though this private organization wants us to.

Importantly for this case, according to the Supreme Court, "Texas license plates are, essentially, government IDs. And issuers of ID's typically do not permit the placement on their messages" -- sorry, "on their IDs of messages with which they do not wish to be associated." That's at Page 212. Again, the creator of the ID is the State.

Kansas driver's licenses are likewise State IDs that meet the Supreme Court's criterion. They, "have traditionally been used for government speech, are primarily used as a form of government ID and bear the State's name," and that's at Page 216.

Individuals do not speak through their driver's licenses. The government provides information that it wishes to see on the driver's license. No Kansas court has held otherwise.

Now, to reach that holding in *Walker* the U.S. Supreme Court had to distinguish the old 1970 case of *Wooley v. Maynard*, which is a case many people learned about in law school. There, the New Hampshire license plate included the state motto, "live free or die." Plaintiff Jehovah's

Witnesses said that that message was contrary to their religious beliefs and asserted that they had the right to put tape over the message "live free or die," and the U.S. Supreme Court agreed with that and said yeah, in your case this would constitute compelled speech and you could put tape over it.

The crucial distinction was that "live free or die" constituted, "the State's idealogical message." That's *Walker* 576 at Page 219. And the State couldn't force New Hampshire residents to display an idealogical message that conflicted with their religious beliefs, so you had a confluence of two first amendment concerns. You had the compelled speech and then you had the free exercise of religion assertion by the plaintiffs here.

Within the *Wooley vs. Maynard* decision there was another distinction the Court had to make that's relevant to the case at bar. To reach its holding the Court had to distinguish a license plate on the back of a vehicle from currency because currency contains the national motto "In God We Trust". And so the Court said, "Currency is generally carried in a purse or pocket and need

not be displayed to the public. The bearer of currency is thus not required to publically advertise the national motto." That's at Page 717, note 15.

In contrast, the vehicle license plate was what the Court called a, "mobile billboard," viewed by hundreds of people every day and that's also on Page 715.

And then there's a final Supreme Court holding that's relevant here, which Your Honor has noted in the TRO order, and that's from *Trump v. Orr*. We've already touched on this in your discussion with opposing counsel. But remember there the court explained that in the context of sex markers on passports, biological sex is nothing more than a, "historical fact," and that's 146 Supreme Court at Page 46.

A historical fact is not a political opinion. A historical fact is not an idealogical message. A historical fact is not something that offends one's religious beliefs.

So the Supreme Court gave us two reasons a driver's license cannot in any context be considered compelled speech of an individual.

Number 1, mere designation of biological

sex among other personal characteristics is not an ideological message offending religious beliefs. It's just a fact. It's a historical fact. It can't be considered a message, and, of course, that comes from *Trump v. Orr* and *Wooley v. Maynard*.

And number 2, the driver's license is carried in a purse or pocket like currency. *Wooley v. Maynard*, opposing counsel asserts that you're going to hand out the -- you're going to show people your driver's license more than you're going to use cash currency. Actually, I don't think so. A lot of us still use cash and we make a lot -- many more transactions in a given day where we hand somebody a dollar bill than we actually pull out our driver's license to get a drink at a bar or whatever you're pulling it out for.

On this constitutional claim there is simply no case law supporting plaintiffs' creation of a new constitutional right.

In sum, the Supreme Court has compelled five conclusions:

Number 1, SB 244 compliant driver's licenses contain government speech, and we get

that from the *Walker* case.

Number 2, it's not attributable to the licensee, also from *Walker*.

Number 3, no one's compelled to say anything to actually express a message.

Number 4, there is no idealogical message.

And Number 5 from *Wooley*, it's not on public display.

Now, Your Honor asked plaintiff how he could answer the argument that it's a State document and the State decides its purpose. Plaintiffs' counsel answered well, historical facts are not what driver's licenses are for and that they have a different purpose. No. The State's purpose is to mark a historical fact. Plaintiffs may wish to use a driver's license for other purposes or they may think the driver's licenses stand for other things. But the State's purpose is to denote a historical fact. It says that on the text of SB 244. The driver's license simply records biological sex at birth, that's all.

Indeed, Brian Hill said this when he was talking and reflecting on the way he views driver's licenses. He reflected the State's

purpose. He said the following, "I don't care who you are. I care who you were." Exactly. That's the State's purpose. We want to know what your sex was biologically speaking at birth.

Plaintiff -- in your discussion with plaintiff he talked about well, the State can't show a compelling interest and there's no narrow tailoring in the way the Kansas driver's license is configured. And then the State looked at sex offender designations in other -- sorry, the plaintiff urged the Court to look at sex offender designation on other State's driver's licenses. Compelling interest? Narrow tailoring? Those standards only apply in strict scrutiny. No strict scrutiny is applied here. Before they can apply strict scrutiny, they have got to establish that this is a new manifestation of the free speech right and specifically compelled speech in the face of so much contrary case law.

Now, let's go to the equal protection claim. SB 244 clearly does not violate a person's right to equal protection under the law. Just to establish what I think is already very clear, the Kansas court has stated expressly -- Kansas Supreme Court has stated that Section 2's equal

protection guarantees are in lockstep with the U.S. Supreme Court and federal court's description of those guarantees. It is -- and that's from *Rivera v. Schwab*, 315 Kan. at Page 894.

Three recent federal cases make clear several things: Number 1, a law does not classify on the basis of sex merely because it references sex or its application turns on sex.

Number 2, where the government does not separate the sexes in context marked by real physiological differences such as athletics, the separation is constitutional.

Three, transgender status is not a suspect classification.

Four, recording biological sex on an information document does not violate equal protection. This Court in its TRO order listed two of those cases *Trump v. Orr*, which we've already discussed, and in *U.S. vs. Skrmetti*. In *Skrmetti* the Supreme Court rejected the argument that banning the use of certain medical procedures for treating transgender children classifies as -- that it classifies individuals based on sex, and, therefore, heightened or intermediate scrutiny, which is applied to sex discrimination, did not

apply.

A reference to sex only triggers intermediate scrutiny when the law "prohibits conduct for one sex that it permits for the other," and that's 605 U.S. at Page 514 and 515.

And in *West Virginia vs. BPJ*, that was a case from this past June, 146 Supreme Court at 2356, there the Court upheld state laws designating girls' and women's athletic teams by biological sex. Importantly --

THE COURT: What was that cite again?

MR. KOBACH: Yeah, that's 146 Supreme Court Reporter 2356.

THE COURT: Thank you.

MR. KOBACH: And the Court held that such laws don't classify on the basis of transgender status because they don't prevent transgender individuals from participating in sports. And then even if they did, transgender status is not a suspect class, and this is a quote, "Transgender status is not a suspect class requiring heightened equal protection of scrutiny." That's at Page 2379.

And that's Thomas concurring, explaining the court's rationale. And *Skrmetti*, Barrett also

noted this in concurrence, again, basically saying the Supreme Court has never recognized transgender status as a suspect class.

Finally, in *Trump v. Orr*, as the Court knows, the Supreme Court held that recording sex on a government passport no more offends equal protection principles than displaying the holder's country of birth because "the government is merely attesting to a historical fact without subjecting anyone to differential treatment," and that's 146 Supreme Court at Page 44.

I think the *Trump v. Orr* case, although it's very brief, more than any other should put to rest the notion that there's an equal protection -- a viable equal protection claim here when the same marker's on a driver's license.

So SB 244's requirements do fit within the Supreme Court's approved framework for three reasons: First, it does not classify on the basis of transgender status. The statute doesn't use the word "transgender," does not exclude or acquire different treatment of transgender persons.

Second, SB 244's driver's license provision do not classify on the basis of sex.

Every license issued to every Kansan attests to the historical fact without subjecting anyone to differential treatment. And, again, *Orr* is obviously the one substantiating that conclusion.

And then third, even if the Court were to conclude that SB 244's facilities provisions draw sex based lines, *BPJ* established that such line drawing is constitutional where it is warranted by inherent physical differences between the sexes.

Interestingly in their briefing, although not in oral argument plaintiffs' counsel didn't get to this, in their briefing plaintiffs deny *Rivera's* holding that Kansas should follow federal precedence for equal protection purposes claiming that *Rivera* should only be limited to the gerrymandering context. They say for every other equal protection issue you should not feel constrained to stay within the contours of the Federal Equal Protection Right.

That is not what *Rivera* said in any measure. It expressly affirmed without any qualification or limitation the following: "The equal protection guarantees found in section 2 are co-extensive with the equal protection guarantees afforded under the 14th Amendment." 315 Kan. at

Page 894.

Plaintiffs know they can't get around *Rivera,* so in their briefing they suggest that maybe *Rivera* should be overruled, and that's at Page 30 of their motion for temporary injunction.

As long as this Court is bound to follow the Kansas Supreme Court, however, this Court must follow federal courts and define the contours of the Kansas Equal Protection Clause.

Okay. Now let's go to the single subject rule. We will argue and have argued in our briefing that SB 244 is -- it contains a single subject and its title expresses that subject. I do want to go through this briefly because I think there are a few points that should be made.

Article 2, Section 16 of the Kansas Constitution provides, "No bill shall contain more than one subject." And then the section goes on to say, not case law, the actual Constitution itself says, quote -- says this provision, "shall be liberally construed to effectuate the acts of the Legislature."

The Kansas Supreme Court that this command dovetails with the separation of powers doctrine and long-recognized principles that courts

"presume a statute to be constitutional, resolve all doubts in favor of the statutes' validity and require that a statute must clearly violate the Constitution before it may be struck down," and that's *KNEA vs. State*, 305 Kan. 749.

KNEA went on to say something else important. The Supreme Court of Kansas said a bills "subject can be as comprehensive as the Legislature chooses as long as it constitutes a single subject and not several different ones," and that's at Page 753. So you can have a very broad subject, and I'm going to give you an example of that in a minute.

The Court also went on to say in *State v. Reves*, 233 Kan. at Page 978, a bill "may include every matter germane, referable, auxiliary, incidental or subsidiary to and not inconsistent with or foreign to the general subject or object of the act." I think that statement from the Kansas Supreme Court's really important. Anything referable, auxiliary, incidental, subsidiary. It just can't be inconsistent with the express subject of the bill.

And the Court on the same page went on to say, even matters which are apparently

constitute -- which apparently constitute distinct and separate subjects are not so when they are not incongruous and diverse to each other. So plaintiffs have to show that the bathroom provisions and the driver's license provisions are incongruous and diverse to one another.

The subject identified in the title of SB 244 is the identification of biological sex. All elements of 244 fall under that topic. It concerns how biological sex is identified on driver's licenses, and it concerns how the government classifies and identifies who may use facilities in State-owned buildings according to biological sex.

The driver's license section directs the State's designation of biological sex on documents and the spaces provision requires that the spaces be designated using the same criterion of biological sex. And the statute says, "For use only by biological individuals of one sex."

The bill does address it as a single subject, that is who is male and who is female on government documents and in public facilities, and it should be determined by biological sex.

Now, the identification of individuals by

biological sex is more than sufficient to meet the standard of Section 16 of Article 2 of the Constitution, especially considering the strong presumption of legality that must be applied. Applying that standard, the Supreme Court has also said, and this is another quote from a different case, "To violate the single subject rule, a bill must have two dissimilar subjects that have no legitimate connection with each other," and that's *Kansas One Call System vs. State*, 294 Kan. at 228.

The cases we cite in our brief illustrate this, but I want to mention one, the KNEA case. It's particularly illustrative. There the subject at the title of the bill was a really broad one. One word, education, was the subject of the bill. And the Kansas Supreme Court found that the bill did not violate the single subject rule even though it encompassed all these things: Notifying teachers about the tort claims act; minimum capacities of children that the state board of education must aim to instill in students; expanding the number of school districts in Kansas; the creation of a tax credit for businesses providing scholarships to low income students; and establishing performance incentives

for GED students to enroll at state universities. Talk about a diverse set of topics and a general word "education." The breadth and differences in those subjects are way beyond anything we see with SB 244.

So unable to show that SB 244 has multiple subjects, plaintiffs in their briefs retreat and say, well, it's vague. There's a vagueness problem with the subject. And they cite the 1958 case of *State ex rel. Dole vs. Kirchner* for the proposition that SB 244 is vague.

But there's a problem here. *Kirchner* was decided under the earlier version of the State Constitution. In 1974, the Constitution was amended to remove the word "clearly." The earlier version of the Constitution pre '74 said the bill must clearly express its title, and the -- and it required only that the subject matter be expressed in its title. *Kirchner* doesn't have bearing on the new broader version of section 16. The 1974 amendment deleted clearly and added the liberal construction requirement.

THE COURT: Added the what, I'm sorry.

MR. KOBACH: The liberal construction

requirement. Courts must construe it liberally to effectuate the purpose of the Legislature.

And then finally in their briefs, plaintiffs attack the legislative process that lead to the enactment of SB 244. But Section 16 of Article 2 doesn't impose a code of legislative procedures. The manner of the bill's passage is entirely irrelevant to analysis under the single subject rule. It can be two separate bills that are put together later in the process. It can be an amendment to one bill. How the final bill arrives at its final shape is irrelevant to the Court's analysis.

You know, the *One Call* case that I mentioned earlier said the whole purpose of the single subject rule is to avoid log rolling where you have completely dissimilar subjects and neither subject on its own could get a majority of the Legislature's vote. When you put them together and then they get a majority of votes, that's when the legislators, "combine their unrelated proposals and present them as separate provisions of one bill so that the bill is able to pass by virtue of the combined votes of the separate factions," and that's from the *One Call*

case at 226. That is not what we have with SB 244.

Okay. So we've talked about the legal issues and they're just -- they simply cannot prevail on the merits of these newly minted claims or on the single subject rule which is not a newly minted claim but is a very broad doctrine in Kansas law.

Let's look at the balancing of equities. We acknowledge that transgender plaintiffs feel some discomfort when using a bathroom they'd rather not. But so do biological girls and women who run into biological males in bathrooms.

All four of the State's fact witnesses testified to personal distress and perceptions of danger on their part or their daughter's part. And the balancing of harms should require actual balancing. I mean, this is where the test is sort of utilitarian.

According to the plaintiffs' expert, Dr. Turpin, the transgender population is between .5 percent and 1 percent of the total population. Let's accept those numbers as true. Add to that what plaintiffs' expert Dr. Scheim said, who testified that prior to the existence of SB 244 or

the existence of any state law on this subject of bathrooms and transgender -- the sex -- having to use the bathroom corresponding to your biological sex, in the year 2015, which was the date of the study, 59 percent of the transgender population reported restroom avoidance.

So that situation is endemic to being a transgender person regardless of what the laws say. Way back in 2015, 59 percent expressed that because they're transgender they feel they have to avoid certain bathrooms.

So striking down SB 244 would not erase that problem for the half a percent to one percent of the population. It's still going to exist just like it exists in 2015, according to plaintiffs' own expert.

But now let's look at the other side of the ledger. The State's evidence shows that substantial stress felt by the other 99 or 99.5 percent of the population. And let's give the plaintiffs the benefit of the doubt, let's assume that not all of nontransgender people feel stress about this. Let's assume it's, you know, a quarter, a tenth of 99 percent of the population. It's still way more than one percent of the

population, and SB 244 succeeds in removing the stress for that much greater percentage of the population. Regardless of whether a male appearing biological female walks into a girls' room with the law in place as Witness Boe said, she can be secure knowing it's "still a girl."

Or as Witness Doe put it, she's now "more comfortable because with 244, it is set in stone what the public standard is." So she knows regardless of the appearance of the person who just walked into the bathroom, it is a biological female. So there is less stress.

So you have one percent of the population whose injury will not disappear by enjoining the law because, again, it's endemic. 59 percent felt this stress before any such laws existed in 2015 versus something 99 percent, who knows, some percent of 99 percent whose injury has been resolved by SB 244. It's already resolved and it's resolved right now in the current status quo.

Now, looking at the specific provisions of the law in terms of the balancing of the equities, I mentioned the state's six rational bases for sex markers on driver's licenses but they're more than rational interest. For the purpose of balancing

the equities, I think the evidence provided in last week's hearing is relevant.

I'll just quickly mention Acting Director Jacobs explained maximizing the amount of unchangeable information does serve the interest of identifying individuals and keeping databases consistent and unchanging.

Sheriff Hill explained the probability of a wanted individual not being arrested because of the gender marker causing the warrant not to pop up in NCIC. Again, he said that, "I don't care who you are; I care who you were." There are two constants he said; date of birth and sex.

Now, on cross-examination plaintiffs' counsel pointed out that Sheriff Hill's two specific cases occurred before driver's licenses could be changed. But he said if they'd occurred later in time, it's likely that law enforcement would have been thwarted. That's the point.

Hill also explained that felons in possession of a firearm are less likely to be detected if the biological sex is not reflected on the driver's license.

Sergeant Stammer, as we discussed, explained knowing biological sex maximizes the

safety and effectiveness of pat downs.

And as Dr. McGregor explained, sex -- "sex is an incredibly important diagnostic tool," in minimizing the chances that emergency personnel will give the wrong dose or wrong medical treatment to an unconscious individual.

Plaintiff presented no evidence to rebut any of these witnesses in their claims. Yes, they did ask questions in cross-examination to qualify or to limit what the witness was saying. But there is no contrary evidence contradicting the claims of these witnesses.

The State doesn't have to -- and one further point on the Sheriff Hill, the point that the two cases Sheriff Hill mentioned were prior to people being able to change their driver's licenses. The State doesn't have to wait for the injury to the public to occur to prevent it. The U.S. Supreme Court noted this in the precedent of *Munro vs. Socialist Workers Party*, and that's 479 at 195. "Such a requirement would necessitate that a state's political system sustain some level of damage before the Legislature could take corrective action. Legislatures we think should be permitted to respond to potential deficiencies

with foresight rather than retroactively," and that's 479 U.S. at 195.

There's another statistical point here before I depart from balancing the equities. Let's look at some numbers again. So according to plaintiffs' expert we're talking about .5 to 1 percent of the total population. The number of Kansans possessing driver's licenses is 2.2 million. So .5 to 1 percent of 2.2 million is either somewhere between 11,000 and 22,000 Kansas transgender individuals possessing licenses. But as we discussed during the TRO hearings, only about 400 in the current number that we have from division of vehicles is 411 in total ever felt the need to change their driver's licenses.

So 411 out of 22,000 felt the need to change their driver's licenses. The other 21,598, we don't know the exact, but 21 and a half thousand transgender individuals with Kansas driver's licenses did not feel the need to come in and change their driver's license marker when they could have done so. They did not feel evidently that their constitutional rights were being violated. They did not feel any injuries, constitutional or otherwise.

This also figures into the facial challenge problem. Those 22 and a half thousand driver's license holders perceived no privacy violation evidently, felt no violation of personal autonomy evidently and didn't think they were compelled to display any message by their driver's license marker.

Plaintiffs have failed to prove irreparable harm. They failed to show that the balancing of inequities weighs in their direction and they failed to prevail on the last point and that's the public interest.

Really briefly here. We begin with the established, well-established proposition that a legislature's decision is presumed to represent the interests of the public unless plaintiffs can show otherwise. In this case, it wasn't just a simple majority of the Kansas Legislature, it was a super majority of two-thirds of the legislators who said it's in the public interest to pass SB 244.

And with respect to public interest in cases like this, the U.S. Supreme Court has provided some guidance. The Court in *Gonzales vs Carhart* said the following -- and this is in a

case where people disagree about, you know -- here we're talking about psychological diagnoses and the like. "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. at Page 163. If there's one thing that came through in the testimony of the experts last week, it's that they sharply disagree and there is a great deal of uncertainty regarding their psychological repercussions surrounding transgender issues writ large.

When medical experts disagree, deference to the Legislature is appropriate in determining what the public interest is. And, again, the public interest is one of the five criteria which plaintiffs must prevail on in order to get their temporary injunction.

Furthermore, all the law enforcement and safety public interests were unrebutted. There's no contrary evidence to push back against those interests that the State gave through evidence.

So in conclusion, if, by some stretch of the imagination, plaintiffs could establish their novel constitutional claims do exist and are found in the Kansas Constitution, and could meet the

other four requirements for a temporary injunction, the Court should note that the injunction plaintiffs are requesting is one that they have said is narrower than the relief they seek in their petition. They said it applies specifically to transgender individuals, and -- but the problem with that is as Dr. Turpin, their own witness conceded, it's impossible to provide a universally accepted definition of what a transgender person is.

Then we heard this morning oh, it's not transgender individuals, it's binary transgender individual -- sorry, binary transgender people who always in every day of their activities and lives portray themselves as the sex to which they have transitioned. Okay. I hadn't heard that definition until today, but the point is now we're getting to an even -- we started with transgender individuals, which is undefinable, and now we've got binary transgender individuals, which is a subcategory of transgender individuals.

And then opposing counsel said flip-flopping people don't get relief. They are not covered. They should not be covered by any temporary injunction that this Court issues. I

don't know how the State can determine at any given time whether a person is a person who flip-flops, to use their terminology.

This is completely unmanageable. A temporary injunction that covers a narrowed subset, an indeterminable narrowed subset of a class that itself cannot be defined according to the plaintiffs' terms makes this a completely unworkable injunction they are seeking.

And finally, I'd note that the law's been in operation for seven and a half months without any irreparable harm occurring to anyone. The public interest has been well served. There is no need -- remember, in a temporary injunction, they are seeking to restore the status quo ante prior to a final decision by this Court. My guess is that this Court is not too far away from a final decision. My guess is that we probably won't need another evidentiary hearing. So it wouldn't make sense to restore the status quo ante for a month or two or however long the Court needs to reach its decision.

But most importantly, I come back to the points I began with. One, plaintiffs have failed to establish that any of their newly conceived

rights exist in the text of the Constitution or have been recognized by Kansas courts.

Number 2, they can't win on the rational bases test. That's why they tried to, you know, imply that the standards of maximal scrutiny apply -- heightened scrutiny.

And number 3, the plaintiffs cannot overcome the high hurdle of facial challenge. There are thousands of cases in which the statutes might operate constitutionally if these constitutional claims were valid ones.

Accordingly, the temporary injunction motion should be denied and the motion to dismiss should be granted. Thank you.

Do you have any questions, Your Honor, before I sit down?

THE COURT: Please have a seat. Let me think about that before I ask for any response.

I'll hear from the plaintiffs.

MR. SELDIN: Thank you, Your Honor. A couple of discrete points. First, if Ms. West unquestionably qualifies for a female gender marker on her driver's license and to use female restrooms in the State of Kansas, then it would seem that the appropriate remedy here is an

injunction that permits her to pursue those things. That seems to be extraordinarily important to Ms. West.

It's the first that we're hearing of this that there's no problem and so in this procedural posture it would seem then that granting an injunction that should she return allows her to update her license to female and when she is here use the females' restrooms. To her as an intersex woman, that's certainly some relief that, you know, I won't be greedy but I think you could issue today.

I think with respect to some of the other --

THE COURT: But that -- do I need to do that if what they're saying is the law already provides for it. So what am I pronouncing?

MR. SELDIN: I think you're pronouncing that she has a right to do that. I mean, right now the way the text of the law is, is that you can apply for this exception. It's not clear how you're supposed to do that or where you're supposed to do that. If what they're saying is that the law doesn't apply to her because she's within the exception, a declaration

from this Court that the law does not apply to her -- you could just do a declaratory relief, it doesn't have to be an injunctive relief. But it does seem in this instance that would be an appropriate exercise of your authority under equity here, or if they want to sign a stipulation, we can talk about that.

But, you know, it seems like -- to me it is not enough for them to say this at the podium. Like, that needs to be effectuated for this to be resolved for our client who has specific needs that are ongoing. I think you heard her testimony that her domicile in Tennessee is not established so if, in fact, her plans would change depending on not only her understanding of whether SB 244 applied to her, but for how long it did or did not apply, so it's enormously important to Ms. West to understand what her legal obligations are or are not under the law and what the State intends to do about it.

I'm less concerned about the mechanism of effectuating as I am in effectuating this concession that we've heard today specifically for our client. Maybe that is something that we can handle separately, but I just -- it felt important

to note that for Ms. West because of her situation that if they're saying this law doesn't apply to her, then a declaratory judgment that it doesn't, I think that would solve a lot of problems certainly for Ms. West.

So I just wanted to have that and then sort of cabin that as important but there were some other things that I wanted to provide some clarification on because that would be helpful.

THE COURT: Oh, sure.

MR. SELDIN: So, you know, sort of working backwards. On single subject -- for the single subject rule I think the important thing there is that there has to be a legitimate connection. And what we know from *State v. Limon* is that you get to look at who the law is affecting to understand what it is doing, even if it doesn't say transgender.

SB 244 is not a law that says, this is about regulating restrooms and here's who can go in and here's how many lights you need and here's how big the partitions have to be and here's how many you have to have. It doesn't say that. It's not a law that says this is about identity documents. Okay, here are the rules for driver's

licenses, here are the rules for birth certificates, here are the rules for hunting licenses. It doesn't say that.

Instead what it says is this is a law about biological sex. The only people who were affected by SB 244 were transgender individuals and individuals or intersex like Ms. West, although now we're hearing today that maybe not, so then that's certainly just transgender individuals.

So like we were talking about earlier, we can understand that the purpose of that law then was to ensure that in these two particular environments, transgender people were marked as such. That is something that the Court considers that really -- that is the connective tissue between these two provisions textually, and so we believe that that is worth interrogation with respect to certainly the motion to dismiss but also our TI.

I think with respect to the scope of what we're talking about here, you know, I'm sort of hearing two things from the State. I'm hearing oh, my gosh, there's no way to administer this, it's so many people, what can we do. And then I'm

hearing well, it's less than 500 people. If it's less than 500 people in the State, then narrow injunction that applies to folks who have already been affected by the law because they changed their license to their gender and now it's been reverted, that would be one way to craft some relief.

I think also there are explanations that you heard for why not everyone has been able to update their license including that KDOR's gender reclassification process was pretty rigorous. You needed doctors' letters. You needed other documents. You heard from plaintiffs who were motivated to make these changes that it was not a simple task, although many folks devoted resources to it. So again, I think that provides some explanation of what we're talking about.

I think also while we're talking about numbers, you know, I was interested to hear after a week of evidence, you know, there was not a witness from the State that they put up who said I've done a study of how people feel in Kansas about sharing the restroom with transgender people and 99 percent of them are uncomfortable. They didn't put up a witness that said that. They put

up some individual people who talked about their beliefs. We have no reason not to credit that they are uncomfortable with the idea that they might be in the restroom with the transgender women. All of them testified that they also don't want to be in the restroom with transgender men, even if they sort of recognize that that's a technical matter that's permitted under the law, and that they can't in fact identify transgender men on-site.

You actually heard from Daniel Doe himself that at a Lawrence pride event he was turned away from competing as a transgender man because they thought he was cis gender. So this idea that we will know trans people on sight, there's not support for that and there's just no evidence in the record that in any of the State's interest with respect to restrooms apply at all to transgender men. So I think that that's an important thing to note.

I apologize, this is thematically not as organized as I would like. But with respect to driver's licenses, again, you know, there is dissemination, right. The whole point of a driver's license is not -- it's not the tree that

falls in the forest and no one hears it, right. You use your license in society to identify yourself.

And I think this idea of historical fact and privacy, you know, let's think about it this way: Whether or not you had an abortion is a historical fact. It either happened or it didn't. There would be a privacy interest implicated if you put that on a driver's license. A law enforcement officer might want to know that about you. A doctor might want to know that about you. There would be an enormous privacy interest problem if the State said we're going to put that you had an abortion on your license. They'd say, oh, well, on line you posted about your experience having an abortion, so that's not a secret anymore. So if you've told anyone you had an abortion, the State can put it on a driver's license? The State's going to say, well, we're not making you say anything. We're just, you know, putting it on your driver's license. That's like saying you're going to hang a sign around your neck that says I had an abortion. You don't have to say anything. You just have to wear that sign when you go to the bank, when you go to the

restroom, when you go to the doctor.

So I think that these arguments about dissemination and driver's license and privacy break down pretty quickly. I think also this is an idealogical message. The Court doesn't have to decide who's right and who's wrong about gender and sex. I think what you heard from Dr. McGregor is that this is an area of continuing study. What you heard from Dr. Turpin is that both of these things are important. They are phenomena that exist in the world.

So what the State's view is about that plaintiffs have a different view. This is not the plaintiffs trying to have their message put on the driver's license. You know, if the State said we're just not going to have sex markers on the driver's license, this is not about Daniel Doe saying no, it's really important for me to have male on there even though you don't say anything. It's if you're going to say something about how I live my life, I live it as a man. This is -- that is the conflict there.

I think also with respect to first amendment issues, the State talked about *Orr*. *Orr* is not a First Amendment case. If there's a

compelled disclosure even of a fact, it still triggers that strict scrutiny analysis. So like with the sex offender brand, you still have to look at why is the State doing this, is it narrowly tailored, is it accomplishing its purpose, and how narrow tailoring works with respect to speech. You know, what triggers it and how you get there is different than equal protection, so it's just when you get to how you do the analysis, they're similar but the path that you get there is just a little bit different. So it's not enough to say there's just no strict scrutiny at all. With speech you have to do a separate analysis which we talk about in our briefing.

I think also with respect to looking at federal law *Skrmetti* and *BPJ* did not decide what the standard is for transgender status and did not adopt Thomas's concurrence, right. It is just not true that the Supreme Court has spoken on when you have a transgender status classification what level of scrutiny you provide. That hasn't been decided yet, just has expressed opinions about what it may or should be but that's not the law right now.

But what you do have, what is the law in Kansas is *Limon*, and *Limon* talks about how you can understand laws that classify even if they don't use the little words of homosexual or transgender.

I think also with respect to *BPJ* in that case there was agreement that, you know, that with respect to sports, there were differences based on birth sex that mattered. Here all the testimony that you've heard from plaintiffs, from the AG's witnesses, is that with respect to restrooms you look at the person in front of you based on their gender presentation. You are not looking at their sex assigned at birth, right. When all of the AG's witnesses who talked about their discomfort with transgender women who they identified by other terms but transgender women as we've been discussing them in court, that was all because they knew them from before, right. They knew them from before because they were in school together. They knew them from before because they were elected officials at their place of work in the state capitol. This was not, I saw someone and I knew from how they looked. That's not what happened.

Again, that is part of why plaintiffs take

up pains to not disclose their transgender status because people will know that about them. But in the vast majority of instances when Kyle Koe walked into the restroom, he's understood as a man. You know, his co-worker who expressed concern about why he was there and the discomfort, assumption was that he was sick, not oh, his sex must have been assigned at birth as female. So just in terms of how restrooms operate, they operate in the social context of gender. They do not operate in the context of sex assigned at birth.

I think with respect to the medical context, you know, I think with -- I think actually the patient on the gurney who can't talk to you is a less compelling use of the driver's license. That's a case where presumably what they're going to do in the hospital is look at your body and figure out what is true and not true about you and treat you accordingly. So I just -- I have some questions about the -- how narrowly tailored this could be to that particular context.

I think also with respect to driver's licenses, you know, if you're looking for a golden record, we shouldn't let anyone change their name,

right. It should be what's on your birth certificate and you should be stuck with that forever. We don't let an administrative convenience dictate the intimate details of peoples' lives. We don't tell people when they get married nope, you can't change your name. We don't tell people, you know, you got adopted, nope, you can't change your name. We don't tell people, you know, you've decided that for whatever reason how you want to be held in society is different, nope, some law enforcement officer somewhere might want to trace you back all the way through time so you don't get to change your name. We don't let administrative concerns dictate that kind of personal information of our society.

We do allow law enforcement to maintain vast databases of information so they can figure this out because, you know, law enforcement is meant to serve the community. The community doesn't serve law enforcement, right. This is about keeping people safe in their communities and in society, not making sure that we live in a society of perfect information where law enforcement know everything about you everywhere all at once. That's not how we have structured

our society, even though it appears to be better than the state of nature.

I think also with respect to Lockean natural rights, you know, men and women existed in 1859. I think in 1859 everyone had a concept that there were men and women. That's why they talked about in *Hodes* separate spheres and how we had evolved past the 1859 understanding of what spheres are. You know, Section 1 says, all men. I think we now understand that it meant people, not just men. But, you know, I think that is important because, you know, the State made some arguments about well, these things didn't exist in a state of nature. But peoples' sense of who they are and living their life as a man or a woman, that, you know, that goes back a long, long time, right. And I think what we are now understanding, like in *Hodes* I where they said our understanding of how gender and equality has evolved since 1859, our understanding of who in the world is a man and who lives as a man, that has evolved and is evolving, too. And so the question is if we are in the state of nature, do we let people, even if there's no driver's license, even if there's no public restroom, do we let them live their truth

in this important and essential way or do we let the government when the government has an apparatus or a data need or some other something, do we let the government say actually now that we're out of the state of nature, we get to tell you if you're a man or a woman.

One, this is not a history and tradition federal test of what were they thinking in 1859, but if you did look and see what they were thinking, I suspect that they would have had a strong sense of identity as men, and there weren't women there but I assume they would have thought that women thought something about their identity as women. And I suspect if you had asked everybody, they would express to you, like we do now, that people want to govern their own lives regardless of gender or certainly regardless of how the State views their appropriate role in society based on their gender. So I think Lockean natural rights is both more nuance than the presentation that you've heard from the State today.

Finally, you know, and I think some of this can honestly be dealt with in the scope of relief, but Title IX doesn't require separate

facilities. It just allows them. We are not challenging the K to 12 school's context. You know, we are talking about adults out in society and out in the world. You didn't hear evidence about that different context, so if that's a concern, I think there are ways to craft the relief here that is specific to the harms that you have heard.

I think also the -- you know, I think the brush that the State is painting with, with respect to rational bases is just a little too broad, right. We had an evidentiary hearing because facts matter. And so to come in after the whistle's blown and to suddenly say, well, 99 percent of people think this, that's not a fact in evidence. The facts that you have in evidence are State witnesses who are uncomfortable with the idea that there might be a transgender woman in their locker room, which we're not talking about, or their restroom, again, only because they knew the person from before in part because they were an elected official, you know, that you don't have evidence of any harm there for balancing.

And for transgender men, what you've heard is that transgender men who are our plaintiffs do

not want to be in restrooms with women. Women do not want to be in restrooms with them, but they are in a completely impossible situation of they have to use the restroom somewhere, right. And so this idea that Kyle Koe hasn't suffered any irreparable harm just seems impossible given the factual record that we've established here to really understand that to be true. And it's unclear whose interest it serves exactly to force Nicholas Noe into a women's restroom. This law presents a problem for him.

This law presents a problem for Cameron Broyles who's trying to parent in Kansas, to be a good dad, to show up for his kids.

It's a problem for Kyle Koe as a civil servant.

It's a problem for Daniel Doe as a KU employee.

It is an enormous problem that cuts at the heart of their ability to be men in Kansas but, more importantly, to be people in Kansas.

And so again, I believe that these issues are fact intensive. They are complicated under the law. But what is very helpful about the hearing that we had last week is that there are

certain things that I just don't think can be reasonably contested on a rational basis with respect to how this law specifically affects transgender men and the way in which Section 1 of the Kansas Constitution does not count and is a law that has created these enormous impediments for people like our plaintiffs. So I think that's what I had in response, Your Honor.

THE COURT: Thank you.

MR. KOBACH: I've got just a couple of quick surrebuttal points. Very brief.

Thank you, Your Honor. Just a few quick points. Opposing counsel said if West qualifies for the accommodation, a temporary injunction should issue, and then the Court asked well, is that really necessary. The State is okay either way. However, I would just note the bureaucratic matter that the division of vehicles doesn't usually consider accommodations for nonresidents, so it might be a little odd for them to stipulate that a nonresident hypothetically if that nonresident ever came to Kansas would get the accommodation.

I think probably the best way to do this, and, again, we completely agree that West

qualifies for the accommodation -- might be a declaration by the Court within its ruling, within either ruling simply noting that West qualifies for the accommodation based on the uncontested evidence that the State does not deny that she fits within that -- indicating that she fits within the criteria for the intersex individual accommodations. That might be the simplest way to do it, but we are fine with however the Court wants to acknowledge that.

Secondly, opposing counsel mentioned the *Limon* case in animus. There's no basis for applying *Limon* in this case because animus only comes into play in *Limon* and in other Supreme Court cases mentioning animus when you're determining the lack of a rational basis. That's where the Court, a court would say okay, you've got these asserted rational bases that the Legislature had, but it was really animus that was motivating it so I'm going to disregard the rational bases because of the existence of animus. That's not really what we're talking about here.

Plaintiff also said that -- claimed that the State says it's impossible to administer the proposed temporary injunction because there are so

many transgender people. But wait, there are so few transgender people. Which is it? No, our argument is that the application of a meaningless standard is impossible regardless of the number. It doesn't matter at all what percentage of the population is transgender.

Let's just imagine a hypothetical. Suppose you have a government building administrator, and the way SB 244 is supposed to work is that if it's being violated and it comes to the knowledge of an administrator of a government building, that the administrator of the government building is supposed to inform an individual who's violating SB 244 that they're doing so. How in the world is someone who is the administrator of any government building going to know the definition of transgender and going to know specifically the subset of the definition of transgender that are binary transgender individuals as opposed to other transgender individuals, and then on top of that also has to know that the individual lives their entire life in the transgender sex designation. There's absolutely no way that a building administrator would know that and be able to somehow apply the

sought after preliminary injunction or temporary injunction.

Then I just have one last point. I heard opposing counsel say the following: Compelled disclosure of a fact triggers strict scrutiny. Pretty sure that's an exact quote. Compelled disclosure of a fact triggers strict scrutiny. Not true. If that were the case, then everything on the driver's license triggers strict scrutiny. Your weight, your height, your date of birth, anything. As soon as you have to disclose that, that must be supported by a compelling public interest that must be narrowly tailored. There's lots of ways you could more narrowly tailor some of those features on a driver's license. No court has ever held that disclosure of any fact triggers strict scrutiny.

I'll give you some more examples, one that has been held clearly to be untrue. In the context of *Terry* stops and then police stops when there isn't even reasonable suspicion. The Supreme Court has said in multiple cases that the test is whether the stop is reasonable, not whether there's a compelling government interest. By their logic, you would take strict scrutiny and

you would impose it on those Fourth Amendment cases and reasonableness would no longer be the standard.

Let me give you another example, one that we are all going to experience if we vote on November 3rd. In Kansas, the State law compels you when you walk up to the election judge to disclose two facts that the judge is supposed to request from you, your name and your address. That is compelled disclosure of a fact to exercise your right to vote. No Kansas court, and indeed I believe no court in the country, has said that disclosing those facts is subject to strict scrutiny.

We are all going to be doing that very soon, and I think it would be a completely unjustified and unbased, there would be no case law for a challenge on strict scrutiny grounds that you cannot be asked your name and your address before you are permitted to vote.

That's all we have, Your Honor, and we ask the Court to deny the temporary injunction and grant the motion to dismiss.

THE COURT: Thank you.

MR. SELDIN: We're getting shorter

and shorter; hopefully that means we're at the end.

It's not a meaningless standard with respect to who an injunction would apply to. KDOR had a standard that worked well with respect to how folks could qualify for a gender reclassification.

You know, with respect to how this is administered, prior to SB 244 you didn't hear any evidence there was a problem. People were using restrooms in accordance with their gender identity and this was just not an issue. So returning to the status quo of SB 244 not applying to transgender people returns everyone to the status quo, including those to whom the law does not apply but certainly for those to whom it does. It is repairing that harm in the interim.

I think with respect to the speech issue, I would direct the Court to *Riley v. National Federation of the Blind*, 487 U.S. 781. And just a moment on how strict scrutiny works. My guess is -- we're not re-litigating this case right now -- but my guess is if you ask what the State's interest in compelling someone to give their name and their address, it would be to make sure that

you're the voter and you're voting in the right precinct. I suspect that that survives strict scrutiny because there's a really good reason for the poll worker to know, are you who you are and do you live here so that you vote correctly. But that's how strict scrutiny works, right. You look and you see is what you're trying to do tailored.

Now, imagine you had a statute that said when you show up to the poll worker, you have to tell them your name, your address and whether or not you've had an abortion, and we want to do that because we've got a database somewhere that says who's had an abortion and who doesn't and that's a third way to make sure you are who you are. I think we look at that third one a little differently than the first two both because of the privacy interests and also because the State's interests in identification, that kind of binary fact, abortion or no abortion, is not narrowly tailored to what they're trying to do, which is are you the voter and are you supposed to vote here. Again, I think that's why the facts matter, the tailoring matters, their articulated interests matter because there has to be some kind of fit.

So with that, we would respectfully

request that the Court issue an injunction and deny the motion to dismiss.

THE COURT: All right. Thank you.

MR. KOBACH: Nothing further, Your Honor.

THE COURT: I'm going to devote all the time and attention to this that I can amongst my other obligations. I don't want to give a window but I would be surprised if I don't have something certainly by mid November.

General observation, and I say this because I certainly think it's worth saying, I appreciated every fact witness that came forward to testify in this proceeding. I found them to be sincere and answering questions in good faith, and none of them seemed delighted to be here but I felt that they were here for reasons that they deemed to be important and put those interests above themselves, so I just think that's worth making a record of.

You know, the other thing I'll just add to the record, and I say this because I think I'm going to anticipate seeing those proposed findings of fact and conclusions of law from the parties, reading the *Hodes* decision and thinking about the

analysis for what's being asked of the Court here, there's reference to understanding Section 1 by analysis of the common law, and that reminds me of -- whenever I think of the common law, I think of Oliver Wendell Holmes, Jr., and I think of his treatise by that name. And that opening section of that work contains the line, "The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage."

And I think both sides have labored to understand the combination of the two and new products that are presenting themselves in the form of this legislation and this challenge, and I will work to get my decision and my answer to these questions as soon as I can, but I will look forward to those proposed findings of fact and conclusions of law to assist me in that.

With that, we're adjourned.

CERTIFICATE

STATE OF KANSAS)
)ss
DOUGLAS COUNTY)

I, Shelee K. Shafer, a Certified Shorthand Reporter do hereby certify that I am the regularly appointed, qualified, and acting Official Reporter for Division No. VI of the 7th Judicial District, Douglas County, Kansas, duly certified under and by virtue of the laws of the State of Kansas. I further certify that on the 7th day of October, 2026, I was present at and reported in machine shorthand the proceedings in the aforementioned case before the Honorable James R. McCabria, Judge of Division No. IV of the District Court of Douglas County, Kansas, and that the foregoing transcript is a true and correct transcript of the proceedings as revealed by my stenotype notes so taken.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Lawrence, Douglas County, Kansas, this 12th day of October, 2026.

/s/Shelee K. Shafer
SHELEE K. SHAFER, CSR #884
Official Court Reporter