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' REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statute

ARGUMENT

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

Pregnancy is necessarily a time-sensitive condition. At most, it lasts nine months, every time. Expectant mothers experience emotional and physical changes on a near daily basis during that time. A just society does not expect pregnant women to engage in litigation related directly to the childbirth they wish to have. Circumstances like these are why the third-party standing doctrine exists. Doctors who work with pregnant women are the ideal plaintiffs to represent their plaintiffs' interests. And binding Supreme Court precedent makes that clear. *June Med. Servs. LLC v. Russo*, 591 U.S. 299, 318 (2020) (citing numerous cases upholding third-party standing in the childbirth context).

For these reasons, Dr. Swanson is an ideal third-party plaintiff to challenge Nebraska's restrictions. She risks direct criminal prosecution under Nebraska law. This harm is not abstract or theoretical. And, as set forth in the complaint, it is self-evident that if she were prosecuted, the challenged restrictions would burden expectant mothers' right to choose the place and manner of giving birth. A child conceived at the initiation of this case would have been born before the filing of this Reply Brief.

And this case has moved swiftly. This Court should hold that Dr. Swanson has standing to assert the rights of her prospective patients.

A. *June Medical* Is Binding on This Court and It Controls

This case is governed by the standing analysis set forth *June Medical Services v. Russo*, 591 U.S. 299 (2020), and the myriad cases upon which it relies. In *June Medical*, the Supreme Court recognized that medical providers who serve pregnant women and face legal consequences for doing so have standing to sue on their prospective patients' behalf—even without specifically naming the prospective patients. *Id.* at 318-19. This resolves the present appeal.

Nebraska disagrees. It argues that *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), which overruled certain abortion precedents, also *sub silentio* overruled decades of third-party standing precedent. Aple. Br. at 14. There is no basis for reading *Dobbs* that way. 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." *Truesdell v. Friedlander*, 80 F.4th 762, 782 (6th Cir. 2023).

June Medical and the cases upon which it relies remain binding precedent on this Court. Even if the standing analysis in *June Medical* was dicta it still (1) remains persuasive and (2) was based on myriad Supreme Court holdings that remain good law. *See In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1064 (8th Cir. 2017) ("Appellate courts should afford deference and respect to Supreme Court dicta . . . ."); *June Medical*, 591 U.S. at 318-19 (citing as support several cases including *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), and *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (holding that an attorney could raise rights of clients to challenge restrictions on fee arrangements)).

Several circuits have applied *June Medical*'s standing analysis since *Dobbs*. Contrary to Nebraska's argument, it simply doesn't matter that some of those decisions ultimately denied third-party standing. Aple. Br. at 19. It's the application of the precedent that matters, not the result. Regardless of the outcome, these cases unequivocally show that sister circuits have applied *June Medical* after *Dobbs*. *See, e.g.*, *Metro. Washington Chapter, Associated Builders & Contractors, Inc. v. D.C.*, 62 F.4th 567, 574 (D.C. Cir. 2023) (applying *June Medical*); *Tingley v.*

Ferguson, 47 F.4th 1055, 1069 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023) (same). This Court should do the same.

Nebraska also makes the sweeping argument that abortion cases should not apply in general. Aple. Br. at 14. It argues that access to an abortion doctor is the only safe way for a woman to obtain that procedure, while there are other ways for women to give birth safely. *Id.* While true, it isn't at all relevant to the standing discussion in *June Medical* or other pregnancy cases.[1]

None of the cited abortion cases concerned a statute that outlawed a doctor from providing abortions. Instead, they placed other restrictions on access to that procedure (time limits, admitting privileges, informed consent laws, etc.). *See, e.g.*, *June Medical*, 591 U.S. 299. The same is true here. Nebraska agrees with Dr. Swanson that banning homebirth

[1] Further, non-abortion cases, like *Griswold v. Connecticut*, 381 U.S. 479 (1965), also support standing for Dr. Swanson. Nebraska tries to distinguish *Griswold* because the litigant in that case had been criminally convicted. Aple. Br. at 15. However, just like the appellant in *Griswold*, Dr. Swanson faces criminal penalties for serving patients. Instead of subjecting herself to criminal penalties for serving patients, she seeks a declaration that the restrictions on her and her patients are unconstitutional. She certainly isn't required to violate the statute and risk criminal penalty in order to ripen her constitutional claims. *Id.*; *see Kowalski*, 543 U.S. at 130.

outright would implicate important constitutional rights. *See* Aple. Br. at 29. But it has placed restrictions on homebirths such that they are either unnecessarily dangerous or impossible to access. App. 12-13, R. Doc. 1 at 11-12. This forces women to choose between a riskier homebirth or a hospital birth they do not want. *Id.*

In any event, the standing analysis from *June Medical* and other Supreme Court precedent plainly applies, and Dr. Swanson has standing to assert the rights of her pregnant patients.

B. Nebraska Misreads Other Third-Party Standing Caselaw

Nebraska misreads several other third-party standing cases to argue that Dr. Swanson is not a proper third-party plaintiff. It argues that *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), categorically established that relationships with hypothetical future clients do not satisfy the close-relationship prong, Aple. Br. at 12, but that is not so. *Kowalski* set out two different categories of plaintiffs seeking third-party standing: one where third parties would be harmed by enforcement of the statute *against the litigant*, and one where they would not. *Kowalski*, 543 U.S. at 130. Under the former, there are relaxed standing rules; under the latter, there aren't. Here, because expectant mothers would be

harmed by enforcement of the statute against Dr. Swanson, the more relaxed doctrine plainly applies.

In *Kowalski*, the statute at issue was enforced directly against criminal defendants, not against the attorney-plaintiffs. *Id.* at 130. Accordingly, the Court held the attorneys to the stricter standard. *Id.* (enforcement against attorneys would not violate third-party rights). Under that more demanding standard, the *Kowalski* Court found that the attorneys did not have a sufficiently close relationship with prospective clients. *See id.* at 131. Here, however, the opposite is true. Dr. Swanson's prospective clients will be injured by the enforcement of the law *against Dr. Swanson*. Dr. Swanson's prospective patients are not "hypothetical." Rather, she has had to turn away dozens of real expecting mothers—most of whom went on to have riskier homebirths without her assistance. App. 10, R. Doc. 1 at 9.

In any event, at this stage, it was improper for the district court to hypothesize a conflict of interest between Dr. Swanson and her prospective patients. App. 24, R. Doc. 22 at 7. *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). Dr.

Swanson's interests are perfectly aligned with those of her patients—both want expanded access to safe homebirths. App. 9-10, 12, R. Doc. 1 at 8-9, 11.

Contrary to Nebraska's argument, Dr. Swanson does not purport to represent *all* expecting mothers. Dr. Swanson seeks to represent expecting mothers who wish to engage midwifery services for homebirth but are barred from doing so by the challenged restrictions. *Id.* Those mothers' interests are necessarily aligned with Dr. Swanson's.[2] Allowing Dr. Swanson to provide these services to the women who contract with her does not affect the right of other women to seek alternative childbirth options. In other words, Dr. Swanson seeks to provide an *additional option* in childbirth—not to force expecting mothers to use the services of an unsupervised nurse midwife against their will.[3]

---

[2] Nebraska does not advance a single reason why Dr. Swanson's prospective patients would want her to be criminally prosecuted for attending their homebirths at their own request.

[3] Nebraska's hypothetical homebirth patient that would "prefer Swanson to have a practice agreement with a supervising physician," *see* Aple. Br. at 21, is curious. Dr. Swanson is barred from providing homebirth services outright. And even if Dr. Swanson could serve homebirth patients, expecting mothers who wish to utilize the services of midwives with practice agreements would be free to do so. Ultimately, without this restrictive law, women could choose the setting of childbirth and the type of qualified birth attendant.

Under the challenged law, there are functionally no legal homebirth attendants in Nebraska, leaving mothers with the difficult choice of a vastly riskier homebirth experience or a sterile hospital experience they do not want. App. 11, R. Doc. 1 at 10-11. The law not only restricts constitutional rights but also removes maternal autonomy in birthing choice. And it does so while unquestionably making homebirths significantly more dangerous. *Id.*

C. Expecting Mothers Are Hindered from Bringing Suit

The district court quoted *Hodak v. City of St. Peters*, 535 F.3d 899, 905 (8th Cir. 2008), to hold that if the third-party group has sued in *any* case, that group could not be hindered from bringing suit in the present case. App. 25, R. Doc. 22 at 8. Nebraska repeats that mistake here. Aple. Br. at 15-16. *Hodak* stands for the unremarkable proposition that it would be strange to find a hinderance if the third-party had already sued in the *same case* in which another party asserts third-party standing. *Hodak*, 535 F.3d at 905.

That's not true here. Nebraska acknowledges that there are many cases finding third-party standing for abortion providers due to the obstacles pregnant women face in asserting their own rights. This is true

even though pregnant women have asserted their own right to abortion in prior cases. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

Nebraska insists that Dr. Swanson cannot show that pregnant women are "categorically" hindered from bringing suit. Aple. Br. at 16. To be sure, a pregnant woman could theoretically sue for her right to give birth at home with a certified nurse midwife like Dr. Swanson. But that's not the standard. That is also true in the abortion context. Both abortion and homebirth are limited by the time-sensitive nature of pregnancy. This obstacle is "not insurmountable," but total impossibility of a right-holder suit has never been a requirement for third-party standing. *See Singleton v. Wulff*, 428 U.S. 106, 117 (1976). It is enough that "some barrier or practical obstacle" stands in the way of the right-holder. *Hodak*, 535 F.3d at 904. The time limit imposed by pregnancy suffices to stand in the way of suit here.[4]

[4] Nebraska also argues that a pregnant woman who wants to give birth has a few more months of time to assert her right than a pregnant woman who wants an abortion. Aple. Br. at 16-17. But that is not necessarily so in either direction. There is no guarantee a baby is going to wait until the mother is full-term. And, on the other hand, where pregnancy threatens the life of the mother, courts have recognized right to abortion through the full term of the pregnancy. Nonetheless, courts have had no issue finding third-party standing for doctors suing to protect that right,

In any event, even a full nine months is a relatively short time in which to litigate a federal case—as demonstrated by the fact that it has already been over nine months since the initiation of this action. This is an obvious hindrance in the context of childbirth. *See also Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014). Because Dr. Swanson's prospective patients face significant obstacles to filing to protect their own right to choose the place and manner of giving birth, Dr. Swanson is a suitable party to assert their rights in this action.

II. Dr. Swanson Has Plausibly Stated Fourteenth Amendment Claims on Her Own Behalf[5]

As Dr. Swanson alleges, the contested restrictions do not rationally advance an interest in safety. App. 11-12, R. Doc. 1 at 10-11. Nebraska argues that the effect of the law—driving women to have homebirths without assistance—is mere "imprecision" in achieving its legitimate

---

though the expecting women had the full term of pregnancy to defend it themselves. *See, e.g.*, *Planned Parenthood of Rocky Mountains v. Owens*, 287 F.3d 910 (10th Cir. 2002).

[5] Dr. Swanson agrees that after the Opening Brief was filed, the Nebraska Supreme Court decided an open question of law and resolved that the State could also prosecute lay midwives under the Nebraska Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. § 38-612(2). *State v. Jones*, 10 N.W.3d 747, 756 (Neb. 2024).

safety aims. Aple. Br. at 29. But that is not so, and Dr. Swanson should have the chance to prove it. She properly alleges that the law is intended to force women exercising a constitutional right to do so in a highly dangerous way or not at all. App. 8, 12, Doc. 1 at 7, 11. This is not a rational means to achieve a legitimate interest in safety. *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"). After all, the addition of a qualified professional like Dr. Swanson could not make homebirth *more* dangerous than proceeding with unassisted childbirth. App. 14, R. Doc. 1 at 13.

Nebraska argues that the law "regulates certified nurse midwives, not patients." Aple. Br. at 29. But, just as in the abortion context, a law barring providers from certain actions can certainly restrict the rights of patients as well. *See June Medical*, 591 U.S. 299 (striking down admitting privileges requirements for abortion providers).

The district court cases that Nebraska cites are not helpful. *See, e.g.*, *Gorenc v. Klaassen,* 421 F. Supp. 3d 1131, 1159 (D. Kan. 2019). In none of these cases did the government impose a total ban on, much less

criminal prosecution for, midwives in a certain birth practice. *See* App. Br. at 21.

Nebraska asserts that Dr. Swanson's allegations are conclusory, Aple. Br. at 32, ignoring the detailed allegations that the challenged restrictions arbitrarily limit the supply of childbirth services and put expecting mothers' health and safety at risk all while worsening childbirth outcomes. App. 9, 11-14, R. Doc. 1 ¶¶ 39, 50-57, 62-66, 73. At this stage, Dr. Swanson is entitled to introduce evidence that these allegations are true. *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). Thus, taking all Dr. Swanson's allegations as true, as the Court must do at this point in litigation, she has stated a plausible claim under the

Fourteenth Amendment. *See Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020).[6]

[6] Nebraska expends considerable ink on whether expecting mothers have the right to choose the place and manner of giving birth. *See, e.g.*, Aple. Br. at 25-27. This issue is not before the Court. Nebraska even acknowledges that the district court did not rule on the issue below. Aple. Br. at 27 n.5. Yet, it suggests that the Court can affirm a district court's holding for any reason supported by the record. But there is simply no holding on the issue to affirm. It may be true that this Court could affirm the district on the issue of third-party standing for reasons not given by the district court, but this Court cannot rule on a substantive issue for which there is no holding at all. *C.f. Hales v. Green Colonial, Inc.*, 490 F.2d 1015, 1017 n.3 (8th Cir. 1974) ("Although the parties urge us to pass on the merits of the cross-claims . . . we decline to do so. There is no judgment on the cross-claims by the district court and any ruling we could now give would be advisory.").

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.

DATED: February 18, 2025.

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 2,799 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: February 18, 2025.

s/ *Joshua Polk*
JOSHUA POLK

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2025, 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 February 18, 2025, this document and the associated addendum was scanned for viruses using Symantec and are virus free.

s/ *Joshua Polk*
JOSHUA POLK