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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2023-CV-000422
PII COMPLIANT

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

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

***Petitioner*,**

vs.

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

***Respondents*,**

and

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

***Intervenor-Respondents*.**

Case No. 23 CV 422
Division No. 3

Pursuant to K.S.A. Chapter 60

PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

This case is about the Department of Revenue's (KDOR's) decision (at the direction of the governor) not to enforce a statute that the legislature passed with a bipartisan supermajority. This defiance is an affront to both the rule of law and the

democratic process. The State petitioned for mandamus to redress this issue and to force KDOR to do its duty to adhere to a law the legislature passed. At the same time, the State moved for a temporary restraining order, which the Court granted. The State also requested a temporary injunction. The Court granted the temporary injunction after finding the State has a substantial likelihood of success on the merits. The time is now ripe for the Court to make a final ruling on the petition.

FACTS

1. In 2023, the legislature passed SB 180 (also known as the Women's Bill of Rights). *Compare* Petition for Mandamus and Injunctive Relief ("Petition") at ¶ 11, *with* Answer by Respondents Harper and Burghart to Petition for Mandamus and Injunction Relief ("Answer") at ¶ 2; TI Order at 1-2.

2. The governor vetoed it, but the legislature overrode the veto with a bipartisan supermajority. *Compare* Petition at ¶ 12 *with* Answer at ¶ 2; TI Order at 1-2.

3. SB 180 is now codified at K.S.A. 77-207. K.S.A. 77-207(a)(1) states: "Notwithstanding any provision of state law to the contrary, with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations, the following shall apply: An individual's 'sex' means such individual's biological sex, either male or female, at birth." In relevant part, K.S.A. 77-207(c) states: "[A]ny state agency . . . that collects vital statistics . . . for the purpose of gathering

accurate public health, crime, economic or other data shall identify each individual who is part of the collected data set as either male or female at birth."

4. KDOR collects information pertaining to the sex of a driver's license applicant or holder. Temporary Inj. Hearing Tr. ("TI Transcript") at 121:2-123:15 (attached as Exhibit A); TI Order at 18, 25.

5. Under Kansas law, "sex" is a vital statistic. K.S.A. 65-2401(a); TI Order at 18 n.3, 25. KDOR acknowledges that the "sex" designation on the Kansas driver's license is a vital statistic. TI Transcript at 162:6-15; TI Order at 8, 18.

6. KDOR is a state agency. *Compare* Petition at ¶ 5 *with* Answer at ¶ 2; TI Order at 18.

7. KDOR issues and renews driver's licenses. *Compare* Petition at ¶ 19 *with* Answer at ¶ 2; TI Transcript at 92:14-23, 110:7-111:11; TI Order at 4, 7, 26.

8. Multiple pieces of identifying information are recorded on the face of a Kansas driver's license including "sex." TI Transcript at 116:24-117:24, 123:7-15; *see also id.* at 95:12-20, 103:4-18, 114:7-13; TI Order at 5, 7, 18. But the term "gender" does not appear on the Kansas driver's license. Respondents' Responses to Petitioner's First Set of Discovery Requests ("KDOR Discovery Response") at 8 (attached as Exhibit B); TI Transcript at 117:20-24, 123:7-15; TI Order at 5, 19.

9. KDOR also has a database for every licensee that includes the information currently displayed on the driver's license in addition to historical information that

evolves over time. Respondents' Motion to Dissolve Temporary Injunction ("Motion to Dissolve") at 5-6; KDOR Discovery Response at 3; TI Transcript at 136:20-137:7; 139:15-141:12; 160:19-162:5; TI Order at 7.

10. As used in KDOR's database, the term "gender" includes the same information that the word "sex"—as used appears on the face of the driver's license—covers. Motion to Dissolve at 6; TI Transcript at 116:24-120:2; TI Order at 7.

11. Prior to SB 180, KDOR maintained a policy that addressed driver's license sex designation changes. Motion to Dissolve at 3; KDOR Discovery Response at 2, 4-5; TI Transcript at 95:12-98:13, 102:6-103:5; TI Order at 4.

12. Shortly before SB 180 became effective, the Attorney General issued an opinion that, among other things, concluded SB 180 "requires KDOR to list the licensee's 'biological sex, either male or female, at birth' on driver's licenses that it issues" as well as "update its data set to reflect the licensee's sex at birth and include that sex on any licenses it issues to that individual in the future." *Compare* Petition at ¶¶ 23-24 (quoting from and hyperlinking to opinion) *with* Answer at ¶ 2; Petitioner's Response to Intervenors' Request for Production No. 12 at OAG000274 (Exhibit C); TI Order at 4.

13. But the Governor ordered KDOR to maintain is pre-existing policy allowing for driver's license sex designation changes, and KDOR announced via its

website that it would not alter its pre-existing policy. *Compare* Petition at ¶¶ 25-27 *with* Answer at ¶¶ 2, 6; TI Order at 4.

14. The mandamus petition followed. *See* Petition. A group of transgender individuals has intervened in the case for the purpose of raising a "constitutional avoidance" theory to defend KDOR's position. *See, e.g.*, Intervenors' Motion to Intervene; Intervenors' Reply Memorandum in Support of Motion to Intervene at 11-12; Intervenor-Respondents' Memorandum in Opposition to Petitioner's Motion for Temporary Injunctive Relief at 32; TI Transcript at 438:25-439:12; TI Order at 17-18.

ARGUMENT

I. Summary Judgment Is Appropriate at This Juncture.

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." K.S.A. 60-256(c)(2); *accord Unruh v. City of Wichita*, 540 P.3d 1002, 1007 (Kan. 2024). " A party may move for summary judgment at any time until 30 days after the close of all discovery." K.S.A. 60-256(c)(1)(A).

Although the Court only recently decided the State's motion for a temporary injunction (ordinarily a preliminary proceeding), the state of this case is such that summary judgment is nonetheless appropriate now for three reasons.

First, the issue presented by the petition for mandamus is entirely a question of law: Does SB 180 prohibit KDOR from putting gender identities on or otherwise changing the sex markers on driver's licenses to anything other than male or female at birth? Once the underlying facts demonstrating a ripe dispute are established (and such a dispute was plainly in evidence at the January hearing), there is no need for additional discovery.

Second, even if discovery were necessary, the parties have already engaged in months of discovery in preparation for the temporary injunction hearing. This discovery included: (1)Petitioner's two sets of interrogatories and two sets of requests for production to Respondents; (2) Petitioner's requests for admission, interrogatories, and requests for production to Intervenors; (3) Petitioner's deposition—at which both Respondents' and Intervenors' counsel were present and participated—of each of KDOR Division of Vehicles Manager Kent Selk, Kansas Highway Patrol Captain Jim Oehm, Dr. Beth Oller, and each of the Intervenors (including Doe 1, who was later dismissed as a party); (4) Intervenors' numerous interrogatories and requests for production to Petitioner; (5) Intervenors' interrogatories and requests for production to Respondents; and (6) Respondents' deposition—at which both Petitioner's and Intervenors' counsel were present and participated—of each of Sheriff Brian Hill, Major Rick Newson, Lieutenant James Burge, and Sergeant Erika Simpson.

Third, the issue before the Court now is much narrower than the issues the Court considered in its TI Order because the Court only needs to consider whether KDOR in fact has the statutory duty that the petition alleges. It is primarily a question of law; insofar as it involves any factual issues, those issues are undisputed. *See generally* K.S.A. 60-801 ("Mandamus is a proceeding to compel some . . . person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law.") Therefore, this summary judgment motion is timely.

II. K.S.A. 77-207 Unambiguously Requires KDOR to List Biological Sex Rather than Gender Identity on Driver's Licenses

K.S.A. 77-207 imposes a clearly defined duty upon KDOR that does not involve any exercise of discretion. The Department and its officials are refusing to perform that duty. Therefore, mandamus is an appropriate remedy; the Court should grant judgment in favor of the State.

"Mandamus is a proceeding to compel some . . . person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." K.S.A. 60-801. It is "designed for the purpose of compelling a public officer to perform a clearly defined duty, one imposed by law and not involving the exercise of discretion." *Manhattan Bldgs. Inc. v. Hurley*, 231 Kan. 20, 26, 643 P.2d 87, 93 (1982) (internal citation omitted).

K.S.A. 77-207 requires any state agency that collects vital statistics to identify any individual that is part of such a data set to be identified by their sex (male or female at birth). There is no question that KDOR is a state agency that collects vital statistics and is bound by this rule. Even KDOR admitted as much at the temporary injunction hearing. *See* TI Transcript at 123:7-15, 162:6-19. Unfortunately, in an effort to get around the plain language of the law, both KDOR and Intervenors try to create ambiguity where none exists.

During the proceedings on the temporary injunction, both KDOR and Intervenors relied heavily on K.S.A. 8-240(c) and 8-243(a) for the proposition that a driver's license must include someone's "gender." They theorized that the legislature intentionally used the word "gender" in that statute in recognition that "sex" and "gender" are two different concepts. That argument has no foothold in fact or reason. As noted in the TI Order, the legislature added the word "gender" to the statute "in 2007 via Senate Bill 9 ('SB 9')," which was "part of a comprehensive effort to align [Kansas law] with the language and requirements of the federal REAL ID Act of 2005." TI Order at 18. Neither KDOR nor Intervenors can produce evidence that this was anything other than a cosmetic change to align the state with a federal statute. In fact, the evidence demonstrates the opposite.

Nor can KDOR or Intervenors point to any evidence that the Legislature intended to treat "sex" and "gender" as meaningfully distinct concepts rather than as

synonymous terms. Indeed, KDOR itself uses those two terms interchangeably. "[W]hile the word 'sex' is used on the face of a Kansas license, the word 'gender' is used to record the same information in the KDOR database." *Id.* at 7. In other words, "the information recorded under 'sex' on the driver's license is . . . recorded in the KDOR database under the heading 'gender.'" *Id.* at 19. Thus, the terms "'sex' and 'gender' are, at least in practice, interchangeable in the context of driver's license statutes." *Id.* In other words, there is no conflict between K.S.A. 77-207 and K.S.A. 8-240(c).

Even if there were a conflict between the two statutes, the State should still succeed because newer statutes control over older states if there is a conflict and this is one of those occasions where the arguably more general statute (K.S.A. 77-207) explicitly controls the special statutes to which KDOR points.

"[O]lder statutes are subordinate to new enactments" and "so will control if there is a possible conflict between the two.'" *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty. & Kan. City*, 264 Kan. 293, 311, 955 P.2d 1136, 1152 (1998) (internal punctuation marks omitted). This is true because the Court must give effect to the "plain and unambiguous" intent of the legislature. *In re Marriage of Killman*, 264 Kan. 33, 42, 955 P.2d 1228, 1234 (1998). "The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted," *id.*, and the newer statute is the more recent, and thus controlling, expression of legislative intent, *Jones v. Cont'l Can Co.*, 260 Kan. 547, 556, 920 P.2d 939, 945 (1996).

Here, K.S.A. 77-207 was enacted later in time than both K.S.A. 8-240(c) and 8-243(a). *See* TI Order at 1-2, 19-20. And since "the plain language of K.S.A. 77-207 applies to require the sex designation on driver's licenses and the corresponding information in KDOR's driver's license database to identify the licensee's biological sex as male or female at birth," *id.* at 18-19, the newer statute controls the older ones.

Second, "'[g]eneral and special statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, the special statute will prevail unless it appears the legislature intended to make the general statute controlling.'" *Tomasic*, 264 Kan. at 311, 955 P.2d at 1152 (emphasis added, internal quotes omitted). Here, though, there is clear evidence that the legislature intended the more general statute, K.S.A. 77-207, to prevail. Indeed, such intent is expressed plainly in the statute itself. As the Court has already observed:

> [T]he Kansas Legislature did not make exceptions or otherwise narrow the application of K.S.A. 77-207 by its plain language. Instead, it made clear that there are no exceptions, and the statute applies "[n]otwithstanding any provision of state law to the contrary," including the driver's license statutes, even if they were somehow "to the contrary" of K.S.A. 77-207, which they are not.

TI Order at 21.

Ultimately, K.S.A. 77-207 is straightforward in its application. There is no legitimate argument that it does not impose a clear duty on KDOR to designate the "sex" marker on a driver's license as male or female at birth. KDOR must perform that clearly defined duty.

III. The Intervenors' "Constitutional Avoidance" Argument Fails

The doctrine of constitutional avoidance is inapplicable in this case. That doctrine only applies if the plain text of the statute is susceptible to two permissible interpretations, and one of the readings would violate the constitution. The language of K.S.A. 77-207 is clear and susceptible to only one interpretation. Therefore, there is no need to even consider constitutional avoidance. *See State v. Marsh*, 278 Kan. 520, 539, 102 P.3d 445, 460 (2004) ("[T]he avoidance doctrine is applied appropriately *only* when a statute is ambiguous, vague, or overbroad. The doctrine is not an available tool of statutory construction if its application would result in rewriting an unambiguous statute."), *rev'd on other grounds*, 548 U.S. 163 (2006).

But even if the Court were to apply the doctrine, K.S.A. 77-207 would still stand. As the Court noted, TI Order at 21-22, Intervenors assert that K.S.A. 77-207 is susceptible to two possible interpretations: either the statute requires sex at birth to be recorded on driver's license and in the KDOR database or (2) the statute does not require this. Because, according to Intervenors, the first interpretation would violate the Kansas Constitution, they believe the second one is proper. They are wrong.

Intervenors claim the following three "rights" would be violated if the Attorney General's interpretation prevailed: (1) the right to "personal autonomy," (2) the right to "informational privacy," and (3) the right to "equal protection of the law." *Id.* at 23.

They cannot succeed on any of these theories because they have not shown and cannot show any of these asserted rights is invoked by K.S.A. 77-207.

First, K.S.A. 77-207 does not violate Intervenors' personal autonomy. In *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610 (2019), our Supreme Court recognized a right to personal autonomy under the state constitution. As this Court correctly noted in the TI Order, however, *Hodes* "defined personal autonomy in terms of 'the ability to control one's own body, to assert bodily integrity, and to exercise self-determination.'" TI Order at 23 (quoting *Hodes*, 309 Kan. at 660, 440 P.3d at 492). *Hodes*, therefore, does not apply to the situation at hand. "*Hodes* said Kansans have the right to control their own bodies. It did not say Kansans have a fundamental state constitutional right to control what information is displayed on a state-issued driver's license." *Id*. Applying *Hodes* in this case would be "an unreasonable stretch." *Id*.

Turning to Intervenors' second claim, K.S.A. 77-207 does not violate Intervenors' "right to informational privacy" for the simple reason that "Kansas courts have not recognized a right to informational privacy," whether in the context of driver's licenses or otherwise, "under Section 1 of the Kansas Constitution Bill of Rights." TI Order at 24. Rights that no court has ever recognized are not ordinarily fodder for the constitutional avoidance doctrine. *See* Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 250 (2012) ("[T]he mere assertion of unconstitutionality by one of the litigants is not enough [to raise the constitutional avoidance doctrine]. The

doubt [about constitutionality] must be 'substantial.'" (citing William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L. Rev. 831 (2001)).

As to Intervenors' third claim, K.S.A. 77-207 does not deprive them of equal protection of the law. Equal protection requires that the law treat similarly situated people alike. *State v. Little*, 58 Kan. 278, 279, 469 P.3d 79, 80 (2020). The first step in analyzing whether there is an equal protection violation is determining the "nature of the statutory classifications and examine whether these classifications result in disparate treatment of arguably indistinguishable classes of individuals." *Villa v. Health Pol'y Auth.*, 296 Kan. 315, 324, 291 P.3d 1056, 1064 (2013). "If there is no classification or disparate treatment, there is no equal protection violation." *Id*.

In this case, there is no equal protection violation because "K.S.A. 77-207 does not create a classification." TI Order at 25. Rather, it directs a "state agency that collects vital statistics . . . to identify every individual by 'biological sex, either male or female, at birth.'" *Id.* (quoting K.S.A. 77-207(c)). KDOR collects information regarding "sex" (a vital statistic) from license or renewal applicants and places that information on the licenses it issues or renews. *See id*. at 4, 7, 18, 25, 26. All the statute requires is that KDOR collect such information from *all* applicants and record such data as male or female at birth. Therefore, "[t]here is no classification based on sex or transgender status or any other factor" because "[t]he rules are the same for identifying each person who seeks a driver's license." *Id*. at 25. In other words, K.S.A. 77-207 does not treat

"[s]imilarly situated people. . . differently." *Id*. Consequently, "there is no equal protection violation." *Id*.

In sum, the Intervenors' theory of constitutional avoidance does not apply in this case because K.S.A. 77-207 is not ambiguous. And, even if it were, their attempt to inject constitutional issues into K.S.A. 77-207 would fall flat because they have not shown a fundamental right or protected class is implicated. K.S.A. 77-207 ultimately concerns a government document—a driver's license—and the statute's mandate is well within the bounds of what the government may constitutionally require in such documents. There is nothing problematic about K.S.A. 77-207 on a constitutional level, so the Intervenors' constitutional avoidance arguments fail.

CONCLUSION

The time is now for the Court to end this case. There is no doubt that K.S.A. 77-207 clearly places a duty on KDOR to record a licensee's sex at birth on the driver's license. KDOR did not follow that duty. Situations like this are the reason why mandamus exists. The Court should therefore grant judgment in favor of the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2024, the above document was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants.

s/ *Jesse A. Burris*
Jesse A. Burris
Assistant Attorney General
Attorney for Petitioner

EXHIBIT A

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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2023-CV-000422
PII COMPLIANT

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE
STATE OF KANSAS

STATE OF KANSAS, ex rel. KRIS KOBACH, Attorney General, Petitioner, vs. DAVID HARPER, Director of Vehicles, Department of Revenue, in his official Capacity, and MARK BURGHART, Secretary of Revenue, in his official capacity, Respondents.	CASE NO: 2023-CV-422

TRANSCRIPT

OF

MOTION HEARING

Proceedings had before the HONORABLE TERESA L. WATSON, JUDGE, THIRD DIVISION, at Topeka, Kansas, on the 10th day of January, 2024.

APPEARANCES

For the State:
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New York, NY 10004

I N D E X

On Behalf of the State:

Witnesses:	Direct	Cross	Redirect
Kent Michael Selk	92	130	160
Brian Hill	165	171	175
		171	
Richard Newson	176	184	195

On Behalf of the Respondent KDOR:

Witnesses:	Direct	Cross	Redirect	Recross
James Oehm	202	209	215	
		212		

On Behalf of the Respondent Intervenors:

Adam Kellogg	219	246	253	254
Kathryn Janelle Redman	255	278		

For the State:

Exhibits:	Offered	Admitted
No. 5	122	
No. 7	98	98
No. 12	124	
No. 17	97	97

For the Respondent KDOR:

Exhibits:	Offered	Admitted
No. 108	218	218
No. 109	218	218
No. 110	129	129
No. 111	129	129

your first witness.

MR. SKEPNEK: Thank you, Your Honor.

MR. KOBACH: -- Your Honor, the State will call Kent Selk from the Kansas Department of Revenue.

THE COURT: Sir, please come forward and be sworn by the court reporter.

KENT MICHAEL SELK,

called as a witness on behalf of the Petitioner, was sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. KOBACH:

Q. Good morning, Mr. Selk. Could you please state your full name for the Court?

A. Yes. My name is Kent Michael Selk.

Q. And Mr. Selk, what is your current job and title?

A. Current job title is Driver Services Manager for the state of Kansas, which is running the driver's license operation across the state for all driver's license offices and everything that involves issuing the credential and the staff there.

Q. And when you refer to the credential are you referring to the actual physical license itself?

A. Correct, sir.

Q. How long have you held that position at -- I'll just refer to it as KDOR?

Those are the two documents that we utilize as determinations of their sex, if that's what your question --

Q. In the case of a first time driver's license, first time learner's permit being issued to a resident aged 18 or younger, is the -- what is the document that KDOR most often relies upon to determine the person's sex?

A. If I had to do a percentage, it's going to be mostly your birth certificate. Most of those individuals don't always have passports at that age.

Q. Prior to the commencement of this lawsuit, in July of 2023, did KDOR allow Kansas ID card or Kansas driver's license holder to change the sex marker on that card or driver's license?

A. They did.

Q. And did KDOR have a written policy outlining the process to change the sex marker on a Kansas ID card or driver's license?

A. We did.

Q. And when was that policy adopted?

A. Prior to my being at KDOR. I do believe it was in the 2007 range, if I'm historically correct. I could be wrong there, but I believe so.

Q. Mr. Selk, I'm going to hand you a document.

MR. KOBACH: Your Honor, does the Court already have the exhibits?

THE COURT: I do.

MR. KOBACH: Okay.

A. Thank you, sir.

BY MR. KOBACH:

Q. Thank you. Mr. Selk, you see that this is listed as Exhibit 17 at the bottom. This would be Petitioner's Exhibit 17. And it states at the top Gender Reclassification Policy. Does that look familiar to you?

A. Yes, sir.

Q. Can you describe what this is?

A. This is our policy for an individual to submit to change their -- the gender or sex on the driver's license.

Q. And can you see the date listed down in the lower left corner here?

A. Yes, sir.

Q. What is that date?

A. It is March 22nd -- or March, yes, 22nd, of 2019. Sorry.

Q. Is that the date on which this policy took effect?

A. I do believe this is just a revision of the actual form. We go through and revise the forms and make

sure that they're grammatically correct and that the PO boxes aren't needing to be changed.

But this would the standard that it was prior to my --

MR. KOBACH: Your Honor, I move for the admission of Exhibit 17 into evidence.

THE COURT: Any objection?

MR. SMITH: No, Your Honor, not from Respondent KDOR. I would also note that this is Exhibit 110 for our purposes.

MR. DALGLEISH: No objection, Your Honor.

THE COURT: Thank you.

Petitioner's 17 is admitted.

BY MR. KOBACH:

Q. And, Mr. Selk, I'll just show you a second document, it's Exhibit 7.

A. Thank you.

Q. Mr. Selk, if you look at this one is it says right below the heading, it says, "Method for Gender Reclassification Based on Court Order." And then there's a date of May 10, 2011.

Have you ever seen this document before?

A. I have.

Q. And what is this document?

A. This would be a court order form for an individual to

change their gender as it requires; the driver's license.

Q. Did this document describe the policy of KDOR in this regard from roughly 2011 to 2019?

A. It does.

MR. KOBACH: Your Honor, I move for the admission of Exhibit 7 into evidence as well.

THE COURT: Any objection?

MR. SMITH: No, Your Honor. For our purposes that's also KDOR Exhibit 108.

MR. DALGLEISH: No objection, Your Honor.

THE COURT: All right.

Petitioner's 7 is admitted.

BY MR. KOBACH:

Q. Mr. Selk, let's look at the Exhibit 7, the 2011 memo.

A. Okay.

Q. Pursuant to that memorandum, what did KDOR require from an applicant in order for the applicant to achieve a change in the sex marker on his driver's license card?

A. The information needs to come from an actual physician. The physicians are laid out on this application at the bottom, on number three. So if you're looking at Exhibit 17 --

Q. I'm actually looking at Exhibit 7 right now. The

Q. You said you did provide the interrogatory responses in this case?
A. I would just provide -- refer back to the staff member that I had, that, yes, this is applicable, what they submitted.
Q. And are you referring to -- when you just answered that question, are you referring to the current policy or the 2019 policy or are you referring to the old policy of 2011?
A. I mean, the policy to me is inherently the same. It's been there since I've been there. So I know it's been updated. But we do not issue the license at the office with an examiner. It still has to come through our central side. If there's any questions it would go through myself. And if I had questions I would ask above me.
Q. So was the 2011 memo, which is Exhibit 7, was that supplanted and replaced with the 2019 guidance?
A. It was updated in 2019. Correct.
Q. Updated. Does that mean that the 2011 memo still stands as well?
A. Yes. I think the policies are the same within it besides some wording changes. But I don't think the heart of the policy changed between 2011 and 2019.
Q. So what would you say did change from the 2011 memo

to the 2019 policy?
A. I don't think much of anything other than maybe just we're updating the wording.
Q. Okay. Well, let's look at the Exhibit 17, the 2019 policy now.

Is there "emphatic declaration from a physician" required anymore?
A. I believe if you look, I don't see emphatic listed in section three here.
Q. So looking at it, you'll see that it says, the request made -- we're looking at Exhibit 17. It says in the middle of the page. The request must include, and then there's numerals one, two, and three.

Is it accurate to say now that in order to get the change made now on your driver's license, change of the sex marker, you merely need to provide the three items, numbers one, two and three?
A. Correct.
Q. And is number one basically a photocopy of your current Kansas driver's license?
A. Correct, sir.
Q. And is number two basically a letter from the applicant requesting the change?
A. Correct.
Q. And is number three the letter from a physician

want to say bounce ideas off each other, but make sure we're trying to be as consistent as we can with all the states when it comes to issuance of licenses and credentials. So we do take their recommendations and their best practices in high consideration in applying it to our applications.

Q. Okay. We may bring that document up later, but maybe we can avoid it, if it's not necessary.

Between 2011 and 2022, inclusive, approximately how many driver's licenses did KDOR issue total?

A. Um --

Q. And to refresh your recollection, you did provide this answer in a response to an interrogatory. Would it be helpful to see that?

A. It could. I can tell you roughly we issue 700,000 credentials a year in the state of Kansas. So I could be off a few here or there, but it's right in there.

Q. Okay. I'm going to show you your responses to the Petitioner's first set of interrogatory requests. And I thought I tabbed the pages, but I did not. Here we go.

If you look at the top of that page. It's in response to question number eight.

A. Yes, sir.

Q. You'll see a series of six digit numbers?
A. Yes, sir.
Q. Is -- are those numbers the annual totals?
A. Correct.
Q. Okay. Understanding that at least by our calculation when you add those numbers up between 2011, the total appears to be 9,316,937. Would it therefore be accurate to state that KDOR has issued approximately 9,316,936 driver's license between 2011 and the end of 2022?
A. Yes.
Q. So from over that same period -- let me rephrase my question.

Up until now, how many sex marker changes has KDOR approved, starting from 2011 and going to the first part of 2024?
A. I would have to look at the actual total that we submitted here. So just not off the top of my head.
Q. If you could take a look at your supplemental response to our interrogatories question number three. I've highlighted the number for you again.
A. Thank you, sir.
Q. You'll see on the -- if you take a look at it, if you'd like. That's a -- essentially an interrogatory asking the same question. And if you look at that

and somewhere in the ballpark of 380 changes issued during that same period, then that would mean .004 percent of driver's licenses had issued were changes. Assuming my math is correct, would you agree with that?

A. I'd agree with you.

Q. So how many sex marker change requests have been denied by KDOR since 2011?

A. I do not have that total in front of me. But my assumption would be it would be a pretty small percentage, given the fact that you have a small percentage of the individuals who change their sex marker to start with.

Q. To refresh your recollection, can you look at question number seven in the initial interrogatory?

A. This one?

Q. Yeah, that one.

A. Sorry, sir.

Q. No, you're all right.

A. It shows four requests.

Q. Yeah, the four requests.

A. Yes.

Q. I believe -- does it say there were at least four requests or exactly four requests that were denied?

A. It says at least four requests.

A. I do not, sir.
Q. I'm going to tell you that one of the exhibits provided by the Intervenor Respondents estimated that approximately 12,400 Kansans would identify as transgender, which is about .56 percent of the population. I know you're not an expert and you're not -- I'm not asking you to say whether that's right or not.

If 552 is taken, so that's the number of license changes that have been issued, is taken as a fraction of 12,400, and that fraction is 4.5 percent, would you agree that it's true that approximately 4.5 percent of the estimated number of transgender Kansans have gotten a driver's license change?

MR. DALGLEISH: Your Honor, objection to foundation with this witness. Speculation. It's also compound.

THE COURT: It also requires a lot of math.

MR. KOBACH: It does.

THE COURT: So that's sustained.

MR. KOBACH: Okay. We'll do the math for you later.

BY MR. KOBACH:

Q. Okay. Now I want to talk about one of the issues at the center of this case. Is it KDOR's position that

there's a difference between the word sex and the word gender?

A. Sex is indicated on the driver's license, actual card. So the card that you are presented or that you carry with you, it is -- I want to say -- I'm trying to say this correctly. That is part of the AAMVA card standard for all of the states to display. Sex is what they display.

Gender -- I am not also an expert in this either. But gender is not in the same breath as sex. However, you're going to probably move to talk about if you're going to do a gender change, then there is a sex change on your driver's license card. I'm assuming that's where you're going with that. And I don't have an answer specifically to that. Other than I know that sex is the universal marker for driver's license cards per the AAMVA standard. Gender, as it speaks to an individual's gender, is seen as different to change the information.

Q. So with respect to what KDOR puts on the card, are the words sex and gender used more or less interchangeably?

A. They are not. Only sex is shown in the system and shown on the card.

Q. Okay. Let's take another look at Exhibit 7, the 2011

KDOR memo. Let's go back to number two on the front page. And this is the three items that are required for the -- from the applicant.

Could you read the sentence under number two again?

A. Yes, sir.

"The applicant must also provide a letter on official letterhead from the applicant's licensed medical, osteopathic physician stating that applicant has undergone the appropriate clinical treatment for the change of sex or the physician has reevaluated the applicant and determined that gender reclassification based on the physical criteria is appropriate."

Q. Okay. So in that sentence you just read, you said change of sex and gender reclassification used in the same sentence. Do these refer to different things or are they essentially talking about the same transition process?

A. My assumption because you're going to change the individual's gender, will also change the sex indicator on their card.

Q. So if I'm understanding you to say, if you're going to change the gender, then you're going to change the sex on the card?

A. In our application, yes.
Q. Okay. Now, let's look at the 2019 policy. And that's Exhibit 17.
Okay. What is the sentence right next to the numeral two say there?
A. Just a second, I'm shuffling through the papers here.
Could you repeat that, please, sir?
Q. Yeah. If you look at the 2019 policy, which is Exhibit 17. And you look at numeral two there. That's the list of things that are requested to include. What does it say next to number two?
A. "A letter from applicant requesting the change in gender."
Q. And then drop down to the words right under that, to f. What does it say there?
A. "Requested gender to be added on the Kansas credential."
Q. Okay. So we have two saying requesting change in gender and then f saying requesting gender to be added to the Kansas credential.
Does the Kansas credential use the word gender?
A. It does not.
Q. Does the Kansas credential use the word sex?
A. It does.
Q. So is it correct to say that you offer the applicant

a change in gender, but you give the applicant on the card a change of the sex marker?

A. Yes.

MR. KOBACH: Your Honor, I'm just trying to decide if we can get through this before 12:30 or if you want to --

THE COURT: Well, we have two minutes until 12:30. So --

MR. KOBACH: This might be a good point to take a break. I'm guessing I have another 15 minutes of direct.

THE COURT: Okay. Let's go ahead and take a lunch break. And it's going to be 30 minutes. So we will be in recess until 1:00 o'clock.

Counsel, I will lock the courtroom when everyone is out. So if you'd like to leave things, you may. If you want to take them, you may. But just know that this will be locked up. I'll unlock it probably 10 minutes before we begin. So you can get back in. All right. We're in recess.

(THEREUPON, a recess was taken.)

THE COURT: All right, we're back from recess.

Sir, in the witness stand, just a reminder that you're still under oath.

And Mr. Kobach.

BY MR. KOBACH:

Q. Mr. Selk, I want to pick up where we left off. We were looking at the use of terms in the documents Exhibits 7 and Exhibit 17.

Now I wanted to ask you about the statute under which you guys operate. Do you recall off the top of your head the relevant Kansas statute, the terminology that uses? It's K.S.A. 8-240 subsection (c).

What does that -- what does that require you to obtain from an individual, the sex or the gender when getting an application?

A. I would have to look at the specific wording on the statute, but I'm assuming it refers to sex if I had to guess.

Q. Well, actually let's look at it.

Let's look at Exhibit Number 5.

A. Thank you, sir.

Q. You see that it's on the -- it's under the heading of the Kansas Office of Revisor of Statutes. Then it says 8-240. Does that look like the driver's license statute under which your agency operates?

A. Yes. I'm familiar with it. I'm in it quite a bit, but I don't remember it word for word. Yes.

MR. KOBACH: Your Honor, I don't know if this is necessary since the Court can take notice of statutes. By for the sake of thoroughness, I'd like to move the entrance into evidence of Exhibit 5, which is the statute.

THE COURT: All right. Well, it's not necessary, but any objection?

MR. SMITH: Your Honor, I don't have any objection to judicial notice being taken, or its admission.

MR. KOBACH: All right.

THE COURT: Okay. That will reduce the paper in the exhibit notebook, so.

BY MR. KOBACH:

Q. So, Mr. Selk, if you could look at the, subsection (c), which is on the bottom of page two of that exhibit. It's the last paragraph starting with every applicant?

A. Gender as stated?

Q. If you look -- can you find subsection (c) at the bottom of second page there?

A. Yeah.

Q. So what -- if you could just read the first two lines of subsection (c) for us, please?

A. Every application shall state the full legal name,

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

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

A. Yes.

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

A. Yes.

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

A. The physical license uses sex.

Q. Okay. Now I want to ask you about something we talked about briefly earlier and that is the American Association of Motor Vehicles Standards. And I'm going to hand you a document, see if you recognize it. It's Exhibit 12.

Mr. Selk, does that document look familiar to you?

A. Yes, sir.

Q. And what would you say that document is?

A. This is the AAMVA Card Design and Standardization for

changes, is that something you simply take a reference from the applicant? Or do you ask them to provide you with documentation of the new address?

A. They have to provide a receipt or return receipt or an envelope that their address has changed. So it's usually two proofs to change your address.

Q. And this again is being scanned with the transaction?

A. Correct.

Q. So it's basically -- it's not unusual for a driver's license examiner to be confronted with documents that have different positions as it relates to name or address or gender?

A. Gender would be different. But yes, every day. It -- every time we do a transaction, almost, I mean. You could probably pick every other person's going to have something that's different. Address, usually. Name change if they've been married or whatever, so to speak. Just pick a plethany (sic) of them. They change quite a bit, yes.

Q. Very good. So in the case of -- let's just go back a little bit and talk about the driver's license and the database. Everyone from the public sees the driver's license, that's what they're waiting for in the mail?

A. Correct.

Q. But that's sort of like the tip of the iceberg of what your responsibilities, or what your examiners' responsibilities are; right?
A. Correct.
Q. It's also important for you to basically maintain the integrity and the consistency of the database?
A. Correct.
Q. Are there a number of law enforcement agencies and other state agencies that basically interface with the driver's license system for information?
A. Yes.
Q. And in your 10 years or 5 years of being a manager, 10 years working with the DOV, have you worked with those other agencies regarding those interfaces and the maintenance of your data?
A. Yes.
Q. And during those 5 or 10 years; 5 years as a manager, 10 years as an employee, have any of those agencies -- let's just begin with non-law enforcement agencies. Has anyone basically raised issues with regard to your gender change policy?
A. No.
Q. And during those 5 years as a manager, 10 years as an employee, have you also dealt with law enforcement as it relates to the day-to-day process of interfaces

General Kobach, they basically also permitted "not specified" as an option as far as the data field is concerned; right?

A. Correct.

Q. And in your experience, gender, that's something that's really sort of discretionary. It's recommended in the credential standard, but it's not a mandatory field?

MR. KOBACH: Objection, foundation.

MR. SMITH: I'll withdraw the question --

THE COURT: Sustained.

MR. SMITH: -- Your Honor, before I win, lose or draw.

BY MR. SMITH:

Q. But let's look at page 99 of Exhibit 110.

A. Can you give me a minute here because I think I shuffled these. I found it.

Q. Now I'm going to have you go two more pages to page 101.

A. Okay.

Q. And do you see data group two?

A. Yes.

Q. And how does that read? What's the title of that section?

A. Data group two, optional license holder information.

Q. And is gender part of that -- under that category?
A. Yes.
Q. Now, with regard to this guide or design standard, is this something that you deal with routinely with customers?
A. Maybe --
Q. Do you talk with customers regarding Exhibit 110? This isn't really a public facing document?
A. No. I guess I was confused by your question. No, I do not discuss this with public facing people.
Q. And this is actually a really highly technical standard document talking about how a database is run and designed?
A. Correct.
Q. And so some of these decisions about what you call the name of a field at a table is really not something for the public, it's just consistent design strategy?

MR. KOBACH: Objection, calls for speculation.

THE COURT: Overruled.

A. I would agree.

BY MR. SMITH:

Q. Now, let's also talk about the fact that -- I guess the robustness of the driver's license system. Is it

possible for someone to change their gender on their credential or on their driver's license system and that you retain a history of prior gender designations?

A. Yes.

Q. Is that information ever lost? I mean, do you keep track of every time they've issued a credential, what the gender was?

A. Correct.

Q. So you're able to go back and basically identify when there have been changes in the person's history?

A. Correct.

Q. Now in going back and looking, pursuant to this case, did you find that a lot of changes were actually corrections of clerical mistakes?

A. Yes. The majority of those were.

Q. And, in fact, we've talked also in the past about birth certificates and amended birth certificates?

A. Correct.

Q. And when you -- it's normal for you to deal with an amended birth certificate in your job?

A. Yes.

Q. And it's not infrequent, and most of your examiners are familiar with an amended birth certificate?

A. Yes.

with these gender change processes and explaining it to them?

A. To me being sensitive of their request, even if it's a denial, yes.

Q. Now, Mr. -- General Kobach asked you some questions, too, about the number of denials you had and the list we had provided.

Is it possible that maybe -- well, I'll withdraw that question. Thank you.

MR. SMITH: That's all the questions I have.

THE WITNESS: Okay.

MR. DALGLEISH: No questions, Your Honor.

THE COURT: No questions. Okay.

Mr. Kobach, anything else?

MR. KOBACH: Very brief redirect, Your Honor.

REDIRECT EXAMINATION

BY MR. KOBACH:

Q. Hi, Mr. Selk, we're almost done.

You were asked by opposing counsel about the -- how outside agencies have a window into the driver's license database; is that right?

A. Yes, sir.

Q. Do outside agencies have access to all of the data that KDOR has within a given driver's license record?

A. It depends on the agency. Certain agencies are redacted, they only see certain amount. Law enforcement sees their specific ones that they would like to see. But anything that's on a driver's license physically, the law enforcement officer can see.
Q. That's on the actual physical card?
A. They can. They can also -- they have a history record, too, of driving offenses, which is pertinent to them because of habitual violators or individuals that have been driving while suspended or things of that nature. So they can look at -- law enforcement does get the individual's driving history, so to speak.
Q. So when you say driving history, you'd be talking about driving offenses that are known to KDOR; is that correct?
A. Correct, sir.
Q. What about the merging, I recall -- let's back up. I can give you context.

I recall when I was secretary of state we could see some things in the KDOR database, but other things we had to call and ask KDOR for further information; is that correct?
A. Correct.

Q. And is that essentially the same with law enforcement? They could see the things you mentioned on the driver's license and the violations, but to see beyond that they have to request it?
A. At times, could be.
Q. Earlier you were asked by opposing counsel whether something was a vital statistic and you gave an answer. Could you please define vital statistic?
A. I don't have a definition for vital statistics.
Q. Does a birth certificate contain vital statistics?
A. It's from vital statistics, so I would say yes.
Q. Is a date of birth a vital statistic?
A. It's part of a vital statistic.
Q. Is a person's weight a vital statistic?
A. I don't know if that's a vital statistic or not.
Q. Okay. Is a person's eye color a vital statistic?
A. I guess it could be seen that way.
Q. And is a person's sex a vital statistic?
A. I would say yes.
Q. KDOR doesn't make statutes or enact statutes, does it?
A. No, we can't. That's legislature. But yes, we do present and --
Q. You were asked by opposing counsel about how, you know, whenever agencies or legislators or law

this actually contrasted with other evidence suggesting that that's not how they understood the law.

And, in fact, the Attorney General's opinion that was issued, that you heard testimony about, which lead to this mandamus action being filed against the Department of Revenue, was initiated because a representative who voted in favor of the legislation asked whether or not it applied to driver's licenses. So if that question had to be asked, there's really a question here of whether the legislators who voted in favor of this even understood to applying this context when they cast their votes.

Second, we point this out in our briefing. But inferring the application of SB 180 to driver's licenses runs contrary to Kansas statutory or interpretation doctrine, which heavily disfavors implied repeals of existing laws. So to the extent that this would constitute a repeal of the statute that was enacted previously that allowed for gender to be listed on driver's licenses, the Court should disfavor that implied repeal. Because that is what case law requires.

And third, Your Honor, and this is a central

argument for the Intervenors here. The Court should avoid construing an ambiguous statute in a way that raises serious constitutional questions. And that's for an important reason. The Court shouldn't strike down statutes or have statutes be stricken down when it is not absolutely necessary to do so. And I think that that's a key difference here that's important for the Court to understand. This is not a facial challenge to SB 180. And it's not cloaked in anything. This is a constitutional avoidance defense against a particular interpretation of a statute that is advocated for by the Petitioner.

And the cases that the Petitioner cited to you as listing -- I believe what he called preconditions for the constitutional avoidance doctrine, actually don't say what the Petitioner thinks they say.

There is no requirement in case law that we have found. And certainly not in the Johnson case, which is one of the ones he cited to you, that says that a constitutional question must be clearly established, or anything of that nature, for the constitutional avoidance doctrine to be invoked.

In fact, the Johnson case says that we should construe statutes to avoid constitutional questions. Avoid the constitutional question. Which is very

EXHIBIT B

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

STATE OF KANSAS, *ex rel.* KRIS KOBACH, Attorney General,	)
Petitioner,	)
vs.	) Case No. 23 CV 422
	) Division No. 3
DAVID HARPER, Director of Vehicles, Department of Revenue, in his official capacity, and MARK BURGHART, Secretary of Revenue, in his official capacity,	)
Respondents.	)

Pursuant to Chapter 60

Petitioner's First Set of Discovery Requests

Interrogatories (First Set)

1. Describe how the Kansas Department of Revenue ("KDOR") collects and verifies the information that it puts on a licensing document (e.g., driver's license, instructional permit, etc.) or state-issued identification card. Your answer should include what documents or other sources of information KDOR reviews, and whether and how KDOR verifies such information. If the process is different for licensing documents and identification cards, describe those processes separately.

ANSWER:

The documents that are primarily relied upon by KDOR are set out in its form "DE-56a. A pdf can be obtained at: https://www.ksrevenue.gov/pdf/de56a.pdf.

Any applicant documentation used to establish identity, lawful presence, and Kansas residency are reviewed by the driver's license examiner and scanned to the applicant's electronic file. Gender is an aspect of identity.

The issuance process between driver's license and identification cards are similar. When there is a variance in name or gender information with the submitted documentation, the examiner is required to determine the basis for the variance and explain such basis in the electronic record. E.g., name difference will require evidence of name change order (name change order, divorce decree etc.); gender difference (gender change form – up until issuance of temporary restraining order).

2. Describe in detail the process for changing the sex marker on one's license or identification card that was in place before the filing of this suit. Your answer should include the name or number of any required forms, a list or description of required supporting documents, and a description of KDOR's internal process or workflow for reviewing, approving, and executing such changes.

ANSWER:

See attached Gender Reclassification Policy - User Guide of March 22, 2019. (Policy). Normally, a gender change applicant will begin the process by asking for gender change at a driver's license station. The applicant will be redirected to work through the Topeka central office and make application consistent with the Policy. If the Division approves the application, the Division will mail correspondence to the applicant directing the applicant to visit their local exam station and to submit the Topeka central office correspondence to the regular driver's license examiner conducting the transaction, to support the gender change. Since 2019, the process required the State central driver's license office to approve applications.

3. Before the filing of this suit, what, if anything, did KDOR do to verify what individuals claim about their sex, gender, or gender identity while seeking to change the sex marker on a license or identification card?

ANSWER:

See Respondent KDOR's response to Interrogatory No. 3. The Topeka central office would review the medical documentation provided and when questions arose, would follow up with the applicant and/or the medical provider.

4. What databases or other systems of records does KDOR maintain that include data pertaining to holders of either (or both) licensing documents or identification documents?

ANSWER:

The State's driver's license system is used to record current gender information and retain the history of changes to the gender information. There is a vendor application (Idemia) that supports the actual issuance of credentials by way of capture, evaluation, and storage of captured images and documents. Since 2019, KDOR staff have also maintained an Access database that has been updated as gender change requests have been forwarded to the Topeka Central Office. The two tables of the database are being attached to this response with the personal information removed.

5. What governmental entities (other than KDOR) or officers use or have access to

the databases or systems of records referred to in the preceding interrogatory? How is that use or access accomplished?

ANSWER:

The governmental entities use is categorized by entities that can make changes to the system record (driver's license and identification card record information, and entities that have inquiry only access to the system record. The third parties that can make changes to system records have contractual agreements with KDOR.

Entities capable of making changes:

a. DL Examiners hired by the State, Kansas Department of Revenue, Division of vehicles.

b. County Treasurers in most State counties. (rural counties)

c. Credential Vendor – Idemia Identity & Security USA LLC.

Entities with Active, Inquiry Only Access:

a. Kansas Bureau of Investigation through its KCJIS interface;

b. Kansas Department of Families; and

c. Kansas Department of Health and Environment.

6. How many sex-marker change requests has KDOR received each month since it issued on May 10, 2011, its policy titled "Requests for Gender Reclassification on Kansas driver's licenses and identification cards"? Give your answer on a month-by-month basis.

ANSWER:

See KDOR's Motion to Dissolve, Legal & Factual Background, Paragraph 8 (pg. 5),

for gender changes processed through KDOR's central office between July 2019 and December 2022. KDOR is still working towards providing monthly totals between May 2011 and June 2018, and will supplement in subsequent discovery responses.

7. How many "gender change requests" has KDOR denied each month since it issued on May 10, 2011, its policy titled "Requests for Gender Reclassification on Kansas driver's licenses and identification cards"? Give your answer on a month-by-month basis.

ANSWER:

The information on denied requests is not maintained. The applicant either returned with the required documentation (Medical letter specifically addressing the issue) or the gender remained the same. Since 2019, there are at least four requests that were denied for insufficient documentation – these requests were refused upon recording and final review. More were refused but not recorded because initial documentation was insufficient upon first review and customer did not contest the issue or submit additional, required documentation.

8. What is the total number of credentials that KDOR has issued each month since it issued on May 10, 2011, its policy titled "Requests for Gender Reclassification on Kansas driver's licenses and identification cards"? Give your answer on a month-by-month basis.

ANSWER:

KDOR is still working towards developing month to month numbers and will supplement in later discovery responses.

10. Has KDOR ever used the word "gender" on any licensing document or on any identification document? If so, please identify those documents and the time period during which the word "gender" was used.

ANSWER:

KDOR has not used the term "gender" on the face of its driver's licenses or identification cards. KDOR uses the term "gender" in its 2011 and 2019 policies on gender change.

KDOR has relied on American Association of Motor Vehicle Administrators' (AAMVA) standards for card design.

11. When and why did KDOR begin allowing people to change the sex designation on their licensing or identification documents for reasons other than an accidental data-entry error?

ANSWER:

See KDOR's Response to Interrogatory No. 9. Prior to May 10, 2011, there wasn't instruction provided to the driver's license examiners. The decision on whether to record a new gender in the driver's license system and express it on the credential was left up to the driver's license examiner at the counter, and an ad hoc decision based on the application information submitted.

In addition to needing to create a bridge document (medical letter) between conflicting documentation (see KDOR's Response in Interr. No. 9), KDOR was

Division of Vehicles
915 SW Harrison St
Topeka KS 66612-1588

Kansas
Department of Revenue

Phone: 785-296-3601
FAX: 785-291-3755
www.ksrevenue.org

Nick Jordan, Secretary
Donna Shelite, Director

Sam Brownback, Governor

To: State Driver's License Examiners

From: Ted E. Smith, KDOR Staff Attorney

Date: May 10, 2011

Subject: Requests for Gender Reclassification on Kansas driver's licenses and identification cards

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Method for Gender Reclassification based on Court Order

The Kansas Division of Vehicles (hereafter "Division") will rely upon a court order announcing a gender reclassification to support an applicant's requested gender change on a State-issued driver's license or identification card. The applicant must provide the examiner with an original order or file stamped photocopy of the order. The Division retains the right to retain the pleadings provided. It is not necessary that the Division be specifically named in the lawsuit or that the Division is specifically ordered to change the applicant's gender classification. If the court order of gender reclassification announces a new, full legal name for the applicant, the examiner may rely upon the order to modify the applicant's full legal name.

Method for Gender Reclassification based on Medical Declaration

The applicant is required to mail a written request to the Kansas Chief Driver's License Examiner, Division of Vehicles – Kansas Department of Revenue, Docking State Office Building, RM 130, 915 SW Harrison, Topeka, KS 66612

The request must include all of the following:

1) A letter from the applicant requesting the change in gender classification. The letter must include: the applicant's current full legal name, Kansas residential address, and gender classification shown on the applicant's current driver's license or identification card, as well as the name, residential address, and gender classification the applicant wants on the new driver's license or identification card. The applicant should also include the applicant's current phone number and email address, if any.
2) The applicant must also provide a letter on official letterhead from the applicant's licensed medical, osteopathic physician stating that applicant has undergone the appropriate clinical treatment for change of sex or that the physician has re-evaluated the applicant and determined that gender reclassification based on physical criteria is appropriate.
3) The applicant must provide a photocopy of the applicant's current Kansas driver's license or identification card.

If the Division approves the request, the applicant will receive a letter from Chief Driver's License Examiner authorizing the applicant's change of gender designation. After the applicant receives this authorization letter, the applicant may visit any Kansas driver's licensing exam station to update the applicant's records and get a new driver's license or identification card. The applicant must take all of the following to the exam station: the Division's authorization letter, the applicant's current driver's license/identification card, and the appropriate fee required by law to secure an original, renewal, or replacement driver's license.

Procedural Limitations on Considering Gender Classification Request

If the applicant wants to change the applicant's full legal name in the Division's record, the applicant must also include an original or certified copy of a court order of name change.

Please Note: the simple production of medical records will not suffice to justify gender reclassification. The Division requires an emphatic declaration or finding of gender classification by the applicant's attending physician - this declaration or finding need not be specifically directed to the Kansas Division of Vehicles.

Medical information provided to the DMV will be held in strictest confidence per K.S.A. 2010 Supp. 45-221(a)(1), and the Federal Driver's Privacy Protection Act, section 2721 *et seq*.

Historical Gender Classification

If the applicant has had a prior gender classification change on the applicant's driver's license or identification card, using a letter from your physician or mental health care provider, court order, or other declaration, such applicant is grandfathered and no further action is necessary to maintain the current gender classification on the Kansas driver's license or identification card.

Gender Reclassification Policy

An applicant must present one of the following documents to the driver's license office to have the gender changed on their Kansas credential:

- Lawful presence document showing correct gender
- Court order announcing a gender reclassification
- Letter from driver's licensing management authorizing the gender change.

To obtain the letter from Driver's Licensing Management, the applicant must mail a written request to:

Driver Services
PO BOX 2188
TOPEKA, KS 66601

The request must include:

1. A photo copy of the applicant's current Kansas credential.
    a. If the applicant does not have a Kansas credential, they may send in a copy of their lawful presence document instead.
2. A letter from the applicant requesting the change in gender.
   The letter must include:
    a. Full legal name
    b. Kansas residential address
    c. Gender classification currently on Kansas credential
    d. Requested new name (If applicable)
    e. New address (If applicable)
    f. Requested gender to be added on Kansas credential
    g. Phone number and email address
3. A letter from the applicant's licensed medical, osteopathic physician stating the applicant has undergone the appropriate clinical treatment for change of gender or that the physician has reevaluated the applicant and determined that gender reclassification based on physical criteria is appropriate.

All medical records provided to the Division of Vehicles will be held in strict confidence per K.S.A 2010 Supp. 45-221(a)(1) and the Federal Driver's Privacy Protection Act, section 2721 et seq.

"gender" to refer to a "gender identity" apart from one's biological sex at birth, we believe that the Legislature in K.S.A. 8-243 used "gender" in its traditional sense to mean "sex."

This conclusion is buttressed by the fact that KDOR itself has used the terms "gender" and "sex" interchangeably. In carrying out K.S.A. 8-243's gender-identification requirement, KDOR uses the word "sex" on driver's licenses,[3] indicating that KDOR has always understood "gender" in K.S.A. 8-243 to mean sex. Since the Legislature adopted SB 180 against this backdrop, we believe the Legislature would have understood its definition of "sex" in SB 180 to govern the meaning of "gender" as used in K.S.A. 8-243.

Consequently, we conclude that section 1(a) of SB 180, in conjunction with K.S.A. 8-243(a), requires KDOR to list the licensee's "biological sex, either male or female, at birth" on driver's licenses that it issues.

This raises questions about existing driver's licenses that list a gender identity different that the person's biological sex at birth. Under section (1)(c) of SB 180, "any state agency . . . that collects vital statistics . . . for the purpose of gathering accurate public health, crime, economic or other data shall identify each individual who is part of the collected data set as either male or female at birth." We believe that KDOR is subject to this provision. Although "vital statistics" is not defined in SB 180, the term is frequently used to refer to data about births,[4] and at minimum KDOR collects licensees' birth dates.[5] Thus, references to sex or gender in the "data set" maintained by KDOR must reflect a licensee's biological sex at birth.[6] A driver's license is not simply a physical card issued to a licensed driver; it is reflection of a data set that is continually maintained and updated to ensure its accuracy.[7] Updated addresses and photographs exemplify the nature of the driver's license as a data set that is maintained through time. Accordingly, if KDOR knows that the sex listed in its data set does not reflect the licensee's biological sex at birth (such as when KDOR has previously changed the sex on a person's driver's license), SB 180 requires KDOR to update its data set to reflect the licensee's sex at birth and include that sex on any licenses it issues to that individual in the future.[8]

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[3] https://www.ksrevenue.gov/dovrealid.html (providing sample images of REAL ID and non-REAL ID licenses).
[4] *See* K.S.A. 65-2401(a); *Vital Statistics*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/vital%20statistics.
[5] KDOR also collects information about licensees' sex, height, weight, and eye color, among other items.
[6] SB 180, § 1(c).
[7] K.S.A. 8-249(a)(4) (requiring KDOR to "maintain suitable records from which information showing the following may be obtained: . . . all data fields printed on drivers' license and identification cards issued by the state").
[8] In the case of a person who seeks to identify and present himself or herself as a member of the opposite sex, that person is entitled to reflect that new image in the manner the person presents