

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL COURT DEPARTMENT**

|                                                      |                    |
|------------------------------------------------------|--------------------|
| HODES & NAUSER, MDs, P.A., on behalf of )            |                    |
| itself, its patients, physicians, and staff; TRACI ) |                    |
| LYNN NAUSER, M.D.; and )                             |                    |
| COMPREHENSIVE HEALTH OF PLANNED )                    |                    |
| PARENTHOOD GREAT PLAINS, on behalf )                 |                    |
| of itself, its patients, physicians, and staff, )    | Case No. 23CV03140 |
| )                                                    |                    |
| Plaintiffs, )                                        | Division No. 12    |
| )                                                    |                    |
| v. )                                                 | K.S.A. Chapter 60  |
| )                                                    |                    |
| KRIS KOBACH, in his official capacity as )           |                    |
| Attorney General of the State of Kansas; )           |                    |
| STEPHEN M. HOWE, in his official capacity )          |                    |
| as District Attorney for Johnson County; )           |                    |
| MARC BENNETT, in his official capacity as )          |                    |
| District Attorney for Sedgwick County; MARK )        |                    |
| A. DUPREE SR., in his official capacity as )         |                    |
| District Attorney for Wyandotte County; the )        |                    |
| STATE OF KANSAS ex rel. Kansas State )               |                    |
| Board of Healing Arts; and JANET STANEK, )           |                    |
| in her official capacity as Secretary of the )       |                    |
| Kansas Department of Health and Environment, )       |                    |
| )                                                    |                    |
| Defendants. )                                        |                    |
| )                                                    |                    |

**STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR NEW  
TRIAL OR, IN THE ALTERNATIVE, TO ALTER OR AMEND THE JUDGMENT –  
ORAL ARGUMENT REQUESTED**

## INTRODUCTION

Pursuant to K.S.A. 60-259, Defendants Kris Kobach, Stephen M. Howe, Marc Bennett, and Mark A. Dupree Sr. (the “State Defendants”) move for a new trial or, in the alternative, to alter or amend the Journal Entry of Judgment Following Trial to the Court entered August 3, 2026 (the “Judgment” or “J.”). This motion is timely under K.S.A. 60-259(b) and (f), and it states the specific errors relied upon as K.S.A. 60-259(c) requires.

The Judgment should be reopened for four independent reasons. First, it permanently enjoins “K.S.A. 65-6709” and “K.S.A. 65-6716” as those statutes exist today. Yet the versions that exist today were overhauled by H.B. 2729, effective July 1, 2026, a month before the Judgment issued—indeed, the trial judge ruled on June 9, 2026, that the effect of those amendments “cannot be addressed on this record.” Second, the trial judge lacked jurisdiction to adjudicate the rights of absent patients on the strength of hearsay from those very patients, and the Judgment’s reliance on *State v. Stubbs* does not cure the due process defects in its ruling. Third, the credibility findings on which the entire Judgment rests were infected by condemnation of witnesses’ religious beliefs, in violation of Section 7 of the Kansas Constitution Bill of Rights and the Free Exercise Clause of the First Amendment to the United States Constitution. Fourth, the pretrial and trial evidentiary rulings were so uniformly one-sided that the State Defendants were “not afforded a reasonable opportunity to present [their] evidence and be heard on the merits of the case.” K.S.A. 60-259(a)(1)(A).

Given the weight of the issues presented by this motion and the underlying issues, Defendants respectfully request the Court set the motion for an in-person oral argument.

## BACKGROUND

### I. Procedural History

Plaintiffs filed this action on June 6, 2023, to challenge the 1997 Woman’s Right to Know Act (“WRTKA”), K.S.A. 65-6708 et seq., and its 2023 amendments of H.B. 2264 concerning abortion-pill reversal (the “APR Mandate”). J. at 6. On October 30, 2023, the trial judge temporarily enjoined K.S.A. 65-6709, 65-6710(a)(3)-(a)(4), 65-6712, and the APR Mandate. J. at 6-7, FOF ¶ 68. In July 2024, Plaintiffs supplemented their petition to challenge H.B. 2749, which amended K.S.A. 65-445. J. at 7, FOF ¶ 69.

The State Defendants have challenged Plaintiffs’ standing to assert their patients’ rights at every stage. The trial judge denied the original motion to dismiss, and on April 30, 2025, denied the State Defendants’ Motion to Narrow or Vacate Injunction and to Dismiss, characterizing it as “repackaged arguments that seek reconsideration of the Court’s prior rulings on legal standing.” Journal Entry on State Defendants’ Motion to Narrow or Vacate Injunction and to Dismiss (Apr. 30, 2025) (“Standing Order”) at 7. It again rejected those arguments following trial. Yet it never ruled on the defect of federal due process that precluded it from taking jurisdiction.

On May 30, 2025, the trial judge ruled on the parties’ cross-motions to exclude expert testimony—twelve in total. Journal Entry on the Parties’ Various Motions to Exclude or Limit Expert Witnesses, Pursuant to K.S.A. 60-457 (May 30, 2025) (“Expert Order”). It denied all nine of the State Defendants’ motions (granting one “in part” as to Professor Sawicki’s medical opinions). Expert Order at 28-41. By contrast, it granted Plaintiffs’ motions by excluding the only Kansas-based OB-GYN in the case to have provided abortion-pill reversal, Dr. Jonathan Scrafford, entirely, *id.* at 6-13; excluding Ms. Donovan entirely, *id.* at 23-28; and precluding Dr. Monique Chireau Wubbenhorst’s opinions on abortion pill reversal, fetal pain, coercion,

legislative purpose, the race-based nature of abortion, and whether abortion is “health care” on the basis that those opinions are “inflammatory,” *id.* at 13-23.

On August 26, 2025, the trial judge barred three of the six women the State Defendants had disclosed to testify about their own abortion experiences, reasoning that “there’s not going to be any piece of evidence that suggests the legislators knew anything about any of these individuals.” Tr. of Motions Hearing (Aug. 26, 2025) at 36:5-13. On September 18, 2025, the trial judge denied the State Defendants’ request to make a formal offer of proof of these women’s testimony. Journal Entry (Sept. 18, 2025) at 2.

## **II. The Trial and the Trial Judge’s Ruling**

The bench trial was conducted on September 26, 29, and 30 and October 14-17, 2025. J. at 7-8. The parties submitted proposed findings in December 2025. J. at 8. On July 13, 2026, Governor Laura Kelly appointed the trial judge to the Kansas Supreme Court. On election day, August 3, 2026, the trial judge took the oath of office as a Kansas Supreme Court justice. Later that day, the trial judge entered a 261-page Judgment in favor of Plaintiffs permanently enjoining “K.S.A. 65-6709, portions of K.S.A. 65-6710 (namely (a)(3), and (a)(4)), K.S.A. 65-6712, and H.B. 2264 (now codified at K.S.A. 65-6716), and H.B. 2749 (now as-revised K.S.A. 65-445).” J. at 4; *see id.* at 257-58.

The Judgment’s credibility findings were entirely one-sided. The trial judge found every one of Plaintiffs’ thirteen witnesses credible, often in superlatives—“extremely powerful,” “exceedingly credible,” “exceptionally compelling.” FOF ¶¶ 71-83. In contrast, the trial judge gave “essentially no weight” or “no weight whatsoever” to every State witness, including the three women who testified about their own abortions—the only abortion patients to testify in the entire case—whose testimony was dismissed as “significantly influenced by the obvious philosophical biases” they had “developed.” FOF ¶¶ 90-93, 99, 100, 104-06, 115.

The trial judge’s reasons for disbelieving the State’s witnesses repeatedly returned to their religious beliefs: Dr. Condic’s credibility was “severely undermine[d]” by “[t]he level of her conviction expressed on a statement that clearly implicates moral, spiritual, philosophical, and existential beliefs,” FOF ¶ 104; Dr. Curlin’s views were “directly attributable to his strong moral and spiritual beliefs on healthcare,” FOF ¶ 115, and the Court disbelieved his testimony that “his personal and religious beliefs are ‘entirely consistent with a proper understanding of medical ethics,’” FOF ¶ 114. The Court introduced Dr. Wubbenhorst’s testimony by reference to her affiliation with an organization “within the Catholic Intellectual Tradition on Ethics and Culture.” FOF ¶ 94. Dr. Pierucci’s professional association was described, in the Court’s words, as “designated a hate group by the Southern Poverty Law Center.” J. at 59 n.9. And the State’s interest in protecting potential life was dismissed as “philosophical/moral/spiritual perspectives which are not persuasive evidence of a ‘compelling’ interest.” J. at 172.

### **III. The Legislature Substantially Amended the WRTKA Before Judgment**

After trial but before the Judgment, a supermajority of the Legislature enacted H.B. 2727 and H.B. 2729, with an effective date of July 1, 2026. *See* Journal Entry Denying State Defendants’ Renewed Motion to Dismiss (June 9, 2026) (“June 9 Order”) at 2. H.B. 2729 eliminates the paper-form requirement that was the centerpiece of Plaintiffs’ delay evidence at trial, permitting the disclosures to be “electronically transmitted to the woman,” and requires that those disclosures be provided “on a form provided by” KDHE, with the required signage identified as a “notice from the KDHE.” State Defendants’ Supplemental Brief on Legislative Amendments (May 15, 2026) (“Supp. Br.”) at 3, 7; June 9 Order at 5. H.B. 2727 creates a private cause of action for patients against providers who fail to make the WRTKA disclosures. June 9 Order at 4-5.

The State Defendants moved to dismiss the WRTKA claims as moot and unripe. The Court denied that motion on June 9, 2026, but in doing so it expressly reserved the effect of the amendments: “What impact, if any, such post-trial legislative changes may or could have cannot be addressed *on this record* at this juncture. Instead, those points likely must await another day, after the Court enters its final Judgment.” June 9 Order at 8. The Judgment does not mention H.B. 2727 or H.B. 2729. It nonetheless enjoins the statutes those bills amended, by section number and without limitation to any prior version. J. at 257-58.

### STANDARD OF REVIEW

K.S.A. 60-259(a)(1) authorizes a new trial for, among other reasons, “[a]buse of discretion by the court . . . or because the party was not afforded a reasonable opportunity to present its evidence and be heard on the merits of the case”; “erroneous rulings or instructions by the court”; a “decision [that] was given under the influence of passion or prejudice”; and a “decision [that] is in whole or in part contrary to the evidence.” K.S.A. 60-259(a)(1)(A)-(D). After a nonjury trial, “the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones and direct the entry of a new judgment.” K.S.A. 60-259(a)(2). A motion to alter or amend under subsection (f) is properly construed as a motion to reconsider whenever it “offers at least some identifiable reason for reconsidering the judgment.” *In re Estate of Lentz*, 312 Kan. 490, 502, 476 P.3d 1151 (2020). Evidentiary rulings warrant a new trial where refusing one would be “inconsistent with substantial justice.” *City of Mission Hills v. Sexton*, 284 Kan. 414, 416, 423, 160 P.3d 812 (2007); *see* K.S.A. 60-261.

Two of the grounds asserted here—lack of subject-matter jurisdiction and the constitutional impartiality of the tribunal—are not subject to harmless-error analysis. *See Gannon v. State*, 298 Kan. 1107, 1122, 319 P.3d 1196 (2014); K.S.A. 60-212(h)(3).

## ARGUMENT

### **I. The Injunction Against the WRTKA Is Moot as to the Amended Statutes.**

#### **A. The Judgment enjoins statutes on which no evidence was taken.**

The Judgment permanently enjoins “the provisions and requirements of K.S.A. 65-6709” and “H.B. 2264 (now codified as K.S.A. 65-6716)” and declares them “unconstitutional, unlawful, and unenforceable.” J. at 257. Those two statutes are the very sections that H.B. 2729 amended. By the time the Judgment issued on August 3, 2026, the amendments had been in effect for more than a month. The Judgment therefore enjoins a statute that the Court never examined and on which, by the Court’s own account, no evidence exists: “Issues pertaining to these enactments were neither contemplated in the Final Pretrial Order nor addressed at trial. . . . The corollary is that, of course, there could be no evidence on such matters that were presented in the record.” June 9 Order at 8.

That is error under K.S.A. 60-259(a)(1)(B) and (D). A judgment following a bench trial must rest on findings of fact, K.S.A. 60-252(a)(1), and a permanent injunction against a statute must rest on a determination that the statute, as it exists when enjoined, is unconstitutional. The Court’s findings address “K.S.A. 65-6709 (b), (k) (2024)” and “K.S.A. 65-6716 (b), (c) (2024).” J. at 210 n.58. No finding addresses the 2026 versions. The Court cannot simultaneously hold that the amendments’ impact “cannot be addressed on this record,” June 9 Order at 8, and enjoin the amended statutes on that record.

#### **B. The amended statutes moot the claims tried.**

“Kansas courts do not render advisory opinions.” *Sierra Club v. Stanek*, 317 Kan. 358, 361, 529 P.3d 1271 (2023). “[W]hen, by reason of changed circumstances between commencement of an action and judgment on that action, a judgment would be unavailing as to the issue presented, the case is moot.” *Roll v. Howard*, 316 Kan. 278, 284, 514 P.3d 1030 (2022).

“[A] statutory amendment moots a case to the extent that it removes challenged features of the prior law.” *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1223 (10th Cir. 2001).

The trial judge’s prior contrary conclusion—issued before the effective date of H.B. 2729—rested on *Montoy v. State*, 279 Kan. 817, 825, 112 P.3d 923 (2005), for the proposition that a challenge “should not be aborted every time the law is amended by the legislature.” June 9 Order at 3. But the Court’s own findings show that the amended features were not cosmetic. The Judgment’s principal factual basis for infringement of bodily autonomy was that delays and denials of care were caused by the paper-form requirement: patients “turned away” because forms were “printed incorrectly (e.g., on pink paper),” FOF ¶ 185; staff spending “at least 30 minutes” comparing each packet “line by line” against “a ‘laminated’ ‘master copy,’” FOF ¶ 181; and “approximately ten patients per week” turned away “due to paperwork compliance issues,” FOF ¶ 184. *See* FOF ¶¶ 174-91. Indeed, the trial judge’s analysis expressly relies on these findings. J. at 148-49. Yet H.B. 2729 eliminates the paper requirement and the delays it purportedly caused. A judgment enjoining a requirement the Legislature has already eliminated is “a textbook example of advising what the law would be upon a hypothetical state of facts.” *Citizens for Responsible Gov’t State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000).

The same is true of the free-speech holding. The trial judge found that the WRTKA “conscripts the providers . . . to serve as the State’s megaphone,” FOF ¶ 290, and that disclaimers “don’t change the conclusion that the WRTKA alters the providers’ speech,” J. at 210 n.58. But H.B. 2729 makes KDHE the author of the form and the signage. The trial judge’s own decree recognizes the difference: it permits KDHE to post the same information on its website “for voluntary consumption/review by the public.” J. at 258 ¶ 1(h). Whether a KDHE-authored form,

transmitted electronically, compels a provider to speak in violation of Section 11 is a different question from the one tried, and it is one the trial judge said it cannot answer on this record.

**C. At a minimum, the Judgment must be amended.**

If the Court declines to dismiss the WRTKA claims, K.S.A. 60-259(a)(2) provides the remedy: the Court should “open the judgment,” “take additional testimony,” and “amend findings of fact and conclusions of law” to address the statutes as amended. No injunction can lie against a law that is no longer in effect. An injunction must be specific enough that the enjoined party can know what conduct is prohibited. The current decree, which enjoins a section number without reference to any version, does not meet that standard.

**II. The Court Lacked Jurisdiction to Adjudicate the Rights of Absent Patients**

Standing in Kansas is “a component of subject matter jurisdiction.” *Gannon*, 298 Kan. at 1122. A plaintiff must show “a cognizable injury and a causal connection between the injury and the challenged conduct.” *State v. Stubbs*, 320 Kan. 568, 570, 570 P.3d 1209 (2025). Here, Plaintiffs sued “on behalf of” their patients, without naming any such patient as plaintiff, presenting any testimony from a patient, or even identifying any patient allegedly harmed by the Woman’s Right to Know Act. J. at 29-30, FOF ¶ 61. But a provider’s alleged injury from a regulation of its own conduct is not the patient’s injury from an alleged infringement of her bodily autonomy. The Judgment’s Section 1 and Section 2 holdings purport to vindicate the rights that belong to women *who were not before the Court, who were never identified*, and whose interests—as the Court itself found—*may diverge from Plaintiffs’ interests*. Standing Order at 16-18. And here, that divergence is not speculative: the trial judge permitted providers to invoke patient rights to overturn a law that gives patients the right to sue those providers.

That divergence is not hypothetical. It is structural. The WRTKA confers rights on patients that run against providers: the right to certain information, to view an ultrasound, to a

period of reflection, and, under the APR Mandate and now the recently enacted H.B. 2727, a private cause of action against the provider for noncompliance. The trial judge permitted abortion providers to invoke their patients’ constitutional rights to strike down a statute that gives those same patients the right to sue those very providers. A litigant cannot adequately represent a third party in seeking to strike down a statute that gives the third party a right to sue the litigant. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004).

The Judgment’s finding of jurisdiction rests on three propositions. Each is mistaken.

First, the trial judge reasoned that *Stubbs* “call[s] into question a court’s reliance on federal prudential rules” and that the Kansas Supreme Court has “never explicitly adopted a prudential standing doctrine.” J. at 136 (quoting *State v. Stubbs*, 320 Kan. 568, 570 P.3d 1209, 1219 (2025)). That answer responds to an objection the State Defendants did not make. The State Defendants’ objection was never that Kansas should borrow a federal court’s discretionary preference for hearing only first-party claims. It was, and is, that the Due Process Clause of the Fourteenth Amendment forbids *any* court from adjudicating the rights of absent persons through a representative whose interests conflict with theirs. That is a constitutional command, not a prudential rule, and declining to adopt the latter does nothing to relieve the Court of the former.

The federal third-party-standing doctrine has two distinct components that the Judgment conflates. One is a self-imposed rule of judicial restraint under which federal courts ordinarily decline to hear a litigant’s assertion of another’s rights. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). That component is “prudential,” and a state court may decline to import it. But the other component—the requirement that the litigant’s interests be aligned with, rather than “potentially in conflict” with, the interests of the person whose rights are being adjudicated, *Elk Grove*, 542 U.S. at 15—is not a matter of judicial discretion. It is the same guarantee of adequate

representation that the Supreme Court has located in the Due Process Clause since *Hansberry v. Lee*, 311 U.S. 32, 40–43 (1940), which held that representative litigation satisfies due process only when the representative’s “substantial interests” are aligned with those of the absent parties. *See also Richards v. Jefferson Cnty.*, 517 U.S. 793, 797, 804–05 (1996) (noting that *Hansberry* right is “a federal right that is fundamental in character”); *Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008) (adequate representation permissible only where “the interests of the nonparty and her representative are aligned”). Those decisions were addressed to state courts and did not turn on whether the state had “adopted” any federal standing doctrine.

The Kentucky Supreme Court, applying these principles after *Dobbs*, held that abortion providers may not assert their patients’ constitutional rights to challenge statutes that create patient causes of action against the providers, because the providers’ “interest in not being civilly or criminally prosecuted . . . appears to potentially conflict with a pregnant woman’s interest in receiving adequate medical care.” *Cameron v. EMW Women’s Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 658–59 (Ky. 2023). *Cameron* did not rest on any Kentucky “adoption” of federal prudential standing; it rested on the conflict itself.

Whatever *Stubbs* says about Kansas courts’ freedom to chart their own course on prudential standing, it cannot free a Kansas court from the Fourteenth Amendment. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985), applied exactly this principle to a Kansas court: the Due Process Clause imposes minimum requirements on Kansas courts’ power to adjudicate the claims of absent parties, independent of Kansas procedure. The question here is whether the Fourteenth Amendment permits a court to enter a judgment resolving the constitutional rights of hundreds of thousands of women through representatives who (i) are not members of the affected group, (ii) have a direct pecuniary interest adverse to the statutory rights

the group holds, and (iii) seek relief that extinguishes the group’s rights to sue those very representatives. *Hansberry* answers that question, and the answer is no.

Second, the Court relied on *Alpha Medical Clinic v. Anderson*, 280 Kan. 903 (2006), *Comprehensive Health v. Kline*, 287 Kan. 372 (2008), and the *Hodes* decisions. J. at 134-35. But none of those cases involved a challenge, by the party asserting third-party standing, to a statute that creates a cause of action for the third party against that party. And the Court’s footnote 17 cases, *Griffie*, *Wallace*, *DPR*, and *NEA-Coffeyville*, involved facial First Amendment overbreadth or a bargaining agent’s statutory representative capacity, not a party asserting a stranger’s Section 1 bodily-autonomy claim in a bench trial. J. at 135 n.17.

Third, the trial judge found “no meaningful conflict, given this record.” J. at 138. But the conflict here is structural, not evidentiary. The trial judge permitted abortion providers to invoke their patients’ constitutional rights to overturn a statute that gives those same patients a cause of action against those very providers. That structural conflict cannot be cured by record evidence because it inheres in the nature of the claim: a regulated party cannot adequately represent the interests of persons whom the regulation empowers to sue it. That finding was also made on a record from which every witness who might have testified to such a conflict, six women who had abortions and now say they wanted the very information the WRTKA requires, was either excluded outright or found not credible because of their “philosophical biases.” FOF ¶¶ 90-93; Tr. of Motions Hearing (Aug. 26, 2025) at 35-36. A conflict cannot be found absent when the evidence of it has been excluded.

That the Judgment’s evidence of harm rests entirely on speculative testimony about patients’ states of mind and out-of-court statements confirms the standing problem. The Judgment’s infringement findings rest overwhelmingly on out-of-court statements by

unidentified patients, admitted over the State Defendants' hearsay objections. The State Defendants lodged numerous hearsay objections at trial; the overwhelming majority were overruled. *See* Trial Tr. vol. I (Sept. 26, 2025, AM) at 47:8-10, 49:25 to 50:1-3, 50:25 to 51:1-5, 66:3-5, 66:15-17, 71:21-24, 74:18-20, 88:3-12 (hearsay objections by State Defendants overruled); Trial Tr. vol. I (Sept. 26, 2025, PM) at 81:15-17, 82:4-8 (same); Trial Tr. vol. II (Sept. 29, 2025, PM) at 113:21-22, 114:3, 126:6 (same). The State Defendants' remaining hearsay objections received implicit or standing-objection rulings. *See, e.g.*, Trial Tr. (Sept. 26, 2025, AM) at 89:1-25; Trial Tr. (Sept. 29, 2025, PM) at 112:11, 127:13, 127:21.

The trial judge relied on the resulting testimony for the core of its infringement holding: that patients were “devastated,” “audibly upset,” and “crying”; that “[a]t least one Comprehensive Health patient said they would commit suicide”; and that patients “don’t understand why it matters what color ink they used.” FOF ¶¶ 187-88. *See also* FOF ¶¶ 183, 185, 189 (findings resting on Pls.’ Exs. 34, 35, 41-45, 47, internal clinic notes about unnamed patients). Those patients were not allowed to be deposed or identified, did not testify, and could not be cross-examined about whether the WRTKA infringed their autonomy or whether, like the State’s witnesses, they wished they had received the information. The trial judge excluded the State’s women because “the legislators knew anything about” them was not shown, Tr. (Aug. 26, 2025) at 36:5-13, yet accepted hearsay from Plaintiffs’ anonymous patients, many from Texas and Oklahoma, FOF ¶ 164, 183, 189, as proof that Kansas law infringes constitutional rights. This is what third-party standing looks like in practice: the rights-holders are absent, their words come in second-hand, and the adverse party has no one to cross-examine.

### **III. The Judgment Is Infused With Unconstitutional Religious Bias.**

The Kansas Constitution provides that “no . . . person [shall] be incompetent to testify on account of religious belief.” Kan. Const. Bill of Rights § 7. The provision has been in the Bill of

Rights since 1859, and it means what it says: religious belief is not a permissible basis for discounting a witness. The Kansas Supreme Court has enforced this principle in *Jackson v. Jackson*, 181 Kan. 1, 309 P.2d 705 (1957), an appeal arising from a bench trial in which a party's religious beliefs were used to attack her. The Supreme Court held that the trial court abused its discretion in allowing the matter of religion to become an integral part of its decision, and religious beliefs regardless of how "obnoxious" they might be to a court cannot be considered. *Jackson v. Jackson*, 181 Kan. 1, 9 (1957) (quoted in *Harrison v. Tauheed*, 292 Kan. 663, 256 P.3d 851 (2011)). In *Harrison v. Tauheed*, 292 Kan. 663, 256 P.3d 851 (2011), the Court reaffirmed that "[c]ourts must be vigilant to avoid invidious discrimination against religious beliefs or practices" when conducting a trial or related proceedings. *Id.* at 683.

The United States Constitution likewise forbids what occurred here. "The judiciary, no less than the other branches of State and Federal Government, must respect people's fundamental rights, and among these are the right to the free exercise of religion and the right to the equal protection of the laws." *Missouri Dep't of Corr. v. Finney*, 146 S.Ct. 538, 539 (Mem.) (U.S. Feb. 20, 2024) (Alito, J., statement respecting denial of certiorari). State action that "single[s] out the religious for disfavored treatment" must survive "the 'most rigorous' scrutiny," and "that is true regardless of whether the differential treatment is predicated on religious status or religious belief." *Id.* (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460, 466 (2017)). The government "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," and "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 638 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993)). *Masterpiece* involved an adjudicator's hostility

toward a party's religious beliefs during a proceeding; the Court held that the party "was entitled to the neutral and respectful consideration of his claims." *Id.* at 634.

The Kansas Rules of Evidence carry Section 7's command into the courtroom. K.S.A. 60-430 provides that "[e]very person has a privilege to refuse to disclose his or her theological opinion or religious belief unless his or her adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his or her credibility as a witness." The statute withdraws religion from the credibility inquiry altogether. Dr. Curlin's Anglicanism, Dr. Pierucci's Catholicism, or the six women's Christian beliefs on when life begins were not "material to an issue in the action other than that of . . . credibility." Yet the trial judge permitted such questioning because, in its view, religion "goes to bias and credibility." Trial Tr. vol. VI (Oct. 14, 2025, PM) at 137:15–22.

Courts applying these principles to witness credibility have consistently reversed where a witness's protected characteristic was used to bolster or impeach credibility. *See, e.g., McFarland v. Smith*, 611 F.2d 414, 417 (2d Cir. 1979). As the Supreme Court put it, "[s]ome toxins can be deadly in small doses." *Buck v. Davis*, 580 U.S. 100, 122 (2017).

Long before trial, Plaintiffs' counsel made religion a systematic subject of discovery. For example, in deposition, they asked one of the State's witnesses, Dr. Farr Curlin, "would you identify yourself as a Christian disciple?"; "you would identify as a Christian physician, correct?"; "What sect of Christianity do you identify with?"; and "what does the Anglican Christian church teach about abortion?" Ex. A, Dep. of Farr A. Curlin, M.D. (Dec. 10, 2024) at 84:15-22, 88:17-18, 88:21-24, 89:17-20, 92:15-22, 94:15-20. They asked Dr. Pierucci whether her ethics training "was based on Catholic moral tradition" and "the ethical and religious directives for Catholic healthcare services," and "[i]s there anything particular that drew you to a

program that . . . follows Catholic ethics?” Ex. B, Dep. of Robin L. Pierucci, M.D. (Dec. 11, 2024) at 19:14-17, 20:7-12.

They did the same to the lay witnesses. Ms. Wolbert was asked, “Do you consider yourself to be a religious person?”; “Would you consider yourself a Christian?”; “Any particular denomination?”; and “do you feel like you were raised with Christian values?” Ex. C, Dep. of Leslie Wolbert (Feb. 7, 2025) at 38:8-17, 40:19-24. Ms. Pond, Ms. Hoyle, Ms. Gillette, and Ms. Neely were each asked whether their “religion” or “religious community” has “a view about when human life begins” and “views about abortion.” Ex. D, Dep. of Donna Pond (Jan. 23, 2025) at 26:18-27:9; Ex. E, Dep. of Sheryl Hoyle (Feb. 13, 2025) at 28:4-20; Ex. F, Dep. of Elizabeth Gillette (Feb. 4, 2025) at 23:10-24:6; Ex. G, Dep. of Arianna Neely (Feb. 12, 2025) at 95:1-6. Ms. Gillette was asked, “And did you become more religious after your abortion?” Gillette Dep. at 24:18-23. These questions had one purpose: to establish that the witnesses’ testimony should be discounted because of what they believe about God. Plaintiffs then moved to exclude all six women as “unduly prejudicial.” Pls.’ Mot. in Limine (May 19, 2025) at 9.

Plaintiffs’ own witnesses supplied the frame. Dr. Sandoval testified that “the determination of when a life begins is a religious determination” and, asked when she thinks life begins, answered, “I’m not a religious person. I don’t have an answer for you.” Ex. H, Dep. of Selina Sandoval, M.D. (Feb. 5, 2025) at 142:2-11. Dr. Wynia testified that a non-falsifiable belief about life “is no longer a belief about a fact, it’s a faith statement.” Ex. I, Dep. of Matthew Wynia, M.D. (Dec. 18, 2024) at 56:1-5. The message was that the State’s witnesses were testifying from faith and Plaintiffs’ from science, a message Plaintiffs carried into their proposed findings, which asked the trial judge to find that Dr. Curlin’s “personal and religious beliefs” made his testimony “self-serving and not credible.” Pls.’ Proposed Findings of Fact and

Conclusions of Law (Dec. 15, 2025) at 39. The trial judge obliged and adopted that proposed finding nearly verbatim. FOF ¶ 114.

At trial, Plaintiffs’ counsel cross-examined Dr. Curlin on his religion at length: that his research “focuses on the integration of religious ideas into medical ethics,” Trial Tr. vol. VI (Oct. 16, 2025, PM) at 132:10-12; that he co-directs a program that invites physicians “to grapple with how the Christian tradition informs the work,” *id.* at 132:22-133:5; that “religious answers will frequently differ from those that emerge from secular frames of reasoning,” *id.* at 133:21-134:4; and whether his “personal beliefs as a Christian physician have conflicted with [his] understanding of ethical medical care,” *id.* at 136:3-137:6. When counsel asked about Dr. Curlin’s “Christian understanding of medical ethics,” the State Defendants objected:

Your Honor, at this point I’d object again. Religious beliefs are not a proper basis for bias. The Kansas Constitution Bill of Rights Section 7 declares that no person shall be incompetent to testify on account of religious belief. And the United States Constitution Free Exercise Clause protects the right of religion. It would be a violation of the Constitution in this instance to call into question his bias based upon [religion].

*Id.* at 138:4-139:12. Counsel added that “it would be as if I asked a witness whether or not their atheistic views about the world influence their opinion on ethics.” *Id.* at 139:7-11. The trial judge overruled the objection: “It goes to bias and credibility just as any other witness carries with them their personal beliefs. So your objection is overruled.” *Id.* at 137:19-22.

The Judgment confirms that the trial judge drew the forbidden inference as to Dr. Curlin—in fact, it went far beyond that and applied it to every one of the State’s witnesses, even where Plaintiffs did not ask for it. It rejected Dr. Curlin’s testimony as “directly attributable to his strong moral and spiritual beliefs.” FOF ¶ 115. It disbelieved his testimony that his “personal and religious beliefs” are consistent with medical ethics. FOF ¶ 114. It found Dr. Condic’s credibility “severely undermine[d]” because she expressed conviction “on a statement that

clearly implicates moral, spiritual, philosophical, and existential beliefs.” FOF ¶ 104. It discredited Dr. Wubbenhorst by her affiliation with an organization “within the Catholic Intellectual Tradition,” FOF ¶ 94, and Dr. Pierucci’s by an advocacy group’s “hate group” label, J. at 59 n.9. It gave “no weight” to three women’s accounts of their own abortions because of their “obvious philosophical biases,” FOF ¶¶ 90-93—the same women whose depositions Plaintiffs had devoted to their churches’ teachings on when life begins. And it characterized the Legislature’s judgment as “the State’s preferred spiritual, moral, and/or ideologic perspective,” J. at 150, and the State’s asserted interest as “philosophical/moral/spiritual perspectives,” J. at 172. *See also* J. at 191 n.47 (Dr. Wubbenhorst and Dr. Curlin “so clearly biased and ideologically driven that their opinions simply carry no weight”).

By contrast, no comparable inquiry was made into the worldview of any of Plaintiffs’ witnesses, even though each of Plaintiffs’ witnesses holds strong personal, religious, and political views in favor of abortion.<sup>1</sup> The only witnesses whose beliefs were treated as disqualifying were those who believe abortion is wrong.

This religious bias permeates the Judgment. The trial judge held that “[i]t is not, in this Court’s view, even a close call, based upon the record before the Court.” J. at 4. But the “record before the Court” was one in which every State witness was disbelieved because they held religious views the trial judge disfavors. Where “the case . . . depended on” the credibility of the affected witnesses, an error that taints the proper assessment of their credibility cannot be

---

<sup>1</sup> *See, e.g.*, Ex. J, Dep. of Emily Wales at 9:18-11:1-5 (Feb. 10, 2025) (previously worked at “EMILYs List,” “a political action committee that . . . support[s] abortion rights”); Ex. K, Dep. of Steven Ralston, M.D. at 67:1-68:3 (Dec. 20, 2024) (serving on the board of Planned Parenthood of Maryland); Ex. L, Dep. of Lisa Lee, Ph.D. at 22:12-23:7 (Dec. 20, 2024) (makes “monthly donation” to Planned Parenthood); Sandoval Dep. at 141:18-142:4 (testifying that the statutory disclosure is “based off of a religious belief and is not evidence-based”); *id.* at 142:10–11 (“I’m not a religious person. I don’t have an answer for you.”).

considered harmless. *McFarland*, 611 F.2d 414. A “decision [that] was given under the influence of passion or prejudice” is a statutory ground for a new trial. K.S.A. 60-259(a)(1)(C). And a decision that rests on a ruling contrary to Section 7 and the First Amendment is an “erroneous ruling[] . . . by the court.” K.S.A. 60-259(a)(1)(B). The State Defendants are entitled to a new trial before a tribunal that evaluates their witnesses without regard to what those witnesses believe about God.

#### **IV. The Trial Judge’s Evidentiary Rulings Were Entirely One-Sided.**

The pattern described above was not confined to religion. From the *Daubert* stage through the last day of trial, the trial judge’s evidentiary rulings ran uniformly in one direction, and the cumulative effect was that the State Defendants were “not afforded a reasonable opportunity to present [their] evidence and be heard on the merits of the case.” K.S.A. 60-259(a)(1)(A).

##### **A. The trial judge excluded the State’s experts and admitted all of Plaintiffs’.**

The Expert Order granted all of Plaintiffs’ motions and denied all of the State Defendants’. The trial judge excluded Dr. Scrafford, a Kansas-based board-certified OB/GYN and ACOG fellow, entirely because his opinions “reflect more advocacy than well-grounded expert scientific testimony”—a foretaste of the religiously discriminatory rulings in the Judgment. Expert Order at 8. The trial judge excluded Ms. Donovan entirely. *Id.* at 28. And the trial judge limited the opinions of Dr. Wubbenhorst—a Harvard-trained epidemiologist and OB-GYN—on all six subjects raised by Plaintiffs, with the trial judge characterizing her proffered testimony as “inflammatory rhetoric,” *id.* at 17, “inflammatory and wholly-conclusory,” *id.* at 20 n.6, and “unhelpful and inflammatory,” *id.* at 21. By contrast, every one of the State Defendants’ nine motions was denied, on the repeated ground that any deficiency “cut[s] towards the weight of that testimony—not the underlying admissibility,” *id.* at 23, and that “[a]ny perceived

shortcomings . . . are more properly addressed through the cross-examination process.” *Id.* at 38. The Court did not apply that standard to the State’s experts.

The asymmetry is starkest in the treatment of the APR literature. The trial judge held that Drs. Scrafford and Wubbenhorst could not opine that APR is “safe and effective” based on a literature review, but that Dr. Schreiber could opine from the same literature that APR is “implausible, risky, and misleading.” Expert Order at 15 n.5; FOF ¶ 76. The trial judge called this a distinction between “definitive opinion evidence” and an opinion that “the medical literature is wholly inconclusive.” Expert Order at 15 n.5. But the Judgment then made definitive findings that APR is “junk science,” FOF ¶ 215, and “unlikely to be biologically plausible,” FOF ¶ 208—findings that rest entirely on the opinion the trial judge allowed and could not be rebutted by the opinions it excluded.

**B. The trial judge excluded the women who could speak to the patient’s perspective.**

Plaintiffs’ case rested on the proposition that the WRTKA’s information is unwanted and stigmatizing to women. FOF ¶¶ 168-69, 216-28. The State Defendants disclosed six women prepared to testify from their own experience that they wanted such information and that its absence harmed them. The trial judge excluded three because “there’s not going to be any piece of evidence that suggests the legislators knew anything about any of these individuals.” Tr. of Motions Hearing (Aug. 26, 2025) at 36:5-13. The remaining three were permitted to testify only under a rule that barred every question about how the information “would have” affected them, and the trial judge ruled that the women’s “personal beliefs” were not “relevant.” Trial Tr. vol. IV (Oct. 14, 2025, PM) at 121:16-124:1.

No such rule governed Plaintiffs. Dr. Nauser was permitted, over speculation objections, to testify about how H.B. 2749 affect her patients, Tr. vol. I (Sept. 26, 2025, AM) at 49:22,

50:25, and Dr. Kimport was permitted to opine that H.B. 2749 “would likely lead to an increase in abortion stigmatization,” FOF ¶ 79. Dr. Syrett was permitted to testify about an 1867 article in the Leavenworth Medical Herald and an 1882 Transactions of the State Medical Society of Kansas as evidence of the 1997 Legislature’s purpose, FOF ¶ 8—although no Kansas legislator in 1997 or 2023 was shown to have read either. The “legislators knew about it” test was applied to the State’s witnesses alone.

Even if these rulings could be defended in isolation, their cumulative effect is fatal. Together they describe a trial in which the State’s experts were excluded as “advocacy” while Plaintiffs’ were admitted as “science”; in which the State’s fact witnesses were excluded for lack of a legislative nexus while Plaintiffs’ historian testified about nineteenth-century medical journals; in which the State’s witnesses could not say what information “would have” mattered to them while Plaintiffs’ witnesses could say what a never-enforced statute “would” do; in which the State’s hearsay objections were overruled and Plaintiffs’ speculation objections sustained; and in which, at the end, every State witness was disbelieved by reference to their faith. The Judgment declares that the outcome was “not . . . even a close call.” J. at 4. It was not a fair contest. Refusing a new trial on this record would be inconsistent with substantial justice.

## CONCLUSION

The State Defendants respectfully request that the Court:

1. Dismiss all claims asserted on behalf of Plaintiffs’ patients for lack of subject-matter jurisdiction and vacate the Section 1 and Section 2 holdings that depend on those claims;
2. In the alternative, grant a new trial pursuant to K.S.A. 60-259(a)(1)(A), (B), (C), and (D); and
3. Grant such further relief as is just.

The State Defendants respectfully request oral argument.

August 31, 2026

Respectfully submitted,

Pursuant to Local Rule 3.7, the undersigned hereby certifies that Generative A.I. was used to prepare this motion. Specifically, Harvey was used, in part, to prepare this submission. The undersigned further certifies that counsel for the State Defendants has independently verified the accuracy of every citation to the law or to the record and that any language drafted by Generative A.I., including quotations, citations, paraphrased assertions, and/or legal analysis has been included and submitted after considering the requirements of KSA 60-211 and any applicable ethical rules governing attorneys.

/s/ James R. Rodriguez

James R. Rodriguez, #29172  
*Deputy Attorney General*  
Dwight R. Carswell, #25111  
*Deputy Solicitor General*  
Office of the Attorney General  
120 SW 10th Avenue, 2nd Floor  
Topeka, Kansas 66612  
(785) 368-8197  
Jay.Rodriguez@ag.ks.gov  
Dwight.carswell@ag.ks.gov

Andrew Nussbaum\*  
FIRST & FOURTEENTH PLLC  
2 N. Cascade Ave., Suite 1430  
Colorado Springs, CO 80903  
Phone: (719) 428-2386  
Email: andrew@first-fourteenth.com

Lincoln Davis Wilson\*  
FIRST & FOURTEENTH PLLC  
784 S. Clearwater Loop # 8011  
Post Falls, ID 83854  
(719) 234-0938  
lincoln@first-fourteenth.com

Chad E. Blomberg, KS Bar #23533  
FIRST & FOURTEENTH PLLC  
6400 Glenwood St., Suite 201  
Overland Park, KS 66202  
Phone: (816) 600-0604  
Email: chad@first-fourteenth.com

Michael Francisco\*  
James A. Compton\*  
FIRST & FOURTEENTH PLLC  
800 Connecticut Ave. NW  
Suite 300  
Washington, DC 20006  
Phone: (202) 998-1978  
Email: michael@first-fourteenth.com  
Email: james@first-fourteenth.com  
\*Admitted pro hac vice

*Attorneys for Defendants Kris W. Kobach, Stephen M. Howe, Marc Bennett, and Mark Dupree*

### **CERTIFICATE OF SERVICE**

I certify that on August 31, 2026, the above was electronically filed with the Clerk of the Court using the Court's Electronic Filing System, which will send notice of electronic filing to all counsel of record who have registered with that system.

/s/ James R. Rodriguez

James R. Rodriguez