

IN THE THIRD JUDICIAL DISTRICT
SHAWNEE COUNTY DISTRICT COURT
CIVIL DEPARTMENT

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

Petitioner,

v.

Case No. 23-CV-000422

Div. 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,

and

ADAM KELLOGG, KATHRYN REDMAN,
JULIANA OPHELIA GONZALES-WAHL,
DOE INTERVENOR 1, and DOE
INTERVENOR 2, on behalf of her minor child,

Intervenor-Respondents.

**INTERVENOR-RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S
MOTION FOR TEMPORARY INJUNCTIVE RELIEF**

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I. INTRODUCTION

Intervenor-Respondents, five transgender residents of Kansas, need driver's licenses they can safely use. Being required to utilize a license with a gender marker that does not match the gender they live as in daily life is damaging to their well-being and discloses that they are transgender to anyone who sees their license, forcibly outing them and putting them at risk of emotional distress and serious personal harm. These five individuals intervened in this case to assert and protect their own constitutional rights and the rights of all transgender Kansans who face an invasion of their autonomy, privacy, and denial of equal protection under the law if Petitioner's prayer for relief is granted in this mandamus action.

Senate Bill 180 (hereinafter "SB 180") does not apply to Kansas driver's licenses or is, at most, ambiguous as to whether it applies. The Court can and should reject Petitioner's interpretation that SB 180 forbids gender marker changes on driver's licenses because such an interpretation is at odds with the existing driver's license statute as amended by Senate Bill 9 in 2007, as well as the text of SB 180 itself, and adopting such an interpretation would violate the constitutional rights of transgender Kansans. Intervenor-Respondents therefore urge this Court to deny further injunctive relief and allow the Kansas Department of Revenue ("KDOR") to resume its longstanding practice of issuing driver's licenses to transgender Kansans with gender markers that reflect their gender identity. To rule otherwise harms Intervenor-Respondents and those similarly situated within this State, and Petitioner has failed (abjectly, despite his earlier representations to this Court) to establish that any harm to any government interest would result.

II. FACTUAL BACKGROUND

Intervenor-Respondents provide the following background information regarding transgender people, the impact of non-affirming identification documents on them, and the context and history of SB 180 and other related laws because such background is relevant to the Court's interpretation of SB 180 and Intervenor-Respondents' constitutional arguments. During discovery, Intervenor-Respondents have presented expert testimony on these issues; Petitioner has not.

A. Transgender People, Gender, and Gender Dysphoria

Transgender people are people who have a gender identity different from their sex assigned at birth. Ex. 1, Decl. of Dr. Beth Oller (hereinafter "Oller Decl.") ¶¶ 13, 16. Gender identity refers to a person's fundamental, internal sense of belonging to a particular gender. *Id.* at ¶ 15. There is medical consensus that gender identity is immutable and cannot be voluntarily altered. *Id.* at ¶¶ 15-16; Ex. 2, Oller Dep. 31:1-14. Gender identity is a core component of human identity. Ex. 1, Oller Decl. ¶ 15.

The gender marker designated on a birth certificate at the time of birth ("sex assigned at birth") is almost always based solely on a healthcare professional's perception of the appearance of an infant's external genitalia. *Id.* at ¶ 13; Ex. 2, Oller Dep. 63:9-25. For cisgender people (those who are not transgender), that sex assigned at birth matches their gender identity. Ex. 1, Oller Decl. ¶¶ 13, 16. For transgender people, that sex assigned at birth does not match their gender identity. *Id.* at ¶ 13.

Contrary to SB 180's bald assertion, "sex" has many components and is not simply sex assigned at birth or reproductive organs. *Id.* at ¶ 14; Ex. 2, Oller Dep. 28:19-29-14. Components of sex include chromosomes, gonads, hormones, secondary sex characteristics, external genitalia, internal genitalia, gene expression, brain structure, hormone receptor sensitivity, and gender

identity. Ex. 1, Oller Decl. ¶ 14; Ex. 2, Oller Dep. 28:19-29-14. The different components do not always align. Ex. 1, Oller Decl. ¶ 14.

Gender dysphoria is a medically recognized condition defined by a marked incongruence between a person's gender identity and the sex they were assigned at birth, when accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning. Ex. 2, Oller Dep. 13:24-14:16; Ex. 1, Oller Decl. ¶¶ 19-20, Ex. 23 to Oller Decl. Gender dysphoria is a serious medical condition that, if left untreated, can lead to debilitating depression and even suicidal thoughts and acts. Ex. 1, Oller Decl. ¶ 23, Exs. 3, 10 to Oller Decl.

Every major medical and mental health organization, including the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the Endocrine Society, the Pediatric Endocrine Society, the Society for Adolescent Health and Medicine, the World Medical Association, and the World Health Organization, support access to age-appropriate, individualized gender-affirming care for transgender youth and adults. Ex. 1, Oller Decl. ¶ 24.

Treatment of gender dysphoria is guided by the Standards of Care set forth by the World Professional Association for Transgender Health (WPATH), which was initially published in 1979 and is now in its eighth version. *Id.* at ¶ 25, Ex. 20 to Oller Decl.; Ex. 2, Oller Dep. 22:8-23:9. These standards were developed by global professionals in medicine, psychology, law, social work, counseling, psychotherapy, family studies, sociology, anthropology, sexology, speech and voice therapy, and other fields. Ex. 1, Oller Decl. ¶ 25, Ex. 20 to Oller Decl. It is the recognized standard of care to address gender dysphoria with 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. Ex. 1, Oller Decl. ¶¶ 25-26, Ex. 20 to Oller Decl; Ex. 2, Oller Dep. 15:25-16:4.

Treatment for gender dysphoria under the WPATH standards includes bringing a person's social interactions, appearance, and body into greater alignment with the person's already-existing gender identity, which in turn helps to alleviate the distress associated with gender dysphoria. *See* Ex. 1, Oller Decl. ¶¶ 26-28. Such treatment may involve hormonal and surgical treatments, voice and communication therapy, primary care, reproductive and sexual health care, mental health care, and social transition. *Id.* at ¶ 26, Ex. 20 to Oller Decl.

Under the WPATH standards, social transition means living one's life consistently with one's gender identity, including using identity documents such as a driver's license that reflect one's gender identity. Ex. 1, Oller Decl. ¶¶ 10, 28-29. Changing one's name or pronouns, dressing in ways that align 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. *Id.* at ¶ 28, Exs. 3, 8, 15 to Oller Decl.

Petitioner conducted significant discovery in this case, but has offered no medical expert testimony in this case to rebut or dispute any of the above facts.

B. The Importance of Accurate Identity Documents for Transgender People

The ability to change the gender marker on an identity document has significant social, legal, and safety implications for transgender persons. Ex. 1, Oller Decl. ¶ 10; Ex. 2, Oller Dep. 24:22-25:19. Legal gender affirmation has been found to be significantly associated with lower reports of depression, anxiety, somatization, global psychiatric distress, and upsetting responses to gender-based mistreatment. Ex. 1, Oller Decl. ¶ 30, Exs. 6, 14 to Oller Decl. Accurate identification documents allow increased identity integration, better mental health, and decreased

vulnerability to harassment and violence. Ex. 1, Oller Decl. ¶¶ 30, 32, Exs. 12, 14, 16 to Oller Decl. Access to accurate identification documents is a structural determinant of health for transgender people. Ex. 1, Oller Decl. ¶ 34, Ex. 12 to Oller Decl.

By contrast, forcing transgender people to use identity documents that do not match their gender identity, or forcing them to go without identity documents, is inconsistent with medical protocols. Ex. 1, Oller Decl. ¶¶ 12, 34, 39. It can cause anxiety and distress to the transgender person, cause them to isolate, and result in discrimination and violence against them when others learn that they are transgender. *Id.* at ¶¶ 30, 32, 35, 38-39, Exs. 2, 5, 16, 17, 22 to Oller Decl. Additionally, for those who have struggled for years with the impact of external invalidation of their identity, the knowledge that one’s identification documents label one with the wrong gender can, by itself, cause serious psychological injury. Ex. 1, Oller Decl. ¶¶ 31, 39.

Unfortunately, the transgender community is more likely to suffer abuse, harassment, discrimination, and violence than the population at large. *Id.* at ¶ 36, Exs. 8, 9, 11, 12, 17, 18, 21 to Oller Decl. According to a KFF/Washington Post Survey published in March 2022, 21 percent of transgender adults nationwide have been fired, denied a job, or denied a promotion because of their gender identity. Ex. 3, Ashley Kirzinger, et al., *KFF/The Washington Post Trans Survey 16* (2022), (hereinafter “KFF/WaPo Survey”). A recent survey of LGBTQ+ Kansans found that “65.2% of trans and gender diverse respondents reported experiencing discrimination in Kansas because of their LGBTQ+ identity.” Ex. 4, ACLU of Kansas, *LGBTQ+ Community & Advocacy Survey* (Jan. 2023), https://www.aclukansas.org/sites/default/files/field_documents/survey_exec_summary_final.pdf. These findings echo those of the *2015 US Transgender Survey*, which found that 29 percent of transgender Kansans have been fired, denied a promotion, or not hired because of their gender

expression. Ex. 1, Oller Decl. ¶ 38, Ex. 22 to Oller Decl. Nationally, a staggering 64 percent of transgender adults have been verbally attacked and 25 percent have been physically attacked because of their gender identity. Ex. 3, KFF/WaPo Survey at 16. These statistics are higher for people of color: 31 percent of transgender adults of color have been physically attacked because of their gender identity. *Id.*

The 2015 nationwide U.S. Transgender Survey also showed that about one-quarter (24 percent) of transgender people have been physically attacked in a K-12 school because people thought they were transgender, with higher rates for American Indian (49 percent), Middle Eastern (36 percent), multiracial (31 percent), and Black (28 percent) people. Ex. 5, Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey* 11 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (hereinafter “USTS”). In Kansas, the statistics are worse: 59 percent of transgender youth have been verbally harassed in school, 27 percent have been physically attacked, and 12 percent have been sexually assaulted because of their gender identity. Ex. 6, Sandy E. James, et al., *The 2015 U.S. Transgender Survey: Kansas State Report* 1 (2017), [https://transequality.org/sites/default/files/docs/usts/USTSKSStateReport\(1017\).pdf](https://transequality.org/sites/default/files/docs/usts/USTSKSStateReport(1017).pdf) (hereinafter “USTS: Kansas”). Eleven percent of transgender youth in Kansas faced such severe mistreatment that they left a K-12 school. *Id.*

Among transgender people nationwide who had interacted with police, 58 percent experienced some form of mistreatment. Ex. 5, USTS at 14. Rates were higher for American Indian (74 percent), multiracial (71 percent), Latino/a (66 percent), Black (61 percent), and disabled (68 percent) people. *Id.* at 15. Of transgender Kansans who have interacted with the police, 53 percent

experienced some form of mistreatment, including verbal harassment, physical assault, or sexual assault. Ex. 6, USTS: Kansas at 2.

Due to widespread discrimination, transgender people are more likely to struggle with adverse mental health effects. Forty percent of transgender people have attempted suicide in their lifetime—nearly nine times the attempted suicide rate in the U.S. population (4.6 percent). Ex. 5, USTS at 112.

The fear, anxiety, and discrimination described above can be amplified when a transgender person presents a driver's license that does not match their gender identity. Ex. 1, Oller Decl. ¶¶ 31-32, 35, 38-39; Exs. 2, 5, 12, 16, 22 to Oller Decl. A license with an incongruent gender marker discloses private, intimate information about one's transgender status and can lead to physical harm, harassment, discrimination, or groundless accusations of fraud. *Id.*

Twenty-five percent of transgender people were verbally harassed, 16 percent denied services or benefits, nine percent asked to leave a location or establishment, and two percent assaulted or attacked after showing identification with a name or gender marker that did not match their gender presentation. Ex. 5, USTS at 82. The rates of assault and attack were twice as high for Black transgender people, three times as high for American Indian transgender people, and almost five times as high for Middle Eastern transgender people. *Id.* at 90.

Similarly, a 2021 study found that 26 percent of transgender people who had gone through TSA screenings in the past year with a license that showed their sex assigned at birth reported harassment from TSA officers regarding the name or gender on their driver's license. Ex. 7, J.L. Herman & K. O'Neill, *Gender Marker Changes on State ID Documents: State-level Policy Impacts* 8 (2021).

A license that shows the wrong gender marker designation is a license that transgender people cannot use without sacrificing their health, privacy, dignity, autonomy, integrity, and safety. Having a valid driver's license is a necessity for most Kansans. Purchasing groceries, keeping a job, attending public civic events, going to church, and visiting loved ones are just a small sample of life in Kansas that is difficult or impossible to access without driving. Ex. 1, Oller Decl. ¶ 33, Ex. 12 to Oller Decl. A driver's license is also the most common form of identity verification. Many people use a driver's license for identification when requesting government records, voting, starting a new job, applying for loans, qualifying for professional licenses, buying alcohol, picking up prescriptions, checking in to a hotel, traveling by plane, and more. *Id.*

Again, Petitioner has no expert testimony to rebut any of the above facts.

C. Kansas Driver's License Policy and Senate Bill 9

KDOR is responsible for issuing and updating Kansas driver's licenses. K.S.A. 2022 Supp. §§ 8-240, K.S.A. 2022 Supp. 8-243. KDOR strongly disagrees with Petitioner's interpretation of SB 180, and Petitioner's effort to dictate KDOR's legislatively mandated operations. Despite copious discovery Petitioner has failed to proffer any testimony—expert or otherwise—establishing that KDOR has incorrectly executed its statutory responsibilities.

Kansas driver's licenses display, among other things, a licensee's full legal name, gender, date of birth, address, and a brief description. Prior to 2007, state law mandated that the license applicants provide information about their "sex." *See* K.S.A. §§ 8-240(c); 8.243(a) (2007. Supp.) (amending prior code).¹

¹ While the physical licenses issued by KDOR are printed with the word "sex" labeling the gender field, KDOR explained in discovery responses that it "has relied on the American Association of Motor Vehicle Administrators' (AAMVA) standards for card design." Ex. 8, KDOR Resp. to Pet. First Set of Interrogs., No. 10. These standards reference "sex" of the cardholder as a datafield. *See, e.g.,* Ex. 9, AAMVA DL/ID Card Design Standard (2020) at 9. KDOR further explained that its "alignment with AAMVA standards is rooted in best practice considerations and a desire to maintain a level of consistency and interoperability with motor vehicle agencies nationwide and to comply with Federal Real ID public laws and regulations." Ex. 8, KDOR Resp. to Pet. Second Set of Interrogs. No. 1.

In 2007, Kansas Senate Bill 9 (“SB 9”) was passed in response to the federal REAL ID Act of 2005, to expand and formalize processes for verifying identity for driver’s license applicants. Among other things, SB 9 changed the information statutorily required for license applications to include the applicant’s “gender” rather than “sex,” and explicitly required KDOR to display the applicant’s “full legal name” and “gender.” K.S.A. §§ 8-240(c); 8.243(a) (2007. Supp.). In order to comply with the verification requirements of REAL ID, to “incorporate physical scanning and pdf capture of documentation provided to a driver’s license examiner that was used as the primary source for identification and lawful presence,” and to determine “how to harmonize submitted, inconsistent but valid documentation” (such as passports and birth certificates), KDOR took steps to formalize its process for reviewing and approving requests to update gender markers on a driver’s licenses. Ex. 8, KDOR’s Resp. to Pet.’s Interrogs. (First Set), No. 9.

In 2011, KDOR adopted the formal policy that has remained in place until this litigation, albeit with some changes in 2019. *Id.*; Ex. 11, Gender Reclassification Policy – User Guide. In 2019, KDOR updated its policy to provide clearer instructions to driver’s license staff and to mandate that all gender marker updates be processed by KDOR’s central office in Topeka. Ex. 8, KDOR’s Resp. to Pet.’s Interrogs. (First Set), Nos. 2, 9; Ex. 11, Gender Reclassification Policy – User Guide. Under KDOR policies, when a transgender person seeks to update the gender marker on their license, they are directed by their local DMV office to apply to the Topeka central office. *Id.* The application process requires several steps of approval, including review of a court order recognizing the updated gender or documentation from a licensed medical or osteopathic physician stating that updating the gender marker is appropriate. *See* Ex. 8, KDOR’s Resp. to Pet.’s Interrogs. (First Set), Nos. 2, 3; Ex. 10, Requests for Gender Reclassification (KDOR 0001-0002), Ex. 11, Gender Reclassification Policy (KDOR 0003-0004). KDOR also accepts U.S. passports, in-state

birth certificates, out-of-state birth certificates, USCIS immigration and/or citizenship documents, and other government documents as proof of gender. KDOR’s Mot. to Dissolve TRO ¶7; *see also* Ex. 8, KDOR’s Resp. to Pet.’s Interrogs. (First Set), No. 9 (U.S. passports, out-of-state licenses); Ex. 11, Gender Reclassification Policy (KDOR 0003-0004).

Consequently, gender marker changes, like other changes to identifying information reflected on a license, can only be done with sufficient documentation and review by trained KDOR staff. *See* Ex. 8, KDOR’s Resp. to Pet.’s Interrogs. (First Set), Nos. 2, 3. At least since 2011, transgender Kansans have thus been able to list their gender on their driver’s licenses following the provision of documentation of their transition to KDOR. Petitioner has admitted via discovery in this case that he has zero evidence of any actual harm arising from this process. This is consistent with the declaration of Captain Jim Oehm, as referenced in Respondents’ Brief in Opposition to Petitioner’s Motion for a TI (hereinafter “Oehm Decl.”) ¶4 (“I have never encountered a situation in law enforcement where the gender represented on the driver’s license, created issues with identifying the person using law enforcement systems.”).

D. Enactment of SB 180

On April 4, 2023, the Kansas legislature passed Senate Bill 180 (“SB 180”), a sparse bill containing a few short paragraphs defining “sex” as “biological sex, either male or female at birth,” and defining “male” and “female” solely based on a person’s certain reproductive capabilities. Ex. 12, SB 180; *see* L. 2023, ch. 84. The bill offers no scientific support underpinning its proffered definitions, no enforcement mechanism, and no guidance addressing existing statutory responsibilities of any Kansas agencies, including KDOR. Nothing within SB 180 expressly or implicitly references or overrules SB 9, though the Legislature could easily have done so had it intended.

In fact, nothing in SB 180’s legislative history suggests that it was intended to have any impact on driver’s licenses whatsoever. To the contrary, the authors of the model legislation that formed the foundation for SB 180 explicitly state that legislation like SB 180 does *not* have any impact on driver’s licenses. SB 180 was based on model legislation from a non-Kansan, third-party entity, the “Independent Women’s Forum,” a 501(c)(3) organization connected with Independent Women’s Voice, a 501(c)(4) lobbying organization. *See* Independent Women’s Forum, *Women’s Bill of Rights*, <https://womensbillofrights.com/>. A document titled “Debunking Misperceptions about SB 180” prepared by Independent Women’s Voice—one of the original proponents of the legislation (shared with the Kansas Attorney General’s office to lobby in support of SB 180, as revealed during discovery here) states that SB 180 was intended only to impact a definition of “sex” and *not* “gender,” **and that it was never intended to have any impact on driver’s licenses**. *See* Ex. 13, Debunking Misperceptions about SB 180, OAG 000594 (“Misperception: SB 180 will require people to change their driver’s licenses”; “SB 180 does not require Kansans to change their driver’s licenses or prevent Kansas from validating gender identity on their license”).

Eighty-three people testified against the bill, and only ten testified in favor. *See generally* Kansas 2023-2024 Legislative Session, *House Committee on Health and Human Services*, (July 12, 2023), http://www.kslegislature.org/li/b2023_24/committees/ctte_h_hhs_1/committee_testimony/?selected_date=03%2F06%2F2023; Kansas 2023-2024 Legislative Session, *Senate Committee on Public Health and Welfare*, (July 12, 2023), http://www.kslegislature.org/li/b2023_24/committees/ctte_s_phw_1/committee_testimony/?selected_date=02%2F15%2F2023.

The individual Kansas legislators who advocated for passage of SB 180 testified that it would provide “legal and linguistic clarity,” **with no reference to driver’s licenses and no indication that KDOR’s existing policy was unclear or complicated.** *See* K.S. Legislature, *Senate Chamber Proceedings 04/26/2023*, YouTube (April 26, 2023, at 4:42:25), [https://www.youtube.com/watch?v=HyTnWwdtF_U&t=16949s&pp=ygUna2Fuc2FzIHN0YXRlIGxlZ2lzbGF0dXJlIHNIbmF0ZSA0LzI2LzIz](https://www.youtube.com/watch?v=HyTnWwdtF_U&t=16949s&pp=ygUna2Fuc2FzIHN0YXRlIGxlZ2lzbGF0dXJlIHNIbmF0ZSA0LzI2LzIz;); K.S. House Veto Debate on SB 180, YouTube (April 27, 2023, at 00:11:28), https://www.youtube.com/watch?v=mqB_yGN4Cpg&list=PLGnUWv2THZAi2p9iHJ2REOOb2zfmHSxQe&index=69&pp=iAQB. Other lawmakers expressed concerns about “biological men” using women’s facilities, in reference to transgender women. *See, e.g.*, K.S. House Debate on SB 180, YouTube (March 28, 2023, at 8:44:37), https://www.youtube.com/watch?v=pzwsOs_q_i0&list=PLGnUWv2THZAi2p9iHJ2REOOb2zfmHSxQe&index=55&pp=iAQB. None of this had anything to do with the driver’s license issues posed by this case. Not a single lawmaker discussed any harm flowing from KDOR’s current driver’s license policy, or indeed, driver’s licenses at all, nor did anyone voting for the bill justify it by reference to the purported harms to law enforcement upon which Petitioner now seeks to rely.²

To the contrary, discovery has revealed that on June 1, 2023, one of the state lawmakers who voted in favor of SB 180 submitted a request for the Attorney General Opinion that is at the core of this litigation, inquiring “[w]hether SB 180 requires a person’s biological sex to be listed on a driver’s license issued by the state of Kansas?” *See* Ex. 14, 6/1/23 Email from Rep. Carrie Barth to Kris Kobach (OAG 0000293-94). This document shows that even the lawmakers who

² At the outset of this case, Petitioner also represented to this Court that his interpretation of SB 180 would prevent problems with organ transplantation in this State. As discussed below, discovery has revealed Petitioner had no evidence to support such statements. Indeed, knowing Respondent KDOR secured expert testimony to the contrary, and facing KDOR’s notice to depose Petitioner to determine what facts he possessed to support what he earlier told this Court, Petitioner abandoned any suggestion that SB 180 is needed to address any deleterious medical effects.

voted in favor of SB 180 did not necessarily interpret the language of the statute to apply to driver's licenses.

SB 180 went into effect on July 1, 2023 over the Governor's veto.

E. Impact on Intervenor-Respondents of Carrying License that Does Not Match Their Gender

Intervenor-Respondents, four transgender people, and the parent of a transgender 17-year-old, have all updated the gender markers on their driver's licenses except for Doe 2's son. Ex. 16, Decl. of Adam Kellogg (hereinafter "Kellogg Decl.") ¶ 5; Ex. 18, Decl. of Kathryn Redman (hereinafter "Redman Decl.") ¶ 5; Ex. 19, Decl. of Juliana Ophelia Gonzales-Wahl (hereinafter "Gonzales-Wahl Decl.") ¶ 4; Ex. 21, Doe Intervenor-Resp't 1 Decl. (hereinafter "Doe 1 Decl.") ¶ 5; Ex. 23, Doe Intervenor-Resp't 2 Decl. (hereinafter "Doe 2 Decl.") ¶ 3; Ex. 24, Doe 2 Dep. 14:14-18 (filed with redactions pursuant to Protective Order). All Intervenor-Respondents have also received gender-affirming medical treatment. Ex. 16, Kellogg Decl. ¶ 7; Ex. 18, Redman Decl. ¶ 7; Ex. 19, Gonzales-Wahl Decl. ¶ 6; Ex. 21, Doe 1 Decl. ¶ 7; Ex. 24, Doe 2 Dep. 18:15-22. Intervenor-Respondents wish to obtain or maintain a Kansas driver's license with a gender marker that matches their gender identity.

Intervenor-Respondents rely on their licenses to accomplish day-to-day activities like driving and traveling, and as proof of government ID when requested while shopping, banking, voting, and more. As explained in greater detail in their supporting Declarations, responses to Petitioner's First Set of Interrogatories, and deposition testimony, several of the Intervenor-Respondents have previously experienced harm when forced to display a driver's license with a gender marker that does not match their gender. All fear what might happen if they are required to do so as a result of this action.

For example, Adam Kellogg, a 20-year-old transgender man and student at the University of Kansas, testified that prior to changing the gender marker on his license to male in 2021, he was accused of providing a false identity document and forced to disclose his transgender identity during a job interview, because his license did not reflect his gender. Ex. 15, Kellogg Dep. 22:14–23:10 (filed with redactions pursuant to Protective Order); *see also* Ex. 16, Kellogg Decl. at ¶ 9.

Mr. Kellogg also testified that identity documents inaccurately denoting his gender as “F” caused him harm while seeking his education and forcibly disclosed his transgender identity on his student records while attending junior college. *See* Ex. 15, Kellogg. Dep. 26:12–28:22; 29:1–33:15.

He also experienced a negative interaction with a law enforcement officer during a speeding stop, because his license did not reflect his gender. *Id.* at 40:14–43:15; *see also* Ex. 16, Kellogg Decl. at ¶ 10.

Additionally, Mr. Kellogg testified that when his driver’s license inaccurately listed an “F” gender marker, he was forcibly outed when seeking medical treatment and picking up prescriptions—leading to uncomfortable and invasive questions about his genitalia or causing him to be misgendered publicly, which was humiliating and anxiety-producing and invaded his privacy. Ex. 15, Kellogg Dep. 44:3–46:17; 46:21–47:13; 47:20–51:10. With his updated license reflecting his accurate gender marker, Mr. Kellogg no longer feels embarrassed or afraid when showing his identification. Ex. 16, Kellogg Decl. at ¶ 11. He does not want to disclose the fact that he is transgender every time he goes to the bank, interacts with law enforcement, rents a car, votes, applies for jobs, or enters government buildings. Ex. 16, Kellogg Decl. at ¶ 13.

Similarly, Kathryn Redman, a 62-year-old transgender woman who lives in Johnson County, Kansas, frequently received rude and harassing comments before she was able to update

the gender marker on her driver's license, because the male gender marker on her license did not match her female appearance. Ex. 17, Redman Dep. 19:3-18; 21:15-22:13 (filed with redactions pursuant to Protective Order); *see also* Ex. 18, Redman Decl." at ¶ 8. Whenever she flew between 2019 and 2020 with a license that inaccurately listed an "M" gender marker, she was required to do supplemental screening with the Transportation Security Administration, involving invasive questions, pat downs of the genital area of her body, and forced disclosure of her transgender identity in a public setting. Ex. 17, Redman Dep. 24:22-30:21; Ex. 18, Redman Decl. at ¶¶ 8-9.

Ms. Redman, a retired IBM executive, followed all applicable Kansas laws and obtained an order from the Johnson County District Court changing her legal gender. She subsequently updated the gender marker on her license. With her updated license, Ms. Redman no longer feels embarrassed, ashamed, or afraid when she shows her license, and she has not been forced to undergo genital pat downs while flying. Ex. 17, Redman Dep. 25:21-22; Ex. 18, Redman Decl. at ¶ 10. Finally, Ms. Redman testified that the inaccurate "M" gender marker in her identity documents resulted in improper insurance denials for her prescribed mammograms, requiring her to disclose her transgender identity to her insurer and appeal her denials before receiving coverage. Ex. 17, Redman Dep. 35:12-39:12.

Juliana Ophelia Gonzales-Wahl is a 30-year-old Latina transgender woman living in Lawrence, Kansas. Ex. 19, Gonzales-Wahl Decl. at ¶¶ 1-2. She has been living as a woman since 2018 and has known she was female for as long as she can remember. *Id.* at ¶ 2; Ex. 20, Gonzales-Wahl Dep. 18:23-19:20; 20:1-9 (filed with redactions pursuant to Protective Order). When Ms. Gonzales-Wahl had an inaccurate gender marker on her license, she felt concerned for her safety. She is aware of the harassment and violence that transgender people, especially transgender women of color, experience, which made her fearful of driving within the state. Prior to receiving

her corrected license, she avoided leaving Lawrence as much as possible. Ex. 19, Gonzales-Wahl Decl. at ¶¶ 7-8. She testified that she was pulled over and required to perform a field sobriety test for an officer after providing a license that inaccurately listed an “M” gender marker, forcibly outing her as transgender. She said the interaction instilled fear and anxiety in her and caused her to further avoid travel in the state. Ex. 20, -Wahl Dep. 40:23–46:3.

When she did have to travel to rural parts of Kansas for her job with the Kansas Geological Survey and her license inaccurately listed an “M,” Ms. Gonzales-Wahl experienced multiple incidents of harm—for instance, she had to show her inaccurate license that outed her as transgender to a hardware store employee and a gas station clerk; after these forced disclosures, she was instructed to leave or felt unsafe and left on her own. Ex. 20, Gonzales-Wahl Dep. 29:11–33:23; 34:7–37:7. And when flying in 2019 with a license that inaccurately listed an “M,” Ms. Gonzales-Wahl testified she was subjected to supplemental security screening involved a pat down of her genitals and loud and invasive questioning. *Id.* at 38:2–39:16. Ms. Gonzales-Wahl would also decline social invitations to avoid having to show an ID that did not match her gender identity, which would out her as transgender. Ex. 19, Gonzales-Wahl Decl. at ¶¶ 7-8. She fears what will happen to her if she is forced to renew her license with an inaccurate gender marker and what that might mean for her ability to move safely and securely in the state and access public services. *Id.* at ¶¶ 11-13.

Doe Intervenor-Respondent 1 (hereinafter “Doe 1”) is a transgender man who lives in a small rural community in southwest Kansas. Ex. 21, Doe 1 Decl.” at ¶¶ 2-3. Doe 1 is aware that transgender people experience significant harassment, discrimination, and even violence solely because they are transgender. He has a young child and fears that negative community backlash against himself and his child might result if his transgender identity is made public through this

litigation, or because he is issued a driver's license with a female gender marker. *Id.* at ¶ 8. He has not publicly disclosed his transgender identity to his broader community and does not wish to do so because of concerns for his own safety and security, and that of his young child. *Id.*

Prior to changing the gender marker on his license, Doe 1 was afraid every time he needed to show his license to the police, at the bank, and in other locations where he did not want to reveal his transgender identity. He has had experiences in the past where he has been treated negatively because he is transgender. *Id.* at ¶¶ 9-10. For example, Doe 1 testified that the only time he went to a bar with a license listing an inaccurate "F" marker, he received a look of "disgust" from the bar employee he provided his license to and was incredibly uncomfortable while the employee tried to determine whether he was actually the person his license identified him to be. Ex. 22, Doe 1 Dep. 16:7–17:19 (filed with redactions and pursuant to Protective Order); *see also* Ex. 21, Doe 1 Decl. at ¶ 12. Doe 1 also testified that, when his license still listed an inaccurate "F" marker, he would be misgendered or forcibly outed as transgender while picking up prescriptions at his local pharmacy, but stopped having such negative pharmacy interactions once he was able to update his license to reflect an "M." Ex. 22, Doe 1 Dep. 24:17–25:8. When enrolling his child in daycare, Doe 1 had to provide his driver's license which, at the time, listed an inaccurate "F" marker and forcibly disclosed Doe 1's transgender identity. Doe 1 testified he was then misgendered by daycare staff on multiple occasions, even after requesting the staff not refer to him with feminine pronouns or terms. *Id.* at 31:6–35:2.

These incidents have caused Doe 1 significant anxiety. Ex. 21, Doe 1 Decl. at ¶ 11. He avoided going to restaurants, bars, and other places where he would need to show his ID. *Id.* at ¶ 12. With his updated license, Doe 1 no longer feels embarrassed, ashamed, or afraid when showing his ID. He is now registered to vote—something he was afraid to do when he had an inaccurate

gender marker on his license—and attends social events without fear of outing, harassment or discrimination. *Id.* at ¶ 14.

Finally, Doe Intervenor-Respondent 2 (hereinafter Doe 2), is the parent of a 17-year-old young man who is transgender. Ex. 23, Doe 2 Decl.” at ¶¶ 1-2. Doe 2’s son was assigned female at birth but has known he is male since he was 11 years old, and he began living as a boy two years ago. *Id.* at ¶ 2; Ex. 24, Doe 2 Dep. 13;17–14:10 (filed with redactions pursuant to Protective Order). Doe 2’s son has a female gender marker on his birth certificate, which he intended to change to a male gender marker. He currently has a driver’s license with a female gender maker and wants to change it to a male gender marker so that he has an ID that accurately reflects his gender and gender presentation. Ex. 23, Doe 2 Decl. at ¶ 3. Doe 2’s son is perceived as a boy in his everyday life, including at school, with acquaintances and friends, and in the community. He only selectively discloses his transgender identity and does not want to be targeted for harassment or discrimination because he is transgender. Ex. 24, Doe 2 Dep. 14:19–15:8; Ex. 23, Doe 2 Decl. at ¶ 5. He petitioned for a name change order, which was granted in August 2023. Ex. 24, Doe 2 Dep. 20:3–21:2. Like the other Intervenor-Respondents, he is afraid that his current license, and the inability to get an accurate license if Petitioner prevails in this suit, will negatively impact him by forcing him to disclose his transgender identity every time he shows his license. Ex. 23, Doe 2 Decl. at ¶¶ 12-13.

Against this mountain of evidence of harm to Intervenor-Respondents arising from inaccurate driver’s license gender markers, what contrary evidence has Petitioner been able to muster? None.

F. Gender Markers on Driver's Licenses Have No Impact on Law Enforcement Safety or Efficacy

Evidence produced in this case demonstrates that law enforcement safety and efficacy are not impacted by allowing transgender individuals to change the gender marker on their driver's licenses. Despite KDOR allowing transgender people to update their gender markers since 2011, **it has received no complaints from any local, state, or federal law enforcement agencies regarding the inability to identify criminal suspects as a result of that policy.** *See* Ex. 25, KDOR Resp'ts Resp. to Intervenor-Resp'ts Req. for Produc., No. 6; Oehm Decl. ¶ 2. Nor has KDOR received any complaints from the Kansas Department of Corrections regarding the inability to safely house individuals as a result of that policy. *See* KDOR Resp'ts Resp. to Intervenor-Resp's Req. for Produc., No. 8.

In reality, as discovery here has confirmed, Kansas police officers and other law enforcement officers do not rely on the gender marker on a driver's license to identify or apprehend suspects. **Petitioner produced no evidence that any transgender person in Kansas has ever eluded arrest or caused harm to law enforcement officers because their driver's license listed the gender they live as rather than their sex assigned at birth.** *See* Ex. 26, Burge Dep. 15:24-16:8; 33:10-21; 38:10-21 (stating "no" when asked whether he has learned of any issues with properly identifying transgender individuals during law enforcement activities during his 23 years of service with the Johnson County Sheriff's Office); Ex. 27, Hill Dep. 27:10-21 (former Topeka Police Department officer and current Shawnee County Sherriff stating that he had no examples of any specific instances of an officer under his chain of command having an issue during a law enforcement encounter with a transgender person). This deposition testimony is confirmed by Petitioner's responses to discovery requests. *See* Exs. 28, 29, Pet. Resp. to Intervenors' First Req. for Produc. and Intervenors' First Set of Interrogs. (when asked via interrogatories and requests

for production to identify all instances where a person's license reflecting their gender identity created a law enforcement problem, Petitioner answered "none."). This is consistent with the declaration of Captain Oehm, as referenced in Respondents' Brief in Opposition to Petitioner's Motion for a TI. Oehm Decl. ¶¶ 1, 4-5.

The Court is aware of the significant obstructions Petitioner attempted to utilize to avoid producing documents requested via discovery. Documents which Petitioner belatedly produced include his communications with Lieutenant Theron Chaulk, who works in the Civil Division of the Johnson County Sheriff's Office and is in charge of traffic offenses, service of civil paperwork, and warrant confirmation. Petitioner attempted to elicit evidence from Lt. Chaulk to support his claims here. But Lt. Chaulk told the Attorney General's office bluntly:

I have spoken to each and every officer in my division and, at this time, there are zero examples of the gender [on driver's licenses] affecting any call for service[.]

Ex. 30, 8/17/23 Email from Lt. Theron Chaulk to Jesse Burris, Assistant Attorney General (OAG003364) (emphasis added). As the discovery in this case has revealed, there are multiple ways to confirm a person's identity during a law enforcement encounter, apart from a driver's license. Ex. 31, Simpson Dep. at 25:20-26:12.

The record provides no evidence of any other harm to law enforcement operations or officer safety due to a transgender person's license reflecting their accurate gender. *See, e.g., id.* at 14:22-25, 22:21-23:3 (no personal experience or safety concerns because of a transgender person's driver's license reflecting something other than sex assigned at birth); *id.* at 27:14-14 (over 700 officers in the Johnson County Sheriff's Office; Sergeant Simpson had not heard of a single issue regarding officer safety created by a transgender person's driver's license reflecting their gender rather than sex assigned at birth); Ex. 32, Newson Dep. at 56:15-18 (reliance on driver's licenses showing sex assigned at birth is unnecessary "to provide for officer safety").

Similarly, the gender marker on a driver's license is not used to make placement decisions in sex-based housing in correctional facilities. There is zero record evidence that a driver's license issued under KDOR's existing gender marker policies has resulted in inappropriate placements or impaired the ability of correctional officers to make placement determinations.

The witness identified by Petitioner to try to support this contention, Major Rick Newson with the Johnson County Sheriff's Office, repeatedly testified at his deposition that his staff rarely use driver's licenses at all during the booking process, and that assignments to either male or female housing units are not based on the gender marker on a person's driver's license, nor even their sex assigned at birth. *Id.* at 52:13-22; 56:15-57:9; 58:16-23; 63:7-9.

Major Newson further agreed that a driver's license is "much lower in the level of importance than other information to determine one's gender," and as a result, he requested that a declaration that the Attorney General's office drafted for him to sign be edited because he believed the Attorney General incorrectly placed too much emphasis on the importance of driver's licenses in the booking process, as driver's licenses are not commonly used to identify appropriate housing placements. *Id.* at 44:10-45:7.

Employees of the Johnson County Sheriff's office likewise confirmed to Major Newson via email that in the very small number of instances where a transgender person was booked into the jail, the jail "did not have to use ID to identify sex." Ex. 33, 8/3/23 E-mail from Raymond Nuss to Richard Newson (MRN0000289).

Similarly, Kansas Department of Corrections ("KDOC") Captain Paul Gorges, who has responsibility for transporting individuals newly admitted to KDOC, submitted a declaration earlier in this case attesting that a driver's license is not used to determine facility placement, and that the "KDOC transportation team does not view, use or require a driver's license to verify

identity or gender of the new admits, parole violators, or interfacility transports.” Ex. 34, Decl. of Paul Gorges.

This testimony is buttressed by jail policies regarding placement. For example, the Johnson County Jail, one of the largest in Kansas, has numerous policies regarding intake, assessment, and placement. *See* Ex. 35, Johnson County Sheriff’s Office Intake Procedures (MRN0000262-266); Ex. 36, Johnson County Sheriff’s Office Inmate Classification Policy (MRN0000189-201); Ex. 37, Johnson County Sheriff’s Office PREA Policy (MRN0000211-228); Ex. 38, Johnson County Sheriff’s Office LGBTI Policy (MRN0000229-234); Ex. 39, Johnson County Adult Detention Center Initial Custody Assessment Scale (MRN0000109-11).

None of these policies relies on sex assigned at birth, let alone the use of driver’s licenses in determining any individual’s sex assigned at birth. Instead, the Johnson County policy for safely housing transgender and intersex individuals explicitly says that housing placements “should *not* be determined solely based on the [individuals’] birth sex, identity documents, or physical anatomy.” *See* Ex. 37, LGBTI Policy, at 4 (MRN0000232). These policies recognize that individuals may self-identify as transgender or gender nonconforming at a medical screening during the intake process, and that information may be used in making an appropriate housing placement. *See, e.g.* Ex. 39, VitalCore Health Strategies Medical & Behavioral Health Admission Screening (MRN0000165 (listing screening questions asked of individuals upon detention regarding gender dysphoria and identification as transgender or gender variant)).

G. Virtually Every Other State and the Federal Government Allow Transgender People to Update the Gender Marker on Their Driver’s Licenses and/or Other Identity Documents

Prior to the TRO entered in this action, Kansas joined virtually every other U.S. state and territory in allowing at least some transgender people to align the gender marker listed on their

driver's licenses with the gender they live as every day. While states have had differing standards regarding what supporting evidence must be produced to support a gender marker change, only Kansas (as a result of this Court's TRO) and Tennessee bar all transgender people from updating their license entirely. *See Equality Maps: Identity Documents Laws and Policies*, Movement Advancement Project (June 28, 2023), https://www.lgbtmap.org/equality-maps/identity_document_laws/drivers_license.³

The federal government also allows transgender people to obtain a passport with a gender marker that reflects their gender identity. *See, e.g.*, 8 Foreign Affairs Manual 403.3 Gender Designation (April 5, 2023), https://fam.state.gov/FAM/08FAM/08FAM040303.html#M403_3_1 (passport rules). Other federal agencies have similar policies regarding updating gender markers on government records.⁴ There is no evidence of problems resulting from gender markers on federal identification documents or from any state driver's license.

³ Tennessee only began barring transgender people from updating the gender marker on their license earlier in 2023 because of the application of a bill somewhat similar to SB 180 (though different in important ways as discussed below), not based on any determination by the state that allowing transgender people to update their gender marker on a license poses actual harm. *See, e.g.*, Ex. 41, News Channel 5, *New TN law requires the gender on your state ID match the gender on your birth certificate*, (July 1, 2023) (available at <https://www.newschannel5.com/news/new-tn-law-requires-the-gender-on-your-state-id-match-the-gender-on-your-birth-certificate>).

⁴ The U.S. Office of Personnel Management, Department of Labor, Veterans Health Administration, Department of Defense, United States Citizenship and Immigration Services, and Social Security Administration have similar policies regarding gender markers in their records. *See The Guide to Personnel Recordkeeping*, U.S. Office of Pers. Mgmt. 4.14-15 (2017), <http://bit.ly/2FOcwvW>; *DOL Policies on Gender Identity: Rights and Responsibilities*, U.S. Dep't of Labor, <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/gender-identity>; VHA Directive 1341(3)(4), Appendix A(1) (2023), <https://news.va.gov/press-room/va-health-records-now-display-gender-identity/>; *USCIS Updates Policy Guidance on Self-Selecting a Gender Marker on Forms and Documents*, U.S. Citizenship and Immigration Servs. (Mar. 31, 2023), <https://www.uscis.gov/newsroom/alerts/uscis-updates-policy-guidance-on-self-selecting-a-gender-marker-on-forms-and-documents>; *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/>; *Department of Defense Instruction 1300.28 In-Service for Transgender Service Members*, U.S. Dep't of Defense (Dec. 20, 2022), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130028p.pdf>; 32 C.F.R. § 161.23(d) (Table 33) (DoD).

For the reasons that follow and based on the evidence that will be presented during the upcoming hearing, Intervenor-Respondents urge this Court to deny Petitioner’s request for relief, both temporary and permanent.

III. DISCUSSION

Intervenor-Respondents agree with the KDOR Respondents that SB 180 does not bar KDOR from issuing driver’s licenses with gender markers that reflect the gender that transgender people live as and know themselves to be, and Petitioner’s requested injunction should be denied on that basis. KDOR policies have addressed updating gender markers on driver’s licenses without incident since 2011. The alleged conflict is one of Petitioner’s imagination. Even if SB 180 could be interpreted to require denial of driver’s licenses with accurate gender markers to transgender Kansans (which it does not), Petitioner’s requested relief should still be denied because it would violate Intervenor-Respondents’ rights to personal autonomy, privacy and equal protection under the Kansas Constitution.⁵

A. Standard of Review

Currently, the only motion pending before the Court is Petitioner’s Motion for a Temporary Injunction. A temporary injunction may be issued only if the moving party meets all of the following factors:

- (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 (2007) (citations omitted). As a threshold matter, the moving party must also show a “substantial likelihood of success on the merits.” *Id.* “The

⁵ For purposes of this action, Intervenor-Respondents rely exclusively on the Kansas Constitution, Bill of Rights, Section 1.

standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the [petitioner] must show a likelihood of success on the merits rather than actual success.” *Id.* at 394 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)). The Court has indicated at prior hearings that it may consider Petitioner’s Motion as a motion for relief on the merits of the entire Mandamus Petition, following the evidentiary hearing scheduled for January 10-11, 2024.

Petitioner cannot show a likelihood of success and, for the same reason, cannot ultimately succeed on the merits of his statutory argument. By its plain language, SB 180 does not apply to driver’s licenses, and any ambiguity in that regard should result in the Court interpreting SB 180 in a way that does not conflict with SB 9 and Intervenor-Respondents’ rights under Section 1 of the Kansas Constitution’s bill of rights to personal autonomy, privacy and equal protection of the laws. In addition, the balance of hardships, the public interest, and irreparable harm tips overwhelmingly in favor of resuming KDOR’s gender marker policy during the remainder of this litigation, and denying the ultimate relief sought by Petitioner in this action.⁶

B. The Plain Language of SB 180 Does not Mandate the Relief Sought by Petitioner

1. SB 180 does not apply to driver’s licenses.

On its face, the definition of “sex” in SB 180 does not apply to the specific statute applicable to driver’s licenses, K.S.A. § 8-243, which has required that a license application supply, and that a state license display, an individual’s “gender” since 2007, or to KDOR policies permitting transgender Kansans to update the gender marker on their driver’s licenses since at least 2011. Nothing in SB 180 refers to driver’s license applications, gender marker changes, or license

⁶ The mandamus action should be dismissed and permanent injunctive relief denied for substantially the same reasons that temporary relief should be denied here: namely, that Petitioner cannot succeed on the merits of his legal argument.

renewals under state law. Even if those statutes, rules, or regulations used the term “sex” (which they do not), the definition of sex in SB 180 does *not* even extend to all Kansas statutes and regulations referring to “sex” and an implied repeal of K.S.A. § 8-243’s existing requirements would be strongly disfavored. This interpretation is borne out by legislative history showing that lawmakers and organizations advocating for the enactment of SB 180 did not believe it would impact driver’s licenses in Kansas, or at a minimum, were unsure.

“[T]he fundamental rule governing the interpretation of statutes is that the intent of the legislature governs if that intent can be ascertained.” *Haddock v. State*, 295 Kan. 738, 754 (2012) (quotations and citations omitted). Intent is presumed to be expressed through the plain language of a statute. *Id.* For that reason, “[i]f the statute’s language is clear, there is no need to resort to statutory construction. Only if the statute’s language or text is unclear or ambiguous does the court employ canons of construction, legislative history, or other background considerations to divine the legislature’s intent and construe the statute accordingly.” *O’Brien v. Leegin Creative Leather Prods.*, 294 Kan. 318, 333 (2012) (citations and quotations omitted).

Section 1 of SB 180 states that:

- (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; (3) the terms “woman” and “girl” refer to human females, and the terms “man” and “boy” refer to human males. (Emphasis added).⁷

⁷ Section 3 of the bill requires “any state agency, department or office or political subdivision 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.” L. 2023, ch. 84 (available at <https://sos.ks.gov/publications/sessionlaws/2023/Chapter-84-SB-180.html>). As KDOR has explained, it can comply with this requirement without changing its longstanding practice of allowing transgender license applicants to have a gender marker that reflects the gender they live as, rather than their sex assigned at birth. See KDOR Mot. To Dissolve TRO, Dkt 5, at 9. Accordingly, Intervenors focus their arguments on the implications of Section 1 of SB 180.

The Kansas driver's license statute and regulations do not refer to "sex", *cf.* K.S.A. § 8-243, however, and they certainly do not reference or require "the application of an individual's biological sex." Instead, K.S.A. § 8-243(a) requires that driver's licenses issued by KDOR "shall bear" the licensee's "gender." While the physical license KDOR issues uses the label "sex" to describe that data field, neither the statute or a driver's license reference any individual's biological sex, and there is nothing inherent in the gender marker listed on a license that suggests that SB 180 was intended to apply to K.S.A. § 8-243(a) at all.

2. KDOR policy allowed gender marker changes since at least 2011 pursuant to Kansas Statutes.

When SB 180 was enacted, KDOR had long been issuing licenses with gender markers that reflected transgender individuals' gender identity, rather than their sex assigned at birth. Consequently, it must be presumed the legislature was aware of KDOR's practice of respecting an individual's gender identity, and if it had intended to change it, would have drafted SB 180 to make clear that it applied to licenses. Instead, the legislature did the opposite, writing a definition that applies *only* "with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations." This is a far cry from specifying that state statutes that references an applicant's "gender" would be impacted by the narrow definition of "sex" in SB 180.

Putting aside the fact that the license statutes refer to an applicant's "gender" rather than "sex," SB 180 does *not* even state that all references to "sex" under Kansas statutes, rules or regulations must be governed by its particular definition of sex. The text of SB 180 expressly applies *only* to that subset of state laws and regulations that relate to the application of an individual's biological sex. The definitions of male and female also do not apply to all state law references to male or female—rather, they apply to the definition of an individual's sex ("either male or female") which in turn is only implicated "with respect to the application of an individual's

biological sex.” The Court must assume the legislature meant what it said when drafting the bill, because “the clear intent of the legislature is reflected in the language it chooses to use.” *State v. Mishmash*, 295 Kan. 1140, 1144 (2012). This Court need not resolve precisely which state laws are governed by the narrow definition of sex in SB 180 to determine that the driver’s license statute and KDOR regulations are not among them.

3. The Kansas Legislature uniquely modified the text of the model bill.

In this regard, it is instructive to contrast the text of SB 180 with the model bill upon which SB 180 was based and measures enacted in Montana and Tennessee earlier in 2023. The model “Women’s Bill of Rights” provides plainly 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.” <https://womensbillofrights.com/>. Similarly, unlike SB 180, the Tennessee law amends the definitions section of the state code and states explicitly: “*As 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). Montana took an even more direct approach and passed a bill that added both a definition that expressly applies across the entire state code to all references to “sex” (Sec. 1), *and* explicitly amended multiple sections of the state code, including the statute governing driver’s license applications (Sec. 40), to add reference to the new definition. S. 458, 68th Sess. (Mont. 2023).

Had the Kansas legislature intended SB 180’s definition to apply to all state laws that reference sex (or gender), the drafters could have used the model language verbatim, specified that the definition applied across the code like Tennessee, or enumerated those statutes where the new definition is intended to apply like Montana. But the Kansas legislature did none of those things.

Instead, the Kansas legislature deliberately *narrowed* the application of SB 180 to apply only “with respect to the application of an individual’s biological sex pursuant to any state law or rules and regulations.” Petitioner has zero evidence otherwise.

4. The Kansas Legislature knows how to state clearly that a definition of “sex” applies, but it did not do so here.

A different bill passed by the Kansas legislature this same session regarding housing incarcerated individuals in county jails on the basis of their sex assigned at birth further illustrates that the legislature would have used different language had it intended the scope of SB 180 to reach as far as Petitioner urges for driver’s licenses. In enacting Senate Bill 228 (2023), the legislature stated clearly, “*As used in this section, ‘sex’ means an individual’s biological sex, either male or female, at birth. 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.*” Consequently, SB 228 directly and clearly indicates that the definition is intended to apply in the specific context covered by the bill.

The contrast between SB 180 and SB 228 offers yet another reason to assume that if the Kansas legislature intended the definition of sex offered by SB 180 to apply to every single Kansas statute that references sex or gender, it would have done so directly, without using ambiguous language. *Cf. Mishmash*, 295 Kan. at 1143-44 (interpreting “personal use” exception for drug offender registration statute to apply even if the drugs were not *solely* for personal use, because “[w]hen the legislature intends to limit a category, it clearly understands how to insert the necessary language” and noting that a different section of the registration scheme stated that funds shall be used “solely for law enforcement and criminal prosecution purposes”).

5. The legislative history of SB 180 negates Petitioner’s interpretation.

The legislative history of SB 180 further belies any intent that this definition would be used to demand that transgender Kansans carry a driver's license with a gender marker that displays the sex they were assigned at birth. As noted above, no lawmaker who voted for SB 180 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. *Supra* at 10-13.

Not only did Independent Women's Voice, the original proponent of the bill and a major voice in favor of its passage, prepare talking points indicating that it would **not** impact any definition of "gender" under state law, they went further to state explicitly that it would not impact current law about driver's licenses and stated that "SB 180 does not require Kansans to change their driver's licenses or prevent Kansas from validating gender identity on their license." *See Ex. 13*, Email to Charles Dalton, May 10, 2023, attaching IWV talking points (OAG 000592-595).

Moreover, documents obtained via discovery here establish that a state lawmaker who voted in favor of the bill submitted a request for the Attorney General Opinion that is at the core of this litigation to inquire "whether SB 180 requires a person's biological sex to be listed on a driver's license issued by the state of Kansas?" *See Ex. 14*, Email from Rep. Carrie Barth to Kris Kobach, dated June 1, 2023 (OAG 0000293-94). Had it been clear on the face of the bill, or to the lawmakers who voted for it, that SB 180 would apply to driver's licenses, there would have been no need for Rep. Barth to make this inquiry.

6. Petitioner's erroneous interpretation of SB 180 is prohibited under Kansas law because it would affect an implied repeal of SB 9.

Alternatively, *even if* the text of SB 180 is read to have any bearing on the driver's license statute, K.S.A. § 8-243(a)—which it should not—such an interpretation would function as an implied repeal of existing law which is heavily disfavored under Kansas statutory interpretation cannon. An implied repeal “is one which takes place when a new law contains provisions which are contrary to, but do not expressly repeal, those of a former law.” *Sch. Dist. v. Bod. of Cty. Comm'rs*, 141 Kan. 108, 112 (1935) (citing 59 C.J. 904, 905). “Whether it has been so repealed is a question of legislative intent.” *Id.*

Such repeals by implication are disfavored. *See, e.g., id.* (“The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable.”); *In re Joint Application of Westar Energy, Inc.*, 311 Kan. 320, 329 (2020) (“This runs contrary to a bedrock principle of statutory interpretation that ‘repeal by implication is not favored’”) (quoting *In re City of Wichita*, 274 Kan. 915, 929 (2002)); *State v. Burney*, 194 Kan. 292, 294 (1965) (“[W]e are to be guided by the well-settled rule that the law does not favor repeals by implication.”).

Because repeals by implication are so disfavored, Kansas courts will only find an implied repeal where the “later enactment is so repugnant to the provisions of the first act that both cannot be given force and effect.” *City of Overland Park v. Nikias*, 209 Kan. 643, 646 (1972) (quoting *Wolff v. Rife*, 140 Kan. 584 (1934)); *see also Burney*, 194 Kan. at 294 (same); *In re City of Wichita*, 274 Kan. at 929 (same).

The fact that SB 180 and K.S.A. § 8-243(a) can be read to “operate independently without conflict,” *In re City of Wichita*, 274 Kan. at 929, provides an alternate basis for construing SB 180

narrowly even apart from the plain language of the statute limiting its relevance “to the application of an individual’s biological sex pursuant to any state law or rules and regulations.”

Moreover, as set forth below, reading SB 180 to require KDOR to issue licenses with transgender Kansans’ sex assigned at birth would be unconstitutional. Because the plain language of SB 180 does not apply to the state driver’s license regime, and because the language is at a minimum ambiguous and susceptible to different interpretations, this Court should construe SB 180 narrowly to avoid an unconstitutional result. *See State v. Stevens*, 26 Kan. App. 2d 606, 609–10 (1999) (“If there is any reasonable way to construe the statute as constitutionally valid, that should be done.”) (quoting *State v. Scott*, 265 Kan. 1, 4 (1998)).

C. Granting the Relief Petitioner Requests Would Violate the State Constitutional Rights of Intervenor-Respondents and Other Transgender Kansans

As noted above, prior to this Court’s order granting the TRO in this action, Kansas—like nearly every other state—allowed transgender people to carry a state driver’s license with a gender marker that reflected the gender they live as and know themselves to be. *Supra* at 23. A driver’s license is a commonly used form of government identification. Employers, businesses, and landlords frequently require proof of identity and age, which often results in a request to disclose a driver’s license. Intervenor-Respondents and other transgender Kansans frequently use driver’s licenses as identification when traveling, including when renting a car, checking into a hotel, or boarding an airplane. *See, e.g.*, Ex. 16, Kellogg Decl. at ¶ 13 (noting that a driver’s license is used for banking, interactions with law enforcement, renting a car, voting, applying for jobs, and entering government buildings); Ex. 18, Redman Decl. at ¶ 15 (“I want to continue fully participating in all that life in Kansas has to offer, but I fear that if I am forced to renew my license with an inaccurate gender marker, I will be subjected to humiliation, degradation, and fear while

going about my daily life, and that I will be denied services because my driver's license will be inaccurate and/or reveal my transgender identity.”). Forcing transgender people either to go without a driver's license and be unable to drive, or to use and display a driver's license that bears an inaccurate gender marker and thereby involuntarily discloses that they are transgender, violates their right to personal autonomy and privacy and denies them equal protection of the laws under the Kansas Constitution.

1. Petitioner's interpretation of SB 180 would burden Intervenors' right to personal autonomy.

Section 1 of the Kansas Constitution's 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 & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 646 (2019). In deciding that the Kansas Constitution independently protects the right to decide whether to continue a pregnancy or have an abortion, the Kansas Supreme Court held that the state Constitution “acknowledges rights that are distinct from and broader than the United States Constitution and that our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards.” *Id.* at 624.

Applying SB 180 to compel transgender Kansans to carry a driver's license that contradicts their gender and involuntarily discloses that they are transgender whenever they show someone their license would violate their right to self-determination and personal autonomy because it burdens their “right to make self-defining and self-governing decisions.” *Id.* at 646. Being forced to go without the ability to drive in Kansas is not a viable option for Intervenor-Respondents. They rely on their ability to drive to get to school and work, take care of their children, attend medical appointments, and engage in all aspects of daily life.

Because it is not possible to tell whether someone is transgender by looking at them, carrying a license with a gender marker that does not match their physical appearance is likely to disclose the fact that they are transgender, which forcibly outs them and puts them at further risk of harassment, discrimination, and violence from others. Ex. 1, Oller Decl. at ¶¶ 30, 32, 35, 38-39, Exs. 2, 5, 16, 17, 22 to Oller Decl. Carrying a license with the wrong gender marker can also simultaneously cause serious psychological, dignitary, and even physical harm to transgender people. *Id.* at ¶¶ 10, 30, 32, Exs. 6, 14 to Oller Decl.; Ex. 2, Oller Dep. 24:22-25:19.

Intervenor-Respondents have already experienced harms including harassment (Ex. 17, Redman Dep. 19:3-18; 21:15–22:13); negative interactions with law enforcement (Ex. 15, Kellogg Dep. 40:14-43:15); being asked embarrassing questions about their genitalia when filling a prescription at the pharmacy (*id.* at 44:3–46:17; 46:21-47:12; 47:20-51:9); and fearing for their own safety after being outed by a license with the wrong gender marker while traveling for work (Ex. 20, Gonzales-Wahl Dep. 29:11–33:23; 34:7–37:7). They have changed their behavior to avoid situations where they might have to present an ID that discloses their transgender status, such as by not voting or going out to socialize with friends. *See, e.g.*, Ex. 21, Doe 1 Decl. at ¶ 12; Ex. 19, Gonzales-Wahl Decl. at ¶¶ 7-8.

Transgender people deserve the dignity and autonomy to decide who they share deeply personal information with, rather than being forced to do so by the State. They should not be forced to choose between having a license and forced outing of their transgender status. Because the driver’s license policy change sought by Petitioner burdens core natural rights to autonomy and self-determination, it is subject to strict scrutiny.⁸

⁸ The fact that transgender people in Kansas have only had a formal mechanism to update the gender marker on their licenses since 2011 does not undermine their argument that denying accurate gender markers on licenses is an impairment of the fundamental right to personal autonomy. In *Hodes & Nausser*, the Kansas Supreme Court expressly

2. Petitioner's interpretation of SB 180 would burden Intervenors' right to informational privacy.

Interpreting SB 180 to force repeated involuntary disclosure of a person's transgender identity every time they are required to show their driver's license would also violate the Kansas state constitutional right to informational privacy. This "constitutionally protected 'zone of privacy'" includes an "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977). While the Kansas Supreme Court has not yet addressed the scope of that right under the state constitution, see *Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 920, 92 (2006), Kansas courts "customarily interpret its provisions to echo federal standards," *id.*, except, of course, where the Kansas Supreme Court has interpreted the state constitution to provide greater protections. *Hodes & Nauser*, 309 Kan. at 621.

The right to informational privacy particularly encompasses information that is sexual, medical, or about mental health, because such information has long been recognized as deeply private. See, e.g., *United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013) (medical, mental health); *United States v. Brice*, 649 F.3d 793, 796 (D.C. Cir. 2011) (medical, mental health); *Aid for Women v. Foulston*, 441 F.3d 1101, 1124 (10th Cir. 2006) (Herrera, J., concurring) (sexual, medical); *Livsey v. Salt Lake Cty.*, 275 F.3d 952, 956 (10th Cir. 2001) (sexual, medical).

Courts that have addressed whether identifying one's transgender status on a driver's license is protected information for purposes of this right consistently have answered yes, in significant part because of the potential harmful consequences of disclosing such information. See, e.g., *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (holding that

rejected arguments that the existence of criminal prohibitions on abortion at the time of ratification of the constitution was relevant to the Court's determination, noting that "rather than rely on historical prejudices in our analysis, we look to natural rights and apply them equally to protect all individuals." *Hodes & Nauser*, 309 Kan. at 659-60.

denying gender marker changes on driver's licenses "forces [transgender people] to disclose their transgender status in violation of their constitutional right to informational privacy").

"Such forced disclosure of a transgender person's most private information is not justified by any legitimate government interest. It does not further public safety, such that it would amount to a valid exercise of police power. To the contrary, it exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger." *Id.* (citation omitted); *see also Love v. Johnson*, 146 F. Supp. 3d 848, 855 (D. Mich. 2015) (holding that state policy denying driver's licenses to transgender residents implicated fundamental due process privacy rights and noting that "Plaintiffs have offered a plethora of evidence which, accepted as true, suggests that the Policy poses a real threat to their personal security and bodily integrity") (citation omitted); *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) ("The Court agrees that one's transgender[] status is private, sensitive personal information While Alaska law does not require anyone to obtain a driver's license, such a license is necessary to enjoy the benefits of operating a motor vehicle in the state. Furthermore, individuals are often required to furnish their driver's license to third parties as a form of identification. When a person such as K.L. furnishes a driver's license bearing a male sex designation, the discrepancy between the license and their physical appearance can lead to the forced disclosure of the person's transgender[] status.").

"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). Where "disclosure of this [highly intimate] information may fall into the hands of persons harboring negative feelings, [denial of a license with an accurate gender marker] creates a very real threat to

Plaintiffs’ personal security and bodily integrity.” *Love*, 146 F. Supp. 3d at 856 (first alteration in original) (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998)).

As Intervenor-Respondents have personally experienced, the disclosure of the mere fact that they are transgender may “provoke . . . hostility and intolerance from others.” *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); *see supra* at 13-18 (summarizing testimony of Intervenor-Respondents regarding harms from carrying a license that discloses their transgender status); Ex. 1, Oller Decl. ¶ 37 (describing harms from forced disclosure of transgender status). For example, Intervenor-Respondent Gonzales-Wahl was pulled over by a police officer while driving, and after she provided a license with a male gender marker, experienced differential treatment and felt scared for her safety. Ex. 20, Gonzales-Wahl Dep. 40:23–46:3. Both Intervenor-Respondent Doe 1 and Intervenor-Respondent Kellogg experienced harassment and humiliation while picking up medical prescriptions after showing licenses that displayed their sex assigned at birth. Ex. 22, Doe 1 Dep. 24:17–25:8; Ex. 15, Kellogg Dep. 44:3–46:17; 46:21-47:12; 47:20-51:9.

In addition to the privacy interest in not disclosing their transgender status to employers, law enforcement, or business owners who might view their driver’s licenses, granting the relief Petitioner seeks in this action would pose an additional and unjustified burden on the right to informational privacy by requiring KDOR and its agents to ask invasive and deeply personal questions about genitalia at birth and reproductive capacity as part of a license application. Adopting Petitioner’s interpretation of SB 180 would create myriad administrative issues and potentially expose all Kansans to continued invasive questioning about their medical status, medical history, and more.

Moreover, this case is not simply about whether transgender people can *change* the gender marker on an existing Kansas license. Petitioner takes the position that KDOR cannot issue an

original license to any transgender person with a gender marker that matches their gender identity, even if that person has moved here from a state where they possessed such a license *and* other affirming identifying documents, such as an out-of-state birth certificate, upon which KDOR will rely in issuing the Kansas license. Pet’s Mot., Dkt. 2, at 8 (“As a result, section 1(a) of SB 180, in conjunction with K.S.A. 8-243(a), requires a licensee’s “biological sex, either male or female, at birth” to be listed on driver’s licenses issued by KDOR.”). Instead, he maintains that KDOR must only issue licenses that reflect an individual’s sex assigned at birth, regardless of what documentation is presented to KDOR agents. But how is KDOR to know whether someone is transgender in instances where state records do not make that clear on their face (such as by reflecting a gender marker change)?

Notably, in response to discovery requests, Petitioner declined to explain how KDOR’s staff could determine what sex a person was assigned at birth to comply with his interpretation of SB 180. *See* Pet.’s Resp. to Intervenor-Resp’ts Interrogs. No. 7. KDOR accepts out-of-state licenses, birth certificates, U.S. Passports, and other documentation as evidence of gender for a license application. *Supra* at 9-10. Many transgender people have updated those documents to reflect the gender they live as, including many of the Intervenor-Respondents. If those documents do not show that someone is transgender, the only way that KDOR would know their “biological sex” as defined by SB 180 with certainty would be if state employees must ask invasive questions about genitalia at birth and reproductive capacity to all applicants—requesting private information that all individuals should have a right to keep confidential.

Requiring transgender people to carry a license that displays a gender marker reflecting their sex assigned at birth, that conflicts with other forms of valid legal identification they may hold, and that may even contradict legal court orders reflecting their gender change, puts them in

an untenable position of being forced to out themselves to others as transgender against their will. The right to informational privacy protects precisely this kind of personal information from forced disclosure.

3. Petitioner’s interpretation of SB 180 would result in denial of equal protection of the laws.

In addition to burdening the fundamental rights to personal autonomy and privacy, denying gender marker changes on driver’s licenses is subject to heightened scrutiny because it would deny equal protection of the laws to transgender Kansans, who alone would be unable to receive a license that matches their gender identity, in violation of the Kansas Constitution. SB 180 purports to define “male” and “female” for some purposes under state law to exclude transgender men and women from those respective classifications, and Petitioner now seeks to import those restrictions onto the gender markers on driver’s licenses issued by KDOR. Because the result Petitioner requests here classifies based on sex (both facially and because it discriminates based on transgender status), Petitioner’s arguments must withstand at least intermediate scrutiny. They cannot.

“Traditionally, when analyzing an equal protection claim, the United States and Kansas Supreme Courts employ three levels of scrutiny: strict scrutiny, intermediate scrutiny, and the rational basis test. The level of scrutiny applied by the court depends on the nature of the legislative classification and the rights affected by that classification.” *State v. Limon*, 280 Kan. 275, 283 (2005) (citations omitted). Classifications based on sex receive intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (“*VMF*”). SB 180 constitutes sex-based discrimination for at least two reasons.

First, SB 180 is 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”:

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"; "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.

If the legislature cannot "writ[e] out instructions" for determining whether treatment is permitted "without using the words man, woman, or sex (or some synonym)," the law classifies based on sex. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1746 (2020).

Second, the Petitioner maintains that transgender individuals cannot obtain a license with gender markers that match their gender identity based on the classification described by SB 180. By "discriminating against transgender persons," denial of the licenses "unavoidably discriminates against persons with one sex identified at birth and another today." *Id.* A woman who was assigned female at birth can receive a license that reflects her female gender identity, while a transgender woman who was assigned male at birth cannot. Classifications based on transgender status are premised on transgender people's identification with a sex other than their assigned sex at birth, and nonconformance with sex stereotypes. *Cf. Tudor v. Se. Okla. State Univ.*, 13 F.4th 1019, 1031 (10th Cir. 2021) (statements about the transgender plaintiff's appearance, lifestyle, and transgender status constituted "clearly sufficient" evidence for a jury to find that she was discriminated against because of her sex) ; *see also Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. '[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.'") (alteration in original) (citation omitted).⁹

⁹ While the Tenth Circuit has not held that classifications based on transgender status are themselves suspect for purposes of federal equal protection analysis, *see, e.g., Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015)

In a somewhat analogous situation, the Kansas Supreme Court in *Limon* held that a state criminal law punishing consensual sexual activity between teenagers of the same sex far more severely than consensual sexual activity between teenagers of different sexes was based on sexual orientation. *Limon*, 280 Kan. at 283, 286. The Court acknowledged that “there is no per se classification of homosexuals, bisexuals, or heterosexuals in the statute,” but found that because the statute imposed a greater burden on conduct engaged in by people who were gay or bisexual, it nonetheless was “a discriminatory classification.” *Id.* at 285-86.

Under the Petitioner’s reading of SB 180, transgender people, and transgender people alone, cannot have a gender marker on their license that matches the gender they know themselves to be and live their lives as; instead, they will be forced to carry a license that reveals their transgender status and sex assigned at birth. People who are not transgender can access a license that reflects their gender identity. Accordingly, the classifications inherent in the relief sought by Petitioner are subject to heightened scrutiny.

4. Requiring KDOR to issue licenses with a gender marker that reveals sex assigned at birth would fail heightened scrutiny, or indeed any level of review.

Because issuing a driver’s license with a gender marker that reflects transgender Kansans’ sex assigned at birth would burden fundamental rights of personal autonomy and privacy, and because it classifies based on sex and transgender status, it would be subject to—and would fail—heightened review. “[I]n cases involving ‘suspect classifications’ or ‘fundamental interests’ . . . the presumption of constitutionality [is] displaced and the burden [is] placed on the party asserting constitutionality to demonstrate a compelling state interest which justifies the classification.” *Limon*, 280 Kan. at 284 (quoting *Farley v. Engleken*, 241 Kan. 663, 667 (1987)).

(citing *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995), that does not mean that *sex discrimination* equal protection claims cannot be brought by transgender individuals, particularly as a matter of state constitutional law.

For the requested relief to survive heightened scrutiny, Petitioner must, at a minimum, provide an “exceedingly persuasive justification” for applying the classifications in SB 180 in the context of driver’s licenses. *VMI*, 518 U.S. at 531. When evaluating whether the relief sought by Petitioner is substantially related to an important governmental interest, “[t]he Court retains an independent constitutional duty to review [legislative] factual findings when constitutional rights are at stake.” *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). The “burden of justification is demanding”—not “deferential”—and it “rests entirely on the State.” *VMI*, 518 U.S. at 533, 555. As discussed below, that burden has not been met here.

In fact, state and federal courts across the country have held that policies barring transgender people from obtaining identity documents matching their gender identity lack sufficient government justification to 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); *Love*, 146 F. Supp. 3d at 856 (driver’s licenses); *K.L.*, 2012 WL 2685183 at *6-8 (driver’s licenses).¹⁰

Departing from KDOR’s longstanding policy of allowing transgender people to update their gender markers based on Petitioner’s reading of SB 180 is not narrowly tailored to serve a compelling government interest, substantially related to any important government interest, or

¹⁰ *But see Fowler v. Stitt*, slip op., No. 4:22-cv-115-JWB-MTS (N.D. Okla. June 8, 2023); *Gore v. Lee*, slip op., No. 3:19-cv-328 (M.D. Tenn. June 22, 2023). These cases found that the states had a sufficient justification for refusing to update the gender marker on *birth certificates*, relying on an asserted state interest in preserving birth certificates as historical documents. That interest does not apply in the context of driver’s licenses, nor has Petitioner—or the Kansas Legislature—asserted it.

even rationally related to a legitimate government interest as required under the lowest standard of constitutional review.

The only government interests relied on by the Petitioner relate to law enforcement, regarding identification of suspects and the placement of detained individuals in sex-based custodial housing.¹¹ It is undisputed that none of these interests were articulated during enactment of SB 180 as justifications for SB 180 in general, let alone as contemporaneous justification for applying SB 180 to KDOR's driver's license policy. For that reason alone, they cannot satisfy the government's burden under heightened scrutiny. *See VMI*, 518 U.S. at 533 (under heightened scrutiny for laws that discriminate on the basis of sex, the government's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation").

But even if these were not *post hoc* justifications, despite extensive discovery, no harm to any legitimate state interest has been demonstrated from the current KDOR policy. Despite KDOR allowing transgender individuals to update their gender marker on their license since at least 2011, there is simply no evidence that any of these harms have ever occurred from allowing transgender people to update the gender markers on their licenses, and similarly, no support to show that SB 180 is tailored to advance—or even rationally related to—any of these government interests.

a. Petitioner's alleged harms to law enforcement operations are unsupported by evidence.

The Petitioner's first alleged law enforcement justification—that licenses must reflect sex assigned at birth because otherwise law enforcement would be unable to apprehend suspects, Pet. Mot. at 8—is untethered to the reality of what law enforcement operations dealing with transgender people look like in practice and what law enforcement has ably handled since KDOR began

¹¹ The Petitioner has disclaimed any reliance on an alleged interest in protecting the safety of organ donation. *Infra* at 51.

allowing for gender marker changes in 2011. Petitioner’s argument assumes that law enforcement officers would be able to accurately identify transgender individuals if their sex assigned at birth was listed on their driver’s license, rather than the gender they are living as. But that practice is more, not less, likely to cause confusion among law enforcement—as it would force transgender people to carry a license that does not reflect the gender they are living as in their daily life. For example, if a transgender man was a suspect of a crime and the witnesses provide law enforcement with descriptions of the perpetrator as a man with short hair and a beard, requiring that transgender man’s license to list an “F” gender marker would only create further confusion for law enforcement in determining if they had apprehended the correct suspect.

Further, Petitioner’s argument here is undermined by testimony and evidence *from their own witnesses* obtained via discovery. **There is no evidence in this record that any transgender person in Kansas has ever eluded arrest because their driver’s license listed the gender they live as rather than their sex assigned at birth.** When asked whether he has learned of any issues with properly identifying transgender individuals during law enforcement activities during his 23 years of service with the Johnson County Sheriff’s Office, Lieutenant Burge—who works in the Warrants Division— testified **no**. Ex. 26, Burge Dep. 15:24-16:8; 33:10-21; 38:10-21. When asked whether he knew of or provided the Attorney General with any specific instances of an officer under his chain of command having an issue during a law enforcement encounter with a transgender person, former Topeka Police Department officer and current Shawnee County Sherriff Brian Hill testified that he had **none**. Ex. 27, Hill Dep. 27:10-21. Lieutenant Chaulk, who works in the Civil Division of the Johnson County Sheriff’s Office and is in charge of traffic offenses, service of civil paperwork, and warrant confirmation, told the Attorney General’s office: “I have spoken to each and every officer in my division and, at this time, there are **zero examples**

of the gender [on driver's licenses] affecting any call for service[.]” Ex. 30, 8/17/23 Email from Lt. Theron Chaulk to Jesse Burris, Assistant Attorney General (OAG003364) (emphasis added); *see also* Oehm Decl. ¶ 4 (“In my Experience, I have never encountered a situation in law enforcement where the gender represented on the driver’s license, created issues with identifying the person using law enforcement systems.”).

Petitioner’s unsupported argument that driver’s licenses must reflect sex assigned at birth to ensure criminals do not escape apprehension appears to be premised on a faulty understanding of what individuals were required to do under KDOR policy, prior to the entry of the TRO in this case, to change the gender marker on their driver’s licenses. *Cf. supra* at 9-10 (detailing process people must go through to change their gender marker on their driver’s license). Petitioner seems to think that anyone attempting to evade arrest could just march into a department of motor vehicles office, obtain a changed ID, and then use it to escape. But this is simply not true. Petitioner’s claim that licenses must reflect sex assigned at birth to ensure arrest of dangerous fugitives is nothing more than post-hoc fearmongering and should be rejected outright.

Nor is there evidence of any other harm to law enforcement operations or officer safety due to a transgender person’s license reflecting their gender.¹² Sgt. Simpson testified at deposition that she had no personal experience or safety concerns because of a transgender person’s driver’s license reflecting something other than sex assigned at birth. Ex. 31, Simpson Dep. 14:22-25;

¹² Petitioner’s only articulated support for this argument is *Simmons v. City of Chicago*, No. 14 C 9087 2017 WL 497755 (N.D. Ill., Feb. 7, 2017)—a case that actually cuts against the argument that KDOR’s gender marker policy causes harm to law enforcement. In *Simmons*, a mismatch between the height listed on a search warrant and the height of the actual person arrested was a factor used to determine the arrest was made without probable cause. 2017 WL 487755, at *13. The court in *Simmons* overturned Simmons’ arrest because his physical appearance—namely, his height and hairstyle—did not correspond with the information listed in the search warrant. Under the logic of *Simmons*, the physical appearance of a suspect is what is relevant to a court’s review of a probable cause determination for arrest—meaning it is more important that law enforcement have data reflecting the true appearance of an individual included in their warrants rather than data reflecting some arbitrary category like “sex assigned at birth” that has no relation to the gender a trans person lives as or may appear to be.

22:21-23:3. She also testified that there are multiple ways to confirm a person's identity during a law enforcement encounter, apart from a driver's license, *id.* at 25:20-26:12, and that of the over 700 officers in the Johnson County Sheriff's Office, **she had not heard of a single issue regarding officer safety created by a transgender person's driver's license reflecting their gender rather than sex assigned at birth**, *id.* at 27:14-14.

This sworn deposition testimony is consistent with the overall lack of evidence supporting Petitioner's allegations in this regard, and is confirmed by Petitioner's answers to discovery requests. Exs. 28, 29, Pet. Resp. to Intervenors' First Req. for Produc. and Intervenors' First Set of Interrogs. (when asked via interrogatories and requests for production to identify all instances where a person's license reflecting their gender identity created a law enforcement problem, Petitioner answered "**none.**").

In reality, Petitioner is arguing for a KDOR policy change that would work *against* any law enforcement interest in accurate identification—because it prevents transgender people from updating their licenses with a gender marker that is consistent with their identity and other people's perceptions. *See, e.g., Love*, 146 F. Supp. 3d at 856 (holding that the state's refusal to correct the sex designation on transgender plaintiffs' driver's licenses "[bore] little, if any, connection to Defendant's purported interests" in maintaining accurate identity documents); *K.L.*, 2012 WL 2685183, at *7 (holding that the state's refusal to correct a trans woman's sex designation on her driver's license not only failed to "further[] . . . the state's interest in accurate document[s] and identification" but, in fact, created a risk of "inaccurate and inconsistent identification documents").

Irrational, contradictory interests that are unmoored from reality are simply insufficient to satisfy any level of constitutional review.

b. Petitioner's alleged harms to jail and prison operations are unsupported by evidence.

Petitioner next argues, again without support, that SB 180 must apply to driver's licenses to avoid problems for jails and prisons making housing determinations for individuals in their facilities. Pet. Mot. at 9. But this argument fails on several grounds. It fails to acknowledge that housing determinations in Kansas's jails and prisons are a product of numerous interconnected policies at either the state Department of Corrections or county level, not the gender markers on individual driver's licenses. And in fact, Petitioner's *own witness* offered in support of the notion that gender markers on driver's license must reflect sex assigned at birth *contradicted* the Petitioner's arguments by repeatedly noting that his jail does not use driver's licenses during booking into correctional facilities. Ex. 32, Newson Dep. at 52:13-22; 56:15-57:9; 58:16-24; 63:7-10.

K.S.A. § 19-1903(a) instructs Kansas sheriffs how to house individuals in Kansas county jails. K.S.A. § 75-5206(a) grants the secretary of the Kansas Department of Corrections (KDOC) the authority to make facility determinations for any individual sentenced to the secretary's custody. These state laws merely instruct the KDOC and county sheriffs to develop their own policies that meet the needs of their facilities and operations. As amended by Senate Bill 228, K.S.A. § 19-1903 does now require county sheriffs to house males and females separately, based on reproductive capacity (in practice, more likely sex assigned at birth).¹³ But nothing in any of these statutes says anything regarding driver's licenses or the use of state-issued identification during booking proceedings.

¹³ As noted below, automatic placement based on sex assigned at birth is inconsistent with the requirements of the Prison Rape Elimination Act (PREA) and implementing regulations requiring an individualized assessment for placement of incarcerated transgender individuals. Even if the gender marker on a license were relevant to determining placement for incarcerated people, which the evidence produced shows it is not, requiring licenses to list sex assigned at birth to further a *subsequently enacted* jail placement policy that is inconstant with federal law cannot provide even a legitimate government interest for SB 180.

Indeed, the Johnson County jail—one of the largest in the state—has its own set of policies that address how the jail handles the intake, screening, and classification of individuals booked into the jail, *See* Ex. 35, Johnson County Sheriff’s Office Intake Procedures (MRN0000262-266); Ex. 36, Johnson County Sheriff’s Office Inmate Classification Policy (MRN0000189-201); Ex. 37, Johnson County Sheriff’s Office PREA Policy (MRN0000211-228); Ex. 38, Johnson County Sheriff’s Office LGBTI Policy (MRN0000229-234); Ex. 39, Johnson County Adult Detention Center Initial Custody Assessment Scale (MRN0000109-11). These policies and forms provide detailed steps jail administrators take to reach appropriate housing classification decisions. Not a single one mentions the use of driver’s licenses in determining sex assigned at birth or making a placement decision. Individuals may self-identify as transgender or gender nonconforming at a medical screening during the intake process, and that may be used in making an appropriate housing placement. *See, e.g.*, Ex. 40, VitalCore Medical & Behavioral Health Admission Screening (MRN0000165) (listing screening questions asked of individuals upon detention regarding gender dysphoria and identification as transgender or gender variant). Again, the designation on the individual’s driver’s license is wholly irrelevant. Similarly, the policy for safely housing transgender and intersex individuals also explicitly says that housing placements “should not be determined solely based on the [individuals’] birth sex, identity documents, or physical anatomy.” Ex. 38, LGBTI Policy, at 4 (MRN0000232).

Along these lines, Major Rick Newson with the Johnson County Sheriff’s Office repeatedly testified at deposition that his staff rarely use driver’s licenses during the booking process, and that assignments to either male or female housing units are not based on the gender marker on a person’s driver’s license, or even their sex at birth. *See* Ex. 32, Newson Dep. at 52:13-22; 56:15-57:9; 58:16-24; 63:7-10.

In fact, when the Attorney General's office drafted an affidavit for Major Newson in conjunction with this litigation, Major Newson asked that it be edited because he believed the Attorney General incorrectly placed too much emphasis on the importance of driver's licenses in the booking process, when driver's licenses are not commonly used to identify appropriate housing placements. *Id.* at 44:10-45:7. Employees of the Johnson County Sheriff's office likewise confirmed to Major Newson via email that in the very small number of instances where a transgender person was booked into the jail, the jail "did not have to use ID to identify sex." Ex. 33, 8/3/23 E-mail from Raymond Nuss to Richard Newson (MRN0000289). Major Newson did not point to a single instance where a transgender person's driver's license created an issue for the Johnson County jail in determining where to safely house an individual.

As noted above, federal regulations governing prisons and jails provide standards for correctional officials regarding the appropriate way to make housing determinations for people in custody. *See* Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2023); *see also* 28 C.F.R. § 115.42(b)-(e) (2023) (providing specific procedures for handling housing determinations for transgender individuals held in prisons and jails). Those regulations were developed for public safety purposes, to prevent, detect, and respond to instances of sexual abuse in confinement facilities. *See* National Prison Rape Elimination Act, 34 U.S.C. §§ 30301- 30302 (describing the purpose of the Act as one of public safety); § 30307 (mandating the development and adoption of national regulations to serve the Act's public safety goals). Those regulations specifically require that jail staff make individualized determinations regarding appropriate housing assignments for transgender individuals, giving "serious consideration" to the individual's preferences about where they can safely be housed. 28 C.F.R. 115.42(b)-(e) (2023). Additional guidance from the U.S. Department of Justice also makes clear that making housing decisions

according to external genitalia or sex assigned at birth would violate PREA regulations. *See* 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> (“Any written policy or actual practice that assigns transgender or intersex inmates to gender-specific facilities, housing units, or programs based solely on their external genital anatomy violates the standard. . . a facility should not make a determination about housing for a transgender or intersex inmate based primarily on the complaints of other inmates or staff when those complaints are based on gender identity.”).

If jails were to do what the Petitioner suggests they do—that is, look at an individual’s driver’s license to determine the individual’s sex at birth and then house the individual according to sex at birth—the facility would be in direct violation of federal law, and risk losing a portion of its federal funding. It would also create a significant safety risk for transgender individuals who may be at increased risk for sexual abuse if placed in a housing unit that matches their sex assigned at birth, but not their gender identity and gender presentation. *Id.* (“Being transgender is a known risk factor for being sexually victimized in confinement settings.”). In other words, the public safety rationale that Petitioner advances in this regard contradicts longstanding federal PREA standards that were designed and promulgated to increase safety within carceral facilities.

This purported justification for interpreting SB 180 to apply to driver’s licenses is therefore completely unsupported and contradictory and cannot provide even a rational justification under any standard of constitutional review.

c. Petitioner’s alleged harms to public health through impact on organ transplant efficacy are unsupported by evidence and have been disclaimed.

Grasping at straws, Petitioner earlier raised the fanciful specter to this Court that KDOR’s gender marker policy could harm public health by causing unsuccessful organ transplant

operations. Pet. Mot. at 9. When asked to back this up via discovery, Petitioner provided no evidence whatsoever supporting this allegation that the gender marker on an individual's driver's license plays any role in organ donation. Then, on November 6, 2023, Petitioner disclaimed any reliance on this alleged government interest during the pendency of this litigation.

d. SB 180 is impermissibly motivated by animus against transgender people.

The only actual justification for SB 180 and applying its narrow definition of “sex” to driver's licenses is an illegitimate one: animus. *Cf. Romer v. Evans*, 517 U.S. 620, 632–33 (1996) (animus against gay and lesbian people not a legitimate government interest). Insisting that transgender people carry a license with a gender marker that reveals their sex assigned at birth, solely because the legislature has declared that transgender women are not female, and transgender men are not male, to further the government interest in “linguistic clarity” is not a proper governmental interest. *See, e.g., Limon*, 280 Kan. at 290-91 (“[D]esire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”) (quoting *Romer*, 517 U.S. at 633 (rational basis review is meant to “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law”)).

There is simply no rationale for requiring transgender people to carry a driver's license that reveals their sex assigned at birth and discloses their transgender status apart from an animus to disadvantage them uniquely. But a “desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). In passing this definition of sex in SB 180, the legislature singled out transgender people for worse treatment than people who are not transgender. Rather than debating the policy implications of adopting specific definitions of sex in specific statutory contexts, Petitioner argues that in enacting SB 180, the legislature rewrote the entire state code to erase transgender people from the law.

While Intervenor-Respondents believe that SB 180 is drafted more narrowly, Petitioner disagrees. Yet if Petitioner is correct and this is truly how SB 180 operates, it could have far-reaching consequences that the legislature likely did not ever contemplate.

“[D]iscriminations of an unusual character such as this one especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)). SB 180 aims to bar transgender people from “seek[ing] specific protection from the law,” *id.*, which is “unprecedented in our jurisprudence,” *id.*, and “is strong evidence of a law having the purpose and effect of disapproval of that class,” *Bishop v. Smith*, 760 F.3d 1070, 1103 (10th Cir. 2014) (Holmes, J., concurring).

The legislative history demonstrates that the explicit purpose of the law was to discriminate against transgender people, based on a stated desire to exclude them from public spaces like restrooms or locker rooms. *Supra* at 10-13. When the apparent aim of the legislature is to harm a disfavored class, a law’s impartiality is called into question. *Limon*, 280 Kan. at 288 (citing *Romer*, 517 U.S. at 633). The “interference with the equal dignity” of transgender people is “more than an incidental effect of the . . . statute.” *United States v. Windsor*, 570 U.S. 744, 770 (2013). Indeed, as interpreted by the Petitioner, SB 180’s “sheer breadth is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects.” *Romer*, 517 U.S. at 632. Despite a nominal gesture at the protection of women in its title, SB 180 actually operates solely by discriminating against transgender people. This, the legislature cannot do under the Kansas Constitution.

D. The Balance of Hardships and Public Interest Favors Denial of the Relief Sought by the Petitioner.

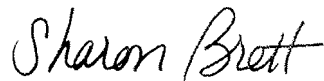
The contradictory, irrational, and unsubstantiated nature of the Petitioner’s alleged injuries, *supra* at 19-22, stand in stark contrast to the concrete harms that have already occurred to Intervenor-Respondents due to their past inability to access identification documents that reflect the gender they live as, and the likelihood of continued future harm if they and other transgender individuals are barred from getting a license with an accurate gender marker in the first instance, correcting their gender marker if necessary, or keeping the corrected gender marker upon license renewal, *supra* at 13-18. Accordingly, the balance of hardships supports Intervenor-Respondents. *See, e.g., Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, (2012) (holding that the court must consider whether “the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party”).

Finally, the public interest factor also weighs against granting the requested injunctive relief. *Steffes v. City of Lawrence*, 284 Kan. 380, 395 (2007). As discussed above, transgender Kansans, including four of the five Intervenor-Respondents, have been able to access driver’s licenses with appropriate gender markers for years. Every other state but one allows at least some transgender people to do the same. There has been no evidence submitted of any harm to the public at all, let alone any evidence that the ban sought here can survive heightened constitutional review. By contrast, Intervenor-Respondents have shown that the impact of issuing the injunction will be “adverse to the public interest.” *Id.* While there may be a general public interest in enforcement of the laws, a desire to enforce an *unconstitutional* law cannot meet this standard. *Cf. Marie v. Moser*, 65 F. Supp. 3d 1175, 1205 (D. Kan. 2014) (“When a law is likely unconstitutional, the interests of those whom the government represents, such as voters, do not outweigh a plaintiff’s interest in having her constitutional rights protected.”) (quotations and alterations omitted).

IV. CONCLUSION

Petitioner has failed to prove what he earlier claimed. Petitioner cannot succeed on the merits of his legal challenge to KDOR's driver's license policy, and the balance of hardships tips heavily towards denying the relief sought in this mandamus action. KDOR's policies regarding the issuance of driver's licenses to transgender Kansas citizens have worked well for over a decade without any evidence of problems or harm. Interference with KDOR's policies, by contrast, will create a myriad of harms. Intervenor-Respondents therefore respectfully request that this Court deny Petitioner's requested injunctive relief and allow KDOR to resume issuing driver's licenses to transgender Kansas with a gender marker that aligns with the gender they live as, are perceived as, and know themselves to be. Intervenor, and all transgender Kansas citizens, are entitled to live without unlawful and unconstitutional interference by Petitioner.

Respectfully submitted,



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Certificate of Service

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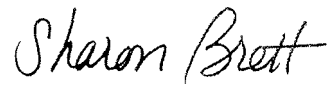
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