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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

KI‘INANIOKALANI KAHO‘OHANOHANO; KIANA ROWLEY; A. EZINNE DAWSON; MAKALANI FRANCO-FRANCIS; KAWEHI KU‘AILANI; MORIAH SALADO; MOREA MENDOZA; ALEX AMEY; and PI‘ILANI SCHNEIDER-FURUYA, on behalf of themselves, their students, and the pregnant and birthing people they care for,

Plaintiffs,

v.

THE STATE OF HAWAI‘I; ANNE LOPEZ, in her official capacity as Attorney General of the State of Hawai‘i; DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS; and NADINE ANDO, in her official capacity as the Director of the Department of Commerce and Consumer Affairs,

Defendants.

CIVIL NO. 1CCV-24-0000269
(Declaratory Judgment)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing on Plaintiffs' Motion for Preliminary Injunction

Dates: June 10, 12, 13, and 14, 2024
Start Time: 8:30 A.M.
Judge: Hon. Shirley M. Kawamura

Trial Date: None Set

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On February 28, 2024, KI‘INANIOKALANI KAHO‘OHANOHANO, KIANA ROWLEY, A. EZINNE DAWSON, MAKALANI FRANCO-FRANCIS, KAWEHI KU‘AILANI, MORIAH SALADO, MOREA MENDOZA, ALEX AMEY, and PI‘ILANI SCHNEIDER-FURUYA

(collectively, "Plaintiffs") filed their Motion for Preliminary Injunction ("Motion") as Docket No. 12. On May 10, 2024, THE STATE OF HAWAIʻI, ANNE LOPEZ, in her official capacity as Attorney General of the State of Hawaiʻi, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, and NADINE ANDO, in her official capacity as the Director of the Department of Commerce and Consumer Affairs (collectively, "Defendants") filed their Memorandum in Opposition ("Opposition") as Docket Nos. 69–73. On May 24, 2024, Plaintiffs filed their Reply in Support of the Motion ("Reply") as Docket No. 90. The Motion came on for hearing before the Honorable Shirley M. Kawamura in Courtroom 12 at Kaʻahumanu Hale at 777 Punchbowl Street, Honolulu, Hawaiʻi 96813 on June 10, 12, 13 and 14, 2024. KIRSHA K.M. DURANTE, DEVIN K. FORREST, TERINA K. FAʻAGAU, JAVIER F. GARCIA, KAELA M. SHIIGI, AARON VER, *pro hac vice*, CECILY T. BARCLAY, *pro hac vice*, HILLARY SCHNELLER, *pro hac vice*, PILAR HERRERO, *pro hac vice*, ASTRID M. ACKERMAN, *pro hac vice*, JEN SAMANTHA D. RASAY, *pro hac vice*,[1] and ZHUYA B. LU, *pro hac vice*, appeared on behalf of Plaintiffs. Deputy Attorney Generals ISAAC H.K. ICKES, SKYLER CRUZ, and YANITA SPIKER, appeared on behalf of Defendants.

The Court, having reviewed the Motion, Opposition, and Reply, and memoranda, declarations, and exhibits attached thereto, having heard and considered the arguments of counsel and the evidence and testimony presented at the hearing, having observed the demeanor of the witnesses and evaluated their credibility and candor, and good cause appearing therefor, makes the following Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part the Motion. Any finding of fact that should more properly be deemed a conclusion of law, and any conclusion of law that should more

[1] Note that Jen Samantha D. Rasay disaffiliated from the Center for Reproductive Rights and withdrew as counsel as of July 23, 2024.

properly be deemed a finding of fact, shall be so construed. To the extent that any of the following Findings of Fact and Conclusions of Law include a mixed finding of fact and conclusion law, each shall be given its full effect.

FINDINGS OF FACT

I. Legislative History

1. On April 30, 2019, the Hawai'i State Legislature passed S.B. 1033: an act relating to the licensure of midwives ("Midwife Licensure Act" or "Act"). 2019 Haw. Sess. Laws 83, 91.
2. Based on concurrent resolutions[2] and auditor's reports[3] conducted at the house and senate levels, id. at 83, the legislature found that the "improper practice of midwifery poses a significant risk of harm to the mother or newborn, and may result in death." Haw. Rev. Stat. § 457J-1(2).
3. The legislature noted that the Act aims "to protect the health, safety, and welfare of mothers and their newborns." Id. To achieve this legislative purpose, the Act "establish[es] licensure and regulatory requirements" which are overseen by the state's Department of Commerce and Consumer Affairs, 2019 Haw. Sess. Laws 83, 83; see also Haw. Rev. Stat. § 457J-3; the legislature deemed such regulation "*reasonably necessary*." Haw. Rev. Stat. § 457J-1(2) (emphasis added).

II. Regulation of Midwifery in the State of Hawai'i

A. Definition of Midwifery

4. Hawai'i Revised Statutes ("HRS") § 457J-2 defines "midwifery" as the provision of one or more of the following services:

[2] H.R. Con. Res. 65, 28th Leg., Reg. Sess. (Haw. 2016); S. Con. Res. 64, 19th Leg., Reg. Sess. (Haw. 1998).
[3] H.R. 17-01, 29th Leg. (Haw. 2017); S. 99-14, 20th Leg. (Haw. 1999).

(1) Assessment, monitoring, and care during pregnancy, labor, childbirth, postpartum and interconception periods, and for newborns, including ordering and interpreting screenings and diagnostic tests, and carrying out appropriate emergency measures when necessary;
(2) Supervising the conduct of labor and childbirth; and
(3) Provision of advice and information regarding the progress of childbirth and care for newborns and infants.

Id. § 457J-2.

B. Licensure Requirements

5. An applicant for state licensure must be a "certified midwife" ("CM") or "certified professional midwife" ("CPM"). Id. § 457J-8(3).[4]

6. CMs are certified by the American Midwifery Certification Board ("AMCB"), a private non-governmental body. Id. § 457J-2. To earn their credential, CMs complete didactic education and clinical rotations. See Minton[5] Tr. 30:16–31:7 (clarifying that a CNM "is the same as a [CM]" due to training and education requirements); Rowley Tr. 214:25–215:11 (specifying didactic and clinical requirements).

7. CPMs are certified by the North American Registry of Midwives ("NARM"), a private non-governmental body. Haw. Rev. Stat. § 457J-2. All CPMs must pass the NARM exam. Cheyney[6] Tr. 130:23–132:4. They

[4] HRS § 457J-6(a)(1) exempts a "certified nurse-midwife" ("CNM") from its licensure requirement if they hold a license under HRS Chapter 457 (nursing). Haw. Rev. Stat. § 457J-6(a)(1). HRS § 457J-6(a)(2) also exempts and permits individuals to practice midwifery without a license under HRS Chapter 457J if they are "[l]icensed and performing work within the scope of practice or duties of the person's profession that overlaps with the practice of midwifery." Id. § 457J(a)(2).

[5] For purposes of the hearing on the Motion, the parties stipulated that Defendants' expert witness, Le'a Minton, MSN, APRN, CNM, IBCLC, IMH-E, is qualified to testify as an expert in the practice of midwifery and the provision of care to women, gender-diverse people, and their newborns. Stip. Regarding Witnesses & Exs. 1–2.

[6] For purposes of the hearing on the Motion, the parties stipulated that each of Plaintiffs' five expert witnesses—Maile M. Taualii, PhD, MPH, Noah Ha'alilio Solomon, MA, PhD, Melissa Cheyney, PhD, LMD, Nicolle Arthum (formerly Nicolle Gonzales), BSN, RN, MSN, CNM, FACNM, and Monica R.

qualify to sit for the exam after either apprenticing with a preceptor (an approved, experienced practitioner under whom a student trains) through the Portfolio Evaluation Process ("PEP") or graduating from a midwifery program accredited by the Midwifery Education Accreditation Council ("MEAC"). Id.

8. Under the Act, only certain CPMs are eligible for a Hawai'i state midwifery license. CPMs who earned their certification via the MEAC pathway are eligible for a license. Haw. Rev. Stat. § 457J-8(4)(A). However, CPMs who earned their certification via the PEP pathway are only eligible for state licensure if they obtained the credential before January 1, 2020,[7] id. § 457J-8(4)(B); after that date, aspiring CPMs in Hawai'i, including those who were in the process of obtaining the credential through PEP as of January 1, 2020, must now complete a MEAC program. Minton Tr. 34:1–15.

C. Birth Attendant Exemption

9. In passing the Act, the legislature exempted "a separate category of birth attendants for a three-year period, to allow this community to define themselves and develop common standards, accountability measures, and disclosure requirements." 2019 Haw. Sess. Laws 83, 83.

McLemore, PhD, MPH, RN—are qualified to testify as experts within the scope of the testimony in each witness' declaration and the certifications identified in each witness' curriculum vitae. Id.

[7] Such applicants must also provide a midwifery bridge certificate issued by NARM. Haw. Rev. Stat. § 457J-8(4)(B). The state separately allows CPMs who have not completed a MEAC program but have obtained a midwifery license from another state without an accredited education requirement to apply for a license in Hawai'i. Id. Accordingly, licensed midwives with bridge certificates who move to Hawai'i are eligible for a midwifery license under HRS Chapter 457J even though they have not completed the educational requirements that the Act imposes on Hawai'i residents as of January 1, 2020. See id.

10. As codified under HRS § 457J-6(a)(5), this category includes an unlicensed "person acting as a birth attendant on or before July 1, 2023." Haw. Rev. Stat. § 457J-6(a)(5).

11. In Section 1 of the Act, the legislature indicated that "[b]y the end of the three-year period, [it] intends to enact statutes that will incorporate *all* birth practitioners and allow them to practice to the fullest extent under the law." 2019 Haw. Sess. Laws 83, 83 (emphasis added).

12. As of July 2024, the state legislature has not yet enacted any such statute. See 2020 Haw. Sess. Laws; 2021 Haw. Sess. Laws; 2022 Haw. Sess. Laws; 2023 Haw. Sess. Laws; see, e.g., H.B. 2649, 32d Leg., Reg. Sess. (Haw. 2024) (introduced January 2024 and referred to the House Health Committee); S.B. 2969, 32d Leg., Reg. Sess. (Haw. 2024) (introduced January 2024 and referred to the Senate Health and Human Services Committee).

13. The "birth attendant" exemption thus expired on July 1, 2023. Letter from Shari Wong, Deputy Att'y Gen., State of Haw., at 1–2 (Jan. 17, 2024) (attached to Pls.' Mot. for Prelim. Inj., Decl. Javier Garcia as Ex. A); see also Kaho'ohanohano Tr. 57:10–12; Teale Tr. 38:20–24.

D. Traditional Native Hawaiian Healing Practices Exemption

14. HRS § 457J-6(b) also clarifies that the Midwife Licensure Act does not prohibit "healing practices by traditional Hawaiian healers engaged in traditional healing practices of prenatal, maternal, and child care *as*

recognized by any council of kūpuna convened by Papa Ola Lōkahi."[8] Haw. Rev. Stat. § 457J-6(b) (emphasis added).

15. The Act also states that nothing in it "shall limit, alter, or otherwise adversely impact the practice of traditional Native Hawaiian healing pursuant to" the state constitution. Id.

E. Summary, Penalties, and Enforcement

16. Applicants seeking a midwife license must provide proof of either (1) a current and valid national certificate issued by AMCB;[9] (2) successful completion of an educational program accredited by MEAC; or (3) a bridge certificate issued by NARM. Id. § 457J-8. Failure to meet these educational requirements prevents the issuance of a midwife license. See id. § 457J-9.

17. The other method for qualifying as either sufficiently trained or educated to practice as a state-authorized midwife or to otherwise be excused from such requirements is to fall under one of the exemptions,[10] including offering the type of care that has been recognized as a traditional practice by a Papa Ola Lōkahi-convened kūpuna council. Id. § 457J-6(b).

18. Practicing midwifery without a license carries the risk of denial of future licensure, id. §§ 436B-19, 457J-12, civil citations of up to $1,000.00 per

[8] Papa Ola Lōkahi is a 501(c)(3) nonprofit with federal and state statutory authority. The Native Hawaiian Health Care Improvement Act instilled the kuleana of supporting "comprehensive health promotion and disease prevention services . . . to maintain and improve the health status of Native Hawaiians." 42 U.S.C. § 11703. The Midwife Licensure Act also implicitly directs the nonprofit to convene kūpuna councils. See Haw. Rev. Stat. §§ 453-2(c), 457J-6(b); see also *Our Kuleana*, Papa Ola Lōkahi, https://www.papaolalokahi.org/kuleana (last visited June 5, 2024).

[9] Note such certification requires graduate-level education. See Haw. Rev. Stat. § 457J-2 (clarifying the AMCB is the "national certifying body for . . . candidates who have received their graduate level education"); Cheyney Tr. 129:4–6.

[10] The other relevant exemption encompasses those providing care to a "spouse, domestic partner, parent, sibling, or child." Haw. Rev. Stat. § 457J-6(c).

violation, id. §§ 436B-26.5, 457J-13, and criminal penalties, including imprisonment and fines of up to $1,000.00 for each separate offense (with each day counting as a separate offense). Id. §§ 436B-27(a)–(b), 457J-13.

19. Furthermore, licensed providers may face liability for "aiding and abetting an unlicensed person to directly or indirectly perform" the regulated activities and "employing, utilizing, or attempting to employ or utilize . . . any person not licensed." Id. §§ 436B-19(6), (16).

III. Procedural History

20. Plaintiffs filed their Complaint against Defendants on February 27, 2024 alleging HRS Chapter 457J violates the Hawai'i Constitution on numerous grounds. Compl. 3, 5.

21. On February 28, 2024, Plaintiffs moved for a preliminary injunction on three counts, arguing that HRS Chapter 457J: (1) denies Plaintiffs their fundamental reproductive autonomy rights to make decisions about pregnancy and childbirth, including decisions about from whom to access pregnancy support and care, and where and with whom to birth, in violation of Article I, §§ 2, 3, 5, and 6 of the Hawai'i State Constitution, Pls.' Mot. for Prelim. Inj. 11; (2) violates the State's affirmative duty to protect customarily and traditionally exercised rights of Native Hawaiians, as required by Article XII, § 7, id. at 15–16; and (3) is unconstitutionally overbroad, in violation of Article I, § 5. Id. at 18–19.

22. In the Motion, Plaintiffs ask this Court to issue a preliminary injunction prohibiting Defendants, their agents, employees, appointees, or successors, and all persons in active concert or participation with them, from enforcing, threatening to enforce, or otherwise applying the

penalties under HRS Chapters 457J and 436B against traditional and apprenticeship-trained midwives and others who may fall within the law's scope but who do not hold a license under HRS Chapter 457J, and from enforcing, threatening to enforce, or otherwise applying the January 1, 2020 deadline to obtain the certified professional midwife credential via the PEP pathway against applicants who are otherwise eligible for a Hawai‘i state midwifery license. Id. at 20.

23. On May 10, 2024, Defendants filed their Opposition.

24. On May 24, 2024, Plaintiffs filed their Reply.

25. The Court held a four-day hearing on the Motion on June 10, 12, 13 and 14, 2024, during which it heard live testimony, received exhibits, and considered arguments from Plaintiffs and Defendants.

IV. Constitutional Rights at Issue

A. Traditional Birthing Practices and Midwife Care

26. Pale keiki, ho‘ohānau, and hānau are terms referring to Native Hawaiian traditional and customary birthing and child-rearing practices, now commonly referred to as "midwifery," established and in existence well before November 25, 1892. Pls.' Mot. for Prelim. Inj., Decl. Noah Ha‘alilio Solomon 2.

27. In fact, mo‘olelo indicate that training and certification for pale keiki existed in Hawai‘i prior to western contact in 1778, and reference specific training areas and sacred sites dedicated to birthing. Id. at 2–5.

28. Pale keiki or ho‘ohānau practices include assisting pregnant people during pregnancy, attending their births, and providing postpartum care. Kaho‘ohanohano Tr. 69:16–19.

29. Hānau practices incorporate aspects of kilo (observation and examination of the pregnant person), pule (prayer and ceremony), lomilomi (bodywork), lāʻau lapaʻau (traditional medicines), hoʻoponopono (conflict resolution), and ʻai pono (nutrition). Id. at 34:10–13, 39:11–13; Franco-Francis Tr. 103:20–25.

30. Furthermore, hānau practices typically include certain protocol, such as offering chants specific to the birthing process, receiving a newborn in kapa (traditional cloth), or treating the ʻiewe (placenta). However, specific hānau practices (e.g., what plant medicines are used, how an ʻiewe is treated) vary among practitioners, depending on where and from whom they received their training and knowledge. Franco-Francis Tr. 108:3–5, 109:7–15.

31. Pale keiki cannot be conducted using solely lāʻau lapaʻau, lomilomi, hoʻoponopono, or lāʻau kahea (prayer), though those practices often overlap with or are modified to be incorporated into hānau-specific practices. For instance, the treatment of ʻiewe is a traditional Native Hawaiian practice important to the practice of pale keiki that does not fall under the training for lāʻau lapaʻau, lomilomi, hoʻoponopono, or lāʻau kahea. Kahoʻohanohano Tr. 69:6–10; Franco-Francis Tr. 111:7–22.

32. Midwives trained as pale keiki can offer pregnant people a connection to Native Hawaiian birthing practices and support families to hānau at home on a family's ʻāina kūpuna (ancestral lands), providing a birthing experience that offers cultural safety and concordance and heals intergenerational trauma. Kahoʻohanohano Tr. 73:1–74:3; Mendoza Tr.

141:6–142:20, 150:9–153:6; Teale Tr. 47:19–48:20; Taualii Tr. 197:2–14, 198:9–199:6.

B. Recognition Pathways

33. Witnesses testified that because there are limited clinical placement options in the state to obtain CM training and *only eight* MEAC-accredited programs in the country, *none* of which are located in Hawai‘i, to pursue the CNM pathway, the Act poses a hardship for those pursuing certification that qualifies for licensure. Cheyney Tr. 130:25–136:17; Rowley Tr. 213:9–218:23; Schneider-Furuya Tr. 195:12–196:23. Even hybrid MEAC programs, with online classes, require students to demonstrate their clinical skills in person at the school, imposing an additional financial and logistical barrier to certification. Cheyney Tr. 134:12–22.

34. Furthermore, "healing practices by traditional Hawaiian healers engaged in traditional healing practices of prenatal, maternal, and child care" are only expressly exempt under HRS § 457J-6(b) if "recognized by any council of kūpuna convened by Papa Ola Lōkahi." Haw. Rev. Stat. § 457J-6(b).

35. Despite the language of the Act, Papa Ola Lōkahi does *not* create kūpuna councils. Ex. D-D at 2.

36. "Practitioners who wish to be recognized may: [s]eek recognition from or join an existing" kūpuna council or form their own kūpuna council and "apply to Papa Ola Lōkahi for recognition." Id.

37. To obtain recognition from Papa Ola Lōkahi, practitioners that form a kūpuna council are required to first have a "business relationship" with a

Native Hawaiian Health Care System, federally qualified health center ("FQHC"), federally designated rural health center, or federally designated "lookalike." Id.; see also Lee[11] Tr. 15:15–18. Papa Ola Lōkahi recognizes a business relationship between the kūpuna councils and the health care systems so that the health care systems can integrate traditional healing practices with their medical services. Lee Tr. 17:4–10. Typically, an FQHC or "lookalike" completes the application for recognition of a kūpuna council by Papa Ola Lōkahi, not the kūpuna council itself. Id. at 24:12–16.

38. Second, it has been Papa Ola Lōkahi's position that prospective kūpuna council must consist of "at minimum, three Native Hawaiians who are proficient at one of the four Native Hawaiian practices that are listed in Act 153[12][:] . . . lāʻau lapaʻau, lāʻau kahea, lomilomi, and hoʻoponopono." Id. at 15:18–23. Indeed, Mr. Lee testified that up until June 13, 2024, the day before he testified, he was unaware of the law protecting any traditional healing practices beyond the four enumerated in Act 153 (which excludes pale keiki and hoʻohānau practices). See id. at 15:24–16:7.

[11] On June 13, 2024, Defendants informed the Court of their intent to substitute Sheri Daniels with a previously undisclosed witness, Kiaʻi Lee. June 13, 2024 Tr. 182:21–185:25. The Court heard arguments on Plaintiffs' Oral Motion to Preclude Kiaʻi Lee from Testifying. Id. at 183:15–185:25; June 14, 2024 Tr. 4:8–13:24. The Court ruled that Mr. Lee may testify provided that his testimony is limited to the scope identified by Defendants in their June 5, 2024 Amended Witness List. June 14, 2024 Tr. 13:25–14:6.

[12] Papa Ola Lōkahi's Letter dated July 31, 2023 appears to be referring to S.B. 1285, which defined "traditional Hawaiian healing practices" as referring to "lāʻau lapaʻau, lāʻau kahea, lomilomi, and hoʻoponopono, *and similar practices* historically performed by traditional native Hawaiian healers." S.B. 1285, 23d Leg., Reg. Sess. § 2 (Haw. 2005) (emphasis added). This language does not appear in current statutes. See 'Traditional Hawaiian Healing Practice' Search, Westlaw, https://1.next.westlaw.com/ (last visited June 6, 2024).

39. Papa Ola Lōkahi began recognizing kūpuna councils in 2002. Id. at 25:24. There are currently five Papa Ola Lōkahi-approved kūpuna councils in existence. Id. at 26:2. Each of the five existing kūpuna councils are attached to a Native Hawaiian Health Care System. See Teale Tr. 26:7–8. Despite Papa Ola Lōkahi's instruction to "[s]eek recognition from or join an existing" kūpuna council, Ex. D-D at 2., the Native Hawaiian Health Care Systems developed their kūpuna councils internally and do not have a process for affiliating an external organization with an existing council, or generating a new council with an external organization that would allow practitioners to form their own. Teale Tr. at 31:5–19.

40. Plaintiff Kahoʻohanohano was involved in seeking recognition from Papa Ola Lōkahi for Ea Hānau Cultural Council, an organization of birth-knowledgeable practitioners convened in an effort to protect Indigenous midwifery and pale keiki practices. Kahoʻohanohano Tr. 67:2–68:12.

41. Formally organized in 2020, Ea Hānau Cultural Council represents kūpuna and mākua (parent-age practitioners) who are knowledgeable in kānaka birth traditions and practices. Teale Tr. 19:20–21:18. Ea Hānau Cultural Council represents and consists of Native Hawaiian practitioners from Oʻahu, Molokaʻi, Maui, Kauaʻi, and Hawaiʻi Island, who have assembled to protect the traditional and customary practices of hānau. Id.

42. Plaintiff Kahoʻohanohano, Mākua/Coordinator for Ea Hānau Cultural Council, Laulani Teale, and other Ea Hānau members initially requested that Papa Ola Lōkahi waive the federal affiliation requirement given the

urgency caused by the impending criminalization of traditional midwifery due to HRS Chapter 457J. Id. at 22:21–25.

43. Meanwhile, between 2020 and 2024, Plaintiff Kahoʻohanohano, Ms. Teale, and other Ea Hānau members also contacted and sought affiliation with at least seven FQHCs and federal "lookalikes" possessing a federal identification number, including Ke Ola Mamo, Waimanalo Health Center, Nā Puʻuwai, and other organizations on Hawaiʻi Island, Kauaʻi, Molokaʻi, Oʻahu, and Maui. Id. at 23:23–28:20. Their efforts were to no avail. Id. at 31:5–36:4.

44. Although it is *theoretically* possible to affiliate and attach to a federally designated organization, those entities may not fully understand traditional and culturally influenced hānau practices, which would prevent them from being able to support those practices within their organizations. See, e.g., id. at 31:20–32:10.

45. Indeed, some may even prohibit traditional and customary pale keiki practices that they deem inconsistent with their protocols or policies. For example, until recently, Mālama I Ke Ola Health Center required that, as a condition of receiving prenatal care there, patients sign a form confirming whether they plan to deliver their baby at the hospital or plan to have a home birth. Casey[13] Tr. 156:15–158:6. The Center would only

[13] On June 10, 2024, the Court heard arguments on Plaintiffs' Oral Motion to Preclude Dr. Duffy Casey from Testifying. June 10, 2024 Tr. 122:21–123:18, 124:18–128:17, 131:15–137:10. Dr. Casey was disclosed for the first time to Plaintiffs on June 5, nearly two weeks after the Court's deadline for witness disclosures. See Defs.' Amended Witness List. The Court granted in part and denied in part Plaintiffs' Motion, ruling that Dr. Casey may testify subject to a Rule 104 hearing. June 10, 2024 Tr. 137:11–24. Furthermore, the Court limited the scope of his testimony to concern only (1) complications that could arise in home births; and (2) the contents of Exhibit P-6, and ordered that Dr. Casey be made available for a deposition the following day. Id. On June 13, 2024, the Court

provide prenatal care for pregnant people who signed the form stating they did not intend to birth at home. Id.

46. Ms. Teale testified that she reached out to another federally designated organization, Ke Ola Mamo. Ms. Teale understood that Ke Ola Mamo would not affiliate with Ea Hānau Cultural Council because they lacked (1) an established process to affiliate with an external organization; (2) sufficient knowledge and experience in traditional hānau practices; and (3) the capacity, staff, and resources to implement the affiliation. Teale Tr. 29:2–32:24, 34:21–35:2, 35:22–36:1.

47. Even if Ea Hānau Cultural Council was attached to a federally designated organization, because kūpuna councils attached to such organizations only recognize practitioners within their catchments, i.e., designated geographical areas, Ea Hānau Cultural Council could not, *in practice*, recognize all Ea Hānau members, who represent practices from and on different Hawaiian islands. Id. at 76:19–78:8.

48. Nevertheless, as the Mākua/Coordinator for Ea Hānau Cultural Council, Ms. Teale submitted an application for kūpuna council recognition to Papa Ola Lōkahi on June 21, 2023, before the scheduled expiration of the birth attendant exemption on July 1, 2023. Id. at 38:12–39:2.

49. Due to not having an attachment to or affiliation with a federally designated organization, Papa Ola Lōkahi rejected Ea Hānau Cultural

heard additional arguments on Plaintiffs' Renewed Oral Motion to Preclude Dr. Duffy Casey from Testifying, June 13, 2024 Tr. 126:13–131:9, and ruled that Dr. Casey may testify provided that his testimony avoid cumulative evidence and is limited to (1) complications that could arise in home births; and (2) whether those home births were assisted by licensed or unlicensed midwives. Id. at 131:10–133:8.

Council's application for kūpuna council recognition. Pls.' Mot. for Prelim. Inj., Decl. Kiʻinaniokalani Kahoʻohanohano, Ex. B, at 1 (letter from Papa Ola Lōkahi denying recognition).

50. Furthermore, per a letter dated July 31, 2023, Papa Ola Lōkahi interpreted traditional healing practices as being limited to the following: lāʻau lapaʻau, lāʻau kahea, lomilomi, and hoʻoponopono.[14] Id. Thus, based on their interpretation of law, Papa Ola Lōkahi did not consider Native Hawaiian hānau practices as eligible for recognition; nor would practitioners recognized by Papa Ola Lōkahi in these four traditional healing practices be able to engage in hānau practices. Lee Tr. 15:15–16:2.

51. Indeed, at a Papa Ola Lōkahi presentation regarding kūpuna council recognition, representatives from Papa Ola Lōkahi stated specifically (and via a slide presentation) that Papa Ola Lōkahi only recognizes the aforementioned four practices; thus, Ea Hānau Cultural Council was not and could not be eligible for recognition as a kūpuna council. Teale Tr. 92:6–93:10.

52. Though Ea Hānau Cultural Council considered submitting a subsequent application to gain recognition as a kūpuna council from Papa Ola Lōkahi, it was told "it was not going to go anywhere because of the policies of

[14] As previously noted, some of the practical and spiritual aspects of pale keiki and hānau are found in these four categories of Native Hawaiian traditional and customary practices. Medicines used in pale keiki exist in the repertoire of lāʻau lapaʻau and lomilomi. Pale keiki also involves the practice of hoʻoponopono as a part of the spiritual cleansing process. Kahoʻohanohano Tr. 34:10–11; Franco-Francis Tr. 105:12–18. Religious and methodological aspects are an important distinguishing element of pale keiki. Certain akua (gods), pule, and oli (chants) are associated specifically with birth, coupled with specific lomilomi techniques and lāʻau lapaʻau. Kahoʻohanohano Tr. 39:2–20; Franco-Francis Tr. 103:20–25. However, there are components of Native Hawaiian pale keiki and hānau practices that are *not* covered by the four categories. Franco-Francis Tr. 107:8–109:20.

Papa Ola Lōkahi," namely, the (1) requirement for attachment to a federally designated center; and (2) requirement to be covered under the four recognized traditional healing practices of lāʻau lapaʻau, lāʻau kahea, lomilomi, and hoʻoponopono. Id. at 75:10–76:4.

53. Defendants argue that per Papa Ola Lōkahi's policies, practitioners may also be recognized by existing Papa Ola Lōkahi-approved kūpuna councils if they meet the particular kūpuna council's independently-developed criteria for qualifying "traditional Hawaiian healers." Mr. Lee, from Papa Ola Lōkahi, explained that once recognized by Papa Ola Lōkahi, "the council can expand its membership by bringing in more practitioners, and those practitioners can include practices beyond the four listed in [Act] 153. But it's up to the independent kūpuna councils to then determine what is their criteria to bring in membership." Lee Tr. 17:15–23.

54. This position, however, violates cultural protocol and recognized practice. Ms. Teale explained why she did not apply for individual recognition as a hānau practitioner by an existing kūpuna council. Ms. Teale first testified that she is unaware of any kūpuna councils with kūpuna who are knowledgeable about hānau practices; thus, "it is not pono and therefore not possible in a cultural context" to seek recognition as a hānau practitioner by any of the existing kūpuna councils. Teale Tr. 83:4–17. It is not viable to expect pale keiki or hoʻohānau practitioners to be recognized by kūpuna councils with no such expertise.

55. Further, Ms. Teale and Mr. Lee both testified about the geographical limitations of the Native Hawaiian Health Care Systems and their affiliated kūpuna councils, which prevent kūpuna councils from

recognizing practitioners outside of their catchment areas. Id. at 76:19–78:8; Lee Tr. 19:15–20:7.

56. Ea Hānau Cultural Council and its members have made exhaustive efforts to become affiliated with a federally designated organization. As Ms. Teale testified, Ea Hānau and its members "tried [their] best" and did "everything that [they] could do to try to protect these [hānau] practices, which was the mandate that was given to [them] by the kūpuna." Teal Tr. 37:11–19.

C. Untenable Recognition Pathways Threaten Constitutionally Protected Rights

57. Defendants have not presented evidence to credibly dispute that no kūpuna council currently exists that can recognize pale keiki practices and/or practitioners. Despite Ea Hānau Cultural Council's best efforts, recognition that would qualify Native Hawaiian birth practices for exemption under HRS § 457J-6(b) has not materialized, and is currently unattainable, making the kūpuna council pathway untenable.

58. There is no workable pathway for these practitioners to engage in their traditional cultural birthing practices without risk of criminalization under HRS Chapter 457J. Given the insurmountable obstacles to kūpuna council recognition, coupled with the exposure for criminal and civil liability, Plaintiffs (and those similarly situated) are currently prohibited from engaging in traditional and customary pale keiki and hānau practices.

59. For Plaintiff practitioners, learning and teaching pale keiki practices are an expression of their cultural identity, and fulfills their kuleana to their community, and to prior and future generations, by protecting such

practices from extinction. Kahoʻohanohano Tr. 44:18–23, 48:15–16; Teale Tr. 49:2–12.

60. For Plaintiff pregnant and birthing persons, a midwife with cultural fluency in traditional Native Hawaiian pale keiki and hānau practices remains a priority to sustain their cultural traditions and make the best decisions for themselves and their family. Kahoʻohanohano Tr. 73:1–74:3; Franco-Francis Tr. 116:24–117:4; Teale Tr. 45:7–13, 47:19–48:20; Mendoza Tr. 141:6–142:20, 150:9–153:6; Taualii Tr. 197:2–14, 198:9–199:6.

61. Significantly, traditional practices such as pale keiki and hānau are passed down from ancient times to future generations; current practitioners such as Plaintiffs are the link between the two. Teale Tr. 49:17–25, 50:10–24.

62. The past generation, however, is aging. As Ea Hānau Cultural Council sought affiliation with a federally designated center, one kūpuna with pale keiki knowledge passed away—losing with him the rich ʻike kūpuna (ancestral knowledge) he offered. Id. at 50:1–12.

63. If Plaintiffs, especially student midwives, and other pale keiki and hānau practitioners, educators, and apprentices are not able to practice, teach, and learn, they will lose the opportunity to gain knowledge from the kūpuna to pass on to future generations. As Ms. Teale credibly testified, "whole aspects of practices are being lost." Id. at 50:25–51:21.

64. Thus, the untenable exemption found in HRS § 457J-6(b) threatens to extinguish pale keiki, hoʻohānau, and hānau practices while leaving pregnant and birthing persons without access to culturally informed care.

65. Furthermore, Defendants have not presented any evidence of negative outcomes attributable to births with pale keiki and hānau practitioners. In fact, Plaintiffs proffered testimony that fewer than five percent of pregnant people cared for by Plaintiff Kahoʻohanohano were transferred to the hospital, and those that were either mutually agreed to or sought transfer because the pregnant person had been laboring for an extended period of time and may have desired, for example, pain relief—not because they were experiencing an emergency. Kahoʻohanohano Tr. 61:14–63:18.

66. Nor have the Defendants presented evidence that Hawaiʻi's rates of maternal and/or neonatal mortality are attributable to pale keiki and hānau practitioners. In fact, the record reflects that all pregnancies and all birth settings come with risks and benefits. Rowley Tr. 211:15–212:11 (outlining her experience as a labor and delivery nurse on Oʻahu); Casey Tr. 160:6–24 (discussing possible complications during hospital birth); Minton Tr. 50:15–57:22 (illustrating general complications that can arise during pregnancy and birth).

67. Finally, the Defendants have not presented any evidence that pregnant people are being misled about the care and treatment they may be receiving from pale keiki and hānau practitioners. In fact, Plaintiffs illustrated the contrary by discussing their informed and self-determinative choices regarding midwife care. See, e.g., Mendoza Tr. 143:15–145:13.

CONCLUSIONS OF LAW

I. Constitutional Right to Privacy

A. Reproductive Decisions Regarding the Use of Unlicensed Midwife Care Are Not a Protected Fundamental Right

1. The Hawai‘i State Constitution specifically protects individuals' right to privacy. Haw. Const. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.").

2. Although this right benefits from stronger protection[15] than its federal constitutional counterpart, State v. Mallan, 86 Haw. 440, 448 (1998); State v. Kam, 69 Haw. 483, 491–93 (1988) ("[A]rticle I, section 6 . . . affords much greater privacy rights than the federal right to privacy . . . ."), *abrogated on other grounds by* Tax Found. of Haw. v. State, 144 Haw. 175 (2019), it is not absolute. Kam, 69 Haw. at 493.

3. Instead, the Court has held that only fundamental liberty rights benefit from such strengthened constitutional protection. State v. Mueller, 66 Haw. 616, 628 (1983).

4. Under state jurisprudence, fundamental liberty rights include a person's privacy in the "personal autonomy sense." Id. at 624. Yet, although the Court has found personal autonomy encompasses decisions "relating to marriage . . . , procreation . . . , contraception . . . , family

[15] This stems from the fact that Hawai‘i stands as one of a handful of states with an explicit right to privacy enshrined in its state constitution. See Kam, 69 Haw. at 493 ("By inserting clear and specific language regarding this right into the [c]onstitution, [the Constitutional Convention Committee] intends to alleviate any possible confusion over the source of the right [to privacy] and the existence of it."); see also Stand. Comm. Rep. No. 69, *in* 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 674–75 (1980).

relationships . . . , and child rearing," id. at 627 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977)) (citations omitted), it has never explicitly extended this right to a birthing person's choices regarding receiving midwifery care (or any other form of prenatal, delivery, or postpartum support options).

5. At the same time, the Hawai'i Supreme Court has bestowed parents a safeguarded fundamental right to make decisions involving the care, custody, and management of their already born children. Doe v. Doe, 116 Haw. 323, 334 (2007).[16]

6. Ultimately, determining "[w]hether an individual's desire to engage in a particular activity is protected by" the right to personal autonomy is "a matter for the courts." Mueller, 66 Haw. at 625.

7. Looking to states with a similar right to privacy enshrined in their constitutions, of the courts that have previously determined how such a right protects or does not protect the personal choice to use a midwife, all have unanimously ruled in favor of regulation.[17]

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[16] This case involved a "grandparent visitation statute," which allowed the Court to award visitation rights to grandparents if it found such visitation "in the best interests of the child." Doe, 116 Haw. at 325. Reviewing the statute under strict scrutiny, the Court ultimately found that any potential state interest in providing grandparents with visitation rights was not compelling enough to override a parent's decision of who should or should not interact with and influence their children. See id. at 329.

[17] States without an explicit constitutional privacy right also weigh in favor of the government. See, e.g., Leigh v. Bd. of Registration in Nursing, 506 N.E.2d 91, 94 (Mass. 1987) (refusing to interpret the right to privacy as guarantying a right to choose the manner and circumstances in which one's baby is born, thereby upholding Massachusetts' midwife regulatory scheme under rational basis review); People v. Rosburg, 805 P.2d 432, 434 (Colo. 1991) (applying rational basis to find that statutory prohibition against practicing midwifery without a license does not infringe privacy rights of pregnant persons); State v. Kimpel, 665 So.2d 990, 994 (Ala. Crim. App. 1995) (determining that the federal "constitutionally protected right to privacy is not violated by a statute regulating the practice of midwifery" pursuant to rational basis review); Sammon v. N.J. Bd. of Med. Exam'rs, 66 F.3d 639, 644–45 (3d Cir. 1995) (finding that the interests of midwives and aspiring midwives to practice midwifery and the interests of parents "in selecting a midwife of their choice" are "not the kind of interests that have been found to be 'fundamental'"); Hunter v. State, 676 A.2d 968, 976 (Md.

8. Specifically, such state courts have found that the right to privacy's encapsulation of procreative freedom and child rearing choice does not extend to personal decisions regarding the manner and circumstances in which a child is born, see, e.g., Bowland v. Mun. Ct., 556 P.2d 1081, 1089 (Cal. 1976), nor guarantee a right "to seek medical care from unlicensed professionals." Weems v. State by and through Knudsen, 529 P.3d 798, 810 (Mont. 2023).

9. This is true even when a state's definition of midwifery *also includes* family planning and newborn care. See Cal. Bus. & Prof. Code § 2507(a) (West 2023) ("The license to practice midwifery authorizes the holder to attend cases of normal pregnancy and childbirth . . . and to provide prenatal, intrapartum, and *postpartum care, including family planning care, for the mother, and immediate care for the newborn*.") (emphasis added); see also Mont. Code Ann. § 37-27-103(4) (West 2023) (defining a midwife as "a person who advises, attends, or assists a woman during

Ct. Spec. App. 1996) (holding that no fundamental right is at issue due to state midwife licensing protocols and thereby applying rational basis to determine birthing persons do not have a protected privacy right in choosing "whomever [they] wish to assist during childbirth"); Lange-Kessler v. Dep't of Educ. of N.Y., 109 F.3d 137, 141–42 (2d Cir. 1997) (affirming that the federal right to privacy does not include the right to select a midwife of one's choice and employing rational basis review to uphold New York's licensing regime). However, in a recent 2024 case, the Pennsylvania Supreme Court concluded—despite the state having only an implicit constitutional right to privacy—that reproductive autonomy constitutes a *fundamental right* deserving of strict scrutiny analysis. Allegheny Reproductive Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 917, 947 (Pa. 2024). Importantly, this case answered the fundamental right question in the context of abortion access; it did not answer whether such abortion access must be provided by a licensed practitioner. Similarly, at least within the context of a citizen's freedom to choose to have an abortion, states with an explicit constitutional right to privacy and thereby an implicit right to personal autonomy have also found reproductive rights to be fundamental. See, e.g., Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice, 948 P.2d 963 (Alaska 1997); Comm. to Def. Reproductive Rts. v. Myers, 625 P.2d 779 (Cal. 1981); Planned Parenthood S. Atl. v. State, 882 S.E.2d 770 (S.C. 2023).

pregnancy, labor, natural childbirth, or the *postpartum* period") (emphasis added).

10. Here, viewing the Plaintiffs' pleadings in the light most favorable to them, it could be argued that midwife care, especially when steeped in cultural and customary practices, implicates child rearing *at least* at the interconception and postpartum stages. In fact, the Act's definition of midwifery includes "provision of advice and information regarding . . . *care* for newborns and infants." Haw. Rev. Stat. § 457J-2(3) (emphasis added).

11. Yet, despite the inclusion of the word "care" in HRS § 457J-2, see id., given unanimously persuasive doctrine, especially from states with similar constitutional protections and statutory definitions, this Court cannot find that reproductive autonomy as it specifically relates to decisions involving whether to use an *unlicensed* midwife is a fundamental right protected under the Hawai'i state constitution.

B. The Court Thereby Employs Rational Basis as the Appropriate Standard of Review

12. If a fundamental right is not at issue, as is the case here, the Court employs rational basis review. Mueller, 66 Haw. at 629.

13. The Court concludes that the regulations related to licensure of the profession of midwifery outlined in HRS Chapter 457J are thereby not subject to strict scrutiny or heightened review.

14. Under the rational basis standard, the Court asks whether the law or regulation at issue "*rationally* furthers a *legitimate* state interest." Child Support Enf't Agency v. Doe, 109 Haw. 240, 247 (2005) (emphases added).

15. A state interest qualifies as legitimate if it implicates public health, safety, or welfare, i.e., the state's police power authorities. Id.; see also Mallan, 86 Haw. at 451 ("The police power of the state has traditionally been described as 'extend[ing] to the public safety, health, and welfare.'") (alteration in original).

16. Here, the state's interest revolves around public health and safety, Haw. Rev. Stat. § 457J-1(3) ("The regulation of the practice of midwifery . . . protect[s] the health, safety, and welfare of mothers and their newborns.")—a fact Plaintiffs concede as evidenced by their plethora of citations and exhibits featuring public health and safety research. See, e.g., Pls.' Mot. for Prelim. Inj., Decl. Melissa Cheyney, Decl. Monica R. McLemore, Decl. Nicolle Gonzales, Decl. Maile M. Taualii.

17. In contrast to strict scrutiny analysis, the Court affords the government, especially in relation to its legislative enactments, "great deference." Child Support, 109 Haw. at 248.

18. "[W]here it is alleged that the legislature has acted unconstitutionally, [the Court] '[has] consistently held . . . that every enactment of the legislature is presumptively constitutional.'" State v. Lee, 75 Haw. 80, 90–91 (1993).

19. Thus, under rational basis review—as the Court applies here—the burden of illustrating the statute at issue is not legitimate lies with the challenging party. Child Support, 109 Haw. at 248.

C. The Midwife Licensure Act Does Not Violate the Constitutional Right to Privacy

20. Here, the Court finds that Plaintiffs have failed to meet this burden.

21. First, other state courts have found that the inclusion of personal decisions surrounding "procreation," "family relationships," and "child rearing" within the right to privacy, see Mueller, 66 Haw. at 624, does not diminish the state's legitimate interest in regulating health care practitioners. Bowland, 556 P.2d at 1089 (finding the state's interest in protecting the unborn valid, thereby warranting its midwife licensing program); Weems, 529 P.3d at 810 ("The right of privacy to make health care choices guarantees access to a health care provider who has been determined 'competent' by the medical community and 'licensed' to perform the service," not a right "to seek medical care from unlicensed professionals.").

22. This is the case even if cited research and presented testimony illustrates that the public health may be better served by allowing for unlicensed midwifes. Bowland, 556 P.2d at 1089 ("Nor is the state's interest in requiring a license diminished by the fact that childbirth with assistance, even the assistance of an unlicensed person, may be safer than self-delivery."); cf. Casey Tr. 161:3–63:10, 163:23–65:9 (discussing the lack of evidence concerning increased complications due to the unlicensed practice of midwifery).

23. In fact, under rational basis review, the government does not need to support their legislation with "conclusive evidence" or "empirical data." Mueller, 66 Haw. at 629.

24. Here, especially considering other state courts' interpretations of parallel licensing regimes, and their findings that they further a legitimate state interest in the public health, the Plaintiffs have failed to provide

convincing legal bases that counter and overcome nationwide jurisprudence on this issue. See supra note 17 and accompanying text.

25. Here in Hawai‘i, regardless of the Act's language, the state has constitutional authority to limit the right to privacy when a state interest so requires. Mueller, 66 Haw. at 624.

26. Furthermore, the legislature has statutory authority to regulate midwifes and midwifery: HRS § 26H-2 orders the legislature to regulate and license professions and vocations "where *reasonably necessary* to protect the health, safety, or welfare of consumers of the services." Haw. Rev. Stat. § 26H-2(1) (emphasis added).

27. The legislature made this finding when it passed the Midwife Licensure Act. Id. § 457J-1(2).

28. The Court affirms this finding by concluding that the regulation of the practice of midwifery is reasonably necessary to protect the health, safety, and welfare of mothers and their newborns.

29. The Court further concludes that addressing concerns relating to health and safety of pregnant persons and newborns advances a legitimate state interest.

30. Thus, the Court finds that the right to privacy does not bar the State of Hawai‘i from exercising its police power to regulate the midwifery profession to protect public health and safety.

II. Constitutional Protection of Native Hawaiian Customary Rights

A. Pale Keiki and Related Traditional Native Hawaiian Healing Practices Are a Protected Native Hawaiian Customary Right

31. The Hawai‘i State Constitution obligates the state to "protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes" by Native Hawaiians. Haw. Const. art. XII, § 7.

32. "To establish the existence of a traditional or customary [N]ative Hawaiian practice, . . . there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary [N]ative Hawaiian practice." State v. Hanapi, 89 Haw. 177, 187, 187 n.12 (1998) (noting a "defendant may lay an adequate foundation by putting forth specialized knowledge that the claimed right is a traditional or customary [N]ative Hawaiian practice," which can "come from expert testimony").

33. Here, Plaintiffs have met the burden of establishing that pale keiki, ho‘ohānau, and hānau are traditional Native Hawaiian customary rights.

34. Furthermore, neither side disagrees that Native Hawaiian midwife practices fall within the scope of customary and traditional rights.

35. Thus, such practices deserve protection under Article XII, § 7.

B. Case Law Requires a Balancing Test as the Appropriate Standard of Review

36. The Hawai‘i Supreme Court has reaffirmed that Article XII, § 7 protects "the broadest possible spectrum of [N]ative rights" and was not intended to be "narrowly construed or ignored by the Court." Pele Def. Fund v. Paty, 73 Haw. 578, 619 (1992).

37. Yet, even when afforded such protection, Native Hawaiian customary rights are still subject to state regulation, as proclaimed in the

constitutional section itself. Id. (stating such rights are "subject to the right of the [s]tate to regulate" them); see also Flores-Case 'Ohana v. U. of Haw., 153 Haw. 76, 90 (2023).

38. That is, "the privilege afforded for [N]ative Hawaiian practices, as expressed in our [s]tate constitution . . . is not absolute." State v. Pratt, 127 Haw. 206, 213 (2012). "The language of the [constitutional] provision[] protecting customary [N]ative Hawaiian practices display[s] a textual commitment to preserving the practices," such as pale keiki, "while remaining mindful of competing interests." Id. at 213.

39. Considering the competing constitutional provisions of Article XII, § 7, the courts thus balance[18] the protection of customary rights against the state's interest in regulating the practices at issue. Id. at 213–17; see also State v. Armitage, 132 Haw. 36, 54 (2014).

40. First, the Court conducts a procedural analysis to determine if the government proactively considered (1) "the identity and scope of 'valued cultural, historical, or natural resources' . . . ; (2) the extent to which those resources—including traditional and customary [N]ative Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken . . . to reasonably protect [N]ative Hawaiian rights if they are found to exist." Ka Pa'akai O Ka'Aina v. Land Use Comm'n, 94 Haw. 31, 47 (2000); see also Flores, 153 Haw. at 87–88.

[18] The Hawai'i Supreme Court has made clear that the right to engage in Native Hawaiian customary practices under Article XII, § 7 "is unique to this [s]tate, and therefore an alleged abridgment of this right is analyzed under Hawai'i jurisprudence." Armitage, 132 Haw. at 58.

41. A challenged rule is sufficient in light of the first two *Ka Pa'akai* factors if it provides a way for "applicants seeking to exercise traditional and customary rights and practices compatible with the law" to do so. Armitage, 132 Haw. at 58.

42. In evaluating the third *Ka Pa'akai* factor, the Court will consider whether the Native Hawaiian customary rights at issue were "reasonably exercised." Id. at 55. In making this determination, the Court will ask, for example, if their exercise (1) caused harm, see, e.g., Pele, 73 Haw. at 618–19 (protecting Native Hawaiians' right to enter and use undeveloped property of others for the purpose of customary practices "for so long as no actual harm is done thereby"); (2) infringed on another individual's constitutionally protected rights, see, e.g., Pratt, 127 Haw. at 215 (holding a practice is not "reasonably exercised" when it infringes on another's private property rights); or (3) abided by reasonable procedural or administrative requirements. See, e.g., Armitage, 132 Haw. at 55 (finding Native Hawaiian defendants did not "reasonably exercise" customary rights when they failed to apply for authorization from the appropriate administrative commission before visiting Kaho'olawe).

43. At the same time, the Court must also assess how regulation might burden and harm Native Hawaiians in their attempts to "reasonably exercise" their sacred customs and traditions. Id. at 58.

44. The Court must balance all of these factors in making its determination of the Act's constitutionality. Pratt, 127 Haw. at 217 (holding the Court must consider the "totality of the circumstances").

45. Lastly, the burden is on the challenger to "explain why their customary usage is reasonable and the government's regulation unreasonable." Flores, 153 Haw. at 91.

C. The Midwife Licensure Act—Specifically, the HRS § 457J-6(b) Recognition Process—Violates Constitutionally Protected Native Hawaiian Customary Rights

46. Turning to the procedural history analysis required by *Ka Pa'akai*, the Midwife Licensure Act's preamble and the statutory language itself safeguards Defendants: First, in passing the Act, the legislature identified the Native Hawaiian customary practices affected by the law. HRS § 457J-6(b) creates an exemption for "healing practices by traditional Hawaiian healers engaged in traditional healing practices of prenatal, maternal, and child care," signifying that the government fulfilled the minimal obligation of consideration. See Haw. Rev. Stat. § 457J-6(b).

47. Second, the legislature clearly considered the effect the Act might have on customary rights. For one, it exempted "a separate category of birth attendants," 2019 Haw. Sess. Laws 83, 83, which—although undefined—Plaintiffs seemingly concede refers to Native Hawaiian midwives. See Pls.' Mot. for Prelim. Inj. 13–14 ("[T]he [s]tate expressly permitted practitioners like Plaintiffs," i.e., Native Hawaiians practicing pale keiki and hoʻohānau, "to continue practicing midwifery as exempt 'birth attendants.'"). Moreover, by offering the Papa Ola Lōkahi recognition exemption, Haw. Rev. Stat. § 457J-6(b), Defendants have, at least *on paper*, provided a pathway for "applicants seeking to exercise traditional and customary rights and practices compatible with the law" to do so. See

Armitage, 132 Haw. at 58. Considering this legislative history, Defendants have met their initial constitutional burden.

48. The third *Ka Pa'akai* factor—whether the government considered the "feasible action, if any, to be taken . . . to reasonably protect [N]ative Hawaiian rights if they are found to exist," Ka Pa'akai, 94 Haw. at 47—instructs the Court to ask whether the government "reasonably protect[ed] those rights *as balanced* with the [s]tate's right to regulate." Flores, 153 Haw. at 87 (emphasis added).

49. Although the majority of Hawai'i case law on the subject of Native Hawaiian customary rights implicates the conflict between the practice of such rights, private property rights as understood in western society and jurisprudence, and the use of land, certain parallels exist between those cases and the controversy at issue: Just as entering undeveloped property causes no harm to others, see Pele, 73 Haw. at 618–19; see also Pratt, 127 Haw. at 215, neither does the intimate and personal decision of choosing to use a midwife within the confines of one's own home—any potential risk of harm does not extend beyond the scope of protected family planning and interpersonal relations. See Mueller, 66 Haw. at 627. Conversely, as argued by the state and identified by the legislature in passing the Act, the practice of unlicensed midwifery can cause serious harm to consumers, especially birthing persons and newborns. Defs.' Mem. in Opp. 2; Haw. Rev. Stat. § 457J-1(2). Thus, determining the appropriate balance by measuring "reasonable exercise" in this way—i.e., harm to others—can weigh the scale down in favor of both Plaintiffs and Defendants.

50. The Court can also analogize the administrative authorization process present in *Armitage* to the kūpuna council procedures under the Act. HAR § 13-261-11—which stipulates the procedural requirements for obtaining approval to enter Kahoʻolawe—instructs the government-appointed committee to "review and consult[] with cultural practitioners" in making their authorization determinations. Haw. Admin. R. § 13-261-11(b). Similarly, HRS § 457J-6(b) stipulates review and recognition by a council of kūpuna familiar with Native Hawaiian cultural health care practices before the state will consider a form of traditional care exempt from licensure. Haw. Rev. Stat. § 457J-6(b). While neither the administrative regime in *Armitage* nor the license application process in the Act provide specific details on *how* councils of cultural practitioners are convened or *what* parameters are used in making their decisions, a key difference between the two programs is whom the burden falls upon.

51. In *Armitage*, the government commission is responsible for cultural consultation. Haw. Admin. R. § 13-261-11(b). Conversely, under the Act, Native Hawaiians are subject to navigating an ill-defined cultural recognition process; as acknowledged by Defendants themselves, "[t]hose interested in forming a kūpuna council do so *on their own*, attach to a qualified health center *on their own*, and once done are eligible to seek recognition from Papa Ola Lōkahi." Defs.' Mem. in Opp. 13 (emphases added). Contrary to the state's contention that Plaintiffs have "simply not followed through" with the "pathway to gaining definitive recognition for traditional pale keiki practices," id., Plaintiffs *have* attempted to abide by this legislative protocol. Pls.' Mot. for Prelim. Inj., Decl. Kiʻinaniokalani

Kahoʻohanohano 10–11 (outlining Plaintiffs' attempts in July 2023 to obtain recognition of Indigenous hānau practices); Teal Tr. 37:11–19. Thus far, their efforts have been futile.

52. This distinguishes the facts of this matter from the analysis in the *Armitage* case: Plaintiffs have not simply refused to fill out a four-page application. See Armitage, 132 Haw. at 53. Instead, they are struggling to comply with an "amorphous pathway" in their attempt to certify Native Hawaiian customary practices that have been performed and passed down for centuries but have only recently become re-subjected to state control. Pls.' Mot. for Prelim. Inj. 17, Decl. Maile M. Taualii 2 (noting Hawaiʻi has not regulated or attempted to regulate midwifery for the past twenty years).

53. Currently, their "reasonable exercise" is stuck in a regulatory catch-22: Such practices cannot fall within HRS § 457J-6(b)'s exemption without Papa Ola Lōkahi approval; however, Papa Ola Lōkahi asserts it does not have statutory authority to recognize practices such as pale keiki and hoʻohānau. Lee Tr. 15:24–16:7. According to Papa Ola Lōkahi, the only "traditional Hawaiian healing practices" they have purview over are "lāʻau lapaʻau, lāʻau kahea, lomilomi, and hoʻoponopono;" thus, they cannot recognize practices such as pale keiki and hoʻohānau because they fall outside the scope of these specifically designated healing techniques. Letter from Babette L. Galang, Traditional Healing & Complementary Health Coordinator, Papa Ola Lōkahi, to Laulani Teale, Ea Hānau Cultural Council (July 31, 2023) (attached to Pls.' Mot. for Prelim. Inj., Decl. Kiʻinaniokalani Kahoʻohanohano as Ex. B). Plaintiffs are currently

left with no recourse—unlike the administrative appeal rights afforded individuals under HRS § 436B-26.5(i), there is no equivalent mechanism to contest Papa Ola Lōkahi determinations.

54. Plaintiffs' attempts to seek clarification from the Department of the Attorney General only further illustrate the "amorphous" nature of the recognition process. Defendants admit "*it is not clear* what, if any cultural practices are exempted from midwifery licensure." Letter from Shari Wong, Deputy Att'y Gen., State of Haw., at 4 (Jan. 17, 2024) (attached to Pls.' Mot. for Prelim. Inj., Decl. Javier Garcia as Ex. A) (emphasis added). This is because "the specific Native Hawaiian healing practice protected by the [s]tate [c]onstitution is *not* identified." Id. (emphasis added). Although Defendants acknowledge that HRS § 457J-6(b) "*seems* to allow traditional healing practices of prenatal, maternal, and child care," they stand by the requirement to obtain recognition from Papa Ola Lōkahi or attain a license. Id. (emphasis added).

55. Thus, the Act fails to reasonably protect Native Hawaiian traditional and customary rights as balanced against Defendants' own regulatory right. Although HRS § 457J-6(b) addresses Native Hawaiian practices and ostensibly creates a path to protect them, there is no means *in practice* to attempt to apply for an exemption for the specific customary rights at issue. And it may not be feasible or culturally appropriate for an individual pale keiki or hoʻohānau practitioner to gain recognition by existing kūpuna councils that lack expertise in traditional and cultural Native Hawaiian birthing practices. Teale Tr. 83:4–17.

56. Furthermore, as previously noted, the Court must assess how the Midwife Licensure Act may harm Native Hawaiians in their attempts to "reasonably exercise" their sacred customs and traditions. Armitage, 132 Haw. at 58. The Motion poignantly emphasizes the harm faced by Indigenous birthing persons, as well as other persons of color, due to their inability to access culturally competent prenatal, delivery, and postpartum care. See, e.g., Pls.' Mot. for Prelim. Inj. 7 ("[The Act] has already prevented midwives from providing care, denied pregnant people access to trusted practitioners, interrupted training for student midwives and the dissemination of endangered cultural knowledge, and stymied collaboration between various actors in the health system. These ongoing *harms* are irreparable.") (emphasis added); id. at 19 ("Every day the [Act] is in effect, there are . . . new *irreparable harms* caused by the suppression of cultural practices the [s]tate is obligated to protect, for cultural practitioners and the many 'ohana who depend on these practices . . . .") (emphasis added).

57. The procedural burden and harm element is also triggered by Plaintiffs' alternative: obtaining licensure via the AMCB, MEAC, or NARM. In response to Plaintiffs' concerns about the Act, the state emphasized that HRS § 457J-5 obligates anyone seeking to practice midwifery, as defined under HRS § 457J-2, "to obtain a midwife license," including previously exempted "birth attendants" and Native Hawaiians using traditional practices not recognized by Papa Ola Lōkahi. Letter from Shari Wong, Deputy Att'y Gen., State of Haw., at 2 (Jan. 17, 2024) (attached to Pls.' Mot. for Prelim. Inj., Decl. Javier Garcia as Ex. A).

58. However, the programs qualified under the Act to obtain a license infringe upon Plaintiffs' "reasonable exercise" because they either require excessive education, do not exist in the state, or place unreasonable barriers on Plaintiffs and those similarly situated. AMCB certification requires formal nursing education—training traditional practitioners do not seek nor need. See, e.g., Pls.' Mot. for Prelim. Inj., Decl. Melissa Cheyney 13 ("These midwives do not typically train in or staff hospitals, and their training does not require a nursing or college degree."). The MEAC has accredited only eight programs in the entire United States. Id. at 16. None are located in Hawai'i. Pls.' Mot. for Prelim. Inj., Decl. Pi'ilani Schneider-Furuya 2. Even if a student midwife is able to access such educational opportunities, there are limited preceptors available to train under as required by MEAC and NARM—some islands have no preceptors at all. See, e.g., Pls.' Mot. for Prelim. Inj., Decl. Kiana Rowley 4 ("Due to limited CNM preceptors on Maui (and in Hawai'i generally), it is likely I will have to commute off island to complete my clinical rotations."); see also Pls.' Mot. for Prelim. Inj., Decl. Melissa Cheyney 16–17 ("For many students, enrolling in a MEAC school means leaving their homes and communities, leaving or relocating their families, and raising funds for out-of-state travel and lodging.").

59. Furthermore, such requirements devalue constitutionally protected Native Hawaiian customary practices by forcing them to assimilate and conform to western medical practices and beliefs. See, e.g., Pls.' Mot. for

Prelim. Inj., Decl. Emilie A.[19] 2 ("The midwifery law adds more barriers. It significantly narrows the pathways a person can take to become [a] lawfully practicing midwife in Hawai'i, valuing formal educational programs . . . over other pathways that are highly valued within communities on Maui and in Hawai'i."); Pls.' Mot. for Prelim. Inj., Decl. Makalani Franco-Francis 7 (underscoring that acceptable programs are "shaped by [w]estern views on health and education . . . and do[] not provide adequate training on cultural practices and ways to affirm hāpai mamas' cultural backgrounds and traditions").

60. Yet, the Act assures "[n]othing . . . shall prohibit healing practices by traditional Hawaiian healers engaged in traditional healing practices of prenatal, maternal, and child care." Haw. Rev. Stat. § 457J-6(b). This promise has held untrue, and it has created an immense burden on and irreparably harmed Plaintiffs and those similarly situated.

61. Looking to the "totality of the circumstances," Pratt, 127 Haw. at 217, the following factors weigh in favor of Plaintiffs: (1) birthing persons' "reasonable exercise," Armitage, 132 Haw. at 55, does not inflict harm on others outside of the scope of intimate family relations, see Pele, 73 Haw. at 618–19; see also Mueller, 66 Haw. at 627; (2) such "reasonable exercise" is stuck in a regulatory catch-22 or is subject to unreasonable, prohibitive, and untenable educational expectations; and (3) Plaintiffs, and other similarly situated individuals, have suffered vast psychological, physiological, and cultural harm. See Armitage, 132 Haw. at 58.

[19] Pursuant to the Stipulation to Amend Caption filed July 23, 2024, this refers to Plaintiff Alex Amey.

62. On the other hand, Defendants attest to the risk of harm to birthing persons and infants due to unlicensed medical practice. Defs.' Mem. in Opp. 2; Haw. Rev. Stat. § 457J-1(2). This potentially makes Native Hawaiian midwifery less "reasonable" as an exercise of customary rights.

63. Given this case's "particular context," Flores, 153 Haw. at 82, including the current state of maternal health services, let alone culturally competent care available to Indigenous and rural communities in Hawai‘i, Pls.' Mot. for Prelim. Inj. 2–4, the Court finds Plaintiffs have met their burden of proof in "explain[ing] why their customary usage is reasonable and the government's regulation unreasonable." Flores, 153 Haw. at 91.

64. To be clear, the state has discretion to regulate Native Hawaiian midwife practices, and the profession of midwifery more broadly, i.e., the Act is *not* unconstitutional on its face. See Haw. Const. art. XII, § 7.

65. Yet, even though the Court affords legislative enactments a presumption of constitutionality, Flores, 153 Haw. at 81 n.9; Doe, 116 Haw. at 331, it should only construe a statute in a way that preserves its constitutionality "if feasible within bounds set by [the statute's own] words and purpose." Doe, 116 Haw. at 331 (quoting State v. Raitz, 63 Haw. 64, 73 (1980)).

66. In its current administration—in particular, due to the catch-22 presented by the Papa Ola Lōkahi recognition process—the Act improperly infringes on the "reasonable exercise" of Native Hawaiian customary practices.

67. Moreover, the Court has recently reaffirmed that the government "does not have the unfettered discretion to regulate the rights of ahupua‘a

tenants out of existence." Flores, 153 Haw. at 83. Here, as argued by Plaintiffs, there is a very real threat that pale keiki, hoʻohānau, and hānau customary practices will be "impermissibly regulated out of existence," Pls.' Mot. for Prelim. Inj. 17, as practitioners continue to unsuccessfully attempt to meet the requirements of the existing regulatory catch-22. If a law regulates a traditional and customary practice out of existence, the government's regulation is unreasonable. Flores, 153 Haw. at 91; see also Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 79 Haw. 425, 451 (1995).

68. Ultimately, despite the Act's references to Papa Ola Lōkahi and the state constitution as sources of protection for Native Hawaiian healing practices, clear and affirmative protections for traditional and customary birthing practices have not materialized. Practitioners are thus left without an *actual* and *meaningful* pathway to exercise their traditional and customary rights.

III. Overbreadth and Constitutional Due Process

69. Facial overbreadth adjudication stands as a limited exception, i.e., "such summary action" is often "inappropriate" and should only be employed as "a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (quoting Coates v. City of Cincinnati, 402 U.S. 811, 617 (1971)); L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999).

70. The Court is thereby rarely justified in invalidating an entire statute on its face, especially if the result "prohibit[s] a [s]tate from enforcing the statute against conduct that is admittedly within its power to proscribe." Broadrick, 413 U.S. at 615.

71. It is undisputed that Defendants have the power to regulate professions. Haw. Rev. Stat. §§ 26H-2, 436B-4; see also June 14, 2024 Tr. 47:8–9 (alluding to the state's occupational licensing authority). Furthermore, Plaintiffs admit that Defendants have authority, albeit subject to the balancing test described herein, "to regulate Native Hawaiian traditional practices." June 14, 2024 Tr. 60:9–10.

72. In a facial challenge to a statute for overbreadth, the Court must determine whether the enactment reaches a substantial amount of constitutionally protected behavior. State v. Beltran, 116 Haw. 149, 152 (2007) (citing Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., 455 U.S. 489, 494 (1982)). This means "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." State v. Alangcas, 134 Haw. 515, 529 (2015) (quoting United States v. Stevens, 559 U.S. 460, 473 (2010)). If the statute does *not* implicate a substantial amount of constitutionally protected conduct, the overbreadth challenge *must* fail. Hoffman, 455 U.S. at 494.

73. Here, the Court finds *only* HRS § 457J-6(b), as currently applied and enforced, impermissibly threatens constitutionally protected Native Hawaiian customary rights. Considering the "plainly legitimate sweep" of HRS Chapter 457J, see Alangcas, 134 Haw. at 529, the Court cannot find the statute meets the "substantiality" threshold.

74. Thus, the Court rejects Plaintiffs' overbroad challenge.

IV. Preliminary Injunction

75. The test for granting preliminary injunctive relief is three-fold:

(1) whether the plaintiff is likely to prevail on the merits; (2) whether the

balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction. Nu'uanu Valley Ass'n v. City & Cnty. of Honolulu, 119 Haw. 90, 106 (2008).

76. The last two factors—whether the balance of irreparable damage favors the issuance of a temporary injunction and whether the public interest supports granting an injunction—merge when the government is a party. Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014).

A. Plaintiffs' Customary Rights Claim Will Likely Be Successful on the Merits

77. As outlined above, Plaintiffs' privacy rights claim and overbreadth charge will likely not succeed.

78. However, the Court finds that Plaintiffs' Native Hawaiian customary rights argument demonstrates a "fair chance of success." In re Focus Media Inc., 387 F.3d 1077, 1086 (9th Cir. 2004).

B. Plaintiffs Will Suffer Irreparable Harm and A Preliminary Injunction Will Serve the Public Interest

79. "The deprivation of constitutional rights '*unquestionably* constitutes irreparable'" injury. Index Newspapers LLC v. U.S. Marshals Serv., 977 F.3d 817, 837 (9th Cir. 2020) (emphasis added).

80. Here, the Act constitutes a constitutional deprivation of protected Native Hawaiian customary rights.

81. Furthermore, injuries that lack an adequate legal remedy, e.g., "intangible injuries," likely qualify as irreparable. E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 677 (9th Cir. 2021).

82. Here, the cultural injuries experienced by Plaintiffs, though intangible, require protection. HRS § 457J-6(b), as applied, is causing irreparable harm through the threat of enforcement, which suppresses Plaintiffs' constitutionally protected cultural practices. See Cuviello v. City of Vallejo, 944 F.3d 816, 832–33 (9th Cir. 2019) (finding chill on constitutional rights and irreparable harm "even if it results from a threat of enforcement rather than actual enforcement . . . .").

83. Beyond constitutional harm, HRS § 457J-6(b) is causing ongoing, irreparable damage in the form of threats to Plaintiffs' health, safety, well-being, and culture. See Off. of Haw. Affs. v. Hous. & Cmty. Dev. Corp. of Haw., 117 Haw. 174, 214 (2008) (finding harm to Native Hawaiian "health and well-being" and "spiritual and traditional beliefs, customs, [and] practices" irreparable), *rev'd on other grounds by* Haw. v. Off. of Haw. Affs., 556 U.S. 163 (2009).

84. Lastly, although Defendants argue that the Plaintiffs' delay in filing the Motion cuts against the irreparable injury prong, "[d]elay by itself is not a determinative factor in whether the grant of interim relief is just and proper." Cuviello, 944 F.3d at 833. Considering the grave and irreparable harm already suffered by Plaintiffs, and the future potential harm to generations of Native Hawaiians at risk of losing their cultural knowledge and traditions, the Court finds the significance of the approximately one-year delay "so small as to disappear." Arc of Cal. v. Douglas, 757 F.3d 975, 990–91 (9th Cir. 2014).

85. Ultimately, although Defendants argue the Act is needed to protect the public health, Defs.' Mem. in Opp. 5, a preliminary injunction advances

the public interest by enabling the preservation and perpetuation of constitutionally protected Native Hawaiian traditional and customary practices. See Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights."). In sum, the need to enjoin HRS § 457J-6(b) and its enforcement outweighs any harm to Defendants; in fact, a preliminary injunction benefits the public interest.

86. Thus, the remaining two factors favor issuing a preliminary injunction: (1) HRS § 457J-6(b) and the penalties which criminalize those that currently cannot practically or meaningfully make use of its exemption cause irreparable harm to "traditional Native Hawaiian healers engaged in traditional healing practices of prenatal, maternal, and child care," see Haw. Rev. Stat. § 457J-6(b); and (2) the public interest weighs heavily towards protecting Native Hawaiian customs and traditions that are at risk of extinction.

C. Plaintiffs' Irreparable Harm and the Public Interest Requires A Statewide Scope

87. "[T]he scope of injunctive relief is dictated by the *extent of the violation* established," and not by geographic bounds. Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (emphasis added).

88. Statutes found unconstitutional require statewide relief. See, e.g., Clement v. Cal. Dep't of Corr., 364 F.3d 1148, 1152 (9th Cir. 2004); Donrey Media Grp. v. Ikeda, 959 F. Supp. 1280, 1287 (D. Haw. 1996).

89. Given the constitutionally protected Native Hawaiian customary rights at issue, statewide relief is required.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

The Court **GRANTS** the Motion in part and **DENIES** it in part. Defendants, and their employees, agents, attorneys, successors, and all others acting in concert or participating with them are **PRELIMINARILY ENJOINED STATEWIDE** from enforcing, threatening to enforce, or otherwise applying any penalties under HRS §§ 436B-19, 436B-26.5, 436B-27, 457J-12, and 457J-13 against individuals who practice, teach, and learn pale keiki, hoʻohānau, and hānau, i.e., "traditional [Native Hawaiian] healing practices of prenatal, maternal, and child care," see Haw. Rev. Stat. § 457J-6(b), but who currently have no practical and meaningful pathway to obtain recognition under the HRS § 457J-6(b) exemption. Such injunction is granted until a kūpuna council that can recognize pale keiki, hoʻohānau, and hānau practices and/or practitioners exists or an otherwise tenable recognition pathway under HRS § 457J-6(b) is formulated. The Court denies all other requests for relief. The Court also makes clear that HRS Chapter 457J is *not* unconstitutional on its face. Specifically, the Court holds the Papa Ola Lōkahi recognition system under HRS § 457J-6(b), in practice, is **unconstitutional**.

Further, the Court exercises its discretion that no security or bond is required under Hawaiʻi Rules of Civil Procedure Rule 65(c), because the lawsuit seeks to vindicate constitutional rights and is in the public interest. Mercer, Fraser Co. v. Cnty. of Humboldt, No. C 08-4098, 2008 WL 4344523, at *2 (N.D. Cal. Sept. 22, 2008).

APPROVED AND SO ORDERED:

/s/ Shirley M. Kawamura

HONORABLE SHIRLEY M. KAWAMURA
JUDGE OF THE ABOVE-ENTITLED COURT

DATED: HONOLULU, HAWAIʻI, JULY 23, 2024.