DEPARTMENT OF THE ATTORNEY GENERAL

DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
ATTORNEY GENERAL

For Immediate Release
September 2, 2017

News Release 2017-114

NOTICES TO WOMEN REGARDING ACCESS TO FAMILY PLANNING SERVICES MUST BE ALLOWED, STATE ARGUES

HONOLULU – Yesterday the Department of the Attorney General filed a memorandum opposing an attempt by certain religiously-affiliated organizations to prevent a new law concerning women's access to information regarding reproductive health services from being enforced. The law, Senate Bill 501 (2017), was passed by the Hawaii state legislature on May 4, 2017, and signed into law as Act 200 on July 12, 2017. It requires limited service pregnancy centers to notify women in writing regarding the availability of state-funded reproductive health services.

The Department's memo argues that the Ninth Circuit Court of Appeals, the federal appeals court with jurisdiction over several Western states including Hawaii, already upheld a similar law passed by California in 2015.

The opposition memo states in part:

> The Legislature has found that "[m]any women in Hawaii … remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, pregnancy-related, and birth-related services." To address this concern, [Act 200] was enacted into law. It requires "limited service pregnancy centers," as defined in the Act, to disseminate a written notice to clients or patients informing them that Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services.

A similar filing was made in a related case yesterday as well. Copies of both memos are attached.

###

For more information, contact:

Joshua A. Wisch
Special Assistant to the Attorney General
Phone: (808) 586-1284
Email: joshua.A.Wisch@hawaii.gov
Web: http://ag.hawaii.gov
Twitter: @ATGHIgov

DOUGLAS S. CHIN 6465
Attorney General of Hawaiʻi

CARON M. INAGAKI 3835
CLYDE J. WADSWORTH 8495
KIMBERLY T. GUIDRY 7813
SKYLER G. CRUZ 9551
KALIKOʻONALANI D. FERNANDES 9964
Deputy Attorneys General
Department of the Attorney
General, State of Hawaiʻi
425 Queen Street
Honolulu, Hawaiʻi 96813
Telephone: (808) 586-1494
Facsimile: (808) 586-1369
E-Mail: Skyler.G.Cruz@hawaii.gov

Attorneys for Defendant
DOUGLAS S. CHIN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAIʻI

ALOHA PREGNANCY CARE AND COUNSELING CENTER, INC., Plaintiff, v. DOUGLAS S. CHIN, Attorney General of the State of Hawaii, in his official capacity, Defendant.	CIVIL NO. 17-00343 DKW-KSC DEFENDANT DOUGLAS S. CHIN'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, FILED JULY 19, 2017; DECLARATION OF SKYLER G. CRUZ; EXHIBITS "A" – "E"; CERTIFICATE OF SERVICE (ECF NO. 4)

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 3

A. The Legislative History of the Act 3

B. The Legislature's Findings 4

C. The Act's Requirements 5

D. The California FACT Act and the Ninth Circuit's Decision in *NIFLA* 8

III. LEGAL STANDARD 11

IV. ARGUMENT 12

A. *NIFLA v. Harris* Controls this Case 12

1. California's Licensing Scheme Does Not Affect *NIFLA*'s Applicability to this Case 14

2. The Pending Certiorari Petition in *NIFLA* is Irrelevant 15

B. Plaintiff Cannot Demonstrate a Likelihood of Success on the Merits of its First Amendment Free Speech Claim 16

1. Strict Scrutiny Does Not Apply 16

2. The Act Regulates Professional Speech and is Subject to Intermediate Scrutiny 19

3. The Act Survives Intermediate Scrutiny 23

C. Plaintiff Cannot Satisfy the Remaining Preliminary Injunction Factors 25

V. CONCLUSION 27

TABLE OF AUTHORITIES

CASES

A Woman's Friend Pregnancy Res. Clinic v. Harris,
153 F. Supp. 3d 1168, 1216 (E.D. Cal. 2015), aff'd sub nom.
669 F. App'x 495 (9th Cir. 2016) 19, 27

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 11, 25

Am. Acad. of Pain Mgmt. v. Joseph,
353 F.3d 1099 (9th Cir. 2004) 24

Blaisdell v. Dep't of Pub. Safety,
No. CIV. 14-00433 JMS,
2014 WL 5581032 (D. Haw. Oct. 31, 2014) 12

Centro Tepeyac v. Montgomery County,
5 F.Supp.3d 745 (D. Md. 2014)... 25

Earth Island Inst. v. Carlton, 626 F.3d 462 (9th Cir. 2010).................................. 11

Employment Division, Department of Human Resources of Oregon v. Smith, 494
U.S. 872 (1990).. 10

Evergreen Ass'n, Inc. v. City of New York,
740 F.3d 233 (2nd Cir. 2014) 25

Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City of Baltimore,
Civ. No. 1:10-cv-00760-MJG ECF No. 118 (D. Md. Oct. 4, 2016), ... 25

JHP Pharm. LLC v. Hospira, Inc.,
No. CV-13-7460-DDP (EX), 2014 WL 12588690
(C.D. Cal. Feb. 10, 2014)... 15

Lowe v. S.E.C.,
472 U.S. 181 (1985)... 21

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994).. 24

Munaf v. Geren,
553 U.S. 674 (2008).. 11

National Institute of Family and Life Advocates v. Harris,
839 F.3d 823 (9th Cir. 2016) 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26

Pickup v. Brown,
740 F.3d 1208 (9th Cir. 2014) 20

Reed v. Town of Gilbert, Ariz.,
135 S. Ct. 2218 (2015).. 16, 17

Retail Digital Network, LLC v. Appelsmith,
810 F.3d 638 (9th Cir. 2016) 23

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011)... 17, 23

The Lands Council v. McNair,
537 F.3d 981 (9th Cir. 2008) 11

United States v. Playboy Entm't,
529 U.S. 803, 823 (2000).. 19

United States v. Swisher,
811 F.3d 299 (9th Cir. 2016) 16, 17

Winter v. Natural Resources Defense Council, Inc.,
555 U.S. 7 (2008)... 10, 11, 26, 27

HAWAI'I STATUTES

S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (2017), ("the Act") 1, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24, 25

CALIFORNIA STATUTES

California Assembly Bill 775 (2015) ["the Fact Act"] 8, 9, 10, 12, 14, 15, 16, 17

LEGISLATIVE HISTORY RE: S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (2017)

Conf. Comm. Rep. No. 156 (2017).. 3, 4

Senate Stand. Comm. Rep. No. 907 (2017)... 4

TREATISES

11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948 (2d ed. 1995) 11

DEFENDANT DOUGLAS S. CHIN'S
MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION, FILED JULY 19, 2017

Defendant DOUGLAS S. CHIN ("Defendant"), by and through his attorneys, submits this Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, filed July 19, 2017.

I. INTRODUCTION

The State of Hawai'i has a substantial interest in the health of its citizens. This includes ensuring that "women in Hawaii are able to make personal reproductive health decisions with full and accurate information regarding their rights to access the full range of health care services that are available." See Exhibit "A," S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (2017) ("S.B. 501"). The Legislature has found that "[m]any women in Hawaii . . . remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, pregnancy-related, and birth-related services." Id. To address this concern, S.B. 501 (the "Act") was enacted into law. It requires "limited service pregnancy centers," as defined in the Act, to disseminate a written notice to clients or patients informing them that Hawai'i has public programs that provide immediate free or low-cost access to comprehensive family planning services.

On July 19, 2017, Plaintiff ALOHA PREGNANCY CARE AND COUNSELING CENTER, INC. ("Plaintiff") filed this lawsuit challenging the constitutionality of the Act based on alleged violations of its First Amendment rights to free speech and free exercise of religion, and based on alleged violations of the Fourteenth Amendment and the Hawaiʻi Constitution. On the same date, Plaintiff filed a Motion for Preliminary Injunction (the "Motion"), seeking to enjoin enforcement of the Act during this litigation. See ECF Nos. 4 & 5. Notably, Plaintiff's Motion only seeks a preliminary injunction based upon its First Amendment free speech claim. See Memorandum in Support of Motion ("Mem") at 4–5.

Based on binding Ninth Circuit precedent, Plaintiff's Motion must be denied. In a case brought by the National Institute of Family and Life Advocates ("NIFLA") and other plaintiffs challenging the constitutionality of a California act requiring a nearly identical notice, the Ninth Circuit Court of Appeals affirmed the denial of a motion for a preliminary injunction, finding that the plaintiffs could not demonstrate a likelihood of success on the merits of their free speech and free exercise claims. See National Institute of Family and Life Advocates v. Harris, 839 F.3d 823 (9th Cir. 2016) ("NIFLA").[1] Through its motion in this case, Plaintiff raises the very same arguments that the Ninth Circuit soundly rejected in

[1] NIFLA has also been referred to as Harris and Becerra.

NIFLA. Recognizing this, Plaintiff contends that there are "factual differences" between this case and NIFLA that "compel different legal conclusions," Mem. at 3, but each of Plaintiff's attempts to distinguish NIFLA fail, as demonstrated herein. Plaintiff simply cannot escape the effect of binding Ninth Circuit precedent. Based on NIFLA, Plaintiff fails to meet its burden of showing a likelihood of success on the merits of its First Amendment claim, and its Motion must accordingly be denied.

II. BACKGROUND

A. The Legislative History of the Act

On January 20, 2017, the Legislature introduced S.B. No. 501, a measure to amend the statutory duties imposed on "limited service pregnancy centers." See Exhibit "B," S.B. No. 501, 29th Leg., Reg. Sess. (2017). The bill was introduced to "ensure that women in Hawaii are able to make personal reproductive health decisions with full and accurate information regarding their rights to access the full range of health care services that are available." Id.

The legislative history of the Act provides insight into the Legislature's intent. In a report to the President of the Senate of the State of Hawaii, the Committee on Ways and Means stated:

> Your Committee believes that when it comes to health care, everyone should have access to comprehensive, accurate, and unbiased information in a confidential setting. Especially for women and their

> reproductive health, timely information is critical in making informed decisions.

See Exhibit "C," S. Stand. Comm. Rep. No. 907 (2017), at p. 2. In a report to the President of the Senate and the Speaker of the House of Representatives of the State of Hawaii, the Committee on Conference stated:

> Your Committee on Conference finds that individuals seeking healthcare, including reproductive healthcare, should receive comprehensive, accurate, unbiased information in a confidential setting. In a reproductive healthcare setting, this includes receiving information about the full range of options, including how to obtain health insurance coverage should a woman be uninsured. Your Committee on Conference further finds that when women are fully informed, they can make the best decisions for themselves and their health.

See Exhibit "D," Conf. Comm. Rep. No. 156 (2017), at p. 2.

B. The Legislature's Findings

In Section 1 of the Act, the Legislature found that the State of Hawaii, through the Department of Health and the Department of Human Services, administers public programs providing insurance coverage and direct services for reproductive health care and counseling to eligible, low-income women. See S.B. 501, § 1. The Legislature also found that "[t]housands of women in Hawaii are in need of publicly-funded family planning services, contraception services and education, pregnancy-related services, prenatal care, and birth-related services." Id. In particular, the Legislature found that:

> In 2010, sixteen thousand women in Hawaii experienced an unintended pregnancy, which can carry enormous social and economic costs to both individual families and to the State. Many women in Hawaii, however, remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, pregnancy-related, and birth-related services.

Id.

The Legislature found that "[b]ecause family planning decisions are time sensitive and care early in pregnancy is important, Hawaii must make every possible effort to advise women of all available reproductive health programs." Id. In Hawaiʻi, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through Med-QUEST and the Department of Health's family planning programs. Id. As the Legislature found:

> Requiring facilities that provide pregnancy- or family planning-related services to provide accurate health information and to inform clients of the availability of and enrollment procedures for reproductive health programs will help ensure that all women in the State can quickly obtain the information and services that they need to make and implement informed, timely, and personally appropriate reproductive decisions.

Id.

C. The Act's Requirements

The Act applies to a "limited service pregnancy center." That term is defined in the Act as follows:

(a) For purposes of this section, "limited service pregnancy center" or "center":

(1) Means a facility that:

(A) Advertises or solicits clients or patients with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling;

(B) Collects health information from clients or patients; and

(C) Provides family planning or pregnancy-related services, including but not limited to obstetric ultrasound, obstetric sonogram, pregnancy testing, pregnancy diagnosis, reproductive health counseling, or prenatal care; and

(2) Shall not include a health care facility. For the purposes of this paragraph, a "health care facility" means any facility designed to provide comprehensive health care, including but not limited to hospitals licensed pursuant to chapter 321, intermediate care facilities, organized ambulatory health care facilities, emergency care facilities and centers, health maintenance organizations, federally qualified health centers, and other facilities providing similarly organized comprehensive health care services.

See S.B. 501, § 2.

The Act requires every "limited service pregnancy center" in the State of Hawaiʻi to disseminate on-site to clients or patients a written notice stating:

> Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including, but not limited to, all FDA-approved methods of contraception and pregnancy-related services for eligible women.

> To apply online for medical insurance coverage, that will cover the full range of family planning and prenatal care services, go to mybenefits.hawaii.gov.
>
> Only ultrasounds performed by qualified healthcare professionals and read by licensed clinicians should be considered medically accurate.

See S.B. 501, § 2.

The written notice must be in English or another language requested by a client or patient, and must also contain the internet address for online medical assistance applications and the statewide phone number for medical assistance applications. Id. The notice must be disclosed in at least one of the following ways:

> (1) A public notice on a sign sized at least eight and one-half inches by eleven inches, written in no less than twenty-two point type, and posted in a clear and conspicuous place within the center's waiting area so that it may be easily read by individuals seeking services from the center; or
>
> (2) A printed or digital notice written or rendered in no less than fourteen point type that is distributed individually to each patient or client at the time of check-in for services; provided that a printed notice shall be available to all individuals who cannot or do not wish to receive the notice in digital format.

See S.B. 501, § 2.

The Act contains an enforcement provision that provides, in relevant part, as follows:

> (a) A limited service pregnancy center that violates section 321-A shall be liable for a civil penalty of $500 for a first offense and $1,000

> for each subsequent offense. If the center is provided with reasonable notice of noncompliance, which informs the center that it is subject to a civil penalty if it does not correct the violation within thirty days from the date the notice is sent to the center, and the violation is not corrected as of the expiration of the thirty-day notice period, the attorney general may bring an action in the district court of the district in which the center is located to enforce this section.
>
> A civil penalty imposed pursuant to this subsection shall be deposited to the credit of the general fund.
>
> (b) Any person who is aggrieved by a limited service pregnancy center's violation of section 321-A may bring a civil action against the limited service pregnancy center in the district court of the district in which the center is located to enjoin further violations and to recover actual damages sustained together with the costs of the suit including reasonable attorneys' fees. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained. If damages are awarded pursuant to this subsection, the court may, in its discretion, impose on a liable center a civil fine of not more than $1,000 to be paid to the plaintiff.
>
> A party seeking civil damages under this subsection may recover upon proof of a violation by a preponderance of the evidence.
>
> For the purpose of this subsection, "person" includes a natural or legal person.

See S.B. 501, § 2.

D. The California FACT Act and the Ninth Circuit's Decision in *NIFLA*

On October 9, 2015, California Assembly Bill 775, known as the "Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act" (the "FACT Act"), was signed into law. See Exhibit "E," Assem. Bill No. 775. The stated purpose of the FACT Act "is to ensure that

California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." See Assem. Bill No. 775, § 2. The FACT Act requires a "licensed covered facility," as defined, to disseminate a notice to all clients stating that:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

See Assem. Bill No. 775, § 3 (the "Licensed Notice"). The notice required by S.B. 501 tracks, in large part, the Licensed Notice.

The FACT Act also requires an unlicensed covered facility, as defined, to disseminate a notice to all clients, stating, among other things, that the facility is not licensed as a medical facility by the State of California. See Assem. Bill No. 775, § 3 (the "Unlicensed Notice").

After the FACT Act was signed into law, NIFLA and two other religiously-affiliated non-profit corporations opposed to abortion, brought suit in the Southern District of California, arguing that the FACT Act violated their First Amendment free speech and free exercise rights. NIFLA, 839 F.3d at 831–32. The plaintiffs brought a motion for a preliminary injunction, seeking to enjoin enforcement of the

FACT Act prior to full litigation of the action.[2] Id. The district court denied the plaintiffs' motion for a preliminary injunction, finding that the plaintiffs were unable to show a likelihood of success on their free speech and free exercise claims. Id. at 832.

The Ninth Circuit affirmed. Id. at 845. With respect to their free speech claims, the court rejected the plaintiffs' argument that the FACT Act should be subject to strict scrutiny. The court noted that while the FACT Act is content-based, it does not discriminate based on viewpoint. Id. at 836. The court held that the Licensed Notice regulates professional speech and is therefore subject to intermediate scrutiny, which it survives. Id. at 839–42. The district court, accordingly, did not err in concluding that the plaintiffs failed to show a likelihood of success on the merits of their free speech claims. Id. at 834–35.

The Ninth Circuit also concluded, with respect to the plaintiffs' free exercise claims, that the FACT Act is a neutral law of general applicability and that it survives rational basis review under Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

Because the plaintiffs were unable to show a likelihood of success on the merits of their claims—the "most important" preliminary injunction factor under

[2] As in the present case, the NIFLA plaintiffs brought their motion for a preliminary injunction with respect to their First Amendment claims. Id. at 831 n.3. The NIFLA plaintiffs' claims for relief also included, as here, claims under the Fourteenth Amendment and a state constitution. Id.

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008)—the court affirmed the denial of the plaintiffs' motion for a preliminary injunction. NIFLA, 839 F.3d at 829.

III. LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy never awarded as of right." Winter, 555 U.S. at 24; see also Munaf v. Geren, 553 U.S. 674, 689–90 (2008) ("A preliminary injunction is an 'extraordinary and drastic remedy.'" (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995))). Plaintiffs seeking a preliminary injunction "face a difficult task in proving that they are entitled to this 'extraordinary remedy.'" Earth Island Inst. v. Carlton, 626 F.3d 462, 469 (9th Cir. 2010).

To succeed on a motion for a preliminary injunction, a plaintiff must demonstrate:

> (1) that he is likely to succeed on the merits of his claim; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.

NIFLA, 839 F.3d at 834 (citing Winter, 555 U.S. at 20). A preliminary injunction may also issue if "a plaintiff demonstrates . . . that serious questions going to the merits were raised[,] the balance of hardships tips sharply in the plaintiff's favor" and the two other Winter factors are met. Alliance for the Wild Rockies v.

Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quoting The Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008)). "Regardless of which standard applies, the movant always 'has the burden of proof on each element of the test.'" Blaisdell v. Dep't of Pub. Safety, No. CIV. 14-00433 JMS, 2014 WL 5581032, at *3 (D. Haw. Oct. 31, 2014).

IV. ARGUMENT

A. *NIFLA v. Harris* Controls this Case

In NIFLA, discussed above, the Ninth Circuit considered a preliminary injunction motion with respect to a California act that is substantively the same as the Act being challenged in this case. Indeed, California's FACT Act and Hawai'i's Act were enacted for the same purpose—to ensure that women in California and Hawai'i, respectively, have information regarding the availability of, and their rights to access, personal reproductive health services. As the Hawai'i Legislature found:

> The purpose of this Act is to ensure that women in Hawaii are able to make personal reproductive health decisions with full and accurate information regarding their rights to access the full range of health care services that are available.

See S.B. 501, § 1. Similarly, the California FACT Act provides:

> The purpose of this Act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.

See Assem. Bill No. 775, § 2. To that end, both acts require certain centers or facilities, as defined, to provide informational notices regarding the availability of, and enrollment procedures for, reproductive health programs offered by the state. The California FACT Act's notice states:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

NIFLA, 839 F.3d at 830. The Hawai‘i notice that Plaintiff challenges provides, in relevant part:

> Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including, but not limited to, all FDA-approved methods of contraception and pregnancy-related services for eligible women.
>
> To apply online for medical insurance coverage, that will cover the full range of family planning and prenatal care services, go to mybenefits.hawaii.gov.

See S.B. 501, § 2.[3]

Despite the outcome in NIFLA, Plaintiff raises the same arguments against Hawai‘i's notice as the plaintiffs in NIFLA raised against California's notice, contending that comparing this case to NIFLA "is to compare the proverbial apples and oranges." Mem. at 4. Nothing is further from the truth. Even a cursory reading of NIFLA would make plain that the Ninth Circuit's decision in that case

[3] The Hawai‘i notice, unlike the California notice, does not mention abortion.

controls the fate of the Motion at issue here.[4] Plaintiff simply cannot relitigate NIFLA.

In an unpersuasive attempt to circumvent NIFLA, Plaintiff contends that there are "factual differences" between this case and NIFLA that "compel different legal conclusions." Mem. at 3. Specifically, Plaintiff contends that NIFLA does not control this case because: (1) the Act compels Plaintiff, a center that is not licensed by the State of Hawai'i, to speak a message similar to the one imposed on licensed clinics by California; and (2) NIFLA's "precedential authority is not yet certain." See Mem. at 2–3. Both of these arguments must be rejected.

1. California's Licensing Scheme Does Not Affect *NIFLA*'s Applicability to this Case

In its Motion, Plaintiff attempts to tie NIFLA's applicability to California's licensing of its facilities. See Mem. at 3. According to Plaintiff, this case differs from NIFLA because Hawai'i does not license facilities in the same manner that California does, yet imposes the same kind of notice requirement on Hawai'i facilities as California did on its licensed facilities. See id. This is a red herring.

The NIFLA court's ruling was not based on California's licensing scheme. The court nowhere concluded that the FACT Act—or the FACT Act's Licensed

[4] Plaintiff conveniently relies on NIFLA for its own purposes, see, e.g., Mem. at 36 (relying on NIFLA to argue that the Act does not regulate commercial speech), while simultaneously contending that the two cases simply cannot be compared, see Mem. at 4 (characterizing NIFLA and this case as "apples and oranges").

Notice specifically—passed constitutional muster because California licenses the covered facilities. Instead, the NIFLA court noted that states have the "power to regulate professions" and the speech "within the practice of the profession." 839 F.3d at 839. Those conclusions were based on the professional speech doctrine (discussed *infra*), without respect to California's licensing scheme. Any attempt to argue that NIFLA's holding turned on state licensure, rather than the words of the notice itself and the professional speech doctrine, is a misreading of NIFLA.

Moreover, even if licensing were central to NIFLA's holding, it is beyond dispute that Plaintiff's facility includes medical professionals subject to state licensing requirements. Plaintiff concedes that it uses the services of an OB/GYN to perform ultrasounds and interpret the results for its clients. See Complaint ("Compl.") at ¶ 9. Any purported distinction on the basis of California's licensing requirement simply has no merit.

2. The Pending Certiorari Petition in *NIFLA* is Irrelevant

Plaintiff also attempts to escape NIFLA by arguing that its "precedential authority is not yet certain" because a petition for a writ of certiorari has been filed with the U.S. Supreme Court. Mem. at 4. The weakness of this argument is apparent. As Plaintiff knows, a cert petition provides absolutely no guarantee of Supreme Court review, and no guarantee of a contrary result even assuming acceptance of cert. Moreover, NIFLA remains fully binding on this Court even if

the Supreme Court grants certiorari. See, e.g., JHP Pharm. LLC v. Hospira, Inc., No. CV-13-7460-DDP (EX), 2014 WL 12588690, at *4 (C.D. Cal. Feb. 10, 2014) ("The basic Ninth Circuit rule is that a grant of certiorari does not supersede a case; it remains good law unless the Supreme Court rules otherwise."). There is simply no reason for NIFLA to be ignored.

B. Plaintiff Cannot Demonstrate a Likelihood of Success on the Merits of its First Amendment Free Speech Claim

1. Strict Scrutiny Does Not Apply

In its Motion, Plaintiff futilely attempts to convince this Court that strict scrutiny applies to the Act in review of its free speech claim. See Mem. at 21–32. Despite devoting 12 pages of its brief to this topic, Plaintiff fails to recognize that strict scrutiny simply does not apply, as dictated by binding precedent. See NIFLA, 839 F.3d at 835–37. Plaintiff contends that the Act is subject to strict scrutiny because it is content and viewpoint-based, but the Ninth Circuit, addressing the very same arguments, disagreed. Id. There is no reason for this Court to reach a different conclusion.

A regulation is content-based when "on its face" the regulation "draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015). But the mere fact that a regulation is content-based, standing alone, does not warrant application of strict scrutiny. Although the NIFLA court determined that the FACT Act is content-based, it made clear that

strict scrutiny was not the appropriate standard. See NIFLA, 839 F.3d at 837 (noting that strict scrutiny has not been applied in abortion-related disclosure cases, "even when the regulation is content-based"); see also United States v. Swisher, 811 F.3d 299, 313 (9th Cir. 2016) ("Even if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny."). Here, even if the Act is content-based, Plaintiff fails to the extent it argues strict scrutiny thereby applies. That conclusion is dictated by NIFLA.

Plaintiff's argument that strict scrutiny is required because the Act is viewpoint-based also fails. A regulation discriminates based on viewpoint when it regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker." Reed, 135 S. Ct. at 2230. The Act does no such thing; it applies to all "limited service pregnancy centers" regardless of their ideology, opinion, or perspective on particular family-planning services. See NIFLA, 839 F.3d at 835 ("The Act, however, does not discriminate based on viewpoint. It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker. Instead, the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services.").[5]

---

[5] Plaintiff's reliance on Sorrell v. IMS Health Inc., 564 U.S. 552 (2011), is misplaced. As Plaintiff itself notes, the law at issue in Sorrell "on its face burden[ed] disfavored speech by disfavored speakers." Id. at 564. Nothing of the

Plaintiff's argument is that the Act singles out a group of speakers—"limited service pregnancy centers." Mem. at 15 ("[T]he Act applies only to, *and only applies to,* LSPCs."). But this argument improperly equates the term "limited service pregnancy center," as defined in the Act, with a particular viewpoint. The Act's definition of the term makes no reference to viewpoint, and those entities subject to the Act's provisions are not determined by viewpoint. Plaintiff seems to assume that all "limited service pregnancy centers," as defined in the Act, share its viewpoint on contraceptives and abortion, but Plaintiff offers absolutely no evidence to support that assertion. Other "limited service pregnancy centers," such as Planned Parenthood, do not share Plaintiff's viewpoint, yet the Act nonetheless applies.[6]

The Act's only exception is for "health care facilities," as defined, because "health care facilities" already provide comprehensive health care services and do

---

sort is at issue in this case. Contrary to Sorrell, where disfavored speakers were targeted and favored speakers exempted, the Act "applies equally to clinics that offer abortion and contraception as it does to clinics that oppose those same services." NIFLA, 839 F.3d at 836.

[6] Planned Parenthood falls squarely within the definition of a "limited service pregnancy center" under the Act because it: (1) advertises or solicits clients or patients with offers to provide, *inter alia*, pregnancy testing and pregnancy options counseling; (2) collects health information from clients or patients; (3) provides pregnancy-related services, including pregnancy diagnosis, prenatal care, and prenatal tests such as ultrasounds; and (4) and it is not a "health care facility" because it does not provide comprehensive health care. See https://www.plannedparenthood.org/health-center/hawaii/honolulu/96814/honolulu-health-center-2951-91810.

not, therefore, raise the Legislature's informational concerns regarding the full range of health services. See S.B. 501, § 1. The exemption does not favor or disfavor any particular speakers based on their viewpoint. See NIFLA, 839 F.3d at 835.

For these reasons, the Act is not viewpoint-based, and strict scrutiny does not apply.[7]

2. The Act Regulates Professional Speech and is Subject to Intermediate Scrutiny

NIFLA establishes that intermediate scrutiny is the appropriate standard to review the Act. The NIFLA court concluded that California's Licensed Notice,

[7] *Even if* strict scrutiny applied, which it does not, Plaintiff cannot demonstrate a likelihood of success on the merits. The Act is "narrowly tailored to promote [the] compelling government interest" of ensuring that, in Hawai‘i, women's reproductive health decisions are informed by "full and accurate information," including knowledge of the "full range of health care services that are available." United States v. Playboy Entm't, 529 U.S. 803, 823 (2000) (setting forth strict scrutiny test); S.B. 501, § 1. The Act is also the "least restrictive alternative"; the notice required by the Act does no more than necessary—recognizing that family planning decisions are time sensitive and care early in pregnancy is important—to "ensure that all women in the State can quickly obtain the information and services that they need to make and implement informed, timely, and personally appropriate reproductive health decisions." S.B. 501, § 1; see A Woman's Friend Pregnancy Resource Clinic v. Harris, 153 F.Supp.3d 1168, 1207 (E.D. Cal. 2015), aff'd sub nom. A Woman's Friend Pregnancy Res. Clinic v. Harris, 669 F. App'x 495 (9th Cir. 2016) (finding that the FACT Act satisfies strict scrutiny, at the preliminary injunction stage, because it is narrowly tailored to affect speech "no more than is necessary to convey the desired factual information," and the least restrictive alternative because it is "the most effective way to ensure women quickly obtain the information and services they need" to make personal reproductive health decisions").

which mirrors the notice at issue in this case, regulates professional speech, *i.e.* "speech that occurs between professionals and their clients in the context of their professional relationship." Id. at 839. The NIFLA court explained as follows:

> Licensed clinics engage in speech that occurs squarely within the confines of their professional practice. For example, Pregnancy Care Clinic provides medical services such as ultrasounds, clinical services such as medical referrals, and non-medical services such as peer counseling and education. Thus, a regular client of Pregnancy Care could easily use many of their services throughout the stages of her pregnancy, such as receiving educational information about best health practices when pregnant, relying upon Pregnancy Care for regular check-ups, or using Pregnancy Care as a resource for counseling. **In all these instances, the client and Pregnancy Care engage in speech that is part of Pregnancy Care's professional practice of offering family-planning services. There is no question that Pregnancy Care's clients go to the clinic precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill. Because licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech.**

Id. at 839–40 (emphases added). Based on Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014), which established a continuum of professional speech regulation, the NIFLA court concluded that intermediate scrutiny applies. NIFLA, 839 F.3d at 839.

In this case, as in NIFLA, the centers subject to the Act provide medical and clinical services in a professional setting. Plaintiff attempts to escape the

professional speech doctrine by arguing that it is an unlicensed facility[8] that does not exercise any judgment or engage in any professional speech, see Mem. at 33–34, but those claims are belied by Plaintiff's own submissions. In its Complaint, Plaintiff makes plain that it offers, among other things, ultrasounds, pregnancy tests, and many forms of counseling, including pregnancy, crisis pregnancy, post-abortive, and parenting counseling,[9] the very same services highlighted in NIFLA as being part of a center's professional practice. See Compl. at ¶ 5; see also NIFLA, 839 F.3d at 839–40 ("Pregnancy Care Clinic provides medical services such as ultrasounds, clinical services such as medical referrals, and non-medical services such as peer counseling and education. . . . In all these instances, the client and Pregnancy Care engage in speech that is part of Pregnancy Care's professional practice of offering family-planning services."). The Ninth Circuit emphasized that clinics or centers offering these types of services "engage in speech that occurs squarely within the confines of their professional practice." Id. at 839.

It is also plain, as in NIFLA, that Plaintiff's clients go to its facility "precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill." Id. at 840; see also Lowe v.

---

[8] For the reasons outlined in section IV.A.1, the fact that Plaintiff is "unlicensed" makes no difference to the analysis.
[9] Given the offering of these services, Plaintiff's assertion that "Aloha staff do not exercise medical or other judgment," Mem. at 35, defies logic.

S.E.C., 472 U.S. 181, 232 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."). Under these circumstances, professional speech is most certainly at issue.

Moreover, even if NIFLA's professional speech ruling was premised upon licensing, as Plaintiff claims, Plaintiff's own Complaint confirms that it uses the services of an OB/GYN to perform ultrasounds and interpret the results for its clients. See Compl. at ¶ 9; see also Mem. at 34.[10] The NIFLA opinion makes clear that states have "the power to regulate professions . . . as well as the power to regulate the speech that occurs within the practice of the profession." 839 F.3d at 839. Regardless of whether it is the centers or the professionals that are licensed, assuming Plaintiff's licensing theory, the speech within the walls is subject to the same regulation under the professional speech doctrine.[11]

---

[10] Plaintiff attempts to side-step this fact by claiming that "[o]n information and belief, ultrasounds in Hawaii do not have to be administered by a licensed professional." See Mem. at 34 n.10. But Plaintiff fails to explain why that contention, even if true, is material. Regardless of whether an ultrasound need be administered by a licensed professional, Plaintiff offers ultrasounds—a service among those NIFLA characterized as being within a center's professional practice—and utilizes the services of a licensed professional to do so.

[11] To the extent Plaintiff argues that the professional speech doctrine does not apply because licensed professionals themselves are not uttering the Act's required notice, it is important to note NIFLA's statement that "[t]he professional nature of the[] speech does not change even if Appellants decide to have staff members

Under the holding of NIFLA, the Act regulates professional speech and is subject to intermediate scrutiny.

3. The Act Survives Intermediate Scrutiny

"In order to survive intermediate scrutiny, 'the State must show . . . that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.'" NIFLA, 839 F.3d at 841 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011)). Intermediate scrutiny is "demanding" but requires less than strict scrutiny. Id. (citing Retail Digital Network, LLC v. Appelsmith, 810 F.3d 638, 648 (9th Cir. 2016)). "What is required is a 'fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" Id. (quoting Retail Digital, 810 F.3d at 649).

Hawai'i's Act, like California's in NIFLA, easily survives intermediate scrutiny. Hawai'i has a substantial interest in the health of its citizens, including ensuring that "women in Hawaii are able to make personal reproductive health

---

disseminate the Licensed Notice in the clinics' waiting rooms, instead of by doctors or nurses in the examining room." 839 F.3d at 840. Here, as in NIFLA, the professional relationship "extends beyond the examining room" and "[a]ll the speech related to the clinics' professional services that occurs within the clinics' walls, including within [] the waiting room, is part of the clinics' professional practice." Id.

decisions with full and accurate information regarding their rights to access the full range of health care services that are available." S.B. 501, § 1; see NIFLA, 839 F.3d at 841 ("California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion."); see also Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 767 (1994) ("[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy.").

States also have a "compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for . . . regulating the practice of professions." NIFLA, 839 F.3d at 841–42 (quoting Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1109 (9th Cir. 2004)).

As in NIFLA, the notice required by the Act is narrowly drawn to achieve Hawai'i's substantial interests. The notice informs the reader "only of the existence of publicly-funded family-planning services," does not contain "any more speech than necessary," and does not "encourage, suggest, or imply that women should use those state-funded services." NIFLA, 839 F.3d at 842. The notice, moreover, is an effective means of informing women about state-funded family-planning services, given that "family planning decisions are time sensitive

and care early in pregnancy is important." S.B 501, § 1; see NIFLA, 839 F.3d at 842 ("[G]iven that many of the choices facing pregnant women are time-sensitive . . . we find convincing the AG's argument that because the Licensed Notice is disseminated directly to patients whenever they enter a clinic, it is an effective means of informing women about publicly-funded pregnancy services.").

For those reasons, the Act survives intermediate scrutiny and Plaintiff cannot demonstrate a likelihood of success on the merits of its First Amendment free speech claim.[12] [13]

C. Plaintiff Cannot Satisfy the Remaining Preliminary Injunction Factors

As discussed herein, Plaintiff cannot show a likelihood of success on its First Amendment free speech claim.[14] As that is the "most important" preliminary

[12] The out-of-circuit cases relied upon by Plaintiff in support of its contention that "other attempts to coerce unlicensed pregnancy centers have failed," Mem. at 17, are entirely distinguishable. In both Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233 (2nd Cir. 2014), and Centro Tepeyac v. Montgomery County, 5 F.Supp.3d 745 (D. Md. 2014), courts struck down laws that expressly "*encouraged*" pregnant women to see a licensed health care provider. In Evergreen, the law also impermissibly required regulated clinics to expressly disclose "whether or not they provide or provide referrals for abortion, emergency contraception, or prenatal care." 749 F.3d at 242. Similarly, in Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City of Baltimore, Civ. No. 1:10-cv-00760-MJG ECF No. 118 (D. Md. Oct. 4, 2016), the court struck down a law requiring regulated providers to post a disclaimer expressly stating that they "do[] not provide or make referral for abortion or birth-control services."

[13] Plaintiff appears to argue that the Act's requirement that the notice be provided in "English or another language requested by a client or patient" also runs afoul of the First Amendment. See Mem. at 31. Plaintiffs fail, however, to in any way tie the Act's language requirement to the First Amendment.

injunction factor under Winter, this Court should deny Plaintiff's Motion on that basis alone. See NIFLA, 839 F.3d at 829 (denying plaintiffs' motion for a preliminary injunction, finding that plaintiffs were unable to show likelihood of success on the merits, the "most important" factor under Winter). But even taking into account the remaining Winter factors, Plaintiff cannot succeed.

First, Plaintiff has not shown that it will suffer irreparable harm in the absence of a preliminary injunction. Plaintiff's alleged irreparable harm is being forced to engage in compelled speech in violation of its First Amendment rights, see Mem. at 37, but Plaintiff has not shown a likelihood of success on the merits on its First Amendment claim. As a result, any argument that Plaintiff will be irreparably harmed due to violation of its First Amendment rights necessarily fails.

Second, Plaintiff has not demonstrated that the balance of equities tips in its favor. Plaintiff contends that its free speech rights "outweigh[] the government's interest in disseminating a message that the government can disseminate itself" Mem. at 37, but, as noted, Plaintiff has failed to demonstrate that its First Amendment claim is at all likely to succeed. Additionally, Plaintiff's requested injunction would interfere with the Hawai‘i Legislature's effort to ensure that women seeking family planning or pregnancy-related services receive full and

---

[14] Nor can Plaintiff show "serious questions" going to the merits of its claim under the alternate test outlined in Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011). For the reasons outlined above, Plaintiff's First Amendment claim fails.

accurate information regarding their rights and the range of available services. See A Woman's Friend, 153 F. Supp. 3d at 1216. This effort implicates important state interests, as outlined *supra*, and Plaintiff's meritless First Amendment arguments do not outweigh the potential harm to women in need of reproductive health services, but unaware of the full range of state-funded services available.

Finally, Plaintiff cannot demonstrate that an injunction is in the public interest. Even assuming Plaintiff's argument that the public has an interest in upholding free speech principles, that interest is not implicated here, where Plaintiff has failed to show a likelihood of success on the merits of its First Amendment claim. Plaintiff also ignores that its requested injunction runs counter to the public's interest in ensuring women are fully informed of the full range of medical services available. An injunction will—counter to the public's interest—"limit the ability of a subset of women who are or may be pregnant from accessing the straightforward information in the required notice when they are making their time sensitive reproductive decisions." A Woman's Friend, 153 F. Supp. 3d at 1217.

V. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court

deny Plaintiff's Motion.

DATED: Honolulu, Hawai'i, September 1, 2017.

STATE OF HAWAI'I

DOUGLAS S. CHIN
Attorney General
State of Hawai'i

/s/ SKYLER G. CRUZ
SKYLER G. CRUZ
Deputy Attorney General

Attorney for Defendant
DOUGLAS S. CHIN

DOUGLAS S. CHIN 6465
Attorney General of Hawai‘i

CARON M. INAGAKI 3835
CLYDE J. WADSWORTH 8495
KIMBERLY T. GUIDRY 7813
SKYLER G. CRUZ 9551
KALIKO‘ONALANI D. FERNANDES 9964

Deputy Attorneys General
Department of the Attorney
General, State of Hawai‘i
425 Queen Street
Honolulu, Hawai‘i 96813
Telephone: (808) 586-1494
Facsimile: (808) 586-1369
E-Mail: Skyler.G.Cruz@hawaii.gov

Attorneys for Defendants
DOUGLAS S. CHIN and DAVID IGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

CALVARY CHAPEL PEARL HARBOR, d/b/a A PLACE FOR WOMEN IN WAIPIO, a Hawai‘i Corporation; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation, Plaintiffs, v.	CIVIL NO. 17-00326 DKW-KSC DEFENDANTS DOUGLAS S. CHIN AND DAVID IGE’S MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION, FILED JULY 12, 2017; DECLARATION OF SKYLER G. CRUZ; EXHIBITS “A” –“F”; CERTIFICATE OF SERVICE (ECF NO. 6) (caption continued on next page)

DOUGLAS S. CHIN, in his official capacity as Attorney General for the State of Hawai‘i; DAVID IGE, in his official capacity as Governor of the State of Hawai‘i,

Defendants.

DEFENDANTS DOUGLAS S. CHIN AND DAVID IGE’S MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION, FILED JULY 12, 2017

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 3

A. The Legislative History of the Act 3

B. The Legislature's Findings 4

C. The Act's Requirements 5

D. The California FACT Act and the Ninth Circuit's Decision in *NIFLA* 8

III. LEGAL STANDARD 11

IV. ARGUMENT 12

A. *NIFLA v. Harris* Controls this Case 12

1. The Act's Private Right of Action is Irrelevant to Plaintiffs' First Amendment Claims 14

2. Calvary Chapel's Status as a Church Does Not Change the Free Exercise Analysis 15

3. California's Licensing Scheme Does Not Affect NIFLA's Applicability to this Case 18

4. The Pending Certiorari Petition in NIFLA is Irrelevant 19

B. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits of their First Amendment Free Speech Claim 20

1. Strict Scrutiny Does Not Apply 20

2. The Act Regulates Professional Speech Subject to Intermediate Scrutiny 23

3. The Act Survives Intermediate Scrutiny 27

C. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits of their First Amendment Free Exercise Claims 30

1. Neutrality 31

2. General Applicability 32

3. Rational Basis Review 33

D. Plaintiffs Cannot Satisfy the Remaining Preliminary Injunction Factors 33

V. CONCLUSION 36

TABLE OF AUTHORITIES

CASES

A Woman's Friend Pregnancy Res. Clinic v. Harris,
153 F. Supp. 3d 1168 (E.D. Cal. 2015) 22, 34, 35

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 11

Am. Acad. of Pain Mgmt. v. Joseph,
353 F.3d 1099 (9th Cir. 2004) 29

Austin Lifecare, Inc. v. City of Austin,
Civ. No. 1:11-cv-00875-LY ECF No. 146 (W.D. Tex. June 23, 2014) 30

Blaisdell v. Dep't of Pub. Safety,
No. CIV. 14-00433 JMS, 2014 WL 5581032
(D. Haw. Oct. 31, 2014) 12

Centro Tepeyac v. Montgomery County,
5 F.Supp.3d 745 (D. Md. 2014)...30

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)... 31, 32

Civil Liberties for Urban Believers v. City of Chicago,
342 F.3d 752 (7th Cir. 2003) 15

Cornerstone Bible Church v. City of Hastings,
948 F.2d 464 (8th Cir. 1991 .... 15, 16

Earth Island Inst. v. Carlton,
626 F.3d 462 (9th Cir. 2010) 11

Employment Division, Department of Human Resources of Oregon v. Smith,
494 U.S. 872 (1990).. 10, 15, 16, 17, 30, 31, 33

Evergreen Ass'n, Inc. v. City of New York,
740 F.3d 233 (2nd Cir. 2014) 30

Grace United Methodist Church v. City of Cheyenne,
451 F.3d 643 (10th Cir. 2006) 16, 33

Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City of Baltimore,
Civ. No. 1:10-cv-00760-MJG ECF No. 118 (D. Md. Oct. 4, 2016) 30

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,
565 U.S. 171 (2012)... 16, 17

JHP Pharm. LLC v. Hospira, Inc.,
No. CV-13-7460-DDP (EX), 2014 WL 12588690
(C.D. Cal. Feb. 10, 2014) 19

Lowe v. S.E.C., 472 U.S. 181 (1985) 25

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994)...28

Munaf v. Geren,
553 U.S. 674 (2008)...11

National Institute of Family and Life Advocates v. Harris,
2016 WL 3627327 (S.D. Cal., Feb. 9, 2016)...17

National Institute of Family and Life Advocates v. Harris,
839 F.3d 823 (9th Cir. 2016) 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

Pickup v. Brown,
740 F.3d 1208 (9th Cir. 2014) 23

Reed v. Town of Gilbert, Ariz.,
135 S. Ct. 2218 (2015).. 20, 21

Retail Digital Network, LLC v. Appelsmith,
810 F.3d 638 (9th Cir. 2016) 28

San Jose Christian Coll. v. City of Morgan Hill,
360 F.3d 1024 (9th Cir. 2004) 33

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011)..27

Stormans, Inc. v. Wiesman,
794 F.3d 1064 (9th Cir. 2015) 15, 30, 31, 32, 33

The Lands Council v. McNair,
537 F.3d 981 (9th Cir. 2008) 11

United States v. Lee,
455 U.S. 252 (1982).. 15, 30

United States v. Playboy Entm't,
529 U.S. 803, 823 (2000) 22

United States v. Swisher,
811 F.3d 299 (9th Cir. 2016 20

Winter v. Natural Resources Defense Council, Inc.,
555 U.S. 7 (2008).. 10, 11, 33, 34

HAWAI'I STATUTES

S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (2017)...................................... 1, 2, 4, 5, 6, 7, 8, 9, 12, 13, 14, 22, 28, 29, 33

S.B. 501, 29th Leg., Reg. Sess. (2017) 3

CALIFORNIA STATUTES

California Assembly Bill 775 (2015)... 8, 9, 12, 14, 17, 19, 20, 21, 28, 30, 31, 32

LEGISLATIVE HISTORY RE: S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (2017)

Conf. Comm. Rep. No. 156 (2017)..4

Senate Stand. Comm. Rep. No. 907 (2017) 4

TREATISES

11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948
(2d ed. 1995) 11

DEFENDANTS DOUGLAS S. CHIN AND DAVID IGE'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, FILED JULY 12, 2017

Defendants DOUGLAS S. CHIN and DAVID IGE (collectively, "Defendants"), by and through their attorneys, submit this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed July 12, 2017.

I. INTRODUCTION

The State of Hawai'i has a substantial interest in the health of its citizens. This includes ensuring that "women in Hawai'i are able to make personal reproductive health decisions with full and accurate information regarding their rights to access the full range of health care services that are available." See Exhibit "A," S.B. 501, S.D. 1, 29th Leg., Reg. Sess. (2017) ("S.B. 501"). The Legislature has found that "[m]any women in Hawai'i . . . remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, pregnancy-related, and birth-related services." Id. To address this concern, S.B. 501 (the "Act") was enacted into law. It requires "limited service pregnancy centers," as defined in the Act, to disseminate a written notice to clients or patients informing them that Hawai'i has public programs that provide immediate free or low-cost access to comprehensive family planning services.

On July 12, 2017, Plaintiffs CALVARY CHAPEL PEARL HARBOR, d/b/a A PLACE FOR WOMEN IN WAIPIO ("Calvary Chapel") and NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA ("NIFLA") (collectively, "Plaintiffs") filed this lawsuit challenging the constitutionality of the Act based, *inter alia*, on alleged violations of their First Amendment rights to free speech and free exercise of religion. On the same date, Plaintiffs filed a Motion for Preliminary Injunction (the "Motion"), seeking to enjoin enforcement of the Act during this litigation. See ECF Nos. 6 & 8.[1]

Based on binding Ninth Circuit precedent, Plaintiffs' Motion must be denied. In a case brought by NIFLA and other plaintiffs challenging the constitutionality of a California act requiring a nearly identical notice, the Ninth Circuit Court of Appeals affirmed the denial of a motion for a preliminary injunction, finding that the plaintiffs could not demonstrate a likelihood of success on the merits of their free speech and free exercise claims. See National Institute of Family and Life Advocates v. Harris, 839 F.3d 823 (9th Cir. 2016) ("NIFLA").[2] Through their motion in this case, Plaintiffs raise the very same arguments that the Ninth Circuit soundly rejected in NIFLA. Recognizing this, Plaintiffs contend that

---

[1] Plaintiffs' Motion is confined to their free speech and free exercise claims under the First Amendment, even though Plaintiffs' Complaint also raises claims under the Fourteenth Amendment, the Coats-Snowe Amendment, and the Hawai‘i Constitution. See Memorandum in Support of Motion ("Mem.") at n.3.

[2] NIFLA has also been referred to as Harris and Becerra.

there are "crucial distinctions" between this case and NIFLA, Mem. at 2, but each of Plaintiffs' attempts to distinguish NIFLA fail, as demonstrated herein. Plaintiffs simply cannot escape the effect of binding Ninth Circuit precedent. Based on NIFLA, Plaintiffs fail to meet their burden of showing a likelihood of success on the merits of their First Amendment claims, and their Motion must accordingly be denied.

II. BACKGROUND

A. The Legislative History of the Act

On January 20, 2017, the Legislature introduced S.B. No. 501, a measure to amend the statutory duties imposed on "limited service pregnancy centers." See Exhibit "B," S.B. No. 501, 29th Leg., Reg. Sess. (2017). The bill was introduced to "ensure that women in Hawai'i are able to make personal reproductive health decisions with full and accurate information regarding their rights to access the full range of health care services that are available." Id.

The legislative history of the Act provides insight into the Legislature's intent. In a report to the President of the Senate of the State of Hawai'i, the Committee on Ways and Means stated:

> Your Committee believes that when it comes to health care, everyone should have access to comprehensive, accurate, and unbiased information in a confidential setting. Especially for women and their reproductive health, timely information is critical in making informed decisions.

See Exhibit "C," S. Stand. Comm. Rep. No. 907 (2017), at p. 2. In a report to the President of the Senate and the Speaker of the House of Representatives of the State of Hawai'i, the Committee on Conference stated:

> Your Committee on Conference finds that individuals seeking healthcare, including reproductive healthcare, should receive comprehensive, accurate, unbiased information in a confidential setting. In a reproductive healthcare setting, this includes receiving information about the full range of options, including how to obtain health insurance coverage should a woman be uninsured. Your Committee on Conference further finds that when women are fully informed, they can make the best decisions for themselves and their health.

See Exhibit "D," Conf. Comm. Rep. No. 156 (2017), at p. 2.

B. The Legislature's Findings

In Section 1 of the Act, the Legislature found that the State of Hawai'i, through the Department of Health and the Department of Human Services, administers public programs providing insurance coverage and direct services for reproductive health care and counseling to eligible, low-income women. See S.B. 501, § 1. The Legislature also found that "[t]housands of women in Hawai'i are in need of publicly-funded family planning services, contraception services and education, pregnancy-related services, prenatal care, and birth-related services." Id. In particular, the Legislature found that:

> In 2010, sixteen thousand women in Hawaii experienced an unintended pregnancy, which can carry enormous social and economic costs to both individual families and to the State. Many women in Hawaii, however, remain unaware of the public programs

> available to provide them with contraception, health education and counseling, family planning, prenatal care, pregnancy-related, and birth-related services.

Id.

The Legislature found that "[b]ecause family planning decisions are time sensitive and care early in pregnancy is important, Hawai'i must make every possible effort to advise women of all available reproductive health programs." Id. In Hawai'i, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through Med-QUEST and the Department of Health's family planning programs. Id. As the Legislature found:

> Requiring facilities that provide pregnancy- or family planning-related services to provide accurate health information and to inform clients of the availability of and enrollment procedures for reproductive health programs will help ensure that all women in the State can quickly obtain the information and services that they need to make and implement informed, timely, and personally appropriate reproductive decisions.

Id.

C. The Act's Requirements

The Act applies to a "limited service pregnancy center." That term is defined in the Act as follows:

> (a) For purposes of this section, "limited service pregnancy center" or "center":
>
> > (1) Means a facility that:

(A) Advertises or solicits clients or patients with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling;

(B) Collects health information from clients or patients; and

(C) Provides family planning or pregnancy-related services, including but not limited to obstetric ultrasound, obstetric sonogram, pregnancy testing, pregnancy diagnosis, reproductive health counseling, or prenatal care; and

(2) Shall not include a health care facility. For the purposes of this paragraph, a "health care facility" means any facility designed to provide comprehensive health care, including but not limited to hospitals licensed pursuant to chapter 321, intermediate care facilities, organized ambulatory health care facilities, emergency care facilities and centers, health maintenance organizations, federally qualified health centers, and other facilities providing similarly organized comprehensive health care services.

See S.B. 501, § 2.

The Act requires every "limited service pregnancy center" in the State of Hawai‘i to disseminate on-site to clients or patients a written notice stating:

> Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including, but not limited to, all FDA-approved methods of contraception and pregnancy-related services for eligible women.
>
> To apply online for medical insurance coverage, that will cover the full range of family planning and prenatal care services, go to mybenefits.hawaii.gov.

> Only ultrasounds performed by qualified healthcare professionals and read by licensed clinicians should be considered medically accurate.

See S.B. 501, § 2.

The written notice must be in English or another language requested by a client or patient, and must also contain the internet address for online medical assistance applications and the statewide phone number for medical assistance applications. Id. The notice must be disclosed in at least one of the following ways:

> (1) A public notice on a sign sized at least eight and one-half inches by eleven inches, written in no less than twenty-two point type, and posted in a clear and conspicuous place within the center's waiting area so that it may be easily read by individuals seeking services from the center; or
>
> (2) A printed or digital notice written or rendered in no less than fourteen point type that is distributed individually to each patient or client at the time of check-in for services; provided that a printed notice shall be available to all individuals who cannot or do not wish to receive the notice in digital format.

See S.B. 501, § 2.

The Act contains an enforcement provision that provides, in relevant part, as follows:

> (a) A limited service pregnancy center that violates section 321-A shall be liable for a civil penalty of $500 for a first offense and $1,000 for each subsequent offense. If the center is provided with reasonable notice of noncompliance, which informs the center that it is subject to a civil penalty if it does not correct the violation within thirty days from the date the notice is sent to the center, and the violation is not

> corrected as of the expiration of the thirty-day notice period, the attorney general may bring an action in the district court of the district in which the center is located to enforce this section.
>
> A civil penalty imposed pursuant to this subsection shall be deposited to the credit of the general fund.
>
> (b) Any person who is aggrieved by a limited service pregnancy center's violation of section 321-A may bring a civil action against the limited service pregnancy center in the district court of the district in which the center is located to enjoin further violations and to recover actual damages sustained together with the costs of the suit including reasonable attorneys' fees. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained. If damages are awarded pursuant to this subsection, the court may, in its discretion, impose on a liable center a civil fine of not more than $1,000 to be paid to the plaintiff.
>
> A party seeking civil damages under this subsection may recover upon proof of a violation by a preponderance of the evidence.
>
> For the purpose of this subsection, "person" includes a natural or legal person.

See S.B. 501, § 2.

D. The California FACT Act and the Ninth Circuit's Decision in *NIFLA*

On October 9, 2015, California Assembly Bill 775, known as the "Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act" (the "FACT Act"), was signed into law. See Exhibit "E," Assem. Bill No. 775. The stated purpose of the FACT Act "is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." See Assem.

Bill No. 775, § 2. The FACT Act requires a "licensed covered facility," as defined, to disseminate a notice to all clients stating that:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

See Assem. Bill No. 775, § 3 (the "Licensed Notice"). The notice required by S.B. 501 tracks, in large part, the Licensed Notice.

The FACT Act also requires an unlicensed covered facility, as defined, to disseminate a notice to all clients, stating, among other things, that the facility is not licensed as a medical facility by the State of California. See Assem. Bill No. 775, § 3 (the "Unlicensed Notice").

After the FACT Act was signed into law, NIFLA and two other religiously-affiliated non-profit corporations opposed to abortion, brought suit in the Southern District of California, arguing that the FACT Act violated their First Amendment free speech and free exercise rights. NIFLA, 839 F.3d at 831-32. The plaintiffs brought a motion for a preliminary injunction, seeking to enjoin enforcement of the FACT Act prior to full litigation of the action.[3] Id. The district court denied the

---

[3] As in the present case, the NIFLA plaintiffs brought their motion for a preliminary injunction with respect to their First Amendment claims. Id. at 831 n.3. The NIFLA plaintiffs' claims for relief also included, as here, claims under the Fourteenth Amendment, the Coats-Snowe Amendment, and a state constitution. Id.

plaintiffs' motion for a preliminary injunction, finding that the plaintiffs were unable to show a likelihood of success on their free speech and free exercise claims. Id. at 832.

The Ninth Circuit affirmed. Id. at 845. With respect to their free speech claims, the court rejected the plaintiffs' argument that the FACT Act should be subject to strict scrutiny. The court noted that while the FACT Act is content-based, it does not discriminate based on viewpoint. Id. at 836. The court held that the Licensed Notice regulates professional speech and is therefore subject to intermediate scrutiny, which it survives. Id. at 839–42. The district court, accordingly, did not err in concluding that the plaintiffs failed to show a likelihood of success on the merits of their free speech claims. Id. at 834–35.

The Ninth Circuit also concluded, with respect to the plaintiffs' free exercise claims, that the FACT Act is a neutral law of general applicability and that it survives rational basis review under Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

Because the plaintiffs were unable to show a likelihood of success on the merits of their claims—the "most important" preliminary injunction factor under Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008)—the court affirmed the denial of the plaintiffs' motion for a preliminary injunction. NIFLA, 839 F.3d at 829.

III. LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy never awarded as of right." Winter, 555 U.S. at 24; see also Munaf v. Geren, 553 U.S. 674, 689–90 (2008) ("A preliminary injunction is an 'extraordinary and drastic remedy.'" (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995))). Plaintiffs seeking a preliminary injunction "face a difficult task in proving that they are entitled to this 'extraordinary remedy.'" Earth Island Inst. v. Carlton, 626 F.3d 462, 469 (9th Cir. 2010).

To succeed on a motion for a preliminary injunction, a plaintiff must demonstrate:

> (1) that he is likely to succeed on the merits of his claim; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.

NIFLA, 839 F.3d at 834 (citing Winter, 555 U.S. at 20). A preliminary injunction may also issue if "a plaintiff demonstrates . . . that serious questions going to the merits were raised[,] the balance of hardships tips sharply in the plaintiff's favor" and the two other Winter factors are met. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quoting The Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008)). "Regardless of which standard applies, the movant always 'has the burden of proof on each element of the test.'"

Blaisdell v. Dep't of Pub. Safety, No. CIV. 14-00433 JMS, 2014 WL 5581032, at *3 (D. Haw. Oct. 31, 2014).

IV. ARGUMENT

A. *NIFLA v. Harris* Controls this Case

In NIFLA, discussed above, the Ninth Circuit considered a preliminary injunction motion with respect to a California act that is substantively the same as the Act being challenged in this case. Indeed, California's FACT Act and Hawai'i's Act were enacted for the same purpose—to ensure that women in California and Hawai'i, respectively, have information regarding the availability of, and their rights to access, personal reproductive health services. As the Hawai'i Legislature found:

> The purpose of this Act is to ensure that women in Hawaii are able to make personal reproductive health decisions with full and accurate information regarding their rights to access the full range of health care services that are available.

See S.B. 501, § 1. Similarly, the California FACT Act provides:

> The purpose of this Act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.

See Assem. Bill No. 775, § 2. To that end, both acts require certain centers or facilities, as defined, to provide informational notices regarding the availability of, and enrollment procedures for, reproductive health programs offered by the state. The California FACT Act's notice states:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

NIFLA, 839 F.3d at 830. The Hawai‘i notice that Plaintiffs challenge provides, in relevant part:

> Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including, but not limited to, all FDA-approved methods of contraception and pregnancy-related services for eligible women.
>
> To apply online for medical insurance coverage, that will cover the full range of family planning and prenatal care services, go to mybenefits.hawaii.gov.

See S.B. 501, § 2.[4]

Despite the outcome in NIFLA, Plaintiffs raise the same arguments against Hawai‘i's notice as the plaintiffs in NIFLA raised against California's notice. Plaintiffs, however, cannot relitigate NIFLA. The Ninth Circuit's decision in that case controls the fate of the Motion at issue here.

In a transparent and unpersuasive attempt to circumvent the Ninth Circuit's decision in NIFLA, Plaintiffs contend that there are "crucial distinctions" between the Act at issue here and the FACT Act. Mem. at 2. Specifically, Plaintiffs contend that NIFLA does not control this case because: (1) the Act includes a private right of action; (2) Calvary Chapel is a church; (3) Hawai‘i does not license

[4] The Hawai‘i notice, unlike the California notice, does not mention abortion.

Plaintiffs' facilities in the same manner that California does; and (4) NIFLA is now before the Supreme Court on a Petition for Certiorari. See Mem. at 2–5. Each of these arguments must be rejected.

1. The Act's Private Right of Action is Irrelevant to Plaintiffs' First Amendment Claims

The private right of action in the Act, for which there is no corollary in the FACT Act, is completely irrelevant to Plaintiffs' First Amendment claims. Plaintiffs contend that because of the private right of action "the threat faced by Plaintiffs and others like them is different in kind from that posed by the law in [NIFLA]," Mem. at 3, but Plaintiffs fail to show that the First Amendment analysis is affected in any way by the "threat" caused by a private right of action. Plaintiffs object, through their First Amendment claims, to the notice required by the Act, not the Act's enforcement provisions, which operate only if a covered entity fails to comply with the Act's substantive provisions. The legal and financial burdens Plaintiffs may face should they fail to comply with the Act are wholly irrelevant to whether the Act violates Plaintiffs' First Amendment rights. For that reason, the existence of a private right of action does nothing either to enhance Plaintiffs' First Amendment claims or to shield Plaintiffs' claims from the Ninth Circuit's ruling in NIFLA.

2. Calvary Chapel's Status as a Church Does Not Change the Free Exercise Analysis

In another attempt to escape NIFLA, Plaintiffs contend that Calvary Chapel's First Amendment free exercise claim merits special treatment because Calvary Chapel is "a church that runs its pregnancy center as a direct outgrowth of its religious mission." Mem. at 3. Plaintiffs are incorrect.

Plaintiffs' free exercise claims, as discussed *infra*, are governed by Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), which recognized that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). Under the Smith test, a neutral law of general applicability is subject to rational basis review. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1076 (9th Cir. 2015).

There is no across-the-board church exemption to the Smith rule. Courts have routinely applied Smith in cases involving churches. See, e.g., Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764 (7th Cir. 2003) (holding that "it is neither the policy nor the practice of Chicago to refuse to extend to churches its system of individualized exemptions and, thus, that the [ordinance] is a generally applicable system of land-use regulation"); Cornerstone Bible

Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991) (applying Smith to find that, "[a]bsent evidence of the City's intent to regulate religious worship, the ordinance [challenged by the church] is properly viewed as a neutral law of general applicability"); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 655 (10th Cir. 2006) (holding that "[city's] zoning ordinance constitutes a neutral policy of general applicability which does not offend [Church's] free exercise principles").

Plaintiffs rely on Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012), to argue that irrespective of Smith, strict scrutiny applies to cases involving churches, but Hosanna-Tabor is inapposite. That case addressed the selection of ministers by religious organizations in the context of employment discrimination laws, concluding that unlike Smith, which "involved government regulation of only outward physical acts," the ability of a church to choose its ministers is a "strictly ecclesiastical," "internal church decision that affects the faith and mission of the church itself." Id. at 190, 195. Needless to say, this case does not involve the selection of ministers, such that the narrow "ministerial" exception recognized in Hosanna-Tabor would apply. Nor can Plaintiffs simply extend Hosanna-Tabor's holding to the facts in this case, given that the Hosanna-Tabor Court expressly limited its ruling to the circumstances under consideration. See id. at 196 ("The case before us is an employment

discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.").

Even assuming that Hosanna-Tabor could stand for the proposition that "internal church decisions" are uniformly exempted from Smith's general rule, Plaintiffs have failed to establish that the Act deals not with "outward physical acts," id. at 190, but instead with the internal teachings, workings, and mission of Calvary Chapel. The notice required under the Act "informs the reader only of the existence of publicly-funded family-planning services. It does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services." NIFLA, 839 F.3d at 842. There is nothing in the Act preventing Calvary Chapel from espousing its views and beliefs to its members, clients, or patients. See National Institute of Family and Life Advocates v. Harris, 2016 WL 3627327, at *5 (S.D. Cal., Feb. 9, 2016) (observing that "the [FACT Act] does not prohibit a center from mentioning, discussing or advocating its pro-life viewpoint or even communicating its disagreement with the statute itself"). Simply put, the internal teachings, workings, and mission of Calvary Chapel are free to remain the same.

3. California's Licensing Scheme Does Not Affect *NIFLA*'s Applicability to this Case

Plaintiffs also argue that NIFLA does not control this case because "Hawaii does not license Plaintiffs' facilities in the same manner that California does." Mem. at 4. According to Plaintiffs, the lack of a comparable licensing scheme means that "there is no need to inform women that 'they are using the medical services of a facility that has not satisfied licensing standards set by the state." Mem at 4–5. Plaintiffs should be well aware, however, that Hawai'i's Act does not require covered facilities to identify whether they have met state licensing requirements. That is a feature of California's FACT Act that is not mirrored in Hawai'i's Act. As a result, Plaintiffs' argument on this point is immaterial.

Plaintiffs also ignore that the NIFLA court's ruling was not based on California's licensing scheme. The court nowhere concluded that the FACT Act passed constitutional muster because California licenses the covered facilities. Instead, the NIFLA court noted that states have the "power to regulate professions" and the speech "within the practice of the profession." 839 F.3d at 839. Those conclusions were based on the professional speech doctrine (discussed *infra*), without respect to California's licensing scheme.

Moreover, even if licensing were central to NIFLA's holding, it is beyond dispute that Plaintiffs' facilities include medical professionals subject to state licensing requirements. As stated in Plaintiffs' Verified Complaint, Calvary

Chapel provides medical services under the supervision of its Medical Director, Dr. Vivien Wong. See Verified Complaint ("Compl.") at ¶ 17. As such, any purported distinction on the basis of California's licensing requirement has no merit.

4. The Pending Certiorari Petition in *NIFLA* is Irrelevant

In their last stand against NIFLA, Plaintiffs argue that this case should be treated differently from NIFLA because a petition for a writ of certiorari has been filed with the U.S. Supreme Court in that case. The weakness of this argument is apparent. As Plaintiffs know, a cert petition provides absolutely no guarantee of Supreme Court review, and no guarantee of a contrary result even assuming acceptance of cert. Moreover, NIFLA remains fully binding on this Court even if the Supreme Court grants certiorari. See, e.g., JHP Pharm. LLC v. Hospira, Inc., No. CV-13-7460-DDP (EX), 2014 WL 12588690, at *4 (C.D. Cal. Feb. 10, 2014) ("The basic Ninth Circuit rule is that a grant of certiorari does not supersede a case; it remains good law unless the Supreme Court rules otherwise.").[5] There is simply no reason for NIFLA to be ignored.

[5] Plaintiffs contend that a preliminary injunction until the Supreme Court "decides whether to hear the case and resolve it on the merits," Mem. at 5, would simply preserve the status quo in this case. Not so. As Plaintiffs acknowledge, the Act has taken effect. See Compl. at ¶ 12. The status quo, therefore, would be for the Act to continue in full force and effect.

B. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits of their First Amendment Free Speech Claims

1. Strict Scrutiny Does Not Apply

In their Motion, Plaintiffs futilely attempt to convince this Court that strict scrutiny applies to the Act in review of their free speech claims. Despite devoting ten pages of their brief to this topic, Plaintiffs fail to recognize that strict scrutiny simply does not apply, as dictated by binding precedent. See NIFLA, 839 F.3d at 835–37. Plaintiffs contend that the Act is subject to strict scrutiny because it is content and viewpoint-based, but the Ninth Circuit, addressing the very same arguments, disagreed. Id. There is no reason for this Court to reach a different conclusion.

A regulation is content-based when "on its face" the regulation "draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015). But the mere fact that a regulation is content-based, standing alone, does not warrant application of strict scrutiny. Although the NIFLA court determined that the FACT Act is content-based, it made clear that strict scrutiny was not the appropriate standard. See NIFLA, 839 F.3d at 837 (noting that strict scrutiny has not been applied in abortion-related disclosure cases, "even when the regulation is content-based"); see also United States v. Swisher, 811 F.3d 299, 313 (9th Cir. 2016) ("Even if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny."). Here, even if the Act is

content-based, Plaintiffs fail to the extent they argue strict scrutiny thereby applies. That conclusion is dictated by NIFLA.

Plaintiffs' argument that strict scrutiny is required because the Act is viewpoint-based also fails. A regulation discriminates based on viewpoint when it regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker." Reed, 135 S. Ct. at 2230. The Act does no such thing; it applies to all "limited service pregnancy centers" regardless of their ideology, opinion, or perspective on particular family-planning services. See NIFLA, 839 F.3d at 835 ("The Act, however, does not discriminate based on viewpoint. It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker. Instead, the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services.").

Plaintiffs attempt to erect a false dichotomy pursuant to which an entity is either pro-life and therefore subject to the Act, or not pro-life, and therefore exempt from the Act. See, e.g., Mem. at 16-17, 28. Contrary to Plaintiffs' assertions, the Act applies regardless of viewpoint on abortion. It applies equally, for example, to Planned Parenthood as it does to Calvary Chapel.[6]

---

[6] Planned Parenthood falls squarely within the definition of a "limited service pregnancy center" under the Act because it: (1) advertises or solicits clients or patients with offers to provide, *inter alia*, pregnancy testing and pregnancy options

The Act's only exception is for "health care facilities," as defined, because "health care facilities" already provide comprehensive health care services and do not, therefore, raise the Legislature's informational concerns regarding the full range of health services. See S.B. 501, § 1. The exemption does not favor or disfavor any particular speakers based on their viewpoint. See NIFLA, 839 F.3d at 835.

For these reasons, the Act is not viewpoint-based, and strict scrutiny does not apply.[7]

---

counseling; (2) collects health information from clients or patients; (3) provides pregnancy-related services, including pregnancy diagnosis, prenatal care, and prenatal tests such as ultrasounds; and (4) it is not a "health care facility" because it does not provide comprehensive health care. See https://www.plannedparenthood.org/health-center/hawaii/honolulu/96814/honolulu-health-center-2951-91810.

[7] *Even if* strict scrutiny applied, which it does not, Plaintiffs cannot demonstrate a likelihood of success on the merits. The Act is "narrowly tailored to promote [the] compelling government interest" of ensuring that, in Hawai'i, women's reproductive health decisions are informed by "full and accurate information," including knowledge of the "full range of health care services that are available." United States v. Playboy Entm't, 529 U.S. 803, 823 (2000) (setting forth strict scrutiny test); S.B. 501, § 1. The Act is also the "least restrictive alternative"; the notice required by the Act does no more than necessary—recognizing that family planning decisions are time sensitive and care early in pregnancy is important—to "ensure that all women in the State can quickly obtain the information and services that they need to make and implement informed, timely, and personally appropriate reproductive health decisions." S.B. 501, § 1; see A Woman's Friend Pregnancy Resource Clinic v. Harris, 153 F.Supp.3d 1168, 1207 (E.D. Cal. 2015), aff'd sub nom. A Woman's Friend Pregnancy Res. Clinic v. Harris, 669 F. App'x 495 (9th Cir. 2016) (finding that the FACT Act satisfies strict scrutiny, at the preliminary injunction stage, because it is narrowly tailored to affect speech "no more than is necessary to convey the desired factual information," and the least restrictive

2. The Act Regulates Professional Speech Subject to Intermediate Scrutiny

NIFLA establishes that intermediate scrutiny is the appropriate standard to review the Act. The NIFLA court concluded that California's Licensed Notice, which mirrors the notice at issue in this case, regulates professional speech, *i.e.* "speech that occurs between professionals and their clients in the context of their professional relationship." Id. at 839. The NIFLA court explained as follows:

> Licensed clinics engage in speech that occurs squarely within the confines of their professional practice. For example, Pregnancy Care Clinic provides medical services such as ultrasounds, clinical services such as medical referrals, and non-medical services such as peer counseling and education. Thus, a regular client of Pregnancy Care could easily use many of their services throughout the stages of her pregnancy, such as receiving educational information about best health practices when pregnant, relying upon Pregnancy Care for regular check-ups, or using Pregnancy Care as a resource for counseling. **In all these instances, the client and Pregnancy Care engage in speech that is part of Pregnancy Care's professional practice of offering family-planning services. There is no question that Pregnancy Care's clients go to the clinic precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill. Because licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech.**

Id. at 839–40 (emphases added). Based on Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014), which established a continuum of professional speech regulation, the

---

alternative because it is "the most effective way to ensure women quickly obtain the information and services they need" to make personal reproductive health decisions").

NIFLA court concluded that intermediate scrutiny applies. NIFLA, 839 F.3d at 839.

Plaintiffs admit that NIFLA involved "similar disclosures regarding 'the existence of publicly-funded family planning services.'" See Mem. at 25. Yet Plaintiffs nonetheless view as inapplicable the Ninth Circuit's conclusion that such disclosures constitute professional speech triggering intermediate scrutiny. Plaintiffs argue that because NIFLA involved facilities licensed by the state, along with a legislative finding that the ability of women to receive accurate information about their reproductive rights and to exercise those rights was being hindered by the existence of crisis pregnancy centers—neither of which, according to Plaintiffs is present here—NIFLA's professional speech rulings should be ignored. Id. This argument must be rejected.

In NIFLA, the Ninth Circuit concluded that because the clinics covered by the Licensed Notice "offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech." NIFLA, 839 F.3d at 840. That conclusion was premised upon an examination of the services provided by the facilities, which included, among other things, ultrasounds, various clinical services, peer counseling, and education. Id. at 839–40. The court did not conclude that professional speech was at issue because California licenses its facilities.

In this case, as in NIFLA, the centers subject to the Act provide medical and clinical services in a professional setting. In their Complaint, Plaintiffs make plain that Calvary Chapel offers ultrasounds, pregnancy tests, counseling, and education classes. See Compl. at ¶ 28, 31-32.; see also NIFLA, 839 F.3d at 839–40 ("Pregnancy Care Clinic provides medical services such as ultrasounds, clinical services such as medical referrals, and non-medical services such as peer counseling and education. . . . In all these instances, the client and Pregnancy Care engage in speech that is part of Pregnancy Care's professional practice of offering family-planning services."). As the Ninth Circuit found, clinics or centers offering these types of services "engage in speech that occurs squarely within the confines of their professional practice." Id. at 839.

It is also plain, as in NIFLA, that Plaintiffs' clients go to their facilities "precisely because of the professional services [they] offer[], and that they reasonably rely upon the clinic for its knowledge and skill." Id. at 840; see also Lowe v. S.E.C., 472 U.S. 181, 232 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."). Under these circumstances, professional speech is most certainly at issue.

Moreover, even if NIFLA's professional speech ruling was premised upon licensing, Plaintiffs' Complaint confirms that Calvary Chapel provides medical services under the supervision of its Medical Director, Dr. Vivien Wong, who is licensed by the State. See Compl. at ¶ 17; Exhibit "F," DCCA Professional & Vocational Licensing Search Results for Vivien C. Wong. The NIFLA opinion makes clear that states have "the power to regulate professions . . . as well as the power to regulate the speech that occurs within the practice of the profession." 839 F.3d at 839. Regardless of whether it is the centers or the professionals that are licensed, assuming Plaintiffs' licensing theory, the speech within the walls is subject to the same regulation under the professional speech doctrine.[8]

Nor can NIFLA's professional speech ruling be distinguished by mining for differences between the findings of the California and Hawai'i legislatures. A legislative finding that the ability of women to receive accurate information about their reproductive rights, and to exercise those rights, was being hindered by the existence of crisis pregnancy centers was not central to the court's analysis

[8] To the extent Plaintiffs argue that the professional speech doctrine does not apply because licensed professionals themselves are not uttering the Act's required notice, it is important to note NIFLA's statement that "[t]he professional nature of the[] speech does not change even if Appellants decide to have staff members disseminate the Licensed Notice in the clinics' waiting rooms, instead of by doctors or nurses in the examining room." 839 F.3d at 840. Here, as in NIFLA, the professional relationship "extends beyond the examining room" and "[a]ll the speech related to the clinics' professional services that occurs within the clinics' walls, including within [] the waiting room, is part of the clinics' professional practice." Id.

regarding the appropriate level of review.[9] Rather, the court examined the services provided by the centers and the context in which those services were provided. The centers subject to the Act's requirements provide substantially similar services to the facilities in NIFLA, including ultrasounds and pregnancy counseling. Thus, under the holding of NIFLA, the Act regulates professional speech and is subject to intermediate scrutiny.

3. **The Act Survives Intermediate Scrutiny**

"In order to survive intermediate scrutiny, 'the State must show . . . that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.'" NIFLA, 839 F.3d at 841 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011)). Intermediate scrutiny is "demanding" but

[9] The NIFLA court cited the California Legislature's finding regarding the existence of crisis pregnancy centers in analyzing whether the FACT Act's Unlicensed Notice passed constitutional muster. See NIFLA, 839 F.3d at 843 ("California has a compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state. And given the Legislature's findings regarding the existence of CPCs, which often present misleading information to women about reproductive medical services, California's interest in presenting accurate information about the licensing status of individual clinics is particularly compelling."). The Unlicensed Notice requires unlicensed covered facilities, as defined, to disseminate a notice stating: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." NIFLA, 839 F.3d at 830. Hawai'i's Act does not contain such a notice provision, so the NIFLA court's discussion of the California Legislature's finding regarding CPCs in reference to the Unlicensed Notice is irrelevant to the level of scrutiny applicable in this case.

requires less than strict scrutiny. Id. (citing Retail Digital Network, LLC v. Appelsmith, 810 F.3d 638, 648 (9th Cir. 2016)). "What is required is a 'fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" Id. (quoting Retail Digital, 810 F.3d at 649).

Hawai‘i's Act, like California's in NIFLA, easily survives intermediate scrutiny. Hawai‘i has a substantial interest in the health of its citizens, including ensuring that "women in Hawai‘i are able to make personal reproductive health decisions with full and accurate information regarding their rights to access the full range of health care services that are available." S.B. 501, § 1; see NIFLA, 839 F.3d at 841 ("California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion."); see also Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 767 (1994) ("[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy.").

States also have a "compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety,

and other valid interests they have broad power to establish standards for . . . regulating the practice of professions." NIFLA, 839 F.3d at 841-42 (quoting Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1109 (9th Cir. 2004)).

As in NIFLA, the notice required by the Act is narrowly drawn to achieve Hawai'i's substantial interests. The notice informs the reader "only of the existence of publicly-funded family-planning services," does not contain "any more speech than necessary," and does not "encourage, suggest, or imply that women should use those state-funded services." NIFLA, 839 F.3d at 842.[10] The notice, moreover, is an effective means of informing women about state-funded family-planning services, given that "family planning decisions are time sensitive and care early in pregnancy is important." S.B 501, § 1; see NIFLA, 839 F.3d at 842 ("[G]iven that many of the choices facing pregnant women are time-sensitive . . . we find convincing the AG's argument that because the Licensed Notice is disseminated directly to patients whenever they enter a clinic, it is an effective means of informing women about publicly-funded pregnancy services.").

[10] Throughout their Motion, Plaintiffs claim that the Act requires them to advertise and/or promote abortion. See Mem. at 1, 8, 9, 14, 16, 26, 27, & 36. That is untrue. The term "abortion" is not used anywhere in the Act. Indeed, the Act makes no express or implied reference specifically to abortion. The Act requires Plaintiffs to do nothing more than disseminate a neutral, informational notice.

For those reasons, the Act survives intermediate scrutiny and Plaintiffs cannot demonstrate a likelihood of success on the merits of their First Amendment free speech claims.[11]

C. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits of their First Amendment Free Exercise Claims

The Supreme Court has recognized that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Smith, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). Under the Smith test, a neutral law of general applicability is subject to rational basis review. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1076 (9th Cir.

[11] The cases relied upon by Plaintiffs in support of their contention that "most pregnancy disclosure laws have been enjoined" are entirely distinguishable. See Mem. at 17-18. In Austin Lifecare, Inc. v. City of Austin, Civ. No. 1:11-cv-00875-LY ECF No. 146 (W.D. Tex. June 23, 2014), the court enjoined Austin's unlicensed pregnancy service centers law as void for vagueness, and *declined* to address the First Amendment issue. In both Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233 (2nd Cir. 2014), and Centro Tepeyac v. Montgomery County, 5 F.Supp.3d 745 (D. Md. 2014), courts struck down laws that expressly "*encouraged*" pregnant women to see a licensed health care provider. In Evergreen, the law also impermissibly required regulated clinics to expressly disclose "whether or not they provide or provide referrals for abortion, emergency contraception, or prenatal care." Similarly, in Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City of Baltimore, Civ. No. 1:10-cv-00760-MJG ECF No. 118 (D. Md. Oct. 4, 2016), the court struck down a law requiring regulated providers to post a disclaimer expressly stating that they "do[] not provide or make referral for abortion or birth-control services."

2015). Because the Act is both neutral and generally applicable, rational basis review applies.[12]

1. Neutrality

"A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." Id. (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)). The Act does not reference any religious practice, and is thus facially neutral. See NIFLA, 839 F.3d at 844.

The Act is also operationally neutral because it "prescribes and proscribes the same conduct for all, regardless of motivation." Id. (quoting Stormans, 794 F.3d at 1077) (brackets omitted). The Act applies to all "limited service pregnancy centers," regardless of any objection, religious or otherwise. It is operationally indifferent to religion or religious motivation. As the NIFLA court noted, the fact that Plaintiffs' objections to the Act are based on their religious beliefs, or that Plaintiffs may be burdened more than others, does not diminish the Act's neutrality. See id. ("The fact that Appellants' objections are grounded in their religious beliefs does not affect the Act's neutrality."); Stormans, 794 F.3d at 1077 ("The possibility that pharmacies whose owners object to the distribution of emergency contraception for religious reasons may be burdened disproportionately

[12] As discussed *supra* at Section IV.A.2, Calvary Chapel cannot escape Smith by relying on its status as a church.

does not undermine the rules' neutrality. The Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct.").

2. General Applicability

A law is generally applicable so long as it does not "in a selective manner impose burdens only on conduct motivated by religious belief." Lukumi, 508 U.S. at 543. As already noted, the Act applies irrespective of religious belief. The Act contains an exemption for "health care facilities," as that term is defined in the Act, but that exemption does not undermine the Act's general applicability. The "health care facilities" exemption is based on the fact that those facilities provide comprehensive health services, and therefore do not implicate the Legislature's concern regarding full information and access to the range of reproductive health care services. See NIFLA, 839 F.3d at 844 (noting that the California FACT Act's second exemption for clinics that already provide all of the publicly-funded services outlined in the FACT Act does not affect the Act's general applicability). The exemption is "tied directly to limited, particularized, business-related, objective criteria," and therefore has no impact on the Act's general applicability. NIFLA, 839 F.3d at 844–45 (quoting Stormans, 794 F.3d at 1082).

3. Rational Basis Review

Because the Act is neutral and generally applicable, rational basis review applies.[13] Stormans, 794 F.3d at 1076. As noted in Section IV.B.3, *supra*, the Act survives intermediate scrutiny. It necessarily, therefore, also survives rational basis review. See NIFLA, 839 F.3d at 845.

D. Plaintiffs Cannot Satisfy the Remaining Preliminary Injunction Factors

As discussed herein, Plaintiffs cannot show a likelihood of success on their First Amendment free speech and free exercise claims.[14] As that is the "most important" preliminary injunction factor under Winter, this Court should deny

---

[13] In an effort to avoid rational basis review, Plaintiffs also argue that this is a "hybrid rights" case requiring strict scrutiny under Smith because this case "involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections"—in this case freedom of speech. Mem. at 30 n.7 (quoting Smith, 494 U.S. at 881). Plaintiffs themselves recognize, however, that their "hybrid rights" theory would require "a free exercise plaintiff [to] make out a colorable claim that a companion right has been violated-that is, a fair probability or a likelihood, but not a certitude, of success on the merits." San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004). Plaintiffs have not made such a showing. As discussed in Section IV.B, *supra*, Plaintiffs have failed to demonstrate a likelihood of success on the merits of their free speech claim. It should also be noted that "[t]he hybrid rights doctrine is controversial. . . . has been characterized as mere *dicta* not binding on lower courts, criticized as illogical, and dismissed as untenable." Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 656 (10th Cir. 2006) (citations omitted).

[14] Nor can Plaintiffs show "serious questions" going to the merits of their claims under the alternate test outlined in Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011). For the reasons outlined above, Plaintiffs' First Amendment claims fail.

Plaintiffs' Motion on that basis alone. See NIFLA, 839 F.3d at 829 (denying plaintiffs' motion for a preliminary injunction, finding that plaintiffs were unable to show likelihood of success on the merits, the "most important" factor under Winter). But even taking into account the remaining Winter factors, Plaintiffs cannot succeed.

First, Plaintiffs have not shown that they will suffer irreparable harm in the absence of a preliminary injunction. Plaintiffs' alleged irreparable harm is being forced to engage in compelled speech in violation of their First Amendment rights, see Mem. at 31, but Plaintiffs have not shown a likelihood of success on the merits on their First Amendment claims. As a result, any argument that Plaintiffs will be irreparably harmed due to violation of their First Amendment rights necessarily fails.

Second, Plaintiffs have not demonstrated that the balance of equities tips in their favor. Plaintiffs contend that their free speech rights "outweigh[] the government's interest in disseminating a message that the government can disseminate itself," Mem. at 37, but, as noted, Plaintiffs have failed to demonstrate that their First Amendment claims are at all likely to succeed. Additionally, Plaintiffs' requested injunction would interfere with the Hawai‘i Legislature's effort to ensure that women seeking family planning or pregnancy-related services receive full and accurate information regarding their rights and the range of

available services. See A Woman's Friend Pregnancy Res. Clinic v. Harris, 153 F. Supp. 3d 1168, 1216 (E.D. Cal. 2015), aff'd sub nom. A Woman's Friend Pregnancy Res. Clinic v. Harris, 669 F. App'x 495 (9th Cir. 2016). This effort implicates important state interests, as outlined *supra*, and Plaintiffs' meritless First Amendment arguments do not outweigh the potential harm to women in need of reproductive health services, but unaware of the full range of state-funded services available.

Finally, Plaintiffs cannot demonstrate that an injunction is in the public interest. Even assuming Plaintiffs' argument that the public has an interest in upholding free speech principles, that interest is not implicated here, where Plaintiffs have failed to show a likelihood of success on the merits of their First Amendment claims. Plaintiffs also ignore that their requested injunction runs counter to the public's interest in ensuring women are fully informed of the full range of medical services available. An injunction will—counter to the public's interest—"limit the ability of a subset of women who are or may be pregnant from accessing the straightforward information in the required notice when they are making their time sensitive reproductive decisions." A Woman's Friend, 153 F. Supp. 3d at 1217.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion.

DATED: Honolulu, Hawai'i, September 1, 2017.

STATE OF HAWAI'I

DOUGLAS S. CHIN
Attorney General
State of Hawai'i

/s/ SKYLER G. CRUZ
SKYLER G. CRUZ
Deputy Attorney General

Attorney for Defendants
DOUGLAS S. CHIN and
DAVID IGE

CERTIFICATE OF WORD COUNT

I hereby certify pursuant to LR 7.5(e) of the Local Rules of Practice for the United States District Court for the District of Hawai‘i that the foregoing document is typed in 14-point Times New Roman font and contains 8674 words, as determined by the word count tool of the word processing system used to produce said document, in compliance with the applicable word limitation set forth in LR 7.5(b).

DATED: Honolulu, Hawai‘i, September 1, 2017.

STATE OF HAWAI‘I

DOUGLAS S. CHIN
Attorney General
State of Hawai‘i

/s/ SKYLER G. CRUZ
SKYLER G. CRUZ
Deputy Attorney General

Attorney for Defendants
DOUGLAS S. CHIN and
DAVID IGE