UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SISTERREACH, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 2:24-cv-02446-SHR-tmp**
	)	**District Judge Sheryl H. Lipman**
JONATHAN SKRMETTI, et al.,	)	**Magistrate Judge Tu M. Pham**
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court "return[ed] the issue of abortion to the people's elected representatives." 597 U.S. 215, 232 (2022). And in the wake of *Dobbs*, Tennessee's elected representatives, like many others across the country, passed laws to safeguard the State's long-recognized interest in protecting fetal life. One of those laws was the Underage Abortion Trafficking Act. *See* Tenn. Code Ann. § 39-15-220 (2024). The Act prohibits adults from "intentionally recruit[ing], harbor[ing], or transport[ing] a pregnant, unemancipated minor within this state for the purpose" of obtaining an abortion prohibited by Tennessee law—including through the use of an "abortion-inducing drug," and regardless of where the abortion is obtained—without the consent of the "minor's parent or legal guardian." *Id.* § 39-15-220(a), (c)(2). The Act thus protects more than fetal life. It also safeguards the "fundamental right of parents to make decisions regarding the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion). Specifically, it ensures that adults cannot intrude into the "constitutionally protected" "relationship between parent and child," to facilitate minors' abortions without their parents' consent. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

Plaintiffs dispute none of this—nor could they. They claim the Act's targeted abortion-trafficking prohibition is unconstitutionally vague in violation of the Fourteenth Amendment and violates their First Amendment rights to freedom of speech, expressive conduct, and freedom of association. But despite their First and Fourteenth Amendment trappings, Plaintiffs' claims are effectively premised upon a nonexistent constitutional right to abortion. Indeed, much of their complaint is devoted to the importance of abortion access and their efforts to provide it. Plaintiffs, of course, are entitled to those views and entitled to share them. "Abortion presents a profound moral issue on which Americans hold sharply conflicting views." *Dobbs*, 597 U.S. at 223. But "[t]he permissibility of abortion, and the limitations upon it, are to be resolved like most important questions

in our democracy: by citizens trying to persuade one another and then voting." *Id.* (cleaned up). This Court, then, should reject Plaintiffs' efforts to "extend . . . constitutional guarantees to new territory." *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023), *cert. granted sub nom. United States v. Skrmetti*, No. 23-477 (U.S.). To be sure, Plaintiffs' complaint should be dismissed for a host of reasons.

At the outset, Plaintiffs' complaint runs headlong into well-settled procedural bars. Plaintiffs lack standing because they have failed to present facts demonstrating they intend to engage in conduct prohibited by the Act but affected with a constitutional interest, nor have they shown a "*certain* threat of prosecution" by any of these Defendants. *Crawford v. Dep't of Treasury*, 868 F.3d 438, 455 (6th Cir. 2017). Plaintiffs' claims are also barred by sovereign immunity, given the complaint's failure to demonstrate that any of these Defendants have "enforced []or threatened to enforce" the Act against them. *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 445 (6th Cir. 2019).

Plaintiffs' claims fare no better on the merits. The Act poses no Fourteenth Amendment vagueness concerns. The Act's key terms are not new—they appear in numerous other criminal trafficking statutes at both the state and federal level. *See, e.g.*, Tenn. Code Ann. §§ 39-13-308 (human trafficking), 39-13-309 (sex trafficking); 18 U.S.C. §§ 1590(a) (human trafficking), 1591(a) (sex trafficking). And a pre-enforcement vagueness challenge is doomed where the statute's terms are commonly used and routinely applied without issue. To conclude otherwise would cast doubt on a host of human- and sex-trafficking convictions that rest on analogous statutory language.

Plaintiffs' First Amendment claims suffer from fatal flaws, too. For one, the Act targets conduct—not pure speech. Properly construed, it targets each step involved with abortion trafficking: the recruiting, harboring, and transporting of a minor. The Act is thus not concerned with speech about abortion in the abstract, or even with the sharing of information about out-of-state abortion services. And to the extent it covers speech at all, it poses no constitutional problem. Speech used to commit or induce a crime is not protected by the First Amendment. *See United States v. Williams*, 553

U.S. 285, 298 (2008). Under any standard, then, Plaintiffs' free-speech claim fails.

The story is the same for their remaining First Amendment claims. Plaintiffs' expressive-conduct claim fails because, while conduct can of course be constitutionally protected, it can also be prohibited if the State has a "substantial interest" unrelated to the suppression of expression. *Lichtenstein v. Hargett*, 83 F.4th 575, 596 (6th Cir. 2023). The State's interests in safeguarding the parent-child relationship and protecting fetal life easily suffice. Next, consider Plaintiffs' expressive-association claim. Association is of course protected. But only "for the purpose of exercising the freedom of speech," *id.* at 601–02 (cleaned up), not to achieve *outcomes* like increased abortion access. And Plaintiffs' overbreadth claim fails because Plaintiffs have made no effort to carry their burden of showing that "the ratio of unlawful-to-lawful applications" is "lopsided," *United States v. Hansen*, 599 U.S. 762, 784 (2023), nor could they.

Finally, on top of the jurisdictional and merits-related problems, Plaintiffs have given this Court no reason to weigh in on the constitutionality of a newly enacted state law that no Tennessee court has had the opportunity to interpret, and longstanding abstention principles urge against the Court doing so here. Plaintiffs' complaint should be dismissed as a matter of law.

LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Meeting this standard requires "more than the bare assertion of legal conclusions" and instead demands "either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Hughes v. Sanders*, 469 F.3d 475, 477 (6th Cir. 2006) (internal quotations omitted). When a complaint fails to allege facts that "raise [the] right to relief above the speculative level," *Twombly*, 550 U.S. at 555, defendants in federal court are "spar[ed] . . . a time-

consuming and expensive discovery process," *Agema v. City of Allegan*, 826 F.3d 326, 332 (6th Cir. 2016); *see also New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011).

Similarly, "threshold question[s]" regarding immunity defenses must be "resolve[d]" at the outset of a case "before permitting discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). For challenges based on sovereign immunity, "[t]he case law is conflicted regarding the subsection of Rule 12 under which … a motion should be brought," but district courts in Tennessee have treated such motions as "factual challenges" to jurisdiction under Rule 12(b)(1). *See Hlfip Holding, Inc. v. Rutherford County.*, No. 3:19-CV-714, 2021 WL 4502833, at *2 n.5 (M.D. Tenn. 2021); *see also JLF v. Tenn. State Bd. of Educ.*, No. 3:21-CV-621, 2022 WL 1571307, at *3 (M.D. Tenn. 2022); *Durham v. Martin*, 388 F. Supp. 3d. 919, 929 (M.D. Tenn. 2019). In a factual challenge, this Court has "broad discretion over what evidence to consider," and "the burden is on the *plaintiff* to prove that jurisdiction exists." *JLF*, 2022 WL 1571307, at *3.

ARGUMENT

Plaintiffs' complaint does not state a viable claim to relief because it runs headlong into well-settled jurisdictional bars and, in any event, fails under the applicable law. Because no amount of repleading could cure these legal deficiencies, the Court should dismiss this suit as a matter of law.

I. Plaintiffs lack standing.

To invoke federal jurisdiction, a plaintiff must prove "an injury in fact . . . fairly traceable to the challenged conduct of the defendant . . . that is likely to be redressed by the requested relief." *FEC v. Cruz*, 596 U.S. 289, 296(2022). Pre-enforcement standing comes with additional hurdles. A plaintiff must first prove "an intention to engage in a course of conduct arguably affected with a constitutional interest[] but proscribed by" the Act. *Crawford*, 868 F.3d at 454 (quotations omitted). And it must then prove "a *certain* threat of prosecution if the plaintiff does indeed engage in that conduct." *Id.* at 455. Plaintiffs flunk both requirements.

First, Plaintiffs' complaint fails to demonstrate an intention to violate the Act. The Act prohibits "adult[s]" from "intentionally recruit[ing], harbor[ing], or transport[ing] a pregnant unemancipated minor within [Tennessee]" and without parental consent "for the purpose of" obtaining an abortion that would be illegal in Tennessee. Tenn. Code Ann. § 39-15-220(a). Right away, there's a problem: Plaintiffs are not "adult[s]." *See Adult*, Black's Law Dictionary (12th ed. 2024) ("Someone who has attained the legal age of majority."). They are instead corporate "non-profit organization[s]." Compl., PageID# 4–5. That fact is not necessarily fatal to their standing, though, since adults who work for Plaintiffs could, of course, violate the Act. And Plaintiffs do claim to sue "on behalf of [their] staff and volunteers." *Id.* at PageID# 5–6. But to sue on behalf of others, organizations must "identify a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct." *Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 543 (6th Cir. 2021). And Plaintiffs' complaint does not identify a single member, staff person, or volunteer, let alone explain how that person would have standing in his or her own right. That fact *is* fatal to Plaintiffs' standing. *See id.*

Nor are these the only problems. Even if Plaintiffs' complaint had identified a member, they would still have to demonstrate that member's "intention to engage in speech or conduct arguably affected with a constitutional interest[] but proscribed by" the Act. *Crawford*, 868 F.3d at 454 (quotations omitted). They haven't come close to doing so. The complaint does not "articulate[] with any amount of specificity" the future speech or conduct Plaintiffs' staff and volunteers intend to engage in. *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 964 (6th Cir. 2009). Instead, they discuss a variety of *past* activities and question whether the Act prohibits them, *see, e.g.*, Compl., Page ID# 28–31, 34, and they express a general desire to "continue helping young people in Tennessee obtain legal abortion care in other states" in the future, *id.* at PageID# 3. These cryptic allegations make it impossible to predict what Plaintiffs intend to do, much less determine whether their intended speech or conduct is

"affected with a constitutional interest" or "proscribed by" the Act. *Crawford*, 868 F.3d at 454.

Second, Plaintiffs' complaint fails to demonstrate a "certain threat of prosecution." *Id.* at 455. Courts faced with pre-enforcement challenges do not assume that every violation of the law will be prosecuted. *McKay v. Federspiel*, 823 F.3d 862, 868 (6th Cir. 2016). Instead, they look for: "(1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action; and (4) the defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff." *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021) (cleaned up) (quoting *McKay*, 823 F.3d at 869). Here, all four factors cut against Plaintiffs' standing.

History of past enforcement. "A threat of future enforcement may be 'credible' when the same conduct has drawn enforcement actions or threats of enforcement in the past." *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014). But Plaintiffs sued before the Act even went into effect, so they necessarily cannot show any prior enforcement.

Receipt of enforcement letters. Enforcement letters, had they been "sent to" Plaintiffs "regarding [their] specific conduct," could lend credibility to their fear of prosecution and thus bolster their standing-related arguments. *Online Merchs. Guild*, 995 F.3d at 550 (quotations omitted). Plaintiffs, though, point to no such letters.

Ease of enforcement. The "universe of potential" enforcers here is limited to "state officials who are constrained by . . . ethical obligations." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014). "Only law enforcement officials can investigate" violations of the Act, and "only prosecutors can bring charges." *Plunderbund Media, L.L.C. v. DeWine*, 753 F. App'x 362, 371 (6th Cir. 2018). The Act is thus a "standard criminal law with no attributes making enforcement easier or more likely." *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 440 (6th Cir. 2024).

Refusal to disavow enforcement. There has been no "refusal to disavow enforcement" of the Act, *Online Merchs. Guild*, 995 F.3d at 550 (quotations omitted), let alone as to Plaintiffs' "*specific* speech" or conduct. *Davis v. Colerain Twp.*, 51 F.4th 164, 174 (6th Cir. 2022). Plaintiffs' complaint does not allege *their* intended future activities with any specificity, so there is nothing to disavow enforcement against. *See Friends of George's*, 108 F.4th at 440 ("the disavowal factor focuses on a particular plaintiff" (citation omitted)). And in any event, as the State has made clear here and in other litigation, the Act is focused narrowly on conduct necessary to the crime of abortion trafficking, not protected speech. *See* Order at 4–5, *Welty v. Dunaway*, No. 3:24-cv-00768 (M.D. Tenn. June 28, 2024). Thus, any impairment of Plaintiffs' protected speech would be attributable solely to self-censorship, and not any of these Defendants.

II. Defendants are entitled to sovereign immunity.

What's more, Defendants, all of whom are sued in their official capacities only, enjoy sovereign immunity from suit. The exception to sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908), does not apply. That too requires dismissal.

Generally, a State is not "amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quotation omitted). A suit against a state official in his official capacity is considered to be a suit against the State. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). There is, of course, "an exception to States' sovereign immunity under *Ex parte Young* . . . whereby a suit challenging the constitutionality of a state official's action is not one against the State." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046-47 (6th Cir. 2015) (citation omitted). But that exception "has been read narrowly." *EMW Women's Surgical Ctr.*, 920 F.3d at 445. To successfully invoke it, "a claim must seek prospective relief to end a continuing violation of federal law." *Russell*, 784 F.3d at 1047. A plaintiff, moreover, must show that the state official has "threaten[ed]" and is "about to commence proceedings" in order to overcome the sovereign-immunity defense. *EMW*,

920 F.3d at 445. Plaintiffs cannot carry this burden.

Plaintiffs have named the Tennessee Attorney General and every District Attorney General in the State as Defendants, but they have not alleged—let alone proven—that any Defendant has "enforced []or threatened to enforce" the Act against them. *See Russell*, 784 F.3d at 1047. For the Attorney General, that is unsurprising; he "does not have the power to initiate criminal prosecutions." *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1032 (6th Cir. 2022). And while the District Attorneys General do have enforcement authority and are "sworn to enforce" the Act, *see* Compl., PageID# 7–18, *Ex parte Young* requires more. Plaintiffs must show that enforcement is "likely." *Doe v. DeWine*, 910 F.3d 842, 848 (6th Cir. 2018). Yet the complaint presents no facts demonstrating that either Plaintiff—one based in Memphis and the other in Chicago—works or has clients in each of the Defendants' respective districts. Sovereign immunity thus bars Plaintiffs claims against each of these Defendants, as Plaintiffs have failed to demonstrate that jurisdiction exists. *JLF*, 2022 WL 1571307, at *3.

III. The Act is constitutional.

Setting aside these threshold jurisdictional problems, Plaintiffs' claims also fail on the merits. Plaintiffs argue that the Act is facially unconstitutional in several ways. First, they assert that it is impermissibly vague, in violation of the Fourteenth Amendment. Compl., PageID# 37–38. And second, they say that it violates the First Amendment because it criminalizes or chills constitutionally protected speech, expressive conduct, and association, and because it is unconstitutionally overbroad. *Id.* at PageID# 38–39.

Plaintiffs' facial challenges necessarily fail. When a plaintiff chooses "to litigate . . . cases as facial challenges, . . . that decision comes at a cost." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). "Even in the First Amendment context, facial challenges are disfavored" and "hard to win." *Id.* at 2397, 2409. To succeed in their facial challenges, then, Plaintiffs must present facts

demonstrating that the Act "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Id.* at 2409 (quoting *Hansen*, 599 U.S. at 770). "The need for [Plaintiffs] to carry [that] burden . . . is the price of [their] decision to challenge the [Act] as a whole." *Id.* Plaintiffs cannot carry that burden, nor have they tried. That fatal problem aside, Plaintiffs' claims fail on their own terms.

A. The Act is not unconstitutionally vague.

Plaintiffs claim that the Act's "key terms"—"recruits," "harbors," "transports," and "concealing"—are unconstitutionally vague. Compl., PageID# 32, 34. The Act, they point out, "fails to define" these terms. *Id.* at PageID# 32. And, they say, "[t]he legislative process leading up to the passage of [the Act] demonstrates that lawmakers passed the statute knowing that it offered little guidance as to what conduct it criminalizes." *Id.* Plaintiffs don't stop there, though: they have also suggested that "there are no commonly accepted meanings of [the Act's] key terms in the context of the statute," and they dismiss comparisons to similarly worded statutes outside the abortion context as "misplaced." PI Mem. at PageID# 613–14. These arguments all fail.

The Due Process Clause's "void for vagueness" doctrine ensures only that a "person of ordinary intelligence" has "a reasonable opportunity to know what is prohibited" by the law. *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). "Perfect clarity and precise guidance have never been required," even for laws "that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Indeed, the law is full of "flexible" "standards," *id.*, and "[c]lose cases can be imagined under virtually any statute," *Williams*, 553 U.S. at 306. The vagueness doctrine thus serves a narrow purpose: to protect against those rare laws that altogether fail "to give ordinary people fair notice of the criminalized conduct" or are "so standardless as to invite arbitrary enforcement." *United States v. Parrish*, 942 F.3d 289, 295 (6th Cir. 2019) (cleaned up).

With these principles in mind, several of Plaintiffs' complaints about the Act can be rejected

out of hand. The fact that the law does not define its "key terms," for instance, is hardly unusual, let alone cause for vagueness concerns. *See Smith v. United States*, 508 U.S. 223, 228 (1993) (observing that "[w]hen a word is not defined by statute," courts "normally construe it in accord with its ordinary or natural meaning."); *see also* Tenn. Code Ann. § 1-3-105(b) (providing that "undefined words shall be given their natural and ordinary meaning"). Nor can cherry-picked quotes from the Act's legislative history establish vagueness; the relevant question is whether the Act's text is clear enough to provide people with reasonable notice of what it prohibits, not what individual legislators—even its sponsors—believe it to mean. *Cf. Grayned*, 408 U.S. at 108; *Lawson v. Hargett*, No. 3:24-CV-538, 2024 WL 3867526, at *12 (M.D. Tenn. Aug. 19, 2024).

Plaintiffs' remaining vagueness arguments fare no better. The Act's key terms are "widely used and well understood." *Cameron v. Johnson*, 390 U.S. 611, 616 (1968). Start with their dictionary definitions:

- *Recruit*: "to fill up the number of (as an army) with new members," "to increase or maintain the number of"; "to secure the services of"; or "to seek to enroll." *Recruit*, Merriam-Webster's Collegiate Dictionary 1041 (11th ed. 2007); *see also e.g.*, *Recruit*, The American Heritage Dictionary of the English Language 1471 (5th ed. 2016) ("To enlist (persons) in military service"; "[t]o hire or enroll, or seek to hire or enroll (new employees, members, or students).").

- *Harbor*: "[t]he act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien." *Harboring*, Black's Law Dictionary (12th ed. 2024); *see also Harbor*, The American Heritage Dictionary of the English Language 800 (5th ed. 2016) ("To give shelter to: *harbor refugees; harbor a fugitive*."); *Harbor*, Merriam-Webster's Collegiate Dictionary 567 (11th ed. 2007) (similar).

- *Transport*: "[t]o carry or convey (a thing) from one place to another." *Transport*, Black's Law Dictionary (12th ed. 2024); *see also Transport*, The American Heritage Dictionary of the English Language 1847 (5th ed. 2016) ("To move or carry (goods, for example) from one place to another; convey."); *Transport*, Merriam-Webster's Collegiate Dictionary 1330 (11th ed. 2007) (similar).

- *Conceal*: "[t]he act of preventing disclosure or refraining from disclosing; esp., the injurious or intentional suppression or nondisclosure of facts that one is obliged to reveal." *Conceal*, Black's Law Dictionary (11th ed. 2019); *see also, e.g.*, *Conceal*, The American Heritage Dictionary of the English Language 380 (5th ed. 2016) ("To keep from being observed or

> discovered."); *Conceal*, Merriam-Webster's Collegiate Dictionary 257 (11th ed. 2007) (similar).

These definitions confirm that the Act prohibits conduct involved with each step of abortion trafficking—not pro-abortion speech or expression.

This commonsense reading is supported by the "canon of *noscitur a sociis*," which "counsels that a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U.S. at 294. Statutory terms must be read "in light of their accompanying words in order to avoid giving the statutory [provisions] unintended breath." *Maracich v. Spears*, 570 U.S. 48, 62–63 (2013) (internal quotations omitted). And here, the Act's three key verbs, read together, confirm that the focus of the Act is on targeted conduct, rather than pure speech. Plaintiffs may well object to the General Assembly's policy decision to criminalize these activities. But those objections do not render the Act's prohibitions *vague*—that is, so unclear that a "person of ordinary intelligence" would not have "a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108.

As further proof, consider the numerous similar state and federal statutes that use *the same* words Plaintiffs challenge here. *See, e.g.*, Tenn. Code Ann. §§ 39-13-308 (making it a crime to "recruit," "harbor," or "transport" for purpose of human trafficking), 39-13-309 (same for sex trafficking); 18 U.S.C. §§ 1590(a) (human trafficking), 1591(a) (sex trafficking).[1] The federal code even uses "recruit," harbor," and "transport" to *define* the term "trafficking." 22 U.S.C. § 7102(11)(B), (12). And some of these statutes' trafficking prohibitions sweep even broader than the Act by adding the qualifier "by any means." *E.g.,* 18 U.S.C. §§ 1590(a), 1591(a). Consider, too, that courts regularly reject vagueness

[1] *See also* Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Colo. Rev. Stat. § 18-3-504; Ga. Code Ann. § 16-5-46; 720 Ill. Comp. Stat. § 5/10-9; Ind. Code § 35-42-3.5-1; Ky. Rev. Stat. Ann. § 529.110; La. Stat. Ann. § 14:46.2; Mass. Gen. L. ch. 265 § 50(a); Mich. Comp. L. Ann. § 750.462e; Miss. Code Ann. § 97-3-54.1; Neb. Rev. Stat. Ann. § 28-830; Nev. Rev. Stat. § 201.300; N.Y. Penal Law § 135.35 (McKinney 2024); N.C. Gen. Stat. § 14-43.11; Ohio Rev. Code Ann. § 2905.32; Tex. Penal Code Ann. § 20A.01; Utah Code Ann. §§ 76-5-308.5; Wash. Rev. Code § 9A.40.100; Wis. Stat § 948.051.

challenges to trafficking statutes that use the *same words* challenged here. *See, e.g.*, *United States v. Snead*, No. 21-4333, 2022 WL 17975015, at *4 (4th Cir. 2022) (concluding that "each of the verbs at issue in [18 U.S.C.] § 1591"—including "recruits, . . . harbors, [and] transports"—"has an ordinary meaning that would provide a person of ordinary intelligence fair notice of what conduct is prohibited.").[2]

This routine use of the Act's key terms and history of straightforward application, paired with the ready availability of "commonly accepted meanings," *contra* PI Mem., PageID# 613, dooms Plaintiffs' vagueness claim. To hold otherwise would call into question the validity of dozens of state and federal trafficking statutes—and the criminal convictions attendant to each of them.

If all of this were not enough, Plaintiffs' vagueness claim would still fail for two reasons. *First*, scienter requirements "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982); *see also Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952) (The "requirement . . . of culpable intent . . . does much to destroy any force in the argument that application of the [law] would be so unfair that it must be held invalid"). This is because, "where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Screws v. United States*, 325 U.S. 91, 102 (1945).

Here, the Act does contain a scienter requirement. It applies only when "[a]n adult *intentionally* recruits, harbors, or transports . . . a pregnant unemancipated minor within this state" for the purpose

[2] *See also, e.g.*, *Commonwealth v. McGhee*, 35 N.E.3d. 329, 339 (Mass. 2015) (rejecting challenge to ban on "recruit[ing], entic[ing], harbor[ing], [or] transport[ing] … by any means" for sex trafficking); *Alonso v. State*, 228 So.3d 1093, 1101–02 (Ala. Crim. App. 2016) (upholding sex-trafficking law that prohibited "recruit[ing]," "harbor[ing]," and "transport[ing]"); *State v. Scotia*, 704 P.2d 289, 290 (Ariz. Ct. App. 1985) (rejecting vagueness challenge to drug-trafficking statute's use of "transport"); *State v. Bryant*, 953 So.2d 585, 587 (Fla. Dist. Ct. App. 2007) (same); *see also People v. Cardenas*, 338 P.3d 430, 436–37 (Colo. App. 2014) (listing numerous trafficking statutes that use "recruiting," "transporting," and other similar verbs).

of obtaining a "criminal abortion" for a minor in Tennessee without parental consent. Tenn. Code Ann. § 39-15-220(a) (emphasis added). Under Tennessee law, "[i]ntentional" is the most culpable mental state. *See id.* § 39-11-302(a). It "refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." *Id.* Reading the Act with that steep requirement in mind, it's hard to see how anyone could accidentally violate it.

Furthermore, Plaintiffs cannot carry their burden of establishing *facial* invalidity. Normally, "litigants mounting a facial challenge to a statute normally must establish that *no set of circumstances* exists under which the statute would be valid." *Hansen*, 599 U.S. at 769 (citation omitted). In the facial-vagueness context, that generally means "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Vill. of Hoffman Ests.*, 455 U.S. at 497. True, this rule has been relaxed somewhat in First Amendment cases, but that doesn't help Plaintiffs here. For one thing, Plaintiffs' vagueness-based challenges to the Act's "harbor[ing]," "transport[ing]," and "concealing" prohibitions don't implicate First Amendment rights. *See infra* at 14-17. And for another, the Supreme Court has now made clear that even under the First Amendment overbreadth test—which neither the Sixth Circuit nor the Supreme Court has ever applied to a facial-vagueness analysis—"neither parties nor courts can disregard the requisite inquiry into how a law works in *all* of its applications." *Moody,* 144 S. Ct. at 2409 (emphasis added).

Against the weight of numerous state and federal statutes with the same terms, interpretive case law, and dictionary definitions, Plaintiffs offer only a few possible future applications—most of which contain insufficient facts to ascertain culpability. Compl., at PageID#34. That is a far cry from demonstrating that the Act's "unconstitutional applications are substantial compared to its constitutional ones." *Moody*, 144 S.Ct. at 2394. And that is unsurprising. It is easy to imagine scenarios that would fall well within the heartland of the Act. Take, for example, a coach who bribes his star

player with financial incentives in exchange for her obtaining an abortion so that she won't miss any games. Or imagine a schoolteacher who promises her struggling student a perfect score on an upcoming exam if she agrees to follow suit. Or think of a youth-group leader who convinces a teen to have his wife take her for an abortion so that she can keep her pregnancy hidden from her religious parents. Or worse, suppose a rapist coerces his minor victim to cross state lines to get an abortion to conceal his crime from her parents (and authorities). Examples abound, and this Court cannot hold the Act facially unconstitutional without "address[ing] the full range of activities" it covers. *Id.* at 2397.

B. The Act does not burden constitutionally protected speech.

Plaintiffs also argue that the Act "violates the First Amendment because it is a content- and viewpoint-based restriction on protected speech" and cannot survive strict scrutiny. Compl., PageID# 38. Specifically, Plaintiffs assert that the Act "criminalizes or chills the provision of information about and referrals for legal abortion care." *Id.* But, as explained above, "commonsense" principles of statutory interpretation require construing the Act in such a way that it does *not* prohibit pure speech about the availability of abortion outside of Tennessee. *See Williams*, 553 U.S. at 294; *Friends of George's*, 108 F.4th at 435 (holding that a district court erred by not applying an appropriate narrowing construction to state law regulating adult cabaret entertainment).

And any speech the Act does cover can be constitutionally prohibited. "Offers to engage in illegal transactions are categorically excluded from First Amendment protection." *Williams*, 553 U.S. at 297. There is, of course, "an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality," *id.* at 298–99 (citations omitted), but the Act does not prohibit "recruiting," "harboring," or "transporting" in the abstract. It prohibits intentionally recruiting, harboring, or transporting a pregnant unemancipated minor in this State "for the purpose of" procuring an abortion that is illegal in Tennessee without parental consent. Tenn. Code Ann. § 39-15-220(a).

Tennessee is well within its rights to prohibit that sort of speech. Governments have long prohibited "speech . . . that is intended to induce or commence illegal activities." *Id.* at 298. As noted above, federal and state codes are replete with criminal statutes that involve some element of speech in their commission. And it is, in fact, the *speech* itself that is prohibited, not just the crime the speech is intended to induce. *See Williams*, 553 U.S. at 300 (explaining that it would not be unconstitutional to punish offers to distribute child pornography, even where the offerors had no child pornography to distribute). This remains true even when the underlying criminal act takes place in a jurisdiction where it is legal. So long as an essential element of the charged offense—here, abortion trafficking—occurs in Tennessee, it can be prosecuted here, even if the abortion itself takes place elsewhere. This is not unusual; other states similarly extend their jurisdiction to crimes occurring elsewhere, so long as some element occurs within their borders. *See, e.g.*, Cal. Penal Code §§ 778, 778(a), 781, 782; Mont. Code Ann. § 46-2-101(1), -(2); Or. Rev. Stat. Ann. § 131.215(1), -(6); Utah Code Ann. § 76-1-201(1), (2); Wash. Rev. Code Ann. § 9A.04.030(1). The State would thus be well within its authority to prohibit trafficking in marijuana—though its use is legal in some states—or prostitution—which is legal in Nevada, if any element of that activity took place here.

Finally, the doctrine of constitutional avoidance requires a reading that does not unconstitutionally restrict speech and avoids constitutional problems. *See Hooper v. California*, 155 U.S. 648, 657 (1895). Plaintiffs' free-speech claim, then, necessarily falls short.

C. The Act does not burden expressive conduct.

Trying another tack, Plaintiffs also claim that the Act violates the First Amendment because it burdens expressive conduct, which they say includes providing "logistical, financial and practical support" to minors seeking an abortion. Compl., PageID# 38; *see also* PI Mem., PageID# 617–19. This claim also fails. It's true, of course, that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Texas v. Johnson*,

491 U.S. 397, 404 (1989) (quotation omitted).

But not all conduct merits First Amendment protection. Indeed, "[t]he Supreme Court has never applied exacting free-speech scrutiny to laws that bar conduct based on the harm that the conduct causes apart from the message it conveys." *Lichtenstein*, 83 F.4th at 583. Rather, so long as the bar on conduct "is unrelated to the suppression of free expression," it "will trigger, at most, the relatively lenient" test set out in *United States v. O'Brien*, 391 U.S. 367 (1968). *Lichtenstein*, 83 F.4th at 584 (citation omitted). Under that test, protections extend only to conduct that is "inherently expressive." *Id.* (cleaned up). And a state may restrict even that sort of conduct if it "identif[ies] a substantial interest that would not be furthered as effectively without the ban." *Id.* (cleaned up).

Here, even if all of Plaintiffs' intended conduct were inherently expressive,[3] Tennessee's interests are surely "substantial." As explained above, Tennessee has longstanding and compelling interests in protecting fetal life, the welfare of children, and the right of parents to direct the care, custody, and control of their children. *See supra* at 1. And it can further these interests by means that target conduct. *See Lichtenstein*, 83 F.4th at 583. That is what the Act does—it prohibits the conduct of recruiting, harboring, and transporting unemancipated minors to obtain abortions that are illegal under Tennessee law and without parental consent. So just as the State can ban conduct like the distribution of absentee-ballot applications, even if it were "inherently expressive," *id.* at 596 (assuming without deciding that the conduct was inherently expressive), it can prohibit Plaintiffs' facilitation of abortions, no matter what messages they intend to express.

D. The Act does not burden expressive association.

Plaintiffs next suggest that the Act burdens their First Amendment right of expressive

[3] This seems doubtful, in large part because there's no obvious limit to Plaintiffs' logic. If funding or otherwise facilitating the violation of a state law is protected by the First Amendment just because it is done with the desire to "protest and def[y]" the State's politicians, Compl., PageID# 37, it's hard to think of conduct that *wouldn't* receive First Amendment protection.

association. Compl., PageID# 39. Once again, their argument can't make it out of the starting gate. The Supreme Court "has read the First Amendment to impliedly protect a right to associate with others," but that right remains closely tethered to the First Amendment's core protections—it ensures the right to associate "*for the purpose of* exercising the 'freedom of speech.'" *Lichtenstein*, 83 F.4th at 601–02 (emphasis added) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

Plaintiffs say that they "associate with pregnant young people in Tennessee," as well as a host of others, "as a show of respect and solidarity" and "as a show of protest and defiance" against laws that restrict abortion access. Compl., PageID# 28. Plaintiffs go on to say, though, that they achieve this association by providing informational, logistical, and financial support for Tennessee minors seeking abortion services in other states. *Id.* at PageID# 29–31. And it's here that their claim falls apart. Again, the First Amendment's right to association guarantees the right to associate "for the purpose" of exercising *the freedom of speech*. *Lichtenstein*, 83 F.4th at 601–02. It doesn't give Plaintiffs a blank check to define the scope of the constitutional right by picking their chosen method of achieving it. The Second Circuit thus rejected a non-profit organization's claim that a similarly worded federal child-trafficking statute—that also uses "recruits," "harbors," and "transports"—burdened the organization's expressive association by limiting its ability to provide practical support to victims of prostitution, including "food and shelter." *United States v. Thompson*, 896 F.3d 155, 165 (2d Cir. 2018). To the extent the statute "restricts the activities of charitable or religious groups," the court said, "it places limits on the non-expressive *conduct* in which they may engage, rather than on their right to associate for the purpose of expressing their views." *Id.* So too here.

E. The Act is not unconstitutionally overbroad.

Finally, Plaintiffs claim that the Act is unconstitutionally overbroad. *See* Compl., PageID# 38. The First Amendment overbreadth doctrine allows courts to "invalidate[] [a statute] as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly

legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quotations omitted). Invalidation for overbreadth, though, is "strong medicine" that courts dispense "with hesitation, and . . . only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982) (quotations omitted); *see also Virginia v. Hicks*, 539 U.S. 113, 124 (2003) ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed at speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."). The Supreme Court has thus "vigorously enforced" the requirement that the challenger prove a substantial number of unconstitutional applications. *Williams*, 553 U.S. at 292. At the motion-to-dismiss stage, it follows that challengers must at least allege a substantial number of unconstitutional applications. Plaintiffs do not come close to carrying even that burden.

"To judge whether a statute is overbroad," this Court "must first determine what it covers." *Hansen*, 599 U.S. at 770. Plaintiffs insist that the Act "is overbroad because a substantial number of its applications are unconstitutional, as compared with its constitutional applications." Compl., PageID# 38. But this conclusory claim, like their free-speech claim, rests on an expansive reading of the Act that "ignore[s] [its] text," the "principle of *noscitur a sociis*," *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997), and the constitutional-avoidance canon, *see Hooper*, 155 U.S. at 657; *see also Williams*, 553 U.S. at 294 (rejecting an overbreadth challenge, in part, based on a scienter requirement and the "the commonsense canon of *noscitur a sociis*," which "narrow[ed]" the statute's scope). Read with these principles in mind, the Act does not sweep nearly as broadly as Plaintiffs suggest. It prohibits conduct—e.g., convincing a minor to cross state lines to obtain an abortion Tennessee law prohibits, or transporting or harboring them for that purpose, and doing so without parental consent—not pro-abortion speech or advocacy.

The next step in the overbreadth analysis is to determine "whether a law's unconstitutional applications are substantial compared to its constitutional ones." *Moody*, 144 S.Ct. at 2394. And, here,

a plethora of constitutional applications exist. *See supra* at 13-14. Plaintiffs have not plausibly alleged that these lawful applications of the Act—to conduct and to speech intended to induce or commence criminal activity—are outweighed by its *un*lawful applications. *Hansen*, 599 U.S. at 784. And they do not even try to analyze "all of [the law's] applications"—a necessity for overbreadth claims. *Moody*, 144 S.Ct. at 2409. Instead, the complaint summarily asserts that "a substantial number of [the Act's] applications are unconstitutional, as compared with its constitutional applications." Compl., PageID# 38; *see also* PI Mem., PageID# 620. That "naked assertion," wholly "devoid of . . . factual enhancement," *Iqbal*, 556 U.S. at 678 (cleaned up), cannot survive a motion to dismiss, much less help this Court "explore the [Act's] full range of applications—the constitutionally impermissible and permissible both—and compare the two sets," *Moody*, 144 S.Ct. at 2398. Thus, this claim fails, too.

IV. Principles of abstention weigh in favor of dismissal.

Finally, Plaintiffs' request for this Court to weigh in on a new Tennessee law that no state court has interpreted also ignores well-established abstention principles. When faced with a "federal constitutional claim . . . premised on an unsettled question of state law," the appropriate course is to abstain and give "the state courts an [o]pportunity" to weigh in. *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975); *see R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Indeed, cases "in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law," are "[a]mong the cases that call *most insistently* for abstention." *Harris Cnty.*, 420 U.S. at 84 (emphasis added). Abstaining in such situations "avoid[s] the possibility of unnecessarily deciding a constitutional question," *id.* at 83, and "affords the [state] courts the respect they are due as . . . equals in a federalist judicial system." *Gottfried v. Med. Plan. Servs.*, 142 F.3d 326, 332 (6th Cir. 1998).

Here, Plaintiffs' claims implicate "unsettled question[s] of state law." *Harris Cnty.*, 420 U.S. at 83. Plaintiffs object to the Act's prohibitions of recruiting, harboring, and transporting, claiming that they are vague and prohibit protected speech and conduct. These claims opportunistically rest on the

absence of Tennessee case law interpreting the Act. But of course, there is a solution: Allow Tennessee's state courts to interpret it first. Doing so may result in an interpretation "that would avoid or modify the constitutional question," *Zwickler v. Koota*, 389 U.S. 241, 249 (1967), and "remove the federal issue by making unnecessary a constitutional decision," *Traughber v. Beauchane*, 760 F.2d 673, 682 (6th Cir. 1985). This Court, then, should "stay its hand," *Harris Cnty.*, 420 U.S. at 83, and dismiss Plaintiffs' claims, *see Brown*, 169 F.3d at 332–33 (affirming dismissal based on *Pullman* abstention).

CONCLUSION

For all of these reasons, this Court should dismiss Plaintiffs' complaint as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2024, a copy of the foregoing document was filed using the Court's electronic court-filing system, which sent notice to the following counsel:

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