Appellate Case No. 24-127390 A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

v.

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

ADAM KELLOGG, *et. al*,
Respondent/Intervenor-Appellants.

Served on Attorney General as required by K.S.A. 75-764

Appeal from District Court of Shawnee County
Hon. Theresa L. Watson, Judge
District Court Case No. SN-2023-CV-000422

BRIEF OF INTERVENOR-APPELLANTS

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April 25, 2024 Oral Argument: 25 Minutes Requested

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INTRODUCTION

In 2023, the Kansas Legislature adopted Senate Bill ("SB") 180, now codified at K.S.A. 77-207, a state statute that defines the term "sex" for some portions of the Kansas code to mean "biological sex, either male or female, at birth." text and the circumstances surrounding the law's adoption make clear that it was intended to target transgender people, that is, individuals whose sex assigned at birth does not match the gender that they live as and know themselves to be.

The question on appeal is whether K.S.A. 77-207(a)'s definition of "sex" applies to a Kansas driver's license statute and associated policy. The district court thought so and granted the Attorney General's request for a temporary injunction requiring the state licensing agency to stop issuing driver's licenses with a gender marker that corresponds to a transgender person's gender identity, and to instead include a person's sex assigned at birth on all new and renewed driver's licenses. In this way, the district court's order will force transgender Kansans to display a driver's license with a gender marker that does not match the gender they live as, and thus disclose their transgender status to government, businesses, and other private parties in their daily lives.

The decision below is wrong and should be reversed. K.S.A. 77-207(a)'s text, structure, and history foreclose its application in the driver's license context. And if those tools of construction did not resolve the question, the canon of constitutional avoidance undoubtedly would: forcing transgender Kansans to out themselves by applying K.S.A. 77-207(a) to the driver's licensing regime raises substantial constitutional concerns under Section 1 of the Kansas Constitution's Bill of Rights, which guarantees personal

autonomy, informational privacy, and equal treatment. Moreover, each of the other equitable factors weighs decisively against the temporary injunction. To hold otherwise, the district court ignored unrebutted evidence from transgender Kansans harmed by the Attorney General's requested relief (hereinafter, "intervenors"); credited the Attorney General's unfounded speculation as to impairment of law enforcement interests; and unjustifiably excluded intervenors' medical expert.

NATURE OF THE CASE

SB 180, now codified at K.S.A. 77-207, was adopted in April 2023 over the Governor's veto, and it became effective on July 1, 2023. Shortly after the law took effect, the Kansas Attorney General brought a petition for mandamus and injunctive relief in the District Court of Shawnee County against two Kansas Department of Revenue ("KDOR") officials responsible for issuing Kansas driver's licenses. The Attorney General argued that K.S.A. 77-207(a) applied to the state driver's licensing regime. (*See* R. I, 7, 11; R. III, 256, App. 7a).[1]

The trial court entered a restraining order compelling KDOR to issue and renew licenses only with reference to an individual's sex assigned at birth, irrespective of the individual's gender identity. (R. I, 30–33). The Attorney General and KDOR agreed to extend that restraining order until resolution of the Attorney General's temporary

[1] Citations to the record ("R.") are by volume and page number. Parallel citations to the appendix ("App.") are included directly after the record cites when applicable. Although some documents included in the attached appendix are contained in record volumes designated as confidential, intervenors include in this public filing only those documents that (1) are not themselves confidential, or (2) have been redacted to remove confidential information.

injunction motion. (R. III, 256–57, App. 7a–8a). Four transgender individuals who were and will continue to be harmed by the relief requested by the Attorney General and the district court's restraining order then intervened as respondents. (R. I, 58–76, 162–71).[2]

After discovery, the district court held an evidentiary hearing on the temporary injunction motion. In so doing, it ruled that intervenors' proposed medical expert was not qualified to serve as an expert under the standards set forth in K.S.A. 60-546(b) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589–93 (1993). (R. III, 264, App. 15a; R. VII, 33–46, App. 35a-48a).

The district subsequently granted the Attorney General's motion for a temporary injunction. (R. III, 282, App. 33a). Intervenors timely appealed from that order on March 12, 2024. (R. III, 283). KDOR officials appealed as well. (R. III, 286).

Intervenors' motion in this Court to transfer the appeal to the Kansas Supreme Court remains pending. After this appeal was noticed, the Attorney General moved for summary judgment in the district court. Thereafter the intervenors filed their own cross-motion for summary judgment. Those motions are currently being briefed and largely mirror the issues in the instant appeal.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that the Attorney General is likely to prevail on his claim that K.S.A. 77-207(a) applies to driver's licenses.

2. Whether the district court erred in concluding that the Attorney General

[2] A fifth intervenor, known as "Doe 1," was voluntarily dismissed by the district court and is therefore not a party to the appeal. (R. III, 212, 250).

satisfied all other factors necessary to warrant the extraordinary remedy of a temporary injunction.

3. Whether the district court abused its discretion in excluding Beth Oller, M.D. as an expert witness addressing the treatment of gender dysphoria and the impact on transgender people of being denied documents concordant with their gender identity, where Dr. Oller is one of the few physicians in Kansas who regularly treats transgender patients and explained how her opinions were reliably derived from facts and data known to her through her experience, training, education, and study.

STATEMENT OF FACTS

1. Transgender People, Gender, and Gender Dysphoria

The term "gender identity" refers to a person's fundamental, internal sense of belonging to a particular gender. (R. VIII, 30–31, App. 118a–19a); R. IX, 228 (Offer of Proof for Beth Oller, M.D., hereinafter "OOP"), App. 77a).[3] There is a medical consensus that gender identity is immutable and cannot be voluntarily altered. (R. IX, 18–19; R. IX, 228–29, App. 77a–78a (OOP)). In contrast, a person's sex assigned at birth is almost always based solely on a health care professional's perception of an infant's external genitalia. (R. IX, 228–29, App. 77a–78a (OOP); R. VIII, 27, 29, App. 115a,

[3] Whether the district court abused its discretion in excluding Dr. Beth Oller as an expert is an issue on appeal. Accordingly, although the district court considered only her testimony as a fact witness, (*see generally* R. VII, 46, App. 48a; R. VIII, 14–43, App. 102a–131a), intervenors also rely here on Dr. Oller's declaration in opposition to the temporary injunction, (*see* R. II, 584–95, App. 90a–101a), and the offer of proof as to proposed expert testimony. (*See* R. IX, 221–39, App. 70a–88a (OOP); R. IX). Exhibits A through J attached to that offer of proof, including Dr. Oller's resume, are found in Volumes IV through VI of the record on appeal.

117a; R. II, 121).[4] For cisgender people (those who are not transgender), one's sex assigned at birth matches their gender identity. (R. IX, 18, 229, App. 78a (OOP)). For transgender people, the sex assigned at birth is inconsistent with their gender identity. (R. VIII, 30–31, App. 118a–19a; R. IX, 229, App. 78a (OOP)).

The American Medical Association and other major medical groups recognize that the marked incongruence between a person's gender identity and sex assigned at birth—when accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning—constitutes a medical condition called gender dysphoria. (R. II, 105–06; R. IX, 230–31, App. 79a–80a (OOP)). If not treated, gender dysphoria can lead to debilitating depression and even suicidal thoughts and acts. (R. IX, 232, App. 81a (OOP); R. VIII, 32–33, 38, App. 120a–21a, 126a).

The standard of care for gender dysphoria involves treatment designed to bring people's bodies and expressions of gender in line with their gender identities, depending on the particular needs of each transgender person. (R. IX, 231, App. 80a; R. II, 107–08; R. VIII, 33, 40, App. 121a, 128a). Every major medical and mental health organization supports access to age-appropriate, individualized care for transgender youth and adults. (*See* R. IX, 230–32, App. 79a–81a (OOP)). Such treatment may involve hormonal and surgical treatments, voice and communication therapy, primary care, reproductive and

[4] Sex assigned at birth may be distinct from the sex attributed to a person later in life. (R. IX, 228, App. 77a (OOP); R. II, 118–19). The latter is based on a range of components, including not only a person's external genitalia and gender identity, but also, for example, chromosomes, hormones, secondary sex characteristics, and brain structure. (R. II, 118–19, 587; R. IX, 228, App. 77a (OOP)). These different components do not always align. (R. II, 587, App. 93a; R. IX, 229, App. 78a (OOP)).

sexual health care, and mental health care. (R. IX, 231, App. 80a (OOP); *see also* R. VIII, 33–34, App. 121a–22a).

Treatment for gender dysphoria may also involve "social transition," wherein a transgender person lives their life consistently with their gender identity, including using identity documents that reflect the gender marker that aligns with that identity. (R. IX, 232, App. 81a (OOP); *see also* R. VIII, 33–35, App. 121a–24a). Changing one's name or pronouns, dressing in accordance with one's gender identity, and amending legal documents to accurately reflect one's gender identity are often the first—and sometimes the only—form of gender affirmation engaged in by transgender individuals. (*See* R. IX, 232–33, App. 81a–82a (OOP)).

The ability to change the gender marker on an identity document has significant social, legal, and safety implications for transgender people. (*See* R. IX, 232–39, App. 81a–88a (OOP); R. VIII, 35–39, App. 123a–27a; R. II, 116–17). It is significantly associated with lower reports of depression, anxiety, somatization, global psychiatric distress, and upsetting responses to gender-based mistreatment. (*See* R. IX, 233–39, App. 82a–88a (OOP); *see also* R. VIII, 35–39, App. 123a–27a). Having accurate identification documents also decreases vulnerability to harassment and violence. (*See* R. IX, 233–39, App. 82a–88a (OOP); R. II, 591–92, App. 97a–98a).

Driver's licenses are among the documents that transgender people often change to reflect their gender identity. (R. IX, 232–33, App. 81a–82a (OOP)). For good reason: the use of driver's licenses for identification is ubiquitous, and it often involves disclosure of personal or private information to a wide range of government officials,

private companies, and individuals. For example, Kansans must have and present licenses to drive or rent a car,[5] and to be employed to operate a motor vehicle.[6] They are asked to show their licenses before they are permitted to vote or enter a federal courthouse (even to serve on a jury).[7] Kansan parents are asked for a license or other photo ID to enroll their child in public school or to volunteer with their child's school.[8] And licenses are required to obtain bank accounts, submit concealed carry firearm applications, and receive notarization services, among other day-to-day interactions.[9]

2. Kansas's Licensing Regime

In Kansas, the driver's licensing process is governed by K.S.A. Chapter 8, article 2, which delegates to KDOR the responsibility for issuing and updating licenses. K.S.A. 8-201 *et seq*. KDOR must "file every application for a driver's license [it] receive[s]" and maintain records from which "all data fields printed on drivers' licenses" may be obtained. K.S.A. 8-249. By statute, a license application must include—and a Kansas

[5] K.S.A. 8-244, 8-266.

[6] K.S.A. 8-265.

[7] K.S.A. 25-2908; *Jury FAQs*, U.S. Dist. Ct. Dist. of Kan., https://ksd.uscourts.gov/jury-info/faq (last visited Apr. 21, 2024).

[8] *See, e.g.*, *Required Documents*, Kan. City Pub. Schs., https://www.kcpublicschools.org/enroll/required-documents (last visited Apr. 21, 2024); *Identity Verification*, Secure Volunteer: Topeka Pub. Schs., https://securevolunteer. com/TOPEKA-PUBLIC-SCHOOLS/Identity-Verification (last visited Apr. 21, 2024).

[9] *See, e.g.*, *Open an Account*, KS State Bank, https://www.ksstate.bank/resources/open-an-account (last visited Apr. 21, 2024); *Frequently Asked Questions*, First Kan. Bank, https://www.firstkansasbank.com/frequently-asked-questions/ (last visited Apr. 21, 2024); Kansas Application for Concealed Carry Handgun License and Qualifying Information, Office of Att'y Gen. Kris W. Kobach, https://ag.ks.gov/docs/default-source/forms/concealed-carry-application.pdf?sfvrsn=51291fdd_40 (last visited Apr. 21, 2024); K.S.A. 53-5a07.

license "shall bear"—the "full legal name, date of birth, gender and address of [the licensee's] principal residence," among other information. K.S.A. 8-240(c); 8-243(a).

The inclusion of a person's "gender" in the Kansas licensing regime dates to 2007, when the Kansas Legislature amended then-existing law that required KDOR to collect a license applicant's "sex." K.S.A. 8-240(c) (2007 Supp.); 8.243(a) (2007 Supp.). The 2007 amendment, known as Senate Bill 9 ("SB 9"), was a response to the federal REAL ID Act of 2005, which set minimum federal standards for the issuance of driver's licenses and barred federal agencies from accepting noncompliant licenses for certain purposes. Pub. L. 109–13, 119 Stat. 311 (codified at 49 U.S.C. § 30301 note). The REAL ID Act, like SB 9, requires inclusion of a "person's gender" on each driver's license. *Id.* § 202(b).

In 2011, after SB 9's adoption, KDOR adopted a policy for reviewing and approving requests from transgender individuals to update gender markers on their driver's licenses. (R. II, 213–14). That policy was in place until this litigation, albeit with some changes in 2019. (*See* R. II, 213–14; R. II, 224, App. 56a; *see also* R. VII, 95).

Under KDOR's policy, a transgender person seeking to change their gender marker must apply to the agency with supporting information. (R. II, 209–10). KDOR relies on documentation from a physician stating that an updated gender marker is appropriate. (R. II, 209–10; R. II, 224, App. 56a; R. II, 244–45). It also accepts U.S. passports, court orders, in- and out-of-state birth certificates, immigration documents, and other government documents as proof of gender. (R. I, 38; *see also* R. II, 213–14). The federal government and many states allow transgender people to obtain passports

and numerous other identification documents reflecting their gender identity.[10]

Between 2011 and 2023, more than 550 Kansans relied on KDOR's policy to change the gender markers on their licenses. (R. VII, 112).

3. SB 180's Adoption and the Attorney General's Opinion

Against the backdrop of KDOR's existing gender marker policy, the Kansas Legislature adopted SB 180, L. 2023, ch. 84, which provides in relevant part:

> (a) 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:
>
> (1) An individual's "sex" means such individual's biological sex, either male or female, at birth;
>
> (2) a "female" is an individual whose biological reproductive system is developed to produce ova, and a "male" is an individual whose biological reproductive system is developed to fertilize the ova of a female[.]

K.S.A. 77-207(a).[11] The law is now codified at K.S.A. 77-207 within a chapter

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[10] *See, e.g.*, (R. II, 273 (compilation of state driver's license policies on gender-marker changes)); 8 Foreign Affairs Manual 403.3 Gender Designation (Apr. 5, 2023), https://fam.state.gov/FAM/08FAM/08FAM040303.html#M40331; *USCIS Updates Policy Guidance on Self-Selecting a Gender Marker on Forms and Documents*, USCIS (Mar. 31, 2023), https://www.uscis.gov/newsroom/alerts/uscis-updates-policy-guidance-on-self-selecting-a-gender-marker-on-forms-and-documents; Abigail Zapote, *Social Security Implements Self-Attestation of Sex Marker in Social Security Number Records*, Social Security Matters (Oct. 20, 2022), https://blog.ssa.gov/social-security-implements-self-attestation-of-sex-marker-in-social-security-number-records; *VA health records now display gender identity*, VA News (Jan. 12, 2022), https://news.va.gov/press-room/va-health-records-now-display-gender-identity.

[11] Another statutory provision—K.S.A. 77-207(c)—requires any state agency "that collects vital statistics for the purpose of complying with anti-discrimination laws or for the purpose of gathering accurate public health, crime, economic or other data" to "identify each individual who is part of the collected data set as either male or female at birth." To the extent this subsection applies to KDOR, the agency has confirmed that its driver's licensing database complies with this command. (R. I, 43). Accordingly, this provision is not at issue on appeal.

addressing statutory construction.

K.S.A. 77-207 offers no scientific support underpinning its proffered definitions, no enforcement mechanism, and no guidance addressing any Kansas agency's existing statutory responsibilities. Nothing in K.S.A. 77-207 refers to driver's licenses, KDOR, or the term "gender" as used in the driver's license statute, *see* K.S.A. 8-240(c); 8-243(a), or elsewhere in the Kansas code.

After K.S.A. 77-207's adoption, the Attorney General released an opinion asserting that K.S.A. 77-207(a) applied to KDOR and driver's licenses. (R. I, 27). That opinion stated that KDOR's existing policy for gender-marker changes was impermissible and that the agency must instead list a "licensee's 'biological sex, either male or female, at birth' on driver's licenses that it issues." (R. I, 27). KDOR disagreed with the Attorney General's opinion and, at the Governor's direction, refused to change its gender-marker policy. (R. III, 256, App. 7a).

4. This Litigation and the Intervenors

The Attorney General brought a petition for mandamus and injunctive relief in the District Court of Shawnee County against KDOR officials involved in the licensing process. The Attorney General sought: (1) to bar KDOR from issuing driver's licenses or other documents that show a gender marker reflecting a transgender Kansans' gender identity, and (2) to require KDOR—upon the renewal of licenses previously updated to reflect a transgender driver's gender identity—to instead display the person's sex assigned at birth. (R. I, 7, 11; R. III, 253, 256, App. 4a, 7a).

Four transgender individuals who were and will continue to be harmed by the

Attorney General's proposed relief intervened as respondents. (R. I, 58–60, 163–70). Three had previously updated their gender markers under KDOR's policy, and they face—upon renewal of their Kansas licenses—having the gender marker on those documents changed back to the sex they were assigned at birth. (R. VII, 222–23, 230, 258–59, 262–63, 276–77; R. VIII, 340, 356–57). One of these intervenors' licenses will expire, and thus needs to be renewed, in June 2024. (R. VII, 231; R. II, 318–19, App. 58a–59a). In addition, one intervenor who has not yet changed the gender marker on his license to reflect his gender identity is now unable to change that marker prospectively because of the district court's injunction. (R. VIII, 89–90).

5. The Evidentiary Hearing

Following discovery, the district court held a two-day evidentiary hearing. Intervenors testified to the harms that the Attorney General's requested relief would cause and the harm they had already experienced when forced to disclose their transgender status using licenses that had not reflected their gender identities. Intervenors also presented Dr. Beth Oller, a board-certified family physician, who testified as a fact witness after being excluded from testifying as an expert. Dr. Oller has treated roughly 100 transgender patients and is one of only a few physicians in Kansas who provide gender-affirming care. (R. VIII, 24, 26, App. 112a, 114a). In her testimony admitted by the district court, Dr. Oller described the consequences to her patients of having driver's licenses that do not match their gender, including a "worsening of anxiety, worsening of depression," "social isolation[,] and increased sense of vigilance." (R. VIII, 36, App. 124 (stating that "long term stress" risks "negative physical consequences")).

However, in an oral ruling before Dr. Oller testified at the evidentiary hearing, the district court barred Dr. Oller from offering any testimony as an expert witness. (R. VII, 46, App. 48a). The ruling was seemingly based on the court's belief that Dr. Oller's testimony was not the result of reliable principles and methods applied to facts and data. (R. VII, 36–46, App. 38a–48a).

In connection with the evidentiary hearing, intervenors submitted, and the court agreed to receive with no objection from opposing counsel, (R. VII, 46–49, App. 48a-51a; R. VIII, 43, App. 131a), a 19-page written offer of proof plus exhibits regarding Dr. Oller's proposed expert testimony. (R. IX, 221–40, App. 70a–89a (OOP)). That testimony would have addressed the nature and standard of care for gender dysphoria, along with accepted medical understandings of sex, gender, gender identity, "biological sex," sex assigned at birth, and other terms central to interpreting K.S.A. 77-207. (*See* R. IX, 221–39, App. 70a–88a (OOP)). In addition, Dr. Oller would have testified that presentation of a driver's license that does not comport with an individual's gender identity has resulted in denials of service, harassment, and attacks on transgender individuals and can impact transgender people's levels of psychological distress, suicidal ideation, and physical health. (R. IX, 234–38, App. 83a–87a (OOP)).

The Court also heard the evidence from the parties addressing the Attorney General's asserted law enforcement interest in applying K.S.A. 77-207 to licenses. (*See* R. VII, 165–71).

6. The Temporary Injunction Order

On March 11, 2024, the district court entered a temporary injunction. It held that K.S.A. 77-207 unambiguously requires "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." (R. III, 270–71, App. 21a–22a). Despite the text and history of K.S.A. 77-207 and the state driver's license statutes on which intervenors and KDOR had relied, the court concluded that K.S.A. 77-207 applies to all state laws and policies, without any discussion of the limiting language in K.S.A. 77-207 that says it applies only "with respect to the application of an individual's biological sex." K.S.A. 77-207. (R. III, 254, 270, App. 5a, 21a).

The district court also held that even if K.S.A. 77-207 were ambiguous, the interpretive canon of constitutional avoidance would not apply because the Attorney General's interpretation of the statute does not violate the Kansas Constitution. (R. III, 273, App. 24a). Specifically, the court refused to recognize any right to informational privacy covered by Section 1 of the Kansas Bill of Rights. (R. III, 276, App. 27a). It also concluded that K.S.A. 77-207 "does not create a classification" for purposes of applying Section 1's right to equal protection. (R. III, 277, App. 28a). And the court rejected the argument that interpreting K.S.A. 77-207 to apply to driver's licenses would burden transgender people's right to personal autonomy. In this respect, the court narrowly read *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019), as rendering non-cognizable those harms to which intervenors testified—including that the "produc[tion of] a driver's license indicating a sex different than their expressed gender"

caused them embarrassment, humiliation, and feelings of being unsafe. (R. III, 275, 281, App. 26a, 32a; *see, e.g.*, R. VIII, 62–71). The court instead suggested that K.S.A. 77-207 would have to have already resulted in intervenors experiencing "physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement" to even plausibly burden Kansans' rights under Section 1's guarantee of personal autonomy. (R. III, 275, App. 26a).

The district court found that the Attorney General had also satisfied the other factors for a preliminary injunction. It concluded there was a "reasonable probability of irreparable injury to law enforcement" in the absence of an injunction "because driver's licenses are routinely used to identify suspects" and other individuals, and it cited a sheriff's testimony as to one instance of confusion over an arrestee's sex. (R. III, 279, App. 30a). It held irrelevant the fact that "there are other ways to identify a person without reference to biological sex at birth." (R. III, 279, App. 30a).

In its assessment of the equities and the public interest, the district court again rejected as legally insufficient evidence as to the harms that intervenors had already faced when forced to disclose information about their transgender status. (*But see* R. III, 281, App. 32a (crediting that disclosure caused intervenors embarrassment and humiliation and made them feel unsafe)). And while the court acknowledged that Doe 2—a transgender child represented by his parent—is presently unable to change the gender marker on his license to conform with his gender identity, it ignored the fact that another intervenor's license will expire in June 2024, almost certainly while this appeal is pending, and that many other transgender Kansans will be injured in the same way. (R.

III, 281, App. 32a). The district court also did not weigh Dr. Oller's fact testimony about the harm to her patients of having a license that reflects a sex at birth that does not match the gender they live as. (*See* R. III, 263–65, App. 14a–16a).

ARGUMENTS AND AUTHORITIES

Issue I: The district court erred in holding that the Attorney General has any chance, much less a likelihood, of prevailing on his claim that K.S.A. 77-207 applies to driver's licenses.

Standard of Review: A temporary injunction must be denied if the moving party cannot show a "substantial likelihood of success on the merits." *Steffes v. City of Lawrence,* 284 Kan. 380, 395, 160 P.3d 843, 854 (2007). This Court reviews de novo the district court's legal conclusions at the temporary injunction stage. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 192, 273 P.3d 709, 713 (2012).

Preservation: Intervenors argued below that the Attorney General cannot prevail on his claim because K.S.A. 77-207's clear text forecloses it, (*see* R. III, 28–32; R. VII, 84–85; R. VIII, 148–52), and because if K.S.A. 77-207 were ambiguous, statutory construction tools, including the canon of constitutional avoidance, would preclude the Attorney General's interpretation, (*see* R. III, 34–35; R. VII, 85–91; R. VIII, 152–66).

Argument

A. K.S.A. 77-207's plain text forecloses the statute's application to driver's licenses.

It is a "fundamental rule" that a statute's text is the best indicator of legislative intent and such intent "governs if [it] can be ascertained." *Haddock v. State*, 295 Kan. 738, 754, 286 P.3d 837, 848 (2012) (quotations and citations omitted). If a "statute's

language is plain and unambiguous" in requiring or prohibiting a specific construction of the law, that is the end of the inquiry. *Id.*

For at least two reasons, K.S.A. 77-207's clear text bars the Attorney General's reading of the statute to apply to KDOR's driver's licensing regime.

First, K.S.A. 77-207 supplies a definition for "sex," not "gender." In contrast, the driver's license statute and KDOR policy address the collection of information about "gender"; indeed, the driver's license statute was amended in 2007 to *remove* the term "sex." *Compare* K.S.A. 77-207 (defining "sex" to mean "biological sex . . . at birth"), *with* K.S.A. 8-240(c), 8-243(a) (requiring that license applications include, and licenses bear, a driver's "gender"). Given this distinction, reading K.S.A. 77-207's definition of "sex" to refer to "gender" is not only at odds with K.S.A. 77-207's clear language, but it would also effect an implied repeal of the Legislature's 2007 amendments to K.S.A. 8-243(a), which intentionally replaced "sex" with "gender" in the licensing regime, *see supra* page 8. Such repeals by implication are heavily disfavored. *In re Joint Application of Westar Energy, Inc.*, 311 Kan. 320, 329, 460 P.3d 821, 826 (2020).

Second, even putting aside the fact that the driver's license statute and KDOR policy refer to an applicant's "gender" rather than "sex," K.S.A. 77-207 does not state that all references to "sex" under Kansas statutes, rules, or regulations are governed by its particular definition of "sex." Instead, it provides that its definition of sex only applies to parts of the code involving "the application of an individual's biological sex," and neither the driver's license statute nor KDOR's policy refers to "biological sex." *See* K.S.A. 8-240(c), 8-243(a); (R. II, 220–24, App. 52a–56a). Because courts must try to

give "[m]eaning to every word in the statute," the Attorney General's interpretation of K.S.A. 77-207 is foreclosed. *State v. Just.-Puett*, 57 Kan. App. 2d 227, 233, 450 P.3d 368, 373 (2019).

The district court's temporary injunction order addressed only the first of these two plain-text bars to the Attorney General's interpretation, ignoring entirely intervenors' argument regarding the second such bar, that is, the impact of the term "application of an individual's biological sex" on K.S.A. 77-207(a)'s scope. (*Compare* R. III, 254, 270, App. 5a, 21a, *with* R. II, 547–48, R. III, 28–30). That error alone is sufficient to warrant reversal.

Moreover, even as to the "sex"/"gender" distinction the district court *did* address, its legal rationale was flawed. The district court treated the fact that the driver's license statute was amended in 2007 to replace "sex" with "gender" as irrelevant to whether K.S.A. 77-207's definition of "sex" applies to driver's licenses. In the court's view, nothing in the 2007 amendment to the license statute suggests that the change in language was "anything other than an effort to true up existing statutory language with the REAL ID Act while making more substantive changes elsewhere." (R. III, 272, App. 23a).

That rationale should be rejected. "When a statute is amended for reasons other than clarifying an ambiguity, courts ordinarily presume that by changing the language of a statute the legislature intended to change its effect[.]" *Matter of Est. of Taylor*, 312 Kan. 678, 687, 479 P.3d 476, 481 (2021) (internal quotation omitted). That presumption applies here, irrespective of whether the change in statutory language was intended to more closely mirror the REAL ID Act, which requires that licenses bear an individual's

"gender," not a person's "sex." *See supra* page 8.

Had the Legislature intended that K.S.A. 77-207 be given the meaning adopted by the district court, it could have defined "sex" in K.S.A. 77-207(a) to be coextensive with "gender." *Cf.* K.S.A. 77-201 (providing that the terms "highway" and "road" "may be construed to be equivalent to" other terms). The Legislature likewise could have made clear that K.S.A. 77-207(a)'s definition of "sex" applies to both "sex and gender." *Cf.* K.S.A. 77-201 (providing that singular words "may be extended to several persons or things" and "'[p]erson' may be extended to bodies politic and corporate" entities). Yet the Legislature did not do any of that, and Kansas courts must "not read [a] statute to add something not readily found within it." *In re K.M.H.*, 285 Kan. 53, 54, 169 P.3d 1025, 1028 (2007). That the district court did so here was erroneous.

In addition, the district court's decision to equate "sex" as used in K.S.A. 77-207 with "gender" as used in the driver's license statutes ignores existing law at the time of K.S.A. 77-207's adoption. When K.S.A. 77-207 was enacted, KDOR had long been issuing licenses with gender markers that reflected transgender individuals' gender identity, rather than their sex assigned at birth. It must be presumed the Legislature "act[ed] with full knowledge of" existing law, including KDOR's gender-marker policy, *State v. Dooley*, 308 Kan. 641, 656, 423 P.3d 469, 479 (2018), and that—had the Legislature intended to change KDOR's practice—it would have drafted K.S.A. 77-207 to make that clear. *See State ex rel. Stephan v. Bd. of Cnty. Comm'rs of Seward Cnty.*, 254 Kan. 446, 448, 866 P.2d 1024, 1026 (1994) ("It is presumed the legislature understood the meaning of the words it used and intended to use them.").

The district court also erred in relying on the fact that in Kansas "the face of the driver's license indicates 'sex,' not 'gender,'" and "the information recorded under 'sex' on the driver's license is likewise recorded in the KDOR database under the heading 'gender.'" (R. III, 271, App. 22a). While the district court was correct that licenses issued by KDOR are printed with the word "sex" labeling the gender field, that fact is legally irrelevant. Despite the label "sex" on the physical licenses, the Kansas driver's license statute does not use the term "sex" in describing information that must appear on licenses; the driver's license data field label is not a "state law, rule or regulation," as that term is used in K.S.A. 77-207(a); and neither the license statute nor the data field refers to the "application of an individual's biological sex," as required for K.S.A. 77-207(a) to apply.

B. K.S.A. 77-207's history and the circumstances of its adoption confirm that the statute does not apply to driver's licenses.

The legislative history and circumstances surrounding K.S.A. 77-207's adoption likewise confirm that the new law does not apply to the driver's license statute or to KDOR's gender reclassification policies. *See O'Brien v. Leegin Creative Leather Prods.*, 294 Kan. 318, 331, 277 P.3d 1062, 1073 (2012) (permitting consideration of the legislative record and other background considerations if language is unclear). The court below did not acknowledge, much less engage with, three key aspects of this history. (*See generally* R. III, 253–82, App. 4a–33a).

First, during debate over SB 180, not a single lawmaker who voted for the bill stated that it would impact driver's licenses or require transgender Kansans to carry a license with a gender marker that discloses the sex they were assigned at birth. (R. II,

532–33). And Independent Women's Voice, the original proponent of the bill and a major voice in favor of its passage, prepared talking points indicating that "SB 180 does not require Kansans to change their driver's licenses or prevent Kansas from validating gender identity on their license." (R. II, 299; *see also* R. II, 297 (stating that "SB 180 ONLY defines 'sex'" and that "'gender' is not a synonym for sex'")). Those talking points, which were later sent to the Attorney General's office as a "helpful" resource for people "who defend SB180 on TV," (R. II, 296), expressly disavowed the interpretation of K.S.A. 77-207 that the Attorney General advanced and the district court adopted.

Second, in adopting K.S.A. 77-207, the Legislature substantially narrowed language proposed in national model legislation for the "Women's Bill of Rights." That national template encouraged states to provide broadly that "[f]or purposes of state/federal law, a person's 'sex' is defined as his or her biological sex (either male or female) at birth." Women's Bill of Rights Model Legislation, Indep. Women's Voice & Indep. Women's L. Ctr., https://womensbillofrights.com/ (last visited Apr. 20, 2024); *see* (R. II, 296–99). Tennessee's version of the law, for example, provides that "*[a]s used in this code*, unless the context otherwise requires, 'sex' means a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person's biological sex." H. 239, 113th Sess. (Tenn. 2023) (emphasis added). Montana likewise passed a bill similar to this national legislative template by defining "sex" for purposes of the entire state code, *and* explicitly amending multiple sections of the state code, including the statute governing driver's license applications, to incorporate the new definition. *See* S. 458, 68th Sess. §§ 1, 40 (Mont. 2023).

Had the Legislature intended K.S.A. 77-207's definition of "sex" to apply to all state laws that reference "sex" or "gender," the drafters could have used the model language verbatim. Like Tennessee, they could have specified that the definition applied across the code. Or like Montana, they could have expressly identified the driver's license statute as one to which the K.S.A. 77-207's definition of "sex" applied. Instead, the Kansas Legislature adopted *narrower* language than that proposed in national template so that K.S.A. 77-207 applies only "with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations," K.R.S. 77-207, and said nary a word about driver's licenses.

Third, the same Legislature that adopted K.S.A. 77-207 also adopted SB 228, a law regarding the housing of incarcerated individuals in county jails based on their sex. SB 228 adopted a section-specific definition of "sex." *See* S.B. 228 (Kan. 2023) ("*As used in this section*, 'sex' means an individual's biological sex, either male or female, at birth." (emphasis added)). This contrast between K.S.A. 77-207 and SB 228, adopted at nearly the same time, offers yet another reason to conclude that K.S.A. 77-207 does not apply to all provisions of the code referring to "sex," and in particular does not apply to the driver's license statute and KDOR policies on "gender." As evidenced by SB 228, the Legislature clearly knew how to make its definition of sex applicable to the driver's license statute specifically, yet it did not do so. *Cf. State v. Mishmash*, 295 Kan. 1140, 1143–44, 290 P.3d 243, 246 (2012) (interpreting drug law to lack a limitation where a different section of the same statutory scheme contained that limitation expressly).

C. The canon of constitutional avoidance forecloses application of K.S.A. 77-207 to the Kansas driver's licensing regime.

Even if K.S.A. 77-207 could plausibly be interpreted to apply to the driver's licensing regime based on its text, structure, and history, *but see supra* Part I.A–B, it would at minimum be ambiguous and warrant application of the canon of constitutional avoidance. That tool of construction forecloses the district court's ruling because applying K.S.A. 77-207 to driver's licenses would raise serious doubts as to the law's constitutionality. Section 1 of the Kansas Bill of Rights provides that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rights § 1. Applying K.S.A. to the licensing regime would at minimum burden Kansans' constitutional rights to personal autonomy, informational privacy, and equal treatment, all of which are protected by Section 1.

The gravity of these constitutional doubts is confirmed by decisions around the country holding that policies barring transgender people from obtaining identity documents matching their gender identity cannot withstand constitutional review. *See Corbitt v. Taylor*, 513 F. Supp. 3d 1309 (M.D. Ala. 2021), appeal docketed, No. 21-10486 (11th Cir. Feb. 12, 2021) (driver's licenses); *Ray v. McCloud*, 507 F. Supp. 3d 925 (S.D. Ohio 2020) (birth certificates); *Arroyo Gonzalez v. Rossello Nevares,* 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (driver's licenses); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142 (D. Idaho 2018) (birth certificates).

1. The district court misunderstood how the constitutional-avoidance canon operates.

The canon of constitutional avoidance is a tool that courts use "'for choosing

between competing plausible interpretations of a statutory text.'" *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 368, 361 P.3d 504, 512 (2015) (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005)). Under this canon, where one plausible reading of a statute is constitutional, and the other would raise "serious constitutional doubts," a court avoids the interpretation that could potentially render the law invalid. *Clark*, 543 U.S. at 381; *see also, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (applying canon based on "serious doubt" as to the constitutionality of an indefinite detention statute); *Anderson Living Tr. v. Energen Res. Corp.*, 886 F.3d 826, 841 n.20 (10th Cir. 2018) (applying canon where one interpretation of statute "might well impair [a party's] existing contracts . . . in violation of the Contracts Clause").

The district court misapprehended how the canon of constitutional avoidance works. Instead of focusing on whether the Attorney General's interpretation raises *serious doubts* about K.S.A. 77-207's constitutionality, the court resolved whether the Attorney General's interpretation would *actually* violate the Kansas Constitution based on the facts as it perceived them in this case. (*E.g.*, R. III, 273–78, App. 24a–29a (rejecting the existence of an informational privacy right); R. III, 277, App. 28a (holding that "[s]imilarly situated people are not treated differently under the statute, thus there is no equal protection violation")). Similarly, instead of considering the constitutional concerns that K.S.A. 77-207 poses for transgender people throughout the state, the district court asked whether intervenors' "testimony at the hearing" was sufficient to demonstrate a violation of their right to personal autonomy. (R. III, 275, App. 26a).

The district court's analysis turns the constitutional-avoidance canon on its head. A party urging the canon's application need not prove that a particular interpretation of the statute would violate or has already violated their constitutional rights. *See Clark*, 543 U.S. at 382. Otherwise, it would "[r]ender every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* And the canon of constitutional avoidance is intended to help courts avoid unnecessary constitutional questions, not—as the district court mistakenly assumed—to serve as "a method of adjudicating constitutional questions." *Id.* at 381.

2. Applying K.S.A. 77-207 to licenses would, at minimum, burden Kansans' constitutional right to personal autonomy.

As the Kansas Supreme Court has recognized, Section 1 of the Kansas Bill of Rights encompasses a "right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." *Hodes*, 309 Kan. at 646. This constitutional right to personal autonomy is implicated in this case because it is not possible to tell whether someone is transgender by looking at them, and carrying a license with a gender marker that does not match one's physical appearance is likely to disclose a person's transgender status. As the unrebutted hearing testimony shows, and as Dr. Oller's proposed expert testimony confirms, the forcible outing of transgender people causes serious psychological harm and puts them at further risk of

harassment, discrimination, and even violence from others. (R. VIII, 32–42, App. 120a–30a; R. IX, 232–39, App. 81a–88a (OOP)).[12]

The district court dismissed any burden on personal autonomy created by the application of K.S.A. 77-207 to driver's licenses, stating without record citation that intervenors' production of "a driver's license indicating a sex different than their expressed gender did not result in physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement." (R. III, 275, 281, App. 26a, 32a). This rationale, which the district court tried to reconcile with the Kansas Supreme Court's *Hodes* decision, 309 Kan. 610, is misguided for several reasons.

First, it is legally irrelevant to whether the canon of constitutional avoidance applies here. As explained above, intervenors need not show that K.S.A. 77-207 would actually violate their right to personal autonomy, much less thn.at it has already done so in the specific ways demanded by the district court. *See supra* Part I.C.1. It is enough that K.S.A. 77-207's application to licenses would raise serious doubts about its constitutionality given Kansans' right to personal autonomy. *See id.* And here, intervenors' unrebutted evidence more than raises those serious doubts by showing that transgender people face increased rates of discrimination, harassment and violence as

[12] *See, e.g.*, (R. II, 312–14 (being asked embarrassing questions about their genitalia when filling a prescription at the pharmacy and seeking healthcare); R. II, 351–67; R. VIII, 62–71 (fearing for their safety while traveling); R. II, 343, App. 65a; R. VIII, 61–62 (changing behavior to avoid situations where they might have to present an ID that discloses their transgender status, such as by not going out with friends and avoiding leaving their city)).

compared to people who are not transgender. (*See, e.g.*, R. II, 42–57, 126, 138–39, 593, 616–30, 632–55, 657–65, 667–88, 718–26; R. IX, 236, App. 85a (OOP); *supra* n.12). Requiring transgender people to show a license that reveals their transgender status puts them at increased risk of experiencing precisely this kind of mistreatment. (*See also, e.g.*, R. II, 312–14; R. II, 351–67; R. VIII, 62–71; R. II, 343, App. 65a; R. VIII, 61–62).

Second, nothing in *Hodes* suggests that the harms enumerated by the district court in this case are the *only* cognizable harms vis-à-vis Kansas's protection for personal autonomy. In fact, *Hodes* recognized that the right of personal autonomy "includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination." *Hodes*, 309 Kan. at 646. Applying K.S.A. 77-207 to compel transgender Kansans to carry a driver's license that contradicts their gender identity and involuntarily discloses that they are transgender would violate their right to personal autonomy because it burdens their "right to make self-defining and self-governing decisions." *Id.* The district court's rationale to the contrary cannot be squared with *Hodes*.

Third, the district court was simply wrong that intervenors' evidence did not demonstrate the specific harms that the court identified as constitutionally significant for purposes of personal autonomy. Unrebutted testimony showed that intervenors—after being outed by displaying earlier licenses with the wrong gender marker—have already experienced harassment, (R. II, 323–24), and negative interactions with law enforcement, (R. II, 311–12; R. VII, 238–41; R. VIII, 68–71).

3. Applying K.S.A. 77-207 to licenses would, at minimum, burden Kansans' constitutional right to informational privacy.

The application of K.S.A. 77-207 to the driver's licensing regime would also pose serious constitutional concerns under Section 1's protection for Kansans' privacy.

Consistent with many federal courts,[13] the Kansas Supreme Court has recognized a federal right of informational privacy. *See Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 919–22, 128 P.3d 364, 376–378 (2006); *Tiller v. Corrigan*, 286 Kan. 30, 47–48, 182 P.3d 719, 729 (2008). This right is also likely to be protected by the Kansas Constitution, given that Kansas courts "customarily interpret" the state's provisions, at minimum, to "echo federal standards." *Alpha Med. Clinic,* 280 Kan. at 920; *see Hodes*, 309 Kan. at 621–22, recognizing the Kansas Constitution may sweep more broadly than federal law).

And other states, too, have recognized that a right to informational privacy is one of the most basic reserved to the people in their constitutions. *See, e.g.*, *Jegley v. Picado*, 80 S.W.3d 332, 347–50 (Ark. 2002) (holding that "a fundamental right to privacy is implicit in the Arkansas Constitution," flowing from the state's inalienable rights of "life and liberty" and "pursuing . . . happiness"); *Powell v. State*, 510 S.E.2d 18, 21 (Ga. 1998) (holding Georgia has an implied right to privacy stemming from the state constitution's provision declaring "no person shall be deprived of liberty except by due process of

[13] *See, e.g.*, *Moore v. Kobach*, 359 F. Supp. 3d 1029, 1049–51 (D. Kan. 2019); *Stewart v. City of Oklahoma City*, 47 F.4th 1125, 1137 (10th Cir. 2022); *Lee v. City of Columbus*, 636 F.3d 245, 259 (6th Cir. 2011); *A.C. ex rel. Park v. Cortez*, 34 F.4th 783, 787 (9th Cir. 2022); *Chasensky v. Walker*, 740 F.3d 1088, 1095–96 (7th Cir. 2014).

law"); *Commonwealth v. Wasson*, 842 S.W.2d 487, 494–95 (Ky. 1992) (confirming prior interpretation of "the Kentucky Bill of Rights as defining a right of privacy, even though the constitution did not say so in that terminology").

A right to informational privacy is also echoed, for example, in tort law that has long imposed liability for the unlawful "disclosure of private information." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). At common law, and in Kansas for over a century, the tort of invasion of privacy has protected Kansans from intrusion upon their "private affairs or concerns" and from publicity of "matters concerning [their] private" lives. *Dotson v. McLaughlin*, 216 Kan. 201, 207–08, 531 P.2d 1, 5–6 (1975).

This right to informational privacy applies in particular to information that is sexual, medical, or about mental health. *See, e.g.*, *United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013); *United States v. Brice*, 649 F.3d 793, 796 (D.C. Cir. 2011); *Livsey v. Salt Lake Cnty.*, 275 F.3d 952, 956 (10th Cir. 2001). And "much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, there are few areas which more closely intimate facts of a personal nature than one's transgender status." *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (citation omitted).

Consistent with this right to informational privacy, applying K.S.A. 77-207 to driver's licenses would pose serious constitutional concerns for at least two reasons.

First, interpreting K.S.A. 77-207 in this way would force transgender Kansans to routinely disclose this "private, sensitive personal information" about their transgender status whenever they present a license for identification. *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN–11–05431 CI, 2012 WL 2685183, at *6 (Alaska Super.

Ct. Mar. 12, 2012), App. 139a. It would require them to do so in a broad range of circumstances involving not just government entities, like schools and law enforcement, but also private parties, such as employers and businesses. *Id.*; *supra* pages 6–7.

This forced disclosure of sensitive, personal information is, by itself, a constitutionally cognizable harm. *See Alpha Med. Clinic*, 280 Kan. at 918–23 (federal constitutional right to privacy protects the privacy of certain personal information). And it can have devastating consequences for transgender people: where disclosure of this highly intimate information falls "into the hands of persons harboring . . . negative feelings" toward transgender people, denial of a license with an accurate gender marker "[c]reates a very real threat" to transgender individuals' "personal security and bodily integrity," *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (D. Mich. 2015) (internal quotation omitted), exposing them "[t]o a substantial risk of stigma, discrimination, intimidation, violence, and danger," *Arroyo Gonzalez,* 305 F. Supp. at 333.

The record in this case is replete with examples of such harm to intervenors and transgender Kansans more generally. (*See, e.g.*, R. II, 312–14, 362–68; R. VIII, 32–42, App. 120a–130a; *see also* R. IX, 228–39, App. 77a–88a (OOP)).

Second, forced disclosure of transgender status imposes an additional and unjustified burden on the right to informational privacy by potentially requiring KDOR to ask invasive and deeply personal questions about genitalia at birth and reproductive capacity. *Cf. NASA v. Nelson*, 562 U.S. 134 (2011) (employment background investigation form questionnaires may violate a constitutional right to informational privacy); *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983) (questioning

job applicants on their sexual activities violated constitutional right to privacy).

For example, KDOR policy permits acceptance of out-of-state licenses, birth certificates, U.S. passports, and other documentation as evidence of identity and gender for a license application. *See supra* page 8. Many transgender people, including some of the intervenors, have updated those documents to reflect the gender they live as. (*E.g.*, R. II, 318–19, 337–38, App. 58a–59a, 61a–62a). Where those documents do not show that someone is transgender, applying K.S.A. 77-207(a) to driver's licenses would invite state employees to ask invasive questions about genitalia at birth and reproductive capacity to all applicants. (*Cf.* R. II, 435 (Attorney General refusing to explain how KDOR's staff could determine what sex a person was assigned at birth)).

The district court did not engage with *any* of these arguments, instead holding in three sentences that because "Kansas courts have not" expressly recognized a right to informational privacy, the district court would not either. (R. III, 276, App. 27a). That rationale should be rejected. The district court ignored the Kansas Supreme Court's repeated recognition that federal constitutional standards generally supply a floor for interpreting the Kansas Constitution, and that the Kansas Supreme Court has recognized a federal right of informational privacy. *See Alpha Med. Clinic*, 280 Kan. at 919–22; *Tiller*, 286 Kan. at 47–48. In addition, intervenors had no obligation to prove that K.S.A. 77-207 as applied to licenses *actually* violates Kansans' right to informational privacy, though they believe it does. Instead, the question is whether the application of the statute to driver's licenses raises serious constitutional doubts about the statute's validity in light of that right. *See Clark*, 543 U.S. at 381. As demonstrated above, it undoubtedly does.

4. Applying K.S.A. 77-207 to licenses would, at minimum, burden Kansans' constitutional right to equal treatment.

When resolving equal-protection claims, Kansas courts look to the nature of a challenged law's classification. As the Kansas Supreme Court explained in *State v. Limon*, although some classifications are apparent from the face of a law, classifications may also exist by virtue of a law's operation. 280 Kan. 275, 284–86, 122 P.3d 22, 28–29 (2005) (holding that a law lacking a "per se classification of homosexuals, bisexuals, or heterosexuals" nevertheless imposed a "discriminatory classification" where it placed greater burdens on conduct engaged in by people who were gay or bisexual).

In this case, K.S.A. 77-207 imposes a facial sex-based classification, in that it relies on reproductive organs to classify people under state laws "with respect to the application of an individual's biological sex." K.S.A. § 77-207 (providing that an "individual's 'sex' means such individual's biological sex, either male or female, at birth" and defining male and female by reference to ova and fertilization of ova). In addition, under the Attorney General's interpretation, K.S.A. 77-207 imposes—through its operation—a licensing classification that targets transgender people. For example, a woman who was assigned female at birth could receive a license that reflects her female gender identity, while a transgender woman who was assigned male at birth could not.

In rejecting intervenors' constitutional-avoidance argument premised on equal-protection principles, the district court stated that K.S.A. 77-207 contains "no classification based on sex or transgender status or any other factor." (R. III, 277, App. 28a). That conclusion, however, cannot be reconciled with the fact that K.S.A. 77-207

expressly defines "sex" by reference to one's sex at birth. (*See* R. III, 277, App. 28a). As a rule of thumb, if the legislature cannot "writ[e] out instructions" for determining when a law applies "without using the word[] . . . sex (or some synonym)," then the law classifies based on sex. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746 (2020).

Nor did the district court wrestle with the discriminatory operation of K.S.A. 77-207 in its application to licensing. As noted above, *Limon* held that even a law lacking a classification on its face can impose one through its operation to the disadvantage of a particular group. *Limon*, 280 Kan. at 284.[14] Just like in *Limon*, where the challenged law treated "the same conduct" differently depending on whether it occurred between same-sex or opposite-sex partners, the Attorney General's interpretation of K.S.A. 77-207 would treat an individual's eligibility for a license reflecting their gender identity differently depending on whether that gender identity is consistent with or different from their sex assigned at birth. *Limon*, 280 Kan. at 276.

5. Constitutional concerns created by applying K.S.A. 77-207 to licensing are confirmed by the law's inability to survive any level of constitutional scrutiny.

Laws that "target[] a suspect class or burden[] a fundamental right" warrant more rigorous review than others and obligate the government, not plaintiffs, to justify the

[14] Although the district court suggested *Limon* is limited to contexts in which a statute imposes "disparate criminal penalties," (R. III, 277, App. 28a), nothing in *Limon* stands for that proposition, and the Kansas equal-protection guarantee applies in civil as well as criminal contexts. *See Miami Cnty. Bd. of Com'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 315, 255 P.3d 1186, 1207 (2011) (applying equal protection analysis to the Kansas Recreational Trails Act); *Rivera v. Schwab*, 315 Kan. 877, 891, 512 P.2d 168, 178 (2022) (same in case involving gerrymandering and vote dilution claims).

discriminatory treatment. *Limon*, 280 Kan. at 284; *see Hodes*, 309 Kan. at 663 (applying strict scrutiny to law burdening right to personal autonomy); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) ("*VMI*") (recognizing that classifications based on sex warrant heightened review). Under the interpretation of K.S.A. 77-207(a) advanced by the Attorney General and adopted by the district court, the law would burden transgender Kansans' fundamental rights to personal autonomy and informational privacy and would impose a sex-based discriminatory classification in the licensing regime. *See supra* Part I.C.2–4. Accordingly, in a case challenging the constitutionality of K.S.A. 77-207 to licenses, a court would be obligated to apply heightened constitutional scrutiny.

Heightened review requires, among other things, that the government identify a compelling, *Hodes*, 309 Kan. at 663, 440 P.3d at 493, or at least exceedingly persuasive, *VMI*, 518 U.S. at 523, justification. The government must demonstrate that the harms it recites are real, and it cannot rest on post hoc justifications. *See Hodes*, 309 Kan. at 662–63 (strict scrutiny standard); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) (intermediate scrutiny standard). The government must also show that "its action is narrowly tailored to serve" its interest. *Hodes*, 309 Kan. at 670.

It is apparent that the government could not meet any form of heightened scrutiny here, as there is no evidence in the legislative record that K.S.A. 77-207 was intended to apply to, or addressed an existing problem with, the driver's license regime, and the only contemporaneous justification offered for adoption of SB 180 was "linguistic clarity." *See supra* Part I.B; *infra* Part II.A; (*see also* R. II, 424 (Attorney General indicates he has no documents to demonstrate that the Kansas legislature enacted SB 180 in reliance

on the potential for law enforcement confusion). Moreover, KDOR—the agency that would presumably be named as a defendant in any action challenging K.S.A. 77-207's application to licensing—takes the position that the statute does not apply. It should go without saying that the government cannot demonstrate a law is narrowly tailored to serve its compelling interest where some relevant government actors do not even believe the law applies, much less that it is needed.

In any event, even under the less rigorous form of constitutional scrutiny known as rational basis review, a "[d]esire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" justifying a discriminatory law. *Limon*, 280 Kan. at 291 (citation omitted); *see also Romer v. Evans*, 517 U.S. 620, 633 (1996). Moreover, under this form of review, Kansas courts still "insist on knowing the relation between the classification adopted and the object obtained." *Limon*, 280 Kan. at 288 (citation and internal quotations omitted). This requirement helps "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. . . . If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *Id.* (citations omitted).

There is no rational relationship between requiring transgender people to carry a license that reveals their sex assigned at birth and the law enforcement interests now asserted. *See infra* Part II.A (discussing rationale). Instead, the Attorney General's view of K.S.A. 77-207 aims to bar transgender people from seeking legal protection, which "is strong evidence of a law having the purpose and effect of disapproval of that class," *Bishop v. Smith*, 760 F.3d 1070, 1102 (10th Cir. 2014) (Holmes, J., concurring).

* * *

At bottom, if K.S.A. 77-207 were ambiguous, the canon of constitutional avoidance would resolve that ambiguity against the Attorney General's interpretation. Applying K.S.A. 77-207 to driver's licenses raises substantial concerns that the law violates transgender Kansans' constitutional rights to personal autonomy, informational privacy, and equal protection. The district court's contrary holding should be reversed.

Issue II: The district court abused its discretion in finding that the Attorney General otherwise meets the temporary-injunction factors.

Standard: A temporary injunction must be denied if the movant cannot show that "(1) there is a reasonable probability of irreparable future injury to the movant; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest." *Steffes v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843, 854 (2007) (citations and quotations omitted). This Court reviews for abuse of discretion a district court's conclusions as to these factors. *Hodes*, 309 Kan. at 619. A district "court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *Id.* (citations omitted).

Preservation: Intervenors argued in the district court that the Attorney General had not demonstrated a likelihood of irreparable harm, and that the equities and public interest weighed against a temporary injunction. (R. III, 28, 55–56; R. VIII, 166–67).

Argument

Even a movant likely to prevail on the merits is not entitled to a temporary injunction unless they otherwise demonstrate that the injunction is necessary to prevent irreparable harm, supported by the balance of equities, and consistent with the public interest. *Steffes*, 284 Kan. at 395. As demonstrated above, the district court's decision should be reversed because of the significant errors it made in assessing the Attorney General's likelihood of success on the merits. To the extent necessary to this Court's review, however, other temporary-injunction factors also weigh decisively against relief.

A. The Attorney General has not demonstrated a likelihood of any harm, much less irreparable harm, absent an injunction.

The Attorney General attempted to justify his request for a temporary injunction based on the assertion that permitting KDOR to continue issuing licenses with markers reflecting gender identity would hamper law enforcement. The overwhelming evidence, however, shows just the opposite.

For example, numerous witnesses—including the Attorney General's—directly refuted the proposition that licenses reflecting sex assigned at birth are necessary or even useful in conducting arrests. (*E.g.*, R. II, 407–10 (lieutenant with 23 years of service working in warrants division testifying he has never had an issue with a transgender person's driver's license and did not know of any officer who had); R. II, 414 (sheriff testifying he knew of no specific instances of an officer under his chain of command having an issue during a law enforcement encounter with a transgender person); R. II, 443 (law enforcement official stating he had spoken to "each and every officer in [his]

division" and found "zero examples of [a person's] gender affecting any call for service [involving] . . . civil paperwork, traffic citations, warrant confirmation"); R. II, 403 (KDOR confirmation that it have not received any complaints from "local, state, or federal law enforcement agenc[ies] regarding [an] inability to identify criminal suspects due to" its gender-marker policy).

The same one-sided evidentiary record exists as to the use of licenses to determine where to house people in jails and prisons. (*See* R. VII, 190–91; R. II, 403, 456–59, 462, 465, 469). And federal law and regulations preclude placements based solely on sex assigned at birth. *See* 28 C.F.R. 115.42(b)-(e) (2023); Nat'l PREA Resource Ctr., DOJ Interpretive Guidance, Standard 115.42, https://www.prearesourcecenter.org/frequently-asked-questions/does-policy-houses-transgender-or-intersex-inmates-based-exclusively (last visited Apr. 21, 2024).

The district court did not discuss any of this evidence in finding that the Attorney General would suffer irreparable harm absent injunctive relief. Instead, it primarily cited a string of court decisions for the proposition that law enforcement "routinely use[s] [driver's licenses] to identify suspects, victims, wanted persons, missing persons, and others." (R. III, 279, App. 30a). Even setting aside the fact that these cases did not involve transgender individuals or gender markers and are not evidence, they are completely irrelevant. *Of course* licenses are a form of identification. The question is whether mandatory inclusion of an individual's sex assigned at birth on a license supports identification efforts. It does not.

Tellingly, despite full-blown discovery in this case and a two-day evidentiary hearing, the district court could muster only two citations to the record in purported support of its irreparable harm conclusion. It cited Major Newson for the proposition that licenses are "one item"—though not the only one—used by law enforcement to identify individuals and decide where to hold them. (R. III, 279, App. 30a). But this commonsense notion that an identification document is used to identify people falls far short of showing irreparable harm. Moreover, the district court recounted Sheriff Hill's statement that he once arrested a transgender person who "told" the sheriff "he was a man" and whose criminal history appeared when the person was "run through a records check as a woman." (R. III, 261, 279, App. 12a, 30a). This citation, too, falls far short of what is required for a temporary injunction. It is not even clear from the record that Sheriff Hill's anecdote involved an individual who presented a driver's license during the interaction with law enforcement, nor does purported confusion establish injury, particularly given that the person in question was in fact arrested and held. (*See* R. VII, 170–71). And it is speculative to assume that this incident is likely to recur during the litigation, particularly given that KDOR's gender marker policy has been in place since at least 2011. *See, e.g.*, *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) ("speculative harm does not amount to irreparable injury").

B. As to the other equitable criteria, the district court's analysis was equally flawed.

The district court concluded that the equities and the public interest favored entry of a temporary injunction. For several reasons, that conclusion was plainly erroneous.

First, the district court was incorrect to treat the state's interest as a unitary one. This case involves an intragovernmental dispute, not a lawsuit with only private parties on one side of the caption. The agency—and by extension the State of Kansas to which it belongs—unquestionably has a strong interest in avoiding the implementation of policies that would expose officials to lawsuits for violating people's rights.[15]

Second, in balancing the equities, the district court failed to account for the harm to intervenors. It recognized that one intervenor could not update his gender marker under the injunction, (R. III, 281, App. 32a), but it ignored a second intervenor whose license will expire in June 2024 and who will, as a function of the injunction, receive a license that lists his sex assigned at birth, (R. VII, 231; R. II, 318–19, App. 58a–59a). The district court also plainly erred when it concluded that "producing a driver's license indicating a sex different than [the intervenors'] expressed gender did not result in physical violence, verbal harassment, loss of employment, loss of benefits, refusal of service, or negative interaction with law enforcement." (R. III, 281, App. 32a). As discussed above, intervenors *did* present evidence that the disclosure of their transgender status through licenses that did not reflect their gender identity had led to harassment and negative law-enforcement interactions in the past, along with experiences of humiliation, harassment, anxiety, and hyper-vigilance that the district court treated as irrelevant. *See supra* Part I.C.2; (R. II, 42–57, 126, 138–39, 593, 616–30, 632–55, 657–65, 667–88,

[15] KDOR's interest in this respect is not speculative. The fact that no such suits have been filed against its officials to date does not mean they will not be in the future, particularly as more and more transgender Kansans have licenses that expire and thus become subject to the district court's temporary injunction.

718–26; R. III, 281, App. 32a; R. VIII, 70; R. IX, 236, App. 85a (OOP); R. II, 312–14; R. II, 351–67; R. VIII, 62–71; R. II, 343, App. 65a; R. VIII, 61–62). These harms to intervenors and KDOR are substantial and outweigh the Attorney General's speculative allegations of countervailing law enforcement harms.

Third, the district court's analysis of the public interest was flawed. It primarily reiterated that the Attorney General was likely to prevail on the merits, (R. III, 277–78, App. 28a–29a), a conclusion that is wrong for the reasons described in Part I. However, even if the Attorney General *were* likely to prevail, that would still not excuse the district court's lack of attention to transgender Kansans, including but not limited to intervenors. As the court recognized, hundreds of Kansans have relied on KDOR's gender-marker policy to update their licenses. (R. III, 259, App. 10a). The district court's injunction ensures that some share of those Kansans will soon be forced to out themselves as transgender against their will. (R. III, 281, App. 32a) (court not disputing the forced disclosure of transgender status but discounting the harms associated with that disclosure). That invasion of Kansans' privacy and autonomy, even by itself, tips the scales sharply against an injunction to disrupt the status quo. Particularly when this privacy intrusion is combined with an increased risk of mental and physical heath harms, along with the risk of harassment and violence toward transgender people, the district court's perfunctory assessment of the public interest is arbitrary and should be reversed.

Issue III: The district court manifestly erred in excluding Dr. Oller as an expert witness.

Standard: This Court reviews for abuse of discretion a district court's decision to exclude expert testimony. *State v. Lyman*, 311 Kan. 1, 20–21, 455 P.3d 393, 409 (2020). "To the extent interpretation of statutes is concerned, review is de-novo." *Id.* "A district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *Id.* (citations omitted).

Preservation: The Attorney General filed a motion to strike Dr. Oller's expert testimony, which intervenors opposed. (R. IX, 4–14, 20–35, 133–51). After the district court granted this motion, intervenors submitted a written offer of proof as to the expert testimony that she would have provided. (R. VII, 46–49, App. 48a–51a; *see generally* R. IX, 221–40, App. 70a–89a (OOP)).

Argument

Even without the expert testimony of Beth Oller, M.D., reversal of the district court's temporary injunction is required for all of the reasons identified above. But to the extent Dr. Oller's testimony is necessary to resolve this appeal, the Court should reverse the district court's arbitrary exclusion of her as an expert witness. K.S.A. 60-456(b)'s standard for expert testimony is a minimal one, and as detailed below, Dr. Oller more than meets this standard.

A. The burden to qualify as an expert witness is minimal, particularly where the court is the finder of fact.

K.S.A. 60-456(b) provides that:

If scientific, technical or other specialized knowledge will help the trier of

> fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case.

This standard is substantively identical to the federal rules of evidence, and cases interpreting the federal rules, including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), are persuasive as to the statute's scope. *See Lyman*, 311 Kan. at 21.

Under K.S.A. 60-456(b), "[t]he requirements for qualification as an expert witness are minimal," *State v. Claerhout*, 310 Kan. 924, 934, 453 P.3d 855, 863 (2019), and the rule's "liberal thrust" makes "rejection of expert testimony . . . the exception rather than the rule," *Daubert*, 509 U.S. at 588; *see also* Fed. R. Evid. 702 advisory committee's note; *Smart v. BNSF Railway Co.*, 52 Kan. App. 2d 486, 496–97, 369 P.3d 966, 974 (2016). That principle applies with even greater force where the court, not a jury, sits as a factfinder, as the district court did here in granting a temporary injunction. In that context, the concerns of "unreliable expert testimony reaching a jury obviously do not arise." *Att'y General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009).

B. Dr. Oller more than meets the standard for admission of expert testimony.

Dr. Oller proposed to offer expert testimony that addressed, in addition to other matters, (1) the accepted medical understandings of sex, gender, gender identity, "biological sex," sex assigned at birth, and other terms central to the interpretation of K.S.A. 77-207(a); (2) the role of social transition—including through updates to one's driver's license—in treating gender dysphoria; (3) the impact of carrying a driver's

license incongruent with one's gender identity, including an increased risk of suicide, depression, anxiety, somatization, psychiatric distress, harassment, and violence, and (4) the reversal of negative health consequences when a person is able to update their license to reflect their gender identity. (*See* R. IX, 221–40, App. 70a–89a (OOP)).

Dr. Oller's knowledge, skills, experience, and expertise easily qualify her to offer expert opinions on these topics. She is a board-certified family physician with a medical degree from the University of Kansas School of Medicine. (R. II, 585, App. 91a; R. II, 597). She is also a Clinical Assistant Professor in the Department of Family and Community Medicine at the University of Kansas School of Medicine. (R. II, 597).

Dr. Oller practices in Rooks County, Kansas, with a population of less than 5,000 people, (R. III, 263, App. 14a). Despite the small, rural community in which she works, Dr. Oller has treated approximately 100 transgender patients. (R. II, 585, App. 91a; R. VIII, 24, App. 112a). Sometimes those individuals present to her for treatment with gender dysphoria; other times she treats those patients for medical issues that are separate from their gender dysphoria. (R. VIII, 24–26, App. 112a–14a). However, in all cases, Dr. Oller's background in gender dysphoria and its treatment are relevant to providing holistic family medicine services to transgender patients. (R. II, 585, App. 91a; R. VIII, 25–26, App. 113a–14a). Among other forms of care, Dr. Oller has prescribed gender-affirming hormone therapy to transgender patients and has referred patients for gender-confirming surgical procedures. (R. II, 585, App. 91a; R. VIII, 34, App. 122a; R. IX, 226–27, App. 75a–76a (OOP)). Some transgender patients "drive three or more hours" for appointments with her because she is their closest provider of gender-affirming care.

(R. VIII, 27, App. 115a). Dr. Oller has assisted approximately 40 transgender patients with updating gender markers on their driver's licenses. (R. VIII, 40, App. 128a).

Dr. Oller also participates in various task forces, national professional groups, and education work relevant to her expertise in transgender patients and gender dysphoria in this case. For example, she is a member of the American Academy of Family Physicians; the Kansas Academy of Family Physicians; and the World Professional Association for Transgender Health. (R. II, 585, App. 91a; R. 597–98). Dr. Oller has also served on the board of, an organization that is interested in research regarding health issues specific to LGBTQ patients, advocacy for LGBTQ patients and providers, and reducing health disparities in this population. (R. II, 112–14, 597; R. II, 585, App. 91a).

As these facts demonstrate, Dr. Oller meets the requirements of K.S.A. 60-456(b) insofar as she is "qualified as an expert by knowledge, skill, experience, training or education."

Moreover, Dr. Oller's proposed expert testimony—set forth in a 12-page expert declaration and confirmed in a 19-page offer of proof, (R. II, 584–95, App. 90a–101a; R. IX, 219–40, App. 70a–88a (OOP)), explains how her background "leads to the conclusion[s] reached," why it "is a sufficient basis for the opinion[s]" she offers, and how her background "is reliably applied to the facts."' *State v. Hatfield*, 60 Kan. App. 2d 11, 19, 484 P.3d 891, 900 (2021) (citing *Smart*, 52 Kan. App. 2d at 495). Dr. Oller is trained, for example, to read and critically evaluate scientific studies. (R. II, 108–09). She also regularly reviews research studies to inform her practice with transgender patients, including studies on factors associated with anxiety, depression, suicide risk in

transgender people, and the relationship between concordant identity documents and suicidal ideation and attempts in trans and non-binary youth. (R. VII, 616–732; R. VIII, 20–21, App. 108a–09a; R. IX, 233–39, App. 82a–88a (OOP)).

C. The district court's rationale for excluding Dr. Oller as an expert is at odds with the text of the expert witness statute and related case law.

Although the district court's stated rationale in excluding Dr. Oller as an expert is not entirely clear, the court appeared to hold that her opinions were not the product of reliable principles and methods applied to sufficient facts and data. (R. VII, 36–46, App. 38a–48a). The court emphasized that she was not involved in conducting academic studies or publishing research findings on the topics for which she offered opinions. (R. VII, 37–38, 41, App. 39a-40a). It also indicated that it viewed Dr. Oller's treatment of gender dysphoria for more than 100 transgender patients as an insufficient foundation for her expert opinions. (R. VII, 36–46, App. 38a–48a, 43a).

The district court's ruling is far outside the reasonable bounds of discretion and should be reversed. K.S.A. 60-456(b) is plain: an expert may be qualified "by knowledge, skill, experience, training *or* education." K.S.A. 60-456(b) (emphasis added). By extension, Dr. Oller was justified in relying on any *one* of those qualifications—and in fact she relied on all four—to identify relevant facts and data and to reliably arrive at expert opinions based on them. *See, e.g.*, *Util. Trailer Sales of Kan. City Inc. v. MAC Trailer Mfg., Inc.*, 267 F.R.D. 368, 370 (D. Kan. May 3, 2010) ("Experience alone—or experience combined with other knowledge, skill, training, or education—may provide a sufficient foundation for expert testimony." (citing Fed. R. Evid. 702 advisory

committee notes)). Nothing in K.S.A. 60-456(b) requires an expert to conduct the scientific studies or write the academic articles on which their expert opinions rely.

Contrary to the district court's suggestion, (*see* R. VII, 36–46, App. 38a–48a), Dr. Oller's experience caring for more than 100 transgender patients and her treatment of gender dysphoria along with other medical conditions confirms the reliability of her expert testimony. The district court viewed Dr. Oller's patient base as insufficiently numerous, but by the court's reasoning, every rural family physician in Kansas would likely be disqualified from providing expert testimony, as would many physicians offering testimony on rare medical conditions. Transgender individuals make up an estimated 0.5% of all U.S. adults and 1.4% of all U.S. youth. (R. IX, 181, 184, 188). Even assuming a conservatively high 1.4% of 4,813 people in Rooks County are transgender (67 people), (R. IX, 153), and that each of those individuals is treated by Dr. Oller, Dr. Oller's experience working with 100 transgender patients is extensive.

The district court also stated that it was "troubled by the fact that" during her deposition Dr. Oller "was not able to summarize or explain a lot of the[] articles that she ha[d] relied upon" in her expert declaration. (R. VII, 37–38, App. 39a–40a). But Dr. Oller's declaration referenced twenty-five different sources and covered more than 2000 pages of material, and the Attorney General did not bring any witness copies of those materials to her deposition. (*See, e.g.*, R. IX, 163; R. IX, 216). In this context, it is unremarkable that Dr. Oller requested copies of the studies to refresh her memory and, when denied those copies and time to review, refused to provide off-the-cuff answers to

narrow questions about the studies, all of which she attested to having read and considered before submitting her declaration. (*See* R. IX, 164, 167, 175–77).

In any event, Dr. Oller's refusal in this respect should at most bear on the weight accorded to her testimony, not her threshold qualification as an expert. *See Hatfield*, 60 Kan. App. 2d at 21 (fact that doctor "could not remember specific details of a study during his testimony may affect the jury's assessment of his credibility, but it does not render his testimony inadmissible"). And given that the Attorney General submitted *no* evidence rebutting Dr. Oller's expert opinions, her testimony was not just admissible; it clearly warranted denial of the temporary injunction.

CONCLUSION

For the foregoing reasons, the district court's temporary injunction order should be reversed and this matter remanded for further proceedings not inconsistent with the Court's judgment. Moreover, given that intervenors and other transgender Kansans are experiencing harm each day that the erroneous injunction remains in place, this Court should, pursuant to Kansas Rule of Appellate Procedure 7.03(b)(1)(B), direct immediate entry of the mandate upon issuance of an opinion.

Respectfully submitted,

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Dated: April 25, 2024

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2024, I filed this document by hand with the Clerk of the Court, and copies were sent via email to:

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