No. 23-12364

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KATIE CHUBB, ET AL.,

Plaintiffs-Appellants,

v.

COMMISSIONER FOR THE GEORGIA DEPARTMENT OF COMMUNITY HEALTH, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division,
Case No. 1:22-cv-03289
The Honorable Thomas W. Thrash, Jr.

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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No. 23-12364 – Chubb, et al. v. Commissioner, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Augusta Birth Center and Katie Chubb, by their undersigned counsel and pursuant to Fed. R. App. P. 26-1 and 11th Cir. R. 26.1-1, files this Certificate of Interested Persons and Corporate Disclosure statement. Appellant Augusta Birth Center is not a publicly held corporation and has no parent corporations, affiliates, or subsidiaries with an interest in the outcome of this case.

Identifiable interested parties to the action are as follows:

Augusta Birth Center	Plaintiff-Appellant
Boyd, Norman	Defendant-Appellee
Bloodsaw, Amayi, M.D.	Owner-Director, Augusta Birth Center
Carr, Christopher M.	Counsel for Defendants-Appellees
Chubb, Katie	Plaintiff-Appellant
Eckrote, Margaret K.	Counsel for Defendants-Appellees
Heidari, Yasha	Counsel for Plaintiffs-Appellants
Laing, Karesha	Defendant-Appellee
McClintock, Andrew B.	Counsel for Defendants-Appellees
Noggle, Caylee, Commissioner	Defendant-Appellee

No. 23-12364 – Chubb, et al. v. Commissioner, et al.

Polk, Joshua	Counsel for Plaintiffs-Appellants
Queen, Kimberly, N.P.	Owner-Director, Augusta Birth Center
Stump, Jeffrey W.	Counsel for Defendants-Appellees
Thrash, Jr., Hon. Thomas W.	District Court Judge
Trotter, Caleb R.	Counsel for Plaintiffs-Appellants

DATED: August 29, 2023.

/s/ Joshua Polk
JOSHUA POLK

STATEMENT REGARDING ORAL ARGUMENT

Appellants Katie Chubb and Augusta Birth Center respectfully request oral argument pursuant to 11th Cir. R. 28-1(c). Oral argument is warranted because this case challenges the constitutionality of a state statute. Further, the outcome of this case concerns the livelihood of childbirth professionals and the availability of childbirth services to Georgia mothers. Oral argument will give these issues the attention they warrant and allow the advocates to aid the Court in careful consideration of this case.

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JURISDICTIONAL STATEMENT

This lawsuit, filed in the United States District Court for the Northern District of Georgia, arises under the U.S. Constitution and 42 U.S.C. § 1983. Doc. 1 at ¶ 6-7. The district court had federal-question jurisdiction under 28 U.S.C. § 1331. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (review of final decision dismissing Complaint). The district court filed an order on February 24, 2023, dismissing Appellants' Complaint on the basis of standing. Doc. 26. Appellants filed a motion for reconsideration pursuant to Fed. R. Civ. P. 59 on March 24, 2023, Doc. 28, which was denied on July 11, 2023. Doc. 31.

This appeal is timely because the Rule 59 motion was resolved on July 11, 2023, and the notice of appeal was filed on July 19, 2023, within the 30 days allowed by Fed. R. of App. P. 4(A)(iv). Doc. 32.

STATEMENT OF ISSUES ON APPEAL

I. Whether the District Court erred in holding that Augusta Birth Center and Ms. Chubb lacked standing where they have alleged that they are ready and able to provide childbirth services absent the Certificate of Need provisions challenged here.

II. Whether the District Court erred in denying Augusta Birth Center and Ms. Chubb's motion for reconsideration when it made errors of law and fact in ruling for Defendants on Defendants' motion to dismiss.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Appellants Augusta Birth Center (ABC) and its executive director, Katie Chubb, are eager to provide critical childbirth services to expecting mothers in northeastern Georgia. Doc. 1 ¶ 4. After making several five-hour round-trips from her home near Augusta to receive prenatal care at the closest birth center in Georgia during her own pregnancy, Ms. Chubb became interested in making birth center services more accessible closer to home. *Id.* ¶ 19. While researching the feasibility of a birth center project, Ms. Chubb learned about the poor state of childbirth healthcare outcomes in Georgia and the extremely limited options available to Georgia's expecting mothers. *Id.* ¶ 18, 22. She realized that a new high quality and low-cost childbirth option was critically necessary to the region and began taking steps to start a birth center. *Id.* ¶ 21.

In 2020, Ms. Chubb created and registered Augusta Birth Center as a non-profit corporation with the mission to offer safe, affordable, and high-quality childbirth services to expecting mothers with low-risk pregnancies. *Id.* at ¶ 1, 23. She secured financing for the project and located a building in Augusta. *Id.* ¶ 52, 66. Ms. Chubb then hired medical

professionals to staff ABC's board and a medical director to oversee operations. *Id.* ¶ 4. ABC entered into multiple ambulance contracts for emergency transfers and has concrete plans to hire certified and licensed nurse-midwives once it receives a permit to open the center. *Id.* ¶ 4, 66. Finally, ABC agreed to an emergency transfer agreement with an individual physician who had admitting privileges with two local hospitals. *Id.* Despite these efforts, the birth center project was brought to a halt when ABC's application for a Certificate of Need was denied by the Georgia Department of Community Health (Appellees) due to application requirements ABC and Ms. Chubb allege are unconstitutional.

Georgia's Certificate of Need Requirements

While birth centers are legal in Georgia, a prospective center may not begin operations without first obtaining a Certificate of Need from the Department of Community Health. O.G.C.A. § 31-6-40; Ga. Comp. R. & Regs. R. 111-2-2-.25. Once a Certificate application is filed, the Department will provide notice of the filing to the highest local official and by newspaper of general circulation in the county of the proposed project. Ga. Comp. R. & Regs. R. 111-2-2-.07. Established providers in

the area may oppose a Certificate if the applicant is a would-be competitor providing "substantially similar services." O.G.C.A. § 31-6-43(d)(1). No other persons are authorized to protest an application.

When reviewing an application, the Department must determine whether an existing business already provides similar services to the applicant in the proposed service area, thereby rendering the applicant's services "unnecessary." Ga. Comp. R. & Regs. R. 111-2-2-.09(c) (hereinafter referred to as the "need requirement"). In making this determination, the Department aims to avoid "unnecessary duplication of services" in the applicant's proposed service area. ABC and Ms. Chubb allege that this requirement serves only to protect the economic interests of existing service providers and is therefore unconstitutional. Doc. 1 ¶ 39.

Certificate applicants must also secure a written emergency transfer agreement from at least one nearby backup hospital that provides at least Level II perinatal services, *i.e.*, one of the applicant's direct competitors. Ga. Comp. R. & Regs. 111-2-2-.25(4), 111-8-7-.07. In addition, every physician practicing at the birth center must have admitting privileges at the backup hospital. *Id.*

Hospitals may refuse to enter into a transfer and emergency services agreement for any reason, including reasons unrelated to the applicant's ability to provide safe, effective, and financially feasible services or the hospital's capacity to accept such transfers. Doc. 1 ¶ 42. The most obvious reason for a hospital to refuse to enter into a transfer agreement with a prospective birth center is that birth centers are their direct competition for childbirth services. *Id.* Hospitals are therefore empowered to veto the opening of a new birth center even if the center has a physician on staff able to facilitate transfer and admission of patients to the same local hospital in case of emergency. *Id.*

Under the Emergency Medical Treatment and Active Labor Act (EMTALA), hospitals that accept payments from Medicare must admit patients suffering a medical emergency without regard to citizenship, legal status, or ability to pay. 42 U.S.C. § 1395dd. Thus, ABC and Ms. Chubb allege that the transfer agreement requirement is redundant to the admitting privileges requirement, EMTALA, and other federal and state regulations. What this redundancy means is that birth centers are required to persuade a competitor to agree to accept transfers that they are already legally obligated to accept. And, for the Certificate of Need

application, competitors can refuse this formality for any reason in spite of this obligation. That is precisely what happened with ABC. Doc. 1 ¶ 42–44.

ABC's Past Certificate Application and Denial

Believing that she would be able to enter into a transfer agreement, Ms. Chubb began a Certificate application. However, all three local hospitals refused to enter into an agreement with ABC. *Id.* at ¶ 51. Undeterred, Ms. Chubb submitted an 821-page Certificate application to the Department satisfying all documentation requirements except for the written transfer agreement she was unable to obtain. *Id.* ¶ 47. Two local hospitals objected to the application because of the lack of a transfer agreement. *Id.* ¶ 49.

In its December 22, 2021, decision, the Department determined that there is a need for ABC's services and that the planned center will be adequately financed as well as high quality and low cost compared to existing hospital services. *Id.* ¶ 52. However, the Department ultimately decided that it was unable to issue a Certificate for the sole reason that Ms. Chubb and ABC failed to secure a transfer agreement. *Id.* at ¶ 52.

This transfer agreement requirement remains an absolute bar—and the *only* bar—to Appellants' ability to secure a Certificate for their birth center services. *Id.* Ms. Chubb and ABC would be able to obtain a Certificate and proceed with providing important childbirth services if allowed to reapply in the future without being subject to the unconstitutional criterion. *Id.* ¶ 52. However, so long as the unconstitutional criterion is in place, they will be denied. Ms. Chubb and ABC are otherwise ready and able to secure a permit and provide birth center services to the expecting mothers of northeastern Georgia. Appellants wish to apply for a Certificate in the future under a constitutional application process.

Procedural History

On August 16, 2022, ABC and Ms. Chubb filed their Complaint to vindicate their right to provide childbirth services free of the Certificate program's unconstitutional criteria. Doc. 1. ABC and Ms. Chubb allege that the challenged application criteria unconstitutionally restrict the right of expecting mothers to give birth in safe, comfortable circumstances of their choosing and the right of others to provide that setting and care in violation of the Fourteenth Amendment. *Id.* ¶ 1. The

complaint seeks only prospective relief from the unconstitutional Certificate application criteria. A ruling in their favor would allow ABC and Ms. Chubb to reapply without being subject to the challenged requirements. *Id.* ¶ 5. ABC and Ms. Chubb do not seek money damages or relief from the Department's prior decision. *Id.* ("Plaintiffs request a declaratory judgment that the challenged laws are invalid ... and a permanent injunction against further enforcement of the challenged laws.").

On September 21, 2022, the Department filed a Motion to Dismiss the Complaint based, in part, on Appellants' purported lack of Article III standing. Doc. 17 at 8–10. On February 24, 2023, the Court issued an order granting the Department's Motion to Dismiss. Doc. 26. The Court held that Appellants' alleged injury in-fact for Article III standing was the Department's decision on Ms. Chubb and ABC's previous Certificate application. Doc. 26 at 9-10. Having held that Appellants' injury was the past certificate denial, the district court then held that Appellants' injury was not redressable, because holding the past injury unconstitutional could not guarantee a future successful Certificate application. Doc. 26 at 10. Ms. Chubb and ABC filed a motion for reconsideration arguing that

these holdings were errors of law and fact. Doc. 28. The district court denied the motion for reconsideration on July 11, 2023. Doc. 31. This timely appeal followed.

II. STANDARD OF REVIEW

A district court's ruling on a motion to dismiss for lack of standing is reviewed *de novo*. *See Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, 26 F.4th 1235, 1240 (11th Cir. 2022). At the motion to dismiss stage, a plaintiff need only allege facts that give rise to a plausible claim of standing. *Id.* Under that standard, the Court must accept all factual allegations in the complaint as true and make all inferences in the light most favorable to the plaintiff. *Tellabs, Inc. v. Makor Issues & Rts, Ltd.*, 551 U.S. 308, 323 (2007). The threshold a complaint must meet to satisfy this standard is "exceedingly low." *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 881 (11th Cir. 2003).

III. SUMMARY OF ARGUMENT

The district court dismissed this case under Fed. R. Civ. P. 12(b)(1), because Ms. Chubb and ABC purportedly lacked Article III standing. The district court's Article III holding plainly misunderstands the injury alleged in the Complaint and conflicts with Eleventh Circuit precedent.

Many allegations in the Complaint demonstrate the forward-looking nature of the relief requested. *See, e.g.*, Doc. 1 ¶ 5, 23.

Rather than asking the court to overturn the Department's prior decision or require the Department to issue a Certificate to Appellants, Ms. Chubb and ABC are ready and willing to apply for a Certificate to provide childbirth services in the future and seek that opportunity. They have incorporated a business entity, secured financing for the project, found a building location, hired medical professionals, and entered into transfer agreements with ambulance companies and a licensed physician. Ms. Chubb and ABC simply wish to apply for a Certificate in the future absent the unconstitutional application criteria. Ample Supreme Court and Eleventh Circuit precedent demonstrate that this is a cognizable future injury redressable by a decision enjoining enforcement of the challenged provisions. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Ne. Fla. Chapter Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993).

Although the past certificate denial is plainly not challenged in this case, even if it were, the district court erred by accepting as true

Appellees' assertions regarding the basis for that denial. Ms. Chubb and ABC alleged that their prior Certificate application was denied because they failed to secure a transfer agreement from a competitor. Appellees disagreed. But at this stage in the proceedings Ms. Chubb and ABC are entitled to the benefit of any ambiguity. And in any case, the extraneous evidence of the prior Certificate decision merely confirms Appellants' allegations. The Certificate decision does not identify any specific shortcomings other than the absence of a written transfer agreement. The district court's holding to the contrary was clear legal error; therefore, its decision should be reversed and the case remanded for further proceedings.

IV. ARGUMENT

A. APPELLANTS HAVE ARTICLE III STANDING

There are three constitutional requirements for standing: 1) the plaintiff must allege a concrete and particularized injury-in-fact; 2) the injury must be fairly traceable to the allegedly unlawful conduct; and 3) the requested relief must be likely to redress the alleged injury. *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 984 (11th Cir. 1990). When seeking prospective injunctive or declaratory relief, a plaintiff must

allege facts showing a "substantial probability" that she will suffer injury in the future. *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1538 (11th Cir. 1994). Appellants' Complaint meets this standard.

Ms. Chubb and ABC allege that they are ready, willing, and able to provide childbirth services to the expecting mothers of northeastern Georgia, but that they cannot do so because of unconstitutional Certificate of Need procedures. Doc. 1 ¶ 5. This injures Appellants because the Certificate program imposes an absolute bar on services they are ready and able to provide. *Id.* ¶ 42. That injury is traceable[1] to Defendants who are tasked with enforcing the challenged law. *Id.* ¶ 12-15. A favorable decision would redress their injury because it would allow them to apply for a Certificate absent the unconstitutional criteria and proceed with establishing a birth center. ABC and Ms. Chubb therefore have standing to bring their claims.

[1] Because neither Appellees' briefing nor the district court's opinion below suggested traceability is an issue here, Appellants' arguments here focus solely on the elements of injury-in-fact and redressability.

1. ABC and Ms. Chubb have alleged a concrete and particularized injury-in-fact.

Courts in the Eleventh Circuit "evaluate standing on a motion to dismiss based on the facts alleged in the complaint." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013). ABC and Ms. Chubb's Complaint requests prospective relief from future enforcement of the challenged Certificate requirements and explicitly states that Appellants do not seek relief from the prior Certificate decision.[2] *See, e.g.*, Doc. 1 ¶ 5, 23 ("Plaintiffs request a declaratory judgment that the challenged laws are invalid … [and] a permanent injunction against *further enforcement* of the challenged laws. Plaintiffs do not seek money damages against any Defendant.") (emphasis added). The Complaint's allegations referring to the prior Certificate denial do not transform this case into an "as-applied" challenge to that decision. Rather, they demonstrate a concrete future injury by showing that the challenged transfer agreement provisions would be an outright bar to any future

[2] It is also for this reason that ABC and Ms. Chubb have standing to challenge the need requirement as well. Having cleared that hurdle in the past does not guarantee success in future applications. And regardless of whether they are able to successfully prove that their services are "needed," they will be forced to first undergo the unconstitutional burden of satisfying the criteria a second time.

application. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (recognizing standing to seek prospective relief from admission criteria where plaintiff had been denied in the past). They also demonstrate Appellants' sincere desire to obtain a Certificate and proceed with providing childbirth services in the absence of the challenged provisions. *See Gen. Contractors of Am.*, 508 U.S. at 666 (1993) (recognizing challenge to *future* enforcement of an ordinance giving preferential treatment to minority-owned businesses).

The denial of Appellants' past application based on the unconstitutional provisions challenged here shows a strong likelihood that they will be injured by the unconstitutional application criteria when they apply again in the future. Contrary to the district court's holding, this injury is not speculative. *Id.*; *Taylor v. Polhill*, 964 F.3d 975, 980 (11th Cir. 2020) ("[A]s Florida's statutory scheme for dispensing hearing aids has been enforced against [plaintiff] in the past, the chance that it will be enforced against him in the future is not speculative."); *see also Bruner v. Zawacki*, 997 F.Supp.2d 691, 697 (E.D. Ky. 2014) ("A favorable decision … would redress the injury, not because the Plaintiffs

would automatically be granted a Certificate, but because the unconstitutional obstacle would be removed from their path to operate.").

Plaintiffs in the Eleventh Circuit may seek prospective relief from unconstitutional application criteria so long as their allegations demonstrate a "substantial probability" that the proposed projects would come into existence absent the challenged provisions. *Jackson*, 21 F.3d at 1538 (citing *Arlington Heights*, 429 U.S. 252). Because ABC and Ms. Chubb allege that they are able and ready to provide services absent the challenged regulations, Doc. 1 ¶ 10, 23, 24, they meet the standing threshold for prospective relief against unconstitutional approval criteria. *Arlington Heights*, 429 U.S. at 255–58 (standing for prospective relief); *Gratz*, 539 U.S. at 262 (same); *Ne. Fla. Chapter Associated Gen. Contractors of Am.*, 508 U.S. at 666 (same).

This is not a case where plaintiffs are alleging a generalized desire to open a business without concrete plans demonstrating they are ready and able. *See Aaron Private Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1337 (11th Cir. 2019) (allegations of general desire to start business "someday" not sufficient for Article III standing); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (lack of allegations

that plaintiff was harmed or would likely be harmed in the future rendered complaint insufficient to establish Article III standing). To the contrary, ABC and Ms. Chubb have demonstrated a substantial probability that they will proceed with birth center operations absent the absolute competitor's veto that the challenged regulations impose on them. ABC is a registered non-profit corporation with medical professional board members and a qualified medical director. Doc. 1 at ¶ 1, 4, 23. ABC and Ms. Chubb secured financing for the project, entered into ambulance service agreements, and found a location for the proposed center. *Id.* ¶ 52, 66. They even completed the Certificate application process, satisfying every criteria except those *directly* linked to the challenged transfer agreement provisions. *Id.* ¶ 47, 52. ABC and Ms. Chubb allege that they are fit, willing, and able to provide safe, effective, and affordable childbirth services. Doc. 1 ¶ 10. ("If not for provisions of the Georgia CON program, ABC would provide safe, effective, and affordable childbirth services to Georgia mothers…."); *id.* ¶ 23-24 ("Plaintiffs wish to provide safe, affordable, and essential childbirth services to women experiencing low-risk pregnancies. If allowed to operate, ABC would focus on low-risk births utilizing a

physician-supervised midwifery model, in accordance with Georgia regulations.").

2. Appellants' alleged injury is redressable by a favorable ruling.

The district court held that ABC and Ms. Chubb's injury is not redressable because Appellants' past Certificate application was denied due to requirements Appellants are not challenging. Doc. 26 at 10. But, as ABC and Ms. Chubb have shown, this contention is legally irrelevant. It is also false. Doc. 1 ¶ 52; Doc. 22 at 8. As discussed above, Appellants are seeking prospective relief from the challenged provisions— not direct relief from the Department's prior decision. ABC and Ms. Chubb have not asked the court to overturn the Department's decision or to require the Department to issue the requested Certificate. Rather, they seek the opportunity to apply for a Certificate in the future absent the unconstitutional requirements. Doc. 1 ¶ 5, 23. To the extent that there are remaining criteria for ABC and Ms. Chubb to satisfy, they will do so when it comes time to re-apply for a Certificate under a constitutional process.

Even if Appellants must satisfy other need review requirements, their injury is redressable. As numerous federal courts, including this

one, acknowledge, plaintiffs may use litigation to tackle just one obstacle, even though future obstacles may remain as to their ultimate goal. *See*, *e.g.*, *Arlington Heights*, 429 U.S. at 260–64 (holding that the alleged injury was redressable though additional obstacles would remain after the requested relief was granted); *Jackson*, 21 F.3d at 1538 (plaintiffs had standing to challenge a discriminatory bidding policy even though the subject project might never be completed); *see also Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 285 (4th Cir. 2018) (seeking removal of just one obstacle is sufficient to satisfy Article III); *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012) (same); *Bruner*, 997 F.Supp.2d at 697 ("A favorable decision ... would redress the injury, not because the Plaintiffs would automatically be granted a Certificate, but because the unconstitutional obstacle would be removed from their path to operate.").

The district court reasoned that this case is distinguishable from *Arlington Heights* because the obstacles in that case were "non-legal" whereas they are "legal" here. Doc. 26 at 12–13. But neither the Supreme Court nor the Eleventh Circuit has ever recognized such a distinction. *See Gratz*, 539 U.S. at 262. In *Gratz*, plaintiff had standing to challenge

unconstitutional college admissions criteria. To ultimately be enrolled, the plaintiff would still have to satisfy the constitutional admissions criteria, but simply being able to compete under fair admissions procedures rendered the alleged injury redressable. *Id; see also Ne. Fla.*, 508 U.S. at 666 (plaintiffs need not show that a member would have received a contract in the past absent the challenged procedures in order to have standing for prospective relief). Likewise, Appellants here need not show that they would have been granted a Certificate in the past absent the challenged provisions in order to have standing for prospective relief against future enforcement of the unconstitutional criteria.

In holding otherwise, the district court relied heavily on *KH Outdoor, LLC v. Clay Cnty., Fla.*, 482 F.3d 1299, 1303 (11th Cir. 2007). Doc. 26 at 13. There, the plaintiffs challenged the denial of seven sign permit applications. *Id.* at 1301. Unlike this case, which seeks prospective injunctive relief that would allow Appellants to reapply for a Certificate absent unconstitutional approval criteria, the plaintiffs in *KH Outdoor* sought an injunction that would require issuance of the permits. *Id.* However, that specific relief was impossible because the proposed signs violated other, unchallenged permit requirements. *Id.* at 1303.

A challenge to past permitting decisions is different in kind to a challenge to future enforcement of permitting criteria. Indeed, the Sixth Circuit has ruled on both sides of this coin in the very same context in which *KH Outdoor* was resolved. In *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456 (6th Cir. 2007), the Sixth Circuit held that the plaintiffs lacked standing because they sought to have the court issue an order allowing them to erect their rejected signs despite the fact that their permit applications were rejected on grounds not challenged in the complaint. That is the precise scenario of *KH Outdoor*. But in *Wagner v. City of Garfield Heights*, the Sixth Circuit explicitly drew a distinction with *Midwest Media*, holding that plaintiffs had standing to challenge *future enforcement* of a sign ordinance's permitting criteria despite not challenging other criteria under which prior permit applications had been denied. 675 Fed. Appx. 599, 606 (6th Cir. 2017).

Like the plaintiffs in *Wagner*, Ms. Chubb and ABC seek injunctive relief against the enforcement of the challenged Certificate requirements so that they will not be subject to the program's unconstitutional provisions in the future. Doc. 1 ¶ 5. This is a redressable injury.

3. The district court erred by taking Appellees' assertions as true rather than Ms. Chubb and ABC's factual allegations.

Even if *KH Outdoor* is relevant to Appellants' claim for prospective relief, the district court erred because the only shortcoming in Appellants' prior application was the lack of a transfer agreement. It was legal error for the lower court to accept as true Appellees' argument as to the basis of the prior certificate denial. Rather, the court should have taken as true Appellants' allegation that their Certificate application was denied for the sole reason that they failed to secure a transfer agreement from their direct competitors. *Houston*, 733 F.3d at 1335 (holding that courts in the Eleventh Circuit "evaluate standing on a motion to dismiss based on the facts alleged in the complaint"). Ms. Chubb and ABC were entitled to this presumption on a motion to dismiss.

In any event, looking outside the Complaint to the Department's decision on the prior Certificate application only confirms Appellants' allegations. The Department pointed to three other "failed" criteria in its prior denial decision, but each—consistent with Appellants' allegations—was based solely on the inability of Ms. Chubb and ABC to enter into a transfer agreement. Doc. 28-1, Polk Decl. Ex. A. If Appellants' suit were

successful, each element would be redressed—by knocking over one domino, they all fall.

First, the Department determined that Ms. Chubb and ABC failed to satisfy the provisions of Ga. Comp. R. & Regs. 111-2-2-.25(5) which require prospective birth centers to document ambulance service agreements. Appellants' failure to satisfy this requirement was solely the result of being unable to satisfy the transfer agreement requirement challenged here. Doc. 28-1, Polk Decl., Ex. A at 5 ("[W]ithout a transfer agreement with a backup hospital, the Department cannot assume the ambulance service will be able to transport patients … within 30 minutes.").

Second, Appellants failed to satisfy Rule 111-2-2-.25(4) which requires the applicant to provide evidence that the birthing center will function as part of the established regionalized system of perinatal care. Appellants find no constitutional fault with such a general requirement. However, the Department made clear that this criterion was not satisfied due only to Plaintiffs' inability to convince a direct competitor to enter into a transfer agreement. Doc. 28-1, Polk Decl., Ex. A at 4 (recognizing

that Appellants satisfied the specific requirements of the provision but the lack of transfer agreement rendered documentation inadequate).

Third, the Department determined that Appellants failed to satisfy Rule 111-2-2-.09(1)(a) which requires proposed projects to be reasonably consistent with the relevant general goals and objectives of the State Health Plan. There is nothing facially unconstitutional about this highly general, catchall criterion. But, as alleged, the Department determined that Ms. Chubb and ABC did not meet the requirement on the basis that they did not enter into a transfer agreement pursuant to the regulations challenged here. Doc. 28-1, Polk Decl., Ex. A at 10. The Department pointed to no other shortcomings in Appellants' application.

It was a legal and factual error to accept Defendants' assertion that Ms. Chubb and ABC were denied a Certificate on any basis other than their inability to secure a transfer agreement. The extraneous evidence provided by Defendants only supports Appellants' allegations. Ms. Chubb and ABC are at least entitled to the benefit of any factual ambiguity at this stage. *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988) (holding that where there is factual conflict over personal jurisdiction at the

motion to dismiss stage, "the court must construe all reasonable inferences in favor of the non-movant plaintiff").

CONCLUSION

The district court erred in dismissing Plaintiffs-Appellants' claims by failing to take their allegations as true and in the light most favorable to them. For this reason, this Court should vacate the district court's order of dismissal.

DATED: August 29, 2023.

Respectfully submitted,
PACIFIC LEGAL FOUNDATION

/s/ *Joshua Polk*

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Plaintiffs-Appellants furnishes the following in compliance with F.R.A.P Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 4,587 words.

DATED: August 29, 2023.

/s/ *Joshua Polk*
JOSHUA POLK

Attorney for Defendant-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2023, I filed the foregoing PLAINTIFFS-APPELLANTS' OPENING BRIEF with the Court via CM/ECF. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

/s/ Joshua Polk
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