

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

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.)

Case No. _____

**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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