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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
FIFTEENTH JUDICIAL CIRCUIT – CIVIL DIVISION

OASIS FAMILY BIRTHING CENTER, LLC, *et al.*, Plaintiffs, v. **ALABAMA DEPARTMENT OF PUBLIC HEALTH, *et al.*,** Defendants.	Civil Action No. 03-CV-2023-901109.00 - GOG

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs in this case have challenged actions by Defendants Alabama Department of Public Health and State Health Officer Scott Harris (collectively, "ADPH") that unlawfully prevent Plaintiffs from offering critically needed, high-quality prenatal, birthing, and postpartum care. Plaintiffs seek to provide this care through freestanding birth centers (referred to herein as "FSBCs," "birth centers" or "birthing centers") in Alabama, a state that is currently facing one of the worst maternal and infant health crises in the United States.

In response to Plaintiffs' First Amended Complaint, Defendants have moved to dismiss a subset of Plaintiffs' claims—raising arguments that were already rejected by this Court, mischaracterizing Plaintiffs' claims, ignoring Plaintiffs' detailed factual allegations, and misconstruing the legal precedent and doctrines on which they rely. Defendants' motion should be denied for the following reasons:

First, in response to Plaintiffs' primary claim—that ADPH lacks authority to regulate FSBCs because FSBCs are not hospitals within the meaning of ADPH's licensing authority—

Defendants ignore the detailed factual allegations of the Amended Complaint that explain otherwise, and instead repeat the same arguments from a previous motion to dismiss that this Court has already denied. On a motion to dismiss, Plaintiffs' allegations must be accepted as true, and this Court should once again find that they more than suffice to support Plaintiffs' primary claim and survive a motion to dismiss.

Second, Defendants erroneously contend that Plaintiffs' Second Claim—that ADPH has adopted a de facto ban on FSBCs—is moot because ADPH has finalized a new regulatory scheme for FSBC licensure. But this argument misunderstands Plaintiffs' claim. As Plaintiffs' Amended Complaint makes clear, Plaintiffs' Second Claim does not challenge the failure to promulgate regulations *per se*. Rather, Plaintiffs are challenging ADPH's failure to provide a realistic path to licensure under *both* ADPH's existing statutory authority *and* the new regulatory scheme. Far from mooting any controversy between the parties, the new regulatory scheme exacerbates it.

Third, contrary to what Defendants claim, the administrative exhaustion doctrine does not apply to Plaintiffs' Third Claim, which argues that ADPH's regulatory scheme for FSBCs imposes numerous unreasonable requirements that exceed ADPH's statutory authority. Where Plaintiffs challenge the validity of an administrative action on these grounds, Alabama law does not require Plaintiffs to seek a waiver of the challenged actions. But even if the administrative exhaustion doctrine did apply, there are several exceptions that permit Plaintiffs to seek relief from this court without first seeking a waiver or variance from Defendants.

Finally, Defendants' argument that they can use any authority they have over FSBCs to limit midwives' statutory scope of practice, and therefore Plaintiffs' Fourth and Fifth claims must be dismissed, is wrong. ADPH has no power to promulgate any regulation in conflict with law, and the Amended Complaint clearly alleges the ways in which ADPH's regulations conflict with

controlling statutes. Accepting Plaintiffs' well-pleaded allegations as true, this Court should find that Plaintiffs Fourth and Fifth Claims survive a motion to dismiss.

The Court should deny the motion in full.[1]

LEGAL STANDARD

When considering a motion to dismiss under Rule 12(b)(6), the Court "must accept the allegations of the complaint as true," *Ex parte Liberty Nat'l Life Ins. Co.*, 209 So. 3d 486, 494 (Ala. 2016) (internal quotations and citation omitted), and "resolve all doubts concerning the sufficiency of the complaint in favor of the plaintiff," *Patton v. Black*, 646 So. 2d 8, 10 (Ala. 1994) (internal quotations and citation omitted). A complaint should not be dismissed "if under a provable set of facts, *upon any cognizable theory of law*, a complaint states a claim upon which relief could be granted." *Id.* (emphasis added) (internal quotations omitted); *see also, e.g.*, *Young Ams. for Liberty at Univ. of Ala. in Huntsville v. St. John*, 376 So. 3d 460, 467 (Ala. 2022) ("[A] Rule 12(b)(6) dismissal is proper *only* when it appears *beyond doubt* that the plaintiff can *prove no set of facts* in support of the claim that would entitle the plaintiff to relief." (emphasis added)).

Thus, the relevant inquiry on a motion to dismiss is not "whether the plaintiff will ultimately prevail, but only whether [the plaintiff] *may possibly* prevail." *Id.* at 465 (emphasis added). Under this liberal standard, *see, e.g.*, *Patton*, 646 So. 2d at 10; *Ellison v. Stokes*, CL-2022-0845, 2023 WL 3029826, at *3 (Ala. Civ. App. Apr. 21, 2023), a Rule 12(b)(6) motion "should seldom be granted," *Campbell v. Sims*, 686 So. 2d 1227, 1229 (Ala. Civ. App. 1996) (internal quotations and citation omitted). For the reasons set forth below, and in Plaintiffs' First Amended

[1] Per this Court's March 15, 2024, Order, all written material pertinent to the hearing scheduled for April 29, 2024, are attached, with copies of case law attached hereto as Ex. A, and statutory, regulatory, and other authority attached hereto as Ex. B.

Complaint, Plaintiffs have more than satisfied this "favorable standard." *Young Ams.*, 376 So. 3d at 467.

BACKGROUND

A. Plaintiffs

Plaintiffs are individual licensed physicians and midwives; freestanding birth centers that either provide or seek to provide midwifery care, including out-of-hospital birthing care; and a membership organization of Alabama midwives.

Plaintiff Dr. Heather Skanes, a licensed and Board-certified obstetrician/gynecologist (OB/GYN), is the founder and Executive Director of Plaintiff Oasis Family Birthing Center (OFBC), a freestanding birth center in Birmingham. Pls.' First Am. Compl. Declaratory & Inj. Relief, Doc. 144 at ¶¶ 8–9 [hereinafter "Am. Compl."]. OFBC originally opened to patients in September 2022 and provided midwifery care—including midwife-attended births—to patients with low-risk pregnancies. *Id.* ¶¶ 21–28, 115. After months of operating, ADPH suddenly informed Dr. Skanes that it considered OFBC to be operating as an "unlicensed hospital," but she could not apply for a license for OFBC because no such license was available. *Id.* ¶¶ 125–27. As a result, OFBC was forced to shut down entirely for six months. *Id.* ¶¶ 29, 130, 165. Pursuant to this Court's preliminary injunction order, OFBC received a temporary license to operate as a FSBC and resumed services in January 2024. *Id.* ¶ 146. Plaintiff Jo Crawford, a licensed certified professional midwife (CPM), currently provides midwifery care in Alabama at OFBC and through her home birth practice. *Id.* ¶ 13.

Plaintiff Dr. Yashica Robinson, a licensed and Board-certified OB/GYN, is the founder and Medical Director of Alabama Birth Center (ABC), a freestanding birth center in development in Huntsville. *Id.* ¶¶ 10–11. But for ADPH's unlawful actions making it difficult, if not impossible,

to operate an FSBC in Alabama, Dr. Robinson intends for ABC to provide midwifery care to patients with low-risk pregnancies during the prenatal, labor and delivery, and postpartum periods. *Id.* ¶¶ 10, 31–33, 162. ABC's application for temporary licensure to operate as a FSBC pursuant to this Court's preliminary injunction order was submitted to ADPH and is currently pending. *See* Am. Compl. ¶ 147. Tracie Stone, a Utah-licensed CPM is currently seeking CPM licensure in Alabama and, once licensed, plans to provide midwifery care at ABC. *Id.* ¶ 14.

Plaintiff Alabama Affiliate of the American College of Nurse-Midwives (ACNM-AL) is the local state affiliate of ACNM, the nationwide professional association of certified nurse-midwives (CNMs), whose members include Alabama-based members of ACNM. *Id.* ¶ 12. As a result of ADPH's actions, and except as may be temporarily permitted under this Court's preliminary injunction order, the members of ACNM-AL have been denied the opportunity to establish, work in, or refer their patients to FSBCs in Alabama, thereby impeding their ability to practice to the full scope of their training, education, and certifications. *Id.* ¶¶ 175–76.

B. Plaintiffs' Original Complaint and Preliminary Injunction Proceedings

On August 8, 2023, Plaintiffs initiated this lawsuit to challenge ADPH's ongoing actions that are preventing Plaintiffs and their members from operating and/or providing midwifery care in FSBCs. Pls.' Compl. Declaratory & Inj. Relief, Doc. 2 at ¶¶ 1–4, 139–57 [hereinafter "Compl."]. Plaintiffs alleged that ADPH's actions prohibiting birth centers from operating in Alabama violated the Alabama Administrative Procedure Act (AAPA), Ala. Code § 41-22-10, and the federal and Alabama Constitutions. *Id.* ¶¶ 159–84. The next day, Plaintiffs moved for a preliminary injunction on the first four of their six claims. Pls.' Mot. Prelim. Inj., Doc. 8 at ¶¶ 11–30.

On September 8, 2023, Defendants filed their first motion to dismiss under Rules 12(b)(1) and 12(b)(6). Mot. Dismiss Defs. Ala. Dep't of Pub. Health & Scott Harris, Doc. 76 [hereinafter

"First MTD"]. In their motion, Defendants argued, among other contentions, that FSBCs constitute hospitals for purposes of ADPH's licensing authority, *see* Ala. Code § 22-21-20(1), and therefore Plaintiffs' first claim to the contrary failed as a matter of law, and that the finalization of ADPH's birth center regulations rendered Plaintiffs' second claim moot. *Id.* at 6–10. Plaintiffs opposed Defendants' motion on the grounds that Alabama law and the Complaint's extensive allegations clearly demonstrated that Plaintiffs OFBC and ABC (collectively, "Plaintiff Birth Centers") are not "hospitals," and thus did not fall under ADPH's regulatory authority. Pls.' Mem. Law Opp. Defs.' First MTD, Doc. 102 at 15–21. Further, Plaintiffs argued that their claims were not moot because ADPH's proposed birth center regulations were not yet final, and, even if they were, they would still not provide a path to licensure. *Id.* at 21–27. Following oral argument, the Court issued its order denying Defendants' motion to dismiss on September 29, 2023. Order, Doc. 104.

On September 30, 2023, after reviewing Plaintiffs' motion for a preliminary injunction and considering the evidence in support of that motion, including live testimony, the Court granted Plaintiffs' motion and enjoined ADPH from "refusing to timely license . . . freestanding birth centers operating in the midwifery model of care . . . that can demonstrate substantial compliance with the standards set out by the American Association of Birth Centers" and satisfy other statutory requirements. Order Granting Pls.' Mot. Prelim. Inj., Doc. 110 [hereinafter "Order"]; *see also* Suppl. Prelim. Inj. Order, Doc. 119 at 1–2. Defendants did not appeal.

C. 2023 Final Regulations and Plaintiffs' First Amended Complaint

ADPH finalized regulations for the operation of FSBCs in Alabama on October 15, 2023 (2023 Final Regulations). Am. Compl. ¶ 150 (citing Ala. Admin. Code r. 420-5-13-.01 to -.19). Plaintiffs filed their First Amended Complaint on January 19, 2024. Am. Compl., Doc. 144. Plaintiffs challenge the 2023 Final Regulations in their entirety, and in the alternative challenge

specific provisions, as unlawful and unconstitutional. Am. Compl. ¶¶ 198–259. On February 29, 2024, Defendants filed their second partial motion to dismiss—only as to claims one through five of Plaintiffs' Amended Complaint—as well as a partial answer. Defs.' Mot. Dismiss Claims One Through Five Pls.' First Am. Compl., Doc. 165 [hereinafter "MTD"]; Partial Answer to First Am. Compl. Defs. Ala. Dep't of Pub. Health & Scott Harris, Doc. 162.[2]

ARGUMENT

I. Plaintiffs' Well-Pleaded Allegations State a Claim that ADPH Lacks Regulatory and Licensing Authority Because FSBCs Are Not "Hospitals" under Section 22-21-20(1) (Primary Claim).

Plaintiffs' well-pleaded allegations in the Amended Complaint more than suffice to state a claim that FSBCs are not hospitals for purposes of Alabama Code Section 22-21-20(1), and therefore ADPH exceeded its statutory authority by threatening criminal and civil penalties against FSBCs that operate without a hospital license.

Defendants agree that whether a particular health care center falls within ADPH's statutory authority and within the definition of "hospital" turns on whether that health care center is "primarily engaged in offering to the public generally . . . obstetrical care." MTD 3 (quoting Ala. Code § 22-21-20(1)). The problem is that Defendants, now, for the second time, ignore both Alabama law and the extensive allegations of the Amended Complaint that—taken as true—more than adequately allege that the Plaintiff Birth Centers do not fall within this definition. Plaintiff Birth Centers do not provide "obstetrical care," and their services are not offered to the "public

[2] Defendants do not move to dismiss the following claims: six (Due Process Right to Pursue Useful Activities under Alabama Constitution); seven (AAPA—Violates Due Process Right to Pursue Useful Activities); eight (Right to Procreate under Alabama and U.S. Constitutions); nine (AAPA—Violates Constitutional Right to Procreate); ten (Due Process—Unlawful Private Delegation under Alabama and U.S. Constitutions); eleven (AAPA—Violates Unlawful Private Delegation); twelve (Due Process and Equal Protection under Alabama and U.S. Constitutions); and thirteen (AAPA—Violates Due Process and Equal Protection). *See generally* MTD, Doc. 165.

generally." Nor is ADPH entitled to any deference in interpreting the statutory definition of hospital. *See Fraternal Ord. of Police, Lodge No. 64 v. Pers. Bd. of Jefferson Cnty.*, 103 So. 3d 17, 28 (Ala. 2012) (stating that deference to agency's interpretation of a statute was not appropriate where "[t]he whole thrust of the [plaintiffs'] argument [was] that the [agency] d[id] not have the statutory authority" to act at all); *Ex parte State Health Plan. & Dev. Agency*, 855 So. 2d 1098, 1102–03 (Ala. 2002) ("[b]ecause an administrative agency may not expand its own jurisdiction by its interpretation of a statute (or by any other means)," court would not defer to agency at all on question of whether agency action fell within its "sphere of statutory authority"). This Court has already denied Defendants' first motion to dismiss Plaintiffs' primary claim based on the same arguments regarding the definition of "obstetrics." Order; First MTD 6–8. The same result is warranted here, as Plaintiffs' Amended Complaint states a claim that ADPH's attempt to require the Plaintiff Birth Centers to obtain a hospital license exceeds its statutory authority. Ala. Code § 41-22-10.

A. Plaintiffs More Than Adequately Alleged that the Plaintiff Birth Centers Do Not Provide "Obstetrical Care."

Defendants assert that *any* provision of "care for women during pregnancy, childbirth, and following delivery," necessarily constitutes "obstetrical care" and therefore falls within the statutory definition of a hospital. MTD 4. However, both Alabama law and Plaintiffs' allegations more than suffice to state a claim that, as a legal and factual matter, the midwifery care that the Plaintiff Birth Centers provide is not obstetrical care.

As a threshold matter, Defendants rest their legal argument almost entirely on a medical dictionary definition that itself contradicts their categorical claim that all pregnancy-related care is obstetrics. MTD 4. The definition Defendants have now cited twice defines "obstetrics" as "*the branch of medicine* that concerns management of women during pregnancy, childbirth, and the

puerperium [i.e., the forty-two days following birth]." *Id.* (emphasis added) (quoting *Obstetrics*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY (18th ed. 1997)); *see also* First MTD 7 (same). Far from supporting Defendants' claim that any and all pregnancy-related care is obstetrics regardless of who provides it, this definition limits obstetrics to "the branch of *medicine*" related to such care. Under Alabama law, many licensed practitioners may provide pregnancy-related care, but the practice of "medicine" can be performed *only* by a licensed "doctor of medicine" or "doctor of osteopathy." Ala. Code § 34-24-50.1(4); *see also* Ala. Code § 34-24-51 (stating that non-physicians licensed in Alabama can practice within the scope of their license so long as they do not practice "medicine and osteopathy"). In fact, it would be a Class C felony for any other person—including other licensed health care providers—to practice "medicine," *id.* § 34-24-51, such as "obstetrical care." Therefore, as a matter of law, non-physicians such as licensed nurse midwives and professional midwives—like Plaintiffs and their members who provide or intend to provide care at the Plaintiff Birth Centers, *see* Am. Compl. ¶¶ 13–14, 25, 34, 111–12, 153–54—cannot practice medicine or any branch thereof, including obstetrics, *see* Ala. Code § 34-24-51.[3]

At the same time, it is beyond dispute that non-physicians, such as licensed midwives, can and do provide pregnancy-related care, even as they are statutorily prohibited from practicing obstetrics or any other branch of medicine. For example, the Legislature has authorized certified nurse midwives to engage in "the performance of *nursing skills* . . . relative to the management of

[3] Defendants also cite an Alabama Supreme Court decision in which Defendants claim the Court "quoted with approval" a definition of "the practice of obstetrics" as "primarily . . . involv[ing] taking care of a mom . . . up to the time of her delivery, taking care of her through the delivery, and then after the delivery process." MTD 4 (quoting *Hegarty v. Hudson*, 123 So. 3d 945, 947 (Ala. 2013) (internal quotation marks omitted)). While this definition is indeed quoted in the opinion as part of recounting an obstetrician's testimony in the trial court, there is no indication that the Court agrees or disagrees with it. And crucially, the case had nothing to do with whether *non-physician* licensed providers providing care to pregnant people *also* constitutes obstetrics, so the Court can hardly be described as having ruled on that point.

women's health care focusing on pregnancy, childbirth, the postpartum period, [and] care of the newborn." *Id.* § 34-21-81(2)(b) (emphases added). And the Legislature has authorized certified professional midwives to engage in "[t]he provision of *primary maternity care* during the antepartum, intrapartum, and postpartum periods." *See id.* § 34-19-11(3) (emphasis added). Notably, the Legislature explicitly stated that nothing in the midwifery statute "shall be construed as authorizing a licensed midwife to practice medicine," *id.* § 34-19-18(b), and did *not* define the scope of practice of either profession as involving obstetrics, obstetrical care, or the practice of medicine, *see generally id.* § 34-21-80 *et seq.*; *id.* § 34-19-11 *et seq.*

The Legislature is "presume[d]" to "know[] the meaning of the words it uses," *Reed v. Bd. of Trs. for Ala. State Univ.*, 778 So. 2d 791, 794 (Ala. 2000) (quoting *Ex parte Jackson*, 614 So. 2d 405, 407 (Ala. 1993)), and its choice of words is not "meaningless," *id.* (quoting *Elder v. State*, 50 So. 370, 371 (Ala. 1909)). Here, the Legislature has deliberately excluded the provision of pregnancy-related care by non-physicians (i.e., midwives) from the practice of medicine and, more specifically, obstetrics. Thus, contrary to Defendants' argument, while midwives and obstetricians may treat overlapping patient populations, the pregnancy-related care midwives provide before, during, and after labor and delivery—as a matter of law—is not obstetrical care, but "women's health care" and "primary maternity care."[4] Because the Legislature has limited ADPH's hospital licensing authority to health care centers providing "obstetrical care," that authority necessarily does not encompass health centers like Plaintiff Birth Centers, where pregnancy-related care is provided by non-physicians—namely, by nurse midwives or professional midwives.

[4] Analogously, the practice of psychiatry involves care for and treatment of mental health conditions, but not all mental health care (such as therapy provided by psychologists or licensed social workers) is therefore the practice of psychiatry. *See* Ala. Code § 34-26-1 (defining practice of psychology); *id.* § 34-30-1 (defining practice of social work).

Moreover, Defendants' argument is not only wrong on the law. Once again, Defendants fail to contend with the extensive and well-supported allegations in Plaintiffs' Amended Complaint that, taken as true, more than suffice to state a claim that the Plaintiff Birth Centers provide *midwifery care* to patients during pregnancy, birth, and the postpartum period, *not* obstetrical care. *Compare* Am. Compl. ¶¶ 8, 10, 19, 24–26, 111–12 (alleging that Plaintiff OFBC provides "comprehensive midwifery services . . . utilizing the midwifery model of care" and employs midwives to deliver patient care, and that Plaintiff ABC intends to do the same), *and id.* ¶ 52 (alleging that FSBCs "utilize[e] a midwifery model of care"), *with* First MTD 6–8; MTD 3–6. As Plaintiffs alleged, and as is consistent with Alabama law set forth above, midwifery is "a distinct health care specialty from obstetrics," with a distinct history, practiced by practitioners with a "different skill set, education, and training background than obstetricians." Am. Compl. ¶ 55; *see also id.* ¶¶ 5 n.5, 54, 56, 67, 79–89. By contrast, obstetrics is a "medicalized model of care" that involves "identifying and treating pathology or abnormality in pregnancy" and performing medical or surgical interventions in delivery, such as augmentation of labor or surgical deliveries. *Id.* ¶ 55; *see also id.* ¶¶ 52, 54 & n.24 (alleging that midwifery does not involve the provision of obstetric interventions). In short, FSBCs like the Plaintiff Birth Centers, which operate "under the midwifery model of care[,] [are] not engaged in offering obstetrical care." *Id.* ¶ 196.

Finally, Defendants' argument that any and all pregnancy-related care is *per se* obstetrical care, *see* MTD 4–5, contradicts the Attorney General's December 2022 opinion, which was issued at ADPH's request on the question of whether FSBCs are "hospitals" under Section 22-21-20(1), Am. Compl. ¶¶ 119–23. This opinion, "addressing the same issue presented in" this case, is "persuasive" authority. *Norris v. Fayette Cnty. Comm'n*, 143 So. 3d 659, 665 (Ala. 2013), *as modified on denial of reh'g* (Dec. 20, 2013). And, despite citing the very same definition of

"obstetrical care" that Defendants now cite in support of their categorical reading, the Attorney General did *not* conclude that all birth centers are "hospitals" *per se* under Section 22-21-20(1). Am. Compl. ¶ 121 (citing Ala. Att'y Gen. Op. No. 2023-12, at 3 (Dec. 15, 2022) [hereinafter "Att'y Gen. Op."], https://opinions.alabamaag.gov/Documents/opin/2023-012.pdf). Instead, the opinion concluded that FSBCs fall within the hospital definition—and therefore under ADPH's authority—*only* if as a *factual* matter a given FSBC provided obstetrical care. *Id*. Yet Plaintiffs' allegations, which must be taken as true, state that ADPH never made any such determination with respect to Plaintiff OFBC before forcing it to shut down, for example. *See also* Am. Compl. ¶ 132. As such, and in light of the well-pleaded allegations, the Attorney General's opinion provides further persuasive authority that Plaintiffs have stated a claim on their Primary Claim.

B. Plaintiffs More Than Adequately Alleged that the Plaintiff Birth Centers Do Not Provide Care to the "Public Generally."

Defendants also assert that FSBCs meet the statutory definition of a hospital because they provide care to "the public generally." MTD 5. However, Plaintiffs' allegations, which must be taken as true, make clear this is not the case. Unlike hospitals, which by their nature offer acute care services to members of the community at large, Plaintiffs alleged that the Plaintiff Birth Centers only provide or intend to provide care to certain patients who must first be screened to ensure they have low-risk pregnancies and are eligible and appropriate candidates for care and delivery in the birth center. *See* Am. Compl. ¶¶ 26–27. And, unlike at hospitals, which are obligated under federal law to provide care to any pregnant patient who presents at the hospital in labor, 42 U.S.C. § 1395dd(b), sometimes patients "risk out" of giving birth in the birth center altogether, if they develop risk factors that no longer make their pregnancies low risk. *See* Am. Compl. ¶¶ 27, 67. Thus, far from offering their care to the public generally, the Plaintiff Birth Centers are much more akin to private practices and home birth practices. In private doctors'

offices, providers exercise discretion in choosing whether or not to take on a particular patient, just like FSBCs, *see* Am. Compl. ¶¶ 26–27, 52, 67, 184, and such private practices are specifically excluded from the "hospital" definition, *see* Ala. Code § 22-21-20(1). And in a home birth practice, professional midwives provide nearly identical care as would be provided in an FSBC, but such practices have never been understood to fall within ADPH's licensing or regulatory authority. *See* Am. Compl. ¶¶ 13–14, 53, 65–66, 153–55, 185–87.

Defendants do not even attempt to dispute these allegations. Rather, Defendants attempt to argue around these well-pleaded allegations by suggesting that FSBCs are merely hospitals serving a specialized population, just like other facilities explicitly listed within the statutory definition of a hospital that also do not serve the general public. MTD 5. But this argument misrepresents the statutory text: The statute names specific types of facilities that constitute a hospital for purposes of ADPH's licensure and regulatory authority (e.g., children's hospitals, abortion and reproductive health centers, rehabilitation centers) and then includes a separate catch-all clause that generally describes any other unnamed facilities that, *inter alia*, serve "the public generally." Ala. Code § 22-21-20(1).[5] Because FSBCs are not explicitly listed in the statute, they can only constitute hospitals if they satisfy the criteria included in the catch-all clause which requires, specifically,

[5] Under the statutory definition, the following facilities constitute a "hospital" for purposes of ADPH's authority:

> General and specialized hospitals, including ancillary services; independent clinical laboratories; rehabilitation centers; ambulatory surgical treatment facilities for patients not requiring hospitalization; end stage renal disease treatment and transplant centers, including free-standing hemodialysis units; abortion or reproductive health centers; hospices; health maintenance organizations; *and other related health care institutions when such institution is primarily engaged in offering to the public generally, facilities and services for the diagnosis and/or treatment of injury, deformity, disease, surgical or obstetrical care.*

Ala. Code § 22-21-20(1) (emphasis added).

that they provide obstetric services "to the public generally." *Id.*

Defendants concede as much, which defeats their own argument. MTD 3 ("Whether FSBCs are hospitals under the statute is determined solely by whether they are 'primarily engaged in offering to the public generally . . . obstetrical care' . . . ."). While the statute contemplates that other types of "hospitals" may not serve the community at large, those that provide obstetric care—as ADPH claims FSBCs do here, *but see supra* Part I.A.—are only hospitals *if* that care is offered "to the public generally." Ala. Code § 22-21-20(1). The facilities Defendants mention are considered hospitals only because they are all explicitly named in a *different* part of the definition, and therefore are not required to satisfy the statutory criterion of serving the "the public generally." *Id.*; *see also City of Montgomery v. Town of Pike Rd.*, 35 So. 3d 575, 584 (Ala. 2009) ("There is a presumption that every word, sentence, or provision [of a statute] was intended for some useful purpose, has some force and effect, and that some effect is to be given to each." (alteration in original) (quoting *Ex parte Children's Hosp. of Ala.*, 721 So. 2d 184, 191 (Ala. 1998)).

Accordingly, Plaintiffs have more than sufficiently alleged that Plaintiff Birth Centers are not hospitals for purposes of Section 22-21-20(1) because they are not open "to the public generally," which provides an independent reason to deny Defendants' motion to dismiss Plaintiffs' Primary Claim.

II. Plaintiffs State a Claim on Their Second Claim for Relief that ADPH's Failure to Provide a Timely, Feasible Path to Licensure for FSBCs Violates the AAPA.

Defendants next seem to contend that the 2023 Final Regulations have mooted any claim concerning ADPH's failure to provide a realistic path to licensure for FSBCs. *See* MTD 6 (arguing mootness exists "*[t]o the extent* the gravamen of Plaintiffs' second claim is that ADPH *has not promulgated rules*" (emphases added)). But this argument mischaracterizes Plaintiffs' Second Claim under the Amended Complaint as turning on the non-existence of regulations, which it does

not.[6] The crux of that claim is not ADPH's failure to promulgate regulations at all, but that Plaintiffs are denied a timely, feasible path to licensure by *both* the 2023 Final Regulations *and* ADPH's refusal to exercise its existing statutory licensing authority. Am. Compl. ¶¶ 198–205.[7] A claim is not moot unless "there ceases to be an actual controversy between the parties." *Chapman v. Gooden*, 974 So. 2d 972, 983 (Ala. 2007) (internal quotations and citation omitted). Here, assuming for the sake of argument ADPH has licensing authority over FSBCs at all, the controversy continues for two reasons:

First, the Amended Complaint contains extensive allegations detailing the extent to which the 2023 Final Regulations do not end the *de facto* ban on FSBCs in Alabama—they only extend it. *See* Am. Compl. ¶¶ 153–62; *see also id*. ¶ 204. For example, the new rules would require FSBCs to "apply for, obtain, and maintain accreditation from a nationally recognized accrediting organization *as a condition of receiving a license*." Ala. Admin. Code r. 420-5-13-.13(6). Thus,

[6] Although Plaintiffs' original Complaint claimed that ADPH's failure to provide a regulatory path to licensure constituted a de facto ban on birth centers (when combined with its refusal to exercise its statutory authority), *see* Compl. ¶ 169, Plaintiffs' Amended Complaint eliminated any claim regarding the nonexistence of regulations, but maintained that ADPH's current policies continue the de facto ban on birth centers. Am. Compl. ¶¶ 203–04 (alleging "the current birth center regulations are unlawful, unconstitutional, and make it difficult, if not impossible, to work in, establish, construct, maintain, or operate birth centers" and therefore ADPH has failed to provide a regulatory path for licensure).

[7] As a threshold matter, Defendants do not deny that Plaintiffs' allegations show that ADPH—assuming it has licensing or regulatory authority over FSBCs at all—has existing statutory authority to issue licenses to FSBCs based on compliance with statutory criteria *now*, but is refusing to exercise that power. MTD 6. Nor do they deny that Plaintiffs' allegations show that the 2023 Final Regulations fail to provide a regulatory pathway to licensure. *Id.* Having elected *not* to contest Plaintiffs' underlying claim that this rule exceeds its statutory authority under the AAPA and instead argue mootness only, Defendants have effectively conceded that Plaintiffs state a claim on the merits of Claim Two. *See generally Tidwell v. Bank of Am., N.A.*, No. 2:17-CV-686-MHT-GMB, 2018 WL 1354794, at *1 (M.D. Ala. Feb. 13, 2018), *report and recommendation adopted*, No. CV 2:17CV686-MHT, 2018 WL 1352168 (M.D. Ala. Mar. 15, 2018); *Holmes v. Behr Process Corp*., No. 2:15-CV-0454-WMA, 2015 WL 7252662, at *2 (N.D. Ala. Nov. 17, 2015); *Cardwell v. Auburn Univ. Montgomery*, 941 F. Supp. 2d 1322, 1329 (M.D. Ala. 2013).

any FSBC seeking a license would need to first not only apply for, but also *obtain*, final accreditation before any license could be granted—a process that ADPH is aware can take *at minimum* six to twelve months. *See* Am. Compl. ¶ 161 (citing Memorandum from Denise Milledge, MBA, BSN, Dir., ADPH Bureau of Health Provider Standards, to State Comm. of Pub. Health, Proposed Rules for Birthing Centers, Chapter 420-5-13 (Aug. 8, 2023), Am. Compl. Ex. D at 13, 19, 21 [hereinafter "Milledge Memo"]). As Plaintiffs alleged, it would be extremely difficult for birth centers to maintain a business, while continuing to incur staffing, property, equipment and other costs, without being able to open and operate for such an extended period of time. Am. Compl. ¶ 161. Moreover, as Plaintiffs have extensively alleged, the regulatory scheme presents myriad other significant obstacles to the operation of FSBCs. *See id*. ¶¶ 153–62 (alleging numerous requirements that would be extremely onerous, if not impossible, for FSBCs to comply with). Indeed, as Plaintiffs alleged, prior to being adopted, the Regulations were met with near-uniform opposition from leading experts on midwifery and birth centers, including the State Board of Midwifery, the American Association of Birth Centers, and the Alabama Midwives Association, Am. Compl. ¶¶ 139, 151, because they, *inter alia*, "greatly restricted the ability of freestanding birth centers to operate in Alabama," *id.* ¶ 139. Thus, the Regulations have only served to continue the *de facto* ban on FSBCs in Alabama, and the controversy between the parties.

In short, Defendants' claim that the mere existence of the 2023 Final Regulations moots Plaintiffs' Second Claim fails to address Plaintiffs' extensive allegations that those Regulations themselves constitute a *de facto* ban on birth centers. Indeed, the Defendants do not contest that Plaintiffs' multiple claims challenging the substance of individual provisions of the 2023 Final Regulations, and the impossibility of Plaintiffs' compliance with them, each state a claim. Just as

Plaintiffs' challenges to those individual provisions are not moot, Plaintiffs' challenge to the 2023 Final Regulations as a whole is not moot.

Second, even if the 2023 Final Regulations are struck down as exceeding ADPH's statutory authority by imposing a de facto ban on FSBCs, Plaintiffs would not have a path to licensure because of ADPH's ongoing policy not to exercise its *existing statutory licensing authority* in the absence of regulations. *See* Am. Compl. ¶ 203. This is crucial, because if Plaintiffs prevail on their Second Claim and the 2023 Final Regulations are invalidated, that relief would be hollow if ADPH continues to refuse to exercise its existing statutory authority to grant licenses.[8] Simply put, the de facto ban would remain in place.

Under Alabama law, ADPH has *statutory* authority to issue licenses to FSBCs, as it may issue "licenses for the operation of hospitals [as defined in Section 22-21-20] which are found to comply with the provisions of this article and *any* regulations lawfully promulgated by the State Board of Health," Ala. Code § 22-21-25(a) (emphases added). Thus, even in the absence of "any regulations," ADPH may issue licenses based on compliance with general statutory criteria. *See also id.* § 22-21-23 (to obtain a license, applicants "shall submit evidence of ability to comply with the minimum standards provided in this article *or* by regulations issued under its authority" (emphasis added)).[9]

However, as Plaintiffs have alleged, ADPH has adopted and enforced a generally applicable policy that it will categorically refuse to exercise its statutory authority to license FSBCs in the absence of regulations. For example, ADPH repeatedly informed Plaintiff Dr. Skanes that

[8] If the 2023 Final Regulations are struck down as an unreasonable regulatory scheme, as alleged in Plaintiffs' Third Claim, this same issue would arise.

[9] This statutory authority is the basis for the temporary relief granted by this Court during the pendency of this lawsuit. *See* Am. Compl. ¶¶ 145–47, 180.

she could not operate OFBC without a hospital license from ADPH *and* refused to allow her even to apply for one. Am. Compl. ¶¶ 125–29 (describing oral and written communication from ADPH Assistant General Counsel informing Dr. Skanes that "no mechanism to seek such a license [from ADPH] existed at that time"); *see also id.* ¶ 126 (describing conversation with Dr. Amber Clark-Brown, Medical Director for ADPH's Bureau of Health Provider Standards, in which "Dr. Skanes requested that OFBC be permitted to apply for a license," and Dr. Clark-Brown informed her that "no such application was available"). Notably, at that time there were no Alabama regulations regarding the licensure of FSBCs in place, as the 2023 Final Regulations would not even be proposed for several months, and it took several more months for them to go into effect. *Id*. ¶¶ 99–104, 113, 135, 150. These "general[ly] applicabl[e]" statements from ADPH to Dr. Skanes, Ala. Code § 41-22-3(9), constitute an agency rule by ADPH because they "substantially affect the legal rights of, [and] procedures available to, the public," *id.* § 41-22-3(9)(c), by making licensure under ADPH's existing statutory authority categorically unavailable to FSBCs in Alabama, including the Plaintiff Birth Centers. *See* Am. Compl. ¶¶ 200, 202–03.[10] And, as a consequence of this rule, even if the 2023 Final Regulations are struck down in their entirety, Plaintiffs would still lack any path to licensure for the birth centers. Thus, Plaintiffs have more than sufficiently alleged under Claim Two that ADPH's policy of categorically refusing to exercise its statutory licensing authority, which imposes a *de facto* ban on FSBCs, constitutes a "rule" under the AAPA. This too constitutes an ongoing live controversy between the parties, and therefore Claim Two is not moot.

[10] As the Supreme Court of Alabama has explained, "the word 'rule' is intended to have a broad definition" under the AAPA. *Ex parte Traylor Nursing Home, Inc.*, 543 So. 2d 1179, 1183 (Ala. 1988) (internal quotations and citation omitted). Any "regulation, standard, or statement of *general applicability* that implements, interprets, or prescribes law or policy" is a rule for AAPA purposes. Ala. Code § 41-22-3(9) (emphasis added); *see also Keith v. LeFleur*, No. 2200821, 2023 WL 5810427, at *6–8 (Ala. Civ. App. Sept. 8, 2023) (agency statements that "apply generally" are rules).

Thus, because the existence of an insurmountable *regulatory* licensing scheme, combined with ADPH's ongoing rule that it will refuse to exercise its *statutory* licensing authority, continues to leave Plaintiffs with no path to licensure for FSBCs, an "actual controversy" persists between the parties, and Claim Two is not moot.

III. Plaintiffs' Third Claim Is Not Subject to the Administrative Exhaustion Doctrine.

Defendants' argument that Plaintiffs were required to exhaust administrative remedies by seeking a waiver or variance of the regulatory provisions challenged under Claim Three is also incorrect. MTD 7–8. Alabama's administrative exhaustion doctrine is not applicable to claims, like Claim Three, that challenge the validity of an administrative action under Section 41-22-10 of the AAPA. Indeed, Plaintiffs' Third Claim more than adequately alleges that ADPH's adoption of the 2023 Final Regulations for FSBCs under the AAPA was an impermissible overreach of ADPH's statutory authority because it imposes numerous unreasonable requirements on the Plaintiff Birth Centers and their staff, Am. Compl. ¶¶ 206–11, which Defendants effectively concede.[11] Even if that were not the case, more than one exception to the administrative exhaustion doctrine would apply here, ameliorating any need for Plaintiffs to pursue a waiver of the Regulations with the agency before seeking relief from this Court. As Defendants seek dismissal of Plaintiffs' Third Claim *solely* on the basis that Plaintiffs have purportedly failed to exhaust administrative remedies, MTD 7, their arguments should be rejected.

[11] Notably, Defendants do not argue that Plaintiffs' Third Claim failed to adequately state a claim. *See generally* MTD 7–8. Having elected *not* to contest Plaintiffs' underlying claim that this rule exceeds its statutory authority under the AAPA and instead argue administrative exhaustion only, Defendants have effectively conceded that Plaintiffs have adequately alleged their Third Claim. *See generally Tidwell*, 2018 WL 1354794, at *1; *Holmes*, 2015 WL 7252662, at *2; *Cardwell*, 941 F. Supp. 2d at 1329.

A. The Administrative Exhaustion Doctrine Does Not Apply to Plaintiffs' Third Claim Challenging the Validity of a Rule under the AAPA Section 41-22-10.

As a threshold matter, because Plaintiffs' Third Claim challenges the validity of the 2023 Final Regulations under Section 41-22-10 of the AAPA, it is immediately reviewable by this Court, and is not subject to the administrative exhaustion doctrine. The AAPA explicitly provides that "[t]he validity or applicability of a rule may be determined in an action for a declaratory judgment or its enforcement stayed by injunctive relief in the circuit court of Montgomery County . . . if the court finds that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." Ala. Code § 41-22-10. A rule is "invalid" if it "exceeds the statutory authority of the agency," among other bases. *Id.*

Here, where Plaintiffs' extensive allegations are sufficient to allege a claim that the 2023 Final Regulations are invalid for exceeding ADPH's statutory authority—which Defendants do not contest, *see supra* note 10—the Alabama Supreme Court has held that the administrative exhaustion doctrine does not apply. In *Alabama Cellular Service, Inc. v. Sizemore*, 565 So.2d 199 (Ala. 1990), the Alabama Supreme Court held that providers of cellular radio telecommunications services were not required to seek relief from an agency before challenging a regulation in Montgomery Circuit Court under Section 41-22-10 of the AAPA, just as Plaintiffs have done here. *Id.* at 205. In reaching that holding, the Court analyzed the history and construction of Section 41-22-10. Noting the absence of any requirement that the agency must first pass upon the validity of a rule, the Court found "that the Alabama Legislature did not intend to make an agency declaratory ruling a prerequisite to seeking a declaratory judgment in circuit court." *Id.* at 203. The Court ultimately "agree[d] with the analysis espoused by the Honorable Alvin Prestwood, who chaired the committee responsible in large part for the passage of the Alabama Administrative Procedure Act," that "[t]he application of the exhaustion principles to section 10 certainly would not enhance

the orderly progress of proceedings and judicial decisions under the APA." *Id.* at 204 & n.8 (internal quotation marks omitted). Accordingly, the Court concluded that "[i]t is unnecessary as a precondition for bringing such a declaratory judgment action to first petition the state agency," and to the extent prior precedent held otherwise, the Court overruled those cases. *Id.* at 205; *see also Keith v. LeFleur*, 256 So. 3d 1206, 1214 (Ala. Civ. App. 2018) (holding plaintiffs "challenging the validity of certain administrative rules" "were not required to exhaust administrative remedies before filing . . . their complaint in the trial court" because "§ 41–22–10 and [Alabama case law] indicate that the plaintiffs could directly challenge the applicable rules in the trial court").

Because Plaintiffs' Third Claim is brought pursuant to Section 41-22-10, just as in *Sizemore*, Plaintiffs are not required to seek a waiver—or any administrative relief—from ADPH in the first instance, and Defendants' argument to the contrary is unavailing. Defendants' reliance on *City of Huntsville v. Smartt*, 409 So.2d 1353 (Ala. 1982), is also misplaced. There, the Alabama Supreme Court considered whether decisions made as a part of a government agency's promotion procedures, *made within the scope of the agency's authority*, were made arbitrarily, capriciously, in bad faith, or as a part of a fraud. *Id.* at 1357. *Smartt* did not consider the application of the administrative exhaustion doctrine where, as here, Plaintiffs challenge a rule as in excess of the agency's statutory authority itself, pursuant to Section 41–22–10.[12]

B. Alternatively, Plaintiffs' Third Claim Satisfies Multiple Exceptions from the Administrative Exhaustion Doctrine.

Moreover, even if *Sizemore* did not already resolve the question, there are still exceptions to the administrative exhaustion doctrine that allow Plaintiffs to pursue Claim Three without first seeking a waiver. The Alabama Supreme Court recognizes a number of exceptions to the doctrine

[12] Even if *Smartt* could be read to apply here, it predates *Sizemore*, and thus is clearly no longer applicable.

of administrative exhaustion, including "when (1) the question raised is one of interpretation of a statute, (2) the action raises only questions of law and not matters requiring administrative discretion or an administrative finding of fact, (3) the exhaustion of administrative remedies would be futile and/or the available remedy is inadequate, or (4) where there is the threat of irreparable injury." *Ex parte Lake Forest Prop. Owners' Ass'n*, 603 So. 2d 1045, 1046–47 (Ala. 1992); *City of Gadsden v. Entrekin*, 387 So. 2d 829, 833 (Ala. 1980) (same). Here, Plaintiffs' Third Claim meets the third and fourth exceptions to the administrative exhaustion doctrine. As explained below, Plaintiffs have clearly alleged that all the challenged provisions of the Regulations threaten irreparable harm, and requiring Plaintiffs to request a waiver would be futile and/or the available remedy is inadequate because ADPH is prohibited from waiving many of the challenged provisions of the 2023 Final Regulations. Additionally, as the Alabama Supreme Court held in *Lake Forest*, because Plaintiffs' *other* claims fall within the first, second, and fourth exceptions, Plaintiffs' Third Claim should not be considered separately from those claims. Accordingly, Plaintiffs are not required to administratively exhaust Claim Three.

1. Plaintiffs' Third Claim satisfies multiple exceptions to the administrative exhaustion doctrine because the 2023 Final Regulations threaten irreparable harm and ADPH cannot grant a waiver or variance for several provisions of the Regulations.

To start, as Plaintiffs' extensive and well-pleaded allegations demonstrate, the 2023 Final Regulations impose numerous unreasonable requirements on the Plaintiff Birth Centers and their staff, including but not limited to burdensome and clinically unjustified limitations on midwives' scopes of practice, physician supervision and minimum staffing requirements, hospital and transport written transfer agreements, and physical plant prerequisites. Am. Compl. ¶ 211. Plaintiffs have more than adequately alleged they would be irreparably harmed if subject to these unreasonable requirements, which Plaintiffs challenge in Claim Three. *See id.* ¶¶ 180–91. Because

Plaintiffs have alleged that the Regulations threaten irreparable harm, Claim Three falls within the fourth exception from the administrative exhaustion doctrine, and Plaintiffs need not seek a waiver for *any* of the challenged provisions of the Regulations. *See Lake Forest*, 603 So. 2d at 1046–47.

Further, while Plaintiffs do not dispute that Alabama Administrative Code r. 420-1-2-.09(d) allows them to seek a waiver of *some* provisions of the Regulations—even though, as explained *supra*, they are not required to do so—Defendants ignore subsection (a) of this part of the Code, which states that a waiver *cannot be granted* "for any provision that restates a statutory requirement or defines any term." Ala. Admin. Code r. 420-1-2-.09(a). The following provisions cannot be waived because they define terms, and include many of the key provisions Plaintiffs alleged are unreasonable in Claim Three:

- Plaintiffs challenged the limitation on CPMs providing "care as assistive personnel," which is contained in the definition of a "Birthing Center." Ala. Admin. Code r. 420-5-13-.01(2)(b); *see also* Am. Compl. ¶ 185.

- Plaintiffs challenged that both CPMs and CNMs are required to have "1 year of experience in labor and delivery and/or newborn intensive care" to work in a birth center, which is included in the definitions of both of those providers. *See* Ala. Admin. Code r. 420-5-13-.01(2)(d) (defining "Certified Nurse Midwife"), (2)(e) (defining "Certified Professional Midwife"); *see also* Am. Compl. ¶ 188.

- Plaintiffs challenged the clinically unjustified patient-eligibility criteria contained in the definitions of "Low Risk Patient" and "Risk Criteria." *See* Ala. Admin. Code r. 420-5-13-.01(2)(p), (u); *see also* Am. Compl. ¶ 190.

- Plaintiffs challenged the written transfer agreement requirement, contained in the definition of "Transfer Agreement," which mandates that FSBCs have an agreement with a hospital for the "hospital's acceptance of referrals from the birthing center and phone consultations as needed to address emergency situations" and an agreement with an emergency medical services provider to transport patients to the hospital. *See* Ala. Admin. Code r. 420-5-13-.01(2)(x); *see also* Am. Compl. ¶ 157.

Because Plaintiffs challenge a number of requirements that are set forth in the definitions section of the Regulations, it follows that ADPH lacks the power to grant a waiver for those provisions. "When the administrative body is without power to redress the complained-of harm,

the complaining party is not required to engage in what would be a futile process." *See City of Bessemer v. McClain*, 957 So. 2d 1061, 1069 (Ala. 2006). Accordingly, the third exception to the administrative exhaustion doctrine applies because seeking a waiver would be futile and/or the remedies inadequate.

2. Plaintiffs' other claims satisfy multiple exceptions to the administrative exhaustion doctrine, and Plaintiffs' Third Claim need not be considered separately.

Plaintiffs' Third Claim is also brought alongside Claims raising constitutional challenges, matters of statutory interpretation, and allegations of irreparable harm, all of which fall under exemptions from the administrative exhaustion doctrine. Indeed, Claim Three is the *only* claim Defendants argue requires exhaustion. MTD 7–8. Thus, even if multiple exceptions to the doctrine did not apply to Claim Three itself, because this claim is raised alongside other claims that indisputably qualify for such exceptions, the doctrine does not apply to Plaintiffs' Third Cause of Action either. *See Lake Forest*, 603 So. 2d at 1046–47.

In *Lake Forest*, the Alabama Supreme Court held that the plaintiffs were not required to administratively exhaust a claim alleging certain nonconforming signs were allowable under a grandfather clause in the city ordinance because "the issue was raised along with constitutional challenges and allegations of irreparable harm, all of which are matters the board of adjustment had no authority to decide." *Id*. at 1047. The Court concluded that "the exhaustion of administrative remedies doctrine is thus inapplicable here, and the issue of the grandfather clause was properly raised for the first time before the circuit court." *Id*.

So too here, Plaintiffs' Amended Complaint stated numerous claims against the 2023 Final Regulations, the overwhelming majority of which raised questions of constitutional and statutory interpretation, and all of which alleged irreparable harm. *See, e.g.*, Am. Compl. ¶¶ 193–97

(claiming statutory definition of hospital does not include FSBCs, in violation of AAPA); *id*. ¶¶ 212–19 (claiming conflict with Childbirth Freedom Act, in violation of AAPA); *id*. ¶¶ 220–26 (claiming conflict with Certified Nurse Midwife Statutes, in violation of AAPA); *id*. ¶¶ 227–33 (claiming unconstitutional violation of due process right to pursue useful activities); *id*. ¶¶ 234–40 (claiming unconstitutional violation of tight to procreate); *id*. ¶¶ 241–49 (claiming unconstitutional violation of due process right by unlawful private delegation); *id*. ¶¶ 250–59 (claiming unconstitutional violation of due process and equal protection rights); *id*. ¶¶ 163–91 (irreparable harm). Tellingly, Defendants do not argue that any of Plaintiffs' twelve remaining claims require exhaustion. Nor could they, as Plaintiffs' claims clearly fall within the exceptions to the administrative exhaustion doctrine. *See, e.g., Pleasure Island Ambulatory Surgery Ctr., LLC v. State Health Plan. & Dev. Agency*, 38 So. 3d 739, 745 (Ala. Civ. App. 2008) (holding "statutory interpretation" exception applied where plaintiffs contested definition of "health care facility" as applied by state agency); *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154, 158 (Ala. 2000) (holding "constitutional challenge" exception applied to plaintiff's challenge to zoning ordinance because "zoning board of adjustment or other such administrative agency cannot entertain a constitutional challenge and would be without authority or power to make a determinative ruling on such a challenge"); *Dawson v. Cole*, 485 So. 2d 1164, 1167 (Ala. Civ. App. 1986) (holding that "[o]ne need not exhaust administrative remedies where irreparable injury is threatened"); *Gadsden*, 387 So. 2d 829 (same).

Accordingly, the administration exhaustion doctrine does not apply to Plaintiffs' Third Claim, and Defendants' motion to dismiss should be denied on this ground, as well.

IV. Plaintiffs State a Claim on Claims Four and Five Because ADPH Regulatory Authority Does Not Extend to Promulgating Regulations in Conflict with Existing Statutes.

Defendants' argument that CPMs and CNMs "engaging in activity in a FSBC" necessarily subjects them to ADPH regulation, and thereby the 2023 Final Regulations do not conflict with the midwifery statutes, MTD 10–11, completely misses the core of Plaintiffs' Fourth and Fifth Claims. CPMs' and CNMs' practice may be subject to ADPH's regulatory authority while providing care in ADPH-regulated facilities as a general matter. But Defendants do not address Plaintiffs' well-pleaded allegations that detail the substantial conflicts between the 2023 Final Regulations and the statutes addressing CPM and CNM practice in Alabama, which violate the explicit statutory directive that ADPH "shall not have power to promulgate any regulation in conflict with law." Ala. Code § 22-21-28(a). These conflicts include, but are not limited to, the Regulations' excessive restriction of CPM and CNM scope of practice stretching far beyond what is permitted by those statutes. "Regulations and administrative action cannot subvert nor enlarge upon statutory policy." *Jefferson Cnty. Bd. of Educ. v. Ala. Bd. of Cosmetology*, 380 So. 2d 913, 915 (Ala. Civ. App. 1980). As Plaintiffs have more than adequately alleged, by promulgating regulations in conflict with the midwifery statutes, ADPH has clearly violated the AAPA. Ala. Code § 41-22-10.

First, in the Childbirth Freedom Act, the Legislature charged the State Board of Midwifery, not ADPH, with licensing and regulating CPM practice to the extent permitted by statute. *See* Am. Compl. ¶¶ 66, 218; *see also* Ala. Code §§ 34-19-11 to -21. Through that Act, the Legislature explicitly granted CPMs the power to practice "independent[ly]," in *any* out-of-hospital setting. *See* Am. Compl. ¶¶ 65, 88, 217–18 (citing Ala. Code §§ 34-19-14(b)(1)–(2), 16(a)). As the Attorney General has explained, the term "hospital" in Section 34-19-16 refers to

the "commonly understood meaning" of the word "as opposed to the specific definition found at section 22-21-20(1) of the Code," which gives ADPH the authority to license and regulate "hospitals." *See* Att'y Gen. Op. 4–5. Accordingly, even assuming FSBCs are "hospitals" for purposes of ADPH's regulatory and licensing authority, they are not for purposes of the Childbirth Freedom Act. And because CPMs have the statutory authority to practice independently in any out-of-hospital setting, this means the Legislature granted them the authority to practice independently in FSBCs.

The 2023 Final Regulations directly conflict with this statutory grant of authority by restricting CPMs to providing only "assistive" care to a physician or CNM in FSBCs. *See* Am. Compl. ¶ 153 (citing Ala. Admin. Code r. 420-5-13-.01(2)(b), -.03(1), -.15(2)(c)); *see also id*. ¶ 155. Specifically, "when patients are present, laboring, and delivering in the birthing center," the Regulations restrict CPMs to providing care only if a minimum number of CNMs or physicians, as well as registered nurses, are present—meaning CPMs can only serve as "assistive personnel" to other staff. Ala. Admin. Code r. 420-5-13-.01(2)(b), (d). Plaintiffs also alleged that the Regulations prevent CPMs with less than one-year experience from practicing in FSBCs, imposing practice requirements in excess of those established under the Act and by the Board of Midwifery regulations. Am. Compl. ¶¶ 188, 219 (citing Ala. Admin. Code r. 420-5-13-.01(2)(b), (e)). Plaintiffs further alleged that the 2023 Final Regulations go so far as to entirely prevent CPMs from working in birth centers. *See id.* ¶¶ 153–55, 185, 187, 188, 212–19. Meanwhile, although no agency can strip CPMs of authority granted to them by statute as the Regulations do, ADPH specifically has not been granted any regulatory authority to implement the Childbirth Freedom Act. As such, Plaintiffs' well-pleaded allegations more than suffice to state a claim that

the 2023 Final Regulations directly conflict with CPMs' statutory authority to practice independently in *any* out-of-hospital setting.

Second, Plaintiffs more than adequately alleged that ADPH's 2023 Final Regulations usurp the Boards of Nursing and Medical Examiners' exclusive, statutorily delegated responsibility to establish CNM practice qualifications because the Regulations inappropriately impose practice requirements beyond those established by the Alabama Legislature and Boards. Per statute, the Board of Nursing is the "sole state authority designated to establish the qualifications necessary for a registered nurse to be certified to engage in advanced practice nursing, including nurse midwifery." Ala. Code § 34-21-84; *see also* Am. Compl. ¶ 225. The only statutorily-provided exception is that the Board of Nursing and Board of Medical Examiners together approve protocols for Collaborative Practice Agreements (CPAs) between a CNM and a physician. *Id.* § 34-21-83, -84, -85, -90; *see also* Ala. Admin. Code r. 610-X-5-.14 to -.25; Am. Compl. ¶ 225. Yet here, as Plaintiffs have alleged, the 2023 Final Regulations prevent CNMs with a valid CPA from practicing in or being employed by FSBCs.[13] *See* Am. Compl. ¶¶ 155, 220–26. For example, as Plaintiffs have alleged, the 2023 Final Regulations purport to limit the physicians who can enter into CPAs with CNMs who work in FSBCs, thus preventing CNMs who have otherwise valid CPAs—CPAs that satisfy the exclusive requirements set by the Boards of Nursing and Medical

[13] Defendants also misrepresent the Board of Nursing's position on the 2023 Final Regulations. Defendants seem to suggest that the Board of Nursing's and Board of Medical Examiners' respective submitted public comments could serve to indicate that the CNM requirements were "approved by" both Boards. *See* MTD 11. But despite Defendants' selective reference to those public comments, the Board of Nursing expressed substantive concerns with the content of the 2023 Final Regulations in their comments. *See* Milledge Memo 1–2. Regardless, even if the Boards were to express unequivocal approval of the Regulations through public comment, they clearly lack the authority to circumvent the Legislature and delegate authority over CNMs to ADPH when that authority was granted exclusively, by statute, to them.

Examiners—from working at FSBCs. *See, e.g.*, Ala. Admin. Code r. 420-5-13-.01(2)(d) (requiring CNM to enter into CPA with staff or consultant physician at FSBC); *id.* -.01(2)(f) (requiring certain qualifications and hospital privileges of consultant physician at FSBC), *id.* -.01(2)(w) (requiring certain qualifications and hospital privileges of staff physician at FSBC); Am. Compl. ¶¶ 155, 226. Additionally, the 2023 Final Regulations prohibit CNMs from practicing in birth centers unless they "have at least 1 year of experience in labor and delivery and/or newborn intensive care," *see* Ala. Admin. Code r. 420-5-13-.01(2)(b), (d), which imposes a restriction on CNMs' ability to practice in FSBCs even if they otherwise meet the requirements set by the Boards of Nursing. Am. Compl. ¶¶ 155, 226. These allegations more than sufficiently state a claim that ADPH has exceeded its statutory authority.

Defendants entirely fail to contend with these well-pleaded allegations showing the conflicts between the 2023 Final Regulations and existing laws governing CPMs and CNMs. Instead, Defendants attempt to take cover under the blanket proposition that ADPH may regulate a "separately licensed provider" if that provider works in an ADPH-licensed facility. MTD 8, 11. But that proposition does not mean that ADPH has the authority to strip a "separately licensed provider" of their *statutorily authorized powers*, simply because they work in such a facility, as Plaintiffs have alleged here. Likewise, the sole case they rely on to support this proposition, *Tucker v. State Department of Public Health*, 650 So. 2d 910 (Ala. Civ. App. 1994), is inapposite, as it does not hold that ADPH may promulgate regulations that directly conflict with powers granted to a provider by statute.

The question presented in *Tucker* was whether ADPH could lawfully use its authority to categorize a particular physician office as a hospital, rather than as a "private office," which would otherwise be outside the scope of ADPH's authority. Because ADPH, by statute, had the authority

to license and regulate "abortion or reproductive health centers" as hospitals, the Court held that ADPH could promulgate regulations that established a threshold number of abortions that would dictate when a location providing abortion care would constitute such a facility. *See Tucker*, 650 So. 2d at 912–14 (citing Ala. Code § 22-21-20(1)); *see also id.* at 912 (citing Ala. Admin. Code r. 420-5-1-.01, which provided that "'Abortion or Reproductive Health Center' means any health care facility operated substantially for the purpose of performing abortions"). As such, the Court rejected Dr. Tucker's categorical argument that he should not be subject to ADPH facility regulations because he was providing abortions in his private office and private physician offices are outside the scope of ADPH's authority. *Id*. at 913. In particular, and unlike in this case, the Court recognized that ADPH's regulatory distinction between an "abortion or reproductive health center" and "private office of a physician" did not conflict with any statutory definition of the latter. *Id*. In fact, the definition of "abortion or reproductive health centers" required that a "facility performs thirty or more abortion procedures per month during any two months of a calendar year" to qualify, which "clearly exclude[d] any privately practicing physician who may do some abortions as a part of his practice, as opposed to a physician whose practice consists of operating a health care facility primarily for the performance of abortions." *Id.* at 912–13. In other words, ADPH was acting consistently with the statutory exclusion for private physician's offices, as the exclusion remained available, even if it was not available to Dr. Tucker. *Id*.

Tucker's holding thus stands for the straightforward premise that ADPH has at least some authority, where not otherwise restricted by statute, to establish threshold criteria that determine what practice settings are subject to ADPH authority, even if such rules may indirectly impose obligations on individuals practicing in those settings. But in Claims Four and Five, presented as alternatives to Plaintiffs' Primary Claim, Plaintiffs assume that this Court finds that ADPH may

regulate birth centers as hospitals, and Plaintiffs do not question ADPH's authority on those grounds. In these claims, Plaintiffs are not concerned with the primary question in *Tucker*, as to whether ADPH can define the practice settings that fall within their regulatory authority. Instead, Plaintiffs specifically challenge ADPH's authority to regulate *within* a practice setting—here, FSBCs—in a way that *conflicts* with the midwifery statutes by ignoring the legal limits on ADPH's authority imposed by those separate statutes. And Defendants point to nothing in *Tucker* that even contemplates, let alone establishes, ADPH's authority to promulgate rules that supersede statutory limits. As explained above, there was no conflict in *Tucker* between the agency's definition of "abortion or reproductive health centers" and the statutory definition of a private office because no such statutory definition existed. Nor was there any alleged conflict with any Alabama law governing physician practice. Thus, the question *Tucker* was addressing, its reasoning, and its holding are totally distinguishable from Plaintiffs' Fourth and Fifth Claims, and the case does not support the kind of authority for ADPH that Defendants suggest.

In effect, Defendants' reliance on *Tucker*'s statement that ADPH has the "'authority to define and regulate a health care provider,'" MTD 9 (quoting 650 So. 2d at 913), assumes a broader understanding of that "authority" than the holding supports. When read in context, *Tucker's* holding is far less sweeping than Defendants suggest, as the Court merely notes that "[t]he State has the authority to regulate a profession, and this does not violate any privacy or property right." 650 So. 2d at 913. But *Tucker's* statement about ADPH's general "authority" is a far cry from the more specific authority ADPH claims to strip licensed providers of their statutorily protected powers: Nothing in *Tucker* could be read to suggest that ADPH is authorized to override the Legislature's unequivocal determination that CPMs may practice independently in a given setting. Likewise, nothing in *Tucker* authorizes ADPH to supersede powers granted to CNMs by their valid

CPAs, when the Legislature has explicitly and exclusively vested authority over CNMs' practice in other agencies.

Plaintiffs have thus more than sufficiently alleged that the 2023 Final Regulations' restrictions on CPM and CNM practice exceed ADPH's statutory authority, and Defendants' motion to dismiss Plaintiffs' Fourth and Fifth Claims should be denied.

CONCLUSION

For the reasons set forth above, the Court should deny Defendants' motion to dismiss.

DATE: April 22, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel of record by electronic filing with the Clerk of Court through Alafile, by e-mail, and/or by placing the same in the U.S. mail on this 22nd day of April, 2024.

/s/ *Alison Mollman*
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