IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HOPE LINDSTROM, Plaintiff, v. MICHAEL HILGERS, in his official capacity as the Attorney General of the State of Nebraska; and ASHLEY NEWMYER, 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. 4:26-cv-3024 **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns Nebraska's direct interference with one of the most personal and consequential decisions an expecting mother will make: how she will give birth. Like every other state, Nebraska permits women to give birth at home. But Nebraska is unique in that it forbids them from receiving assistance from certified nurse midwives ("CNMs") while doing so. The result is a categorical exclusion of one of the safest and most accessible forms of professional home-birth care, imposed at the point when a woman must decide the circumstances under which she will bring her child into the world.

Plaintiff Hope Lindstrom is an expecting mother, a licensed pastor, and a Nebraska resident. She is currently pregnant with her second child, a daughter, and is expected to give birth on or around April 22, 2026. Ex. A, Lindstrom Decl. at 3. Her pregnancy is low-risk. She has no significant medical conditions, the pregnancy is with a single child, and fetal development is progressing normally. *Id.* at 1-2. There are no identified maternal or fetal factors that increase the likelihood of complications beyond the ordinary risks of pregnancy and childbirth. *Id.* Based on her medical history, personal values, and religious beliefs, Ms. Lindstrom seeks to have a water birth at home. *Id.* at 3. As with her first child, she seeks the assistance of a CNM. *Id.* She intends to have more children in the future the same way. *Id.*

Lindstrom's prior out-of-hospital childbirth experience was safe, successful, and affirming. In April 2023, while living in Oregon, she gave birth to her first child at a licensed birth center with CNM assistance. *Id.* at 1-2. The CNMs at the birth center provided prenatal, intrapartum, and postpartum care and emphasized continuity of care, individualized decision-making, and respect for the mother's experience. *Id.* That experience confirmed for Lindstrom that CNM-assisted birth—outside a hospital setting—is the model best suited to her medical needs, family plans, and deeply held personal and religious values. *Id.* at 2. Lindstrom holds sincere religious beliefs concerning pregnancy and childbirth, including the belief that childbirth is a sacred event

best approached in a prayerful, non-clinical setting. *Id*. at 3. At the same time, her faith emphasizes responsible stewardship of her own health and that of her child, leading her to seek professional medical assistance rather than an unassisted home birth. *Id.*

But Nebraska law forecloses Lindstrom's preferred choice. Under the Certified Nurse Midwifery Practice Act, certified nurse midwives—licensed medical professionals whom Nebraska authorizes to provide prenatal, delivery, and postpartum care—are prohibited from attending home births. Neb. Rev. Stat. § 38-613(3)(b). A CNM who provides such care faces criminal penalties, including felony prosecution. As a result, Lindstrom is left with only three options: submit to a hospital birth that conflicts with her medical preferences and deeply held values and beliefs; give birth at home without the presence of a trained medical professional; or secure illegal assistance.

That dilemma is immediate and concrete. Nebraska has no licensed freestanding birth centers and offers few hospital-based options that provide CNM-supported childbirth services that are anywhere near a home environment and involving a complete water birth. The hospital nearest to Lindstrom's residence does not offer comparable CNM-supported care for childbirth, though it would be available for emergency transfer, if needed, were she permitted to give birth at home with a CNM in attendance. *Id.* at 4. The only hospital within realistic traveling distance that offers even a limited

approximation of Lindstrom's preferred model of care is located nearly two hours from her home. *Id.*

Lindstrom has filed a complaint challenging Nebraska's prohibition under the Due Process Clause of the Fourteenth Amendment, the Free Exercise Clause of the First Amendment, and Nebraska's First Freedom Act. Compl., Doc. 1 ¶¶ 62-117. She seeks injunctive and declaratory relief that will allow her to use a paid CNM to attend the birth of her child at her home a few months from now, and for all future childbirths. *Id.* at 18-19. Because of the time-sensitivity surrounding her claim and the impending birth of her child, she now seeks both a preliminary injunction and a temporary restraining order against Nebraska enforcing its prohibition.

The criteria for preliminary relief and a temporary restraining order are satisfied here. First, absent relief, Lindstrom will be irreparably harmed. Childbirth is time-sensitive and irreversible. Once Lindstrom is forced to give birth without the option of CNM-assisted home care, the deprivation of her constitutional liberty cannot be undone. Courts have long recognized that the loss of constitutional freedom—even for a limited period—constitutes irreparable harm.

Second, Lindstrom is likely to succeed on the merits. Nebraska's prohibition forecloses a deeply personal decision concerning childbirth—how, where, and with whose assistance a woman will give birth—without advancing

maternal or infant health. The State permits unassisted home birth but categorically forbids attendance by licensed CNMs, professionals trained to manage low-risk pregnancies and coordinate emergency care when needed. That mismatch undermines any claim that the restriction meaningfully serves health or safety. As applied to Lindstrom, the law also imposes a severe burden on her sincere religious exercise by forcing her to choose between a hospital birth that conflicts with her faith and a home birth without professional assistance that her beliefs also reject. Whether analyzed under Nebraska's First Freedom Act, the Free Exercise Clause, or the Fourteenth Amendment's protection for intimate bodily and family decisions, the prohibition cannot withstand heightened scrutiny. And even if heightened scrutiny does not apply, Nebraska's one-of-a-kind ban lacks a rational connection to any legitimate governmental interest.

Finally, the balance of equities and the public interest favor preliminary relief. Such relief would simply allow Lindstrom to obtain care from licensed professionals who are willing and qualified to do so, but for the challenged law. It is in the public interest to enjoin enforcement of a constitutionally suspect restriction that increases risk and constrains individual liberty.

Immediate relief is necessary. Lindstrom's due date is fast approaching, and the challenged prohibition prevents her from securing CNM-assisted care in advance of labor. Because childbirth decisions must be made before

delivery—and because enforcement of the statute exposes CNMs to felony liability—Lindstrom cannot safely wait for extended adversarial briefing and a hearing without risking the loss of her constitutional rights. Temporary restraining relief is therefore warranted to protect Lindstrom's constitutional rights while her request for a preliminary injunction is under consideration.

LEGAL STANDARD

In deciding whether to grant a preliminary injunction or temporary restraining order (TRO), courts in the Eighth Circuit consider four factors: (1) the threat of irreparable harm to the movant; (2) the balance between that harm and the injury that granting the injunction would inflict on other parties; (3) the likelihood of success on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113-14 (8th Cir. 1981) (en banc). These factors are balanced flexibly, and no single factor is dispositive. *Calvin Klein Cosms. Corp. v. Lenox Lab'ys., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 730 (8th Cir. 2008) (courts must consider all four factors together and assess the nature of the rights at stake and the imminence of the harm alleged). Where a plaintiff alleges an ongoing deprivation of constitutional rights and shows that enforcement of the challenged law will cause imminent and irreversible harm before final judgment, preliminary injunctive relief is appropriate. *Elrod v.*

Burns, 427 U.S. 347, 373 (1976); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977).

There are no additional factors for issuing a TRO. *S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989). To satisfy Rule 65(b), counsel for Ms. Lindstrom has provided notice of the complaint and this motion for temporary injunctive relief via email and certified mail. Ex. B, Polk Decl. at 1-2.

ARGUMENT

I. WITHOUT PRELIMINARY RELIEF, LINDSTROM WILL SUFFER IMMINENT IRREPARABLE HARM

Absent preliminary injunctive relief, Lindstrom will suffer irreparable harm. As to her current pregnancy, her injury is immediate, concrete, and irreversible, and it cannot be remedied by post hoc relief. Deprivation of constitutional rights, even for minimal periods of time, constitutes irreparable harm as a matter of law. *Elrod*, 427 U.S. 373; *see also Citizens for Cmty. Action*, 558 F.2d at 867 (holding that a violation of constitutional rights "supports a finding of irreparable injury"). Thus, where a plaintiff plausibly alleges that a state law infringes fundamental, constitutional rights, the irreparable-harm requirement is satisfied.

Further, the harm Ms. Lindstrom faces is time-sensitive and cannot be undone. Ms. Lindstrom is approximately six months pregnant, with a due date

of April 22. Lindstrom Decl. at 1. Final decisions concerning the manner and setting of childbirth must be made in advance of labor, and once childbirth occurs, the loss of the opportunity to exercise that choice is permanent. Courts in the Eighth Circuit routinely recognize that injuries tied to discrete, time-limited events—where relief after the fact would come too late—are irreparable. *See D.M. by Bao Xiong v. Minn. St. High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019); *Dataphase*, 640 F.2d at 114 (irreparable harm exists where injury cannot be prevented or fully remedied by later relief). Enforcement of the challenged law forces Ms. Lindstrom into an unconstitutional dilemma: she must either abandon her chosen method of childbirth or proceed without professional medical assistance. Being forced to choose between constitutionally protected liberty and personal safety constitutes irreparable harm. *See Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959-60 (8th Cir. 2017) (finding irreparable harm where challenged law forced patients to forgo constitutionally protected medical decisions).

The burdens imposed by the law are not speculative. Because Nebraska has no licensed birth centers and prohibits CNMs from attending home births, Lindstrom's only available option, approximating her desired care, requires travel of nearly two hours to a hospital. Lindstrom Decl. at 4. The law thus increases Lindstrom's physical, emotional, and logistical burdens during

pregnancy and childbirth—harms that cannot be remedied after delivery. Lindstrom does not seek monetary damages beyond nominal damages. In any case, post hoc remedies would not and could not compensate for the loss of bodily autonomy, religious exercise, and the ability to make intimate family decisions at the moment they matter most. *See Elrod*, 427 U.S. at 373; *Citizens for Cmty. Action*, 558 F.2d at 867.

Because Ms. Lindstrom faces the imminent and irreversible loss of constitutionally protected liberty interests, she has established irreparable harm warranting preliminary injunctive relief. The immediacy of Ms. Lindstrom's harm also warrants temporary restraining relief. CNMs are unwilling to provide home-birth care while the statute remains in effect due to the threat of criminal prosecution, but would be willing to do so if the prohibition were enjoined. Lindstrom Decl. at 4. Without temporary injunctive relief, Ms. Lindstrom will be unable to secure CNM assistance in advance of labor, effectively mooting her request for preliminary relief before it can be adjudicated. Courts in the Eighth Circuit routinely grant TROs where, as here, there is the threat of imminent and irreversible harm before a preliminary injunction hearing can be held. *See, e.g.*, *Nokota Horse Conservancy, Inc. v. Bernhardt*, 666 F. Supp. 2d 1073, 1081 (D.N.D. 2009).

II. LINDSTROM IS LIKELY TO SUCCEED ON THE MERITS

Lindstrom is likely to succeed on the merits of all three of her claims—although a likelihood of success on any one of them is sufficient for preliminary relief. First, Nebraska's First Freedom Act provides broad statutory protection for religious exercise and requires strict scrutiny whenever state action substantially burdens a person's religious practice—a standard the challenged prohibition cannot satisfy as applied to Lindstrom. Second, the prohibition violates the Free Exercise Clause of the First Amendment by imposing a severe and coercive burden on Lindstrom's sincere religious beliefs and by permitting comparable—and riskier—secular conduct while prohibiting religiously motivated conduct that would mitigate those risks. Third, the law infringes fundamental rights protected by the Due Process Clause of the Fourteenth Amendment by foreclosing Lindstrom's ability to choose the manner and circumstances of childbirth, without adequate justification. Each claim independently supports relief, and together they confirm that Lindstrom has a strong likelihood of success on the merits.

A. Lindstrom Is Likely to Succeed on the Merits Under Nebraska's First Freedom Act

In 2024, Nebraska enacted the First Freedom Act, Neb. Rev. Stat. §§ 20-701 to -705, to provide robust statutory protection for religious exercise against state action. The Act's core protection provides that: "state action shall not . . .

[s]ubstantially burden a person's right to the exercise of religion" unless the state can demonstrate "that applying the burden to that person's exercise of religion in this particular instance is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." Neb. Rev. Stat. § 20-703. By its terms, the Act requires the government to satisfy strict scrutiny—as to the "particular instance" at issue—whenever state action substantially burdens religious exercise.

The Act defines "exercise of religion" expansively to include "any action that is motivated by a sincerely held religious belief," regardless of whether the action is compulsory or central to a religious tradition. *Id.* § 20-702(2). It further defines "substantially burden" to include any action that "directly or indirectly constrains, inhibits, curtails, or denies" religious exercise or compels conduct contrary to religious belief. *Id.* § 20-702(6)(a). And it defines "state action" to include the implementation or enforcement of any state law. *Id.* § 20-702(5).

No Nebraska court appears yet to have interpreted or applied the First Freedom Act. This Court should apply the statute according to its plain text—which deliberately adopts a strict-scrutiny framework that is broader and more protective than federal Free Exercise doctrine. *See, e.g.*, *State v. Montoya*, 304

Neb. 96, 117, 933 N.W.2d 558, 576 (2019) (Nebraska courts apply statutes according to their plain and ordinary meaning where the text is clear).

1. The CNM Home-Birth Ban Substantially Burdens Lindstrom's Religious Exercise

Nebraska's prohibition on CNMs attending home births is "state action" because it is the implementation and enforcement of a Nebraska statute. *Id.* § 20-702(5). And Lindstrom's intent to give birth at home with the assistance of a CNM falls squarely within the Act's definition of "exercise of religion." *Id.* § 20-702(2).

Lindstrom holds sincere religious beliefs regarding pregnancy and childbirth, including the belief that childbirth is a sacred and spiritual event; that it should occur in a prayerful, non-clinical environment; that her husband should be able to participate through prayer and religious ritual; and that childbirth should proceed with respect for the body's natural processes while remaining open to medically responsible assistance when necessary. Lindstrom Decl. at 3. At the same time, she believes that giving birth at home without trained medical assistance would be irresponsible and inconsistent with her religious belief in proper stewardship of life and health. *Id.* Because there are no birth centers in Nebraska, and because physicians do not visit homes to assist in births, the best—if not only—way for Lindstrom to reconcile these religious commitments is to give birth at home with the assistance of a

CNM. *Id*. Her desire to do so is motivated, at least in part, by her religious beliefs. *Id*.

The challenged law, however, forces Lindstrom into a coercive dilemma. She must either (1) abandon her religiously motivated birth plan and give birth in a hospital setting she believes is inconsistent with her faith; (2) give birth at home without the assistance of a licensed and medically trained professional, contrary to her religious belief in responsible stewardship of life and health; or (3) attempt to obtain CNM assistance in violation of Nebraska law. That is a textbook "substantial burden." The law does not merely make Lindstrom's religious exercise more difficult or expensive; it categorically forecloses the only means by which she can engage in her desired religious practice by criminalizing the conduct of the only class of licensed professionals willing and able to attend her home birth. *Cf. Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015) (policy that "put petitioner to th[e] choice" of violating his religious beliefs or facing disciplinary action substantially burdened his religious exercise). In doing so, the law "constrains, inhibits, curtails, or denies" Lindstrom's religious exercise within the meaning of § 20-702(6)(a). The burden is neither speculative nor incidental. Pregnancy and childbirth are inherently time-limited, and the law operates with full force at the precise moment when Lindstrom's religious exercise must occur. This burden—imposed at a moment

of heightened vulnerability and irreversibility—is substantial in the strongest sense.

2. The State Cannot Satisfy Strict Scrutiny

Because the Act requires application of strict scrutiny, the burden shifts to the State to demonstrate that applying the CNM home-birth ban is essential to further a compelling governmental interest and is the least restrictive means of doing so, "in this particular instance." Neb. Rev. Stat. § 20-703. The State cannot meet that burden.

a. No Compelling Interest Justifies the Ban

Even assuming the State has a compelling interest in maternal or fetal health in the abstract, it cannot plausibly claim that prohibiting CNMs from attending Lindstrom's home birth furthers that interest as applied to her, "in this particular instance."

Lindstrom's pregnancy is low-risk. Lindstrom Decl. at 1-2. She resides in reasonable proximity to emergency medical care. *Id.* at 3. Any CNM she would use would be a highly-trained, licensed medical professional specifically educated to manage low-risk pregnancies, monitor labor, identify complications, and coordinate timely hospital transfers when necessary. *Id.* She has identified CNMs who would be willing to assist her, absent Nebraska's prohibition. *Id.* In these circumstances, allowing Lindstrom to give birth at

home with CNM assistance presents no material risk to her or her baby's health.

Moreover, Nebraska cannot plausibly claim a compelling interest in excluding CNMs from home births to protect maternal or infant health while simultaneously permitting unassisted home births without restriction. The State thus allows conduct that presents far greater risks to maternal and fetal health while forbidding the attendance of licensed professionals who would mitigate those risks. That underinclusiveness fatally undermines any claim that the prohibition is essential to protecting health. *See, e.g.*, *Republican Party of Minn. v. White*, 416 F.3d 738, 750 (8th Cir. 2005) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quotation omitted); *Quaring v. Peterson*, 728 F.2d 1121, 1127 (8th Cir. 1984) (where the government denies a religious exemption but allows other exceptions, that undermines its compelling state interest argument), *aff'd sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985).

b. The Ban Is Not the Least Restrictive Means

Even if Nebraska could identify a compelling interest in health that applies "in this particular instance," the categorical prohibition on CNM-attended home births is not the least restrictive means of furthering it. Numerous less restrictive alternatives are readily available, including

individualized risk screening, informed-consent requirements, emergency-transfer protocols, physician-collaboration requirements, and professional discipline for unsafe practices. Nebraska already employs such regulatory tools in other medical contexts and permits CNMs to provide identical prenatal, labor, delivery, and postpartum care—but only in hospitals. *See* Neb. Rev. Stat. § 38-609-613. There is no reason that it cannot use those regulatory tools in this particular instance to allow CNM-assisted home births.

Instead, Nebraska imposes a blanket ban that excludes CNMs from home births—while permitting unassisted home birth and hospital-based CNM care. That cannot satisfy the Act's demanding least-restrictive-means requirement. The First Freedom Act requires the State to justify its application of its law to Lindstrom "in this particular instance," not to invoke generalized policy preferences or categorical rules. Neb. Rev. Stat. § 70-703(1). Because application of the ban to Lindstrom cannot survive strict scrutiny, her claim is likely to succeed.

3. Because Lindstrom Is Likely to Prevail on Her State Law Claim, the Court May Grant Preliminary Relief Without Reaching the Federal Constitutional Questions

The First Freedom Act expressly authorizes preliminary injunctive relief to prevent ongoing and future violations. Neb. Rev. Stat. § 20-704(3)(b). Given the imminent and irreversible nature of childbirth and the statute's

unambiguous strict-scrutiny mandate, Lindstrom has more than satisfied the likelihood-of-success requirement to obtain such relief. Because Lindstrom has demonstrated a strong likelihood of success under the Act, this Court may grant preliminary injunctive relief on state-law grounds alone, without needing to resolve the federal Due Process or Free Exercise claims set out below at this stage.

B. Lindstrom Is Likely to Succeed on Her Free Exercise Claim

The First Amendment's Free Exercise Clause provides further protection for Lindstrom's sincerely held religious beliefs. Where a law substantially burdens religious exercise and is not neutral or generally applicable, it is subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). A law is not generally applicable if it treats comparable secular conduct more favorably than religious exercise. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). If, by contrast, a law is neutral and generally applicable, it is ordinarily subject only to rational basis review under *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

1. Nebraska's Law Is Not Generally Applicable

As set forth above, Lindstrom's religious beliefs are sincere and motivate her challenge to Nebraska's home birth restrictions. Lindstrom Decl. at 3-4; *Thomas v. Rev. Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that courts must defer to a plaintiff's characterization of her

opposition to a law as religious). Thus, Nebraska's law is subject to strict scrutiny if its prohibitions are not "generally applicable."

Under *Tandon v. Newsom*, a law is not generally applicable if it "treat[s] *any* comparable secular activity more favorably than religious exercise." 593 U.S. at 62 (per curiam); *see also Lukimi*, 508 U.S. at 543 ("A law is . . . not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it."). The comparability inquiry does not turn on whether the secular activity is identical, but on whether it poses similar or greater risks with respect to the government's asserted interest. *Tandon*, 593 U.S. at 62. Where a law permits secular conduct that contradicts or undermines the government's stated interest while prohibiting religiously motivated conduct—especially where the religious conduct would actually *mitigate* those same risks—strict scrutiny applies. *Id.*

Nebraska's prohibition fails the general-applicability requirement. Nebraska permits women to choose to give birth at home without any professional assistance, for any reason—including purely secular reasons (convenience, tradition, dislike of hospitals, cost savings, etc.). At the same time, it categorically forbids CNMs from attending home births—even those that are motivated by religious beliefs. The State thus allows secular conduct

that presents greater risks to maternal and fetal health while prohibiting religiously motivated conduct that would mitigate those risks.

That disparity is decisive under *Tandon* and shows that Nebraska's law is not generally applicable. Where the State asserts an interest in maternal or fetal health, unassisted home birth and CNM-assisted home birth are plainly comparable activities, judged against the risks each poses. In both cases, the government has the identical interest in ensuring the health and safety of mother and child. The relevant risk is that the health and safety of mother or child is threatened by the childbirth procedures. However, CNM-assisted home birth motivated by religious belief, which is absolutely prohibited by state law, presents *lower* risk to both mother and child than an unassisted delivery. By permitting the riskier secular option while categorically prohibiting the safer religiously motivated option, Nebraska's scheme "treat[s] comparable secular activity more favorably than religious exercise," triggering strict scrutiny. *See id.*; *Lukumi*, 508 U.S. at 542-43.

Tolerating conduct that undermines the government's asserted interest while prohibiting comparable (and less risky) conduct motivated by religious belief violates the right to free exercise of religion. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 689 (9th Cir. 2023). In *Fellowship*, a school district revoked recognition of a religious student organization based on its faith-based leadership requirements, while

continuing to recognize secular student groups that imposed comparable exclusionary criteria to advance their own missions. *Id.* at 677. The court rejected the district's claim of general applicability because the policy, as applied, tolerated conduct that undermined the district's asserted interest in ensuring universal access to school programs when undertaken for secular reasons, while prohibiting comparable conduct when motivated by religion. *Id.* at 689. The dispositive flaw was not animus toward religion, but the government's willingness to accept the practical consequences of its policy so long as they arose from secular choices.

Nebraska's regime operates similarly. The State tolerates conduct—unassisted home birth—that directly undermines an interest in maternal and fetal health. But it withholds access to licensed professional assistance when the choice to give birth at home with such assistance is religiously motivated, even though professional attendance would reduce the very health risks at issue. As in *Fellowship*, Nebraska's law is not generally applicable because it accepts greater risk for allowed secular conduct, while prohibiting religiously motivated, risk-mitigating conduct. *See also Does 1–6 v. Mills*, 16 F.4th 20, 32 (1st Cir. 2021) (comparing the effects of a religious exemption to the interests asserted by the state). Here, Nebraska's prohibition channels religiously motivated women toward unassisted home births—at increased risks to maternal and fetal health.

2. Even if Nebraska's Law Is Generally Applicable, Strict Scrutiny Is Still Warranted Given the Nature of the Burden Imposed

Even where a law is framed as neutral and generally applicable, the Supreme Court has recognized that certain categories of burdens on religious exercise warrant heightened constitutional scrutiny because of the nature of the interests affected. *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). In *Yoder*, the Court held that compulsory education requirements could not be applied to Amish parents whose sincere religious beliefs governed the upbringing and formation of their children. *Id.* Although it pre-dated *Smith*, *Yoder* has not been displaced, and the Supreme Court has continued to recognize that laws imposing severe and coercive burdens on religiously motivated parental decision-making occupy a distinct constitutional space. *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025).

In *Mahmoud*, the Court treated *Yoder* as a narrow but continuing precedent reflecting the Constitution's special solicitude for religious exercise in contexts involving family formation and parental decision-making. *Id.* (explaining that where a law "imposes a burden of the same character as that in *Yoder*," strict scrutiny may apply even absent a finding that the law is non-neutral or not generally applicable). The Court emphasized that *Yoder* rests not on whether there is hostility toward religion, but on the Constitution's longstanding protection of religious exercise in matters of family life, parental

responsibility, and moral formation—particularly where the State forces parents to choose between compliance with the law and adherence to religious convictions. *Id.* at 564-65.

The burden imposed here bears meaningful similarities to the burden recognized in *Yoder* and *Mahmoud*. Lindstrom's religious beliefs govern not merely abstract spiritual preferences, but concrete decisions concerning family formation, upbringing, and parental stewardship. Nebraska's categorical prohibition forces her to choose between a hospital birth that conflicts with her religious convictions, a home birth without professional assistance that her beliefs counsel against, or soliciting unlawful conduct. Lindstrom Decl. at 4. That choice is not incidental. It is coercive and imposed at a singular and irreversible moment.

To be clear, Lindstrom does not contend that all medical regulations affecting religious adherents trigger strict scrutiny. Nor does she ask this Court to extend *Yoder* beyond its core concern with profound interference in family life and parental responsibility. Rather, Lindstrom submits that where, as here, the state's regulation directly and categorically interferes with religiously compelled decisions about the manner in which a child is brought into the world—while offering no individualized assessment and no

accommodation—those burdens fall closer to *Yoder* than to the routine application of neutral laws upheld under *Smith*.[1]

3. The Challenged Statute Fails Even Under Rational Basis Review

Even if the Court concludes that heightened scrutiny does not apply at this stage, Lindstrom is still likely to succeed on her free exercise claim because Nebraska's categorical prohibition fails even rational basis review. While rational basis review is deferential, it is not toothless. The State must show a real connection between the challenged law and a legitimate governmental interest. *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (The asserted interest must "find some footing in the realities of the subject addressed.").

Nebraska's prohibition cannot meet that standard. The law permits home birth, yet categorically forbids assistance from licensed CNMs—the very professionals trained to manage low-risk pregnancies and coordinate emergency transfer when necessary. It does not regulate qualifications, training, supervision, or safety standards. Instead, it explicitly bars the provision of professional care in a lawful birth setting. A law fails rational basis review where the government's asserted rationale "undercut[s] the principle of non-contradiction." *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008). A law that allows risky unassisted home birth while forbidding licensed

[1] As explained above, the statute's prohibitions do not survive strict scrutiny.

assistance is internally inconsistent and cannot rationally be said to advance maternal or infant health.

Finally, to the extent the prohibition operates to shield incumbent providers from competition, that purpose is not legitimate. Courts have repeatedly held that "economic protectionism, that is, protection of a discrete interest group from economic competition, is not a legitimate governmental purpose." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir. 2013); *see also Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). Because Nebraska's categorical ban bears no rational relationship to health, safety, or access to care—and at best operates to exclude qualified providers for the benefit of hospital-based services—it is unlikely to survive even rational basis review.

C. Lindstrom Is Likely to Succeed on Her Fourteenth Amendment Due Process Claim

The Due Process Clause of the Fourteenth Amendment protects those liberties that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Courts assessing such claims must provide a "careful description" of the asserted right and examine its treatment at common law, during the Founding era, and at the time of the Fourteenth Amendment's ratification. *Id.* at 721; *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215,

241-50 (2022). If such a right is established by the historical record, restrictions on that right must be reviewed under strict scrutiny.

Childbirth lies at the core of a mother's identity and her relationship with her child. It is an intensely personal and private event, involving the most intimate aspects of a woman's life and body. Like the rights to procreate, *Skinner v. Okla.*, 316 U.S. 535 (1942); to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015); to bodily integrity, *Rochin v. Cal.*, 342 U.S. 165 (1952); and to make intimate decisions free from government intrusion, *Griswold v. Conn.*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence v. Tex.*, 539 U.S. 558 (2003), decisions surrounding childbirth fall squarely within the Constitution's protection of personal privacy and bodily autonomy. The substantive protections of the Due Process Clause prohibit government interference in such private matters absent extraordinary justification, and those same protections apply with full force to personal decisions concerning childbirth.

The ability of women to exercise autonomy over childbirth has long been treated as a matter of profound importance and has historically been left largely unimpeded by government, except where necessary to address bona fide health and safety concerns. The history of childbirth and midwifery in the United States, as set forth below, reflects a longstanding tradition that has only recently been threatened. That tradition has allowed women to choose

among safe alternatives for birth, including the location and manner of childbirth and the attendants who assist them. Nebraska's categorical prohibition on CNMs attending home births is a modern and unjustified departure from that tradition and should be reviewed under strict scrutiny.

1. History Supports a Right to Choose a Safe Place and Manner of Giving Birth

During the colonial period, childbirth was the "exclusive providence of women." Richard W. Wertz & Dorothy C. Wertz, *Lying-In: A History of Childbirth in America* 1 (The Free Press, 1977). Expecting mothers "controlled much of the experience of childbirth" and "determined the physical setting for their births, the people to attend them during labor and delivery, and the aids or comforts employed." *Id.* at 232.

None of the colonial governments outlawed midwifery or out-of-hospital births. Instead, childbirth overwhelmingly occurred in the home and was most often attended by midwives. Midwives were central figures in their communities, providing prenatal care, delivery assistance, and postpartum support. *Id.* Where regulation existed, it took the form of requiring community recognition or competency assurance, not categorical exclusion. *Id.* at 21-30. There is no historical tradition of any state forbidding women from obtaining professional assistance from a midwife during home childbirth.

Prior to the Civil War, childbirth in the American South was attended most typically by African midwives. That continued after the Civil War, and midwifery was used in over 90% of all African-American births in the South through 1910. Helen Varney & Joyce Beebe Thompson, *A History of Midwifery in the United States: The Midwife Said Fear Not* 14 (Springer Publishing Co., 2015). In 1930, about 50,000 midwives were operating in the United States. Tina Cassidy, *Birth: The Surprising History of How We Are Born* 71 (Thorndike Press, 2006). Crucially, at the time the Fourteenth Amendment was passed and ratified in 1868, there was no tradition of state laws prohibiting midwifery or compelling hospital birth. *See* Judy Barrett Litoff, *American Midwives: 1860 to the Present* 69-84 (Praeger 1978); Wertz & Wertz, *Lying-In*, at 163-72.[2]

Fewer than five percent of births took place in hospitals as late as 1900. *See* Wertz & Wertz, *Lying-In*, at 6; Litoff, *American Midwives*, at 11-15. There was a general shift from home birth to hospital birth in the twentieth century that resulted from economic, technological, and cultural developments—not from state mandates. *See* Wertz & Wertz, *Lying-In*, at 189-225. States did not

[2] From the time of statehood, Nebraska followed this broader national pattern, and midwives played a significant role in childbirth throughout the state well into the twentieth century, particularly in rural and immigrant communities. *See* Rebecca J. Anderson, *Grandma Gabel, She Brought Ralph: Midwifery and the Lincoln, Nebraska, Department of Health in the Early Twentieth Century*, Nebraska History 94:158-75 (2013).

compel women to give birth in hospitals. Nor did they criminalize home birth or professional midwifery. *Id.* at 133.

Certified nurse midwives represent the modern professionalization of a practice that has existed for centuries. One early study concluded that "in the hospital setting, prenatal, intrapartal, and postpartal care provided by certified nurse-midwives with physician consultant back-up produces health outcomes equivalent to those of the traditional physician service." C. Slome, et al., *Effectiveness of certified nurse-midwives: A prospective evaluation study*, American Journal of Obstetrics & Gynecology, Vol. 124, No. 2, 181 (Jan. 1976). In Nebraska, CNMs receive graduate-level education, are nationally certified, and are licensed by the state to provide comprehensive obstetric care. *See* Neb. Rev. Stat. § 38-604. Decades of empirical research demonstrate that CNM-led care for low-risk pregnancies is safe and effective and is often associated with fewer unnecessary interventions and comparable or improved maternal and neonatal outcomes.[3] The State's decision to prohibit CNMs from attending home births departs from both historical practice and the State's own recognition of CNMs as qualified obstetric providers.

[3] *See, e.g.*, Melissa D. Cheyney, et al., *Outcomes of care for 16,924 planned home births in the United States: the Midwives Alliance of North America Statistics Project, 2004 to 2009*, J. Midwifery Women's Health 59:17-27 (2014); Jacqueline Wallace, et al., *An alternative model of maternity care for low-risk birth: Maternal and neonatal outcomes utilizing the midwifery-based birth center model*, Health Serv Res. (Feb. 2024).

2. Childbirth Autonomy Is Implicit in the Concept of Ordered Liberty

A liberty interest is fundamental not only if it is historically rooted, but if it is implicit in the concept of ordered liberty. *Glucksberg*, 521 U.S. at 721. This inquiry asks whether the claimed interest safeguards a sphere of autonomy central to personal dignity and self-determination. *Id.* at 720; s*ee, e.g.*, *Skinner*, 316 U.S. 535; *Rochin*, 342 U.S. 165; *Griswold*, 381 U.S. 479; *Loving*, 388 U.S. 1; *Lawrence*, 539 U.S. 558; *Obergefell*, 576 U.S. 644. Decisions about childbirth implicate similar core concerns. Pregnancy and childbirth are natural processes that involve profoundly intimate bodily experience, physical risk, family bonds, and emotional significance.

The right to give birth in the manner of one's choosing also stands in sharp contrast to asserted rights that the Supreme Court has held are *not* deeply rooted in the Nation's history and tradition. For example, in *Dobbs*, the Court concluded that there was no historical basis for a constitutional right to abortion. 597 U.S. at 250. The Court distinguished the unique context of abortion on the ground that it "destroys . . . 'potential life.'" *Dobbs*, 597 U.S. at 257. And it emphasized that states had not recognized or protected such a right until the late twentieth century. *Id.* at 241. Indeed, abortion was prohibited in every state for much of the Nation's history and was subject to total bans in

approximately three-quarters of the states at the time of the Fourteenth Amendment's ratification. *Id.*

Similarly, in *Glucksberg*, the Court rejected an asserted liberty interest in assisted suicide based on its consistent criminalization at common law and across the states. 521 U.S. at 710-19. As with the claimed right to abortion in *Dobbs*, the Court relied on a historical record showing sustained legal prohibition and societal condemnation of the asserted conduct. No such historical record exists as to the right at issue here. This case is thus outside the reasoning of *Dobbs* and *Glucksberg* and squarely within the country's tradition of protecting personal autonomy in matters of family life and bodily integrity.

Nor do out-of-circuit cases such as *Sammon v. New Jersey Board of Medical Examiners* and *Lange-Kessler v. Department of Education* call Lindstrom's asserted right into question here. In *Sammon*, the Third Circuit upheld New Jersey's licensing requirements for midwives, rejecting the asserted right to practice midwifery without a license. 66 F.3d 639, 644-45 (3d Cir. 1995). The court upheld the restrictions in part because they did not "regulate where or in what manner birthing may take place" and did not "foreclose the parents from . . . electing . . . any particular procedure in the course of delivery." *Id.* Similarly, *Lange-Kessler* upheld New York's prohibition on the unlicensed practice of midwifery and emphasized that the state was

regulating *who* may practice midwifery—not *where* childbirth may occur or *whether* women may obtain professional assistance. 109 F.3d 137, 142-43 (2d Cir. 1997). In both *Sammon* and *Lange-Kessler*, professional assistance remained available in all lawful birth settings.

In contrast, the challenged restriction here does not regulate qualifications, training, or licensure. It categorically forbids CNMs—who are licensed medical professionals—from attending home births. And unlike *Sammon* and *Lange-Kessler*, the asserted right is not a provider's economic right to practice a profession free from regulation, but a pregnant woman's right to choose the manner and circumstances of childbirth and to receive professional medical assistance during labor. Those are the types of interests the Supreme Court has treated as fundamentally different from occupational regulation. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

3. Nebraska's Prohibition Does Not Satisfy Strict Scrutiny

As explained above, *supra* at 14-16, the State cannot demonstrate that prohibiting CNMs from attending Lindstrom's home birth serves a compelling governmental interest, particularly where Nebraska permits unassisted home births and allows CNMs to provide identical care in hospital settings. Even assuming a generalized interest in maternal or fetal health, the categorical ban

is not narrowly tailored. A blanket prohibition that excludes licensed medical professionals from mitigating risk, while permitting riskier secular alternatives, cannot survive strict scrutiny.

That women have alternatives—such as giving birth unassisted or in a hospital—does not save the statute. The Supreme Court has repeatedly rejected the notion that a law may burden a fundamental right so long as some alternative means of exercising the right remains available. *See D.C. v. Heller*, 554 U.S. 570 (2008) (striking down laws inhibiting the fundamental right to possess a functional firearm for immediate self-defense in the home); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). Even if other options technically remain available, a state law that has the effect of preventing individuals from exercising a fundamental right in a meaningful way violates the Constitution. *Heller*, 554 U.S. at 629 (rejecting the argument that banning handguns was permissible because other firearms were available).

Likewise, by allowing home birth but forbidding assistance from CNMs, Nebraska leaves women with only illusory alternatives: abandon home birth or proceed without professional medical assistance. The restriction thus "submerge[s] the individual" and creates a relationship between the citizen and the State that is "wholly different from those upon which our institutions rest." *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). By sharply limiting where and with whose help a woman may give birth, Nebraska intrudes into a deeply

personal and private sphere of life that has historically been left to individual choice. The Constitution does not permit the State to eliminate professionally assisted home birth as an option for women through a categorical prohibition untethered from individualized health or safety concerns. Thus, Lindstrom is likely to succeed on the merits.[4]

III. THE PUBLIC INTEREST AND BALANCE OF HARMS WEIGH HEAVILY IN FAVOR OF AN INJUNCTION

An injunction enjoining enforcement of Nebraska's prohibition on certified nurse midwives attending home births serves the public interest. The public is not served by continued enforcement of a law that likely violates the Constitution; instead, the public is served by the preservation of individual liberty and bodily autonomy protected by the Fourteenth Amendment. *Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007) ("[I]t is always in the public interest to protect constitutional rights."). That principle applies with particular force where, as here, the challenged law burdens decisions involving religious belief and practice, bodily integrity, family life, and personal medical autonomy. *See Cruzan*, 497 U.S. at 278; *Casey*, 505 U.S. at 851.

Enjoining enforcement of Nebraska's categorical prohibition while this case proceeds serves the public interest by preventing the continued

[4] As explained above, Nebraska's law also fails even under rational basis review.

deprivation of constitutionally protected liberty and by allowing licensed medical professionals to provide care they are otherwise authorized to deliver.[5] The public interest is not served by prohibiting a safe alternative to hospital birth while allowing the less safe alternative of an unassisted birth. Instead, it is served by permitting professionally supported childbirth in a manner consistent with safety, autonomy, and longstanding historical practice.

The balance of harms also weighs decisively in Lindstrom's favor. Absent relief, she will suffer immediate and irreversible harm. She will be forced either to abandon her chosen method of childbirth or to proceed without professional medical assistance during labor and delivery. That harm includes the permanent loss of bodily autonomy, interference with deeply personal medical and family decisions, and the deprivation of a choice that cannot be

[5] Lindstrom has acted diligently throughout her pregnancy. In the early weeks of her pregnancy, she began researching childbirth options in Nebraska and was surprised to discover how limited the available choices were for women seeking CNM-supported care consistent with her medical preferences and religious values. Lindstrom Decl. at 4. As she learned more about Nebraska's restrictions, she consulted with a Nebraska attorney in the fall of 2025 regarding a potential legal challenge but was unable to proceed at that time due to the cost of representation. *Id.* In December 2025, Lindstrom discussed legal representation with the non-profit law firm Pacific Legal Foundation, which agreed to represent her. *Id.* She filed this action promptly in January 2026 and sought temporary injunctive relief within a few days thereafter. Doc. 1. At each stage, Lindstrom acted reasonably and without delay once she understood both the nature of the restriction and her ability to pursue relief.

restored after childbirth occurs. Such injuries are concrete, imminent, and not compensable by damages.

By contrast, Defendants will suffer no cognizable harm from preliminary relief. Lindstrom seeks narrow, prohibitory relief preventing enforcement of a categorical statutory ban. An injunction would not dismantle Nebraska's regulatory framework, require the issuance of new licenses, or restrict the State's ability to enforce health-and-safety regulations governing midwifery practice. It would simply allow CNMs—who have already been licensed by the State to assist in all aspects of childbirth—to attend a home birth they are otherwise trained and authorized to manage. Any speculative administrative or regulatory burden to the State does not outweigh the concrete, irreversible harm Lindstrom will suffer absent relief. *See Elrod*, 427 U.S. at 373.

IV. NO SECURITY SHOULD BE REQUIRED

Federal Rule of Civil Procedure 65(c) provides that a court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper." However, courts retain discretion to waive or minimize the security requirement. *Richland/Wilkin*, 826 F.3d at 1043. Doing so is appropriate where defendants do not demonstrate a likelihood of monetary damages resulting from an erroneously issued injunction, or where the injunction serves to vindicate constitutional rights rather than secure private economic interests. *Id.*; *see also Phelps-Roper*, 509 F.3d at 485. Courts

routinely waive the bond requirement in cases involving constitutional challenges to government action. *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 978-79 (D. Minn. 2016); *see also Richland/Wilkin*, 826 F.3d at 1043 (recognizing that bond may be waived where damages are speculative or unlikely).

Here, Defendants cannot show that they will suffer any monetary damages as a result of preliminary relief. Lindstrom seeks only narrow, prohibitory relief vindicating her constitutional rights and enjoining enforcement of a categorical statutory ban. The injunction would not compel the State to expend funds, alter its licensing regime, or provide government services. It would merely prevent enforcement of a restriction that forecloses Lindstrom's chosen course of care. Any potential harm to the State from an improvidently granted injunction is speculative and, in any event, not readily reducible to monetary damages. Under these circumstances, requiring Lindstrom to post security would serve no practical purpose. The Court should waive the bond requirement or, alternatively, set it at a nominal amount.

CONCLUSION

The Court should grant Lindstrom's motion for a temporary restraining order and preliminary injunction and enjoin enforcement of Nebraska's ban on certified nurse midwives attending home births while this case proceeds.

Respectfully submitted this 2nd day of February, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2026, I served this document via Certified Mail to all Defendants.

/s/ Joshua Polk
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