No. 24-3027

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HEATHER SWANSON and ONEIDA HEALTH, LLC,

Plaintiffs – Appellants,

v.

MIKE HILGERS, Nebraska Attorney General,
and CHARITY MENEFEE, Director of the Division
of Public Health, in their official capacities,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Nebraska
No. 4:24-cv-03072
Hon. Robert F. Rossiter, Jr., U.S. District Court Judge

APPELLANTS' OPENING BRIEF

JOSHUA POLK
HALEY DUTCH
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JPolk@pacificlegal.org
HDutch@pacificlegal.org
Attorneys for Plaintiffs-Appellants

SUMMARY OF THE CASE

Heather Swanson, a certified nurse midwife (CNM), and her healthcare business, Oneida Health, LLC, appeal from the decision below.[1] They challenge two restrictions imposed on licensed CNMs in Nebraska: (1) CNMs are barred from attending home births under any circumstances, including when under physician supervision; and, (2) CNMs are barred from practicing without obtaining a collaboration agreement from a local physician.

Dr. Swanson alleges that the challenged restrictions violate the right of expecting mothers to choose the place and manner of giving birth, and the right of nurse midwives to provide childbirth services. Nebraska filed a motion to dismiss, arguing that Dr. Swanson lacked standing to represent expecting mothers and did not state a plausible claim for relief. The district court granted the motion, and Swanson filed this appeal.

Appellant respectfully requests 15 minutes of oral argument per side to address the important fundamental rights at stake in this litigation.

[1] For the sake of clarity and brevity, Appellants Heather Swanson and Oneida Health, LLC, will be referred to as "Dr. Swanson" through this opening brief.

CORPORATE DISCLOSURE STATEMENT

Appellant Oneida Health, LLC, by and through its attorney Joshua Polk, and pursuant to Federal Rules of Appellate Procedure 26.1(a), hereby states:

Appellant Oneida Health, LLC, is a limited liability company wholly owned by Appellant Heather Swanson. It has no publicly or privately owned parent corporation.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction to review Dr. Swanson's claims under 28 U.S.C. § 1331. The district court entered its order and judgment granting Nebraska's motion to dismiss on September 9, 2024. Dr. Swanson filed her notice of appeal on October 3, 2024. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(ii) and 4(a)(4)(A)(iv). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether midwives have third-party standing to represent expecting mothers who wish to give birth with the assistance of a certified nurse midwife but are prevented from doing so under Nebraska law.

Apposite Cases: *June Med. Servs., LLC v. Russo*, 591 U.S. 299, 318 (2020); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014).

2. Whether Dr. Swanson has plausibly stated a claim under the 14th Amendment that the challenged Nebraska laws unconstitutionally burden her right to provide childbirth services.

Apposite Cases: *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Des Moines Midwife Collective v. Iowa Health Facilities Council*, Case No. 4:23-cv-00067, 2024 WL 2747758 (S.D. Iowa May 29, 2024).

Apposite Constitutional Provision: Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

I. Factual Background

Heather Swanson is a Certified Nurse Midwife (CNM), nurse practitioner, and professor of nursing and midwifery with decades of experience in childbirth. App. 4, R. Doc. 1 at 3. CNMs are state-licensed advance practice nurses qualified to provide independent birth care, with nursing degrees and further training in the medical aspects of childbirth. With her education, license, and decades of experience, Dr. Swanson seeks to provide Nebraskan women with safe, high quality, and much-needed homebirth and in-facility childbirth services through her healthcare business, Oneida Health, LLC. *Id.*

There is a severe shortage of healthcare professionals in Nebraska, especially in rural areas. App. 7, R. Doc. 1 at 6. Many Nebraskans must drive hours to reach proper care—a heavy burden, and one that's even heavier if the patient is pregnant or in labor. App. 9, R. Doc. 1 at 8. Dr. Swanson seeks to fill the gap in accessible healthcare, but Nebraska severely limits where and with what attendants a childbirth may occur.

Homebirths are legal in every state—including Nebraska—but Nebraska law makes them much more dangerous by forbidding CNMs

from attending them. Nebraska Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. § 38-612(2); App. 6, R. Doc. 1 at 5. CNMs who violate this ban face fines and criminal prosecution. *Id.* Thus, while it is legal for a Nebraska woman to give birth in her home alone, if a CNM assists her, the CNM is subject to jail time.[1] Many Nebraskan women want to give birth at home, in a safe manner assisted by a CNM, but the government forces these expecting mothers into a difficult choice: giving birth at home completely unassisted or finding their way to the nearest hospital which may or may not offer midwifery services. App. 5, 8, R. Doc. 1 at 4, 7.

Nebraska law further limits the availability of CNMs to expecting mothers by forcing CNMs to enter into collaboration agreements with willing local physicians, *i.e.*, one of their direct competitors, on terms wholly unrelated to health and safety of the expectant mothers or their infants. Neb. Rev. Stat. § 38-613(3)(b); App. 8, R. Doc. 1 at 7. The statute does not limit the conditions that a physician may impose on collaborating CNMs, and there is no requirement that imposed

[1] A CNM is the only trained attendant available to most Nebraska women who opt for homebirth. Physicians are rarely available to assist with homebirths. App. 9, R. Doc. 1 at 8.

conditions serve any health or safety objective. *Id.*; App. 9, 11, R. Doc. 1 at 8, 10.

Further demonstrating the anticompetitive purpose, the statute does not set out guidelines for supervision or otherwise specify what supervisory conditions must be included in a collaborating agreement. *Id.* It does nothing but give physicians veto power over their competition. As a result, it is impossible to enter into a collaboration agreement in many places due to a lack of willing physicians. Worse still, many hospitals with eyes for only the bottom line bar associated physicians from entering into agreements with CNMs. App. 9, R. Doc. 1 at 8.

Thus, many expecting mothers have no access to CNM services. *Id.* The challenged provisions have forced Dr. Swanson to turn away dozens of women who typically go on to give birth in more dangerous settings with less qualified attendants or no attendants at all. App. 10, R. Doc. 1 at 9. These regulations put the economic interests of a select few incumbent physicians over the constitutional rights of Dr. Swanson and her prospective patients. App. 11-12, R. Doc. 1 at 10-11. As set forth below, Nebraska lacks any reasoned basis for denying Nebraskans their rights in this manner.

II. Legal Proceedings

On April 16, 2024, Dr. Swanson and Oneida Health, LLC, filed a complaint challenging both the ban on CNM attendance at homebirths and the collaboration agreement requirement. App. 2, R. Doc. 1. Dr. Swanson raises her own constitutional right to provide childbirth services and also the right of prospective patients to receive her services. App. 3, R. Doc. 1 at 2. She alleges that the challenged provisions unconstitutionally interfere with expecting mothers' right to choose the place and manner of giving birth and the right of CNMs like Dr. Swanson to provide the desired childbirth services. *Id.*

On May 29, 2024, the state filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). R. Doc. 17. On September 9, 2024, the district court granted the motion. It held that Dr. Swanson and Oneida Health lacked standing to represent their prospective patients and did not state a plausible claim for a violation of their own rights. R. Doc. 22. Dr. Swanson timely appealed that judgment. R. Doc. 23.

LEGAL STANDARD

This Court reviews the district court's decision to dismiss *de novo*. *Liscomb v. Boyce*, 954 F.3d 1151, 1153 (8th Cir. 2020); *Buckler v. United States*, 919 F.3d 1038, 1044 (8th Cir. 2019). The Court must construe the allegations in the complaint in the light most favorable to Dr. Swanson and take all inferences in her favor. *Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 715-16 (8th Cir. 2011). Dismissal is only appropriate "in the unusual case" where there is "some insuperable bar to relief." *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir. 1978); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (dismissal is inappropriate even where facts plead are unlikely or improbable).[2]

ARGUMENT

The district court dismissed Dr. Swanson's complaint, finding that: (1) she did not have standing to assert the rights of expectant mothers; and, (2) she did not state a claim for relief under the Fourteenth

[2] While the plaintiff has the burden of establishing subject matter jurisdiction, the district court was correct that "the third-party standing question the State raises does not appear to involve the jurisdictional issues that implicate Rule 12(b)(1)." App. 22, R. Doc. 22 at 5 (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

Amendment. It was wrong on both counts, and the decision below should be reversed.

I. Dr. Swanson Has Standing to Assert the Constitutional Rights of Her Patients

A plaintiff may assert the constitutional rights of a third party if two conditions are satisfied: (1) the plaintiff and third party have a close relationship and (2) the third party is somehow hindered from asserting its own rights. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). The Supreme Court has recognized that reproductive healthcare providers have third-party standing to assert the rights of their patients as a matter of law. *Id.* Under *Powers* and other controlling precedent, Dr. Swanson has standing to assert the rights of her patients.

A. *June Medical* Controls

The Supreme Court's decision in *June Medical Services v. Russo*, 591 U.S. 299 (2020), directly resolves the standing issue in this case. There, the Court held that medical providers who serve pregnant women and face legal consequences for doing so have standing to sue on their patients' behalf. *Id.* at 318–19.

The standing ruling from *June Medical* is binding on this Court, despite the opinion being overruled on other grounds. The district court

suggested that the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 292 (2022), "casts doubt" on *June Medical*'s standing analysis. App. 22, R. Doc. 22 at 9. But, of course, this Court must follow Supreme Court precedent until it is expressly overruled. *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016); *Truesdell v. Friedlander*, 80 F.4th 762, 782 (6th Cir. 2023) (Supreme Court decisions "remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). In *Dobbs*, the Supreme Court explicitly overruled two abortion-rights cases, *Roe* and *Casey*, while leaving the standing analysis in *June Medical* untouched. *Dobbs*, 597 U.S. at 292.

In fact, since *Dobbs* was decided, several appellate courts have relied on *June Medical*'s standing holding, while acknowledging that its holding on the right to abortion was abrogated. *See, e.g.*, *Luca McDermott Catena Gift Tr. v. Fructuoso-Hobbs SL*, 102 F.4th 1314, 1324 n.2 (Fed. Cir. 2024); *Metro. Washington Chapter, Associated Builders & Contractors, Inc. v. D.C.*, 62 F.4th 567, 574 (D.C. Cir. 2023); *Tingley v. Ferguson*, 47 F.4th 1055, 1069 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33

(2023). This Court should do the same and apply the binding Supreme Court precedent of *June Medical*.

B. Dr. Swanson Has Article III Standing Even if *June Medical* Is No Longer Binding

Instead of applying *June Medical*, the district court relied on the Supreme Court's earlier opinion in *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). The court below suggested that third-party standing is disfavored and that a party must assert her "own legal rights and cannot rest [a] claim to relief on the legal rights or interests of third parties." App. 23, R. Doc. 22 at 23.

However, while *June Medical* is on point (and binding), *Kowalski* also supports third-party standing for Dr. Swanson. It cannot realistically be questioned that the threat of prosecution faced by Dr. Swanson impacts the constitutional rights of her patients. The Supreme Court has been "quite forgiving" about third-party standing where the litigant asserts that a third party will be harmed by proceedings initiated *against the litigant*. *See Kowalski*, 543 U.S. at 130 ("[T]his Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights.").

The district court erred by applying the stringent requirements meant for third parties who are *not* directly affected by enforcement of the challenged law. App. 24, R. Doc. 22 at 7. The *Kowalski* Court expressly held that its strict standard did not apply to situations like Dr. Swanson's. *Id.* (explaining third-party standing is proper in certain situations). Here, mothers are highly unlikely to be prosecuted if they choose a homebirth with a CNM, but nurse midwives like Dr. Swanson will face fines and even jail time for abiding a mother's choice. *See* Neb. Rev. Stat. §§ 38-612(2), 38-613(3)(b).

C. Dr. Swanson Also Has Standing Under *Kowalski*

Even under the stricter *Kowalski* standard, Dr. Swanson has established third-party standing. Under *Kowalski*, third-party standing exists when (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. 543 U.S. at 130. Both factors are present here.

1. Dr. Swanson Has a Close, Intimate Relationship with Her Patients

The closeness of the relationship between a woman and her medical provider is "patent." *Singleton v. Wulff*, 428 U.S. 106, 117 (1976). For good

reason, medical providers like CNMs are well situated to assert their patients' rights. *See, e.g.*, *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014).

First, medical providers face penalties for treating their patients, eliminating the risk of a lawsuit without a true case or controversy. *Id.*; *see also Griswold*, 381 U.S. at 481 ("[T]hose doubts are removed by reason of a criminal conviction for serving" the rightsholder.). Second, by virtue of the medical relationship, CNMs have an extremely high level of trust and intimacy with their patients. *See Planned Parenthood*, 748 F.3d at 589.

In *Planned Parenthood*, the court held that abortion doctors could assert their patients' rights, in part, because of that intimate relationship between abortion doctor and patient. Midwives have a much more intimate relationship with their patients. Whereas midwives generally see patients through nine months of pregnancy, at labor, and beyond, abortion doctors may only see their patients once.

Dr. Swanson repeatedly pleads facts showing how she meets the *Kowalski* factors in her complaint. Indeed, the facts can hardly be questioned. She clearly faces direct punishment for assisting women with

homebirths. *See* Neb. Rev. Stat. §§ 38-612(2), 38-613(3)(b). And, she obviously has a close relationship with her patients. App. 10, R. Doc. 1 ¶¶ 3, 39-41; *see also Singleton*, 428 U.S. at 117.

The district court rejected both of these well-pled allegations as merely "hypothetical," App. 24, R. Doc. 22 at 7. They are not; they are real. Dr. Swanson has had to turn away dozens of very real expecting mothers. App. 10, R. Doc. 1 at 9. And many of those women went on to have a riskier homebirth experience without a qualified provider. *Id.*

The district court was also wrong to hypothesize a conflict of interest between Dr. Swanson and her prospective patients. App. 24, R. Doc. 22 at 7. Not only is such conjecture improper on a motion to dismiss, *see Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020) (reversing order on motion to dismiss for failure to take all inferences in favor of plaintiff), but it is also contradicted by Dr. Swanson's allegations. The complaint seeks to represent expecting mothers who *want* to use midwifery services either at home or at a facility. App. 10, R. Doc. 1 at 9. And there are many such Nebraskan mothers. App. 10, R. Doc. 1, ¶ 39.

Further, challenging the requirement of a collaboration agreement does not generate a conflict of interest between Dr. Swanson and her prospective patients. *C.f. June Med.*, 591 U.S. at 318. Declaring the challenged provision unconstitutional would simply give expecting mothers an additional option in childbirth. It would not force expecting mothers to use the services of an unsupervised nurse midwife or otherwise place them in danger of a riskier childbirth.[3] The interest in accessible CNM services completely align. There is no conflict.

2. Expectant Mothers Are Hindered from Bringing Suit Under Nebraska Law

Nebraskan expectant mothers are plainly hindered from bringing suit themselves by the time-sensitive nature of pregnancy and childbirth. But the lower court disagreed, holding that because prospective patients have joined midwives in *other* suits, there is no hinderance to patients joining this lawsuit. But just because patients *have joined* other lawsuits, does not mean they aren't *hindered from joining* as required by *Kowalski*.

[3] Naturally, giving expectant mothers a choice to allow trained professionals to assist in homebirths is not riskier than requiring them to give birth wholly unassisted.

Contrary to the lower court, *Hodak v. City of St. Peters*, 535 F.3d 899 (8th Cir. 2008), does not hold otherwise. *See* App. 25, R. Doc. 22 at 8. *Hodak* involved a patient who was actively litigating the same case concerning the same issue. *Hodak*, 535 F.3d at 905. That is not true here. No prospective patient has challenged Nebraska's Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. §§ 38-612(2) and 38-613(3)(b), nor has any patient been involved in this litigation.

There is simply no authority to suggest a "hindrance" must make it impossible for a third party to assert her own interests. Nor should there be. In the context of childbirth (or abortion),[4] it is enough that there exists an extremely time-sensitive issue. App. 13, R. Doc. 1 at 12 ("Given the time-sensitive nature of childbirth, Plaintiffs and Plaintiffs' prospective patients are suffering substantial and irreparable harm . . . .").

Lastly, contrary to the district court's opinion, it would not "surpass strange," App. 25, R. Doc. 22 at 8, for third-party standing to exist where a similarly situated third party has sued before. That was also true in

[4] If a pregnant woman seeking an abortion faces obvious hindrances to bringing suit, then surely a pregnant women seeking to give birth in the home faces similar obstacles. *See Planned Parenthood of Greater Texas Surgical Health Servs.*, 748 F.3d at 589.

June Medical, where third-party abortion providers had standing even though prospective patients had sued in previous cases like *Roe v. Wade*, 410 U.S. 113 (1973). *Compare June Med.*, 591 U.S. at 318-19 (suit asserting third party standing), *with Roe v. Wade*, 410 U.S. at 120 (suit by prospective patient), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

Whether *June Medical* controls or doesn't, Dr. Swanson can assert the rights of her patients. Whether *Kowalski* controls or doesn't, Dr. Swanson can assert the rights of her patients. Under any understanding of the state of third-party standing, Dr. Swanson satisfies it.

II. Dr. Swanson Has Stated Fourteenth Amendment Claims

Dr. Swanson has properly pled her Fourteenth Amendment claims.[5] As set forth in the complaint, Dr. Swanson pled that the challenged provisions unlawfully burden her right to provide childbirth services to the expecting mothers who want that service. App. 10-13, R.

[5] The district court did not explicitly discuss Dr. Swanson's standing to assert her own rights, but it implied that she did have first-party standing by resolving her economic liberty claim on its merits. App. 18, R. Doc. 22. Further, the state did not argue against first-party standing below.

Doc. 22 at 9-12. Under any standard,[6] Plaintiffs are entitled to introduce evidence that the challenged regulations are not properly tailored to a compelling or even legitimate governmental interest. *See Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007); *Frost v. City of Sioux City, Iowa*, No. 16-CV-4107-LRR, 2017 WL 4126986, at *9 (N.D. Iowa Sept. 18, 2017) (whether the plaintiffs will ultimately prevail under the rational basis standard "is an issue for a later stage of the case"). The plausibility standard is not a "probability" requirement. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (citing *Iqbal*, 556 U.S. at

[6] The district court stated that Nebraska made a strong argument that the rights asserted in the complaint are "not fundamental." App. 22-23, R. Doc. 22 at 5-6. However, it ultimately passed on the question after determining that Dr. Swanson did not have standing to raise the fundamental rights of her prospective patients. *Id.* Now is not the time for the Court to rule on whether the right to give birth is fundamental. But because the district court unnecessarily disparaged Dr. Swanson's fundamental rights claim, Dr. Swanson notes here that she has more than sufficiently alleged that the right to give birth is a fundamental right. App. 5, 11-12, 15, R. Doc. 1 at 4, 10-11, 14 (alleging a deeply rooted right for expectant mothers to choose how to give birth). If proven true, the allegations in the complaint show that the challenged provisions of the Act would fail strict scrutiny. *See, e.g.*, App. 12, R. Doc. 1 at 11 (alleging that the lack of access to birth center services has imposed personal, monetary, and health-related burdens on expecting mothers); *see also Planned Parenthood of Greater Iowa v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997) (striking down a need review program under strict scrutiny analysis because it burdened access to a fundamental right).

678). That Dr. Swanson's claims may be difficult to prove does not impact whether she has stated a claim.[7] *Id.*

The district court did not separately address the two provisions Dr. Swanson and Oneida Health have challenged, even though the complaint provides detailed allegations unique to each provision. Instead, it lumped in both challenged provisions as a "licensing restriction" and declined to allow the case to proceed on the basis that the state legislature has the absolute authority to restrict the activities of licensed nurse midwives. App. 28-29, R. Doc. 22 at 11-12; *see also id.* at 11 (discussing the legislation's statement of purpose).

While the government has a legitimate interest in health and safety, mere recitation of a government interest cannot satisfy even rational basis review, much less the heightened scrutiny due here. There must be a real connection between the challenged law and the interest asserted. *See Heller v. Doe*, 509 U.S. 312, 320-21 (1993) ("the asserted State interest 'must find some footing in the realities of the subject

[7] Notably, courts in this Circuit have allowed cases presenting nearly identical legal issues to proceed beyond a motion to dismiss. *Des Moines Midwife Collective v. Iowa Health Facilities Council*, 2024 WL 2747758, at *7 (S.D. Iowa May 29, 2024). Plaintiffs should likewise receive the opportunity to prove their claims here.

addressed'"); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (holding that the Court is required to "insist on knowing the *relation* between the classification adopted and the object to be obtained").

Simply asserting a broad interest in health and safety does not—and cannot—substantiate a ban on CNMs attending homebirths. Even under the lowest standard of review, Dr. Swanson can show the stated interest is not real and merely pretextual. App. 15, Doc. 1 ¶¶ 65, 73. The law could also fail rational basis review if Dr. Swanson can show that the stated purpose is not furthered by Nebraska's scheme. She intends to show both and has pled as much.

First, she plausibly alleges that the stated interest in health and safety is pretextual. As Dr. Swanson alleges in her complaint, the challenged homebirth restrictions have *nothing* to do with health and safety. App. 14, R. Doc. 1 at 13. By its explicit terms, the restrictions do not "insure the availability of high-quality midwifery services." Instead, they explicitly bar the provision of such services. *C.f. Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (striking down licensing legislation where the government's asserted rationale "undercut[] the

principle of non-contradiction"). Restricting market entrants means *fewer* available services and *less* access, not more. *Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 985 F.2d 164, 167 (4th Cir. 1993) ("[R]estricting market entry . . . necessarily limits the available services because it limits the number of [providers] from which a [person] can seek service."). The obvious explanation for a law that puts unfettered power in the hands of physicians to restrict their competition is the protection of industry incumbents.

Second, even if the government passed the restrictions with a true interest in Nebraskan women's health and safety, these particular restrictions do not rationally advance those goals. As alleged in the complaint, the ban on attending homebirths bears no relation to the government's stated objection of maintaining the health and safety of expecting mothers and their infants and undercuts its interest in "insuring the availability" of high-quality services. It is irrational to say narrowing the healthcare market, reducing choice, and pushing women into completely unassisted childbirth advances their safety. Simply put, the restrictions mean that women who choose a homebirth must deliver their children alone, without medical assistance. The government cannot

explain how the addition of a qualified professional like Dr. Swanson—even with the supervision of a physician—could make that birth *more* dangerous. Dr. Swanson should have the opportunity to prove these allegations in court.

Regarding the challenged collaboration agreement restrictions, the lower court dismissed the complaint based on *Gorenc v. Klaassen*, 421 F. Supp. 3d. 1131 (D. Kan. 2019). But the regulation challenged in *Gorenc* was different in kind—it did not bar nurses from attending home births altogether, it just required supervision. *Id.* at 1139. Requiring supervision was found to have a rational relation to health. *Id.* at 1160. But that is not the case here, where midwives are barred from practice even under supervision and on terms that serve only the financial interests of incumbent physicians. App. 9, R. Doc. 1 at 8. Whether a Kansas law justified on different grounds, with different evidence and different factual predicates, survives rational basis review is hardly binding on whether this Nebraska law does. Not to mention that the right asserted here is fundamental, making the standard of review completely different.

Not all supervision requirements are created equal. Dr. Swanson's complaint contains detailed factual allegations about the specific provisions challenged here that, if proven true, demonstrate that the law bears no rational connection to the stated health and safety goals. *See* App. 9, 11-14, R. Doc. 1 ¶¶ 39, 50-57, 62-66, 73. *A fortiori*, it cannot survive heightened scrutiny.

Dr. Swanson has alleged that the law worsens health outcomes for mothers while serving only an illegitimate protectionist interest. At the motion to dismiss phase, these allegations, demonstrating a plausible claim for relief, must be taken as true. *See Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020).

CONCLUSION

Dr. Swanson and Oneida Health have standing to assert their own rights and the rights of expectant mothers in Nebraska, and their allegations state plausible claims for relief under the Fourteenth Amendment. The decision of the district court should be reversed.

DATED: November 12, 2024.

Respectfully submitted,

JOSHUA POLK
HALEY DUTCH
Pacific Legal Foundation

By: s/ *Joshua Polk*
JOSHUA POLK

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,481 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook.

DATED: November 12, 2024.

s/ *Joshua Polk*
JOSHUA POLK

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Joshua Polk*
JOSHUA POLK

CERTIFICATE THAT DOCUMENT IS VIRUS FREE

I hereby certify that on November 12, 2024, this document and the associated addendum was scanned for viruses using Symantec and are virus free.

s/ *Joshua Polk*
JOSHUA POLK