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.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants have failed to identify a valid basis for dismissing any portion of this case.

Their standing and sovereign immunity arguments lack merit because Plaintiffs have alleged an intent to 1) engage in conduct arguably affected with a constitutional interest, but 2) proscribed by statute, and 3) a credible threat of prosecution. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

Defendants' merits arguments are equally unavailing. Plaintiffs state a plausible vagueness claim. Because SB 1971 imposes criminal penalties and has chilled constitutionally protected expression, there is a relatively high bar for the notice that it needs to provide of the conduct it prohibits. *Jordan v. De George*, 341 U.S. 223, 230 (1951); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Yet the statute is so unclear that those dedicated to helping young people in Tennessee secure legal abortion care in other states cannot determine if their support constitutes a crime. Compl. ¶¶ 4, 117–122, 134; *see United States v. Williams*, 553 U.S. 285, 304 (2008). As such, SB 1971 gives prosecutors unbridled discretion to target anyone whom they disfavor. Compl. ¶¶ 4, 122, 134; *see Williams*, 553 U.S. at 304. Tellingly, Defendants still have not defined "recruit," "harbor," or "transport." Instead, they take great pains to analogize SB 1971 to disparate human and sex trafficking statutes.

Plaintiffs also state plausible claims that SB 1971 stifles their speech, expressive conduct, and expressive association based on their viewpoint; fails heightened scrutiny; and is overbroad in violation of the First Amendment. Defendants deny that SB 1971 targets "pure speech" in one breath and in another maintain that Tennessee may criminalize information about legal abortion care in other states because it has chosen to prohibit abortion within its own borders. Mem. of L. in Supp. of Defs.' Mot. to Dismiss (ECF No. 35) ("MTD") at 14–15. This, however, flies in the face of longstanding Supreme Court precedent. *See Bigelow v Virginia*, 421 U.S. 809, 824–25 (1975).

Confusingly, Defendants merely "doubt[]" that Plaintiffs engaged in expressive conduct, but contest that they engaged in expressive association. MTD at 16 n.3, 16–17. Until SB 1971 took effect,

however, Plaintiffs both provided support to young people and associated with them and others to express respect for and solidarity with young people and protest of politicians' efforts to harm and stigmatize them. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

Even as Defendants recognize that *Dobbs v. Jackson Women's Health Organization* returned the issue of abortion to the states, they double down on their flawed assertion that they may squelch Plaintiffs' expression in the interest of preventing abortion care in another state. 597 U.S. 215, 232 (2022); *see* MTD at 1; *Bigelow*, 421 U.S at 824–25. What is more, in many cases, SB 1971 is ineffective at forcing a young person to carry a pregnancy to term and simply requires them to find their way out of state without the support and protection of helpers such as Plaintiffs. *See* Compl. ¶¶ 116, 123–128, 131. Nor can SB 1971 be justified as a way to "safeguard[] the parent-child relationship." MTD at 3. Even if the State had such an interest, which it does not, the extent to which SB 1971 advances that interest is a disputed factual issue. Plaintiffs plausibly allege that SB 1971 does not support parent-child relationships, let alone constitute the least restrictive means of doing so. SB 1971 does not just require young people to consult a parent; it requires written, notarized parental consent. *See* Compl. ¶¶ 3, 106, 124.

Accordingly, Plaintiffs have stated a plausible claim that SB 1971's unlawful applications substantially exceed its lawful ones, namely: 1) expression integral to conduct that violates Tennessee's abortion ban and 2) conduct involving coercion. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). Defendants' assertion to the contrary rests on their misapprehension of Plaintiffs' free speech, expressive conduct, and expressive association claims.

Thus, this Court should deny Defendants' motion to dismiss in its entirety.

LEGAL STANDARDS

"Dismissal for lack of subject-matter jurisdiction [under Rule 12(b)(1)] is proper only when the claim is so 'completely devoid of merit as not to involve a federal controversy.'" *Brownback v. King*, 592 U.S. 209, 217 (2021) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83,

89 (1998)). To defeat a motion to dismiss on the basis of standing, Plaintiffs "'need[] only to plead general facts that would suggest'" a credible fear of enforcement. *Block v. Canepa*, 74 F.4th 400, 410 (6th Cir. 2023) (quoting *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (2015)). "[I]n a pre-enforcement review case under the First Amendment . . . courts do not closely scrutinize the plaintiff's complaint for standing when the plaintiff 'claims an interest in engaging in protected speech that implicates, if not violates, each [provision of the law at issue].'" *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Ct.*, 769 F.3d 447, 451 (6th Cir. 2014) (quoting *Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010)).

Asserting Eleventh Amendment sovereign immunity under Rule 12(b)(1) constitutes a factual attack. *Oshop v. Tenn. Dep't of Children's Servs.*, No. 3:09-CV-0063, 2009 WL 1651479, at *2–3 (M.D. Tenn. June 10, 2009). In evaluating a motion to dismiss under Rule 12(b)(1), the court may weigh the conflicting evidence to arrive at the factual predicate that subject-matter jurisdiction does or does not exist, and has wide discretion to allow for "affidavits, documents, and even a limited evidentiary hearing to resolve jurisdictional facts." *Gentek Bldg. Prod., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007).

When weighing a motion to dismiss under Rule 12(b)(6), a court must "'construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.'" *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 538 (6th Cir. 2012) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). To survive a Rule 12(b)(6) motion to dismiss, the complaint need contain only "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of the claim. *See Skinner v. Switzer*, 562 U.S.

521, 529–30 (2011). Additionally, a complaint "need not pin plaintiff's claim for relief to a precise legal theory" or contain "an exposition of his legal argument." *Id.*

ARGUMENT

I. Plaintiffs Have Standing

Plaintiffs need not "'expose [themselves] to actual arrest or prosecution'" before seeking relief from an unconstitutional statute. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Here, Plaintiffs have standing because they allege (1) "'an intention to engage in a course of conduct'" that is both "'arguably affected with a constitutional interest'" and "'proscribed by a statute,'" and (2) "'a credible threat of prosecution.'" *Driehaus*, 573 U.S. at 160 (quoting *Babbitt*, 442 U.S. at 298). This Court should reject Defendants' arguments to the contrary because they misrepresent the pleadings and distort the law.

A. Plaintiffs' Intended Expression Is Arguably Affected with a Constitutional Interest and Proscribed by SB 1971.

Plaintiffs allege a specific intention to engage in expression protected by the First Amendment but arguably proscribed by SB 1971.[1] *See, e.g.*, Compl. ¶¶ 9–10, 14–15, 90–103; Scott Decl. ¶¶ 24, 30, 36–38; Parker-Kafka Decl. ¶¶ 38, 40–41, 44–46. Before SB 1971 took effect, Plaintiffs provided significant support to young people throughout Tennessee, regardless of whether their clients had written, notarized parental consent. These services included: (1) referring young people to out-of-state abortion providers, Compl. ¶¶ 93, 99, 118; (2) funding their lawful abortion care, *id.* ¶¶ 94–95;

[1] Defendants erroneously insist that Plaintiffs meet the test for associational standing. *See* MTD at 5. Associational standing "permits an association that has suffered no injury to sue on behalf of members who have." *Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 534 (6th Cir. 2021). But Plaintiffs have shown that SB 1971 injures them, making associational standing irrelevant to their claims. *See* Compl. ¶¶ 117–125, 132; Declaration of Cherisse Scott ("Scott Decl.") (ECF No. 6-2) ¶¶ 30, 35–38; Declaration of Diana Parker-Kafka ("Parker-Kafka Decl.") (ECF No. 6-3) ¶¶ 37–38, 40–43, 46. Even if Plaintiffs were required to identify individual staff members who SB 1971 has injured, they have done so through the declarations of Plaintiff representatives, Cherisse Scott and Diana Parker-Kafka. Scott Decl. ¶¶ 1–3; Parker-Kafka Decl. ¶¶ 1–3.

and (3) arranging and funding their transportation and lodging for out-of-state abortion care, *id.* ¶¶ 101, 120–21. Plaintiffs' desired activities are affected with a constitutional interest, *see infra* 9–17, and the "wide range" of expression proscribed by SB 1971 means that the law prohibits at least some of Plaintiffs' intended activities, *Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022). Finally, Plaintiffs allege they would resume these activities if they could be assured that they would not be prosecuted for doing so. *See, e.g.*, Compl. ¶¶ 10, 15, 122; Parker-Kafka Decl ¶ 41; Scott Decl. ¶¶ 36–38.

Defendants ignore that courts consistently permit pre-enforcement challenges when plaintiffs provide a detailed description of past activities and allege a desire to continue them in the future. *See, e.g.*, *Driehaus*, 573 U.S. at 161–62 (concluding that plaintiff had standing where it "previously intended" to engage in now-prohibited speech and "'it desires to make the same or similar statements'") (quoting appendix); *Babbitt*, 442 U.S. at 301 (sustaining a pre-enforcement challenge to a law prohibiting "deceptive publicity" where the plaintiffs had "actively engaged" in publicity campaigns and "alleged . . . an intention to continue" those activities). Unlike the bare allegations in *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 964–65 (6th Cir. 2009), on which the Defendants mistakenly rely, Plaintiffs' complaint thoroughly describes the support they intend to provide young people throughout Tennessee—not a "generalized" desire to engage in unspecified conduct.

B. Plaintiffs Face a Credible Threat of Prosecution.

Plaintiffs face a credible threat of enforcement if they resume providing support to young people in Tennessee without written, notarized parental consent. To sustain their challenge, Plaintiffs are not required to show that enforcement is certain—only that their "fear of prosecution [is] not 'imaginary or wholly speculative.'" *Driehaus*, 573 U.S. at 160 (quoting *Babbitt*, 442 U.S. at 302).[2]

[2] Although Defendants rely on *Crawford v. United States Department of Treasury* to suggest that Plaintiffs must demonstrate a "*certain* threat of prosecution," *Crawford* itself applied the *Driehaus* "credible threat" test and derived its analysis from the many U.S. Supreme Court cases implementing that standard. 868 F.3d 438, 455, 458 (6th Cir. 2017).

Defendants incorrectly treat the factors articulated in *McKay v. Federspiel* as an exhaustive set of conditions that must be satisfied. 823 F.3d 862 (6th Cir. 2016); *see Online Merchants Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021) ("The[] *McKay* factors are not exhaustive, nor must each be established."). "To identify a credible threat of enforcement, the first and *most important* factor is whether the challenged action chills speech." *Fischer*, 52 F.4th at 307 (emphasis added). Because SB 1971 targets Plaintiffs' expression, *see infra* 12–17, it has forced Plaintiffs to engage in self-censorship—"a harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *see Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1023 (6th Cir. 2024) ("[T]he rationale for pre-enforcement challenges applies with particular force to the First Amendment."). Here, the risk of prosecution is particularly high given the huge variety of expression potentially covered by SB 1971.[3] *See Fischer*, 52 F.4th at 307 (finding standing where the plaintiffs engaged in self-censorship "because the [Defendants'] vague threats . . . could apply to a wide range" of speech).

In any case, Plaintiffs meet at least two of the *McKay* factors, which surpasses the showing necessary for a pre-enforcement challenge.[4] *See Cameron*, 995 F.3d at 550. First, Plaintiffs seek to engage in precisely the same conduct that they engaged in before SB 1971 took effect. Defendants' refusal to disavow enforcement of SB 1971 for that conduct—including in their briefing to this Court—amounts to a credible threat of enforcement. *See, e.g.*, *Boone Cnty. Republican Party Exec. Comm. v. Wallace*, No. 24-5783, 2024 WL 4048630, at *5 (6th Cir. Sept. 5, 2024). Second, Tennessee's grand jury structure, which permits "[a]ny person" with knowledge of a criminal offense

[3] Defendants' protestations that there is no credible threat of enforcement are especially unpersuasive given their statement that "in the wake of *Dobbs*, Tennessee's elected representatives . . . passed laws" to eliminate abortion access, and that "[o]ne of those laws was [SB 1971]." MTD at 1.

[4] Since SB 1971 had not taken effect when Plaintiffs filed their complaint, it is neither surprising nor significant that the other two *McKay* factors—a history of prior enforcement and enforcement warning letters invoking the statute—are absent here.

to testify before a grand jury, Tenn. Code Ann. 40-12-104(a), (c), makes "enforcement . . . more likely." *McKay*, 823 F.3d at 869; *see Welty v. Dunaway*, No. 3:24-cv-00768, slip op. at 23 (M.D. Tenn. Sept. 20, 2024).[5] Additionally, Defendants have "publicly *doubled down*" on their intention to prosecute abortion-related expression, making enforcement not only possible, but probable. *Kareem*, 95 F.4th at 1024; *see infra* 8 & n.6. For these reasons, Plaintiffs have standing to bring this pre-enforcement challenge.

II. The Attorney General and District Attorneys General Are Proper Defendants

Defendants misunderstand sovereign immunity doctrine. Plaintiffs "'seek prospective relief to end a continuing violation of federal law'" as required by the *Ex parte Young* exception to sovereign immunity. *Russell*, 784 F.3d at 1047 (quoting *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013)). "[A]t the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy . . . *Ex parte Young*." *Id*. Because Plaintiffs have standing, *see supra* 4–7, they also satisfy *Ex parte Young*.

Additionally, sovereign immunity does not bar Plaintiffs' claims against the Attorney General simply because he is not charged with enforcing SB 1971 in the first instance. Where a district attorney general declines to enforce SB 1971, the Attorney General can petition the Tennessee Supreme Court to appoint a district attorney general pro tem to enforce it. *See* Tenn. Code Ann. § 8-7-106(a)(2). More broadly, the Attorney General is charged with "defend[ing] the constitutionality and validity of all legislation of statewide applicability. . . ." Tenn. Code Ann. § 8-6-109(b)(9).

[5] The recent decision in *Welty* temporarily enjoining only certain district attorneys general from enforcing SB 1971's recruitment provision against anyone does not provide adequate relief to the Plaintiffs. No. 3:24-cv-00768, slip op. at 48; *see* Pls.' Notice of Supp'l Auth. (ECF No. 36) at 1–2. The entirety of SB 1971, including its harboring, transporting, and concealing provisions, criminalizes or chills Plaintiffs from resuming their support to young people throughout Tennessee. *See* Compl. ¶¶ 106, 117–125, 132, 136, 142. Accordingly, Plaintiffs seek an injunction restraining every district attorney general in the state from enforcing any portion of the statute against anyone. *Id.* at 39.

Significantly, the Attorney General has defended his ability to institute criminal, civil, or administrative investigations or proceedings against helpers of abortion patients, such as Plaintiffs.[6]

Universal Life Church Monastery Storehouse v. Nabors, 35 F.4th 1021 (6th Cir. 2022) ("*ULCMS*") is therefore distinguishable from this case. In *ULCMS*, the Attorney General had never opined on the question at issue: whether someone ordained as a minister "for free and over the internet" can validly officiate a wedding in Tennessee. 35 F.4th at 1026. And his office had opined on related issues more than twenty years prior. *Id*. at 1026–28. That context could hardly be more different from the present one, where the Attorney General is not only authorized to ensure that SB 1971 is enforced, but has also publicly committed to enforcing abortion restrictions. *Supra* 6–7. The State's sovereign immunity argument specific to the Defendant district attorneys general is equally unsound because it overlooks Plaintiffs' allegations that they want to resume providing services to young people in every part of Tennessee. *See, e.g.*, Compl. ¶¶ 9–10, 15, 93, 100–101, 103; Scott Decl. ¶¶ 9–10, 16, 30, 36–38; Parker-Kafka Decl. ¶¶ 6, 18, 40–46. Accordingly, the Court should reject Defendants' sovereign immunity defense and deny their motion to dismiss.

III. Abstention is Inappropriate

Pullman abstention, which Defendants request here, is an "'extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it.'" *Jones v. Coleman*, 848 F.3d 744, 749 (6th Cir. 2017) (quoting *Cty. Of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959)). Abstention is inappropriate 1) where there is no action pending in state court that will likely resolve the state-law questions underlying the federal claim and 2) where the state court is not particularly suited to address the state-law question. *Id.* at 750. Abstention should be invoked only after "careful consideration" due to the "delays inherent in the abstention process and

[6] *See* Anita Wadhwani, *Tennessee AG asserts right to out-of-state abortion, transgender care medical records*, Tennessee Lookout (July 18, 2023), https://tennesseelookout.com/2023/07/18/tennessee-ag-asserts-right-to-out-of-state-abortion-transgender-care-medical-records/.

the danger that valuable federal rights might be lost in the absence of expeditious adjudication in federal court." *Harris Cnty. Comm'rs Ct. v. Moore,* 420 U.S. 77, 83 (1975).

Here, there is no action pending in state court. "The nature of these issues, moreover, means that it is unlikely that any one case—or even several cases—would resolve the underlying questions of ambiguity or overbreadth. At most, individual state court cases *might* lead to clarification that certain specific actions raised in those cases are or are not within the scope of [SB 1971]." *Welty*, No. 3:24-cv-00768, slip op. at 29–30. Plaintiffs need not wait for such speculative, piecemeal adjudication when they are suffering ongoing constitutional injuries. *See Dombrowski v. Pfister,* 380 U.S. 479, 490, 492 (1965) (holding that abstention was an improper way to address the vagueness of a statute that plaintiffs had "attacked on [its] face as abridging free expression" because abstaining would "subject [them] to the uncertainties and vagaries of criminal prosecution").

IV. Plaintiffs State a Plausible Vagueness Claim

SB1971 is unconstitutionally vague because it does not allow Plaintiffs to determine which of their services to young people in Tennessee who lack written, notarized parental consent would constitute criminal "recruiting," "harboring," or "transporting." Compl. ¶¶ 4, 117–122, 134; *see Williams*, 553 U.S. at 304. Nor does SB 1971 bind prosecutors' enforcement decisions enough to prevent ad hoc, discriminatory enforcement of the statute. Compl. ¶¶ 4, 122, 134; *see Williams*, 553 U.S. at 304.

In asserting that "[p]erfect clarity and precise guidance" are not required even of laws that restrict expression, Defendants erect a strawman. MTD at 9. Plaintiffs are asking for neither perfect clarity nor precise guidance. They are asking, rather, for this Court to hold SB 1971 to the relatively high standard required of laws that impose criminal penalties and impinge on constitutional—particularly First Amendment—rights. "The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Hoffman Estates*, 455 U.S. at 498. 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*, 341 U.S. at 230. Likewise, vagueness concerns are heightened where a statute "threatens to inhibit the exercise of constitutionally protected rights." *Hoffman Estates*, 455 U.S. at 499. "[W]hen a statute 'interferes with the right of free speech or of association,'" as does SB 1971, "'a more stringent vagueness test should apply.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010) (quoting *Hoffman Estates*, 455 U.S. at 499).

Defendants' argument that SB 1971 merely presents "close case[s]" of interpretation is unavailing. MTD at 9. To begin, Defendants claim that Plaintiffs have cherry-picked legislative history indicating that the statute's authors did not know what it means without supplying the supposedly missing context. *Id.* at 10. Because there is none. *See* Compl. ¶¶ 108–110.

Additionally, Defendants concede, as they must, that SB 1971 itself does not define "recruit," "harbor," or "transport." MTD at 10. Defendants instead point to litany of dictionary, "common-sense" meanings. *Id.* at 10–11. But the various meanings of a term in the abstract do not resolve its meaning in a particular context. In *Belle Maer Harbor v. Charter Township. of Harrison*, for example, the Sixth Circuit held that a criminal ordinance against operating bubbling devices that created open water areas exceeding "an area determined by the inspecting officer to be a reasonable radius" was unconstitutionally vague. 170 F.3d 553, 555 (6th Cir. 1999). The Sixth Circuit concluded that "reasonable," which of course has dictionary, common-sense meanings, was "susceptible to a myriad of interpretations" "in this context." *Id.* at 558. 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, and the Ordinance "confer[ed] on the inspectors 'a virtually unrestrained power to arrest and charge persons with a violation,'" *id.* at 558 (quoting *Kolender v. Lawson*, 461 U.S. 352, 360 (1983)).

By the same token, it is not remotely clear under SB 1971 1) how someone recruits another person to have an abortion when that person is actively seeking their help to obtain one; 2) how

someone harbors someone who is not a criminal or a fugitive, and 3) whether paying for transportation qualifies as transporting someone. *See Welty*, No. 3:24-cv-00768, slip op. at 6 ("[SB 1971] . . . provides no express guide to what the concept of 'recruitment' is supposed to mean when the underlying action is not being 'recruited' into an illicit activity, but simply obtaining a lawful abortion.").

Defendants try in vain to legitimize SB 1971 by invoking *noscitur a sociis*, a statutory construction canon stating that a word's meaning can be understood from the words surrounding it. But they never explain how "harbor," for instance, illuminates the meaning of "recruit" or how either term illuminates the meaning of "transport." *Cf. Maracich v. Spears*, 570 U.S. 48, 62–63 (2013) (holding that a statute did not permit an attorney to solicit clients because all the activities it expressly permitted involved an attorney acting as an officer of the court and not as a commercial actor). Rather, Defendants summarily conclude that the terms "read together" confirm that SB 1971 targets conduct and not speech, a position that they contradict elsewhere. MTD at 11, 14 ("And any speech the Act does cover can be constitutionally prohibited."); *see Welty*, No. 3:24-cv-00768, slip op. at 30 (holding that "recruitment" "plainly involves speech implicating the First Amendment").

And despite ample opportunity to do so, Defendants have not addressed the fact that human and sex trafficking statutes that include "recruit," "harbor," or "transport" invariably also include coercion or material benefit to the perpetrator. *See, e.g.*, 22 U.S.C. § 7102(11)(B) (defining "trafficking" in part as the "*recruitment, harboring, transportation*, provision, or obtaining of a person for labor or services, through the use of *force, fraud, or coercion* for the purpose of *subjection to involuntary servitude*") (emphasis added). The human and sex trafficking statutes therefore target behavior that is fundamentally different from people providing pro bono support to those seeking their help to obtain lawful healthcare. Consequently, these statutes add no clarity about SB 1971, and invalidating it as unconstitutionally vague would not affect any convictions pursuant to them.

Defendants' attempt to salvage SB 1971's constitutionality using its scienter requirement is equally misplaced. To be sure, a scienter requirement can mitigate a law's vagueness. But it does not help where, as here, no one can discern what the law prohibits. *See* Compl. ¶¶ 4, 117–122, 134. In other words, it does not help that Plaintiffs need to act with an intent to violate the law when they cannot tell what would violate the law. *Screws v. United States*, which Defendants cite in support of their scienter argument, only reinforces this. 325 U.S. 91 (1945). There, the U.S. Supreme Court held that "a requirement of specific intent to deprive a person of a federal right *made definite by decision or other rule of law* save[d] the Act from any charge of unconstitutionality on the grounds of vagueness." *Id.* at 103 (emphasis added). The Court emphasized that someone "violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law." *Id.* at 104. Here, by contrast, there is no way to assure that Plaintiffs avoid imprisonment other than to stop providing all support to young people in Tennessee lacking written, notarized parental consent. Compl. ¶¶ 117–122.

V. Plaintiffs State a Plausible First Amendment Claim

A. Plaintiffs State a Plausible Free Speech Claim

SB 1971 violates Plaintiffs' right to free expression because it restricts their speech based on its viewpoint. Compl. ¶¶ 4, 11, 16, 106, 132. The statute criminalizes or chills the information and referrals that Plaintiffs want to provide young people in Tennessee because such speech concerns where and how young people can obtain a legal abortion. *Id.* ¶¶ 93, 99–100, 106, 109; *see Welty*, No. 3:24-cv-00768, slip op. at 31–32 (holding that the "recruitment provision represents a content-based, viewpoint-based distinction in its purest, most pernicious form: a criminal prohibition, backed by the threat of imprisonment, for communicating a message that the government simply dislikes"). Courts have enjoined similar statutes because they violate the right to free speech under the First Amendment. In *Matsumoto v. Labrador*, for example, the court held that plaintiffs were likely to succeed on the merits of their claim that an Idaho "abortion trafficking statute" 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 and referrals about 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).

Defendants' position that this Court must "construe [SB 1971] in such a way that does *not* prohibit pure speech about the availability of abortion outside of Tennessee" and thus avoids constitutional problems defies statutory construction principles because that is not a plausible interpretation of the statute. MTD at 14. Defendants' efforts to shoehorn that interpretation into the statute is reminiscent of the federal government's efforts in *United States v. Stevens*, which the Supreme Court soundly rejected. 559 U.S. 460 (2010). *Stevens* involved a statute that criminalized knowingly creating, possessing, or selling a depiction of "animal cruelty." *Id.* at 464. The federal Government implored the Court to adopt a narrowing construction of animal cruelty that limited it to extreme cruelty because the statute's legislative history focused on crush videos and the Government assured that it would apply the statute only to depictions of extreme cruelty. *Id.* at 465, 480. The Court repudiated the Government's request for two reasons. First, a "'limiting construction can be imposed only if the statute 'is readily susceptible to such a construction,'" and the reading that the Government desired required "rewriting, not just reinterpret[ing]" the statute. *Id.* at 481 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997)). Second, the Court "will not uphold an unconstitutional statute merely because the Government promises to use it responsibly." *Id.* at 480.

Here, there is even less of a reason than in *Stevens* to adopt a narrowing construction because SB 1971's legislative history lacks any guidance on how to interpret the statute, and the State has not

assured it will not enforce SB 1971 for providing information or referrals about legal abortion care. *Supra* 6–8. More importantly, nothing in the statute itself supports that interpretation. Compare SB 1971 with the statute at issue in *Williams,* for instance, which Defendants cite in support of their narrowing construction and *noscitur a sociis* arguments. MTD at 11, 18. There, the Supreme Court construed promoting child pornography as recommending child pornography to someone for their acquisition because the statute included "promotes" in a list alongside "solicits," "distributes," and "advertises." *Williams*, 553 U.S. at 294–95. SB 1971 is bereft of such guidance.[7]

Defendants claim in the next breath that they may restrict Plaintiffs' speech because it constitutes an offer to engage in an illegal transaction even though Plaintiffs' speech indisputably concerns legal abortion care. MTD at 14–15. Accepting Defendants' argument would for the first time—and in defiance of our constitutional structure—allow a state to effectively reach into another state and criminalize conduct there. In *Bigelow*, for example, the Supreme Court reversed a Virginia newspaper editor's conviction under a pre-*Roe* Virginia statute that prohibited the advertisement of legal abortion services in New York because the statute violated the First Amendment. 421 U.S. at 811–12, 829. 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," 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.* at 824. Likewise, Tennessee's views about abortion care do not authorize it to prevent abortion services in other states or to prevent young people in Tennessee from learning about such services.[8] Put differently, Tennessee could criminalize non-

[7] Contrary to Defendants' assertions, *Parker v. Metropolitan Life Insurance Company*, 121 F.3d 1006, 1014 (6th Cir. 1997) and *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 440 (6th Cir. 2024) are distinguishable for the same reason. *See* MTD at 14, 18.

[8] Every statute that Defendants cite in support of their outlandish argument that they may criminalize speech about activity that is lawful where it occurs is inapposite because it involves an actual crime. *See* Cal. Penal Code §§ 778, 778(a), 781, 782; Mont. Code Ann. § 46-2-101(1), (2);

expressive conduct that occurs in Tennessee even if such conduct is lawful in other states. What it cannot do is criminalize speech about conduct that is lawful in other states. *Id*.

B. Plaintiffs State a Plausible Expressive Conduct Claim

SB 1971 also violates Plaintiffs' right to free expression because it restricts their expressive conduct based on its viewpoint. The statute criminalizes or chills the logistical, financial and practical support that Plaintiffs want to provide young people in Tennessee seeking legal abortion care. Compl. ¶¶ 94–95, 101–03, 106, 122, 132. This includes transportation and funding for transportation, lodging, meals, childcare and the abortion itself. *Id.* ¶¶ 94–95, 101–03. That support is intended and understood to express: 1) respect for and solidarity with young people, and 2) protest of politicians' efforts to impose pregnancy, childbirth and parenthood on young people. *Id.* ¶¶ 87–88, 90, 96; *see Texas v. Johnson*, 491 U.S. 397, 404 (1989).

Defendants' arguments to the contrary are flawed in several respects. First, Defendants waffle over whether Plaintiffs' conduct is expressive because they ignore the limiting principle imposed by the two-part test in *Johnson*. MTD at 16 n3; 491 U.S. at 404.

Second, Defendants wrongly contend that the Court should apply the *O'Brien* test rather than strict scrutiny because Tennessee has an interest in enforcing SB 1971 unrelated to the suppression of expression. MTD at 16. But "*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech." *Holder*, 561 U.S. at 27. And SB 1971, which on its face is limited to expression supporting abortion access, restricts expression because of its message.[9] Compl. ¶ 106. As such, it is subject to strict scrutiny. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

Or. Rev. Stat. Ann. § 131.215(1), (6); Utah Code Ann. § 76-1-201(1), (2); Wash. Rev. Code Ann. § 9A.04.030(1).

[9] By contrast, *Lichtenstein v. Hargett*, which Defendants rely on, involved a law that "neutrally applies no matter the message that a person seeks to convey." 83 F.4th 575, 579 (6th Cir. 2023).

Third, SB 1971 fails the *O'Brien* test in any event because it fails to further an important governmental interest, and it burdens First Amendment freedoms more than necessary to further the interests the State asserts. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Tennessee lacks a valid interest in preserving potential life by preventing abortion care in another state. *Supra* 14. Moreover, the extent to which SB 1971 actually preserves potential life is a factual issue. Plaintiffs' position, which must be credited at this stage of the case, is that rather than preventing young people in Tennessee from obtaining an abortion in many instances, the statute subjects them to unnecessary medical risks and other hardships. Compl. ¶¶ 116, 123–128, 131. Similarly, the extent to which the statute advances a state interest in "safeguarding the parent-child relationship," MTD at 3, assuming such an interest is even valid, is also a disputed factual issue. Plaintiffs plausibly allege that SB 1971 undermines, rather than advances, this interest by saddling parents who support their child's decision to end a pregnancy with a written notarization requirement. Compl. ¶¶ 3, 124. Further, even if the statute advanced Defendants' asserted interest, its requirements are more burdensome than necessary. SB 1971 does not simply require young people to consult a parent; it requires written, notarized parental consent. *See Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 804–05 (1984) (holding that challenged legislation was overinclusive because, "[w]hile some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want").

C. Plaintiffs State a Plausible Expressive Association Claim

SB 1971 violates Plaintiffs' right to expressive association because it restricts their expressive association based on its viewpoint. SB 1971 criminalizes or chills Plaintiffs' desired association with young people, nonprofits, clinicians, and donors to express: 1) respect for and solidarity with young people, and 2) protest of politicians' efforts to impose pregnancy, childbirth and parenthood on young people. Compl. ¶¶ 87–90, 93–96, 99–103, 106, 122, 132. Until SB 1971 took effect, Plaintiffs achieved this association by providing informational, logistical, financial and practical support for

young people in Tennessee seeking legal abortion care, and by coordinating that support with other helpers. *See id.* ¶¶ 87–90, 93–96, 99–103, 122.

Defendants' sole response to Plaintiffs' expressive association claim seems to be that the expressive association right protects only speech and excludes expressive conduct. MTD at 17. This position defies both settled precedent and common sense. In *Americans for Prosperity Foundation v. Bonta*, for example, the Supreme Court recognized that donors engaged in expressive association by giving money to certain nonprofits. 594 U.S. 595, 618 (2021); *see Dale*, 530 U.S. at 648 ("[T]o come within [the] ambit [of expressive association], a group must engage in some form of *expression*, whether it be public or private.") (emphasis added). Further, the notion that the expressive association right excludes expressive conduct stretches incredulity when the Constitution protects expressive conduct on par with speech. *Johnson*, 491 U.S. at 404 ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").

The State's reliance on *United States v. Thompson*, 896 F.3d 155, 165 (2d Cir. 2018), is misplaced. In *Thompson*, someone convicted of sex trafficking argued that the statute underlying his conviction was overbroad because it violated the expressive association rights of nonprofits *not before* the court. *Id.* at 158. The Second Circuit rightly rejected his claim because, unlike here, he provided zero evidence that such organizations engaged in conduct intended to be or understood as expressive. *Id*. at 165 ("Thompson paints with far too broad a brush when he implies that an organization's activities of this sort would be protected by the First Amendment simply because the organization earnestly believes those activities are important.").

Importantly, Plaintiffs do not claim that logistical, financial, or practical support is per se expressive. Rather, "the nature of [Plaintiffs'] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that [t]he[y] engaged in a form of protected expression." *Spence v. Washington*, 418 U.S. 405, 409–10 (1974). Helping young people

navigate countless, often intentional hurdles to obtaining a legal abortion expresses affirmation to them and dissent from political developments, particularly after *Dobbs*. *See* Compl. ¶¶ 90, 93–96, 99–103. 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 id.* at 94–95, 100, 102.

D. Plaintiffs State a Plausible Overbreadth Claim

SB 1971 is overbroad because a substantial number of its applications infringe on protected expression, *supra* 12–17, as compared with its limited constitutional applications to expression integral to conduct that violates Tennessee's abortion ban and conduct involving coercion. *See Stevens*, 559 U.S. at 473; *Giboney*, 336 U.S. at 498. Defendants' opposition to Plaintiffs' overbreadth claim falls flat because it hinges on their flawed contentions concerning Plaintiffs' free speech, expressive conduct, and expressive association claims. *See* MTD at 18; *supra* 12–17.

In fact, the First Amendment injuries that SB 1971 inflicts on Plaintiffs and other helpers are analogous to the injuries that the Supreme Court deemed intolerable in *Bonta*. There, plaintiff charities argued that a statute requiring them to disclose their major donors' names and addresses to California violated the donors' right to expressive association. 594 U.S. at 600–01, 618. The Court did "not doubt that California has an important interest in preventing wrongdoing by charitable organizations." *Id.* at 612. But "California cast[] a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information w[ould] become relevant in only a small number of cases involving filed complaints." *Id.* at 614. What is more, the Court credited the lack of evidence that "alternative means of obtaining [relevant information]—such as a subpoena or audit letter—[we]re inefficient and ineffective . . . ." *Id.* at 613. The Court affirmed that "[n]arrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'because First Amendment freedoms need breathing space to survive.'" *Id.* at 609 (quoting *NAACP v. Button*, 371

U.S. 415, 433 (1963)). Consequently, the Court "ha[d] no trouble concluding" that the "disclosure requirement [wa]s overbroad." *Id.* at 615.

Similarly, SB 1971 chills an enormous amount of information and referrals, as well as funding and transportation expressing particular messages. *Supra* 4–5. And there is no indication that any of this expression is relevant to addressing the coercion that the State is actually concerned about. *See, e.g.*, MTD at 13–14 (invoking, among other scenarios, "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" and "a rapist [who] coerces his minor victim to cross state lines to get an abortion to conceal his crime from her parents (and authorities)"). What is more, other laws already address that coercion. *See, e.g.*, Tenn. Code Ann. §§ 49-5-1003 (forbidding Tennessee school staff from using their "professional relationship with the student for private advantage"); 49-5-1006 (requiring reporting of any breaches of an educator's code of conduct); 39-15-202(i)(1)(A) (criminalizing the failure of facilities that provide abortions to display a notice that "[i]t is against the law for anyone, regardless of the person's relationship to you, to coerce you into having or to force you to have an abortion. . . . You have the right to contact any local or state law enforcement agency to receive protection from any actual or threatened criminal offense to coerce an abortion"); 39-13-302(a) (criminalizing "knowingly remov[ing] or confin[ing] another unlawfully so as to interfere substantially with the other's liberty"). This lack of tailoring makes SB 1971 overbroad under the First Amendment.

VI. Plaintiffs Are Entitled to Facial Relief

Questions about the scope of relief are premature at this stage of the case. As the Supreme Court has explained: "The distinction between facial and as-applied challenges is not so well defined that it has some automatic effect . . . . [It] goes to the breadth of the remedy employed by the Court, not to what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Moreover, when entering final judgment, a court "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c).

In any event, Defendants are flatly wrong that Plaintiffs must establish that no set of circumstances exists under which the statute would not be vague. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (holding that a vagrancy ordinance that criminalized normally innocent activities, such as walking around at night, was void for vagueness without considering every potential application of the law); *Winters v. New York*, 333 U.S. 507, 509 (1948) ("It is settled that 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."); *Belle Maer Harbor*, 170 F.3d at 557 (holding complainants to the standard that an "'enactment is impermissibly vague in all of its applications'" only "[w]here the enactment does not reach constitutionally protected conduct" and does not impose criminal sanctions) (quoting *Hoffman Estates*, 455 U.S. at 495).

Further, Defendants admit that Plaintiffs are entitled to facial relief if they prevail on their overbreadth claim but rehash their erroneous contention that SB 1971's lawful applications exceed its unlawful ones. *See* MTD at 13–14; *supra* 18–19. And despite Defendants' best efforts to suggest otherwise, the call in *Moody v. NetChoice, LLC*, to consider how a law works in all its applications is nothing more than a reminder of the first step in an overbreadth analysis, which Plaintiffs have met. 144 S. Ct. 2383, 2409 (2024); *supra* 18–19.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rupali Sharma, do hereby certify that on October 15, 2024, a true and correct copy of the foregoing was served via the Court's CM/ECF system, which will send notification to all counsel of record.

/s/ Rupali Sharma
Rupali Sharma