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With transgender Kansans now represented, AG needs more time for driver's license lawsuit

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The Kansas attorney general's office now has more time to prepare its arguments over gender markers on driver's licenses after arguing that allowing transgender people to be represented will make the case more complex.

Shawnee County District Court Judge Teresa Watson on Monday delayed the various deadlines in the case, in which Attorney General Kris Kobach is suing members of Gov. Laura Kelly's administration over differing interpretations of a new law, Senate Bill 180.

While Kobach views the law as banning transgender people from changing their gender markers, among other things, the Kansas Department of Revenue disagrees. The ACLU has gotten involved to represent the interests of five transgender Kansans.

Kansas attorney general needs more time to prepare

Watson has already sided once with Kobach by issuing a temporary restraining order that blocks KDOR from making such changes. The court's next step is to consider a preliminary injunction.

The previous scheduling order had called for a Nov. 1 hearing date. But after Watson agreed to allow the ACLU to intervene, the attorney general's office requested delaying the hearing until January. Solicitor General Anthony Powell said their original case was "simple" and "straightforward" about the interpretation of SB 180, while the intervenors are making the issues more complex.

"There's transgender litigation going all over the country," he told reporters after Monday's court hearing. "It's mostly under the federal constitution, but this case is under the Kansas Constitution, so it's an issue of first impression. And so we think it's worth taking the time to brief it right for the court so that the court gets it right."

Sharon Brett, legal director of the ACLU of Kansas, disagreed that more time is necessary.

"What we're seeking here is simple at its core," Brett said, "which is the dignity, autonomy and privacy rights of transgender people as protected by the Kansas Constitution."

Brett said the ACLU's arguments won't be a surprise to the attorney general.

"The constitutional avoidance defense that we're raising in this case certainly requires the attorney general to contend with arguments that he did not want to contend with and was not planning on contending with when he filed this mandamus action," she said.

Pedro Irigonegaray, an outside attorney representing the Department of Revenue, said there are 514 people who have qualified to obtain a gender marker change on their driver's license. He contended that further delay risks a lawsuit against the agency, but Powell said he doubts a separate lawsuit would come since the ACLU is already involved in the current case.

Watson sided with the attorney general's office.

Powell said the new deadlines are more in line with brief timelines for appellate courts.

"So we're really not asking for extra time," he said. "We're asking for a standard amount of time."

Abortion case precedent could affect transgender case

Powell said part of the reason the case will be more complex is the intervenors are raising constitutional questions. That includes how to apply the precedent from the Kansas Supreme Court's ruling in the Hodes and Nauser abortion rights case.

"As you might recall, Hodes and Nauser said that we have a constitutional right to personal autonomy," Powell said. "They're making for the first time transgender claims under that provision. It's a case of first impression. We think it's a very serious matter that needs to be adequately addressed."

He said Kobach, who plans to try the case himself, will argue in his briefs that Hodes should not be applied to transgender people.

"This is going to be a serious case and it's probably going to go to the Kansas Supreme Court," said Powell, who is a retired Kansas Court of Appeals judge. "The law is unsettled in this area."

The Supreme Court's ruling has had wider effects than protecting abortion rights. It has been cited as reason to apply strict scrutiny in election law litigation, but it has also been rejected as reason to invalidate the death penalty.

"It's hard to say how far and how wide the Supreme Court is going to deal with this right to personal autonomy," Powell said. "That's going to be fleshed out probably in the next five to a dozen years conceivably. ... This is just another one of those issues that's now coming forward, and we're going have to litigate them one by one and see where the court takes us in terms of drying up and scoping out the right."

Staffing shortages are affecting Kansas attorney general's office

In arguing for more time, Powell told the court that the attorney general's office has limited resources and staffing.

"We've been working hard to try to fill positions," he said. "It's been hard in this economy. ... It's a struggle to find lawyers, and we have a particular need for litigators. So that's a constant battle that we're fighting and unfortunately we're still fighting that, so we're not up to strength."

Powell said staffing shortages were not the primary reason for seeking the extension, and they have not affected his solicitor general's office's ability to meet court deadlines and effectively litigate cases.

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Judge will hear arguments as Kansas Legislature returns to Topeka

The new schedule has the hearing set for the first week of the legislative session.

"If there is some sort of backlash to this litigation through the Legislature, the ACLU of Kansas is there as well," Brett said. "We have the backs of transgender Kansans across the state, and there's nothing about this litigation or about the start of the next legislative session that changes that."

The Republican supermajorities in the Legislature have pursued a slate of bills aimed at transgender people. The outcome of this case and others around the country could affect the appetite of legislators for further legislation, such as banning or restricting gender-affirming care.

More: In win for transgender rights advocates, effort to enact Kansas trans health care ban fails

A separate case remains pending in federal court, where Kobach is attempting to reopen an already decided lawsuit where a consent order directed the Kansas Department of Health and Environment to change gender markers on birth certificates for transgender people. That case is awaiting a ruling from the judge on whether to reopen the case.

Brett said the Legislature should pay attention to the legal rulings.

"There are many different issues that the legislature can and should be taking up that would help all Kansans, and these discriminatory attacks on transgender individuals is clearly not one of such issues," she said. "So our hope is that they would come back to the legislative session focused on the issues that are actually affecting Kansans and harming Kansans and work collaboratively across the aisle to develop solutions to those problems, rather than using their political platform as a means to attack transgender individuals."

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