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Filed August 22, 2025

United States Court of Appeals
For the Eighth Circuit

No. 24-3027

Heather Swanson; Oneida Health, LLC,

Plaintiffs - Appellants,

v.

Michael Hilgers, in his official capacity as the Attorney General of the State of Nebraska; Ashley Newmyer, in her official capacity as the Interim Director of the Division of Public Health for the Nebraska Department of Health and Human Services[1],

Defendants - Appellees.

Appeal from United States District Court
for the District of Nebraska - Lincoln

Submitted: May 15, 2025
Filed: August 22, 2025

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[1] Ashley Newmyer is automatically substituted for her predecessor under Federal Rule of Appellate Procedure 43(c)(2).

Before COLLOTON, Chief Judge, SMITH and SHEPHERD, Circuit Judges.

COLLOTON, Chief Judge.

Heather Swanson, a board-certified nurse midwife, brought this action alleging that Nebraska state officials violated her constitutional rights and rights of her prospective patients through laws restricting the practice of midwifery. The district court[2] dismissed Swanson's first-party claims on the merits and dismissed her claims on behalf of prospective patients for lack of standing. Swanson appeals, and we affirm.

I.

The Nebraska Legislature passed the Nebraska Certified Nurse Midwifery Practice Act in 1984 "to safeguard public life, health, safety, and welfare, to assure the highest degree of professional conduct by practitioners of certified nurse midwifery, and to insure the availability of high quality midwifery services to persons desiring such services." Neb. Rev. Stat. § 38-602. The Act requires that midwives perform their services (1) under the supervision of a licensed physician and under a "practice agreement," and (2) only in an authorized medical facility, and not in attendance at a home birth. *Id.* § 38-613. A "practice agreement" with a licensed physician specifies the

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[2] The Honorable Robert F. Rossiter, Jr., Chief Judge, United States District Court for the District of Nebraska.

medical functions to be performed by the midwife and limits where she may perform those services. *Id.* § 38-609. Midwives who violate the ban are subject to potential fines and criminal prosecution. Neb. Rev. Stat. §§ 38-196, -1,118, -1,124.

Heather Swanson is a certified nurse midwife who seeks to provide home birth services for women in Nebraska. Swanson says that she has been constrained to "turn away many women who wished to experience a home birth for a variety of reasons." Swanson sued the attorney general and public health director of the State of Nebraska in an effort to gain relief from the statute.

Swanson's complaint alleged that the Act violates the Due Process Clause of the Fourteenth Amendment by preventing Swanson from attending home births and by requiring her to maintain a practice agreement with a supervising physician. The complaint also asserts that the Act violates a fundamental due process right of Swanson's "prospective patients" to "choose the manner and circumstances of giving birth."

The district court dismissed the complaint on the ground that Swanson failed to state a claim for a violation of her own rights and lacked standing to vindicate the alleged rights of her prospective patients. We review a district court's grant of a motion to dismiss for failure to state a claim *de novo*, taking all facts alleged in the complaint as true. *Carter v. Arkansas*, 392 F.3d 965, 968 (8th Cir. 2004). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009) (internal quotation omitted).

II.

Swanson argues that the challenged provisions impermissibly burden an alleged constitutional right to provide childbirth services. The regulations require Swanson to maintain a practice agreement with a physician. Such an agreement limits the settings where Swanson may practice midwifery and the medical functions that she may perform. Neb. Rev. Stat. § 38-609. Swanson may undertake only the functions authorized in a practice agreement under a physician's supervision, and she may not attend a home birth. *Id.* § 38-613. Swanson argues that these regulations are designed to further the economic interests of physicians and advance no interests in health or safety. She also contends that the regulations undermine the health and safety of mothers and infants, because they limit the availability of medical services.

Health and welfare laws are entitled to a "strong presumption of validity" and "must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022) (internal quotation omitted). State restrictions on the practice of a profession are likewise reviewed under a rational basis standard. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

The Act states a legislative purpose "to safeguard public life, health, safety, and welfare, to assure the highest degree of professional conduct by

practitioners of certified nurse midwifery, and to insure the availability of high quality midwifery services to persons desiring such services." Neb. Rev. Stat. § 38-602. The legislature rationally could have believed that the Act would serve those legitimate interests. The risks involved with delivery of a newborn make it rational for a legislature to require that back-up assistance and emergency facilities be readily available. *See Leigh v. Bd. of Registration in Nursing*, 506 N.E.2d 91, 93 (Mass. 1987). The requirement that certified nurse midwives operate under a physician's supervision rationally furthers a legitimate state interest in ensuring that midwives safely perform the contemplated services. *Lange-Kessler v. Dep't of Educ. of the State of N.Y.*, 109 F.3d 137, 141-42 (2d Cir. 1997); *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 646-47 (3d Cir. 1995); *Gorenc v. Klaassen*, 421 F. Supp. 3d 1131, 1160-61 (D. Kan. 2019).

There may be a robust policy debate over whether the statutory restrictions are optimal: Swanson argues that they actually narrow the health care market, reduce choice, and lead some women to undergo unassisted childbirth at home. But "[a] law supported by some rational basis does not offend the constitution merely because it is imperfect, mathematically imprecise, or results in some inequality." *Birchansky v. Clabaugh*, 955 F.3d 751, 758 (8th Cir. 2020). The Constitution leaves the choice among rational alternatives to the legislature, and the district court properly granted the motion to dismiss on Swanson's claim alleging a violation of her rights.

III.

Swanson next maintains that she has third-party standing to vindicate the rights of her prospective patients. Generally, a plaintiff may assert only her own injury in fact and "cannot rest [her] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This rule is "grounded in Art. III limits on the jurisdiction of federal courts to actual cases and controversies." *New York v. Ferber*, 458 U.S. 747, 767 n. 20 (1982). Article III requires "that a plaintiff have a 'sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy.'" *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 n.5 (1984) (alteration in original) (quoting *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)).

There are also prudential reasons for the doctrine. If a "claim is brought by someone other than one at whom the constitutional protection is aimed, the courts might be called upon to decide abstract questions of wide public significance" which should remain with "governmental institutions . . . more competent to address" them. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (internal quotations omitted). The restriction on third-party standing "'frees the Court . . . from unnecessary pronouncement on constitutional issues'" and "assures the court that the issues before it will be concrete and sharply presented." *Joseph H. Munson Co.*, 467 U.S. at 955 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

The Supreme Court has recognized a "limited" exception to this rule for a litigant who demonstrates

(1) a close relationship to the third party and (2) a hindrance to the third party's ability to bring suit. *Kowalski*, 543 U.S. at 129-30. Swanson does not meet these criteria, so she may not assert the rights of her patients.

Swanson does not have a close relationship with "prospective patients" whom she has not yet met or treated. While "*existing*" relationships may be sufficient to confer third-party standing, "*hypothetical*" relationships with unknown claimants are not. *Id.* at 131. Nor are Swanson's prospective patients meaningfully hindered in asserting their own rights. A pregnant woman who seeks to challenge the statute likely has nearly the nine-month gestational period to address the issue, and a prospective mother may be able to raise the claim even earlier in anticipation of a future pregnancy. *See Sammon v. N.J. Bd. of Med. Examiners*, 66 F.3d 639, 643 (3d Cir. 1995). If more time were required, then the woman's claim would survive the end of pregnancy under an exception to the doctrine of mootness. *Roe v. Wade*, 410 U.S. 113, 125 (1973). Experience shows that women are in a position to assert their own rights related to pregnancy and childbirth. *See, e.g., H. L. v. Matheson*, 450 U.S. 398, 400 (1981); *Williams v. Zbaraz*, 448 U.S. 358, 361 (1980); *Maher v. Roe*, 432 U.S. 464, 467 (1977); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); S*pencer v. Se. Mo. Hosp.*, 452 F. Supp. 597, 597 (E.D. Mo. 1978); *Williams v. S.F. Unified Sch. Dist.*, 340 F. Supp. 438, 439 (N.D. Cal. 1972).

Swanson argues that even if she fails to demonstrate a close relationship and hindrance, the Supreme Court has "been quite forgiving with these criteria . . . 'when enforcement of the challenged

restriction against the litigant would result indirectly in the violation of third parties' rights.'" *Kowalski*, 543 U.S. at 130 (quoting *Warth*, 422 U.S. at 510); *see U.S. Dep't of Lab. v. Triplett*, 494 U.S. 715, 720 (1990); *Craig v. Boren*, 429 U.S. 190, 195 (1976); *Singleton*, 428 U.S. at 113-17 (plurality opinion); *Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961); *Barrows v. Jackson*, 346 U.S. 249, 252, 255-58 (1953). Even in the cited cases, however, the criteria still "have been satisfied" in the eyes of the Court. *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

Swanson maintains that if the criteria were satisfied by abortion providers seeking to assert rights of prospective patients, *see June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 318 (2020) (plurality opinion); *id.* at 354 n.4 (Roberts, C.J., concurring in the judgment), then it follows that she too has third-party standing. The difficulty with this contention is that the abortion cases "ignored the Court's third-party standing doctrine." *Dobbs*, 597 U.S. at 286-87. While the Supreme Court has not had occasion to revisit those decisions directly, *Dobbs* is a clear signal that a "forgiving" approach to third-party standing in abortion cases should not be extended. An early opinion in this area reasoned that a woman seeking an abortion has "[o]nly a few months, at the most" to assert a putative right, and that she may "be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit." *Singleton*, 428 U.S. at 117 (plurality opinion). By contrast, a woman seeking midwife services has a longer gestational period in which to press a claim,

and she is unlikely to be deterred from disclosing a forthcoming birth (or she could proceed under a pseudonym as warranted). Particularly where the court cannot reliably know whether the interests of unidentified expectant mothers will align with the midwife's preferences on such matters as providing care without a supervising physician, it would be imprudent to extend the availability of third-party standing to this context.

* * *

The judgment of the district court is affirmed.

Filed September 9, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:24CV3072

HEATHER SWANSON and ONEIDA HEALTH, LLC,

Plaintiffs,

v.

MIKE HILGERS and CHARITY MENEFEE, in their official capacities,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on defendants Mike Hilgers and Charity Menefee's (together, the "State") Motion to Dismiss (Filing No. 11) plaintiffs Heather Swanson ("Swanson") and Oneida Health, LLC's ("Oneida Health" and together, the "plaintiffs") Complaint (Filing No. 1) for lack of standing and failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (6). The plaintiffs oppose dismissal on either ground (Filing No. 17). For the reasons stated below, the motion is granted in part and denied in part, and this case is dismissed.

I. BACKGROUND[1]

Swanson is a Certified Nurse Midwife ("CNM") and Nurse Practitioner in Long Pine, Nebraska. She owns and operates Oneida Health, a family nurse practitioner practice. She has more than "20 years of training and experience in midwifery, nursing, and medicine" and has obtained "a Bachelor of Science in Nursing, a Master of Science in Nursing with a Midwifery Specialty, and a Doctor of Nursing Practice." Her "calling is to provide childbirth services to Nebraska women, including those that require home birth assistance."

Swanson states she stands ready "to provide safe and accessible childbirth services to women who wish to experience a home birth" in Nebraska but is prevented from doing so by Nebraska's Certified Nurse Midwifery Practice Act (the "Act"), Neb. Rev. Stat. § 38-601 *et seq*. In particular, she states she and Oneida Health are unable to provide needed childbirth services "due to state laws that: (1) require CNMs to obtain a supervision agreement with a local physician and (2) forbid CNMs from attending home births even if under the supervision of a physician." *See* Neb. Rev. Stat. §§ 38-612(2), 38-613(3)(b). In Swanson's view, those provisions of the Act "violate the Due Process of Law, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment."[2]

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[1] The factual background is primarily drawn from the Complaint.

[2] The plaintiffs concede "that the Supreme Court's opinion in *Slaughter-House Cases*, 83 U.S. 36 (1872),

On April 16, 2024, the plaintiffs sued Hilgers, Nebraska's Attorney General, and Menefee, the Director of the Division of Public Health for the Nebraska Department of Health and Human Services, in their official capacities based on their respective roles in enforcing Nebraska law and "regulating health-related professions and facilities in" Nebraska. Swanson states she seeks "to vindicate her constitutional rights and the rights of the mothers she wishes to serve" under 42 U.S.C. § 1983.

On May 29, 2024, the State moved to dismiss the Complaint with prejudice, contending the plaintiffs do not have standing to assert the rights of the mothers they want to serve, *see* Fed. R. Civ. P. 12(b)(1), and fail "to state any plausible claim upon which relief can be granted," *see* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009). The plaintiffs maintain their claims are properly raised because they have third-party standing and plausibly state grounds for the relief sought.

II. DISCUSSION

A. Standing

"The party invoking federal jurisdiction has the burden of establishing that [they have] standing to assert [their] claim." *Stalley v. Cath. Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). Standing is—at heart—a question of "whether a litigant is entitled to have a federal court resolve [their]

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forecloses their Privileges or Immunities cause of action." They state they simply want to "preserve their arguments for potential appellate review."

grievance." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009) ("The doctrine of standing limits the jurisdiction of federal courts to 'those disputes which are appropriately resolved through the judicial process.'" (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The standing "inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also Braden*, 588 F.3d at 591 (describing the prudential elements as "self imposed limits on judicial power").

"When considering a motion under Rule 12(b)(1), a court is to consider whether a party is asserting a 'facial attack' or a 'factual attack' on jurisdiction." *Smith v. UnitedHealth Grp. Inc.*, 106 F.4th 809, 813 (8th Cir. 2024) (quoting *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016)). "If it is a facial attack, the court looks only at the pleadings and gives the non-moving party the same protections available under Rule 12(b)(6)." *Id.* "The plaintiff must assert facts that affirmatively and plausibly" establish federal jurisdiction. *Stalley*, 509 F.3d at 521.

"In a factual attack, the court considers matters outside the pleadings and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990) (internal citations omitted); *see also Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993) (explaining a court "may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute"). "[T]the party

invoking federal jurisdiction must prove jurisdictional facts by a preponderance of the evidence." *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018). In either case, the Court will not lightly dismiss a complaint for a lack of subject-matter jurisdiction. *See Wheeler v. St. Louis Sw. Ry. Co.*, 90 F.3d 327, 329 (8th Cir. 1996).

Neither party in this case mentions the facial/factual dichotomy, but their submissions indicate a facial attack on the plaintiffs' standing—even if a limited one.[3] In its reply, the State clarifies that it concedes the plaintiffs have standing to challenge the Act and its implementing regulations as it pertains to their own rights. But it challenges the plaintiffs' alleged third-party standing to litigate "'the manner and circumstances of giving birth' of [the plaintiffs'] future pregnant patients." *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (confirming "a plaintiff must demonstrate standing for each claim [she] seeks to press"). The State urges the Court to reject the plaintiffs' purported attempt "to marry [their] nonfundamental right[s] to someone else's right" as a way to subject the challenged provisions of the Act to strict scrutiny.

In essence, the State challenges Swanson's prudential standing to vindicate "the rights of the

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[3] For example, neither party offers any evidence, otherwise looks outside the pleadings, or raises a factual dispute. *See Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) (refusing to "constrain the power of a court hearing a 12(b)(1) motion").

mothers she wishes to serve." Historically, some uncertainty existed as to "whether prudential standing is a waivable exercise in judicial self-restraint or a jurisdictional bar 'determining the power of the court to entertain the suit.'" *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938 (8th Cir. 2013) (quoting *Urban Contractors Alliance of St. Louis v. Bi-State Dev. Agency*, 531 F.2d 877, 881 (8th Cir. 1976)). That uncertainty led to a longstanding circuit split. *See id.* (declining to decide the issue); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 185 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (listing cases); *Lewis v. Alexander*, 685 F.3d 325, 340 n. 14 (3d Cir. 2012) (same).

In *June Medical Services L.L.C. v. Russo*, the Supreme Court ostensibly resolved the dispute, concluding prudential limits on third-party standing do "not involve the Constitution's 'case-or-controversy requirement'" and "can be forfeited or waived." 591 U.S. 299, 317 (2020) (plurality opinion) (quoting *Kowalski*, 543 U.S. at 129), *abrogated by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 2d 545 (2022); *June Medical*, 591 U.S. at 358 (Roberts, C.J., concurring in the judgment); *Id.* at 366 (Thomas, J., dissenting); *id.* at 378 (Alito, J., joined in part by Thomas, Gorsuch, and Kavanaugh, J.J., dissenting); *id.* at 413 (Gorsuch, J., dissenting); *id.* at 429 n.2 (Kavanaugh, J., dissenting). In light of that decision, the third-party standing question the State raises does not appear to involve the jurisdictional issues that implicate Rule 12(b)(1). *See Warth*, 422 U.S. at 498; *Faibisch*, 304 F.3d at 801 (concluding "a standing argument implicates Rule 12(b)(1)" if it would deprive the Court of subject-matter jurisdiction). In the end,

the question is not critical here given the limited scope of the State's motion and the facial nature of the dispute before the Court. *See Warth*, 422 U.S. at 501 (stating that courts "ruling on a motion to dismiss for want of standing" generally "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party").

With that, the Court turns to the plaintiffs' allegations. The plaintiffs assert "the challenged regulations unconstitutionally burden both the fundamental right of expecting mothers to choose a safe place and manner of giving birth and [their own right] to provide childbirth services." Regulations infringing fundamental rights or operating "to the peculiar disadvantage of a suspect class" are subject to strict scrutiny, while most other regulations are subject to rational-basis review. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976); *see also 301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1384 (8th Cir. 2022). Fundamental rights are those that "are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

The parties not only dispute the propriety of treating the individual's choice of the place and manner of giving birth as a fundamental right but also whether the plaintiffs have third-party standing to raise that right on behalf of their potential future customers. The State makes a fairly strong argument the right asserted is not fundamental, noting neither

the Supreme Court nor Eighth Circuit has so held. *See, e.g., Lange-Kessler v. Dep't of Educ. of N.Y.*, 109 F.3d 137, 142 (2d Cir. 1997) (explaining the Supreme Court "has not interpreted the right to privacy so broadly that it encompasses the right to choose a particular healthcare provider"); *see also Birchansky v. Clabaugh*, 955 F.3d 751, 756 (8th Cir. 2020) (concluding "the right to receive treatment from a particular provider at a particular facility" is not fundamental). Nor have other courts been persuaded that the right is fundamental. *See, e.g., Lange-Kessler*, 109 F.3d at 142 (holding the right to privacy "does not encompass the right to choose a [particular type of] midwife to assist with childbirth"); *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 645 (3d Cir. 1995) (concluding "the interest of the parents in selecting a midwife of their choice" is not fundamental); *Des Moines Midwife Collective v. Iowa Health Facilities Council*, No. 4:23-CV-00067-SMR-HCA, 2024 WL 2747758, at *5-*6 (S.D. Iowa May 29, 2024) (joining the cited state and federal courts that have rejected the assertion that "the right to choose the place and manner of giving birth is fundamental").

Regardless, the plaintiffs fail to show they have third-party standing to assert any such rights. Third-party standing is largely disfavored. *See Kowalski,* 543 U.S. at 130. Ordinarily, a party must assert their "own legal rights and interests, and cannot rest [a] claim to relief on the legal rights or interests of third parties." *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499); *see also United States v. Hansen*, 599 U.S. 762, 769 (2023); *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 80 (1978) ("There are good and sufficient reasons for this prudential

limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.").

Still, the rule is not absolute. *Kowalski*, 543 U.S. at 129-30. A limited exception may apply if (1) "the party asserting the right has a 'close' relationship with the person who possesses the right" and (2) "there is a 'hindrance' to the possessor's ability to protect [their] own interests." *Id.* at 130. The Supreme Court has also been more forgiving "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Id.* (quoting *Warth*, 422 U.S. at 510).

Here, the plaintiffs contend they "appropriately assert the rights of their prospective patients in this action." As they see it, "by restricting CNM's ability to operate and provide homebirth services, the challenged restrictions burden the right of expecting mothers to choose the circumstances and manner of giving birth." They say those mothers will "have fewer options for birth attendants and may be forced to secure the services of attendees with less formal training and fewer qualifications." The plaintiffs' arguments miss the mark.

First, it is not easy to show a close relationship when invoking the rights of a prospective customer as opposed to an existing one. *See Kowalski*, 543 U.S. at 131 (noting the stark distinction between an "*existing* attorney-client relationship" and "the *hypothetical*

attorney-client relationship posited" in that case—which was "no relationship at all"). And the plaintiffs barely try.

Second, whatever the plaintiffs' relationship with their hypothetical customers, it is not entirely clear that their respective interests fully align with regard to the specific provisions the plaintiffs challenge. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (explaining third-party standing may not be proper when a potential conflict exists between the interests of the plaintiff and the third party), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). For example, the plaintiffs' stated interests in avoiding the difficulty and costs of obtaining collaboration agreements with a licensed practitioner arguably conflict with their potential customers' broader interests in health and safety. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379-80 (2024) ("[T]he standing doctrine serves to protect the 'autonomy' of those who are most directly affected so that they can decide whether and how to challenge the defendant's action.").

Finally, the plaintiffs do not adequately articulate the type of compelling "hindrance necessary to allow" them to assert their hypothetical customers' rights. *Kowalski*, 543 U.S. at 132. "The test for 'hindrance' is a question of 'the likelihood and ability of the third parties . . . to assert their own rights.'" *Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008) (quoting *Powers v. Ohio*, 499 U.S. 400, 414 (1991)). To prove hindrance, the plaintiff "must show that some barrier or practical obstacle (e.g., third

party is unidentifiable, lacks sufficient interest, or will suffer some sanction) prevents or deters the third party from asserting his or her own interest.'" *Id.* (quoting *Benjamin v. Aroostook Medical Ctr., Inc.*, 57 F.3d 101, 106 (1st Cir. 1995)).

The plaintiffs summarily contend "[e]xpectant mothers are hindered from asserting their own rights by the time-sensitive nature of childbirth," but they do not elaborate on what specifically hinders their prospective customers' ability to protect their own rights and interests as a practical matter, let alone show that the challenged regulations deprive prospective parents of "the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Kowalski*, 543 U.S. at 129. It is not enough to say that "the very same allegedly illegal act that affects the litigant also affects a third party." *U.S. Dep't of Lab. v. Triplett*, 494 U.S. 715, 720 (1990).

From the start, the plaintiffs' argument is belied to some degree by those cases in which prospective parents have joined midwives as plaintiffs in challenging similar regulations related to childbirth. *See, e.g., Lange-Kessler*, 109 F.3d at 139. It would surpass strange to find that practical barriers warrant third-party standing "if the third party actually" has asserted their own rights. *Hodak*, 535 F.3d at 904-05 (8th Cir. 2008) ("Other circuits agree that if a third party actually asserts his own rights, no hindrance exists, and third-party standing is improper.").

Of course, in certain circumstances, courts have "permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Medical*, 591 U.S. at 318. But that practice does not mean that merely invoking childbirth or reproductive health automatically creates third-party standing. *See Kowalski*, 543 U.S. at 129-30. The Court must consider the facts of each case in determining whether the limited exception for third-party standing applies. *See Kowalski*, 543 U.S. at 129-30. And the plaintiffs in this case fail to show how the challenged regulations on midwives involve the same type of hindrances that have historically justified third-party standing for abortion providers and other regulated parties. *See June Medical*, 591 U.S. at 318. What's more, the decision in *Dobbs* at least casts some doubt on existing precedent regarding third-party standing related to the regulation of reproductive-health services. *See Dobbs*, 597 U.S. at 286-87 (stating that some of the Supreme Court's abortion cases had ignored its "third-party standing doctrine").

The Supreme Court's usual aversion to third-party standing "represents a 'healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed,' the courts might be 'called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.'" *Kowalski*, 543 U.S. at 129, 132 (first quoting *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955, n.5 (1984), then

quoting *Warth*, 422 U.S. at 500). Those concerns abound in this case.

On this record, the plaintiffs do not have third-party standing to "vindicate" the rights of their prospective customers. *See Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th Cir. 2016) (concluding the plaintiff did not "have third-party standing" where he failed "to show a hindrance to his wife's ability to protect her own interests"). That leaves the plaintiffs' first-party claims subject to rational-basis review. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."); *accord Birchansky*, 955 F.3d at 757 ("We will uphold a state law that does not draw a suspect classification or restrict a fundamental right against an equal protection or substantive due process challenge if it is rationally related to a legitimate state interest.").

B. Failure to State a Plausible Claim

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In deciding such a motion, "'[t]he [C]ourt may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record.'" *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011) (alteration in original) (quoting

Mills v. City of Grand Forks, 614 F.3d 495, 498 (8th Cir. 2010)).

A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Court accepts the plaintiffs' factual allegations—but not their legal conclusions—as true. *Id.* A complaint that alleges facts that are "merely consistent with" a defendant's liability "stops short of the line between possibility and plausibility." *Twombly*, 550 U.S. at 557. The plaintiff must provide "sufficient factual information to provide" a basis for each claim "and to raise a right to relief above a speculative level." *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008). If she doesn't, her claims must be dismissed. *See Twombly*, 550 U.S. at 555.

The plaintiffs assert that even without a fundamental right, dismissal is improper in this case. They contend they should be allowed to "seek discovery and prove that the challenged regulations fail rational basis scrutiny." In their view, "Nebraska lacks any reasoned basis for" the challenged regulations. More specifically, they argue "the homebirth prohibition and physician supervision provisions are not a rational means to achieve any legitimate government end because they are not related to a provider's fitness, nor do they advance any health or safety interests." The plaintiffs see them solely as "economic protectionism" for physicians.

In contrast, the State highlights the three key legislative findings underlying the Act:

> The Legislature hereby finds and declares that the Certified Nurse Midwifery Practice Act is necessary to safeguard public life, health, safety, and welfare, to assure the highest degree of professional conduct by practitioners of certified nurse midwifery, and to insure the availability of high quality midwifery services to persons desiring such services.

Neb. Rev. Stat. § 38-602. According to the State, those findings rationally relate the challenged regulations "to a legitimate end—protecting the health and well-being of patients, including Nebraska mothers during childbirth and their babies." The State contends the plaintiffs' claims raise policy questions that invade the province of the legislature and thus are properly dismissed without discovery. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (clarifying that a state "has no obligation to produce evidence to sustain the rationality of a statutory classification"); *Gilmore v. County of Douglas*, 406 F.3d 935, 937 (8th Cir. 2004) (reiterating "that because 'all that must be shown is any reasonably conceivable state of facts that could provide a rational basis for the classification, it is not necessary to wait for further factual development' in order to conduct a rational basis review on a motion to dismiss" (quoting *Carter v. Arkansas*, 392 F.3d 965, 968 (8th Cir. 2004)).

The State finds support in *Gorenc v. Klaassen*, 421 F. Supp. 3d 1131, 1160-61 (D. Kan. 2019), in

which the district court dismissed the plaintiff midwives' due-process and equal-protection challenges to a collaborative-practice regulation and other restrictions because the limitations furthered "a legitimate state interest"—protecting "the health and welfare of the public, such as mothers and children who may seek the services of a midwife." In reaching that conclusion, the court reasoned that it "'must not interfere with'" the challenged regulations because "'it is for the legislature, not the courts, to balance the advantages and disadvantages' of the restrictions on plaintiffs' licenses." (alteration omitted) (first quoting *Younger v. Colo. State Bd. of L. Exam'rs*, 625 F.2d 372, 377 (10th Cir. 1980), then quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955)); *accord Sammon*, 66 F.3d at 646. That same logic applies here.

The plaintiffs' unbridled assertions that "the challenged regulations are solely protectionist" and "bear no connection to the government's stated goals" border on frivolous. *See Birchansky*, 955 F.3d at 757 (stating a "law's rational relation to a state interest need only be conceivable"). And their remaining arguments about whether the regulations actually "contribute to public health or safety" or are as effective as possible are precisely the type of balancing questions committed to the legislature. *See Williamson*, 348 U.S. at 487; *Birchansky*, 955 F.3d at 758 ("A law supported by some rational basis does not offend the constitution merely because it is imperfect, mathematically imprecise, or results in some inequality."); *United Hosp. v. Thompson*, 383 F.3d 728, 733 (8th Cir. 2004) ("The perfect must not become the enemy of the good.").

The plaintiffs repeatedly question the challenged provisions' efficacy and offer what they see as a better way to reach the Act's goals. But that is not this Court's call to make. *See Dobbs*, 597 U.S. at 301 (stating courts must uphold a health and safety law "if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests"); *Danker v. City of Council Bluffs*, 53 F.4th 420, 425 (8th Cir. 2022) (explaining that courts conducting rational-basis review "cannot second guess or judge" the wisdom or "fairness of legislative choices").

"On rational-basis review," legislative decisions regarding health and safety bear "a strong presumption of validity, and those attacking the rationality of" those decisions "have the burden to negative every conceivable basis that might support it.'" *Id.* at 423 (quoting F*CC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993)); *see also Gallagher v. City of Clayton*, 699 F.3d 1013, 1020 (8th Cir. 2012) (noting the defendant would have to meet that onerous burden even if the defendant's asserted rationales failed rational-basis review). "Where there are plausible reasons for [the legislature's] action, [the Court's] inquiry is at an end." *Birchansky*, 955 F.3d at 757 (first alteration in original) (quoting *FCC*, 508 U.S. at 313-14). Such is the case here.

Based on the foregoing,

IT IS ORDERED:

1. Defendants Mike Hilgers and Charity Menefee's Motion to Dismiss (Filing No. 11) is granted in part and denied in part.
2. Plaintiffs Heather Swanson and Oneida Health, LLC's first-party claims are dismissed with prejudice.
3. Their purported third-party claims for their prospective customers are denied without prejudice to any claim those customers might raise on their own.

Dated this 9th day of September 2024.

BY THE COURT:

/s/ Robert F. Rossiter, Jr.
Robert F. Rossiter, Jr.
Chief United States
District Judge

Filed April 16, 2024

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Case No. _____

HEATHER SWANSON, and ONEIDA HEALTH, LLC,

Plaintiffs,

v.

MIKE HILGERS, in his official capacity as the Attorney General of the State of Nebraska; and CHARITY MENEFEE, in her official capacity as the Director of the Division of Public Health for the Nebraska Department of Health and Human Services,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This civil rights lawsuit challenges Nebraska law that arbitrarily restricts certified nurse midwives (CNMs) from providing childbirth services to expecting mothers.

2. Heather Swanson is a Certified Nurse Midwife with a passion for providing childbirth services to underserved communities. She is a Doctor

of Nursing Practice and an Associate Professor of Nursing, as well as the owner of Oneida Health, LLC.

3. Dr. Swanson's calling is to provide childbirth services to Nebraska women, including those that require home birth assistance. She, along with Oneida Health, is ready, willing, and able to provide safe and accessible childbirth services to women who wish to experience a home birth. They would be doing so now absent the challenged restrictions.

4. Plaintiffs' work is particularly important because Nebraska has more counties without accessible maternity care than the national average. These "maternity deserts" mean many Nebraskan women are left without adequate childbirth care. It is unsurprising that the rates of adverse maternal and infant outcomes increase together with a woman's distance from her maternity care provider.

5. Dr. Swanson is prevented from meeting this need due to state laws that: (1) require CNMs to obtain a supervision agreement with a local physician and (2) forbid CNMs from attending home births even if under the supervision of a physician. Nebraska's Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. 38-612(2) and 38-613(3)(b).

6. Dr. Swanson brings this challenge to vindicate her constitutional rights and the rights of the mothers she wishes to serve. In particular, the challenged laws violate the Due Process of Law, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment.

JURISDICTION AND VENUE

7. This action arises under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction over these federal claims under 28 U.S.C. § 1331 (federal question), and § 1343(a)(3) (redress for deprivation of civil rights). Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. § 2201.

8. Venue is proper in this Court, pursuant to 28 U.S.C. § 1391(b)(1), because the Defendant resides in this District, and 28 U.S.C. § 1391(b)(2), because a substantial part of the acts giving rise to Plaintiffs' claims occurred and continues to occur in this District.

PARTIES

Plaintiffs

9. Plaintiff Heather Swanson is the owner and operator of Oneida Health, LLC. She is a citizen of the United States and resident of Long Pine, Nebraska. She has over 20 years of training and experience in midwifery, nursing, and medicine. She has a Bachelor of Science in Nursing, a Master of Science in Nursing with a Midwifery Specialty, and a Doctor of Nursing Practice. She is a board-certified CNM and Nurse Practitioner.

10. Plaintiff Oneida Health, LLC, is a domestic limited liability corporation registered in the State of Nebraska. Oneida Health is a family nurse practitioner practice wholly owned and operated by Dr. Swanson.

Defendants

11. Defendant Mike Hilgers is the Attorney General of Nebraska. His official duties include upholding and defending the laws of Nebraska and enforcing health regulations. He is responsible for enforcing Nebraska's Certified Nurse Midwifery Practice Act. He is sued in his official capacity only.

12. Defendant Charity Menefee is the Director of the Division of Public Health for the Nebraska Department of Health and Human Services (DHHS). Ms. Menefee has the ultimate responsibility for regulating health-related professions and facilities in the state of Nebraska. She is responsible for adopting rules and regulations to carry out the Certified Nurse Midwifery Practice Act. She is sued in her official capacity only.

FACTUAL ALLEGATIONS

Home Birth

13. During the colonial period, and at the time of the enactment of the Bill of Rights in 1791, the vast majority of American births occurred outside of a hospital with the assistance of midwives.

14. When the Fourteenth Amendment was enacted in 1868, midwifery was universally legal, and women maintained extensive choices among a variety of birth assistants.

15. From the founding through the early twentieth century, choices regarding the person assisting childbirth and the place and manner of

childbirth were, by practice, law, and custom, a matter of individual and family choice.

16. Home birth can be a safe option for mother and child, and it is legal in all 50 states.

17. Home births alleviate the financial burden of childbirth on the overall healthcare system. Service charges for home births are generally lower than charges for hospital births in the same service area. Further, the lower number of unnecessary medical interventions results in a significant reduction in childbirth costs.

18. Home births also offer mothers an important alternative to hospitals. They provide a comfortable environment, affordable and accessible services, avoidance of contact with sick people, and compatibility with personal or religious values.

19. In addition to conferring the benefits enjoyed by expecting mothers and their infants, safe home births alleviate the pressure on overwhelmed or understaffed hospital maternity wards.

20. Home birth is rising in popularity nationwide and is at its highest level in decades. Many of those who choose home birth for religious reasons or based on personal values will proceed with a home birth even if they are unable to secure the services of a qualified CNM, leading to a significantly riskier childbirth experience.

21. The dearth of trained healthcare professionals willing and able to attend home births has pushed Nebraska women to less safe alternatives,

including unassisted home birth and home birth assisted by lay midwives or others who operate without restriction in Nebraska.

22. But unassisted labor or labor with the assistance of a provider with no formal training can be dangerous. Unlike CNMs like Dr. Swanson, untrained mothers or birth attendants—who are not prohibited from providing childbirth services under the challenged statute—may not know if or when a hospital transfer becomes necessary.

23. To make matters worse, there is a shortage of physicians in Nebraska, and physicians rarely dedicate their scarce resources to the time-intensive home birth process, particularly in rural areas.

Challenged Laws

24. Nebraska's Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. 38-609, 613(2), forbids the state's highly trained certified nurse midwives from assisting any birth without first entering a practice agreement with a local physician.

25. Regarding the practice agreement mandate, the statute does not require that a physician consider, much less enter into, a CNM practice agreement.

26. Nor does the statute specify any requirements regarding what must be included in an agreement, such as medical functions, health and safety procedures, or the scope of supervision.

27. The statute also fails to limit the conditions which a physician may impose on collaborating CNMs. And there is no mandate that conditions imposed must serve a legitimate health or safety objective.

28. The second challenged provision, Neb. Rev. Stat. 38-613(3)(b), prohibits CNMs from attending home births even if under the direct supervision of a collaborating physician.

29. The law does not prohibit any other childbirth assistant in the home birth context; thus, it only excludes the most qualified childbirth service providers while continuing to allow much less qualified assistants such as lay midwives, doulas, and others.

30. Failure to adhere to the challenged provisions can lead to fines and criminal prosecution.

31. The challenged restrictions thereby leave expecting mothers with three options for home births: to labor unassisted, to be attended by an unlicensed lay midwife, or to be attended by a physician. Because physicians are often unavailable for home births, particularly in rural areas, the most common path for a woman wishing to experience home birth is to proceed unassisted or with someone significantly less qualified than a CMN.

Effect of the Challenged Law on Plaintiffs

32. Heather Swanson has a passion for assisting expecting mothers through the challenges of pregnancy, leading her to pursue multiple degrees

focused on nursing and midwifery. She chose her career specifically to assist with home births.

33. There is a physician shortage in Nebraska, with many rural women not having ready access to a doctor. Prenatal care is especially scarce—some women drive over an hour to reach their OB-GYN. This has resulted in women giving birth on the road on the way to the closest hospital with childbirth services.

34. There is a demand for certified nurse midwives among Nebraska women, but their options are limited due to the restrictions challenged here.

35. In many areas, it is difficult or impossible to enter into a collaboration agreement with a local physician. Many physicians are simply unwilling to enter into a collaboration agreement with a competitor for childbirth services.

36. Further, some hospitals prohibit their associated doctors from entering into CNM collaboration agreements. Physicians at these hospitals are threatened with revocation of their admitting/clinical privileges.

37. Even physicians that are willing to enter into an agreement often impose onerous conditions or require an extortionate money payment in exchange for collaboration.

38. The ban on CNMs at home births has forced Dr. Swanson to turn away many women who wished to experience a home birth for a variety of reasons, including religious beliefs.

39. The majority of women Dr. Swanson turns away, especially those like the Amish who choose home birth for religious reasons, go on to have a home birth with an unlicensed provider or with no assistance at all.

40. Plaintiffs wish to provide safe, affordable, and essential childbirth services to women experiencing low-risk pregnancies. If allowed to provide midwifery services, Dr. Swanson and Oneida Health would focus on assisting low-risk births in a home setting.

41. Plaintiffs are ready, willing, and able to meet this need and provide pregnancy and delivery care to women in rural Nebraska. If the challenged laws are enjoined, they would do so.

42. Plaintiffs would adhere to health and safety regulations including, but not limited to, CNM licensing and patient risk pre-qualification.

CLAIMS FOR RELIEF

First Cause of Action

The Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. 38-609, 613(2-3), Violates the Due Process of Law Clause of the Fourteenth Amendment

43. Plaintiffs incorporate by reference each and every allegation set forth in this Complaint.

44. Plaintiffs are persons under 42 U.S.C. § 1983.

45. The Due Process of Law Clause of the Fourteenth Amendment protects the liberty of individuals to be free from government interference.

46. Under this Clause, a law cannot deprive any person of her fundamental right to choose the manner and circumstances of giving birth unless the law is narrowly tailored to achieve a compelling government interest.

47. The right of women to choose the manner and circumstances of giving birth is deeply rooted in this nation's history and tradition.

48. But by imposing the challenged provisions on CNMs and expecting mothers, Nebraska unnecessarily limits and burdens mothers' privacy in family-planning and their choices for childbirth services.

49. These burdens imposed by Nebraska are not narrowly tailored to a compelling state interest. Indeed, they are not even rationally related to a legitimate government interest.

50. The provision requiring a supervision agreement allows physicians or medical facilities to veto prospective competition in the market for childbirth services for purely anticompetitive reasons. This is true despite Nebraska's dire need for more providers.

51. Thus, expecting mothers in many parts of Nebraska, especially rural areas, have no options for medically trained birth attendants.

52. Allowing competitors to veto new childbirth services results in fewer services, longer wait times, facility crowding, higher service prices, and lower quality services. It threatens women's health and denies expecting mothers the constitutionally protected rights to liberty, privacy, and the right to give birth in the manner or circumstances of their choosing.

53. This provision does not serve any health or safety end; rather, it protects the economic well-being of physicians and hospitals at the expense of CNMs and the expecting mothers who wish to use their services.

54. Dr. Swanson would like to provide home birth assistance as part of her family practice, but the challenged provisions burden her right to make a living through the longstanding profession of midwifery.

55. She is qualified to practice independently and would only require a physician's assistance in a rare serious emergency. Dr. Swanson is trained and qualified to recognize and act quickly upon such emergencies.

56. Further, home births will continue regardless of Nebraska's restrictions on CNMs; thus, excluding the most qualified birth attendants does not render Nebraskan home childbirths safer.

57. CNMs are highly trained and regulated by Nebraska law. Federal and state law ensure that home birth patients receive timely emergency services

if necessary. There is no compelling or rational reason to impose the challenged requirements, which effectively deny access to services in many parts of the state.

58. Given the time-sensitive nature of childbirth, Plaintiffs and Plaintiffs' prospective patients are suffering substantial and irreparable harm and will continue to do so until this Court declares the challenged restrictions unlawful and enjoins their enforcement.

Second Cause of Action

The Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. 38-609, 613(2-3), Violates the Equal Protection Clause of the Fourteenth Amendment

59. Plaintiffs incorporate by reference each and every allegation set forth in the preceding paragraphs of this Complaint.

60. Plaintiffs are persons under 42 U.S.C. § 1983.

61. Under the Equal Protection Clause of the Fourteenth Amendment, a discriminatory law that impacts a fundamental liberty must be narrowly tailored to serve a compelling government interest.

62. Through its competitor's veto provisions—Neb. Rev. Stat. 38-609, 613(2-3)—Nebraska draws an arbitrary distinction between childbirth service providers that may operate and those that may not. The result is that the most

qualified childbirth attendants are excluded from home births while unlicensed and unqualified attendants are allowed to provide services.

63. Nebraska allows other advanced practice nurses, such as nurse anesthesiologists, to maintain independent practice, but not CNMs.

64. These distinctions are not related to the provider's fitness to operate: they relate only to whether a provider is able to secure permission and supervision from a direct competitor.

65. The law's discriminatory provisions do not serve any compelling, or even legitimate, government interest. They serve only the economic interests of existing providers.

66. Given the time-sensitive nature of childbirth, Plaintiffs and Plaintiffs' prospective patients are suffering substantial and irreparable harm and will continue to do so until this Court declares the challenged restrictions unlawful and enjoins their enforcement.

Third Cause of Action

The Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. 38-609, 613(2-3), Violates the Privileges or Immunities Clause of the Fourteenth Amendment

67. Plaintiffs allege and incorporate by reference each and every allegation set forth in this Complaint.

68. Plaintiffs are persons under 42 U.S.C. § 1983.

69. The Privileges or Immunities Clause of the Fourteenth Amendment protects the rights explicitly set out in the Constitution as well as unenumerated rights.

70. The Fourteenth Amendment was enacted after the Civil War to address the failure of slave states to protect the civil rights of former slaves. The intention was to create federal protection for the Bill of Rights, natural rights, and common law rights. Chief among the author's concerns was the right to enter a common occupation.

71. Congress also intended to protect those rights recognized by the Civil Rights Act of 1866, which had been vetoed by President Andrew Johnson on the basis that it exceeded Congress's power under the Thirteenth Amendment. Though Congress was able to surmount the veto with a supermajority vote, legislators remained concerned about the law's constitutionality. They, therefore, sought to constitutionalize that act and the rights it protected. Among those protected liberties was the right to earn a living.

72. The practice of midwifery—especially outside the hospital context—was a common and lawful occupation at the time of the founding and through passage of the Fourteenth Amendment. Thus, it is an occupation protected from arbitrary restriction by the Privileges or Immunities Clause.

73. By imposing an arbitrary and discriminatory "Competitor's Veto," Defendants, acting under color of state law, are irrationally interfering with the constitutional rights of Plaintiffs in violation of the Privileges or Immunities Clause.

74. Plaintiffs are suffering and will continue to suffer substantial and irreparable harm until the arbitrary, irrational, and fundamentally unfair procedures established by Nebraska's law for CNM practice are declared unlawful and enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

A. A declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that the home birth prohibition and supervision requirements of the Nebraska's Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. 38-609, 613(2)-(3)(b), violate the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment to the United States Constitution;

B. For a permanent prohibitory injunction enjoining Defendants from enforcing the home birth prohibition and supervision agreement requirements of Nebraska's Certified Nurse Midwifery Practice Act;

C. An award of costs and attorney's fees pursuant to 42 U.S.C. § 1988; and;

D. Any such other relief as the Court may deem just and proper.

Respectfully submitted this 16th day of April, 2024.

/s/ Joshua Polk
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