

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

KATIE CHUBB and AUGUSTA BIRTH)
CENTER, Inc.,)

Plaintiffs,)

v.)

CAYLEE NOGGLE in her official)
capacity as the Commissioner of the)
Georgia Department of Community)
Health, KARESHA LAING in her)
official capacity as Interim Executive)
Director of the Office of Health)
Planning, and NORMAN BOYD in his)
official capacity as Chairman of the)
Board of Community Health,)

Defendants.)

Case No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This case involves two precious constitutional rights: the right of expectant mothers to give birth in safe, comfortable circumstances of their choice, and the right of others to provide that setting and care. Plaintiff Katie Chubb created the Augusta Birth Center, Inc. (“ABC”) to put her passion for helping underserved communities to work by opening a free-standing birth center in Northeastern Georgia. That work is particularly important given reports of crowded hospitals, poor birth outcomes in Georgia, and the wishes

of several Georgia mothers to give birth with the help of certified nurse midwives outside of a hospital setting. But Ms. Chubb has been prevented from opening a birth center due to a state law that places the economic interests of existing hospitals over Plaintiffs' constitutional rights.

2. Birth centers are lawful in Georgia, but their operation is effectively conditioned on getting permission from their direct competitors: hospitals. In fact, Ms. Chubb was denied permission to operate a birth center solely because of her inability to secure local hospitals' permission to open. This competitor's veto doesn't serve health or safety; it serves only the unconstitutional end of economic protectionism.

3. Plaintiffs allege that provisions of Georgia's Need Review law and birth center regulations, O.C.G.A. 31-6-1, et seq.; Ga. Comp. R. & Regs. R. 111-2-2-.09(1)(c), .25(4); and R. & Regs. R. 111-8-7-.07, deprive them of rights guaranteed by the Ninth Amendment and violate the Due Process of Law, Equal Protection, and Privileges or Immunities clauses of the Fourteenth Amendment to the United States Constitution.

4. Plaintiffs are fit, willing, and able to provide safe, effective, and affordable childbirth services. ABC has medical professionals on its board. An obstetrician will serve as ABC's medical director. ABC will hire certified nurse midwives and fully comply with Georgia's health and safety regulations. And

hundreds of expecting mothers have requested ABC's services as an alternative to crowded and impersonal hospitals. But anti-competitive provisions of Georgia's Certificate of Need (CON) law remain an obstacle to Plaintiffs providing those services.

5. Plaintiffs request a declaratory judgment that the challenged laws are invalid, unenforceable, and void; a permanent injunction against further enforcement of the challenged laws, and costs and reasonable attorney fees. Plaintiffs do not seek money damages against any Defendant.

JURISDICTION AND VENUE

6. Plaintiffs bring this civil rights lawsuit pursuant to 42 U.S.C. § 1983, for the violations of rights secured by the Ninth Amendment and the Due Process of Law, Equal Protection, and Privileges or Immunities Clauses to the Fourteenth Amendment.

7. Jurisdiction over Plaintiffs' claims for declaratory and injunctive relief is vested in this Court by 28 U.S.C. §§ 1331 (federal question jurisdiction), 1343 (civil rights jurisdiction), and 2201–2202 (the Declaratory Judgment Act).

8. Venue is proper in this Court, pursuant to 28 U.S.C. § 1391(b), on the grounds that all or a substantial part of the acts giving rise to Plaintiffs' claims occurred in Atlanta, Georgia which is located in the Northern District of Georgia.

PARTIES

Plaintiffs

9. Plaintiff Katie Chubb is the Executive Director and a principal shareholder of Augusta Birth Center, Inc. She is a citizen of the United States and resident of Grovetown, Georgia. She is a mother of two kids and experienced childbirth care at both a birth center and a hospital. She is currently going to school to become a certified nurse midwife.

10. Plaintiff Augusta Birth Center, Inc. is a domestic nonprofit corporation registered in the State of Georgia. ABC is owned by Katie Chubb (34%), Amayi Bloodsaw, M.D. (33%), and Kimberly Queen, N.P. (33%). If not for provisions of the Georgia CON program, ABC would provide safe, effective, and affordable childbirth services to Georgia mothers. Ms. Chubb wishes to open and operate ABC but she cannot do so without risking fines and other penalties because Plaintiffs were denied a CON.

Defendants

11. Each Defendant is sued individually in his or her official capacity.

12. Defendant Caylee Noggle is the Commissioner for the Georgia Department of Community Health (“the Department”). In her official capacity, Ms. Noggle maintains the ultimate responsibility for managing the

Department including implementation and enforcement of Georgia's CON program.

13. Defendant Karesha Laing is the Interim Executive Director for the Department's Office of Health Planning (OHP). OHP administers the CON program, including approval or denial of CON applications.

14. Defendant Norman Boyd is the Chairman of the Board of the Department of Community Health. The Board governs the Department of Community Health, and its responsibilities include implementation of and rulemaking for Georgia's CON program.

15. Defendants are empowered to approve or deny Certificate of Need applications, adopt rules implementing the "need" requirement and competitor's veto challenged in this lawsuit, to enforce those rules, and to enjoin, fine, and otherwise prohibit Plaintiffs and other similarly situated persons from providing childbirth services without a Certificate of Need. O.C.G.A. 31-6-21.

I. FACTUAL ALLEGATIONS

PLAINTIFFS WISH TO PROVIDE SAFE, AFFORDABLE, AND DESPERATELY NEEDED CHILDBIRTH SERVICES TO GEORGIA MOTHERS AND THEIR FAMILIES.

16. Plaintiff Katie Chubb is a mother, nursing student, and long-time entrepreneur. She has run her own personal fitness business for 12 years, focusing on helping women maintain physical health during pregnancy. In that time, she has developed a passion for assisting expecting mothers through the challenges of pregnancy, leading her to pursue a nursing degree. Once she obtains her degree, she intends to secure certification as a nurse-midwife.

17. Ms. Chubb is the mother of two young children and has experienced childbirth in both hospital and birth center settings. For her first child, she preferred to give birth at a freestanding birth center.

18. A freestanding birth center is a non-hospital healthcare facility that offers prenatal and childbirth services. Ga. Comp. R. & Regs. R. 111-8-7-.01. Freestanding birth centers are staffed and operated by physician-supervised certified nurse midwives (CNMs) and are preferred by some mothers for their personal attention and home-like environment. Birth centers are legal in Georgia, but there are only three freestanding birth centers in the state, which sees over 120,000 childbirths annually. All three existing birth

centers are located at least 150 miles away from ABC's proposed location. Not one is located within a 2-hour drive of Augusta.

19. Because there were no birth centers near her home in Northeastern Georgia, Ms. Chubb had no other option than to take regular 5-hour round-trip drives to the Atlanta Birth Center for prenatal care and labor. She made this trip approximately 15 times over the course of her pregnancy.

20. Ms. Chubb endured the hardship of regular travel to and from the birth center because she was impressed by the personalized and sensitive care provided by the certified nurse midwives and physicians on staff. For example, birth centers tend to avoid having strangers in the birthing room and carry a lower risk of C-sections. Mothers also tend to have more freedom over whether they have friends or family in the room and how they labor, for example in a warm bath. Many other women will not or cannot sustain the burden and expense of the long-distance travel required to access birth center services from the Augusta area.

21. Because she has experienced childbirth care under both the hospital and birth center models and witnessed the difference, Ms. Chubb was galvanized to form a team of qualified professionals and establish birth center services in Northeastern Georgia.

22. Ms. Chubb found that the status of childbirth healthcare in Georgia is bleak. According to one report, 58% of pregnancy-related deaths in 2019 were preventable.¹ With 90 deaths in 2014, the state's maternal mortality rate ranked lower than that of Turkmenistan. With 78 deaths in 2015, the state ranked only slightly higher than Libya, but below Iraq. The Augusta area—the region Plaintiffs wish to serve—is even worse off. With five deaths in 2015, the region ranked worse than the state average and ranked below that of Cuba and Syria. As of 2017, Georgia's infant mortality rate ranked sixth highest in the U.S. with some rural areas ranking worse than third-world countries.

23. In response to the dismal state of childbirth healthcare and the lack of choices for expecting mothers, 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.

24. Plaintiffs would further adhere to all Georgia health and safety regulations including, but not limited to, CNM licensing, physician supervision, birth center staffing standards, and patient risk pre-qualification. Plaintiffs

¹ See *Healthy Mothers, Healthy Babies Coalition of Georgia*, State of the State Report (2019).

will also adhere to practice standards established by the American Association of Birth Centers.

THE CHALLENGED LAWS AND THEIR ENFORCEMENT

25. Properly staffed birth centers are a safe option for mother and child and they are legal in all 50 states. Only 15 states require birth centers to secure a CON.

26. Birth centers are explicitly authorized by Georgia law. R. & Regs. R. 111-8-7.

27. According to studies, birth centers are a safe alternative to hospital births and an even safer alternative to homebirths, which are also legal in Georgia. One study analyzed a sample of 14,881 women admitted to a birth center in labor and found that less than 1% of births were transferred to a hospital for emergency reasons. A smaller percentage of women and infants (0.4% of women and 0.6% of infants) were transferred to a hospital after birth for emergency reasons.² Birth centers maintain comparable health outcomes for mother and child.³

² See, Susan R. Stapleton, et al., *Outcomes of Care in Birth Centers: Demonstration of a Durable Model*, 58 *Journal of Midwifery and Women's Health* 3-14 (2013).

³ See e.g., *id.*; J.P. Rooks, et al., *Outcomes of Care in Birth Centers*, *The New England Journal of Medicine* (1989).

28. Birth centers also alleviate the financial burden of childbirth on the overall healthcare system. Service charges at birth centers are generally lower than charges for hospital births in the same area, and the lower number of unnecessary medical interventions grants mothers a significant reduction in childbirth costs.

29. ABC would provide significant cost savings to its patients and their families. ABC's projected charges for uninsured, uncomplicated deliveries is \$5,000, which is lower than all three of the local hospital systems. According to the Department's Annual Hospital Questionnaire (2020), the charge is \$10,024 less than AU Medical Center, \$17,552 less than Doctors Hospital of Augusta, and \$2,371 less than University Health Care System (now Piedmont Augusta).

30. Birth centers also offer mothers an important alternative to hospitals. They provide a comfortable home-like environment, personal attention, affordable and accessible services, avoidance of contact with sick people, and compatibility with personal values.

31. Beyond the benefits enjoyed by expecting mothers and their infants, freestanding birth centers can help alleviate the pressure on overwhelmed or understaffed hospital maternity wards.

32. While birth centers are legal in Georgia, a prospective birth center cannot lawfully open its doors without first obtaining a Certificate of Need from the Department, and then securing a permit. O.G.C.A. § 31-6-40; Ga. Comp. R. & Regs. R. 111-2-2-.25.

33. A healthcare facility that offers services without having first obtained a required CON may be fined an amount of \$5,000 per day for 30 days, \$10,000 per day from 31 days through 60 days, and \$25,000 per day after 60 days. O.G.C.A. § 31-6-45.

34. To obtain CON approval, a prospective birth center must first submit a letter of intent to the Department at least 30 days prior to applying for a CON. O.G.C.A. § 31-6-43.

35. Next, the prospective service provider must submit an application to the Department and pay an application fee. The fee is \$1,000 for applications for projects costing up to \$1,000,000 and 0.1% of the total cost if the project is greater than \$1,000,000. R. & Regs. R. 111-2-2-.06(4).

36. When a new application is submitted, the Department will provide notice of the application to a newspaper of general circulation in the county of the project. R. & Regs. R. 111-2-2-.07.

37. After deeming an application complete, the Department will review an application to determine whether an existing business in the

proposed services area already provides similar services to the applicant, thereby rendering the applicant's services "unnecessary." 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." R. & Regs. R. 111-2-2-.09(c)(3).

38. The applicant has the burden of proving that their services would not "duplicate" those of existing providers.

39. This requirement serves to protect the economic interests of existing providers.

40. Established healthcare facilities may oppose a Certificate application if the applicant would be competitor providing "substantially similar services" within a 35-mile radius or within an overlapping service area. O.G.C.A. § 31-6-43(d)(1). No other entities apart from direct competitors are authorized to oppose a Certificate application.

41. Birth centers must also secure a written agreement for transfer and emergency services from at least one nearby backup hospital that provides at least Level II perinatal services, *i.e.*, their direct competitors. *Id.* Additionally, every physician practicing at the birth center must have admitting privileges at the backup hospital. *Id.* Admitting privileges are

formal agreements between a physician and a hospital allowing the physician to directly admit patients to the hospital and provide services as medical staff.

42. Hospitals may refuse to enter into a transfer and emergency services agreement for reasons unrelated to a birth center's ability to provide safe and effective services. The most obvious reason is that birth centers are in direct competition for childbirth services. Hospitals may therefore veto the construction of a new birth center even if the birth center has the functional equivalent of a transfer agreement: a physician on staff who has admitting privileges at the same hospital.

43. Further, under the Emergency Medical Treatment and Active Labor Act (EMTALA), hospitals that accept payments from Medicare—including the three hospitals in ABC's proposed service area—must admit patients suffering a medical emergency without regard to citizenship, legal status, or ability to pay. This includes emergency transfers from even illegal healthcare operations.

44. The transfer agreement requirement is thus redundant to both the admitting privileges requirement and EMTALA. It requires birth centers to get their competitors to agree to accept transfers that they are already obligated to accept.

45. If able to obtain a Certificate, the applicant must then apply for a permit. R. & Regs. R. 111-8-7-.03. Other than a permit requirement duplicating the transfer agreement requirement, R. & Regs. R. 111-8-7-.07, Plaintiffs do not challenge any of the permitting provisions.

46. The need requirement and the transfer agreement requirements collectively form a competitor's veto that confers no health benefits. Rather, the regulations deprive Plaintiffs of their constitutional right to provide safe and affordable childbirth services and the constitutional right of Georgia mothers to choose the place and manner of giving birth.

**THE CHALLENGED REQUIREMENTS PREVENT PLAINTIFFS
FROM PROVIDING SAFE AND AFFORDABLE CHILDBIRTH
SERVICES TO GEORGIA MOTHERS.**

47. On August 23, 2021, Plaintiffs applied for a Certificate to provide childbirth services in State Service Delivery Region (SSDR) 7.⁴ Their 821-page application package provided information demonstrating a need for childbirth services in the prospective service area. In addition to providing extensive statistical data supporting a “need” for childbirth services in the proposed service area and a lack of existing alternative services, Plaintiffs also cited

⁴ Plaintiffs wish to serve eleven counties in SSDR 7 including Richmond, Burke, Columbia, Glascock, Jefferson, Jenkins, McDuffie, Taliaferro, Warren, Washington, and Wilkes counties.

studies showing that more childbirth services would improve outcomes for Georgia mothers.

48. At the time of the application, Plaintiffs had received over 150 letters of support from prospective patients, local community leaders, and healthcare providers. Since then, that number has risen to over 500 letters of support.

49. After the Department provided notice of the new application, two hospitals located in the proposed service area – University Health Care System (now Piedmont Augusta) and Augusta University Medical Center – submitted letters of opposition to Plaintiffs’ application.

50. Both letters contended that ABC’s services were unneeded because the hospital services adequately served the proposed service area.

51. All three local hospitals—including the two opposing hospitals — refused to enter into a transfer agreement with ABC, effectively vetoing ABC’s application.

52. On December 22, 2021, the Department denied ABC’s application. While it found that ABC’s services were financially feasible, that ABC’s charges for uncomplicated deliveries were reasonable, and that the ABC’s project would enhance the delivery of health services by offering low-cost, high-quality alternative for perinatal health care services in the proposed service

area, it denied the application for the sole reason of failing to secure the cooperation of their direct competitors and to secure an emergency transfer agreement.

53. Because ABC has secured a transfer agreement with a physician who has admitting privileges to multiple local hospitals, and because EMTALA already requires hospitals to accept emergency transfers anyway, the transfer agreement requirement would not improve the health outcomes of ABC's patients.

54. Both the need requirement (which denies new birth centers the ability to operate if the Department deems there to be enough providers) and the transfer agreement (which needlessly requires permission from a local hospital) jeopardize women's health by stifling ABC's ability to provide safe, affordable, and effective services to Georgia women. Many expecting mothers who would like to experience birth at a birth center under the CNM model of care will have no options in ABC's proposed service area. The Certificate of Need law not only limits the number of legal birth centers, it forces women to incur additional travel and healthcare costs to secure childbirth services.

55. 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 under the circumstances of their choosing.

56. Georgia's CON requirement has also stopped Ms. Chubb from fulfilling her dream of starting a non-profit birth center that serves the needs of the Augusta community and the surrounding area.

LEGAL CLAIMS
FIRST CLAIM FOR RELIEF
(Due Process of Law)

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

58. The Due Process of Law Clause of the Fourteenth Amendment protects the liberty of individuals to be free from unreasonable or arbitrary government interference, including the fundamental right of mothers to choose the place and manner of giving birth. Under this provision, a law cannot deprive any person of her right to choose between safe alternatives for childbirth unless the law is narrowly tailored to achieve a compelling government interest.

59. Though that right is not explicit, it is one of the rights retained by the people under the Ninth Amendment.

60. That right is deeply rooted in this nation's law, history and tradition. 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.⁵

61. When the Fourteenth Amendment was enacted in 1868, midwifery was universally legal and women maintained extensive choices among a variety of birth assistants.⁶

62. From the colonial period until the early part of the 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. To this day, homebirths are widely legal and birth centers are legal in all 50 states, with only fifteen requiring a CON and even fewer requiring a transfer agreement.

63. By imposing the challenged provisions on freestanding birth centers and their providers, Georgia's CON program limits Georgia mothers' privacy in family-planning and unnecessarily limits their choices for childbirth services.

⁵ Richard Wertz & Dorothy C. Wertz, *Lying-In, A History of Childbirth in America* 260 (1989)

⁶ *Id.* at 133.

64. The program also violates Plaintiffs' fundamental right to earn a living.

65. The Certificate program's requirement that a prospective birth center secure a written agreement for transfer and emergency services with a direct competitor does not serve any compelling, or even legitimate government interest.

66. Here, Plaintiffs had secured a transfer agreement with a physician who maintained admitting privileges to multiple qualifying backup hospitals as well as two ambulance agreements that guaranteed transfer to a hospital within 30 minutes. Further, EMTALA already requires that hospitals accept emergency cases regardless of the patient's citizenship, legal status, or ability to pay. Thus, this requirement does nothing to improve the health outcomes of any potential emergency transfers. It serves only the illegitimate end of economic protectionism for hospitals.

67. The Certificate program's requirement that prospective birth centers demonstrate "need" for their services likewise serves no compelling, or even legitimate government interest. Rather, by arbitrarily restricting the entrance of new childbirth services based on the number of existing services, it serves only to protect incumbent hospital providers from economic competition.

68. By artificially limiting the supply of birth center services based on whether a new provider will compete with existing providers, the Certificate program increases costs, lowers service quality, and decreases access to care. It is therefore not narrowly or even rationally tailored to achieve any government interest.

69. Birth centers are safe and legal in Georgia. Federal and state law ensure that birth center patients receive timely emergency services if necessary, and otherwise ensure such facilities are safe. There is no compelling or rational reason to impose the challenged requirements, which effectively deny access to services altogether.

70. Given the time-sensitive nature of childbirth, Plaintiffs and their 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 CLAIM FOR RELIEF

(Equal Protection)

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

72. Under the Equal Protection Clause of the Fourteenth Amendment, a law that discriminates between who may and who may not exercise a

fundamental right is unconstitutional unless the law's classifications are narrowly tailored to serve a compelling government interest.

73. Through its competitor's veto provisions, Georgia's Certificate program draws an arbitrary distinction between childbirth providers that may operate and those that may not.

74. This distinction is not related to the provider's fitness to operate, it relates only to whether a birth center is able to secure permission from a competitor.

75. Georgia's Certificate program does not impose a transfer agreement provision on those who conduct homebirths—a service that, though legal, has significantly worse outcomes than childbirth at a birth center.

76. Georgia's Certificate program does not impose a transfer agreement requirement on many other healthcare facilities, such as ambulatory surgical centers, that provide riskier services than childbirth or prenatal services.

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

THIRD CLAIM FOR RELIEF
(Privileges or Immunities Clause)

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

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

80. 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 authors' concerns was the right to enter a common occupation.

81. Congress also intended to afford constitutional protection to those rights enshrined in the Civil Rights Act of 1866. Among those protected liberties was the right to earn a living.

82. 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.

83. Plaintiffs are suffering and will continue to suffer substantial and irreparable harm until the arbitrary, irrational, and fundamentally unfair

procedures established by Georgia's Certificate program for birth centers are declared unlawful and enjoined by this Court.

II. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

A. An entry of judgment declaring that the need and transfer agreement requirements of the Georgia Certificate program established by O.C.G.A. 31-6-1, et seq.; Ga. Comp. R. & Regs. R. 111-2-2-.09 (1)(c), .25(4); and R. & Regs. R. 111-8-7-.07 violate the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment to the United States Constitution;

B. An entry of a permanent injunction enjoining Defendants from enforcing the need and transfer agreement provisions of the Georgia Certificate program for birth center services as well as the transfer agreement provision of Ga. Comp. R. & Regs. R. 111-8-7-.07;

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 17th day of August, 2022.

/s/ Yasha Heidari
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**Pro Hac Vice application to be
filed*