IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

DANIEL DOE and MATTHEW MOE,

Plaintiffs,

vs. Case No. DG2026CV000112

STATE OF KANSAS, ex rel KRIS KOBACH, Attorney General, KANSAS DEPARTMENT OF REVENUE KANSAS DIVISION OF VEHICLES; DEANN WILLIAMS, Director of Vehicles, Department of Revenue, in her official capacity; MARK BURGHART, Secretary of Kansas Department of Revenue, in his official capacity; KANSAS DEPARTMENT OF ADMINISTRATION; and ADAM PROFFITT, Secretary of Department of Administration, in his official capacity,

Defendants.

TRANSCRIPT OF MOTIONS HEARING

PROCEEDINGS had before the Honorable James McCabria, District Court Judge, Division 4, District Court of Douglas County, Kansas, at Lawrence, Kansas, on the 6th day of March, 2026.

APPEARANCES

The Plaintiffs appeared by Mr. Harper Seldin, Senior Staff Attorney, 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.

AND

Ms. Jocelyn Sitton, Ballard Spahr, LLP, 1800 Larimer Street, Suite 1600, Denver, Colorado 80202-5596.

The Defendant, State of Kansas, appears by Attorney General Kris W. Kobach, and Mr. James Rodriquez, Assistant Attorney General, and Mr. Dwight R. Carswell, Deputy Solicitor General, 120 S.W. 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597.

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 S.W. 9th Street, P.O. Box 3506, Topeka, Kansas 66601-3506.

The Defendants, Kansas Department of Administration and Adam Proffitt, by Mr. Jordan Brewer, Chief Counsel, 1000 S.W. Jackson, Suite 500, Topeka, Kansas 66612.

DONNA M. LYTLE, CSR, RPR, CRR
Douglas County District Court
111 E. 11th Street
Lawrence, Kansas 66044

THE COURT: Good afternoon to everyone. This is case number 26LM112, Daniel Doe and Matthew Moe versus State of Kansas and others.

We have a lot of people here today. Usually unless we issue jury summons, our courtrooms don't fill up quite this much.

For those who are here, as long as the people standing aren't a distraction for the court, and right now I'm not distracted. I just want to make you aware, anticipating a number of people showing up, the Division 2 courtroom is going to have these proceedings livestreamed the way you see them on the screen here. So if you want to stand, you're welcome, if you want to go downstairs and watch it in Division 2, you can certainly do that.

I want to acknowledge the public interest in the proceedings today. Thank everyone for participating. Because so many are present, I just want to remind everyone of the court's rules, whether you're here in court or attending via Zoom the court has rules and expectations of people who appear here.

There is no audio or video recording allowed of any of the proceedings. No saving or downloading of the Zoom stream. Members of the press have been

given permission to have laptops, to take pictures, and made other special requests but if you haven't received that permission, those things are prohibited.

The lawsuit this court is hearing today challenges the constitutionality of a law passed by the legislature. It seems obvious to say, the legislature passes laws, the executive branch enforces those laws but they impact people and when people feel aggrieved by an enactment, it's the role of the judiciary to give them a forum for those concerns to be adjudicated.

So my role throughout these proceedings is to give both sides an opportunity to be heard. We want cases decided through thorough briefing with full and thoughtful consideration. Today is not that full, thorough, thoughtful consideration on the ultimate merits of the case. We are in the temporary restraining order stage of the proceedings.

Plaintiffs have asked that this court enter a temporary restraining order. They have a certain burden that they have to meet and the Court's going to hear, you're going to hear the attorneys argue to me what the legal standards are that the Court

should apply.

I'm going to do my best to give each side at this stage the opportunity... we anticipate a couple of hours today. Based on a couple of hours of record, I'm going to be tasked with applying the law as I see it based on that record.

There's going to be 30, 40, 50 hours of time spent before we get to the ultimate decision, and so it's temporary. Whatever the Court's decision is today, it's based on what I hear today. There may be interim requests to review that, but I just want to explain the proceedings.

With that said, I'll ask counsel to enter their appearances.

MR. DALGLEISH: Good morning, Your Honor. Doug Dalgleish on behalf of plaintiffs.

I'll allow my colleagues to introduce themselves.

MR. SELDIN: Good afternoon, Your Honor, Harper Seldin also for the plaintiffs.

MS. SITTON: Good afternoon, Your Honor, Joselyn Sitton also on behalf of plaintiffs.

THE COURT: Thank you.

MR. KOBACH: Good afternoon, Your Honor, Kris Kobach for defendants. With me, I'll

let them introduce themselves.

MR. CARSWELL: Dwight Carswell, Deputy Solicitor General.

MR. RODRIGUEZ: James Rodriguez, Assistant Attorney General.

THE COURT: Thank you.

MR. SELDIN: Good afternoon, Your Honor, Jordan Brewer, Chief Counsel for the Department of Administration for defendants, Department of Administration and Secretary Proffitt.

MR. SMITH: Ted Smith, Chief Counsel with the Kansas Department of Revenue appearing on behalf of the Department, the Division of Vehicles, Secretary Mark Burghart and Director DeAnn Williams.

THE COURT: All right, thank you. Everybody please be seated.

I'm going to trust everybody, I think that's the complete representation of all parties so the first issue I want to take up, I'd asked previously if there was going to be an objection, this case has been filed with the request to allow to proceed under pseudonyms. The initial indication of Mr. Kobach at the prior proceeding was they didn't intend to raise objections. I haven't seen anything in writing.

I also indicated at that hearing I would wait to see if I received any objections from any interested third parties or press outlets. I have not received those objections. So unless somebody is here to make objection today... I'm not seeing any indication that that's the case.

Courts need to be mindful the public has a strong interest in transparency of what happens in its courtrooms. There are special circumstances and times when pseudonyms have been allowed by the court. In other contexts, both state and federal courts have granted standing to third parties to assert privacy interests, for example, medical providers for patients when there's a concern that the court can see where requiring a person to come forward might chill their interest in asserting their rights, and so I've reviewed the application put forward by plaintiffs. As I said last time, I saw an articulated basis, and absent any objection I'm going to grant that request.

So that takes care of that, and we're going to move to the arguments on the temporary restraining order unless somebody tells me there's a procedural aspect they'd like to take up first.

Not seeing that, counsel, and I will just

tell counsel, you know, I expect I'm going to have questions today. I'm going to ask you to think through some of these things with me. I don't remember how many pages your memorandum in support was. I received Mr. Kobach's response this morning, I think it was filed yesterday. It was 39 pages.

There's lots of case law, there's lots of arguments that have been put forward so if I'm asking questions, I'm not trying to cut you off, I just want to try and stay on top of what you're telling me and where I think the issues may be, and some of those questions may be more suited for the ultimate questions that we have to determine so we'll just work our way through it that way.

Please, go ahead.

MR. SELDIN: Thank you, Your Honor. Harper Seldin for plaintiffs.

I think -- we appreciate the Court taking our lengthy briefs. We didn't have time to write short briefs, we wrote long ones, but we'll certainly be mindful in the future of doing better.

THE COURT: Oh, no, no, it's not the distance, it's just a lot to absorb. I wasn't trying to criticize.

MR. SELDIN: No, no, we didn't take it

that way, Your Honor.

Just in terms of how plaintiffs see today proceeding, I have some prepared remarks to walk us through triggered by your questions at any time. We want to be as helpful as we can to the Court. We know this is extraordinary relief that we're seeking on a short time frame so we're mindful of that but are eager to be helpful to the Court in any way that we can.

THE COURT: Great.

MR. SELDIN: Daniel Doe and Matthew Moe are ordinary Kansans. Daniel moved here for college because of his family's deep multigenerational ties to the State. He intended to move back to California but instead stayed to build a life in Lawrence with his fiancée.

Matthew Moe is a PhD student who volunteers for the science programs for children in this community but Daniel and Matthew were demoted to second class citizens on February 26th when SB 244 went into effect. Daniel and Matthew are no longer permitted to use restrooms with other men in government buildings or use driver's licenses they rely on to go to school and work, raising the question what had Daniel and Matthew done to deserve

this?

They hadn't done anything. They're just transgender and because of that fact, because of the circumstances of their birth, the legislature decided that they were unfit to be in the same space as other men because when they were born, their sex was female.

They were suddenly required, with no notice or opportunity to be heard, to present themselves to the DMV to obtain driver's licenses that are announced to everyone: The teller at the bank, the clerk at the hotel, the poll worker on election day, that they are transgender. It did not matter that for their adult lives they have lived as men, they present themselves as men, and that in all aspects of their lives, to their friends, their co-workers, the people they meet as they go on their way, they are men.

The Kansas Legislature has singled out Daniel and Matthew and all transgender people like them in Kansas for a unique social stigma. They are forced to disclose, every time they need to use their driver's license or a public restroom in a government building, closely held facts about their medical history and their bodies. No other Kansans

are required to do that.

The effect of SB 244 is to mark Daniel and Matthew and all transgender people like them with a Scarlet T. They can no longer legally use men's restrooms in public buildings, including where they work and study, and even in this courthouse.

If they do, they can be reported and investigated, fined, charged with a class B misdemeanor, and their driver's licenses which they obtained following the rules were invalidated overnight with no opportunity to comply.

Now, just because a law is cruel doesn't make it unconstitutional but SB 244's offenses to the Kansas Constitution are several. SB 244 infringes on the rights of personal autonomy, informational privacy, procedural due process, freedom of speech, equal protection under the law, and there's a structural problem with the law in that it violates Article 2, Section 16's single subject and clear title requirements.

Moreover, a law that specifically targets a disfavored group and infringes on their fundamental rights is its own affront to the freedom guaranteed by the Kansas Bill of Rights.

THE COURT: Can I ask a quick question --

MR. SELDIN: Yes, Your Honor.
THE COURT: -- about the structural issue?
What would be the remedy if I found a structural issue?
Does that invalidate the law?
Does it make it unconstitutional?
What's the distinction, if any, there?
MR. SELDIN: We believe the correct remedy is to strike down the law in its entirety. There is some case law supporting a remedy if the Court can determine which was the predominant portion of the bill --
THE COURT: Just for that structural issue.
MR. SELDIN: Yes, because Article 2, Section 16 is meant to prevent logrolling. It's this idea that bills should mean what they say and say what they mean, and so there's particular perniciousness in the Kansas Constitution's mind to a bill that hides the ball or that can't really get together a majority on one bill, can't really get the majority together in the other bill, but if you can put them together, suddenly there's a majority.
Kansas Constitution is unique. It's not the

only one, but it's unique among state constitutions. Certainly unique as compared to the federal in that there's this structural issue, and so the remedy for that structural deficiency is to strike down the law itself in its entirety.

I will say there is some --

THE COURT: Is there a distinction between -- does that make it invalid or unconstitutional?

MR. SELDIN: I believe that --

THE COURT: It's invalid because it involved the constitution and therefore is unconstitutional?

MR. SELDIN: I think that's right, Your Honor, if it was enacted in violation of the requirements of the Kansas Constitution, it is invalid because of that structural defect that is unconstitutional.

THE COURT: I know that's sort of the... I don't mean the priority, end of your list, there's other issues you wanted to address, but that one I hadn't really thought of much in the past, quite frankly hadn't been presented with a challenge of that nature before and hadn't looked at it so I just wanted to get that sort of straight in my head

as you were talking on these others, so please.

MR. SELDIN: No, no, and truthfully, I'm happy to move to that point because I do think that it is relevant to the remedy that we are seeking and also, you know, we have --

THE COURT: Is the remedy today -- what's your bottom line on the remedy that you're seeking today?

You want me to do what?

Are the pieces that can be addressed, does it have to be addressed as a whole?

MR. SELDIN: I have two answers to that, Your Honor. We believe that if you find that... and we are likely to succeed on the merits of our Article 2, Section 16 claim that the appropriate remedy is to strike down the law in its entirety, I think that for the other individual rights claims, the remedy is still to strike down the law with respect to driver's licenses and restroom restrictions. Those are the ones that we are specifically targeting.

I will say that certainly the immediate harm of this law was the overnight invalidation of driver's licenses, and so while the SB 244 relief that we are entitled to is invalidation of the law

in its entirety, certainly the portions as they relate to driver's licenses and restrooms in public buildings, but if the Court were inclined to cut closer to the bone, certainly the portion of the driver's license bill that retrospectively invalidates is uniquely problematic from a procedural due process perspective so that seems to cry out for a TRO in a particular way.

THE COURT: Okay, and just help me understand your thinking on distinguishing between the driver's licenses becoming invalid and the birth certificates becoming invalid, why is there a distinction?

MR. SELDIN: So we...

THE COURT: In terms of the remedy I would enter today.

MR. SELDIN: So I think the harms that Daniel and Matthew set out in their declaration reveal how they use their driver's licenses on a daily basis, that is not how they use their birth certificates.

THE COURT: That makes sense.

MR. SELDIN: Most of us understand that you need your birth certificate. It's an important document. It's not an everyday document.

THE COURT: Sure.

MR. SELDIN: You keep it in the safe, not your wallet.

Driver's license is in your wallet because you need it out and about in the day and so --

THE COURT: That's what came to mind but I didn't know if there was another distinction you wanted to make about it so...

MR. SELDIN: I think there are some other relevant distinctions when we get deeper into the analysis of the individual rights claims about what the State's interest is with respect to driver's licenses versus birth certificates and so I think in reading the AG's response, there seem to be some crossing of the streams between what's an interest in a birth certificate versus a driver's license.

We are focused on the driver's license portion in this lawsuit and also specifically with respect to the TRO, knowing that this is a 14 or 28-day activity. That is a meaningful time for people who need to go to work or go to school, other things that they need to do that they need their IDs for.

THE COURT: Thank you for addressing

those.

MR. SELDIN: I think to the extent that Your Honor is inclined to find likelihood of success on the merits on the single subject rule claim, I think that some cases that are helpful to this Court are Thiessen and Sholl and Cashin.

THE COURT: Can you spell for the court reporter, please, and for me.

MR. SELDIN: Sure. Thiessen, I believe, is T-H-I-E-S-S-E-N, Sholl is S-H-O-L-L, Cashin is C-A-S-H-I-N. These are also in our table of contents if my notes are accurate to reflect -- refer to the table.

I think Thiessen and Cashin both talk about legislative history as an important element in understanding whether this is a violation.

I'd say that state constitutions that don't have a single subject rule or clear title rule are a little bit more agnostic about how the sausage is made when it comes to legislation.

You know, wheeling and dealing, horse trading, whatever you call it, in some places that's... you might find it offensive but it's not constitutionally offensive. It is constitutionally offensive in Kansas, and so the history of SB 244,

how it started in another house bill, how it got logrolled with a restroom restriction and how it got gutted and goad, called shucking in some places, into vehicles, specifically to avoid public comment and further hearings, those are things that the Court can take judicial notice of. We have those materials in our filings and they're also relevant to understanding the clear title and the single subject rule.

I think that Thiessen is also helpful in understanding what the -- Thiessen and Sholl are particularly helpful in understanding what the limits of that single subject rule are. Thiessen talks about crimes cannot unite a bill that talked about changes to criminal procedure and a law enforcement training center. You can't sort of have a word association claim of, well, crimes are investigated by law enforcement and law enforcement needs to be trained and so the training center, that's too far; right?

You can't play that game to get around Article 2, Section 16.

Same with Sholl. You can't abstract to a level that makes it meaningless. You can't say, well, this is an act to establish certain laws and

then enact whatever laws you want; right?

Not every state constitution has this, but it's there, it's important.

I think Cashin talks about how it's a mandatory directive in the constitution so even if there are other cases where this happens and it goes unnoticed or it's not brought up, that doesn't mean that just because the passage of time or the frequency that it occurs, that doesn't mean that it's constitutional.

So I think that those three cases are particularly helpful and especially in understanding the limits of talking about identification of biological sex; right?

In order to get from birth certificates and driver's licenses, which we would concede are a single topic, right, this is government issued identity documents. That's completely different than civil and criminal penalties for what people are doing in government buildings.

You could word associate your way there, but in so doing, you would trip over Article 2, Section 16, and that triggers its unconstitutionality.

I think also Sholl is helpful, there's a concurrence in there and it talks about how the

effect of the logroll in Sholl is going to be strip people of due process by essentially removing courts from large portions of the state, and the concurrence talks about how there are some limits to legislative power when it has the effect of stripping people of due process so I think that that's helpful flavor in understanding why a rule like the single subject rule on the clear title are important, right, because there's this idea that the legislature is going to diminish peoples' rights and should speak plainly when it does so and it needs to do that one at a time, it can not do it wholesale.

I think... if the Court doesn't have any further questions about how single subject rules, I might --

THE COURT: Not at the moment, but that was helpful, thank you.

MR. SELDIN: Thank you. So I think with respect to the individual rights claims, the AG is incorrect when he says that we're asking the Court to break new ground. This is not a novel set of theories that require the government to do anything. All that is required is the assistance in enforcing an unconstitutional law, and the thing, the thread through these individual rights claims is

that this is about Daniel and Matthew's right to be left alone by the government. They're not asking the government to do anything. They're asking to be left alone as they were, as they lived their lives, and they're asking that the State leave them at peace and not require them to endure the pain of civil and criminal penalty, to abridge their freedoms in a way that offends the Kansas Constitution or that they be given at least minimal due process before that happens.

THE COURT: Let's talk about that as an argument.

Aren't there... I won't say an infinite list, but a long list of topics that people could say I wish the government would just leave me alone on this, and how far do I go in deciding, you know, I want to be left alone in how I... how much I pollute whatever water stream runs past my property, or how much fertilizer I put on a particular place, or how much bacteria I allow in the food that I process.

I mean, against each of those there's some sort of identifiable state interest that one can articulate but just by itself, the right to be left alone, help me contextualize that as against any

other time I hear that from people. I hear that a lot in all sorts of cases.

MR. SELDIN: Understood, Your Honor, and I think I would distinguish it in two ways. The first is the examples that you've just given all fall in the context of economic regulation which is different than regulations and laws that deal with individual people and their rights.

I think from cases like State V Limon which is decided on a rational basis review. That is a helpful case in understanding that even when a court is implying rational basis review, it is different when there's an equality or a liberty issue at stake. It is different from economic regulation.

Now, we argue that because this law infringes on fundamental rights, then I'll talk about the civil limits you're concerned about, we believe the government has to have heightened scrutiny of some kind and on a TRO where the only record is the available record of the facts that plaintiff submitted, it doesn't prejudice any parties' rights going forward if on this factual record that you have which is unrebutted, that you find that the State has failed to meet its burden for heightened strict scrutiny.

At a later date when there's more evidence and everyone has had more time to reflect, maybe the State can meet its burden, we don't think they can, but they can certainly try, but at this stage on the TRO, we agree there's going to be a paper record for this, that gives you enough to find that the Court can't meet its burden.

THE COURT: What is your star case that's been cited for the heightened scrutiny application here?

MR. SELDIN: So the Hodes line of cases talks about what scrutiny it tends to a fundamental right. I think the League of Women Voters V Schwab has, if anything, a stronger statement. It says something like it's a fundamental right, it's unconstitutional full stop. I think there's probably some strict scrutiny that needs to happen in there as opposed to a full stop because these rights are not absolute but nonetheless I think those are the cases that help understand what heightened or strict scrutiny would look like in this instance, but I promise you I'll get back to what's the limit on what the government needs to leave alone.

I think Hodes One and Two provide a sense of

what is within the scope of the government needs to leave alone, and those are things related to your personal autonomy, your bodily integrity, and your reproductive choices, and I think it's important to understand why in the Hodes line of cases the restriction on abortion offended personal autonomy, and it's not because personal autonomy is synonymous with the right to an abortion. That's not what the courts said in Hodes One or Hodes Two. It didn't say Section 1 is all about abortion, only about abortion.

Instead, there's a locked in natural rights theory here that's embedded in our constitution, it covers personal autonomy and bodily integrity and when you force a woman to be pregnant against her will, you're forcing her to entertain a course of conduct that could be harmful to her, that would alter her life, and as a part of being in Kansas, the government cannot force you to do that.

This kind of liberty sits in the same place. It's this idea that Daniel and Matthew are entitled to live their lives how they want, even if that has a gender component, maybe especially when it has a gender component to it, and in a case where there's overlapping rights in the Kansas Constitution, so I

think Section 1 and Section 2 for equality under the law, and the Section 1 personal autonomy, they came together; right?

It's this idea that the government can not tell you how to live your life because the government thinks you're a man or a woman, and that's what's happening here. As Matthew and Daniel talk about in their declarations, they've lived as men for their adult lives. They've undertaken no small effort, in fact, an incredible effort to be men, to look like men, to have medical treatment so that they can feel like themselves and present in the world as men.

They've changed their legal documents so that wherever they go they are legally recognized as men, and as noted in their desire to remain under pseudonyms in this case, they go to great lengths to make sure that they're the ones who tell people that they're transgender, and not that they are marked for that wherever they go.

And so I think in the same way that the State cannot force women to conduct their lives in a certain way with respect to pregnancy, the State cannot force people like Daniel and Matthew to live their life in a certain way just because the State

has an opinion about whether they are men and women, so I think that because --

THE COURT: Are these statutes expressing a view by the State on whether these individuals are men or women or is this in the nature of the State issuing certain documents which it has its reasons and purposes for, and making definitions of what the terms within those documents mean, and then there's a consequence that flows beyond that which I think... I don't want to say undeniable, but it can have a consequence for your clients.

To what degree do I go beyond, and is it fair to characterize it in that way?

This is -- driver's licenses exist because the State says they should. Birth certificates exist because the State says they should. They don't have to exist. The State's decided they should exist for purposes that the State defines and then they're defining terms that they want those documents to contain.

Is that the same as declaring someone to be the definition that's in that document?

Does that make sense?

Is that a distinction that has legal

significance here?

MR. SELDIN: I think it does, Your Honor, in two specific ways. The first is that if you look at a case like State V Limon, you can look at the effect of a law to understand how it is to further a specific group so I think the AG in the response briefing have said the law doesn't even say anything about transgender people.

Well, we know who it's affecting, we know, Your Honor, who it's affecting, and --

THE COURT: Point me a little bit to the legislative history on that, and again, I'm sorry for interrupting but just to help me follow, I want to get some things out of my way in my head, especially with respect to the bathroom issue. What was articulated as the State's interest in having this law passed?

MR. SELDIN: So there are no legislative findings attached to this bill so that is hard to know, and again, because of the way that it was logrolled, there wasn't public debate on it in the same way so kind of hard to know why that was happening, and I think that's why cases like Sholl and Landgraf are particularly helpful. Landgraf is a federal case, not a Kansas one, but Landgraf talks

about how when the legislature has unique and enormous power to change settled circumstances for swaths of people without individualized consideration, and so when the court -- when the legislature does that, it raises the question of has this been done to target that specific group of people, and State V Limon gets to that the same way. You don't have to say the magic words of this law is about transgender people to know and understand that this law was about transgender people.

With respect to...

THE COURT: Go ahead.

MR. SELDIN: With respect to the restroom specific interest, I think that --

THE COURT: With respect to...

MR. SELDIN: Restrooms, specifically focused on restrooms, and I do think that there are separate but overlapping interests related to driver's licenses and restrooms but speaking specifically about restrooms, the State in its papers have articulated an interest in privacy and safety.

I think on this record that you have now with the evidence that you have is that it does not enhance or further State interest in safety or

privacy to have this law to be in effect on restrooms. You can see that from how Daniel and Matthew articulate their experience in restrooms as men who go in and out like other men without incident. What would happen if they went into women's restrooms --

THE COURT: Was it illegal for a man to use a woman's restroom prior to the enactment of this law?

MR. SELDIN: No.

THE COURT: Was there a crime being committed?

MR. SELDIN: Your Honor, the way that restrooms work socially is we sort of let people sort themselves out and then we deal with issues of conduct as they arise.

THE COURT: So if somebody uses the women's restroom because the male restroom is full and nobody knows they were in there and they leave and nothing of moment happens, no crime as far as I can think of, and I may not have thought into it very deeply, would have occurred, but if someone is a male and goes into a women's restroom and for the purpose of disruption or creating a disorderly conduct situation, or for some other more nefarious

purpose, then it's the conduct that would still be analyzed as a potential criminal act.

MR. SELDIN: Yes, exactly, and I would say the same if a woman went into a women's restroom.

THE COURT: Or vice versa, or a man into a man's restroom and did those same things --

MR. SELDIN: Right.

THE COURT: -- it's the conduct in the area, but by itself, I'm not aware of anything that made it illegal to occur.

MR. SELDIN: Neither are we.

THE COURT: Okay.

MR. SELDIN: That's why this law is a sea change in how restrooms in public buildings are regulated in the State of Kansas with severe penalties.

THE COURT: On that issue, again, you're going to be bringing me up to speed and I'm sure the State has some things they want to say about this... sorry, I just lost my train of thought.

With respect to the safety issue, is it in any way legally significant that the law only addresses public -- restrooms in public buildings as

opposed to restrooms everywhere?

Is there some indication that there's more safety concerns in public buildings than restaurants here in town which have gender neutral bathrooms or more privacy interests that exist if you use a restroom in a public building as opposed to a nonpublic building?

Is there something in the record that addresses those issues?

MR. SELDIN: I think there's no evidence in the record that there's any meaningful distinction between those circumstances.

THE COURT: Is that legally significant for the Court in determining the constitutionality?

MR. SELDIN: It is, because if the law infringes on a constitutional right, it must be tested under heightened or strict scrutiny in this instance, and so the State cannot after the fact, after the law's passed say, well, here's some possible hypothetical problems that maybe could have motivated the legislature. It doesn't work that way. They have to be grounded in actual facts. It can't be post hoc, and also there has to be a compelling state interest which is a high bar and the law has to be narrowly tailored to that interest

so if the State had come with some specific issue in public restrooms on this topic that demonstrate that factually, that would be a different conversation.

That's not the conversation that we're having today because the record evidence here is plaintiffs' declarations, Angela Turpin's declaration and Ayden Scheim's declaration.

I think the declaration of Dr. Scheim is particularly helpful. He's an epidemiologist. He's run his own original analyses and also has used the literature on this topic, and the upshot of his research is that when transgender people are allowed to use restrooms that match their gender identity, they're not forced to use restrooms that go with their sex assigned at birth, I think that happens to anyone, and nothing bad happens to trans people.

It is very different when transgender people are forced to use restrooms that align with their sex assigned at birth because of the harassment they experience, because of the policing that they experience, and so it makes them less safe, and you can sort of see that reflected in Dr. Turpin and Daniel and Matthew's declarations.

So that's the evidence the Court has now, that there is no problem with allowing trans people

to use restrooms on the same terms as everybody else and that there are enormous problems when the contrary is true.

THE COURT: I just realized it's two o'clock, and I'm sorry I've asked as many questions as I have, does anybody want a recess of any kind?

We set this for a couple of hours. I don't know how far you are into your argument and I don't want to go too long here, do you have a guess if I just let you finish?

MR. SELDIN: My guess is based on our conversation, I probably have about half an hour, if it's going to be...

THE COURT: I'm going to try to refrain as much as I can. We'll take a short recess between when you finish and then you'll have equal time of course.

MR. SELDIN: The most important thing is to answer your questions, so I'd like to get through it but I want to be helpful to Your Honor.

THE COURT: Okay. Then the last thing I'm going to say and try to stop myself after that is Trump Versus Orr, 146 Supreme Court 44 was cited. I don't know if you... I didn't notice in your briefing and the portion of it that...

So it's a situation where the executive branch policy required all new passports to display an individual's biological sex at birth, the United States District Court for the District of Massachusetts, that's my equivalency, preliminarily enjoined the government from enforcing the policy. The appellate court declined to stay that injunction but the United States Supreme Court, as I understand this ruling, said no, that injunction should not stand.

I don't know the reasoning because the United States Supreme Court didn't say much but it seems to me that that's something I should be mindful of here at least in terms of this portion, displaying passport holders' sex at birth no more offends equal protection principles than displaying their country of birth. In both cases, the government is merely attesting to a historical fact without subjecting anyone to differential treatment.

On this record, respondents have failed to establish that the government's choice to display biological sex lacks any purpose other than a bare desire to harm a politically unpopular group.

So it's not deep but it's there and I don't know the status of it since it was decided back in

November of '25 so I don't know if that was part of what you intended to address.

I'm going to try to stop myself from asking questions unless I can't stop myself.

MR. SELDIN: No, no, don't hold back on my account.

I think... so Trump V Orr, I think, is distinguishable in multiple important respects. That is a federal equal protection decision which does not have bearing on this Court's analysis of Section 1 and Section 2 of the Kansas Constitution.

The federal constitution is the floor. The Kansas Constitution has its own -- Farley V Engelken talks about this, its own separate greater rights, and so -- there's also some good case law in Kansas that talks about, because sometimes things change in federal law because of the Supreme Court, that's not -- it's not helpful to the people of Kansas to move the Kansas Constitution's bar up and down just because it's moved with the Supreme Court.

THE COURT: I certainly recognize that, but in many ways, we have lots of case law that says we tend to, as you say, the floor, I guess, follow federal constitutional law.

MR. SELDIN: Your Honor, and if we had

only moved on equal protection, I think that that would be -- that will be a deeper conversation as we get deeper into equal protection but we have personal autonomy rights in Kansas that are separate and apart.

I think also -- a couple things, Section 1 is not the same as what's in the Kansas Constitution. I think in order to have this Court be mindful of the way of Trump V Orr that would influence its decision, you would have to predict that Kansas Supreme Court is going to interpret Section 1 exactly the same as the Supreme Court is interpreting a different provision of a different constitution and ignore the facts that are here as opposed to the facts there.

I think what's important about the Supreme Court's decision, they said, on this record, right, Orr was in a preliminary posture. We, too, are in a preliminary posture but we don't need to skip ahead to what the Supreme Court said about someone else's preliminary posture to dictate the answer here.

I also think that we have a different -- two other things I would distinguish. I think the Supreme Court talked about the foreign policy aspects of passports. That's not present here in

the state driver's license.

I think, also, that the history of targeting of transgender people, both in Kansas and in this specific bill and its history, are relevant facts for this Court understanding how this law offends the Kansas Constitution.

THE COURT: I said I wouldn't interrupt but is that a conclusion by deduction, that it must be aimed at those folks because they can't articulate a different reason, or... again, it goes back to that legislative history which I had not had the time to absorb from the briefings that's been submitted. I appreciate it being included, I just haven't had a chance to look at it, and you've sort of intimated to me that there were no legislative findings on some of these issues.

What's the basis for the conclusion that it was aimed at this impact on your clients?

MR. SELDIN: So two ways to answer that. The first is State V Limon teaches us that you can look at the law's effect to understand who it was targeting, and if it seems like the law was then enacted specifically for that group, that raises questions of a constitutional dimension even on a rational basis.

THE COURT: Sort of where I met my deduction.

MR. SELDIN: Right. I think the second is that this Court can take judicial notice not only of the history of SB 244 but SB 180, the predecessor litigation which, you know, I think we go full into the gory detail in our brief, I'll try to do it a little more briskly here, but in short, the litigation around SB 180 was specifically related to transgender peoples' use of driver's licenses that had their gender instead of their sex assigned at birth.

There was an evidentiary hearing on that, there's been an opinion from the intermediate appellate court explaining what the factual record showed or didn't show. The Kansas Supreme Court declined to review that. SB 180 was then amended via this law. So I think in order to say this law has nothing to do with trans people, you'd have to ignore all of that.

I think this Court's not required to ignore that. You shouldn't ignore it under State V Limon. In fact, it needs to understand that is part of what is happening here.

I think -- so it's both deduction and also

what's actually happened, right, in terms of how -- why do we have this law, why we're here today, and where we've been before on this and similar issues.

So I think in terms of the individual rights claims for personal autonomy and informational privacy, I think the thing that I would want to say about that is just because the State has found a new way to infringe on our freedom, it doesn't lessen the infringement. It rather emphasizes the unprecedented nature of the intrusion.

So, Your Honor said previously it wasn't a crime just to be a man in a women's restroom. In part that's because this was not a problem. Transgender people have been allowed to be themselves in society, as long as they're not disrupting just the same way as no one else is disrupting. The State wasn't in the business of policing the restroom use, and now it is, and that intrusion, you know, I remember being a younger attorney and a more experienced attorney said, you're never going to find a case for the proposition that the sky is blue because we know no one is going to litigate that.

So I think this idea that because there's no case that says the State can't require transgender

people to mark themselves in this way and be treated differently than other men and women, doesn't mean it's constitutional, it just means that the State hasn't had the opportunity to single out this particular group for this particular legal disability before, and I think the recent history of the State doing that or attempting to do that is relevant to understanding why this is an infringement on personal autonomy and informational privacy, and I think with respect to, you know, I think Your Honor talked about what do we actually need for a TRO and this is where you can't unring the bell on being forcibly outed as trans; right?

Once Daniel and Matthew's colleagues know they're transgender, once the bank teller knows they're transgender, you can't reverse that; right?

And so every time that they use their driver's licenses, they're in this position. Every time they find themselves in an impossible set of decisions about using the restroom, they're in this potential position, and so I think that that is a unique way in which the harm flowing from the infringement is well suited to a TRO.

We have other individual rights claims that I think are relevant, specifically the procedural

due process claims that come under Section 18. I think, again, this is another place where there's a really close link between the benefits and the need for a TRO and the nature of the constitutional infringement.

So Section 18 is injuries suffered to your person, reputation, or property. It's remedied by due course of law and justice administered without delay.

And so there's a, I think, well-trod path of how courts analyze questions of procedural process. Wilkinson gives us the map and what the map says is the first thing you have to do is to say, what's the protected property right with liberty interest?

I think I'll talk for driver's licenses first, that one's pretty easy. We have that from the case of Creecy, and Bell V Burson that talk about, you know, you don't have a right to a driver's license, it's a privilege, but once you have it, you have to have pre-revocation process unless there's an exigent circumstance or emergency.

There's no process here; right?

The law went into effect. Overnight the license was invalidated. There wasn't even a trigger of, well, you know, once you get your letter

from KDOR, then your license is invalid. You have X number of days. This was treated completely differently than things like expirations where there's grace periods and warnings and everybody knows what's going to happen. This was entirely unlike that in a way that offends procedural protections.

And then on the restrooms front, the protected liberty interest is that Section 1, right, of personal autonomy and informational privacy so those are the two rights that have been put into jeopardy by SB 244.

And so then the question becomes, okay, I see you have this right, tell me what procedural due process you were supposed to get that you didn't get.

I think that one's also pretty easy because there was no process on driver's licenses. There was no notice and opportunity to be heard. There was also no time to comply, and there's, I think, a couple of different cases that explain why, when the due process offense is the inability to comply, the lack of time to comply, an appropriate remedy is a preliminary injunction even though as time goes on, people can start to try to comply.

The AG talked about that in his response brief. He said it's numbers, the people that come in. The fact that something is broken and is laying on the floor broken for a while doesn't make it less broken, I think it just reveals that it needs to be dealt with and cleaned up, and so that case that is helpful on that is Planned Parenthood of Wisconsin talks about that impossibility -- when there's no possible way of compliance, that's a compelling reason for an preliminary injunction especially when there's a mismatch between the speed of the law and recency of the alleged problem.

So there's no emergent problem here; right?

This was changing a long settled state of affairs, and so this idea that suddenly overnight there had to be a change, that mismatch, and then to proceed with due process. I think DeLano and Southwestern Bell and Davison and Campbell also similarly talk about you have to have time to conform your conduct to the law, otherwise it offends procedural due process.

Similarly with restrooms, there's also this issue of how is this being adjudicated and I think the State pointed to, well, there's all the usual processes that attend criminal investigations but

that's not really how this law is structured. It's structured in a way where there's this first layer of administrative process that is undefined, even though clearly the legislature knew how to define it because when -- if a municipality or some other government entity is accused of violating SB 244, they're not policing their restrooms in the way the legislature wants, they have to be given notice, they have to be given opportunity to cure; right?

There's a process for them to understand what it is they have done to offend the law, to cure it, to test that.

For individual people, we don't have any of that. The way the statute is written is that you have sort of post adjudicative notice that you've been found in violation and then you can appeal.

That first finding isn't a freebie. It's a predicate conduct to civil fines of a thousand dollars and then criminal penalties, and so it is both -- both the process that's in there is insufficient and also it offends due process to put people on this path to escalating civil and criminal penalties, where on the front end there's no guarantee to their independent decision-making, right of appeal, how are you supposed to prove this.

So in those ways this law offends due process.

And then the final part of the Wilkinson map, we have a right, we have what's the process that you should have gotten that you didn't get, and then it takes it to, okay, well, it's not cost free to give people more process, how does it come out in the wash; right?

Is this the kind of place where process is due to protect the right or not?

Here we're balancing individual rights to keep driver's licenses that were valid when issued, to keep using restrooms in public under the same issues they were without fear of civil or criminal penalty.

You balance that with the risk for erroneous deprivation. I think that's easy because there's no individualized review.

THE COURT: Balance what?

MR. SELDIN: Sorry, the risk of erroneous deprivation. If I gave you more process, would you be more likely to come to the right answer?

There's no process. I think that balancing factor comes out pretty clear, and then the question is, what's the State interest?

Here there's no State interest in abruptly changing the status quo that was working. We know that on driver's licenses from the Kansas V Harper decision. We know no one is safer because there's a lack of clarity about how to comply with the law; right?

That doesn't help anybody, so there can't be a State interest in denying due process and just forcing them to comply at their own peril.

So I think on the individual rights claims, we also have claims under the quality of the law and freedom of expression.

In the interest of time and because we don't need to win on all six for a TRO, we only need to show the likeliness of success on the merits of one. Unless Your Honor has specific questions about the equality under the law or freedom of expression, I'm inclined to move and talk about how heightened review works in this case.

THE COURT: I may have just misheard you, there's five things you have to show today and if you fail on one of them, injunctive relief is denied; is that not correct?

MR. SELDIN: Sorry, two different tests. The test for a TRO, we have to be likely to

succeed on the merits --

THE COURT: Right.

MR. SELDIN: -- of our claims. Not all of our claims. If you find that we have succeeded on the merits of just one of these six --

THE COURT: Yes, okay.

MR. SELDIN: -- that's the hook. That's different than the five. I don't have to run the table on all six for a TRO.

THE COURT: Correct, correct.

MR. SELDIN: I think we can at the end of the day but...

THE COURT: Okay.

MR. SELDIN: Seems like a heavy lift.

THE COURT: Substantial likely of prevailing on the merits, reasonable probability of irreparable injury, no adequate legal remedy, threat of injury to plaintiff outweighs the harm to the opposing party, and the injunction is not against public interest.

MR. SELDIN: Right, and so I think where I want to move is to what I would call the end of the beginning, the end of the individual rights, why the state today can't meet its burden which is on those five individual rights, all of those

require heightened review because they're infringement on fundamental rights, and that's where there has to be a compelling justification for the law, motivated by real harm or not post hoc or imagined issues, and the law has to be narrowly tailored.

And again, on this record you have today, the State just can't meet its burden. It's the State's burden to show that, and they can't. They have no evidence, and ours is unrebutted.

I also -- what you know from the evidence that you do have from plaintiffs and from our experts is that this law will have the opposite affect on privacy and safety. It undermines whatever interest the State might have in privacy and safety to force Daniel and Matthew to conduct themselves in this way.

And I would again direct the Court to the Kansas Court of Appeals decision in the Harper case which dealt with SB 180 which talks about what we know about driver's licenses, the absence of harm or problem here as it relates to criminal suspects or other potential interests that the State had raised in that litigation.

I also want to say that heightened scrutiny

is a high bar for the State to clear. That is triggered if we show that there's been an infringement of constitutional right but even if we hadn't, the law still cannot survive rational basis review at this stage of the game, and as you can see from the evidence that we've marshaled, that there still needs to be a legitimate State interest and some connection between the two and the State in its briefing, the AG rather, listed some potential ways that this could be legitimate, right, and one of them was the State argued that this doesn't ratify... the State said, well, this ratifies longstanding arrangements. I think that's not right. It actually changes the rules pretty abruptly from what the status quo was on restrooms and public buildings and the status quo on driver's licenses to this new regime so this idea that we're just keeping things as they were, that's not true. That cannot be a legitimate reason for this law.

State also says, well, identity -- you can't use a driver's license to identify someone accurately if it has their gender instead of their sex assigned at birth, and I think this is where there's a difference between birth certificates and driver's licenses.

Birth certificates I think are more concerned with the historical fact issue although quite frankly we amend birth certificates all the time for things that became true after the fact: Name changes, adoptions, other things like that, so without completely abandoning that, I would just say that's different from a driver's license and your driver's license isn't a record keeping exercise. It doesn't have your height and weight at birth. It doesn't have where you used to live. It's supposed to represent you now.

So to the extent that the information on the face of it is meant to say this ID belongs to this person, it undermines the State interest to require it to be sex assigned at birth when that is, in fact, not really helpful for identifying folks like Daniel and Matthew as being correct on the license.

This is also where State V Limon is instructive which is that it would be enough today to say that the State has not even shown the law can survive rational basis review because a desire to target or to harm a politically unpopular group is just not a legitimate government interest, and I think State V Limon, when we talk about animus, it doesn't have to mean hatred, it can just mean that

the reason that the law was passed was animated by this desire to single out this group, and so you don't have to decide anything about how the legislature feels about trans people.

Some individual legislators have said one thing or another, but you don't have to -- this is not a referendum on what is in their hearts, it is a referendum on is this law specifically singling out a group for treatment, or is the law written in such a way that the only group it's really going to affect is this one group, and that under State V Limon, even under a rational basis review, this Court can take a closer look.

And I think that the way that the AG is defending the law reveals that it is, in fact, specifically concerned with transgender people; right?

It talks about how... the way that the AG has framed our argument is that we are saying you have to privilege transgender ideology over biological reality.

Well, I think it does display maybe a little bit of animus to claim that someone isn't real or that someone's deeply held identity as you see in Matthew and Daniel's declarations is somehow false,

it is somehow unreal, or contrary to reality; right?

These are things that we say when we want to diminish and dehumanize, not things we say when maybe we just don't understand, and I think that we see from the declarations of our experts what the effect is on transgender people when that happens and how given the immense harm that befalls trans people in that kind of legal regime versus the net effect, nothing bad happens to anybody else.

It can offend equal protection or just the Kansas Constitution under rational basis review to let a law like this remain in effect.

THE COURT: With respect to your expert, I have not had a chance to review, are there Kansas specific aspects to that, or what's the...

MR. SELDIN: Yes, Your Honor, and I'm happy to talk a little bit about our two experts and what they show.

THE COURT: I'll be happy to look at them, because I haven't --

MR. SELDIN: There are. Dr. Angela Turpin is a Kansas endocrinologist. She is the founder of a clinic at Children's Mercy that treats adolescents and young adults who are gender dysphoria or transgender. She talks specifically

about her Kansas patients and what their experience is, what it means to be transgender, how that manifests medically, and then she also talks about how her Kansas patients obtain driver's licenses that reflect their gender.

You need to -- under the old regime, you need a medical letter to support this change and her clinic does that and she talks about what it means to her patients to be able to have this identity document so I think that the specific Kansas examples that you have of transgender people and what is happening to them under this law come from Daniel, they come from Matthew, they come from Angela Turpin and then Dr. Ayden Scheim provides the statistical analysis to understand that this is not an anomaly. This is not something unique to Kansas. This is happening everywhere.

THE COURT: When I put the interest on the scale, what you just indicated, I think, plays a little bit into the positive right aspect of the argument that the attorney general made that they're entitled to or they need to have this document that the government issues and has a government purpose for, reflect their personal identities and that's -- if I go back to what is the purpose of the document

and what's the State's interest in issuing the document, weighing what any government document says about me, you know, I guess maybe... I don't want to disparage lawyers but maybe lawyers have more of an ability to make those legal distinctions and say, I don't care what the document says, that's government business, I know who I am and what I do.

So what's the legal basis that I take that aspect of the argument and either give it weight or discount it?

MR. SELDIN: So I think --

THE COURT: Because that goes back to the government has its purposes for what it's issuing these documents for and people may react -- I may be very offended by the blue background on my driver's license because I think blue represents something that I -- cause that I'm deeply offended by.

Does that... I mean, so what, from a legal perspective; right?

MR. SELDIN: And so I think a couple of responses, Your Honor. The net effect of the government's choice here with respect to the license is to require transgender people to reveal their transgender status which is --

THE COURT: And that to me, I can see that next step, but just a personal reaction to the government document.

MR. SELDIN: And I would say this. It is not enough to just say, well, the government has a purpose. The question has to be, is the purpose related to what's actually happening, and you're right, there has to be some line between under heightened scrutiny, it's got to be a real thick line, but even under rational basis review, you've got to have at least a little dotted line there, and there isn't that dotted line between a government's interest in a document that reflects your sex assigned at birth and why they say they need that.

THE COURT: And I accept that, it's just -- I don't know that you're persuading me that putting any weight on the scale in terms of the person's sense of self because the government document marks them a certain way. It has to have an impact beyond them.

MR. SELDIN: And it does.

THE COURT: And no arguments, I'm not trying to say I'm dismissing you, but I thought you were trying to argue to me that I should also consider those aspects of any impact and I don't see

constitutionally or legally where that...

MR. SELDIN: I think it comes in in two ways, and the effect of this law and requiring people to have the sex assigned at birth on the driver's license is relevant in two specific ways. It is relevant to the constitutional analysis because under heightened scrutiny, you have to deal with actual facts on the ground. Was there a compelling interest and is it narrowly tailored, and so the government says I have a government interest in maintaining historical records about who's assigned what sex assigned at birth. Then the question is okay, how does the... after the M on the front of the license further that; right?

KDOR has records of that change, we know that they do. The registrar in Kansas has records of this change. You can always ask people, did you ever change it, that happens, and so if the government is saying we really need, as the government, to say the sex assigned at birth on your driver's license, the next question is why, and how much you have to be persuaded by the why, that's the difference between rational basis review and heightened scrutiny.

Under heightened scrutiny you have to be

really convinced. It's got to be compelling reasons, it's got to be narrowly tailored, it's got to be real facts.

Under rational basis review it's more like, sure, okay. I don't think this passes the "sure, okay," test either because of what we know about how driver's licenses are used, and so that's how it's relevant to the constitutional analysis that if you're deep in the weeds with us on heightened scrutiny and the State can't meet its burden because... they can't just say, well, we want to do this and we have reasons. Has to be reasons that make sense, but even on a lower threshold, it still doesn't make any sense, and so that's why the constitutional analysis is relevant.

THE COURT: It's relevant. I didn't hear in that any mention of the impact on the person's sense of self other than the way it may play out by then having to declare themselves publicly or to operate a certain manner as a result of the impact of the law.

MR. SELDIN: And this is where the impact of the State requiring people to do that, that's where it matters because if the State says the reason that we want you to have sex assigned at

birth on the face of your license is because we don't want trans people to be able to say that they are men or women if that's not how they were born. Then that is relevant if they passed the law specifically to do that. I think it's relevant because that targeting offends equal protection, it offends even rational basis review under State V Limon.

And so I think that's why, again, that takes us to the question of why are we here, what about SB 180?

All of that is relevant because if the State had said, actually, we had some weird computer thing and so we have to do it this way because of some computer thing, we'd talk about the computer thing and see if that was real.

The only people this is affecting and the only reason this seems makes sense or matter to the State is if the State says we have an interest in making sure that trans people are identifiable in this way or at least they cannot conceal their transgender identity by virtue of being able to change it, and there's no State interest in that that can't be accomplished through other means other than the face of the license to the extent that even

if it's a State's interest in knowing if they're transgender.

And so my hope is to have the last word --

THE COURT: Yes.

MR. SELDIN: -- and so I think I might save the rest after that, but we would respectfully ask this Court to grant the TRO.

THE COURT: Thank you.

Let's take a five minute recess anyway. Let everybody freshen and let the court reporter have a break.

I'm going to leave the stream on, I'm going to mute the microphones.

(WHEREUPON, a recess was taken, after which the following proceedings were had with all parties present.

THE COURT: We're back on the record in 26CV112. Appearances are the same as before the recess.

I did not inquire of the State side other than Mr. Kobach or counsel planning on making argument today?

MR. KOBACH: Not unless you wish.

MR. SMITH: We'll probably have some brief statement.

MR. BREWER: We'll be brief, no more than two or three minutes.

THE COURT: Great, thank you.

Mr. Kobach.

MR. KOBACH: Your Honor, what I'd like to do, if it's okay with you, is just walk through the constitutional claims one at a time fairly quickly, then go to the balancing of the equities and the irreparable harm assertion by plaintiffs, but I want to start with two observations at the outset about the very heavy burden the plaintiffs face and I'm not talking about just the very heavy burden of a TRO generally, but there's two additional heavy burdens they face.

The first is, and they have left this untouched in their presentation to the Court today, this is a facial constitutional challenge. They had a choice when they brought this case. They could have brought it as an applied challenge to Doe and Moe and could have said, as it applies to them, here's what we find is problematic.

But they're saying the Kansas Constitution renders this statute invalid in all of its applications. That, according to the Kansas Supreme Court, I'm just quoting the long sentence here, a

facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the act would be valid, end quote, State V Jones. It's on the first page of our brief.

THE COURT: And that goes to ultimate success on the merits here.

MR. KOBACH: Yes, right, to show success on the merits in each of their claims, they have to show there's no conceivable set of circumstances in which it would, not has already proven to be, but would possibly operate constitutionally.

It's an incredibly high hurdle they've given themselves by bringing this as a facial challenge, and in this case, there are enumerable examples, both hypothetical and empirical where the statute does and can conceivably operate constitutionally, even if you grant that their novel constitutional theories are valid, so even then, they just can't meet the burden that they have set for themselves.

Second point at the beginning, and we mentioned this in our brief, the plaintiffs are asking this Court to recognize, indeed to invent

positive rights. The Kansas Constitution only contains negative rights in the Bill of Rights, and Kansas Supreme Court has said that it only recognizes one positive right which is a right where you assert that the government must do something for you, a negative right is what we see traditionally in the U.S. Constitution, the government cannot do something to you, but a positive right allows the individual to compel the government to act, and --

THE COURT: I think that goes into the question I had for counsel of, you know, whatever a person may feel about their need to be perceived by the world in a certain way, what right do I have to compel the government to identify me in that way, regardless of what the basis for that identity is. Whether it's the blue background on my driver's license, gender marker, all sorts of things that the government may impose on me that I don't like and don't want to be perceived in that way, and I say, well, but the government doesn't do this thing and the government should do this thing so that I can have that represented.

That's the part of the argument that I don't know that they're putting much weight on but I think that's the point that you're making.

MR. KOBACH: I think the essence of your question makes the point very well, and that is you don't have the right to force the government to speak in certain ways when it speaks in the form of driver's license or when it speaks in the form of birth certificate --

THE COURT: Or when the government says this is the purpose for which the document exists and I say, well, I want it to represent this --

MR. KOBACH: Right.

THE COURT: -- and make it that and then build my constitutional arguments off what I want it to be.

MR. KOBACH: Right. That's why our rights in our Bill of Rights both state and federal are negative rights. The government can't do things to me but I cannot force -- our constitution, other than the one positive right of making provision for finance of public schools, we can't force the government to do things we want the government to do, and that's what they're asking for here. They want the government to allow them to use the driver's license as a kind of canvas on which they can paint various aspects of their personality and say certain things.

That's not what the driver's license is. It is a government document issued by the government, owned by the government, controlled by the government, and they are seeking a positive right to compel government action.

THE COURT: So what government purpose is served by the issuance of this driver's license and what purpose is thwarted by gender marker versus biological sex.

MR. KOBACH: So there are several purposes. We talk about this toward the end of our brief, but I'll go through them quickly.

One purpose that is served is, of course, the accuracy of documentation, and the plaintiffs in this case keep talking about the Harper case, this is something beyond Harper. Driver's licenses need to be as accurate and as objective and as unchanging as possible.

There are only three elements of our driver's license that can be accurate, objective, and unchanging: Those are your date of birth, your sex, and your eye color. Everything else can change with time. You can grow, you can get heavier, your picture can change, but those are the only three things that will always be true about you, and to

the extent that plaintiffs are saying, no, we're going to take one of those away and we're going to make it a subjective one and it's a changeable one, then the driver's license has less inherently accurate objective information on it.

The second reason that the government does not want to have people able to change their sex marker back and forth, there's no limit, remember, if you allow it, you can allow the person to come back and then go back again to whatever sex variation they seek.

There's a law enforcement interest here, too, and this information was presented in the Harper case. The court of appeals erred by not accounting for the testimony of the sheriff of Shawnee County who explained that there were instances where, indeed, a specific case he described in great detail where an individual tried to evade arrest by changing gender, and that -- or changing sex. That is something that's very difficult because when you're pulled over for speeding and the officer types in your name and well, he's looking at your registration and everything else, if there's a warrant out for a person of a certain name and a certain date of birth

who is a male but the individual is presenting a driver's license that says, no, I'm a female, the officer cannot make the arrest, period, if the driver's license disagrees with the sex on the warrant. And so that's a second interest that the State has in consistency of driver's licenses.

Then we have other interests which I'll get to maybe at the end if you want me to talk about the bathrooms or I can talk about them right now. I'll reiterate briefly at the end.

With respect to the bathrooms, probably the most important one is the interest of individuals in not being... not suffering anxiety, and in the case certainly perhaps more often where a female encounters a biological male coming into the bathroom, sometimes fear of people of the opposite sex being in the same bathroom that is supposed to be single sex. Same with locker rooms and other intimate spaces.

In the Federal District Court for the State of Kansas in the case of Kansas versus U.S. Department of Education which we cite, specifically found that that is a very real, factual fear that is present in bathrooms, locker rooms, all across the country but specifically in Kansas when you have

biological males coming into.

Now that case just happened to be biological males coming into female spaces because it was Title 9 but the opposite can conceivably hold true as well so there's a State interest there with respect to restrooms, but let me --

THE COURT: To what degree does that need to be established to pass even a rational basis analysis?

You know, I don't mean to sound overly idealistic but we're all human and to the extent that I encounter another human being in any setting depends on -- and my reaction to that depends on so many different circumstances, and so for the government to say, well, biological females encountering biological males in this particular setting, we've identified that as a sufficient harm to act to pass this law, what level of substantiation does the constitution require for that?

MR. KOBACH: If it's rational basis review, virtually none, and indeed none. As the cases we present in FCC versus Beach Communications, U.S. Supreme Court case 508 U.S. 315, a law will be upheld if there's any conceivable rational reason.

I think opposing counsel is conflating factual showings which will be necessary when the court makes factual findings down the road, with rational basis review.

Rational basis review does not require any factual showing. Indeed the U.S. Supreme Court and the Kansas Supreme Court have repeatedly said we, the court, can come up with conceivable reasons, we don't even have to rely on the litigants in the courtroom to provide us with reasons. Anything we can conceive of or they can conceive of that is rational is enough.

THE COURT: And I think you cited a case, if not, I know I've seen it before where the government need not wait until harm occurs before it creates a law --

MR. KOBACH: Correct.

THE COURT: -- that's designed to prevent an anticipated harm.

MR. KOBACH: Yes, that's exactly right, Your Honor.

THE COURT: But then we have that effect of law and its impact on people and that's where the analysis comes in and so -- but I think at the front end on the constitutional facial

challenge, I understand where your argument stands on that.

MR. KOBACH: And so let me now start -- well, I just want to say one more thing on the positive versus negative rights, the plaintiffs' attorney does say one thing on this and his exact words, we're not asking the government to do anything, end quote.

That's incorrect. They are asking the government to allow certain changes to be made to driver's licenses and to make those changes at their request and to make changes to birth certificates at their request, and they're asking governments to change the rules governing bathrooms in government buildings contrary to what the government has decided the State legislature wants to do.

These are indeed positive rights, not all of them, but several of the rights they assert or positive rights and that is an extraordinary thing, and perhaps this Court will find there is a positive right in the Kansas Constitution but it certainly should not do so on a TRO hearing at this very preliminary stage and I would say should not do so at all because that's a really big step, and I'll get to it when we talk about the right to personal

autonomy from Hodes.

That was a negative right found by the Kansas Supreme Court. They're asking you to transform that negative right into a positive right in a completely different area but --

THE COURT: Explain that a little bit to me, negative...

MR. KOBACH: Let's just jump to that one then.

In that case, Hodes, of course, was a case where the Kansas Supreme Court found that there was a fundamental right to abortion and it found -- it rooted that right, they called it a natural right, but it found the natural right was rooted in the words liberty and the pursuit of happiness in Section 1 of the Kansas Bill of Rights. It was a negative right to tell the government you cannot stop me from getting an abortion.

Now, what they're asking -- what plaintiffs are asking you to do is to take that negative right, that very limited negative right, turn it into a positive right and apply it way over here on something that has nothing to do with abortion and the problem with this, and we haven't heard any response from opposing counsel on this, is that in

Hodes 2 or Hodes 3 as they call it, the latest Hodes case, the Kansas Supreme Court expressly said, whoa, this is not something applicable to other areas of personal autonomy, this is limited to abortion.

The Court did that because in dissent Justice Stegall suggested that maybe it could be applied to all kinds of things. Laws against public nudity was one example he gave, physician assisted suicide was another example he gave, and the majority came back and said that's wrong. We are limiting the right -- we have not extended the right anywhere that we recognize in Hodes 1 beyond the right to an abortion.

And if I can quote the court, this is found on page 1013 of Hodes 2, it's 318 Kan at 1013, and also at 1012, the Court said specifically Hodes 1 concerned only the intimate -- quote, intimate, personal, and profound act of deciding to have an abortion, end quote, and the Court expressly said in addition to that that they find that they are not going beyond -- here we go, on page 1013 again, they examined the unalienable natural right to personal autonomy in the specific context of abortion which necessarily limited the scope of its holding, end quote, referring to the holding of Hodes 1.

So the Kansas Supreme Court said this is just about abortion. Plaintiffs are asking you to say -- to do two things: Take it out of the context of abortion and extend it to driver's licenses and bathrooms, and they're saying transform this negative right into a positive right which is a very unusual thing.

THE COURT: And even if I leave it as a negative right, I go back to, again, this is all front end thinking here, but it's that the government has decided to issue these documents for the purposes the government has determined are necessary and defined the terms, and if I look at the negative, traditional negative prohibitions of the government, it would be necessary for me to determine that a person has some sort of constitutional right to have their identity as they need to fully and completely express it in their day-to-day life be the definition that the government adopts for purposes of that document, and it's an invasion of their right if the government does differently, and that would be the only way I could get to a negative and I can't find... I struggle to find the right that's being infringed there but... and I'm sure you'll get to this, go

beyond that to the impact on peoples' day-to-day lives and where do I go with the analysis from there, but as you see fit, I'm just thinking out loud with you.

MR. KOBACH: I think you're going exactly the right direction. Opposing counsel didn't express this or didn't explain it in detail but he suggested that no, this is a -- this is a negative right. We're not forcing the government to do anything.

No, they're forcing the government to change the sex markers and to change government policy on birth certificates and to change government policy regarding bathrooms.

It is hard to twist it into a negative right because you're still... traditional negative rights are you just go about your business as a person, you're not asking the government to do anything in particular.

THE COURT: You can't infringe my speech, you can't infringe my religion, my ability to associate, my right to be secure in my person --

MR. KOBACH: Exactly.

THE COURT: -- those sorts of things and then tells the government, stop, you can't

invade into that area.

If I view that in this light, I have to find some right for a person, and I absolutely believe a person has a right to express themselves and identify themselves as they need to do. The question is where can the government act and not act in all of our lives, whether it's smoking marijuana, owning firearms, getting abortions, all those hot topic buttons, and here it seems to be I'm being asked in some way to consider that identity in a document is a right that I should find and, therefore, limit, and I don't know -- I'll leave counsel for the last word for plaintiff but I struggle along that first step.

MR. KOBACH: Here's another way to think about it, and I see where you're going, you have a right that you hold as a private individual in this world to walk around freely, to worship, to speak. These are all things that don't require the government to even exist, you just do these things, and some of these are rooted in concepts of natural law, some of these are rooted in ancient biblical concepts but these are things you just have a right to do as a person. The government can't do things to you to stop that.

This is different. Driver's licenses don't have to exist as I think you and opposing counsel noted. You noted. Birth certificates don't have to exist. Government buildings like this one don't have to exist and so the government, this is not a situation where the government's not involved, just let me be myself. Plaintiffs are saying in those things that the government has created, we are demanding certain aspects and we want changes. That's why it's a positive assertion.

It's such a bold right they're declaring. I'm not saying positive rights are impossible but they're very rare in constitutions.

THE COURT: I just want to be clear, it's the right of a person to exist, it's that Lockean argument, it's the constitutional argument. We enter into a contract with the government and we agree to give up very limited aspects of our freedoms in exchange for greater good, and here I'm trying to fit that in that box as my first step out of the box, I guess.

MR. KOBACH: Again, I think the government has legitimate reasons -- that's why we go to rational review basis here. There is no constitutional right in our Kansas Constitution and

that's ultimately what they've got to prove and there is no positive right of the nature they have asserted.

They tried to root it in Hodes. The Hodes court has said, no, don't go beyond abortion here. I just don't think they can get there.

Let me jump, if I may, to the due process claim they're making. So before you can make a due process claim you have to show that liberty or your property is being taken or infringed and that you aren't being given due process in the course of that. So do they have a protected interest?

Well, plaintiffs say, yes, we have a protected interest in driver's licenses but all the cases they cite are driver's license suspensions where the license is taken as is your ability to drive, and plaintiffs, I believe, are intentionally conflating driver's license suspension with driver's license replacement.

We have to replace our driver's licenses when the given number of years, six years typically, expires. Your license is replaced and none of us have a due process right to demand that, no, I want to keep my old license. I really like my photo on that old license and I don't want a new one. You

have no due process property interest in not having your license replaced, but you do have a due process interest in not -- in how your license is not suspended, meaning taken away permanently and you get no replacement license, and all of their cases are about suspension and so again, they're completely in opposites here.

Now, they also say that they have an -- to quote them in their brief, they have an established due process interest in accessing government spaces but that's not what they're asserting. They're saying they have a due process right to use the preferred restroom and they cannot cite any case law on point. The only case they cite recognizing anything like that is McMillen versus U.S. School District Number 380, and McMillen is not relevant but to the extent that it might be, it goes against them.

The court recognized -- first of all, the right there was the right to continue employment by the government, not a right to go into a government building and any restroom you see fit, but then the court also said in McMillen that that right, that property interest, only exists if state law creates it.

Here State law has gone in the opposite direction and said you don't have that right, so McMillen works against them because the State has chosen to say you don't have a right to go into that particular bathroom.

THE COURT: Well, that goes to the question I asked earlier, what prevented a man from going into an unoccupied women's restroom because the men's room's full.

Was any crime being committed?

MR. KOBACH: Fascinating question, and we pondered over that as you were asking it. No, there wasn't a criminal law against it. I think it's social norms. People... vast majority of this country's history has said, no, you go into the restroom of your biological sex, and so sometimes there doesn't need to be a law because the way people behave conforms to whatever the social norm is, the more of the times.

THE COURT: So when the State acts to create a law, it needs some basis, that level basis determined from the people affected and the interest of the State. If there was nothing that prevented me by itself from entering into a... as a biological male into a restroom marked women, and now that's

changed, are we starting from ground zero?

Was there any interests that were affected by that social norm becoming a law?

MR. KOBACH: So I think... let's pick another one. We should all chew our food thoroughly before swallowing; right?

That's a social norm. We have self-interest in doing -- that's just way people behave, but suddenly people started, you know, go down the internet, you know, swallow things before chewing them. It's conceivable the State might say, well, there's a health, safety, and welfare interest of the State exercising our traditional police powers as they're called to compel people to chew their food thoroughly, and I'm being somewhat facetious here, but the point is the government can act when social norm breaks down and the government perceives that that break down is causing harm to someone.

In this particular case they would say harm to law enforcement with the driver's license. It's harm to the State interest with uniformity of documentation. Harm to the individuals who suffer anxiety when someone of the opposite biological sex comes into the bathroom.

So the legislature has this massive police

power and it can only be set aside if there's a specific constitutional right, traditionally a negative constitutional right, that is being violated here, and so the legislature made that decision by super majority to say we're going to reinforce what was previously a social norm that needed no legal reenforcement with a law.

THE COURT: So that invites me to ask you to comment on the evidence that they've put forward about the harm that didn't exist and the greater harm that exists by virtue of the law being passed.

Is that an analysis this Court should be engaged in?

MR. KOBACH: Well, I think you would engage in it on the balancing of the equities portion of the test for a TRO, and they have been implying that somehow these are -- the word frequently used by opposing counsel, is unrebutted, that they've presented all this harm.

This is a TRO hearing. TRO hearings most of the time are ex parte. TRO hearings are not the place where factual findings are made, as you know Your Honor. Perhaps at the temporary injunction hearing, that certainly could be and would be where

we would present expert testimony and fact witnesses as well, but the notion that a TRO hearing, the other side, which may not even be present, has a duty to present a slew of affidavits is simply incorrect. That's not how you are system works, but to the extent that you --

THE COURT: Critique what they did before for me.

I mean, is it as strong as...

MR. KOBACH: No, I don't think so. They've offered affidavit evidence of the individual plaintiffs and the harms and anxiety and stress that they feel. They've offered some expert testimony not specific to Kansas, not specific to anything that's actually happened in the wake of this law's passage and said generally these are some stresses that the individuals who are transitioning or have transitioned would feel under these circumstances, but we would say, like, take the balancing of the equities on the bathroom question, the restrooms question, and we mentioned this in our brief.

Yes, they've shown that the two individuals have asserted that they suffered this anxiety in that point, but we would say, one, it's not irreparable harm, and they concede in both cases,

that there is actually a single use bathroom in the building but it's just inconvenient because it's on a different floor, it's farther away than the bathroom the individual would prefer to use, and as we've noted, the Kansas Supreme Court, has said mere inconvenience does not create an injury much less irreparable injury.

But on the other side of the ledger you've got to weigh the injuries of 99 plus of the population that is using and wants to use the bathroom that corresponds to its biological sex, and as the Federal District Court in the District in Kansas in Kansas versus U.S. Department of Education said and recognized factually holding that this is a -- this does cause significant amount of anxiety to biological females who are forced to share these private spaces with biological males.

And to the extent that the Court needs a holding or some sort of -- something more firm in a TRO hearing, that's certainly it. That holding in the federal district court and, of course, we presented numerous articles talking about specific instances of individuals, typically females, suffering some sort of either injury or stressful situation caused by biological males in the

bathrooms.

Let me continue with the due process, if I may.

So let's -- so my first point was that they haven't established that they have a property interest in either the driver's license context or the restrooms context. They also say they don't have notice and reasonable opportunity to comply.

With respect to the driver's license requirement, they assert that it is impossible to comply. They cite cases concerning impossibility of compliance, but it is perfectly possible to comply and as we noted in our brief, it was 134... yeah, 134 of the 275 individuals as of two days ago, 275 individuals have received letters to surrender their licenses, 134 have already done so. As of this morning, it was 138. The majority have already complied. You can't take seriously the impossibility of complying when so many already have.

We also point out in the case of the two plaintiffs here who reside in Lawrence, there are Bus Route Number 6 will go right by the DMV. They don't need to drive to exchange their license. They can take an Uber, they can have a friend drive them.

It is absolutely possible to comply and the vast majority of the 275 individuals affected have complied.

THE COURT: Complied or submit and suffer the harm that they perceive.

MR. KOBACH: Oh, sure, but I think -- if I understand plaintiffs' argument, I think they were saying it was impossible for them to exchange their driver's license. I think that was their impossibility claim.

But to be sure --

THE COURT: They couldn't drive to the -- without being in violation but, yes.

MR. KOBACH: Right. To be sure, they will argue that even if their due process claim fails, they will say these other constitutional harms still exist and I want to get through those.

With regard to the bathroom requirement, plaintiffs also in their brief talk at length about the possibility that people would lie in wait for them to turn them in and that government officials in charge of these buildings would throw aside any due process concern. They ignore the presumption of regularity, and the Supreme Court and the U.S. -- both of Kansas and the United States have stated

this is an important presumption in American law and that is presume government officials are acting constitutionally and in accordance with the law until there has been proof otherwise, and that was Hendrickson versus Sheetz in our brief at page 296.

Now, they have no authority. They also claim -- then when you get to the point of where the adjudication of violation occurs, they complain that SB 244 doesn't set out step-by-step procedures at every stage of a potential violation what notice is due and what procedures must occur.

There is no obligation of the legislature for each statute in the code to say with this statute, here are the procedures, with this statute. If that were the case, probably over 90 percent of the laws in the Kansas Statute Book would be unconstitutional because they default to the normal standards of if it's an administrative body, there would be an administrative hearing or some administrative review.

In Kansas, if it's a Kansas government building, it would go to the office of administrative hearings. All of those decisions by administrative law judges are then reviewable by courts like this one, state district courts, and

then they go to the state courts of appeals.

If it were a local government or county government building, they are supposed to adhere to standards of due process and those two would be -- any decision made could be reviewable in a court like this one and on to the Kansas Court of Appeals.

So the notion that because this doesn't lay out express delineation of how your due process and how this will be adjudicated and what your due process protections are, that somehow makes it unconstitutional is absolutely incorrect.

Another point that plaintiffs dwell on both in their briefs and in their oral presentation is that there's this first violation and an individual doesn't have -- they argue procedures that are necessary at the time of the first violation but there's no penalty after the first violation. The first penalty only comes in after the second violation and at that point, as plaintiffs correctly describe it, it is a predicate act to find the penalty -- to impose the penalty on the second violation.

They would absolutely get -- at that time have the ability to contest whether they violated the law the first time which is necessary to find

any penalty for the second and subsequent violations.

Again, probably on this constitutional claim more than any other, the facial challenge defeats plaintiffs. They have to show that there's no conceivable, imaginable circumstance where this statute would operate constitutionally. They would have to show that in every conceivable hypothetical that due process would be denied. They can't do it with this particular constitutional claim. There's just no way to get there.

We've talked about personal autonomy, we've talked about due process. Let's jump to informational privacy.

Plaintiffs allege they have a right to informational privacy but, of course, such a right has never been recognized in the Kansas Constitution. The Kansas Constitution does not contain the word privacy. Instead, plaintiffs only offer a "see" citation which when I read opposing briefs in any case, I love to read the "see" citations because those usually say something other than what's asserted.

And they say "see" Alpha Medical Clinic versus Anderson, 280 Kan 903, so I went and saw it, and the court said this: Referring to a privacy

right in the Kansas Constitution, we have not previously recognized and need not recognize in this case, despite petitioner's invitation to do so, that such rights exist -- also exist under the Kansas Constitution, end quote. Kansas Supreme Court has never recognized an informational privacy right.

Now --

THE COURT: In that context of that case, I think they were sort of acknowledging the fact that to some degree federal law does recognize that, it wasn't necessary in that case.

MR. KOBACH: Right, that's right, but the court affirmed that Kansas Supreme Court has never recognized one, and this case is being brought --

THE COURT: Under Kansas.

MR. KOBACH: Under the Kansas Constitution.

So they do argue that, well, let's just look at federal case law and let's interpret the Kansas Constitution to have a similar privacy right.

Well, that's not how it works. The Kansas Constitution just doesn't automatically create a mirror image of every federal statute.

The other --

THE COURT: Mr. Kobach, I'm sorry, I need to respond to one thing --

MR. KOBACH: Go ahead.

THE COURT: That's sort of emergent in nature.

I apologize.

Go ahead.

MR. KOBACH: So the privacy rights in those federal cases where statutory rights against disclosure to the public or disclosure to large number of people, and we have these in Kansas law as well, your Social Security number can't be disclosed by the state to anyone who wants it for marketing purposes or other purposes.

That's nothing like the privacy right that they are asserting here. This is -- your driver's license information is not disclosed. Yes, you may show it to people if you choose to use a driver's license when you rent a car or check into a hotel but it is not broadly disclosed like those federal statutes and like our state statutes are concerned.

So they're basically -- they also suggest here that this might be a substantive due process right. Well, substantive due process is one of those unwritten rights that courts are hesitant to

find and then we go back to -- and they haven't even done any necessary analysis in their brief. You'd have to show a deeply rooted history in tradition of these asserted rights.

Of course, the right to transition your driver's license gender is a fairly newly minted claim, similarly with respect to using bathrooms of the opposite sex. They haven't even begun to do the analysis to show that it's a fundamental right that now the courts of Kansas should recognize.

If you read the Hodes 1 opinion, I'm sure you have, the court goes through this long dissertation on the history of Kansas to find that there are deep historical roots, and using those deep historical roots, the court then says, okay, we find in the word liberty this one. They would have to do the same and show a history and tradition if they're going to create a substantive due process right to privacy in the form they describe it.

I'm going to jump on to the next one, I think we've covered that one.

Equal protection. So first of all, let me point out one mistake that I believe plaintiffs made. Plaintiffs said with respect to equal protection that the federal constitution only

creates the floor and that the Kansas Constitution can build upon that.

Incorrect.

That's substantive rights. With substantive rights, the federal constitution creates the floor and federal statutes can create a floor, too. We have substantive right not to have this done by the state but the -- when you go to equal protection, it's different.

With equal protection there's no floor and then you build rights upon it. With equal protection, our Kansas Supreme Court has said the equal protection contours are the same in the Kansas Constitution as they are in the federal constitution and we track federal constitutional jurisprudence.

The floor analogy is opposite in equal protection analysis, and the Kansas Supreme Court stated very clearly many times, most recently in Rivera V Schwab, 315 Kan at 894, that the State's equal protection guarantees are coextensive with equal protection guarantees of the United States Constitution.

Plaintiffs actually claim that this federal decision in Trump Versus Orr has no bearing on the state constitution. That's not true at all.

In equal protection, our State Supreme Court has said we follow... what we in Kansas follow what the Supreme Court says the equal protection clause states.

Your Honor, you mentioned the quote from Orr and I think -- it really says it all. I don't see why -- obviously, it's a short quote but there's really nothing more to say. Displaying passport holders' sex at birth no more offends equal protection principles than displaying their country of birth. In both cases, the government is merely attesting to a historical fact without subjecting anyone to differential treatment, end quote.

Let's suppose I'm from a country that's disfavored in the United States or wherever I'm traveling. I might not like that, that my country of origin is A when the people of this country I'm going to really like country B and they don't like country A. It's just a fact, and it may affect me unequally when entering that port of entry but it's just factual information.

Everybody has it equally, so I think that is a holding that does constrain this Court because of Rivera versus Schwab where the Supreme Court of Kansas says we follow what the Supreme Court of the

United States says, and then opposing counsel tried to make a distinction. He said, well, I have another distinction, that's foreign policy. There's no foreign policy in driver's licenses.

Well, it's true, you do use your passport to enter a foreign country, but you also use your passport as an identity document to vote. You can use your passport for boarding a plane for TSA purposes. You can use your passport for virtually any purpose you can use your driver's license for other than probably renting a car, so it is common. It is probably the second most common government identity document that we in the United States have, and it is used very similarly so I think it would be very hard to find a distinction between the driver's license analysis and the passport analysis of the United States Supreme Court.

Plaintiffs did not mention United States versus Skrmetti which is also very important here because in Skrmetti the Supreme Court said, look, the law applies the same way. It makes distinctions based, the use of the purpose of the surgery and the age of the person seeking the surgery, but those distinctions are not ones that in any way violate equal protection on the basis of sex.

They, absolutely how those distinctions may work out in a person's life as you go down the steps of what happens, might yield things that are more desirable for one person and less desirable for another, but the actual things that the government is saying in that law apply equally and be able to stand on the basis of reasonable treatment and the age of the person seeking the treatment.

THE COURT: Do you have the citation for Skrmetti?

MR. KOBACH: 605 U.S. 495.

THE COURT: Thank you.

MR. KOBACH: And you might look at pages 511 to 512.

Plaintiffs didn't get into this in their oral argument, I'll just quickly mention it here, and that's the Bostock approach.

The plaintiffs tried to incorporate the Bostock analysis which is a Title 7 claim adjudicated by the United States Supreme Court in 2020. In the Title 7 context, the Supreme Court did do this sort of logical step-by-step analysis. If you apply the statute to one person and it's a female, and one person and it's a male having to do with homosexual... it had to do with how it applied

differently depending on whether one was homosexual or heterosexual. The court said, yes, you would get a different result and that would be contrary to Title 7 but in Skrmetti the U.S. Supreme Court said, we have not yet considered whether Bostock's reasoning reaches beyond Title 7 context, and we need not do so here, that was at page 520, and then Bostock expressly said its analysis does not extend to, quote, bathrooms, locker rooms, or anything else of the kind, end quote, even within Title 7, and that was at 590 U.S. 681. So the Bostock reasoning doesn't work either.

Free speech rights. They didn't spend much time here, that's probably because they recognize it's a tough claim for them to make.

This is state speech. It's not -- when I show you my driver's license, I'm not speaking, the State is speaking on the driver's license, and the constitutional freedom of speech clauses does not apply when I would like the State to say something else. When the State is forcing me to say something like in the famous Barnett case, like saying the Pledge of Allegiance when I don't want to, yeah, that's compelled speech, but my reciting the Pledge of Allegiance is me speaking. The driver's license

and birth certificate, that's the State speaking, and we have a recent Supreme Court case in the United States in Walker versus Texas Division, Sons of Confederate Veterans which we cite, and the U.S. Supreme Court found that even the license tags, Texas issued license tags are government speech, and I say even because with license tags, there is a degree of... you can do vanity plates where you choose the letters and you can in most states now pick a variety of different types of tags but even there, the government said it's still the government speaking. You might have chosen those letters but it's us speaking, not you, on the license plate, and it speaks for its own purposes.

And as I might reiterate, in the case of driver's licenses, the government is speaking in ways that maximize accuracy, objectivity, and unchanging features, and having sex is one of those three features that is accurate, objective, and unchanging. Can't be moved back and forth, at least biologically speaking.

Okay, so those are all the Constitution issues and I'll get to single subject in a minute.

So they say well, we should treat this to heightened scrutiny, either intermediate or strict

scrutiny. There's no way they get there. They would have to show that they have a constitutional claim, they have to show discrimination on the basis of a suspect class and equal protection. The Supreme Court says you don't even get to that point because there's no discrimination with respect to passports, and the same, there isn't one here.

None of the rights they have asserted are recognized by the Kansas Supreme Court or are described in the Kansas Constitution. This is minimal scrutiny.

Now, they claim, well, maybe we could pass even minimal scrutiny -- oh, I should note one thing, transgender status is not a suspect class. The Supreme Court of the United States said that in Skrmetti at page 517.

Okay, let's look at rational basis review. As I mentioned earlier in response to your question, laws can be upheld if there's any conceivable rational basis supporting it. FCC versus Beach Communications, that's 508 U.S. at page 315.

Also mentioned here that this doesn't require a factual showing, it just requires an assertion of an interest at this point so I've mentioned many of the rational bases.

One that I wanted to that I should have mentioned earlier when I listed the various rational bases is Title 9. The State of Kansas has an interest, a rational basis for doing everything it can do to comply with Title 9 which is, of course, the federal anti-discrimination statute applicable to universities and public schools.

The District of Kansas in the same case I've been mentioning, Kansas versus U.S. Department of Education, said that allowing opposite sex access to private spaces like bathrooms and locker rooms, quote, would subvert Congress' goals of protecting biological women in education.

This is where the court also went on to hold that factually, quote, requiring schools to coordinate fears, concerns, and privacy interests of biological women to the desires of transgender biological men -- sorry, requires the schools to subordinate, the government in that case, was requiring the schools to subordinate the fears, concerns and privacy interests of biological women to the desires of transgender biological men to shower, dress, and share restroom facilities with their female peers, end quote, and the court, of course, is recognizing those fears and privacy

interests.

THE COURT: Sorry, give me the case name again.

MR. KOBACH: That's Kansas versus U.S. Department of Education, 739 F. Supp. 3d. Case begins at 902, and these quotes are from page 921 and 923.

THE COURT: Thank you.

MR. KOBACH: So the problem here is if this Court were to issue the TRO that they request allowing biological males to enter women's restrooms, then the State would then be in violation of Title 9 as interpreted by the U.S. District Court for the District of Kansas, and there's also a federal executive order that we cite in our briefs, a footnote.

So the State has an interest in complying with Title 9, and this, of course, applies to only government buildings that are educational in nature, but that is an interest that is certainly relevant there.

I mentioned --

THE COURT: Meaning one of the public interests to weigh on the five factor...

MR. KOBACH: Yeah, so that would be --

that's one of the interests that should be weighed --

THE COURT: Thank you.

MR. KOBACH: -- in the State interest, although I'm talking about here in context of rational basis but then you would use it again when you're weighing the government -- the public interest and the balancing of the equities.

I've mentioned already the government interest with driver's license, there's two of them: One is a law enforcement interest in executing warrants and searches and whatnot accurately, and then the other one is that the document needs as many objective, accurate, and unchanging facets as possible.

Let me jump now to the single subject rule and I'll be getting near the end here.

So the way the single subject rules apply, they say you should look at Thiessen and Sholl. I say absolutely look at Thiessen and Sholl. Those cases just state the rule, the single subject rule and how it's applied, but those cases don't in any way support plaintiffs' assertion that SB 244 violates the single subject rule.

All of these cases say you should do this.

First, you look at the subject as expressed in the title of the bill. The title of this bill states Identification of Biological Sex, so that's the subject, and it is a broad subject admittedly, but in Bowman versus Cockrill, and that's 6 Kansas at 334 and 35. The court said it must always be left entirely within the discretion of the legislature to say how comprehensive and general, or how narrow and limited that subject shall be. So the legislature has discretion to take a narrow subject or a very broad subject.

THE COURT: You said 6 Kansas?

MR. KOBACH: Yes, 6 Kansas 311 at 334 and 335.

THE COURT: Thank you.

MR. KOBACH: And the legislature can choose, a narrow subject or a broad subject. Here, I think they chose something relatively in between, the subject being identification of biological sex.

And then we would point the Court to KNEA versus State, 305 Kansas at 752 and 753. An act is valid if its provisions are, quote, all germane to the subject expressed in the title, end quote, and then the court went on to say, and quote, the subject can be as comprehensive as the legislature

chooses, so long as it constitutes a single subject and not several different ones.

We would argue that all of these fall under the subject of biological sex. They're all about how the government will classify individuals as far as sex and they all go to, we will classify according to biological sex.

THE COURT: As I told counsel, I'm not -- don't have a lot of depth with this legal analysis but it seems to me I can come up with a topic that covers about, you know, 80 percent of what anybody does at any point in time that the state could regulate.

I mean, surely there has to be something more than -- the comprehensiveness has to have other limitations.

MR. KOBACH: I think common sense suggests there would be. State couldn't say the topic of this bill is crime, and then have things covering the entire waterfront.

THE COURT: Funding of law enforcement, definitions of different things.

MR. KOBACH: But I think this one -- this is not that broad. This is how the state classifies individuals. Whether it's classifying

them on government documents or classifying them in government buildings. They're clearly closely related.

I point you to State V Reves as well. Quote, 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, end quote, and that's 233 Kansas 972 at page 978.

So that's... I'd add one more sentence there. Quote -- court went on to say -- even matters which apparently constitute distinction and separate subjects are not so where they are not incongruous and diverse to each other, end quote.

The case law on this is pretty favorable to defendants here. There's a lot of leeway that the legislature has given. These things would have to bear no relation to the topic listed in the bill to be a violation of the single subject rule.

Another word that opposing counsel used frequently was logrolling. Look at the way the legislature did this, they were involved in logrolling. Logrolling is when you take two completely separate things that would not pass on their merit and you put them in a single bill and

they are completely disparate, have no relation whatsoever to one another.

For the first part, there's no logrolling standard in single subject ruling in jurisprudence in Kansas. There's no standard whereby you look at how a legislature passed something and use that as a tool to assess whether it contains the same subject.

THE COURT: So the idea of logrolling is you're sort of forcing people, I don't want to lose this, I hate that --

MR. KOBACH: Exactly.

THE COURT: -- and you're forcing someone to vote for something they would never support because they have to get the things that they do support.

MR. KOBACH: That is exactly right, Your Honor, that's why logrolling is disfavored but at least -- that's not what happened --

THE COURT: Except in lots of other jurisdictions.

MR. KOBACH: Yeah, it is accepted in lots of jurisdictions and it certainly happens in Congress. We saw that with the so-called Big Beautiful Bill which had everything under the sun in it, but that is accepted in many jurisdictions.

In Kansas, there is no logrolling test in our single subject rule jurisprudence, so even if it had occurred here, which it didn't, then it wouldn't be relevant anyway.

In particular in this case, as plaintiffs correctly point out, this wasn't just one bill. SB 244 was the second chapter to SB 180 which did essentially the same thing on the driver's license and birth certificates.

SB 180 had extensive legislative hearings and deliberation, and then in the case of SB 244, the house judiciary had several hours of hearing on January 13th of this year, then the house deliberated and voted on January 28th. It was, I'm going to estimate, approximately three hours of debate on it. I'm estimating because I got so tired of listening to it I just had to get on with other things it was going on so long, but there were innumerable amendments and deliberations. This was not something where the legislature said here we go, SB 244, all in favor, say aye. It was a long and tortuous debate in my opinion.

Then the senate deliberated and voted on the matter on January 28th and spent less time but still spent a good hour deliberating, so this notion that

there wasn't adequate opportunity for opponents to voice their objection is simply not true.

But again, even if it had been just run through with no deliberation, that wouldn't mean that it violated the single subject rule.

THE COURT: Again, it's one of those things that I think is going to prevent me from certainly ruling today, but law enforcement's interest in identification and document accuracy on the one hand, and how we regulate public restroom use, and the only commonality is biological sex.

It raises a question in my mind.

MR. KOBACH: We see this --

THE COURT: Is there a greater relationship other than that single common denominator for those two issues?

MR. KOBACH: Well, I think they're actually quite related. Let's suppose that there was someone in a government building say, hey, I don't think you're going into the right restroom. If the individual shows a driver's license, then -- and this law is in effect, then that presumably is all that need be said, the individual is going in the right restroom, so there's a direct relationship there. One facilitates the other.

They both go to the question of who's a man and who's a woman which is a question our society debates. These new social norms that our society now is presented with and the government is now weighing in and saying, well, here's what we're saying, for the government's purposes, biological sex, and then they're saying here are all the government applications where biological sex is the defining factor.

You'll find many statutes, Your Honor, and we can certainly brief this further in the temporary injunction phase where a statute has a few related topics that are all part of the same general topic but different interests, different entities, different parties in society. Particularly this aspect of the statute, Section 1, others like Section 2, others like Section 3, but they're all part of the same general topic.

So the idea that different interests are served by the same topic, statute, does not mean that separate topics are addressed.

THE COURT: As I said, it's just one of those things I'll have to look at.

MR. KOBACH: And then finally, I want to look at the other factors.

So again, the harm must be irreparable, can't be speculative. We've noted that as far as the harms here, they are, you know, they're certainly asserted emotional or psychological, however you want to describe it, harms, discomfort, but you also have to weigh that against -- if you balance the equities, the harms of 99 plus percent of the population which feels the anxiety when the bathrooms do not have biological sex.

THE COURT: What's the substantiation for that?

MR. KOBACH: The percentages?

THE COURT: That 99 percent of people are anxious if a person that they aren't like or similar to or they find out of the ordinary, that that means that sort of anxiety that the government needs to --

MR. KOBACH: I'm not asserting that, I apologize, I'm asserting that 99 percent of the population is not seeking to use a bathroom that is -- just broadly looking at the numbers of individuals in Kansas who sought to have their driver's license changed and the total population. Even if you multiply that times 10, you still wouldn't get to 1 percent.

The point is that 99 percent are not seeking to use bathrooms that are distinct from their biological sex, and a chunk of those, a significant number of those, would feel discomfort and as the U.S. District Court recognized, do feel discomfort, and if we get to further proceedings in this case, we will present evidence that, in fact, they do feel discomfort. Do all 99 percent of them feel discomfort; certainly not.

But the point is you're balancing the equities and on one side you have a much larger section of the population.

So then we look at the other harms. This is important to note here, when the government is enjoined from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury, end quote, and that's from Maryland versus King, United States Supreme Court 567 U.S. at 1303.

We also have the Fifth Circuit opinion right after that, but there is harm just when you have a duly enacted statute not enforced.

Now, I would say there needs to be more than that, and there is more than that. You have the harm of law enforcement officers no longer being

able to have high confidence in executing arrests and warrants and searches, and in detaining -- maintaining safety with the detainees, keeping them in the appropriate area, women and men, and then we also have the interest in -- confined in Title 9.

So let me go to this -- finally go to this claim about the compliance that we've had. In eight days, statute's only been in effect for eight days, we've had 138 of 275 individuals who received the letter already comply with it.

To the extent that Your Honor believes that this is difficult or imposing some sort of burden that could be of constitutional magnitude on the individuals who haven't yet complied, the State is perfectly willing to delay the entry into the database that law enforcement officers use of the change of the status of the driver's license, and that change of status is the equivalent of, and fellow counsel can talk about this if you want to ask them, but is the equivalent of what might happen if your license expires, but it has to be done manually, one at a time, and we are more than willing to extend it to a month after the statute became effective which would be March 26th, to actually effectuate a change in the database that a

law enforcement officer would see in case there's some hypothetical individual who can't use a bus, can't use Uber, and has no friends to get him -- and doesn't have a bike to get him to the DMV and needs to drive on that expired license, we're more than happy to delay the switching over in the database for those purposes, but we don't think that impossibility of compliance is even close here since the majority have already complied.

So with that, I'd be willing to take any other questions you have at this point.

THE COURT: I'm restraining myself to see where we end up on time, but thank you.

MR. KOBACH: Thank you.

THE COURT: Mr. Smith.

MR. SMITH: Your Honor, Ted Smith.

Can you hear me okay?

THE COURT: Yes, sir.

MR. SMITH: Ted Smith, chief counsel with the Kansas Department of Revenue, here representing Secretary Burghart, Secretary Williams, Division of Vehicles, and Kansas Department of Revenue.

The Department of Revenue, we're a creature of statute. I'm here pretty much in an operational

context to help answer the Court's questions it may have about the processes for driver's license, record keeping, and driver's license status issues.

The Kansas Attorney General speaks for us with regard to constitutional issues and obviously I'll leave it to the ACLU and the attorney general to basically work out issues regarding constitutional arguments.

That being said, I'll just say from an operational perspective as General Kobach indicated, that we have basically issued notices to approximately 275 people. Approximately 138, I think, have come in as of Wednesday, that number's shrinking on a daily basis. For most part, those are the same people that received notices but there are some differences, and that's really the issue for us, is unlike issues regarding DUIs or suspended driver's licenses or revoked drivers that are unsafe, those are situations where we change the status immediately.

Unfortunately, in this case, as Senate Bill 244 was passed into law, literally we were given effectively one week from when the veto to override occurred, so we had a seven day window, so lot of these 275 people that received the notice are

literally getting it the day of, maybe a day or two before the law went into effect, and we were statutorily required to take action.

So when Attorney General Kobach indicates delaying the implementation of us changing the status to March 26th, that would be very welcome to give us some administrative room to administer this in a fair way because what's serious about this is that this class of Kansas constituents, again, they haven't done anything unsafe in driving privileges, yet the law basically went into effect immediately, put a charge on us, and unless this Court orders us, unless this Court does something, we're simply going to follow the statute.

Unfortunately, that creates a pretty big administrative danger for us in the sense that we may be changing statuses and the customer may not know it for a day or two, and during that period of time they're subject to being stopped by a law enforcement officer and seeing in their system that they don't have validity to drive.

Now, General Kobach did correctly express how we intend to communicate this to law enforcement, treating it as an expiration, so I can tell you historically, when a law enforcement

officer and you as a prosecutor probably remember those days, is that usually when an officer comes upon someone who has an expired driver's license, they usually don't arrest somebody. They usually issue a citation, they say get it fixed, but that's usually what happens; right?

It's still a misdemeanor, and so with that being said, Your Honor, I'll stand for any questions you may have as far as the Division of Vehicles, the Department of Revenue.

THE COURT: I haven't given much thought to the operational aspect.

The comment to delay entry into the database for law enforcement until March 26th, am I understanding that's the concession?

Is somebody asking the Court to approve that?

I don't know what the concerns are with that -- proceeding in that way?

MR. SMITH: I can't speak for the ACLU and I can't speak for whether the Court wants to do this TRO in whole or whether it wants to break it down into parts.

What I can say --

THE COURT: Here's what I will say. I think the world turns every day and relies on people

making pragmatic decisions and operating within the limits of what they can do and, you know, I presume that people, especially in Kansas government, tend to operate in good faith and do the best job that they can do, and if it takes manual entry passed the date that the statute says it's supposed to happen, that won't be the first time in Kansas history that's occurred and everybody acts reasonably and rationally. I like those outcomes more than the Court's directing minutiae, but to me, I don't have concerns about what I'm hearing in terms of... but if you're asking because you want some protection under which to operate in that fashion because you have some concern that there's going to be some consequence to you or your agency, I'm kind of -- I wasn't even in that space coming into the hearing today.

So if there's a particular request, I need to have it articulated better. Plaintiff has something to comment on it, they can do that, but... so there's my general thought on what you're telling me.

MR. SMITH: Thank you, Your Honor. I'm just explaining that we are operating in good faith to try to comply with the statute and I think I've

communicated to the Court the consequences that some of these constituents are faced with.

THE COURT: Sure.

MR. SMITH: So thank you.

MR. BREWER: Hello, Your Honor, Jordan Brewer.

Can you hear me okay?

THE COURT: Yes, sir.

MR. BREWER: On behalf of the Department of Administration and Secretary Proffitt.

I'm going to echo a lot of what Ted said. Our role as the Department of Administration is very similar to the Department of Revenue. Creature of statute and we have certain roles and responsibilities that we're required to perform on an executive level for the State of Kansas.

Because of that, our role is not to defend the legality of the statutes, that's the attorney general's role, so I'm not going to touch much on that, but because of our role in this particular lawsuit and the difference there, we might take a position that's slightly different.

Regarding the impact of the TRO on the Department of Administration that's been highlighted multiple times by everybody today, there's really

two components to that bill. There's the driver's license component and the bathroom, I'm going to call it the bathroom, although I think it's broader than that.

THE COURT: I've been trying to think of a better word than that myself.

MR. BREWER: That's what I'll use today when I address that. I won't speak to the driver's license portion of it because that is outside the responsibilities of the Department of Administration.

Particularly with the bathroom portion though, we are tasked under the law of taking a reasonable step to implement the laws in regards to multiple occupancy private spaces, bathrooms and other things, in public buildings.

THE COURT: How many public buildings are we concerning ourselves with here?

MR. BREWER: I guess that depends on the overall role of the Department of Administration. Frankly, I don't have a number for you. If you look at -- the definition of public building in the law is broad. It's not just state buildings. It's municipal buildings, school districts.

THE COURT: Does your secretary have concerns with county level and municipal level buildings or only for state operations?

MR. BREWER: We don't believe so, and we don't even believe that we necessarily apply to every single state operation. There's certain agencies that operate outside of Department of Administration --

THE COURT: Constitutional offices.

MR. BREWER: Sure. Particularly, the Board of Regents and some other entities that just have their own structure under statute where the Department of Administration does not have full authority over.

Now, our particular policy -- well, it's brought up in the plaintiffs' petition and the motion, it's not necessarily singled out as where they're seeking -- at least that's my interpretation of what they're seeking an restraining over against, it's against the overall implementation of 244 which our policy that we issued would fall under that realm but we did issue that policy, as Mr. Smith noted, we only had less than 10 days after the veto override to the effective date of the law to come up with something that would put us into compliance

with that law, and that policy was the decision we made at that time to distribute to certain state agencies as our effort to take that reasonable step.

We haven't really done anything else at this point and as the plaintiffs noted in their motion, our policies are essentially a regurgitation of the law and sets forth what the Department of Administration's role might be, and then further notes that guidance on the complaint and investigative process is forthcoming. We have not to this point established that.

We also haven't created any new signage or taken any efforts to retrofit any bathrooms to comply with the law. At this point, we're operating on the policy that we issued.

Because of that, and the unclear nature of where we're going at this point, we are not opposed to a TRO for the bathroom portion. In fact, we'd probably in some ways lean towards supporting it to allow us the opportunity to have additional time to evaluate.

The one thing that's a little bit different in the aspect of where the Department of Revenue is with the driver's license portion of it, as the government entity responsible for bathrooms, we

actually can be investigated if we're not taking those reasonable steps and could be subject to penalties if we're not enforcing that law, and given the quick turn around and the potential for us not to have that fully developed at this point, a little bit of extra time under this TRO and potentially whenever the injunction is addressed, would and could benefit the Department of Administration.

But again, I'm very limited on what I'm going to talk about here given our role but I'll answer any questions about our policy that the Court may have.

THE COURT: Well, I appreciate the role that you're in. I just want to clarify, when you say, will support the TRO, not for any constitutional reasons but just as an administrative aspect of having time to do what you think the law requires of you?

MR. BREWER: Sorry, Your Honor, there are potential harms against the Department of Administration if we aren't taking certain steps to enforce -- to take those reasonable steps.

THE COURT: All those harms flow from the existence of the law --

MR. BREWER: As it is --

THE COURT: -- as it is presently stated.

THE DEFENDANT: Presently, yes.

THE COURT: Outside of the constitutional grounds, what would be the basis for the Department of Administration to ask me to enter a TRO?

MR. BREWER: -- it wouldn't be constitutional. Again, it's -- we're not necessarily supporting it, we're not objecting to it. If it's something that the Court is --

THE COURT: I don't mean to sound like I'm criticizing you for what you're saying but I just want to clarify, you're not making an argument, statutory or constitutional, for the TRO to exist but if it existed, it gives you some breathing room, for lack of a better way of phrasing it.

MR. BREWER: Yes, it reimposes the status quo, and as you highlighted earlier, prior to this bathroom policy, there were no laws, no state policies on who could use a bathroom. This is all relatively new.

THE COURT: Well, sometimes the legislature throws burdens on us that...

MR. BREWER: It is, and the good thing

about the particular status of this case is we're not talking about a law that's been in effect for years where we don't know where we're going. The constitutionality of this law was clearly challenged on the day it went into effect, and so the guidance that we would get from that would obviously put us in a better position going forward.

THE COURT: Sure, I appreciate that. I have no other questions, thank you.

MR. BREWER: Thank you.

THE COURT: We can take five more minutes if anybody would like to request it. If not, I can certainly hear from counsel for plaintiffs.

MR. SELDIN: Your Honor, five minutes, if we can do that.

THE COURT: Let's do that. I'm going to mute microphones but leave the video on for the courtroom and we'll come back between five till and 4 o'clock.

(WHEREUPON, a recess was taken, after which the following proceedings were had with all parties present.)

THE COURT: Back on the record in 26CV112. The appearances are the same as before the

recess, and counsel for plaintiffs.

MR. SELDIN: Thank you, Your Honor, I'll try to be brief.

I think we're hearing for the first time today that there seems to be some interest in... call it stipulation or a concession, that a little bit more time to administer this law might be helpful. I think the parties agree to withhold from conduct that they may have a legal right to pursue all the time in pursuit of making things easier down the line. I don't really see why the parties couldn't do that here if that is on the table. We're hearing it for the first time today, but I certainly think at a minimum you're hearing about the inability to administer this law in the way the legislature directed suggests that the State interests in terms of the balance of equities for the TRO that the State interest might actually be served by an injunction against -- a temporary injunction against this law to allow some certainty and some development of how this is going to be implemented.

So I don't know if the defendants are prepared to sign something that says they're fine with this outcome but I certainly think what you get

from the factual representation suggests the balance of the equities here might be leaning more in favor of a TRO than maybe when we started a couple hours ago.

THE COURT: Well, let me interject a couple of things on that point. One, so that everyone clear, this Court does not compel people to reach agreements but I rely on reasonable agreements being reached all the time, so there's the line that the Court does not cross into, and then secondly, and I appreciated counsel's clarification and my comment was, I didn't mean to be too glib, the legislature not infrequently speak to any number of county commissioners or sheriffs' offices or other entities that are subject to sudden regulation and the timing doesn't seem to make sense.

We're here today talking about constitutional challenges, not the effectiveness or efficiency or thoughtfulness of the legislature and how they enact any given legislation, so to me, while I appreciate the pragmatic aspect of what you're staying, I don't weigh that on the scale very much, although it's the reason I wanted this hearing sooner rather than later because lots of money, time, energy, effort is going to have to be spent to

comply, and if the law's not going to stand, those entities want to know that so there's reasons.

And as I referenced earlier, in the very back of my mind I thought there was a not impossible chance that I'd make some ruling today if things fell out a certain way. I'm not going to be making a ruling today. What I'm thinking is, I looked at my calendar during the break, if I'm as optimistic as I can be, Tuesday of next week, so that gives time, if parties want to have discussions about those aspects of the case and you want to update me on that, but I -- so I appreciate what you're saying and I say that so you can respond further to it if you want to, but I want the -- frankly because we're being observed by so many people, I want to clarify the waters in that regard.

MR. SELDIN: No, and I understood Your Honor, I think I more wanted to say on the record that I'm very happy to talk to the defendants if we want to work something out and we'll come to you, if we can do that.

I would say in the interim, though, to the extent that you have heard facts about the administration ability of this law and representations from defendants that are binding on

them, I think that that can factor into your eventual analysis a little bit.

THE COURT: A little bit.

MR. SELDIN: The weight is for you to determine but it's a helpful factor at the very least.

A couple of very quick points, Your Honor. We have filed this afternoon a reply, I believe it's 10 pages. It addresses, I think, many of the points that were raised in the AG's presentation to the extent that it mirrors the briefs, so we hope that is helpful. I don't want to repeat that, but I just want to draw your attention to that, that that's been emailed to everybody, but I think that might provide some clarity on some of the points that were raised.

THE COURT: Thank you.

MR. SELDIN: I think also just a couple of things to flag, I think that there was some misstatement of the facts that were found in Kansas V Harper. I would to encourage the Court to read very carefully what the appellate court said about the State interest or lack thereof in enforcing sex assigned at birth on the driver's license.

That again was in the posture of whether the

State had shown irreparable harm to itself as a result of KDOR's position after SB 180. I encourage the Court to read that carefully because circumstances have changed since then.

The AG appealed, the Kansas Supreme Court did not review, so I think that that is helpful context for this Court.

THE COURT: I flagged that in mind when I heard -- and I should say, I apologize, I've been saying Mr. Kobach, I don't mean any disrespect, it should be Attorney General Kobach...

Sorry, I just took myself off track.

You were saying how to read that -- oh, but now he's sort of flipped because the State was in the TRO position in that case, and here now it's your irreparable harm showing.

MR. SELDIN: Yes, and also the facts that came out in that case about things like law enforcement interest. I think the anecdote that the Attorney General told about this one law enforcement incident, my recollection is that the issue was that the law enforcement officer made an assumption about the person's gender or sex based on what they looked like, it wasn't actually related to the license.

I want encourage the Court to read carefully

how that case shook out as it does bear on the driver's license portion of this when you are looking at the facts in front of you, and again, I think the facts in front of you are unrebutted, they're what you have today. I know it's a paper record but we don't have anything else from the State on that.

Also, you do have Kansas specific facts from the declaration of Dr. Turpin. That was something else I wanted to clarify from the AG's presentation. Dr. Turpin practices in Kansas, she's talking about Kansas patients, and Kansas process, so that is in-state information as, of course, are Daniel and Matthew's declarations.

And then also there's a misstatement of the law with respect to Skrmetti and Bostock. It is not the case that in Skrmetti the Supreme Court said the trans status is not a protected status. They didn't decide that in that case, so again, and we addressed this in our reply, we don't believe Skrmetti is relevant to this case because it comes under the Kansas Constitution, because it a very different law here than the one there, but nonetheless, that is worth noting, that that is not correct.

Similarly with Bostock, that is a decision

that dealt most with homosexual and transgender employees.

Both these cases, Skrmetti and Bostock, they are only as persuasive as you are persuaded by them because we have the Kansas Constitution.

I would submit that Bostock is particularly persuasive in terms of how you are understanding what it means to treat people differently based on sex.

Again, this is deeper into the weeds on just one of our claims but a couple of things I wanted to highlight specifically for you.

And then the final matter, I wanted to address the AG's contentions about what compliance looks like here and what the interests are of the other 99 percent, and I think before this law passed, the good people of Kansas were very happy with the social norms that we had. There's no evidence of a problem, and I think it does the people of Kansas a disservice so assume that they live in fear of transgender people like Daniel and Matthew and it does the people of Kansas a disservice to assume that they share that kind of ill will or misunderstanding that might cause them to object to the mere presence of a man like Daniel

or Matthew in their restroom.

If the State wants to marshal facts about that later, that's fine, but I don't think even on a rational basis it's appropriate to attribute that kind of ill will of feelings towards one's neighbor as a reason to sustain a law.

And just one final case I would direct the Court to, it is admittedly not directly on point but I think it's illustrative. It's called Tennessee V Lane. It's 541 U.S. 509. It is a 2004 Supreme Court decision --

THE COURT: Sorry, 541 U.S...

MR. SELDIN: 541 U.S. 509.

THE COURT: Thank you.

MR. SELDIN: And look, it is not on point legally. It's about Congress' power under Section 5 of the 14th Amendment to make the state's comply with Title 2 of the ADA.

I'm not at all saying it's related in this way but the factual jumping off point for that case was a man named Mr. Lane who used a wheelchair and he had a criminal summons on the second floor of the courthouse and there was no elevator, so he crawled up the steps to his first appearance and then when he came back he refused to crawl and refused to be

carried by officers and so he was arrested for failing to appear.

And in the process of making the legal determination, one of the things the court said was that access to the courts is protected by the 14th Amendment and due process clause and meaningful opportunity to be heard includes removing obstacles to their participation.

So the kind of compliance that the Attorney General is talking about of having people present themselves to the DMV and tell DMV clerks I'm here to comply with SB 244 and then explain what that means. The compliance of asking a friend to take them, of waiting for a bus they don't normally take, of changing how they use the restroom in public buildings, that is the kind of compliance that we are talking about, and we don't require that of people to participate in our society.

So again, we are very appreciative of the Court's time and careful consideration and we would respectfully request that you issue a TRO as soon as possible.

THE COURT: Okay. I'm going to do this. I've made some notes before the hearing that I didn't want to distract myself with because I've

already had a bunch of questions so please have a seat. Counsel, give me a minute to make sure there's no questions I want to direct to either side.

I'm reading the bill correctly that you have to designate a multiuse room, male or female, and it's only if it's single use can it be uni-sex.

Am I reading it correctly?

MR. KOBACH: That's our understanding, Your Honor.

MR. SELDIN: The only nuance would be the definition of multiple occupancy space says even if there are curtains or partial walls, it doesn't account, I think, for full walls so like a fully enclosed stall that has a sink. The airport has that. I think that would probably not be included but hard to know.

THE COURT: We do have -- it's 4:15. General, if there's anything you want to make a point on, I'll give you one minute --

MR. KOBACH: Yes, sir.

THE COURT: -- but I'm always going to give the last to the plaintiff.

MR. KOBACH: Should take about one minute, Your Honor, and that is the Court -- two

things: Number one the Court's suggestion is correct that the Court can't issue a partial TRO without meeting all the five facts and applying them under constitutionality, but I'm just going to represent as the lead attorney representing the State that we will ask KDOR to refrain from changing anymore records until a month after the effective date which would be March 26th.

Then we will -- and because also the attorneys, the entity that would enforce against the government agency that was refusing to comply with regard to the bathroom restrictions, we will not entertain any enforcement action against any government agency until after, again, March 26th, a month after the statute went into effect.

The only other point I want to make, Your Honor, was opposing counsel made one point about Skrmetti suggesting that perhaps Skrmetti found some sort of heightened scrutiny or suspect classification regarding transgender individuals, I'm just going to direct the Court to page 517 of the Skrmetti decision, that's 605 U.S. 517, this court has not previously held that transgender individuals are a suspect or quasi-suspect class. And this case, in any event, does not raise that

question because SB1 does not classify on the basis of transgender status.

That's all we have to say.

THE COURT: I keep transposing the letters of your last name for some reason, Mr. Seldin.

I think the point or what I heard was to the extent that Skrmetti didn't make a positive pronouncement that it's not a protected class is what you were wanting me to understand?

MR. SELDIN: Yes, Your Honor.

THE COURT: There's no pronouncement either way?

MR. SELDIN: That's right.

MR. KOBACH: We're agreed.

THE COURT: Anything, Mr. Smith?

MR. SMITH: Thank you.

MR. BREWER: Not on the TRO, I did have one clerical issue I did want to bring up. On the filing of the petition and in Court records, Secretary Proffitt's last name is misspelled. It's P-R-O-F-F-I-T-T, there's two Ts at the end. I don't know how the Court wants to handle that but I wanted to bring that in front of you.

THE COURT: The correct spelling is...

MR. BREWER: P-R-O-F-F-I-T-T.

THE COURT: Okay, I will address that with an order to the clerk to amend the captions unless somebody else wants to approach it a different way.

MR. SELDIN: No, we apologize that in our 37 pages we didn't find room for the extra T. No offense was meant.

MR. BREWER: Your Honor, it wasn't meant to be that, just wanted to make sure the record was clear.

THE COURT: I appreciate those sorts of things.

Any responses or final comments?

MR. SELDIN: None, Your Honor, thank you.

THE COURT: Okay. Of course, the courts, as I said at the beginning, want to make as complete deliberation as they can in the context in which they're asked to act. I'm being asked to act quickly here and there's a lot of information I need to absorb, cases I need to read.

I'm going to endeavor to get a written decision by Tuesday. If I have any concern that that's not going to occur or if I have further

questions, I may invite counsel back for some sort of Zoom appearance or I may conduct... I'll probably do it that way.

I'm a little worried I'm setting myself too short of a deadline but I do think there are important interests on both sides and, you know, the court exists to enforce the laws.

I've sentenced people on convictions that I didn't think should even be crimes but it's not what I think about things, it's what the law directs and here we're in that similar posture. We've got constitutional challenges that the Court wants to give complete consideration to and I will endeavor to do that and endeavor to issue a ruling by Tuesday, and I'll notify you if I think for some reason that's not going to occur.

Okay. Thank you all for the attendance, and thank you, counsel, for their professional presentation, we're adjourned.

END OF THE PROCEEDINGS

STATE OF KANSAS,
SS:
DOUGLAS COUNTY,

CERTIFICATE

I, Donna M. Lytle, a Certified Shorthand Reporter for the State of Kansas, and the regularly appointed, qualified and acting Official Court Reporter for the 7th Judicial District of Kansas, do hereby certify that I was present at and reported the above and foregoing proceedings in Case No. DG2026CV000112, Daniel Doe and Matthew Moe, Plaintiffs, vs. State of Kansas, et al, Defendants, heard on the 6th day of March, 2026, before the Honorable James McCabria, District Court Judge, Division 4.

I further certify that at the request of Ms. Jocelyn Sitton, Attorney for the Plaintiffs, a transcript of my shorthand notes was typed, and that the foregoing transcript is a true and correct transcript of my notes in said case, to the best of my knowledge and ability.

SIGNED AND OFFICIAL SEALED this 10th day of March, 2026.

/s/ Donna M. Lytle
DONNA M. LYTLE, CSR, RPR, CRR
Official Court Reporter, #0757