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APPEAL NO. 23-127124-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HODES & NAUSER, MDs, P.A., on behalf of itself, its patients, physicians, and staff; TRACI LYNN NAUSER, M.D.; TRISTAN FOWLER, D.O.; and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself, its patients, physicians, and staff,

Plaintiffs-Appellees,

v.

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,

Defendants-Appellants,

SUSAN GILE, in her official capacity as Executive Director of the Kansas Board of Healing Arts; JERRY DEGRADO, D.C., in his official capacity as President of the Kansas Board of Healing Arts; and JANET STANEK, in her official capacity as Secretary of the Kansas Department of Health and Human Services

Defendants.

Appeal from the District Court of Johnson County,
Honorable K. Christopher Jayaram, Judge
District Court Case No. 23CV03140

BRIEF OF APPELLANTS

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INTRODUCTION

A district court has the responsibility to serve as an evidentiary gatekeeper by assessing the reliability and relevance of expert testimony. *State v. Aguirre*, 313 Kan. 189, 196, 485 P.3d 576, 585 (2021). Here, the district court neglected that responsibility by enjoining Kansas's longstanding Woman's Right to Know Act ("the Act")—which protects pregnant women by requiring abortion providers to disclose certain information to them before undergoing an abortion to ensure that their consent to the procedure is fully informed—without even considering the reliability of the State's expert evidence. The district court aptly recognized that the issue of abortion is "one of the most divisive social issues of our modern history" and that addressing the issue is a "heavy task" that must be executed "impartially and dispassionately." R. Vol. 1 at 164. Nevertheless, the Court dramatically tipped the scales in one side's favor when it deemed every single one of the State's experts not credible and adopted the conclusions of Plaintiffs' experts wholesale. With only one side's experts to rely on, the Court then enjoined the Act.

Ordinarily, this Court defers to a trial court's credibility assessments. But a trial judge may not "insulate his findings from review by denominating them credibility determinations." *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 575 (U.S.N.C. 1985). Nor is deference appropriate when the trial court's decision is based on a paper record, leaving the trial judge with no unique

advantage to evaluate witness credibility. *See Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 269, 275 P.3d 869, 878 (2012). Rather, an appellate court should only defer to a trial court's assessment of experts when the court fulfills its function as an "evidentiary gatekeeper" by scrutinizing whether an expert "is *qualified* and if his or her opinions result from *reliable* methods or principles." *State v. Hatfield*, 60 Kan. App. 2d 11, 18, 484 P.3d 891, 899 (2021) (emphasis in original).

The State presented reliable expert testimony from highly qualified experts on each of the key medical issues under the Act. Yet the district court dismissed it all with a sweeping "credibility" determination, providing neither an analysis of the reliability of the experts' methods and opinions nor even an explanation of why it found them not credible. Having set aside the State's expert case with this conclusory finding, the district court then adopted the conclusions of Plaintiffs' experts as factual findings and relied on those findings alone to support its legal analysis. This was reversible legal error. Where the parties proffered competing declarations from highly qualified experts, granting relief required resolving that dispute based on the Court's evaluation of the science—not adopting one side's conclusions wholesale and waving the other away as "not credible."

This Court should reverse and vacate the district court's decision and remand this case to the district court for further proceedings.

STATEMENT OF THE ISSUE

Whether the district court erred in disregarding the State's expert evidence based on an unexplained credibility finding issued solely on a written record.

BACKGROUND

I. The Woman's Right to Know Act.

The Kansas Legislature first enacted the Woman's Right to Know Act in 1997 and has amended it several times since. The Act's purpose is to protect unborn life and women's health by ensuring that pregnant women who seek an abortion have received all information necessary from an abortion provider to inform their decision. The Act accomplishes this purpose in two ways.

First, the Act directs abortion providers to disclose certain information about the nature of pregnancy and abortion. This information includes a description of the proposed abortion method, its risks and potential complications, and its alternatives, as well as information about fetal development and contact information for prenatal and perinatal medical assistance. K.S.A. 65-6709(a), (b), (d), 65-710; H.B. 2264 § 1(c). It further requires that the opportunity to view the ultrasound image and listen to the fetal heartbeat of her unborn child be offered to the pregnant mother at least 30 minutes before the abortion procedure. K.S.A. 65-6709(h), (i). These

requirements are waived in the case of a "medical emergency". K.S.A. 65-6709, 65-6711.

Second, the Act requires abortion facilities to provide notices informing women of their rights related to abortion and informed consent. K.S.A. 65-6709(k); H.B. 2264 § 1(b). Under a 2023 Amendment, the notices must include information on reversing the effects of an incomplete chemical abortion ("Abortion Pill Reversal" or "APR"), should a woman wish to continue her pregnancy. H.B. 2264 § 1(b)(1).

II. Plaintiffs' Challenge to the Act.

Plaintiffs are doctors and facilities that perform abortions. *See* Pls.' Br. in Supp. at 2–3 ("Pls. Br.")(R. Vol. 3 at 162-3). On June 6, 2023, they sued Defendants, who are Kansas state officials (collectively "the State"), arguing that the Act violated the Kansas Constitution as an infringement on the right to abortion and free speech, as a denial of equal protection, and as void for vagueness. *See* Pet. (R. Vol. 1 at 8-49).[1] Plaintiffs also moved for a temporary injunction and/or temporary restraining order. *See* Pls.' Mot. for Temp Inj. ("Pls.' Mot.") (R. Vol. 3 at 7-159); Pls.' Br. (R. Vol. 3 at 160-192). Because the Act involves technical medical information, the parties submitted competing expert reports in support of their briefing on whether the Act provides truthful

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[1] On June 22, 2023, Plaintiffs amended their petition to add two additional defendants. *See* Am. Pet. (R. Vol. 1 at 54-97).

information and advances the State's compelling interests. *See* Pls.' Mot., Exs. 1–4 (R. Vol. 3 at 13-159); Defs.' Br. in Opp'n ("Defs.' Br.") (R. Vol. 3 at 210-595), Exs. 1–4, 6–8 (*id.* at 250-455, 489-595).

The titles and disciplines of the State's experts are as follows:

Expert	**Titles**	**Disciplines**
Farr A. Curlin, M.D.	Co-Director of the Theology, Medicine, and Culture Initiative, Duke Divinity School Professor, Duke Medical School	Internal Medicine Palliative Medicine Clinical Medical Ethics
Robin Pierucci, M.D., M.A. F.A.A.P.	Medical Director and Neonatologist, NICU Bronson Children's Hospital Clinical Assistant Professor, Western Michigan University School of Medicine	Pediatrics Neonatology Bioethics
Monique Chireau Wubbenhorst, M.D., M.P.H.	Senior Research Associate, Center for Ethics and Culture, University of Notre Dame Obstetrician-Gynecologist Hospitalist, Saint Joseph's Regional Medical Center	Reproductive Health Epidemiology Global Health Medical Ethics
Joel Brind, Ph.D.	Emeritus Professor, City University of New York CEO, Natural Food Science, LLC	Biology Endocrinology
Maureen L. Condic, Ph.D.	Associate Professor, University of Utah School of Medicine	Neurobiology Embryology Pediatrics
George Mulcaire-Jones, M.D.	Director, Maternal Life International	Obstetrics Pediatrics Family Medicine

	Consultant, Montana Perinatal Quality Collaborative	
Jonathan Scrafford, M.D.	Obstetrician/Gynecologist, Ascension Health	Obstetrics Gynecology

The State argued that, if strict scrutiny applied, the Act survived it because it was narrowly tailored to advancing several compelling interests, including upholding informed consent, R. Vol. 1 at 204, 223, maternal health and patient safety, *id.* at 209, 221, protecting the life of the fetus, *id.*at 213, and preventing fetal pain, *id.* at 215, 218. The State relied on its experts to show how the Act advances each of these interests. For example, the State relied on its experts' claims that a fetus may feel pain at 20 weeks' gestation to explain how the Act provides truthful information that can reduce such pain. *See* Defs.' Br. (R. Vol. 3 at 239). And it relied on its experts' claim that APR is safe and effective to explain how information about the protocol can protect fetal life. *Id.* at 241-2.

III. The District Court's Injunction.

The district court found that Plaintiffs were likely to succeed on their free speech and abortion rights claims, and on October 30, 2023, it entered a temporary injunction enjoining enforcement of the Act. *See* R. Vol. 1 at 250–51. The district court's legal analysis relied on numerous claims from Plaintiffs' expert witnesses that the court repurposed nearly verbatim under its

"Findings of Fact." For example, the district court repeated in its factual findings one expert's highly controversial claim that the risks of chemical abortion are comparable to the risks of Tylenol. R. Vol. 1 at 181; *see* Pls.' Mot., Ex. 2 ¶ 21 (R. Vol. 3 at 45). It adopted this claim, though, without explanation and despite a direct refutation from the State's experts, one of whom clarified that it is "erroneous to state that mifepristone is as safe as or safer than Viagra or Tylenol," since, as the FDA's warning label recognizes, "Mifepristone can and has caused serious complications and death." Defs.' Br., Ex. 3 ¶ 78(R. Vol. 3 at 380).

The Court also adopted the oft-disputed contention that abortion is "one of the safest types of medical care provided in the United States" and that the procedure is 12–13 times safer than carrying a pregnancy to term. R. Vol. 1 at 181–82; *see* Pls.' Mot., Ex. 2 ¶ 24(R. Vol. 3 at 45). But one of the State's experts also countered this claim, noting that the results of one reputable study "clearly and consistently demonstrate pregnancy associated mortality is higher in induced abortion compared to ongoing pregnancy or live birth. The methodology and results clearly refute the claims made that 'abortion is safer than pregnancy.'" Defs.' Br., Ex. 7 ¶ 35(R. Vol. 3 at 563).

And the Court accepted Plaintiffs' experts' outright rejection of the viability of Abortion Pill Reversal, a therapy commonly employed by medical professionals to reverse the effects of an incomplete chemical abortion. R. Vol.

1 at 186; *see* Pls.' Mot., Ex. 1 ¶ 54(R. Vol. 3 at 17). The Court accepted this conclusion without ever addressing one of the State's expert's contentions that "APR is a safe and effective option for pregnant women who have taken mifepristone recently but have not taken misoprostol. As of 2022, the APR protocol has . . . resulted in over 4,000 lives being saved." *See* Defs.' Br., Ex. 8 ¶ 8(R. Vol. 3 at 586).

Having grounded its "Findings of Fact" firmly in the conclusions of Plaintiffs' experts, the Court held that the Act likely infringed on Plaintiffs' right to an abortion and that the State was accordingly required to demonstrate it survived strict scrutiny. R. Vol. 1 at 203. Relying extensively on Plaintiffs' experts and ignoring the State's, the Court held that Plaintiffs were likely to demonstrate that that the Act was not narrowly tailored to the State's proffered compelling interests and that the Act thus was unlikely to survive strict scrutiny. Concerning fetal pain, for example, the Court accepted the arguments of Plaintiffs' experts that "a fetus likely cannot physiologically experience 'pain,' as currently envisioned and understood scientifically, before approximately 28 weeks, if at all." *Id.* at 215. And in regard to protecting fetal life, as another example, the Court again accepted Plaintiffs' experts' rejection of the viability of APR, stating that "importantly, the Amendment's 'reversal' therapy theory appears, based upon the record before the Court, unproven,

theoretical, far from generally accepted within the relevant medical/scientific community, and potentially-dangerous to the pregnant woman." *Id.* at 220.

In contrast to the court's full embrace of Plaintiffs' experts, the Court rejected all but a single claim of the State's experts.[2] For example, it found that "there is absolutely no credible evidence in the record, at this juncture, that the proposed 'reversal' theory endorsed in the Amendment is anything other than experimental and unproven[,]" *id.* at 222, and that "[t]here is no credible evidence in the record that abortion increases the risk of preterm delivery or labor," *id.* at 186. The district court justified its embrace of Plaintiffs' position at each point of its abortion-right analysis by dismissing the State's experts as not "credible." *Id.* at 186–87, 207–08, 211–13, 215, 218, 220, 222, 225. And continuing its reliance on Plaintiffs' experts and rejection of the State's, the Court also concluded that Plaintiffs were likely to succeed on their claim that the Act failed to survive strict scrutiny under the Kansas Constitution's provision protecting free speech. *Id.* at 235.

In sum, from its "Findings of Fact" through each step of its legal analysis, the Court adopted the assertions of Plaintiffs' expert reports in their entirety while rejecting the State's expert reports wholesale. Nowhere in its opinion,

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[2] The single claim the district court adopted of the State's experts is their unrebutted and uncontroversial assertion that the edge of viability is often 22–23 weeks. *See* R. Vol. 1 at 182.

however, did the court grapple with the theories and arguments underlying the experts' competing opinions or assess their qualifications. Having then only Plaintiffs' experts to rely on, the Court found they were likely to succeed on the merits of their free speech and abortion rights claims and granted their requested temporary injunction. R. Vol. 1 at 250–52. This appeal followed.

STANDARD OF REVIEW

This Court ordinarily reviews the grant of a temporary injunction for abuse of discretion. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191–92, 273 P.3d 709, 713 (2012). Under this standard, this Court reviews legal conclusions de novo. *Id.* And "whether the district court actually performed its gatekeeping role using the proper standard" is a question of law reviewed de novo. *Aguirre*, 313 Kan. at 198.

ARGUMENT

As an "evidentiary gatekeeper," the district court was required to assess the reliability and relevancy of the parties' experts. *Aguirre*, 313 Kan. at 196. But the Court provided no analysis of the reliability, relevancy, or accuracy of the parties' expert reports, nor did it assess the experts' credentials. Instead, without explanation, it rejected the State's expert reports in almost every respect based on a "credibility" determination. *See, e.g.*, R. Vol. 1 at 208, 211. It then proceeded to rely entirely on the Plaintiffs' experts to rule in their favor. Using a "credibility" determination in this way is reversible legal error. And

the district court cannot fall back on the deference afforded to credibility determinations in a typical case because here its "credibility" assessments were made entirely on a paper record. This Court should reverse.

I. The district court failed to discharge its gatekeeper duty.

As a gatekeeper, the district court has the responsibility to assess the reliability and relevancy of expert testimony. *Aguirre*, 313 Kan. at 196. The district court failed to conduct that analysis. Faced with conflicting scientific opinions from qualified experts about the central issues in dispute, the district court did not engage with the rationale of the experts' opinions at all. Instead, it accepted the Plaintiffs' experts' account wholesale and waved away the State's experts as not "credible." That approach disregards the district court's gatekeeper duty and requires reversal of the injunction below.

A district court has a duty to "adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Aguirre*, 313 Kan. at 205 (quoting *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000)). This responsibility exists whether the Court is acting as a gatekeeper for a jury or is itself acting as the finder of fact. *See In re Garcia*, 414 P.3d 752, 2018 WL 1440182, at *10 (Kan. Ct. App. 2018). And if the Court is the fact finder, it must additionally "examine the underlying rationale of a qualified expert's opinion in evaluating competing expert opinions." *Davis v. State*, 2017 Ark. 74, 5 (2017); *see also In re Noel*, 226 Kan.

536, 550, 601 P.2d 1152, 1164 (1979) (recognizing the importance of "careful[] balance[]" and "thoughtful and articulated analysis" when evaluating expert testimony (quoting *State v. Fields*, 77 N.J. 282, 307–08 (1978))). Thus, "[i]t is certainly within a district court's province to choose one expert's opinion over a competing qualified expert's opinion," but "in crediting an expert's opinion, it is not the opinion itself that is important, but the rationale underlying it." *United States v. Ghane*, 593 F.3d 775, 781 (8th Cir. 2010).[3]

This "gatekeeper" duty applies not only to decisions on whether to admit expert testimony, but also to how courts resolve conflicts in expert testimony in fashioning relief. That is especially true for an order granting an injunction, which requires finding a likelihood of success that necessarily implies the plaintiff is likely to prevail on disputed questions of material fact. *Downtown Bar & Grill*, 294 Kan. at 191 (2012). Plus, because all orders for temporary injunctions "must set forth the reasons for the injunction" and "shall be specific in terms," *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 67, 341 P.3d 607, 615 (2014) (quoting K.S.A. 2013 Supp. 60-906), the district court could not grant relief without resolving the conflict between the parties' experts on the core scientific issues in this case. Failing to comply with that duty of

[3] The Kansas Supreme Court looks to federal decisions on procedural issues for "persuasive guidance." *Aeroflex*, 294 Kan. at 264.

explanation is alone reversible error. *Ostler v. Nickel*, 196 Kan. 477, 479, 413 P.2d 303, 305 (1966).

Here, the district court purported to resolve the conflict in the expert evidence by accepting Plaintiffs' account and dismissing the State's experts as not credible. But a district court's gatekeeper duty is distinct from making "a credibility determination," which concerns "the candor of a fact witness," not "whether an expert witness' medical theory" is scientifically supported. *Andreu ex rel. Andreu v. Sec'y of Dep't of Health & Hum. Servs.*, 569 F.3d 1367, 1379 (Fed. Cir. 2009). And when a trial court conflates these assessments, "cloak[ing] the application of an erroneous legal standard in the guise of a credibility determination," it commits reversible legal error. *Campbell v. Sec'y of Health & Hum. Servs.*, 90 Fed. Cl. 369, 379 (2009) (quoting *Andreu*, 569 F.3d at 1379). That is what happened here.

The decision in *Campbell* is both analogous and illustrative. There, the plaintiff sued the federal government, alleging that the administration of the influenza vaccine injured her by causing the onset of rheumatoid arthritis. 90 Fed. Cl. 377 (2009). The plaintiff was required to prove that the vaccine caused her injury, and the parties submitted competing experts on the question. *Id.* at 377–78. The special master presiding over the case concluded that the defendant's expert was more credible and accordingly found that the plaintiff's expert testimony was insufficient to prove causation. *Id.* at 383. But the Court

of Federal Claims reversed, concluding that the special master "erroneously relied on an assessment of [the plaintiff's expert's] credibility as a basis for rejecting [his] testimony and concluding that [the plaintiff] had not met her burden to establish causation in fact." *Id.* at 384.[4] The court found that both experts were highly qualified and that "there was no genuine issue with regard to [the plaintiff's expert's] candor or truthfulness." *Id.* at 382–83. Thus, by "improperly fram[ing] his rejection of [the plaintiff's] claim 'under the rubric of a "credibility" determination,'" the special master impermissibly "attempt[ed] to insulate his decision from review by the incantation of magic words." *Id.* at 384 (quoting *Andreu*, 569 F.3d at 1379). So the court set aside the special master's findings as legal error and remanded the case to the special master for reevaluation. *Id.* at 388.

The Court of Federal Claims grounded its analysis in *Campbell* on the Federal Circuit's decision in *Andreu*. That case also involved a vaccine-injury claim where the parties submitted competing experts on the question of whether the vaccine administered to the plaintiff caused his injuries. *Andreu*, 569 F.3d at 1371–72. The court found that the special master employed an

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[4] The standard of review employed by the Court of Federal Claims in *Campbell* is substantially the same as the standard of review this Court employs here. The court was to set aside factual findings or legal conclusions "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 379 (quoting 42 U.S.C. § 300aa–12(e)(2)).

improper test to reject the causation theory of the plaintiff's expert but that she "framed her rejection of [the plaintiff's expert's] theory of causation under the rubric of a 'credibility' determination." *Id.* at 1379. Though trial courts are normally afforded "considerable deference" in their credibility determinations, "this does not mean that a special master can cloak the application of an erroneous legal standard in the guise of a credibility determination, and thereby shield it from appellate review." *Id.*

As in *Campbell* and *Andreu*, the district court invoked a credibility finding to sidestep its duty to evaluate the substance of the experts' scientific reasoning. That mattered because each of the key scientific issues in this case is disputed by the parties' experts. And yet on each one, the district court adopted the opinion of the Plaintiffs' experts and ignored the contrary opinions of the State's experts:

- **Maternal Health:** The district court found that "abortion, particularly when performed in the earlier stages of pregnancy, is very safe," R. Vol. 1 at 211, repeating Plaintiffs' expert's highly controversial claim that the risks of chemical abortion are comparable to the risks of Tylenol. R. Vol. 1 at 181; *see* R. Vol. 3 at 45. But it ignored the State's expert evidence that it is "erroneous to state that mifepristone is as safe or safer than Viagra or Tylenol," since "[m]ifepristone can and has caused serious complications and death." R. Vol. 3 at 380. That is particularly troubling

because those risks are acknowledged on the FDA-approved labeling for mifepristone (R. Vol. 3 at 378)—a proposition the district court never even addressed.

- **Informed Consent:** The district court found that "plaintiffs have submitted evidence that they provide necessary and appropriate information, as prescribed by the well-established applicable standard of care within their subspecialty." R. Vol. 1 at 206. But it ignored the State's expert evidence that "[i]n light of what abortion does, the disclosures mandated by the statutes provide factual and relevant information that the Plaintiffs otherwise would withhold." R. Vol. 3 at 253.
- **Preventing Fetal Pain:** The district court found that "a fetus likely cannot physiologically experience 'pain,' as currently envisioned and understood scientifically, before approximately 28 weeks, if at all." R. Vol. 1 at 215. But it ignored the State's expert evidence that "a fetus at 20 weeks clearly detects and responds to pain, without making any assumptions regarding the nature of this experience." R. Vol. 3 at 503.
- **Protecting the Fetus:** The district court found that "importantly, the Amendment's 'reversal' therapy theory appears, based upon the record before the Court, unproven, theoretical, far from generally accepted within the relevant medical/scientific community, and potentially-dangerous to the pregnant woman." R. Vol. 1 at 220. But it ignored the

State's expert evidence that "[t]he best available clinical research demonstrates that using progesterone to counter the effects of mifepristone and to stop the medication abortion process is safe and effective." R. Vol. 3 at 586.

- **Regulating Professional Conduct, Providing Relevant Information:** The district court found that the Act includes "factually inaccurate information regarding risks of premature birth (following abortion) and an increased risk of breast cancer (following abortion)." R. Vol. 1 at 236. But it ignored the State's expert evidence that "the information [in the Woman's Right to Know handbook] is factual, accurate and evidence based." R. Vol. 3 at 564. "[T]he handbook correctly provides the right to know about possible harm to future reproduction, including preterm birth." *Id.* at 572.

These examples just scratch the surface. This failure to account for the substance of the opinions proffered by the State's experts is even more egregious than the reversible error in *Campbell* and *Andreu*. In *Campbell*, the special master at least at some points "reached beyond his credibility findings to draw conclusions about the validity of the principal medical theory propounded" by the experts. 90 Fed. Cl. at 386. And in *Andreu*, the court did attempt to evaluate the substance of the experts' testimony, albeit under an erroneous standard. 569 F.3d at 1377–79. But in both cases, this minimal

review of the experts still amounted to legal error. *Id.* at 1383; *Campbell*, 90 Fed. Cl. at 386.

Here, the district court's error was all the more egregious, having abdicated its responsibility to assess the reliability, relevance, and underlying rationales of the State's experts. It provided no analysis of the competing theories presented by the experts and failed to sufficiently explain why it believed Plaintiffs' experts provided more accurate conclusions than the State's. At most, the district court made vague references to "consensus," the "mainstream medical community," "generally accepted science," and "generally accepted views." *See* R. Vol. 1 at 186–87, 212, 216, 220, 225. And it only directly addressed two of the many theories presented by the State's experts. Concerning the State's experts' analysis of APR, the court concluded that the theory "is not credible or grounded in established and appropriately peer-reviewed and validated science." R. Vol. 1 at 186; *see* R. Vol. 1 at 222 (theory is "experimental and unproven"). And the Court accused the State's experts of being "misleading" through their comparison of fetal nociception and pain. R. Vol. 1 at 225 n.34.

The theories presented by the State's highly qualified experts show conclusively that Plaintiffs' experts are not in fact the heralds of a universal scientific "consensus." And not only did the district court ignore a host of evidence presented by the State's experts, but its analyses of APR and fetal

pain amount to nothing but threadbare conclusions about what is "validated," "unproven," and "misleading." R. Vol. 1 at 186, 222, 225 n.34. The district court's unexplained conclusions provide nothing more for this Court to review than the district court's "credibility" determinations. They amount to blanket assertions that are far from the "thoughtful and articulated analysis" required when evaluating competing experts, *Noel*, 226 Kan. at 550 (quoting *Fields*, 77 N.J. at 307–08), and they fail to "adequately demonstrate by specific findings on the record that [the district court] has performed its duty as gatekeeper," *Aguirre*, 313 Kan. at 205 (quoting *Goebel*, 215 F.3d at 1088). The district court's conclusory and unexplained dismissals of the experts' opinions do not satisfy its gatekeeper duty.

II. The district court's credibility finding cannot save its injunction.

Nor is the district court's invocation of the purported "credibility" of the State's experts sufficient to sustain its injunction. To be sure, a fact finder may evaluate an expert witness's credibility to determine what weight to credit the expert's testimony, *State v. Kahler*, 307 Kan. 374, 397, 410 P.3d 105, 123 (2018), and this Court ordinarily defers to those findings. *Cresto v. Cresto*, 302 Kan. 820, 839 (2015). But a trial judge may not "insulate his findings from review by denominating them credibility determinations." *Anderson*, 470 U.S. at 575. And a trial court errs when it "expediently declar[es] a key witness's testimony not credible" and "disregard[s] testimony that is uncontradicted and

unchallenged where no basis for doing so appears in the record." *State v. Nelson*, 488 N.W.2d 600, 604 (N.D. 1992). That is what happened here. Three reasons show why this is so.

A. Credibility is not at issue for qualified experts.

The district court did not make a proper finding of credibility because it ignored entirely the qualifications of the State's experts. "[W]here a highly qualified expert" presents a legitimate scientific theory, "the issue is not one of credibility." *Campbell*, 90 Fed. Cl. at 384 (quoting *Andreu*, 569 F.3d at 1379). The State's experts are respected professionals in their field, each holding either an M.D. or a Ph.D. Dr. Farr A. Curlin is a professor of medicine with extensive clinical, editorial, leadership, and writing experience in the medical field. R. Vol. 3 at 277-299. Dr. Robin Lynne Pierucci is a professor and medical director of a NICU with several peer-reviewed publications and frequent lecture appearances. *Id.* at 329-337. Dr. Monique Chireau Wubbenhorst is an obstetrician/gynecologist with over 30 years of experience in practice and teaching and has published over 20 of her works. *Id.* at 419-431. Dr. Joel Brind served as a professor of biology, chemistry, and endocrinology for over 30 years with dozens of published works. *Id.* at 445-450. Dr. Maureen Condic is a tenured professor of neurobiology with extensive teaching, research, and writing experience with numerous publications spanning four decades. *Id.* at 510-548. Dr. George Mulcaire-Jones is a medical doctor with nearly four

decades of experience who has several publications and awards. *Id.* at 576-581. And Dr. Jonathon Scrafford is an obstetrician/gynecologist with multiple awards for excellence in teaching and several research publications. *Id.* at 592-5.

The State's experts have centuries of combined professional experience highly relevant to the medical questions in this case, which was used to formulate and present their scientific theories in the expert reports submitted to the district court. And Plaintiffs did not challenge those qualifications. *See* R. Vol. 4 at 9. Yet the district court ignored the State's experts' qualifications and instead dismissed them all as not "credible." *See, e.g.*, R. Vol. 1 at 208, 211. That was not a credibility issue at all, and whatever objection the district court had, it did not explain it. This was legal error.

B. Credibility findings have a minimal role on a paper record.

The infirmity of the district court's credibility finding is also clear because its evaluation of the experts was limited to their written reports. Appellate courts defer to a trial court's credibility findings because of the trial judge's "advantageous position" of being present at live hearings, which affords the "ability to observe witnesses" and "to assess detachment, objectivity, and professionalism." *Cresto*, 302 Kan. at 839. Kansas appellate courts "defer to those credibility decisions precisely because the district court has had the opportunity to observe the witnesses as they testify—a unique vantage point

we cannot replicate from a transcript." *State v. Bollig*, 523 P.3d 1, 2023 WL 329289 at *4 (Kan. Ct. App. 2023), *review denied* (Aug. 25, 2023). Appellate courts also may defer because of the trial judge's unique position to observe the cross-examination of a witness. *State v. Logsdon*, 304 Kan. 3, 22, 371 P.3d 836, 851 (2016); *Bollig*, 2023 WL 329289 at *4.

No such deference is warranted here on this paper record. Without a live hearing, the district judge was in no "advantageous position" to review credibility, as the demeanor and inflection of the State's experts were not available for review, nor were the experts subject to cross-examination. *Cresto*, 302 Kan. at 839. "[I]n a case such a[s] this, where 'the district court's decision was made on the basis of a paper record, without a[n] evidentiary hearing, [the appellate court is] in as good a position as the district judge to determine the propriety of granting a preliminary injunction.'" *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995) (quoting *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124, 125 (2d Cir. 1984)); *see also GKN Co. v. Magness*, 744 N.E.2d 397, 401 (Ind. 2001).

The Kansas Supreme Court upheld this principle in another context when it instructed that motions to dismiss for lack of personal jurisdiction should be reviewed de novo if the district court relied solely on the pleadings and affidavits. *Aeroflex*, 294 Kan. at 269 (recognizing the "general rule that

[an] appellate court construes written documents de novo and without regard to [a] district court's ruling" (citing *Estate of Draper v. Bank of Am.*, 288 Kan. 510, 517, 205 P.3d 698 (2009))). In that case, the Court recognized that "when presented with affidavits, the parties do not have the ability to test evidence through cross-examination, and the district court *does not have the opportunity to judge credibility* and does not take on the role of factfinder." *Id.* at 268–69 (emphasis added). This reasoning applies just as well to review of preliminary injunctions—if the district court is not able to assess witnesses through cross-examination, it "does not have the opportunity to judge credibility," *id.*, and deference to its factfinding on the matter is thus unwarranted.

To be sure, the district court did not make a typical credibility determination, and standing alone, its "credibility" assessment amounted to a reversible legal error. But even if the Court had made a typical credibility determination, because the rationale supporting deference is absent here, the district court cannot take safe harbor from review, and such deference should not inhibit this Court from remanding here.

C. The district court did not explain its credibility finding.

With no live hearing, and no challenge to the qualifications of the State's experts, it is unclear what, if anything, the district court relied on for its credibility findings. In these situations, "it is important to distinguish between

credibility as a matter of personal veracity and as a matter of the substantive reasonableness of a witness's testimony. While the trial court's determinations concerning the former are unreviewable by an appellate court, the same is not true of the latter." *Green v. Schuylkill Cnty. Bd. of Assessment Appeals*, 565 Pa. 185, 209 n. 11, 772 A.2d 419, 434 (2001). Here, the district court had no basis to evaluate the former, and it cited no reason in connection with its "gatekeeper" role to be concerned with the latter. There is thus no basis to affirm its rejection of the State's experts' opinions.

In *Campbell*, the special master at least provided the basis for his credibility assessment—he noted that the plaintiff's expert was less experienced, expressed the courtroom demeanor of an advocate, derived a significant portion of his income from work as an expert witness, and failed to withstand at least two previous *Daubert* challenges. *Campbell*, 90 Fed. Cl. At 383. But despite this analysis, the reviewing court still concluded that the special master improperly relied on credibility to avoid appellate review. *Id.* at 384.

The district court here offered even less to justify its repeated assertions that the State's experts are not "credible":

- "There is no credible evidence in the record that abortion increases the risk of preterm delivery or labor . . . ." R. Vol. 1 at 186.

- "[T]here is no credible evidence that the mandatory delays imposed by the Act for arbitrary periods of time are likely to, in fact, improve either the consent/decision-making process by pregnant patients or conduct by the medical profession." R. Vol. 1 at 208.
- "[T]he record is equally devoid of any credible evidence that the disclosures mandated by the Act, when combined with mandatory waiting periods, are likely to address an 'urgent' or 'rare' need to improve the pregnant patient's health or increase her safety." R. Vol. 1 at 210–11.
- "[T]he State has not provided sufficient credible evidence to demonstrate that 'promotion of patient/maternal health' is a 'compelling' governmental interest . . . ." R. Vol. 1 at 211.
- "[T]here is absolutely no credible evidence in the record, at this juncture, that the proposed 'reversal' theory endorsed in the Amendment is anything other than experimental and unproven . . . ." R. Vol. 1 at 222.

See also R. Vol. 1 at 187, 207, 212–13, 215, 218, 220, 225. Despite consistently relying on "credibility," the district court offered almost nothing to justify it. And when it did, its brief explanations were conclusory. In one footnote, for example, the court concluded the State's experts used "somewhat flamboyant rhetoric, questionable logic/logical leaps, and hyperbolic statements at times." R. Vol. 1 at 212 n.27. In another footnote, it determined that the State's experts were "all over the 'map'" on when a fetus may experience pain. R. Vol. 1 at 216,

n.28. And it accused the State's expert of "contort[ing] their affidavit testimony" to support the State's position. R. Vol. 1 at 212.

That is not enough to justify the district court's summary dismissal of the State's experts. The district court never explained how the experts "contort[ed]" their testimony, R. Vol. 1 at 212, nor how they were "all over the 'map'" on fetal pain, R. Vol. 1 at 216, n.28. And in contrast to the district court's attack of the experts themselves, it had almost nothing to say about the reliability of their scientific theories, as explained above. *See supra* § I. Without any reasoned critique of the conflict between the State's experts and Plaintiffs' experts, the district court's complaints about "credible evidence" are no more supported than its claim that the witnesses themselves were not credible. The district court fell far short of its gatekeeper role and this Court should reverse.

III. The district court's credibility finding pervaded its order.

Finally, the district court's "evaluation of the experts pervaded [its] analysis" of the legal issues in this case. *Campbell*, 90 Fed. Cl. at 384. As explained, the district court copied conclusions from Plaintiffs' expert reports throughout its findings of fact. R. Vol. 1 at 20, 22–23, 25–26. And these "factual findings" formed the bedrock of the Court's legal conclusions, since only experts could speak to the technical nature of the State's compelling interests. The court used these opinions extensively in its analysis, necessarily relying on them to support its finding against every single compelling interest raised by

the State. R. Vol. 1 at 206, 211, 213, 216, 222, 225. And the district court was able to rely exclusively on the opinions of Plaintiffs' experts, without addressing the conflicting evidence from the State's experts, only because it rejected the State's experts in toto as not credible. For all the reasons above, that was error.

The district court's one-sided view of the expert record "tainted [its] entire analysis." *Campbell*, 90 Fed. Cl. at 384. "[B]y couching his rejection of [the State's position] in terms of credibility," the district court would render its decision "virtually not reviewable on appeal." *Id.* at 383. But those credibility findings were not supported by the record and cannot permit the district court to shirk its gatekeeper duty to evaluate the reliability of expert testimony—especially when asked to grant preliminary relief based on a conflicting expert record. This was reversible "legal error." *Id.* at 384; *Andreu*, 569 F.3d at 1379.

This Court may overturn a district court's decision as an abuse of discretion if it was "based on an error of law," *i.e.*, if it was "guided by an erroneous legal conclusion . . . ." *State v. Ward*, 292 Kan. 514, 550, 256 P.3d 801 (2011). When a trial court fails to "actually perform[] its gatekeeping role using the proper standard," it commits "an error of law." *Aguirre*, 313 Kan. at 198. Granting relief in a case involving highly technical and disputed scientific evidence on issues of great public concern requires, at a minimum, that the district court address that science and resolve the conflict—not simply rubber-

stamp one side and dismiss the other as not credible. This Court should reverse.

CONCLUSION

This Court should reverse and vacate the district court's order granting a temporary injunction.

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Respectfully submitted,

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