

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT OF KANSAS**

STEPHANIE MOTT,

Petitioner,

v.

KANSAS DEPARTMENT OF HEALTH
AND ENVIRONMENT

and

SUSAN MOSIER, IN HER OFFICIAL
CAPACITY AS SECRETARY OF THE
KANSAS DEPARTMENT OF HEALTH
AND ENVIRONMENT,

Respondents.

Case No. 2016-cv-0150

**REPLY MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION FOR JUDGMENT ON PETITION FOR REVIEW**

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Petitioner Stephanie Mott, by and through her attorneys of record, hereby states this Reply in support of her Motion for Judgment on the Petition for Review in her favor and against Kansas Department of Health and Environment and Susan Mosier.

SUPPORTING MEMORANDUM

I. INTRODUCTION

In their Response to Petitioner Stephanie Mott’s (“Ms. Mott”) Petition for Review, Kansas Department of Health and Environment and Susan Mosier (collectively, “KDHE”) fail to meaningfully address Ms. Mott’s statutory and constitutional grounds for relief, focusing instead on meritless procedural arguments that either have already been decided against KDHE or would not defeat Ms. Mott’s motion even if they were successful. KDHE’s arguments do not overcome Ms. Mott’s showing in her Motion that she is entitled to relief on her Amended Petition for Review.

First, Ms. Mott has established that KDHE was statutorily obligated to grant her request to amend the gender marker on her birth certificate pursuant to K.A.R. 28-17-20(b)(1)(A)(i) (the “Regulation”).¹ KDHE does not dispute that she met the requirements for such an amendment under the Regulation and fails to address that KDHE is statutorily required to enforce its own regulations unless and until they are amended or repealed. *See* K.S.A. 65-2402(a)(5) (KDHE has statutory duty to enforce regulations that have been enacted under enabling statutes). Contrary to KDHE’s claim, the Regulation did not exceed the agency’s authority (and no court has so held), and KDHE’s subsequent amendment to the regulation to remove the provision on which Ms. Mott relied does not apply retroactively.

¹ As used herein, unless otherwise stated, K.A.R. 28-17-20(b)(1)(A)(i) refers to the Regulation in effect at all relevant times through the filing of Ms. Mott’s Petition for Judicial Review and until the Regulation was amended on June 24, 2016.

Second, Ms. Mott has established that KDHE's denial of her request violated her rights to both due process and equal protection under the United States Constitution. Contrary to KDHE's suggestion, those constitutional questions are properly before this Court, and would be even if Ms. Mott had never raised them to the agency, because an administrative agency has no authority to determine such issues. KDHE also fails to overcome Ms. Mott's showing that KDHE violated her due process rights. KDHE simply ignores entirely the Tenth Circuit's holdings recognizing a privacy right against forced disclosure of medical information, as well as the United States Supreme Court's recognition of the right to autonomy in *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584, 2589 (June 26, 2015). With respect to Ms. Mott's equal protection challenge, KDHE incorrectly describes the relevant standard to claim that a plaintiff must show purposeful or intentional discrimination, and also completely ignores her showing that KDHE's birth certificate amendment policy singles out transgender people for particular deprivation of equal treatment. Because the policy facially discriminates based on transgender status and sex, and it cannot survive heightened scrutiny, it is unconstitutional under the Equal Protection Clause. Even if an additional showing of intentional discrimination were required—and it is not—Ms. Mott has shown that the change in policy was a politically motivated decision aimed at stripping certain rights from transgender people and not simply a neutral attempt to follow the law.

Finally, although none of Ms. Mott's arguments require consideration of the materials she submitted in December 2015, those materials are nonetheless properly considered because KDHE has already certified to the Court that they are part of the Agency Record in this action and KDHE is now estopped from claiming otherwise. In any event, because they relate to the constitutional issues that were not required to be raised before the agency, the Court can properly

consider them for the first time on review. *See Sierra Club v. Moser*, 298 Kan. 22, 39, 310 P.3d 360, 372-73 (2013).

Because Ms. Mott has established that KDHE is required by statute and, independently, under the United States Constitution to grant Ms. Mott's request for an amendment to the gender marker on her birth certificate, KDHE's refusal to enforce the Regulation was procedurally improper, contrary to law, unconstitutional, and arbitrary and capricious. *See* K.S.A. 77-621(c)(1), (2), (4), (5), and (8). Ms. Mott's Motion for Judgment thus should be granted.

II. KDHE WAS REQUIRED BY STATUTE TO GRANT PETITIONER'S REQUEST FOR AN AMENDMENT TO HER BIRTH CERTIFICATE

A. KDHE Was Required to Grant Ms. Mott's Request Because She Submitted a Certificate Substantiating a Physical or Anatomical Change

Ms. Mott met the requirements of the Regulation in November 2013 (1CR at 1-3), and none of KDHE's arguments justifies KDHE's refusal to enforce the Regulation and grant Ms. Mott's request.

1. KDHE Does Not Dispute that Ms. Mott Met the Requirements of the Regulation

KDHE does not dispute that the Regulation in effect at the time of Ms. Mott's request provided that that "[t]he items recording the registrant's sex may be amended if the amendment is substantiated . . . with a medical certificate substantiating that a physiological or anatomical change occurred." K.A.R. 28-17-20(b)(1)(A)(i). KDHE also does not dispute that Ms. Mott met the requirements to amend her birth certificate under the Regulation in effect at the time of her request. KDHE acknowledges that Ms. Mott's November 2013 request to amend the gender marker on her birth certificate included "a letter from [Ms. Mott] stating that sex reassignment

surgery had occurred and a statement from a physician indicating that he had performed the surgery resulting in female external genitalia.” (Response at 2; *see also* 1CR at 1-2 (submitting May 28, 2012 “Certificate of Postopsurgery” to KDHE).)²

Ms. Mott’s November 2013 request thus unquestionably met the requirements for an amended birth certificate under the Regulation—and KDHE does not argue otherwise.

2. KDHE Fails to Acknowledge its Statutory Duty to Enforce its Own Regulations

Because Ms. Mott’s November 2013 request met the requirements for an amended birth certificate under the Regulation, KDHE was statutorily required to grant her request—an obligation that KDHE fails entirely to address in its Response.

The Regulation was adopted in 1986 and was *enforced for 26 years* before, on February 22, 2012, under Governor Sam Brownback’s administration, the agency abruptly, and without notice, stopped enforcing it. Once a regulation has been adopted, the agency is statutorily required to enforce it. K.S.A. 65-2402(a)(5) (KDHE secretary “shall . . . enforce this act and the regulations made pursuant thereto”); *see also Tew v. City of Topeka Police & Fire Civil Serv. Comm’n*, 237 Kan. 96, 100, 697 P.2d 1279, 1282-83 (1985) (“As a general rule an administrative agency may not violate or ignore its own rules, and where it fails to follow the rules which it has promulgated its orders are unlawful.”). This is because “[a]gency regulations are issued for the benefit of both the agency *and the public*, and an agency must be held to the terms of its regulations.” *Id.* (emphasis in original).

KDHE fails entirely to address this authority, arguing only that KDHE now believes that its own Regulation—*i.e.*, a regulation adopted by KDHE—exceeded the scope of K.S.A. 65-

² KDHE also does not claim that the documentation that Ms. Mott submitted to meet these requirements is outside of the agency record on review before this Court. (Response at 2, 6.)

2422c. KDHE, however, cannot identify any judicial decision that invalidated the Regulation or held that it is unenforceable. Nor did KDHE take any action to remove the language at issue from the Regulation—at least, not until Ms. Mott filed her Petition for Review.

In light of KDHE’s statutory obligation to enforce its own regulations, simply refusing to comply with a regulation that remains on the books is *not* a permissible method of changing a regulation. *See Bruns v. Kansas State Bd. of Tech. Professions*, 255 Kan. 728, 737, 877 P.2d 391, 397 (1994) (petitioner could not be subjected to agency’s “internal written policy” because “[m]embers of the public . . . should not be subjected to agency rules and regulations whose existence is known only by agency personnel”) (citation omitted). Instead, the *only* means by which an agency can avoid enforcing its own regulation is to amend or repeal the regulation according to statutorily prescribed procedures, including notice and a hearing. *See* K.S.A. 65-2402(a)(4) (statutory duties of the Secretary of Health & Environment include making and amending necessary regulations “after notice and hearing”); K.S.A. 77-421 (setting forth procedure for adopting and amending regulations, including notice, hearing, and statement of reasons); K.S.A. 77-415(c)(4) (“‘Rule and regulation,’ ‘rule,’ and ‘regulation’ means a standard, requirement or other policy of general application that has the force and effect of law, *including amendments or revocations thereof*, issued or adopted by a state agency to implement or interpret legislation.”) (emphasis added); K.S.A. 77-425 (“Any rule and regulation not filed and published as required by this act shall be of no force or effect . . .”).

KDHE still has not identified *any* authority for the proposition that an agency’s own interpretation of case law permits it to refuse to follow its own regulation. *See* K.S.A. 65-2402(a)(5). Rather, in each of the cases on which KDHE relies, it was the *court* that determined that the agency had exceeded the scope of its authority, and the court did so by *reversing* the

agency action that was determined to exceed the agency's authority. *See Director of Taxation, Dep't of Revenue v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 459, 691 P.2d 1303, 1310 (1984) (holding that agency, in deciding appeal by taxpayer from the Department of Revenue opinion finding the taxpayer subject to a tax, incorrectly interpreted a statute to add an exemption from a tax that did not otherwise exist in the statute); *Ruddick v. Boeing Co.*, 263 Kan. 494, 500, 949 P.2d 1132, 1136 (1997) (finding that regulation at issue was invalid insofar as it conflicted with a statute).

The proper recourse when an agency no longer wishes to enforce a regulation is to amend the regulation through statutorily prescribed procedures such as notice and comment rulemaking. *Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1222 (10th Cir. 2009). This process should be no surprise to KDHE, as—after the filing of the instant Petition—KDHE successfully amended the Regulation through just such a process. *See* March 2, 2016 Notice of Hearing on Proposed Administrative Regulations, 2016 KS REG TEXT 418754 (NS) (noticing hearing on proposed amendments for May 12, 2016). Allowing KDHE to raise its arguments as to the appropriateness of its regulation in a motion to dismiss a petition for review filed against it would allow an agency to make an end-run around the statutorily prescribed amendment and revocation procedures by simply refusing to follow its own regulations and then burdening the courts by forcing litigation of the issues.

3. In Any Event, the Regulation Did Not Exceed the Scope of the Enabling Statute as KDHE Claims

Even if KDHE could avoid the statutory procedures for amending a regulation by simply refusing to enforce it, which it cannot, the Regulation did not exceed the scope of the enabling statute, as KDHE now argues. K.S.A. 65-2422c authorizes KDHE to adopt regulations for

“minor corrections” to birth certificates. Amending the gender marker on a birth certificate is a minor correction to the certificate for KDHE and thus falls squarely under the statutory authority of K.S.A. 65-2422c.

First, a correction to the gender marker of a birth certificate is *minor*: It only amends a single item on the certificate, which is not unique to the holder; it neither grants new legal benefits nor requires the amendment of other records; and it affects only the holder by ensuring that the document accurately reflects the holder’s true sex and accurately lines up with other identity documents—including the person’s driver’s license, which Kansas *permits* transgender people to change. While the gender marker on a birth certificate has enormous significance and utility to the holder, the gender marker on a birth certificate—unlike, for example the birthdate—has little significance to KDHE.

Second, it is a *correction* because, as confirmed by the materials that Ms. Mott submitted to KDHE in support of her request, the prevailing practice is to assign a sex to newborns based on an often cursory examination of the external genitals—a practice that, in the majority of cases, results in a correct assignment. However, the appearance of a person’s genitals is only one of several characteristics that define their sex as male or female. As medical evidence shows, the most reliable indicator of sex is an individual’s gender identity. Many transgender people have had their sex incorrectly denoted on their birth certificate because this designation was made solely upon an examination of the external genitalia. This inaccurate designation stands in need of correction just as urgently as any other mistaken identification on a vital record, and thus the Regulation, which allows for this correction, falls under the statutory authority of K.S.A. 65-2422c.

Indeed, this conclusion is clear even without considering the scientific evidence Ms. Mott submitted to demonstrate that an amendment to the gender marker on a transgender person's birth certificate is a "correction." That a gender marker amendment constitutes a "minor correction" is consistent with the approach of the federal government and the overwhelming majority of states to correct identity documents for transgender people.³ Every state—including Kansas—permits transgender people to update the gender marker on a driver's license; the federal government permits transgender people to update the gender marker on passports and Social Security records; and 47 of the 50 U.S. states currently provide a mechanism for transgender people to correct the gender marker on a birth certificate.⁴

It is thus clear that the Regulation is well within the authority conferred on KDHE by K.S.A. 65-2422c to adopt regulations for "minor corrections" to birth certificates, and this Court should reject KDHE's urging that it instead follow dicta in the Kansas Court of Appeals decision *In re Estate of Gardiner*, 29 Kan. App. 2d 92 (2001), *aff'd in part, rev'd in part*, 273 Kan. 191, 42 P.3d 120 (2002), which did not actually hold that the Regulation exceeded the agency's authority. At no point did the Court of Appeals rule on the validity of the Kansas Regulation, nor could it have, as no birth certificate amended pursuant to the Regulation was at issue in the case. Because the Court of Appeals' holding regarding the weight to be afforded the Wisconsin birth certificate was not based on the validity of the Kansas Regulation, the court's casual

³ Indeed, for the last four decades, the Model Vital Statistics Act has provided for amendments to the gender markers on transgender people's birth certificates: The 1977 Revision to the Model State Vital Statistics Act and Model State Vital Statistics Regulations, which was in effect when the Regulation was adopted, and the 1992 Revision to the Model State Vital Statistics Act and Regulations, which is the current version, both provide for amendment of a birth certificate under certain circumstances where the "sex of an individual . . . has been changed by surgical procedure." See 1977 Model State Vital Statistics Act, Section 21(e) (available at <https://www.cdc.gov/nchs/data/misc/mvsact77acc.pdf>); 1992 Model State Vital Statistics Act, Section 21(d) (available at <https://www.cdc.gov/nchs/data/misc/mvsact92b.pdf>).

⁴ For a search engine with information regarding each state's procedures for correcting the gender marker on a birth certificate, see <http://transequality.org/documents>.

speculation that the Regulation might “overstep[]” the statutory grant of authority is merely dicta and thus does not have the force of law. *See Denton v. Sunflower Elec. Coop., Inc.*, 242 Kan. 430, 432, 748 P.2d 420, 421-22 (1988) (affirming district court’s “conclu[sion] that . . . statements made in cases where it was not necessary for the appellate disposition of the case were dicta”); *Matter of Loughmiller’s Estate*, 229 Kan. 584, 589-90, 629 P.2d 156, 160-61 (1981) (court’s prior opinion on a subject not before it, which “was couched in speculative terms and was unnecessary to the holding of the case,” “was dicta” and thus would not be applied in later case).

Even if the Court of Appeals’ discussion of K.A.R. 28-17-20(b)(1)(A)(i) in *Gardiner* were not dicta, it holds no persuasive or precedential value because the discriminatory marriage law at the center of *Gardiner* has been determined unconstitutional by intervening cases at all levels of the federal courts. The sole legal question that was presented in *Gardiner* was whether the Kansas marriage between the petitioner’s father and the father’s wife, a “post-operative male-to-female transsexual,” was valid under the Kansas statute that prohibited marriages between persons of the same sex. 29 Kan. App. 2d at 99. Since the *Gardiner* Court of Appeals decision was decided, however, state laws prohibiting marriages between persons of the same sex have been determined to be unconstitutional. *See Obergefell v. Hodges*, 135 S.Ct. 2584; *Bishop v. Smith*, 760 F.3d 1070, 1081-82 (10th Cir.), *cert. denied*, 135 S.Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1229-30 (10th Cir. 2014); *see also Marie v. Moser*, 65 F. Supp. 3d 1175, 1203 (2014) (“*Kitchen* and *Bishop* establish a fundamental right to same-sex marriage, and state laws prohibiting same-sex marriage infringe upon that right impermissibly. . . . Kansas’ same-sex marriage ban does not differ in any meaningful respect from the Utah and Oklahoma laws the Tenth Circuit found unconstitutional.”) (citations omitted).

The *Gardiner* Court of Appeals decision also is not well reasoned and not persuasive. The *Gardiner* Court of Appeals read the enabling statute as permitting the Secretary to prescribe regulations only for “minor corrections,” and opined that a gender marker change to “respond to anatomical changes” was not “minor.” 29 Kan. App. 2d at 123-24. However, the court gave no guidance as to what constitutes a “minor” change, or explanation as to why a gender marker change following a “mistake”—or, as the Department now interprets the statute, for individuals who undergo surgery on previously ambiguous genitalia—is “minor” and thus permissible, but a correction following sex reassignment surgery is not. No such distinction is authorized by the statute. Changing the gender marker on a birth certificate is logically equally “major” or “minor” in all cases.

Contrary to *Gardiner*’s speculation, if the legislature in fact believed that the Regulation contravened its intent in K.S.A. 65-2422c, it had plenty of time in which to amend that statute to override the rogue Regulation. The Regulation, enacted in 1986, was in effect—and enforced—for decades, expressly and unmistakably authorizing amendments to birth certificates following gender confirmation surgery. That the legislature was silent on the issue and made no effort to amend this portion of the Regulation, while updating the statute numerous times—in 1987, 1988, 1990, 1992, 1993, 2004, and 2005—to make other changes, indicates its acquiescence. The Regulation, remaining in place, must be presumed valid. *See Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 168, 239 P.3d 51, 62 (2010) (“Regulations an administrative agency is authorized to adopt are presumed valid, and the party challenging a regulation bears the burden to establish its invalidity.”).

Accordingly, the Regulation was within the scope of the enabling statute, and thus KDHE was required to enforce it.

**4. KDHE’S Attempt to Apply the Recently Amended Statute
Retroactively Should Be Rejected**

KDHE concedes, as it must, that the grounds for a birth certificate amendment on which Ms. Mott relies were a part of the Regulation until they were removed in June 2016—well after Ms. Mott made, and KDHE denied, her request for a birth certificate amendment. (Response at 11.) KDHE nonetheless argues that because Ms. Mott’s Amended Petition for Review was filed after the Regulation was amended, “an amendment to the birth certificate is no longer permitted by law,” and the petition must be dismissed. (*Id.*) That KDHE subsequently amended the Regulation to attempt to deprive transgender individuals of the ability to change a birth certificate *after* Ms. Mott made her request to KDHE, however, does not relieve KDHE of the statutory obligations it was under at the time Ms. Mott made her request.

First, even if KDHE were correct that the right must have existed at the time of Ms. Mott’s filing of the petition for review, and not just at the time of her Request—which it is not—the Amended Petition undoubtedly relates back to the initial petition. *See* K.S.A. 60-215(c)(2).

Second, “administrative regulations operate prospectively unless a contrary intent is clearly indicated.” *State v. Ernesti*, 291 Kan. 54, 70, 239 P.3d 40, 50 (2010). Indeed, by Kansas statute, “[t]he revocation of a rule and regulation by a state agency shall not be construed as . . . affecting any right which accrued . . . under or by virtue of the rule and regulation revoked.” K.S.A. 77-425. Because Ms. Mott’s right to an amendment to her birth certificate had already accrued when she made her request, the amendment of the Regulation in June 2016 must not be construed as affecting that right. *See Ernesti*, 291 Kan. at 69 (holding that K.S.A. 77-425 “preserves the validity” of certificate issued pursuant to certain regulation “even after the

regulation was revoked.”). KDHE’s attempt to apply the newly amended regulation retroactively to justify its denial of Ms. Mott’s request must be rejected.

5. That Ms. Mott Requested an Amendment and not an Amended Certificate Is Immaterial

In a last-ditch effort to avoid its statutory obligation to enforce its own Regulation, KDHE argues that Ms. Mott’s request for “an amendment” to her original birth certificate must be rejected because K.S.A. 65-2422c “only provides for an ‘amended’ certificate” and not an “amendment” to the certificate. (Response at 13 (citing K.S.A. 65-2422c).) However, K.A.R. 28-17-20(b)—both at the time of Ms. Mott’s request and as amended—provides that birth certificate “*amendments* may be made as follows,” K.A.R. 28-17-20(b) (emphasis added), and Ms. Mott’s request tracks this language. KDHE certainly is not arguing that the *entire* regulation exceeds the authority of K.S.A. 65-2422c on the basis of this admittedly “fine distinction” (Response at 13), nor could it reasonably make that argument. Indeed, the insignificance of this semantic distinction is highlighted by KDHE’s own use of the term “amendment” as opposed to “amended certificate” in its briefs. (*See, e.g.*, Response at 11 (arguing that “an amendment to the birth certificate [as a result of sex reassignment surgery] is *no longer* permitted by law,” thereby implying that “an amendment” was previously permitted).)

KDHE was statutorily required to allow Ms. Mott to amend the gender marker on her birth certificate under the Regulation, whether it did so in the form of an amendment to the certificate or an amended certificate. KDHE’s frivolous argument based on this insignificant semantic distinction should be rejected.

B. KDHE Also Is Required to Grant Ms. Mott's Request Because Her Sex Was Incorrectly Recorded at Birth

1. KDHE Must Grant Ms. Mott's Request on this Second Basis Under the Now-Repealed Regulation

KDHE argues that Ms. Mott's ground for relief based on the now-repealed portion of K.A.R. 28-17-20(b)(1)(A)(i) that allowed for amendment based on an "affidavit . . . that the sex was incorrectly recorded," was not raised before KDHE in her November 2013 letter, and thus was waived. (Response at 14.) KDHE ignores, however, that in her November 2013 Letter, Ms. Mott stated that "[t]o hold consistent and *accurate* identification documents, it is critical that I am able to change my birth certificate as well to reflect my *accurate* gender." (1CR at 1 (emphasis added).) Ms. Mott thus clearly stated in a signed letter that the gender on her birth certificate was inaccurate, satisfying the requirements for this second basis for an amendment under the Regulation, and KDHE was statutorily required to grant her request for this reason, too.

2. KDHE Must Grant Ms. Mott's Request Under the Regulation as Amended

Ms. Mott is entitled to a birth certificate amendment pursuant not only to the portion of the now-repealed portion of K.A.R. 28-17-20(b)(1)(A)(i), but also under the Regulation as subsequently amended. As amended in June 2016, the Regulation provides for a birth certificate amendment based on the "registrant's affidavit . . . that the sex was incorrectly recorded and with medical records substantiating the registrant's sex at the time of birth." K.A.R. 28-17-20(b)(1)(A)(i).

In addition to an affidavit stating that her sex was incorrectly recorded at birth (1CR at 35), Ms. Mott submitted reports of medical experts that substantiated that, as a transgender person, Ms. Mott has a birth certificate that incorrectly recorded her sex at the time of her birth. (1CR at 178-179 – Brown Report at 4-5; 1CR at 192 – Gorton Report at 2; 1CR at 198 – Coleman Report at 1.)⁵ Though it could not have been known at the time, Ms. Mott was then and is now female. As a result, the sex designator on her birth certificate is incorrect, and Kansas law provides for a correction. *See* K.A.R. 28-17-20(b)(1)(A)(i).

KDHE relies on the Supreme Court’s *Gardiner* decision for its analysis of the definition of sex in the state’s no-longer-valid ban on same-sex marriage, K.S.A. 23-101 (since repealed and transferred to K.S.A. 23-501 and then declared and enjoined as unconstitutional), to claim that the sex of transgender people is *not* incorrectly recorded on their birth certificates. The *Gardiner* Supreme Court decision considered the definitions of “male” and “female” and concluded that, for purposes of the no-longer-valid marriage law prohibiting same-sex marriage, a “male-to-female post-operative transsexual does not fit the definition of a female.” *Gardiner*, 273 Kan. at 214 . This conclusion is today medically unsupported: under current scientific understanding, a transgender woman like Ms. Mott is in fact considered female. The Court’s own language further demonstrates how inappropriate it is to the present context, going on to opine that “[t]he words ‘sex,’ ‘male,’ and ‘female’ in everyday understanding *do not encompass transsexuals.*” *Gardiner*, 273 Kan. at 213 (emphasis added). This conclusion, applied to the context of birth certificates, would lead to absurd results. Taken literally, *Gardiner* would mean that for someone who is considered transsexual, no gender marker on a birth certificate can be accurate. KDHE, however, does not and cannot reasonably take that position.

⁵ These reports are part of the Agency Record that KDHE “certifie[d]” to this Court as part of its Revised Certified Agency Record.

In any event, KDHE’s reliance on this case is particularly concerning because the law it analyzed, K.S.A. 23-101, was held to be unconstitutional by subsequent rulings pursuant to United States Supreme Court precedent. *See Obergefell v. Hodges*, 576 U.S. --, 135 S.Ct. 2584 (2015) (state laws barring same-sex couples from marrying abridge the fundamental right to marry in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment).

III. KDHE’S POLICY OF DENYING BIRTH CERTIFICATE AMENDMENTS TO TRANSGENDER KANSANS IS UNCONSTITUTIONAL

A. Ms. Mott’s Constitutional Challenge is Properly Before this Court

Under the KJRA’s scope of review provision, one of the grounds for which the court “shall grant relief” is that the agency action “is unconstitutional on its face or as applied.” K.S.A. 77-621(c)(1). KDHE seeks to avoid a finding that its ‘refusal of Ms. Mott’s request is unconstitutional by arguing that Ms. Mott’s constitutional arguments are not properly before this Court because they were not raised until after KDHE’s November 2013 final order. This argument fails.

As an initial matter, Ms. Mott’s due process and equal protection arguments can be raised for the first time before the district court under K.S.A. 77-617(d)(2). K.S.A. 77-617(d)(2) provides that a “person may obtain judicial review of an issue that was not raised before the agency” if “the interests of justice would be served by judicial resolution of an issue arising from . . . agency action occurring or first reasonably knowable to the person after the person exhausted the last feasible opportunity for seeking relief from the agency.” K.S.A. 77-617(d)(2). Here, KDHE’s unconstitutional denial of Ms. Mott’s request only occurred *after* she had made her

submission to the agency, and thus the Court is the appropriate entity to resolve her constitutional challenges.

Ms. Mott’s request was for KDHE to amend her birth certificate pursuant to the Regulation—the terms of which KDHE does not dispute she met. (Response at 2.) When Ms. Mott made that request, she had not yet been deprived of any constitutional right. It was not until KDHE *denied* her request that she was deprived of a constitutional right and her constitutional claims arose. For Ms. Mott to have raised her constitutional arguments as part of her initial request, she would have had to have *guessed* that KDHE would refuse to apply a regulation that was on the books, which the law does not require her to anticipate. Moreover, because there were no administrative avenues for review once KDHE denied Ms. Mott’s request giving rise to her constitutional challenges, Ms. Mott had already “exhausted [her] last feasible opportunity for seeking relief from the agency” when KDHE denied her request and the constitutional issues arose. *See* K.S.A. 77-617(d)(2). This Court, in “the interests of justice,” thus should consider Ms. Mott’s constitutional challenges to KDHE’s denial under K.S.A. 77-617(d)(2).

Ms. Mott’s due process and equal protection arguments also are properly raised for the first time before this Court because constitutional arguments are not waived for failure to raise them before the agency. While KDHE is correct that the KJRA generally limits review to issues that were raised before the agency, “[c]onstitutional issues present a unique situation, however, because administrative boards and agencies may not rule on constitutional questions.” *Board of Educ. of Unified Sch. Dist. No. 443, Ford Cty. v. Kansas State Bd. of Educ.*, 266 Kan. 75, 81, 966 P.2d 68, 76 (1998). “Therefore, ‘the issue of constitutionality must be raised when the case is on appeal before a court of law.’” *Id.* (quoting *In re Residency Application of Bybee*, 236 Kan. 443,

Syl. ¶ 4, 691 P.2d 37 (1984)); *see also Solis v. Brookover Ranch Feedyard, Inc.*, 268 Kan. 750, 757, 999 P.2d 921, 926-27 (2000) (“[B]ecause administrative agencies cannot rule on constitutional questions, the issue of constitutionality *can be raised for the first time before a court of law.*”) (emphasis added). KDHE relies on cases that limited the district court’s review of *non-constitutional* issues not raised before the agency, and thus are inapplicable. (*See* Response at 6 (citing *Nelson v. State Dep’t of Agric.*, 44 Kan. App. 2d 1042, 242 P.3d 1259 (2010); *Chowning v. Cannon Valley Woodwork, Inc.*, 32 Kan. App. 2d 982, 991, 93 P.3d 1210 (2004); and *Kansas City, Kan., Unified Sch. Dist. No. 500 v. Womack*, 20 Kan. App. 2d 608, 611, 890 P.2d 1233 (1995)).) The KJRA thus does not bar Ms. Mott from raising her constitutional grounds for relief for the first time before this Court.

Zarda v. State is not to the contrary, as it deals with the petitioner’s failure to exhaust remedies—an issue not present here, as KDHE does not contend that Ms. Mott had any additional administrative remedies available to her. *See Zarda v. State*, 250 Kan. 364, 826 P.2d 1365, *cert. denied*, 504 U.S. 973, 112 S.Ct. 2941 (1992). In *Zarda*, the plaintiff taxpayers brought an action for mandamus directly in district court, arguing that “the alphabetical ‘staggered registration system’ for motor vehicle registration and taxation, established by K.A.R. 92-51-21, unconstitutionally discriminated against persons whose registration month was any month after February.” *Id.* at 365. “The sole issue [on] appeal [was] whether the district court lacked subject matter jurisdiction on the ground that plaintiffs had failed to exhaust administrative remedies.” *Id.* The plaintiffs did not claim “that they exhausted, or even initiated, the administrative remedies” before the State Board of Tax Appeals (“BOTA”), *id.* at 367, but rather argued that they were excused from exhausting their administrative remedies because the sole issue they raised was a constitutional issue. *Id.* at 365.

As an initial matter, the *Zarda* court held that “the plaintiffs *could* have sought a declaratory judgment as to the constitutionality of the regulations and injunctive relief in the district court *without first presenting these two issues to BOTA*,” *id.* at 371 (emphasis added)—just as Ms. Mott did here. Thus *Zarda* does not prevent this Court from considering Ms. Mott’s constitutional grounds for injunctive and declaratory relief.

Moreover, even with respect to the other relief the *Zarda* plaintiffs sought—the “recovery of the taxes collected and paid pursuant to the implementation of K.A.R. 92-51-21”—the *Zarda* court held only that the plaintiffs were required to exhaust their administrative remedies first: Under the 1980 reforms in tax procedure, “[the aggrieved taxpayer’s] sole remedy is now to file an application for refund within the thirty-day period with BOTA. This statutory change achieved the legislative objective of eliminating direct action in the district court, thus channeling all tax matters through BOTA, the paramount taxing authority in the state.” *Id.* at 371 (citing *Northern Nat. Gas Co. v. Dwyer*, 208 Kan. 337, 492 P.2d 147 (1971), *cert. denied* 406 U.S. 967 (1972)) (emphasis omitted). Unlike in the taxpayer context, where there is an avenue of administrative relief through a review procedure of the agency action before BOTA, there were no such administrative avenues available to—or required of—Ms. Mott. Thus Ms. Mott did not fail to exhaust her administrative remedies and, under *Zarda*, Ms. Mott’s constitutional challenges are properly before the Court.⁶

⁶ In any event—even though Ms. Mott was not required to do so—she *did* present her constitutional challenges to KDHE’s denial of her request in her December 2015 submission to KDHE, which she submitted before KDHE complied with K.S.A. 77-613(e) by informing her of the next step in the process for review of the agency action. If KDHE wanted the opportunity to weigh in on the constitutional challenges before the district court, it could have done so at that point rather than reiterating its denial in its January 2016 letter without any consideration of her constitutional arguments.

B. KDHE’s Policy Violates Ms. Mott’s Rights to Privacy and Autonomy under the Due Process Clause

Despite its focus on a non-exhaustive list of fundamental rights articulated in *Taylor v. Kansas Department of Health & Environment*, 49 Kan. App. 2d 233, 244., 305 P.3d 729, 737-38 (2013), KDHE concedes that the protections of the Due Process Clause of the United States Constitution are not limited to the specific liberties enumerated in the Bill of Rights, and indeed, “the ‘outer limits of the substantive sphere’ of protected liberties have not been defined.” *See State v. Edwards*, 48 Kan. App. 2d 264, 267, 288 P.3d 494, 497 (2012). In addition to the rights enumerated in the Bill of Rights, the United States Supreme Court has recognized the right to privacy, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992), and the right to autonomy in “defin[ing] and express[ing] [one’s] identity,” *Obergefell*, 135 S.Ct. at 2593, both of which are infringed by KDHE’s refusal to amend Ms. Mott’s birth certificate.

1. The Forced Disclosure of the Sex Ms. Mott Was Assigned at Birth Violates Her Right to Privacy

With regard to Ms. Mott’s privacy rights, KDHE fails entirely to address the line of Tenth Circuit authority that recognizes the privacy interest in the confidentiality of medical information. *See Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000) (recognizing a constitutional right to privacy in the non-disclosure of information regarding one’s HIV status by a government official); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) (“There is no dispute that confidential medical information is entitled to constitutional privacy protection.”). Moreover, KDHE does not and cannot dispute that, under Tenth Circuit authority, whether a person is transgender and disclosures regarding a person’s diagnosis of GID or gender

dysphoria constitutes confidential medical information. *See Brown v. Zavaras*, 63 F.3d 967, 969 (10th Cir. 1995) (“The medical term for transsexuality is ‘gender dysphoria,’ and gender dysphoria is a medically recognized psychological disorder resulting from the ‘disjunction between sexual identity and sexual organs.’”) (citation omitted). By refusing transgender people like Ms. Mott a birth certificate that is congruent with their gender identity, KDHE forces disclosure of those persons’ medical information, thereby infringing on their constitutional right to privacy in violation of the Due Process Clause of the Fourteenth Amendment.

KDHE also does not dispute that the Tenth Circuit has recognized that the constitutionally protected due process right of privacy “protects . . . the individual’s interest in avoiding disclosure of personal matters.” *Eastwood v. Dep’t of Corr.*, 846 F.2d 627, 630-31 (10th Cir. 1988) (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)). Several federal circuit court decisions—none of which KDHE addresses in its Response—have recognized that this right includes transgender people’s interests in avoiding disclosure of their transgender identity. *See Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (“The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.”); *see also Franklin v. McCaughtry*, 110 F.App’x 715, 719 (7th Cir. 2004) (citing *Powell* with approval); *Moore v. Prevo*, 379 F.App’x 425, 428 (6th Cir. 2010) (same); *cf. Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015) (“transgender people often face backlash in everyday life when their status is discovered”).

Ignoring this authority, KDHE addresses only *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015). (Response at 7-8.) In that case, a federal district court in Michigan recognized that transgender people have a cognizable constitutional privacy claim under the Fourteenth Amendment when prohibited from changing the gender marker on their state-issued

identification documents pursuant to state policy. *Love*, 146 F. Supp. 3d at 851-52. KDHE’s attempt to distinguish this case on the ground that the identification document at issue in *Love* was a driver’s license, as opposed to a birth certificate, ignores that the very same fundamental right to privacy is at stake in both cases. The *Love* court’s holding that “by requiring Plaintiffs to disclose their transgender status, the Policy directly implicates their fundamental right of privacy” applies equally to the forced disclosure of transgender status that results when transgender people have to present birth certificates that list the sex they were assigned at birth. *Id.* at 856; *see also Adkins*, 143 F. Supp. 3d at 139-40 (“[M]any forms of identification required for asserting legal rights, such as birth certificates, indicate the bearer’s gender. A mismatch between the gender indicated on the document and the gender of the holder calls down discrimination, among other problems.”).

Ms. Mott has thus established a Due Process violation based on both the forced disclosure of her private medical information and the forced disclosure of her transgender status.

2. The Refusal to Correct Ms. Mott’s Birth Certificate Impermissibly Abridges Her Liberty Interest in Defining Her Own Identity Without Undue Interference From the State

KDHE also fails entirely to address Ms. Mott’s claim that KDHE’s refusal to amend her birth certificate infringes on her right to self-determine her gender identity and live in accordance with that identity without undue interference from the state. *See Obergefell*, 135 S.Ct. at 2589. The United States Supreme Court’s decision in *Obergefell*, which KDHE entirely fails to acknowledge, confirmed that the liberties protected by the Due Process Clause “extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.” *Id.*; *see also Lawrence v. Texas*, 539 U.S. 558, 574

(2003) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”) (*quoting Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 851).

A state’s refusal to recognize a transgender person’s sex not only denies that person equal dignity and respect by undermining their very existence, but also authorizes and invites other public and private entities to similarly discriminate and treat her with disrespect. *See United States v. Windsor*, -- U.S. --, 133 S.Ct. 2675, 2695 (2013) (by denying recognition to marriages of same-sex couples, “the principal purpose and the necessary effect of [the Defense of Marriage Act] are to demean those persons who are in a lawful same-sex marriage”); *cf.*, *e.g.*, *Lusardi v. McHugh*, App. No. 0120133395, 2015 WL 1607756, at *10 (E.E.O.C. April 1, 2015) (denying transgender woman access to communal restroom consistent with her female gender identity “perpetuated the sense that she was not worthy of equal treatment and respect,” “deprived [her] of equal status, respect, and dignity,” and “refused to recognize [her] very identity”).

While policies prohibiting transgender people from amending their birth certificates once may have been commonplace among the states, Kansas is now an extreme outlier⁷ and its policy can no longer be viewed as anything other than a bare violation of the liberty interests of transgender individuals born in this state.

C. KDHE’s Policy Violates Ms. Mott’s Right to Equal Protection of the Laws

KDHE incorrectly asserts that Ms. Mott cannot show that she has been denied her right to equal protection of the laws because a state’s enforcement of “a statute as to one person and not to another does not in itself constitute denial of equal protection; there must also be an element of intentional or purposeful discrimination.” (Response at 8-9 (citing *Snowden v. Hughes*, 321

⁷ For a search engine with information regarding each state’s procedures for correcting the gender marker on a birth certificate, see <http://transequality.org/documents>.

U.S. 1, 8, 64 S. Ct. 397 (1944); *Pork Motel, Corp. v. Kansas Dep't of Health & Env't*, 234 Kan. 374, 387, 673 P.2d 1126, 1137 (1983).)

This argument ignores that Ms. Mott has demonstrated that she is a member of a protected class—a showing that KDHE has not attempted to dispute. By contrast, the petitioners in *Snowden* and *Pork Motel* did not even argue that they were part of a protected class. *See Snowden*, 321 U.S. at 7-8 (“[P]etitioner disclaimed any contention that class or racial discrimination is involved. . . . Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification.”); *Pork Motel*, 234 Kan. at 384 (pork finishing corporation claimed that “KDHE singularly imposes on Pork Motel its rules and regulations in a malicious and confiscatory manner, thereby violating Pork Motel’s constitutional rights”). Because they had not alleged that they were subject to classification or discrimination based on a protected characteristic, the only way they could establish an equal protection violation would be to meet the higher bar of showing intentional or purposeful discrimination. *See Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth.*, 933 F.2d 853, 859 (10th Cir. 1991) (“The state action did not single out any class of contractors, nor has Buckley alleged ‘an element of intentional or purposeful discrimination’ in the application of the bidding procedures so as to invoke the clause as an individual.”) (citing *Snowden*, 321 U.S. at 8); *Cook v. City of Price, Carbon Cty., Utah*, 566 F.2d 699, 701 (10th Cir. 1977) (“However, when the discrimination is not aimed at a ‘suspect class,’ a plaintiff must show intentional or purposeful discrimination.” (citing *Snowden*, 321 U.S. at 8).

KDHE does not address the suspect classification analysis, and thus does not dispute any of the bases on which Ms. Mott has demonstrated that discrimination against transgender people is entitled to heightened judicial scrutiny. The Supreme Court has identified four factors for determining whether a classification based on certain characteristics warrants heightened scrutiny: (1) a history of discrimination against those with the characteristic; (2) the lack of relevance of the characteristic upon which the classification is based; (3) the immutability of the characteristic; and (4) the minority status or political powerlessness of those with the characteristic. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (four-factor test for strict scrutiny); *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (plurality opinion) (analyzing factors and concluding that classifications based on sex are subject to heightened scrutiny); *Kerrigan v. Comm’r of Pub. Health*, 289 Conn. 135, 166-68 (2008) (analyzing factors and concluding that classifications based on sexual orientation are subject to heightened scrutiny).

Transgender persons easily meet the indicia of a “suspect” or, at a minimum, “quasi-suspect” classification. See *Board of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, -- F. Supp. 3d --, No. 2:16-CV-524, 2016 WL 5372349, at *16 (S.D. Ohio Sept. 26, 2016) (discrimination against transgender people should receive heightened scrutiny); *Adkins*, 143 F. Supp. 3d at 139-40 (same); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (same). Cf. *Kerrigan*, 289 Conn. at 166 (holding that discrimination against gays and lesbians should receive heightened scrutiny); *Windsor v. United States (Windsor I)*, 699 F.3d 169, 181-82 (2d Cir. 2012) (identifying factors and concluding that classifications based on homosexuality warrant heightened scrutiny), *aff’d*, 133 S. Ct. 2675 (2013) (declining to decide

whether classifications based on homosexuality should be given heightened scrutiny but finding that DOMA violated equal protection principles).

First, transgender people have experienced a long history of discrimination.⁸ See *Brocksmith v. United States*, 99 A.3d 690, 698 (D.C. 2014) (“The hostility and discrimination that transgender individuals face in our society today is well-documented.”). Transgender people experience discrimination in employment,⁹ housing,¹⁰ education,¹¹ public accommodations,¹² and access to government services.¹³ For example, according to the National Transgender Discrimination Survey Report, 97% of nearly 6500 respondents experienced harassment or mistreatment on the job or took actions like hiding their gender transition to avoid such treatment, and 47% of respondents lost their jobs, were denied a promotion, or were denied a job as result of being transgender. See J.M. Grant *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (“National Survey”) (2011) at 53, available at

⁸ See, e.g., James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi M., *The Report of the 2015 U.S. Transgender Survey*, Washington, DC: National Center for Transgender Equality (2016), available at <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>; J.M. Grant *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011) (hereafter “National Survey”), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf (also available at 2CR at 261-373, but see *infra* fn. 14). Cf. *Obergefell*, 135 S.Ct. at 2588-91 (noting history of discrimination against gays).

⁹ National Survey, at 53 (also available at 2CR at 289); Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009), available at <http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment>.

¹⁰ National Survey, at 4 (also available at 2CR at 264) (statistics regarding discrimination transgender people face in housing)

¹¹ National Survey, at 33-47 (also available at 2CR at 279-86) (statistics discrimination transgender people face in education).

¹² National Survey, at 72, 124, 130-35 (also available at 2CR at 299, 324-25, 327-28) (statistics discrimination transgender people face in public accommodations).

¹³ National Survey, at 72, 124, 158 (also available at 2CR at 299, 324-25, 341) (statistics discrimination transgender people face in government services).

http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf (also available at 2CR at 289).¹⁴

Second, the characteristics that distinguish transgender people as a group have no relation to their ability to perform or contribute to society. *See, e.g., Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1305 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011) (ruling in favor of transgender employee in employment discrimination case where the termination was not performance-based and was because of the gender transition). *Cf., Windsor I*, 699 F.3d at 182-83 (“The aversion homosexuals experience has nothing to do with aptitude or performance.”).

Third, gender identity is an immutable characteristic. *See, e.g., Latta v. Otter*, 771 F.3d 456, 464-65 n.4 (9th Cir. 2014) (“We have recognized that [both] ‘[s]exual orientation and sexual [gender] identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.’”) (citation omitted); *see also* Kevin M. Barry *et. al., A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 560 (2016) (“[I]t strains logic to say that a person chooses to become part of the transgender class—membership in which quadruples one’s risk of suicide and exposes the person to almost certain discrimination in nearly every aspect of life.”). *Cf. Obergefell*, 135 S.Ct. at 2594 (noting the “immutable nature” of sexual orientation).

Fourth, transgender people are a minority and lack political power. Approximately 0.6% of the population is transgender. *See* Andrew R. Flores *et al., How many adults identify as transgender in the United States?*, Williams Institute (June 2016) at 3, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as->

¹⁴ It appears that the Revised Certified Record omits every other page of the National Survey. A complete version of the National Survey can be accessed at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

Transgender-in-the-United-States.pdf. Transgender people are also seriously underrepresented at all levels of government. *See Adkins*, 143 F. Supp. 3d at 140 (“[T]here is no indication that there have ever been any transgender members of the United States Congress or the federal judiciary.”). Indeed, it has been even more difficult for transgender people to protect themselves from discrimination by the majority than it has been for gays and lesbians to do so. *Cf. Windsor*, 699 F.3d at 185 (gays and lesbians “are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public”).

Heightened scrutiny should also be applied because discrimination against transgender people is a form of sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (recognizing that discrimination against an individual for failing to conform to sex stereotypes is a form of unlawful sex discrimination); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1304 (D. Kan. 2005). Following *Price Waterhouse*, the vast majority of federal courts to consider the question have concluded that discrimination against transgender individuals is a form of sex discrimination entitled to at least intermediate scrutiny under the Equal Protection Clause. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5, 1319 (11th Cir. 2011) (“[S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that ‘the approach in *Holloway* . . . has been eviscerated’ by *Price Waterhouse*.” . . . “[D]iscrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.”); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004) (same); *Norsworthy*, 87 F. Supp. 3d at 1119 (same). Ms. Mott has thus established—and KDHE has not refuted—that she is part of a protected class of transgender people.

In any event, although not required to do so, Ms. Mott also has demonstrated purposeful or intentional discrimination by KDHE. The timing of KDHE's decision to stop enforcing the Regulation after 26 years was untethered to the *Gardiner* Court of Appeals decision issued more than ten years earlier, but rather came on the heels of a new governor, Sam Brownback, taking office. The suddenness of the decision, memorialized on a Post-It Note without analysis, public notice, or any legitimate justification, leaves no doubt that the purpose of KDHE's decision was to deny a right that transgender people previously had enjoyed. By targeting transgender people for the deprivation of a right, KDHE engaged in intentional and purposeful discrimination. *See Romer v. Evans*, 517 U.S. 620, 633, 116 S. Ct. 1620, 1628 (1996). For this reason, too, Ms. Mott has established a violation of her right to equal protection of the laws.

D. KDHE's Policy Cannot Survive Any Level of Scrutiny

In order for KDHE's infringement of Ms. Mott's fundamental rights to be permissible under either the Due Process Clause or the Equal Protection Clause, it must survive exacting scrutiny. *See Kitchen*, 755 F.3d at 1218 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109 (10th Cir. 2008) (citing *Johnson v. California*, 543 U.S. 499, 505 (2005)); *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002)).

In addressing Ms. Mott's constitutional arguments, KDHE has offered no justification, much less a compelling state interest, to justify its refusal to amend Ms. Mott's birth certificate. Instead, as set forth above, the suddenness of the choice to refuse to enforce the Regulation as well as its lack of justification makes clear that it was a political decision aimed at removing certain rights from transgender people and not a neutral attempt to follow the *Gardiner* Court of Appeals decision as KDHE previously has claimed.

Even assuming conformity with KDHE’s interpretation of *Gardiner* were a compelling state interest, however, its refusal to amend the birth certificates of transgender people is not narrowly tailored. It is in fact significantly underinclusive, as KDHE does not dispute that it allows for amendments where an individual has undergone sex reassignment surgery on “ambiguous” genitalia, or to correct other “mistakes” in gender determination. (ICR at 154-61 & 163-70 – Irigonegaray Decl., Exs. 21 & 22.; K.A.R. 28-17-20(a).) Because KDHE permits amendments to birth certificates for individuals that share the same relevant characteristic with Ms. Mott and other transgender individuals—a gender identity that is inconsistent with the sex assigned at birth—its scope is plainly untethered from the alleged goals of the regulatory regime. *See Kitchen*, 755 F.3d at 1221 (“Utah law sanctions many marriages that share the characteristic—inability to procreate—ostensibly targeted by [amendment banning same-sex marriage]. The absence of narrow tailoring is often revealed by such under-inclusiveness.”). This lack of narrow tailoring, which points to a true motivation of animus toward transgender persons, is fatal.

Even if the intermediate scrutiny standard applicable to gender-based discrimination applies, KDHE’s action cannot stand. No “important” objective is advanced by subjecting transgender people to uniquely disfavored treatment under KDHE’s birth certificate amendment policy, denying them access to corrected birth certificates when all other people born in Kansas can obtain records that accurately reflect their lived gender. *See United States v. Virginia*, 518 U.S. 515, 531, 533 (1996) (under intermediate scrutiny, government “must demonstrate an exceedingly persuasive justification for that action”; “[t]he burden of justification is demanding and it rests entirely on the State.”) (internal quotation marks and citations omitted).

Indeed, KDHE's refusal to allow transgender people to amend the gender markers on their birth certificates cannot survive even rational basis review. KDHE permits such amendments to non-transgender people whose assigned birth sex is incorrect, as well as to intersex people with ambiguous genitalia whose assigned birth sex is incorrect, yet it does not permit such amendments for transgender people whose assigned birth sex is incorrect. KDHE can advance no rational basis for differentiating among transgender, non-transgender, and intersex people in this way. *See Price-Cornelison*, 524 F.3d at 1114 (“[Defendant] has not asserted, and we cannot discern on this record, a rational reason to provide less protection to lesbian victims of domestic violence than to heterosexual domestic violence victims. [Plaintiff], therefore, has sufficiently established that [Defendant] violated her constitutional rights.”). Similarly, while refusing to amend the gender marker on transgender people's birth certificates, Kansas permits amendments to the gender marker on transgender people's driver's licenses and there is no rational basis for treating these types of identification documents differently. Nor could KDHE claim that the policy of denying amendments to the gender marker on birth certificates for transgender people is rational because a birth certificate is a record of the holder's identity as identified at a moment in time. Kansas permits all sorts of other after-the-fact amendments to birth certificates. *See* K.S.A. 23-2223(a) (setting forth procedure to add the name of a parent, correct the name of either parent or of the child or change the child's last name).

**IV. THIS COURT HAS ALREADY CORRECTLY REJECTED KDHE'S
TIMELINESS ARGUMENTS IN AN ORDER THAT IS LAW OF THE CASE**

In an effort to avoid the merits of Ms. Mott's petition for review, KDHE once more seeks to re-argue that Ms. Mott was required to file a petition for review within 30 days of its November 2013 letter, despite acknowledging that that letter did not comply with K.S.A. 77-

613(e). This Court has already held that the November 2013 letter did not comply with that statute (July 29, 2016 Order at 9), and that KDHE “satisfied the service requirements of K.S.A. 77-613(e)—and, thus, ‘served’ their final order—only when they sent the January 22, 2016 letter.” (*Id.* at 10.) Accordingly, the Court properly determined that the 30-day period in which to file a petition for review began on January 22, 2016, and Ms. Mott’s February 19, 2016 Petition for Review was timely filed under K.S.A. 77-613(b). (*Id.* at 11.)

That determination is law of the case, and KDHE offers no basis on which this Court may depart from that ruling. Indeed, the Court’s conclusion is indisputably correct. The Kansas Supreme Court has made clear that the time to file a petition for review does not begin to run unless and until the final agency order complies with K.S.A. 77-613(e) by “stat[ing] the agency officer to receive service of a petition for judicial review on behalf of the agency.” K.S.A. 77-613(e); *see Heiland v. Dunnick*, 270 Kan. 663, 671-73, 19 P.3d 103, 109-10 (2001); *Reifschneider v. State*, 266 Kan. 338, 343, 969 P.2d 875, 877-78 (1998); *see also Guss v. Fort Hays State Univ.*, 38 Kan. App. 2d 912, 917, 173 P.3d 1159, 1165 (2008) (agency’s failure to include language required by K.S.A. 77-613(e) “tolls [the] 30-day period for the filing of a petition for judicial review”). The reason for K.S.A. 77-613(e)’s requirement is to “give [petitioner] some idea of his next step by designating the agency person to receive his petition for judicial review” *Heiland*, 270 Kan. at 672, so “that [petitioner’s] appellate rights may be preserved.” *Id.* at 671; *Reifschneider*, 266 Kan. at 342-43. Accordingly, “[t]he notice provisions of K.S.A. 77-613(e) require strict compliance.” *Id.*, 266 Kan. at 342.

KDHE also argues that Ms. Mott’s Petition for Review failed to strictly comply with the pleading requirements of K.S.A. 77-614(b) by failing to identify the correct agency action, and that her subsequently filed Amended Petition (which did identify the correct agency action) was

untimely because it was filed more than 30 days after KDHE's January 22, 2016. (Response at 11.) This frivolous argument blatantly disregards this Court's July 29, 2016 Order, in which it expressly granted Ms. Mott's request for leave to amend the petition to comply with K.S.A. 77-614 by identifying the November 2013 letter as the final order, and allowed Ms. Mott 30 days from the receipt of its order to file her amendment. (Order at 11.) Ms. Mott's Amended Petition, which satisfies the pleading requirements of K.S.A. 77-614(b), was filed on August 17, 2016, and is thus timely under the Court's order.

To argue otherwise, KDHE again urges the Court to reverse its prior ruling, which it cannot do. Nor should it, as the prior ruling granting leave to amend was well within the Court's discretion. *See* K.S.A. 77-614(c) (providing that leave to supplement the petition with information required to comply with 77-614(b) "shall be freely given when justice so requires"). Ms. Mott demonstrated that there would be no prejudice to allowing her amendment because both the November 2013 Letter and the January 2016 order were discussed in, and attached to, the initial Petition for Review, and because KDHE itself argued that the November 2013 Letter was the final order. *Id.*

While KDHE reiterates its argument that a failure to identify the agency action at issue under K.S.A. 77-614(b)(3) "is contrary to the strict compliance standard for actions under the KJRA," it relies on the interpretation of K.S.A. 77-614 in the 2008 case *Kuenstler v. Kansas Department of Revenue*, 40 Kan. App. 2d 1036, 1039, 197 P.3d 874, 877 (2008). K.S.A. 77-614, however, was amended in July 2009 to make clear that "[f]ailure to include some of the information listed in subsection (b) in the initial petition *does not deprive the reviewing court of jurisdiction* over the appeal." K.S.A. 77-614(c) (emphasis added). As the legislative record explains, this amendment was passed precisely to avoid the harsh result that KDHE urges. *See*

Kansas Summary of Legislation, 2009 Reg. Sess. S.B. 87 (Kan. 2009) (noting that 2009 amendment “[p]revents dismissal of an appeal for lack of jurisdiction when there is a defect in the petition for judicial review and authorizes such petition to be amended to include the omitted information”). Indeed, courts recognize that cases that pre-date the amendment are no longer good law on this issue. *See Pappan v. Kansas Dep’t of Revenue*, 369 P.3d 341, No. 112,677, 2016 WL 1545650, at *4 (Kan. Ct. App. Apr. 15, 2016) (denying motion to dismiss for failure to strictly comply with K.S.A. 77-614 because “our legislature amended K.S.A. 77-614 by amending subsection (c)”).

V. KDHE’S ATTEMPTS TO LIMIT THE RECORD ON REVIEW SHOULD BE REJECTED, AND IN ANY EVENT, WOULD NOT CHANGE THE OUTCOME

KDHE argues that the record on review is limited to the materials submitted to KDHE before its November 2013 denial of Ms. Mott’s request, and does not include the supporting materials that were enclosed with Ms. Mott’s December 14, 2015 letter, which was submitted before KDHE issued its January 22, 2016 letter finally complying with K.S.A. 77-613(e).

(Response at 9-10.)

As an initial matter, these supporting materials are included in the Revised Certification of Agency Record that KDHE filed in this action, in which KDHE specifically “certifie[d] the following is a true copy of the Agency Record in this case.” (Revised Certification of Agency Record at 1-2 (listing December 14, 2015 “Irigonegaray & Associates Requesting Review of Denial” and “Supporting Materials to Request for Review of Denial” as part of the agency record).) Because KDHE has certified the supporting materials as part of the agency record in this case, it cannot now claim otherwise.

Even if KDHE had not already certified that the December 2015 letter and supporting materials were part of the agency record in this action, the Court can properly consider them because they relate to the constitutional issues, which are before this Court for determination in the first instance, and not on review of the agency's determination of the issues. *See Sierra Club v. Moser*, 298 Kan. 22, 39, 310 P.3d 360, 372-73 (2013).

In *Sierra Club*, the court held that it could consider affidavits and declarations submitted by the petitioner directly to the court as evidence of a petitioner's standing, notwithstanding the prohibitions and limitations to supplementing the agency record found in K.S.A. 77-618 and 77-619. *Id.* ("Despite the limited nature of the exceptions stated in K.S.A. 77-619(a) and the general prohibition against additional evidence found in both the KAQA and the KJRA, . . . these provisions do not prohibit our consideration of the members' declarations for purposes of determining the existence of Sierra Club's standing to challenge the permit in this court."). The court reasoned that KJRA is "limited to the scope of a court's review of an *agency's actions*," and "KDHE made no findings on the issue of standing, nor was it asked to take such action." *Id.* (emphasis in original). The court noted that "although an organization . . . *could* establish the prerequisites for associational standing at the administrative level, it is not *required* to do so." *Id.* (emphasis added). The court thus found that it was permitted to consider additional evidence not previously submitted to the agency because the court was "not addressing standing in the context of a review of the agency's determination on the issue." *Id.*

Similarly, the Court here is not addressing Ms. Mott's constitutional challenges in the context of a review of KDHE's determination of those claims. This is because, as discussed above, administrative agencies like KDHE cannot rule on constitutional questions, and thus the issue of constitutionality is properly raised for the first time before this Court. *See Bd. of Educ.*

of Unified Sch. Dist. No. 443, 266 Kan. at 81; *Solis*, 268 Kan. at 757. This Court, in considering Ms. Mott's constitutional arguments, thus can and should consider the entire Certified Agency Record, including the December 2015 letter and supporting materials.

In any event, even if this Court were to conclude that the agency record was limited to Ms. Mott's November 2013 submission, that more limited agency record provides more than a sufficient basis on which to find that KDHE is both statutorily and constitutionally required to grant Ms. Mott's request to amend her birth certificate.

First, the November 2013 submission established that Ms. Mott met all of the requirements of the Regulation then in effect, which KDHE was statutorily required to enforce. (1CR at 1-3.)

Second, with regard to Ms. Mott's constitutional arguments, the Due Process challenge is a purely legal one: Ms. Mott has established that KDHE's refusal to permit transgender people to amend the gender markers on their birth certificates violates their privacy rights that protect them from forced disclosure of their transgender status and private medical information, as well as their right to autonomy.

The Equal Protection challenge similarly is a legal question. Although it requires a finding that transgender people are a protected class or that KDHE's action is based on intentional or purposeful discrimination, the Court can make these findings without relying on Ms. Mott's supporting materials. That transgender people are a protected class is supported not only by the expert reports and publicly available research that Ms. Mott submitted to the agency, but also by case law, which is unquestionably before this Court. Indeed, courts across the country have reached the same conclusion without needing to consider evidence regarding the

applicable constitutional standard. *See, e.g., Highland Local Sch. Dist.*, 2016 WL 5372349, at *16; *Adkins*, 143 F. Supp. 3d at 139-40; *Norsworthy v. Beard*, 87 F. Supp. 3d at 1119.

Similarly, while the internal documents obtained from KDHE pursuant to a Kansas Open Records Act request add additional support to the argument that KDHE's decision to cease enforcing the Regulation in 2012 was driven by animus toward transgender people and not by a desire to achieve conformity with the *Gardiner* Court of Appeals decision, KDHE's motives for the decision to stop enforcing the Regulation are clearly established by factors observable to the Court outside that record, including the relative chronology of the agency's actions and the lack of reasoned analysis. Thus, even if this Court were to accept KDHE's unfounded argument that the agency record is more limited than the record KDHE has already certified to this Court, that finding would not preclude a determination of Ms. Mott's statutory and constitutional arguments in her favor.

VI. CONCLUSION

For all of the foregoing reasons and the reasons set forth in Ms. Mott's Motion for Judgment, Ms. Mott respectfully requests that the Court enter judgment in Ms. Mott's favor and grant the following relief: (a) set aside the Denial Order; (b) enter an order requiring the KDHE to approve the amendment to the gender marker on Ms. Mott's birth certificate; (c) enter an order enjoining KDHE from denying requests from transgender people for amendments to the gender marker on their birth certificates; (d) render a declaratory judgment confirming the invalidity of the Regulation, as amended; and (e) award Ms. Mott her attorneys' fees and costs to the extent authorized by law.

Respectfully submitted,

IRIGONEGARAY & ASSOCIATES

s/ Pedro L. Irigonegaray
Pedro L. Irigonegaray, #08079
Elizabeth R. Herbert, #09420
1535 SW 29th Street
Topeka, KS 66611
785-267-6115; 785-267-9458 fax
pli@plilaw.com; erh@plilaw.com
Attorneys for Petitioner Stephanie Mott

Christopher G. Caldwell (*pro hac vice*)
Kelly L. Perigoe (*pro hac vice*)
725 S. Figueroa St., 31st Floor
Los Angeles, CA 90017
213-629-9040; 213-629-9022 fax
caldwell@caldwell-leslie.com
perigoe@caldwell-leslie.com
Attorneys for Petitioner Stephanie Mott

Ilona M. Turner (*pro hac vice*)
Sasha Buchert (*pro hac vice*)
1629 Telegraph Ave., Suite 400
Oakland, CA 94612
415-865-0176; 877-847-1278 fax
ilona@transgenderlawcenter.org
sasha@transgenderlawcenter.org
Attorneys for Petitioner Stephanie Mott

CERTIFICATE OF SERVICE

The undersigned person hereby certifies that a true and correct copy of the above and foregoing document was served on counsel of record by (____) placing the same in the United States mail, postage prepaid; by (____) courier service; (**X**) **electronic mail**; by (____) facsimile, to telephone number _____ and that the transmission was reported as complete and without error, and that the facsimile machine complied with Supreme Court Rule 119(b)(3); or by (____) hand delivery, on February 21, 2017, to:

Darian P. Dernovish
Interim Deputy Chief Counsel
Eugene Lueger
Associate Chief Counsel – Public Health
Kansas Department of Health and Environment
Legal Services
Curtis State Office Bldg., Suite 560
1000 SW Jackson, Ste. 560
Topeka, KS 66612-1371
(785) 296-5334 Office
ddernovish@kdheks.gov; glueger@kdheks.gov

*and the original was filed with the Court
using the eFlex System at:*

Angela M. Callahan, Clerk of Court
Shawnee County District Court
Third Judicial District
200 SE 7th Street, Suite 209
Topeka, KS 66603
<https://filer.kscourts.org/>
F: 785-291-4911

and a Chambers copy hand delivered 2-22-17 to:

Honorable Judge Teresa L. Watson
Courthouse – Div. 3
200 SE 7th Street, Room B8
Topeka, KS 66603
785-251-4130; 785-251-4917 fax

s/ Pedro L. Irigonegaray