UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SISTERREACH, INC.; MIDWEST ACCESS COALITION, INC.,	)	
	)	CASE NO.: 2:24-cv-02446-SHL-tmp
Plaintiffs	)	
v.	)	
JONATHAN SKRMETTI, in his official capacity as Attorney General of Tennessee et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR EMERGENCY HEARING, TEMPORARY RESTRAINING ORDER, OR IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

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Plaintiffs SisterReach, Inc. ("SisterReach") and Midwest Access Coalition, Inc. ("MAC") seek an emergency hearing and temporary restraining order ("TRO"), or, in the alternative, a preliminary injunction, enjoining Defendants from enforcing S.B. 1971(1)(a), Gen. Assemb., Sec. Reg. Sess. (Tn. 2023) ("SB 1971").

INTRODUCTION

Indifferent to the extraordinary impact of denying a young person[1] access to legal abortion care, Tennessee Senate Bill 1971 ("SB 1971") seeks to criminalize a wide range of actors, including the Plaintiffs, for helping young people leave Tennessee to obtain legal abortions in other states without written, notarized parental consent to do so. In incendiary fashion, SB 1971 brands non-profit groups like Plaintiffs as traffickers, when in fact they are longstanding, caring allies who serve young people to express respect for and solidarity with them.

SB 1971 is so unclear that those dedicated to helping young people in Tennessee secure legal abortion care in other states cannot determine if their support violates the statute. As such, SB 1971 gives prosecutors unbridled discretion to target anyone whom they disfavor. What is more, SB 1971 stifles helpers' protected expression *because* the expression concerns legal abortion as opposed to any other legal healthcare, and because the speech concerns expanding rather than restricting legal abortion.

Consequently, this Court should grant an emergency hearing and temporarily restrain, or in the alternative, preliminarily enjoin Defendant State officials from enforcing SB 1971 on the grounds that it: 1) is unconstitutionally vague in violation of the Fourteenth Amendment, 2) criminalizes or chills speech, expressive conduct, and expressive association based on content in violation of the First Amendment, and is 3) overbroad in violation of the First Amendment.

[1] This brief uses "young person" as shorthand for an unemancipated minor under the age of eighteen.

FACTUAL BACKGROUND

A. Young People in Tennessee Face Daunting Challenges to Obtaining Legal Abortion Care and Avoiding Compelled Pregnancy, Childbirth, and Parenthood—Especially After *Dobbs*.

Young people in Tennessee have always needed abortions. In fact, a fiscal analysis of SB 1971 found that between 2019 and 2020, before Tennessee's abortion ban took effect, over 500 abortions were provided to young people in the state.[2]

In 2019, however, Tennessee enacted a criminal abortion ban whose enforcement would be triggered by a U.S. Supreme Court judgment overturning *Roe v. Wade*, 410 U.S. 113 (1973). Tenn. Code Ann. § 39-15-213. On June 24, 2024, the U.S. Supreme Court issued such a judgment in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), and overruled nearly fifty years of precedent affirming a right to end a pregnancy. On August 25, 2022, Tennessee began enforcing its "trigger ban." Tenn. Code Ann. § 38-15-213.

An intended and horrifying consequence of Tennessee's criminal abortion ban is that many Tennessee residents who do not want to remain pregnant, including young people, must travel out of state for abortion care. Indeed, in the year after the ban took effect, the number of abortions provided in the state plummeted from about 1,200 each month to less than ten.[3] Having to travel out of state for an abortion is generally more complicated, more expensive, more time-consuming, and more distressing than obtaining an abortion in one's home state. *See* Declaration of Diana Parker-Kafka ("Parker-Kafka Decl.") ¶¶ 26-29, 31; Declaration of Cherisse Scott ("Scott Decl.") ¶¶ 21, 30.

To legally end an unwanted pregnancy, young people in Tennessee need to know where they can obtain care given their unique circumstances, including their gestational age, health profile, and the funds they can cobble together for the cost of the care. Parker-Kafka Decl. ¶¶ 23, 26, 28-29; Scott

[2] Fiscal Note – HB 1895 & SB 1971, Tennessee General Assembly Fiscal Review Committee (Feb. 4, 2024), available at https://www.capitol.tn.gov/Bills/113/Fiscal/HB1895.pdf.

[3] Society of Family Planning, *#WeCount Report*, Society of Family Planning (Oct. 24, 2023), at 11, https://societyfp.org/wp-content/uploads/2023/10/WeCountReport_10.16.23.pdf.

Decl. ¶ 18. And they need to know the most efficient way to get to their abortion appointment since many lack a driver's license and common carriers bar them from purchasing tickets on their own. Parker-Kafka Decl. ¶¶ 26-27, 29. Young people in Tennessee, most of whom lack a meaningful income, also need transportation to their abortion appointments or funding covering transportation. Parker-Kafka Decl. ¶¶ 26-27, 31; Scott Decl. ¶ 21.

The need to leave the state for an abortion also makes it more likely that young people in Tennessee will need lodging or funding covering lodging to legally end their pregnancies. Parker-Kafka Decl. ¶¶ 20, 31; Scott Decl. ¶ 21. As with common carriers, Airbnb and many hotels will not sell accommodations to a young person without an adult's involvement. Parker-Kafka Decl. ¶ 26.

The longer someone seeking an abortion is away from home, the more meals they will need away from home—for which young people in particular lack funds—and the longer they will need childcare. Parker-Kafka Decl. ¶¶ 26-29, 31; Scott Decl. ¶ 21. About one in ten of the young people that MAC serves need childcare. Parker-Kafka Decl. ¶ 18. More often, young people are caretakers for other young people in their family, such as siblings. *Id.*

These needs are especially acute among young people belonging to communities of color, rural communities, and LGBTQ+ communities. Parker-Kafka Decl. ¶¶ 7, 31; Scott Decl. ¶¶ 32, 34.

B. Plaintiffs Support Young People in Tennessee Seeking Legal Abortion Care in Solidarity with Young People and in Defiance of Efforts to Isolate and Degrade Them.

Plaintiff, SisterReach, Tennessee's only reproductive justice organization,[4] provides two key services to young people in Tennessee seeking legal abortion care. Scott Decl. ¶¶ 9, 19.

First, SisterReach provides accurate and complete information about young people's lawful options for ending their pregnancy, which almost always involves abortion care in other states. Scott Decl. ¶ 19. SisterReach also refers young people to abortion providers based on their location and gestational age. Scott Decl. ¶ 18.

[4] Reproductive justice organizations are Black-led organizations that believe all people have the right to decide whether to have children, the right to decide when to have children, and the right to parent the children they have in safe and healthy environments. Scott Decl. ¶ 9.

Second, SisterReach provides funding to defray the cost of young people's legal abortions. Scott Decl. ¶¶ 19, 21. A young person is then free to use the funding they would have used to cover their abortion to pay for transportation, lodging, food, and childcare. *Id*.

SisterReach provides these services to stand in solidarity with young people in Tennessee, to communicate the importance of not imposing one's moral code on others, and to resist politicians' efforts to do exactly that to the detriment of the health and wellness of the communities SisterReach serves. Scott Decl. ¶ 9.

SisterReach sometimes provides these services at the request of a clergy member calling on behalf of a young person in their congregation. Scott Decl. ¶ 20. But SisterReach never requires that callers disclose their age, and thus does not require young people to involve a parent or guardian in their decision to seek a legal abortion. Scott Decl. ¶ 22.

Plaintiff, Midwest Access Coalition, a nonprofit organization based in Illinois, provides three key services to pregnant young people in Tennessee. Parker-Kafka Decl. ¶¶ 9-10.

First, MAC gives young people in Tennessee accurate and complete information about their lawful options for resolving their pregnancy, such as legal abortion care in other states. Parker-Kafka Decl. ¶ 6. MAC also refers young people to clinicians, including abortion providers, consistent with the young people's considered decisions. Parker-Kafka Decl. ¶ 17. In providing these services, MAC shows that young people deserve to make informed choices about their bodies and lives, and to have those choices honored. *Id*.

Second, MAC helps young people in Tennessee navigate the logistics of traveling to an out of state abortion provider by helping them develop a detailed plan and talking them through challenges as they arise during the trip. Parker-Kafka Decl. ¶¶ 4-5, 26-29. In working closely with young people in this way, MAC communicates that, as human beings, they are entitled not simply to choose whether to remain pregnant, give birth, or parent a child, but also to have a comfortable and private abortion experience if they choose to reject or delay those things. *See* Parker-Kafka Decl. ¶¶ 12, 17-18, 25.

Third, MAC funds the transportation, lodging, meals, and childcare that young people in Tennessee need to obtain legal abortions out of state. Parker-Kafka Decl. ¶¶ 27-29. This includes booking and/or paying for: gasoline, flights, commuter trains, ride shares, hotels, and babysitters. *Id*. Occasionally, MAC also physically transports young people in Tennessee to and from out of state abortion appointments. Parker-Kafka Decl. ¶ 27.

While MAC does not pay for the abortions themselves, it does connect young people in Tennessee with sources of funding for abortion care, and often secures the funds on behalf of the young people from multiple sources. *Id*.

MAC sometimes provides these services in close consultation with the young person's parent or primary caretaker, who sometimes accompanies the young person to their abortion appointment. Parker-Kafka Decl. ¶ 24. But MAC does not require young people to involve a parent or guardian in their decision to seek a legal abortion. *Id*.

In sum, Plaintiffs associate with young people in Tennessee to express respect for and solidarity with them. Parker-Kafka Decl. ¶ 17; Scott Decl. ¶¶ 9, 29 35. Specifically, they convey the messages that pregnancy does not strip young people of their inherent dignity and that the young people are not alone. Parker-Kafka Decl. ¶¶ 12, 17-18; Scott Decl. ¶¶ 9, 29-30. Plaintiffs also associate with young people in Tennessee to express protest and defiance. Scott Decl. ¶ 9, 14. Specifically, they convey the messages that continued pregnancy, childbirth, parenthood, or adoption must be as freely chosen as the pregnant person's circumstances allow. Parker-Kafka Decl. ¶¶ 12, 17-18; Scott Decl. ¶ 9. Plaintiffs convey that choosing not to continue a pregnancy is a valid, deeply personal choice that should remain out of politicians' hands. Parker-Kafka Decl. ¶¶ 12, 17-18; Scott Decl. ¶ 9. Plaintiffs work, not only with young people in Tennessee, but also with other helpers to disseminate these messages, including reproductive justice organizations, abortion funds, practical support organizations, clinicians, and donors. Parker-Kafka Decl. ¶ 18; Scott Decl. ¶ 10.

C. SB 1971 Makes it a Crime to Support Young People in Tennessee Seeking Legal Abortion Care.

Governor Bill Lee signed SB 1971 into law on May 28, 2024.[5] SB 1971 creates the criminal offense of "abortion trafficking of a minor." SB 1971§ 1(a). The statute provides that "abortion trafficking" occurs when any adult "recruits, harbors, or transports a pregnant unemancipated minor within [Tennessee]" without the written, notarized consent of the minor's parent or guardian for the purpose of:

1) "Concealing an act that would constitute a criminal abortion under § 39-15-213 from the parents or guardian of the pregnant unemancipated minor";

2) "Procuring an act that would constitute a criminal abortion under § 39-15-213 for the pregnant unemancipated minor, regardless of where the abortion is to be procured"; or

3) "Obtaining an abortion-inducing drug for the pregnant unemancipated minor for the purpose of an act that would constitute a criminal abortion under § 39-15-213, regardless of where the abortion-inducing drug is obtained."

Id. § 1(a).[6] Notably, no abortion needs to occur for a helper to violate SB 1971—acting with the intent to help make an abortion happen is enough.

SB 1971 fails to define its key terms or phrases, including "recruiting" "harboring" "transporting," "concealing," or "within Tennessee." Equally important, SB 1971 fails to address what it means to procure an abortion or obtain an abortion-inducing drug in violation of Tennessee's abortion ban if the abortion happens outside of Tennessee. The legislative process leading up to the passage of SB 1971 demonstrates that lawmakers passed the bill knowing that it offered little guidance as to what conduct it criminalizes. When fellow legislators raised concerns during committee hearings and floor discussions about the bill's ambiguity, including the meaning of

[5] Shay Patterson, *UPDATE: TN Gov. Lee signs 'abortion trafficking' bill for minors into law*, Local 3 News (June 21, 2024), https://www.local3news.com/local-news/update-tn-gov-lee-signs-abortion-trafficking-bill-for-minors-into-law/article_451fbf90-f1dc-11ee-9d90-bbacef162f70.html.

[6] SB 1971 "does not apply to the provision of a medical diagnosis or consultation regarding pregnancy care" so long as the diagnosis or consultation excludes "performing or attempting to perform an abortion . . . or arranging for travel . . . to procure an abortion or abortion-inducing drug." ("Medical Diagnosis Exemption") *Id.* § 1(f).

"recruit," "harbor," or "transport," bill sponsors Senator Paul Rose and Representative Jason Zachary demurred that the courts would have to decide the issue.[7] At other times, the sponsors admitted that "'to recruit' could include just about anything," and Representative Zachary characterized "help[ing] any young person travel out of state if they need[] an abortion" as "recruitment."[8]

SB 1971 makes "abortion trafficking" a Class A misdemeanor, punishable by imprisonment for eleven months and twenty-nine days. *Id.* § 1(b).

SB 1971 also authorizes a young person's parent or guardian to bring a wrongful death suit against anyone who violates the statute. S.B. 1971(e), Gen. Assemb., Sec. Reg. Sess. (Tn. 2023). In this case, the plaintiff may recover economic damages, noneconomic damages, punitive damages, and attorney fees and costs. *Id.* § 1(e). The statute does not require a defendant to be criminally charged for a civil suit to be brought against them. *Id.*

Without this Court's intervention, SB 1971 will take effect on July 1, 2024.

D. Without Preliminary Relief, SB 1971 Will Force Plaintiffs to Stop Engaging in Protected Speech and Expressive Conduct That is Essential to Their Missions.

SB 1971 does not allow Plaintiffs or other helpers to determine which of their services to young people in Tennessee who lack written, notarized parental consent constitute criminal "recruiting," "harboring," "transporting," or "concealing." Parker-Kafka Decl. ¶ 39; Scott Decl. ¶¶ 24, 28. Consequently, the law will have a significant chilling effect on helpers who face potential criminal liability. Parker-Kafka Decl. ¶¶ 38-40; Scott Decl. ¶ 24. Plaintiffs plan to cease providing

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[7] *See* Senate Session, 61st Legislative Day (April 10, 2024, 10:03 AM), https://wapp.capitol.tn.gov/apps/videowrapper/default.aspx?CommID=601000; House Population Health Subcommittee Hearing (February 13, 2024, 2:05 PM) https://wapp.capitol.tn.gov/apps/videowrapper/default.aspx?CommID=801000; House Health Committee Hearing (February 21, 2024 11:09 AM) https://wapp.capitol.tn.gov/apps/videowrapper/default.aspx?CommID=801000. Rep. Zachary also deferred some questions regarding statutory definitions to a legislative attorney, who similarly stated that the court would have to resolve questions about the bill's reach.

[8] *Id*. at 0:13:17 (statement by Rep. Jason Zachary); *Id*. at 0:13:58 (statement by Rep. Jason Zachary).

services to young people in Tennessee so long as SB 1971 can be enforced against them, especially in light of its criminal penalties. Parker-Kafka Decl. ¶¶ 43, 45-46; Scott Decl. ¶¶ 24, 27.

SB 1971 would, therefore, force Plaintiffs and other helpers to turn away young people in Tennessee who cannot involve a parent in their abortion decision or have good reasons not to. Parker-Kafka Decl. ¶ 30, 40; Scott Decl. ¶¶ 24-25. These reasons include not knowing whether or where the young person's parents are living; having parents who are incarcerated or battling substance abuse issues that prevent them from adequately caring for their children; having abusive[9] or neglectful parents, including parents who would throw the young person out for becoming pregnant; living in foster care; and living in juvenile detention. Parker-Kafka Decl. ¶ 30; Scott Decl. ¶¶ 31-33.

SB 1971 would also force Plaintiffs and other helpers to turn away young people in Tennessee whose parents have consented to their seeking a legal abortion in another state, but who cannot secure written, notarized parental consent for all the support they need to obtain that abortion. Parker-Kafka Decl. ¶ 40; Scott Decl. ¶ 26. Some parents lack state-issued identification, cannot visit a notary on short notice, or lack the technology needed to use a virtual notary. Parker-Kafka Decl. ¶ 40;

The logistical, financial and practical barriers to obtaining a legal abortion out of state may be insurmountable for some young people in Tennessee in the wake of the gap left by Plaintiffs and other helpers. Parker-Kafka Decl. ¶ 33; Scott Decl.¶¶ 31-34. This is particularly true for young people who lack the support and guidance of a parent or trusted adult. Parker-Kafka Decl. ¶¶ 30, 34; Scott Decl.¶ 33. In these ways, S.B. 1971 would compel some young people in Tennessee to carry a pregnancy to term and require them to make agonizing decisions about whether or how to parent a child in challenging circumstances. Parker-Kafka Decl. ¶¶ 12, 17-18, 33, 35; Scott Decl. ¶¶32-33.

[9] The legislature's indifference towards young people living with abuse or incest is evident from its rejection of a proposed amendment that would have exempted from SB 1971 young people whose pregnancy was caused by rape or incest by a parent. Am. 9 to H.B. 1895, Gen. Assemb., Sec. Reg. Sess. (tn. 2023).

By forcing Plaintiffs to turn away young people in Tennessee for lack of written, notarized parental consent, SB 1971 would both stifle and subvert the messages they express through their services. Parker-Kafka Decl. ¶¶ 41-46; Scott Decl. ¶¶ 35, 37. That is, rather than express respect for and solidarity with young people, or communicate protest and defiance of political schemes to deprive young people of legal abortion access, S.B. 1971 would require Plaintiffs to reject and distance itself from some young people, and to twist its operations to comply with legislation that would prevent some young people from obtaining legal abortions. Parker-Kafka Decl. ¶¶ 17-18, 41-46.

ARGUMENT

A. Legal Standard

Plaintiffs are entitled to a TRO or, in the alternative, a preliminary injunction against SB 1971.[10] For either motion, courts weigh: (1) the movant's likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the relief; (3) whether the public interest favors the relief; and (4) whether the balance of equities favors the relief. *Sisters for Life, Inc. v. Louisville-Jefferson Cty.*, 56 F.4th 400, 403 (6th Cir. 2022); *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 833 (W.D. Tenn. 2020). "[I]n constitutional cases, the first factor is typically dispositive . . . because when constitutional rights are threatened or impaired, irreparable injury is presumed." *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (internal citations omitted).

I. Plaintiffs are Likely to Succeed on Their Claim that SB 1971 is Void for Vagueness.

"The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489,

[10] In general, a party seeking a preliminary injunction must "give[ ] security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). But this issue "rests in the discretion of the District Judge." *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2 810, 815-16 (6th Cir. 1954) (requiring no security where "no material damage will ensue"); *see also, e.g.*, *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("[T]he rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security."). Here, entry of a preliminary injunction would not subject Defendants to any costs or damages. Accordingly, no security is necessary.

498 (1982). Criminal laws are subject to exacting scrutiny because "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan v. De George*, 341 U.S. 223, 230 (1951). Likewise, vagueness concerns are heightened where a statute "threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates*, 455 U.S. at 499. "[W]hen a statute 'interferes with the right of free speech or of association, a more stringent vagueness test should apply.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010) (quoting *Village of Hoffman Estates*, 455 U.S. at 499). This heightened scrutiny is intended to protect against laws that chill constitutionally protected expression. *See Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1560-61 (M.D. Tenn. 1989) ("Due to the First Amendment's paramount position among all constitutional rights, . . . all laws which seek to regulate First Amendment activities must be sufficiently definite and certain so as to [avoid u]ncertain meanings [that] lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.") (citing *Jordan*, 341 U.S. at 231-32 and *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

A statute is unconstitutionally vague if it fails to provide "a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). The Sixth Circuit observed both flaws in a criminal ordinance against operating bubbling devices[11] that created open water areas exceeding "a five-foot radius . . . or an area determined by the inspecting officer to be a reasonable radius."[12] *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 555 (6th Cir. 1999). Applying strict scrutiny, the court reasoned that the ordinance failed to define

[11] "Bubbling devices extract relatively warmer water from the bottom of a waterway and bring that water to the surface, creating an area of open water which otherwise would be covered by ice." *Belle Maer Harbor*, 170 F.3d at 555 n.2.

[12] The court concluded as an initial matter that the ordinance "in no way limits the imposition of criminal penalties on operators for maintaining an area of open water of *less than* five feet in radius, as long as the shorter radius is determined not to be a 'reasonable' radius." *Id.* at 557.

"reasonable" and "there is no commonly accepted meaning of the term." *Id.* at 558 (noting that Black's Law Dictionary defined "reasonable" alternatively as "[f]air, proper, just, moderate, suitable under the circumstances" and "[f]it and appropriate to the end in view"). That is, "a standard grounded on reasonableness in this context is susceptible to a myriad of interpretations." *Id.* Thus, a bubble operator could not "ascertain by examining the language of the Ordinance alone whether criminal sanctions w[ould] result from [the amount] of open water created by [their] bubbler around [an] object." *Id.* at 558-59. Further, the ordinance "confer[ed] on the inspectors 'a virtually unrestrained power to arrest and charge persons with a violation.'" *Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (citation omitted).

SB 1971 provides even less notice of what it prohibits and is even more standardless than the ordinance at issue in *Belle Maer Harbor*, and therefore unconstitutionally vague. *See Williams*, 553 U.S. at 304. Like the ordinance, SB 1971 fails to define its key terms, including "recruits," "harbors," "transports," and "concealing." *See* SB 1971 § 1(a). Moreover, the legislative history of the statute betrays that its sponsors were unable to define any of these terms themselves, and instead left it to the courts to do so, or defined them so broadly that they would encompass *any* help to a young person in Tennessee wanting to legally end a pregnancy. *Supra* 6-7; *see United States v. Reese*, 92 U.S. 214 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.").

And like the term, "reasonable" in the ordinance at issue in *Belle Maer Harbor*, there are no commonly accepted meanings of SB 1971's key terms in the context of the statute. The fact that other criminal statutes use these terms in no way mitigates SB 1971's vagueness. S*ee, e.g.*, Tenn. Code Ann. §§ 39-13-308 ("Trafficking persons for forced labor or services"), 39-13-309 ("Trafficking a person for a commercial sex act"). SB 1971 has imported the terms from a fundamentally different context—one where actors covertly use violence, coercion, and fraud to extract labor from others for personal profit. The terms are misplaced in a context where actors

proudly support people seeking their help to obtain lawful healthcare, often at personal costs to themselves. "Recruit," "harbor," "transport," and "conceal" have never been used in the context of support for abortion patients and have no meaning here.

Accordingly, S.B. 1971 does not allow Plaintiffs or other helpers to determine which of their services to young people in Tennessee who lack written, notarized parental consent constitute criminal "recruiting," "harboring," or "transporting." *Supra* 7. Nor does SB 1971 bind prosecutors' enforcement decisions enough to prevent ad hoc, discriminatory enforcement of the statute.

Consider the following scenarios. A young person in Tennessee expresses that she does not want to be pregnant, in part because her mother would throw her out of their home if she learned of the pregnancy. A SisterReach employee provides the young person comprehensive information about an abortion provider in a state where there are no parental involvement requirements. Does this constitute "recruiting" under SB 1971?

Similarly, does it constitute "harboring" under SB 1971 for a young person's aunt to allow her niece to spend a night in her Nashville home before the niece's flight to Washington, D.C., where the young person intends to obtain an abortion without her parents knowing?

And is a MAC employee "transporting" a young person under SB 1971 when they disburse funds for an Uber to drive the young person from Tennessee to Illinois without knowing whether the young person's parent consents to that service?

Lastly, does the "concealing" that SB 1971 criminalizes include a MAC employee disbursing funds to a Tennessee hotel so that a young person can recuperate after obtaining an abortion in another state without disclosing the procedure to her family?

Given SB 1971's criminal penalties, its ambiguity would force Plaintiffs and other helpers to cease supporting young people in Tennessee, which would involve forgoing First Amendment activities, such as providing information about legal abortion care. "[A] statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment

of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment." *Jordan*, 341 U.S. at 231-32.

II. Plaintiffs are Likely to Succeed on Their Claim that SB 1971 Violates First Amendment Rights to Expression and Association.

Plaintiffs are likely to succeed on their claim that SB 1971 violates the First Amendment because it is: 1) a content-based restriction on their protected speech, expressive conduct, and expressive association that fails heightened scrutiny, and is 2) overbroad.

A. Plaintiffs are Likely to Succeed on Their Claim that SB 1971 Violates The Freedom of Speech.

The First Amendment protects information about and referrals for legal abortion care. *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975) (holding that a Virginia statute criminalizing the advertisement of legal abortion care in other states violated the First Amendment even though Virginia criminalized abortion); *see Katt v. Dykhouse*, 983 F.2d 690 (6th Cir. 1992) (holding that a Michigan law prohibiting insurance agents from informing Michigan residents about rebating practices legal in Florida but illegal in Michigan violated the First Amendment). A statute regulating such protected expression because of its content "is presumptively invalid, and the Government bears the burden to rebut the presumption." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)).

In *Bigelow*, for instance, the Supreme Court reversed a Virginia newspaper editor's conviction under a Virginia statute that prohibited the advertisement of abortion because the statute violated the First Amendment. 421 U.S. at 811-12, 829. The editor had published a pre-*Roe* advertisement about the availability of lawful abortion services in New York. *Id*. at 811-13. Emphasizing that a "State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State," *id*. at 824, the Court held that Virginia "possessed no authority to regulate the services provided in New York," and that it therefore lacked authority to keep information from its residents about lawful abortion services in New York. *Id*.

Since *Bigelow*, several courts have held that restricting speech about how and where someone, including young people, can obtain legal abortion care in other states constitutes a content-based speech restriction at odds with the First Amendment. In *Matsumoto v. Labrador*, for example, the court held that plaintiff helpers were likely to succeed on the merits of their claim that an Idaho "abortion trafficking statute" like S.B. 1971 violates their free speech rights by chilling them from providing information to young people in Idaho about legal abortion options outside the state. No. 1:23-cv-00323-DKG, 2023 WL 7388852, at *19 (D. Idaho Nov. 8, 2023). Similarly, in *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, Inc.* ("*PPGNHAIK*") *v. Comm'r, Ind. Dep't of Health*, the court held that an Indiana statute prohibiting information about and referrals for legal abortion care in other states to young people in Indiana lacking parental consent for the abortion violated the First Amendment. No. 1:17-cv-01636-SEB-MG, 2024 WL 1908110, at *6 (S.D. Ind. May 1, 2024); *see Planned Parenthood Greater Northwest v. Labrador*, 684 F. Supp. 3d 1062, 1093–94 (D. Idaho July 31, 2023) (holding that plaintiffs were likely to succeed on the merits of their claim that an interpretation of Idaho's abortion ban by the Attorney General violates the First Amendment by chilling referral of Idaho residents to out-of-state abortion providers); *Yellowhammer Fund v. Attorney General of Alabama Steve Marshall*, Nos. 2:23cv450-MHT, 2:23cv451-MHT, 2024 WL 1999546, at *19-21 (M.D. Al May 6, 2024) (denying State's motion to dismiss claim that interpreting Alabama law to criminalize counseling about lawful abortion care in other states violates the First Amendment); *see also Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon*, 220 S.W.3d 732, 741 (Mo. 2007) (affirming that information about legal abortion, including for young people, is "core protected speech").

SB 1971 violates Plaintiffs' free speech rights for the very same reasons. Plaintiffs provide, and want to continue providing, young people in Tennessee: 1) information about how and where they can obtain a legal abortion in other states, and 2) referrals to facilities offering legal abortion care in other states, regardless of whether the young people's parents consent to the provision of that information. These abortion services are plainly "activities that [Tennessee's] police powers do

not reach." *Bigelow*, 421 U.S. at 828. But SB 1971 appears to criminalize information about and referrals for legal abortion care for young people outside the Medical Diagnosis Exception when the speaker lacks written, notarized parental consent to speak. *Supra* 6. Moreover, SB 1971 criminalizes this protected speech because of its content and viewpoint: it concerns legal abortion as opposed to other legal healthcare, and it reflects the view that abortion care should be accessible to anyone who wants it, regardless of age or other socioeconomic factors. *Supra* 8-9. Lastly, Tennessee cannot show that the statute is narrowly tailored to achieve a compelling state interest because it lacks even a valid interest in stifling speech about legal activity. *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813.

B. Plaintiffs are Likely to Succeed on Their Claim that SB 1971 Violates The Freedom of Expressive Conduct.

"[C]onduct may be sufficiently imbued with elements of communication to fall within the scope of the First . . . [Amendment[]." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (internal quotation omitted). Conduct receives First Amendment protection when (1) the actor intended to convey a particularized message and (2) the message was likely to be understood by those who viewed the conduct. *Id*. "[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569-70 (1995). Instead, the Supreme Court has recognized a wide array of expressive conduct.[13] *See, e.g.*, *Holder*, 561 U.S. at 21-22, 27-28 (holding that nonprofit groups engaged in expressive conduct in training foreign terrorist organizations on how to use international law to

[13] *See Hurley*, 515 U.S. at 570 (marching in a parade); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991) (nude dancing); *Johnson*, 491 U.S. at 405-06 (burning an American flag); *Spence v. Washington*, 418 U.S. 405, 406, 409-11 (1974) (per curiam) (displaying an upside-down American flag affixed with a peace symbol); *Schacht v. United States*, 398 U.S. 58, 62-63 (1970) (wearing a military uniform in a play); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (wearing a black armband to school); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (opinion of Fortas, J., announcing the judgment of the Court) (participating in a silent sit-in at public library); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (saluting the American flag); *Stromberg v. California*, 283 U.S. 359, 360-61, 369 (1931) (flying a red flag).

peacefully resolve disputes, petition international bodies for relief, and engage in political advocacy).

The logistical, financial and practical support that Plaintiffs provide, and want to keep providing, young people in Tennessee seeking legal abortion care in other states constitutes expressive conduct because they both intend to express certain messages through that support and those messages are likely to be understood by onlookers to the support. Specifically, in funding the transportation, lodging, meals, and childcare that young people in Tennessee need to obtain legal abortions out of state, Plaintiffs express respect for and solidarity with the young people, and protest and defiance of politicians' attempts to impose pregnancy, childbirth and parenthood on them. *Supra* 5; *see McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014) (holding that contributing money to a political candidate constitutes protected expression and association under the First Amendment); *Matsumoto*, 2023 WL 7388852, at *8–10 (holding that an Idaho "abortion trafficking" statute violates the right to engage in expressive conduct by chilling financial and practical support to young people seeking legal abortion care in other states). Context matters.[14] In other words, the act of helping young people navigate countless, often intentional hurdles to obtaining a legal abortion is necessarily a message of affirmation to them and of dissent from political developments, particularly after *Dobbs*. *See supra* 5. Further, that Plaintiffs' messages center young people's dignity and privacy is evident from the lengths that Plaintiffs go to help ensure young people a comfortable and private abortion experience. *See supra* 3-5.

As with SB 1971's criminalization and chilling of protected speech, the statute criminalizes and chills expressive conduct because of its content. *See supra* 6-7. Tennessee again cannot show that SB 1971 is narrowly tailored to achieve a compelling state interest because it lacks a valid

[14] *See Bongo Prods., LLC v. Lawrence*, 548 F. Supp. 3d 666, 682 (M.D. Tenn. 2021) ("[T]he widely held opposing view to ['Choose Life'] suffice it to say, is not that people should 'choose death.'. . . ['Choose Life'] was, in context and against the existing cultural backdrop, really a statement about abortion.")

interest in stifling expression concerning legal activity. *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813.[15]

C. Plaintiffs are Likely to Succeed on Their Claim that SB 1971 Violates The Freedom of Expressive Association.

The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *see Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am.*, 530 U.S. at 647-48. "[T]o come within its ambit, a group must engage in some form of expression, whether it be public or private." *Id*. at 648. Infringements on freedom of association are subject to strict scrutiny. *Roberts*, 468 U.S. at 622.

Plaintiffs associate, and want to keep associating, with young people in Tennessee, reproductive justice organizations, abortion funds, practical support organizations, clinicians, and donors to convey: 1) respect for and solidarity with young people seeking legal abortion care, and 2) resist political efforts to obstruct, punish, and stigmatize these patients. *Supra* 5. Plaintiffs achieve this association by providing informational, logistical, financial, and practical support for young people in Tennessee seeking legal abortion care in other states, and by coordinating that support with other helpers. *Supra* 3-5. But SB 1971 criminalizes or chills each form of support, and thus criminalizes or chills Plaintiffs' expressive association. *Supra* 6-9. As with SB 1971's criminalization or chilling of protected speech and expressive conduct, Tennessee cannot show that

[15] Even if SB 1971's burden on expression were incidental, meaning that the State had an interest in enforcing SB 1971 unrelated to suppressing expression, the statute would be subject to the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). This test requires a state to show that a law furthers a substantial state interest and does not burden speech more than necessary to further that interest. *Id.* at 377. Because Tennessee lacks even a valid interest in stifling expressive conduct concerning legal activity, SB 1971 would violate the First Amendment even under the *O'Brien* test.

SB 1971 is narrowly tailored to achieve a compelling state interest because it lacks even a valid interest in stifling expression concerning legal activity. *See Playboy Entm't Grp.*, Inc., 529 U.S. at 813.

D. Plaintiffs are Likely to Succeed on Their Claim that SB 1971 is Overbroad.

"[A] law may be [wholly] invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (internal quotation marks omitted). In *Stevens*, for instance, the Supreme Court held that a statute that criminalized knowingly creating, selling, or possessing a depiction of animal cruelty was overbroad under the First Amendment. *Id*. at 464, 482. The statute required that the depicted conduct be illegal in the state where the depiction was created, sold, or possessed, regardless of whether the conduct happened in a state where the conduct was legal. *Id*. at 475 (offering hunting as an example of relevant conduct that is illegal in some states and protected in others). "A depiction of entirely lawful conduct r[a]n afoul of the ban if that depiction later f[oun]d[] its way into another State where the same conduct [was]s unlawful." *Id*. at 475-76. The Court held that this greatly expanded the statute's scope "because although there may be a broad societal consensus against cruelty to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel." *Id*. at 476. Put differently, "the statute [impermissibly] allow[ed] each jurisdiction to export its laws to the rest of the country." *Id*. at 477.

Likewise, SB 1971 is overbroad because a substantial number of its applications infringes on protected expression, *supra* 6-8, as compared with its limited constitutional application to expression integral to conduct that violates Tennessee's abortion ban. *See generally Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). And like the overbroad statute in *Stevens,* SB 1971 criminalizes or chills expression concerning activity that is legal where it happens simply because the expression occurs in a state where the activity is illegal. *See supra* 6-8.

III. Allowing SB 1971 to Take Effect Would Irreparably Harm Plaintiffs and the Young People They Support.

Irreparable injury is presumed when constitutional rights are threatened. *Vitolo*, 999 F.3d at 360; *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") Plaintiffs have shown irreparable injury because, without a TRO or preliminary injunction, SB 1971 would deprive them of their Fourteenth Amendment right to avoid criminal prosecution and sanctions because they could not determine when they would be violating the statute. *See supra* 11-12. Plaintiffs have also shown irreparable injury because, without a TRO or preliminary injunction, SB 1971 would prohibit or chill them from engaging in protected speech, expressive conduct, and expressive association in violation of the First Amendment. *See supra* 14-18.

Although Plaintiffs need not demonstrate any further irreparable harm, without a TRO or preliminary injunction, SB 1971 would prevent them from carrying out their missions to empower vulnerable communities, *see supra* 7-9, and isolate and degrade their clients who are young people in Tennessee, *see supra* 8.

IV. The Public Interest and Balance of Equities Favor a TRO or Preliminary Injunction.

Both remaining factors—the public interest and balance of equities—strongly favor Plaintiffs. ("[I]t is always in the public interest to prevent violation of a party's constitutional rights" because "there can be no cognizable harm caused by stopping unconstitutional conduct." *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001).

What is more, allowing SB 1971 to be in effect for any length of time would deeply harm Plaintiffs, other helpers, and the young people who rely on them. The statute threatens most adults who try to help a young person in Tennessee legally end a pregnancy without written, notarized parental consent with criminal prosecution and sanctions. *Supra* 7-9. Thus, it is likely that SB 1971 would force many helpers—as it would Plaintiffs—to cease counseling young people who cannot furnish such consent about their legal abortion options; referring them to abortion facilities in other

states; advising them on how to navigate challenges that arise during their journey; and funding their transportation, lodging, meals, and childcare. *Supra* 7-9. The ultimate impact of SB 1971 is to isolate and shame a substantial number of vulnerable young people in Tennessee who dare to try to direct the course of their lives. *See supra* 8-9.

By contrast, Defendants would suffer no harm from a TRO or preliminary injunction against SB 1971. The statute has not taken effect, so the relief would simply preserve the status quo. *See Fischer v. Thomas*, 78 F.4th 864, 868 (6th Cir. 2023) ("The purpose of a preliminary injunction 'is merely to preserve the relative positions of the parties until a trial on the merits can be held.'") (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). Notably, relief in this case would not affect Tennessee's ability to continue criminalizing abortion care within its own borders.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion and enter an order temporarily restraining or preliminarily enjoining Defendants from enforcing SB 1971.

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Respectfully submitted,

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*Application for admission pending
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CERTIFICATE OF SERVICE

I, Melissa J. Stewart, do hereby certify that on June 27, 2024, a true and correct copy of the foregoing was served via the Court's CM/ECF system, if registered.

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