No. 23-3787

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOURDES MATSUMOTO, et al.,

Plaintiffs-Appellees,

v.

RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho,

Defendant-Appellant,

On Appeal from the United States District Court
for the District of Idaho

No. 1:23-cv-00323-DKG
The Honorable Debora K. Grasham

REPLY BRIEF OF APPELLANT

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Many laws exist in state criminal codes to protect the sanctity of the parent-child relationship. Idaho Code § 18-623 is one of them. And although Plaintiffs are adamant that the law prohibits conduct that they wish to engage in, they cannot bring themselves to admit that they intend to violate the law's key element. That is to be expected. After all, it should go without saying that no adult has a legitimate interest in recruiting, harboring, or transporting a minor to obtain a serious medical procedure with the intent to conceal the medical procedure from the minor's parents. It is the least we can expect from law-abiding citizens. One would hope, at least. But regardless of what Plaintiffs really wish to be freed to do, the First Amendment does not prevent Idaho from safeguarding vulnerable minors and parental authority over their children.

But before even getting to the merits, Plaintiffs' suit falters on Eleventh Amendment and standing grounds. The Attorney General is the only defendant Plaintiffs sued, yet he has no enforcement authority against Plaintiffs. That is a problem under the Eleventh Amendment, and it is also a problem for pre-enforcement standing. Plaintiffs have never been threatened with enforcement of Idaho Code § 18-623 by anyone, so they lack an Article III injury. They also aren't seeking relief that can be redressed by enjoining Idaho Code § 18-623. Standing issues plague their claims.

The State of Idaho has every right to protect the rights of parents to be present at a critical moment for their children. By prohibiting abortion trafficking, the State prevents third parties who have no legal right to make medical decisions for children

from obtaining an abortion for a minor child by recruiting, harboring, or transporting her within the State of Idaho with an intent to conceal that abortion from the minor's parents. This is both constitutional and necessary.

For all these reasons, the district court's order should be reversed and the preliminary injunction should be vacated.

I. The Attorney General Has Eleventh Amendment Immunity.

When Plaintiffs sued the Attorney General—and him only—they sued an Idaho official who is merely a representative of the State. The Attorney General has no enforcement authority against Plaintiffs. He has never warned or threatened Plaintiffs with enforcement of the law. And, in fact, he has consistently disclaimed enforcement authority against Plaintiffs. So Plaintiffs' suit against the Attorney General is nothing more than a transparent attempt to make the State a party. *See Ex parte Young*, 209 U.S. 123, 157 (1908). But that is exactly what the Supreme Court has said litigants may not do under the Eleventh Amendment. *Id.*

Plaintiffs' first response is that Idaho Code § 18-623 expressly gives the Attorney General enforcement authority and, thus, *Ex parte Young* applies. *See* Dkt. #20.1 at 25. But Plaintiffs misread the statute badly. The provision Plaintiffs refer to gives the Attorney General enforcement authority to prosecute a violation of the statute *only* "if the prosecuting attorney authorized to prosecute criminal violations of this section refuses to prosecute violations of any of the provisions of this section by any person without regard to the facts or circumstances." Idaho Code § 18-623(4). That provision

does not give the Attorney General the authority to initiate a prosecution, second guess a prosecutor's decision not to prosecute a specific violation, or to supervise a prosecutor's prosecution of a specific case. Its grant of enforcement authority to the Attorney General is limited to prosecutorial nullification. So the Attorney General may enforce the statute if, and only if, a prosecutor refuses to enforce the statute under any circumstances.

The statute's protection against nullification based on a prosecutor's personal disagreement with the statute, political or otherwise, does not give Plaintiffs the right to sue the Attorney General. They do not allege that any prosecutor in Idaho has refused to enforce the statute against them in such a way as to trigger subdivision (4). Nor do they allege that the Attorney General has claimed grounds exist to trigger his enforcement authority. Indeed, the Attorney General has said the opposite.

Still, Plaintiffs contend that the Attorney General has a sufficient connection with enforcement of the law because the statute gives him "sole discretion" to determine whether "to prosecute a person for a violation of the statute if the county prosecutor does not do so." Dkt. #20.1 at 25. The statute does no such thing. It merely ensures the Attorney General has prosecutorial discretion in the event of prosecutorial nullification, which remains a necessary condition to any Attorney General enforcement authority. In other words, prosecutorial nullification will not, in and of itself, require the Attorney General to enforce the law; he retains discretion in exercising any prosecutorial authority.

Plaintiffs alternatively respond that the Attorney General has a sufficient connection to enforcement of Idaho Code § 18-623 based on his general authority to "assist" prosecutors. They rely on *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004), but the Eleventh Amendment holding in that case was dependent upon the Ada County prosecutor also being named as a defendant. *Id.* at 919. So the Attorney General's assistance authority was relevant in *Wasden*. It is not here, where Plaintiffs have not named any county prosecutor. And Idaho law is clear that the Attorney General has no enforcement authority, whether via assistance authority or otherwise, unless a prosecutor first seeks his assistance. "Under Idaho law, the attorney general may 'assist' county prosecutors in a 'collaborative effort,' but may not 'assert dominion and control' over prosecutions against the county prosecutor's wishes." *Id.* at 919 (quoting *Newman v. Lance*, 922 P.2d 395, 399-401 (Idaho 1996)). With no county prosecutors named as defendants in this case, the Attorney General has no one to "assist" in a "collaborative effort" to enforce the law against Plaintiffs, so *Wasden* is no help to Plaintiffs. *See Newman*, 922 P.2d at 399-401; *see also* SER-016-017 (dismissing the Attorney General because he "had merely secondary enforcement authority" and plaintiffs did not "allege that county prosecutors are expected to either fail or refuse to enforce, or need assistance in enforcing" the applicable laws).

This Court requires a state official to have a "fairly direct" connection to enforcement of a state law under *Ex parte Young*. *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). But here, there is no "fairly direct" connection between the Attorney

General and enforcement against Plaintiffs. *Id.* And being the "final stop" at the end of a series of contingent events, as Plaintiffs' allege, Dkt. #20.1 at 35, is not sufficient under controlling precedent. The Court should therefore not allow Plaintiffs to circumvent the Eleventh Amendment by suing the Attorney General.[1]

II. Plaintiffs' Response Confirms They Lack Article III Standing.

Plaintiffs spend nearly 15 pages of briefing trying to meet their burden of demonstrating standing. They have not done so. On each of the three elements that make up the irreducible constitutional minimum of standing, Plaintiffs' allegations fall short.

A. Plaintiffs have not suffered an injury-in-fact.

Plaintiffs' response highlights their lack of injury. This is a pre-enforcement challenge, so Plaintiffs must show that they face a "genuine threat of imminent prosecution." *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1139 (9th Cir. 1999) (en banc). That, in turn, depends on whether (i) Plaintiffs have a "concrete plan" to violate Idaho Code § 18-623, (ii) the Attorney General has "communicated a specific warning or threat to initiate proceedings," and (iii) there is a "history of past prosecution

[1] In their Response to the Attorney General's stay motion, Plaintiffs argued that the Attorney General has abandoned his Eleventh Amendment argument. *See* Dkt. #30.1 at 23. Not so. Aside from preserving the argument in his opening brief and again here, the Attorney General has nowhere waived sovereign immunity. Such a waiver "must be unequivocally expressed," *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 848 (9th Cir. 2012), and the stay motion's focus on the merits defects falls far short of that requirement.

or enforcement under" Idaho Code § 18-623. *Id.* Each factor confirms that Plaintiffs lack standing.

No Concrete Plan to Violate the Law. Plaintiffs' Complaint and representations to this Court confirm that they do not have a "concrete plan" to violate the law. This Court "requires something more than a hypothetical intent to violate the law," and "[a] general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Thomas*, 220 F.3d at 1139. Here, Plaintiffs emphasize that their "past and desired future actions do not involve deception." Dkt. #20.1 at 40. They further explain very clearly in their Complaint, declarations, and Response what they want to do, and their desired conduct noticeably lacks any allegation of a plan to intentionally conceal information, let alone relevant information, from a minor's parent.

Plaintiffs' only response is that NWAAF "does not seek or obtain parental consent," IIA has provided assistance "with awareness that the pregnant minor's parents do not know about the minor's intent to seek abortion care," and Matsumoto wants to act "regardless of whether minors' parents know or do not know." Dkt. #20.1 at 34. But not seeking parental consent, or knowing a minor's parents lack knowledge, or acting without regard to parental knowledge is very different than acting to conceal a minor's abortion from her parents. That is particularly true where Plaintiffs state that none of their planned conduct involves deception. Idaho Code § 18-623 "requires 'proof of a specific intent to do something which the law forbids; more than a showing

of careless disregard for the truth is required.'" *See Idaho State Bar v. Smith*, 513 P.3d 1154, 1172 (Idaho 2022) (citation omitted). The absence of a concrete plan to intentionally conceal a procured abortion or the obtaining of abortion drugs on behalf of a minor from that minor's parents leaves Plaintiffs without standing.

No Specific Warning or Threat of Enforcement. The record is clear that the Attorney General has never warned or threatened enforcement of Idaho Code § 18-623 against Plaintiffs or anyone. Nor have Plaintiffs alleged that the Attorney General has ever communicated such a warning or threat. And even if the Court finds that the Attorney General has a sufficient connection with enforcement of the statute for Eleventh Amendment purposes, that alone is insufficient to establish standing in the pre-enforcement context. Here, Plaintiffs "must" demonstrate that "the threat of enforcement" is "credible" and "not simply imaginary or speculative." *Thomas*, 220 F.3d at 1140 (citations and quotations omitted). Just as in *Thomas*, "[n]o action has ever been brought against [Plaintiffs] to enforce the [abortion trafficking] provision," and "[t]here has been no specific threat or even hint of future enforcement or prosecution." *Id.* At this point, Plaintiffs' fear is "imaginary or speculative." *Id.* That's not enough to invoke this Court's jurisdiction.

No Enforcement History. Plaintiffs acknowledge that Idaho Code § 18-623 has no enforcement history. And although this Court gives "little weight" to the third factor "when the challenged law is 'relatively new' and the record contains little information as to enforcement," *Tingley v. Ferguson*, 47 F.4th 1055, 1069 (9th Cir. 2022)

(citation omitted), it is still Plaintiffs' burden to establish the elements of standing, and the third factor does not help them show standing here.

B. Any injuries Plaintiffs may suffer will not be redressed by the injunction.

Plaintiffs also lack standing because their requested relief will not redress their claimed injuries. The core conduct that Idaho Code § 18-623 criminalizes—sheltering (or harboring) a minor without permission from the minor's parents and transporting that minor within the state, again without parental permission—remains illegal under Idaho law apart from Idaho Code § 18-623.

Under Idaho Code § 18-1510, it is unlawful to "knowingly or intentionally provide[] housing or other accommodations to a child seventeen (17) years of age or younger without the authority of: (a) the custodial parent or guardian of the child." This is known as providing shelter to runaway children. That statute applies to the very conduct Plaintiffs say Idaho Code § 18-623 prohibits: Plaintiff Matsumoto's desire to be free to transport minors within the state and provide shelter to minors in Idaho "whether those minors' parents know or do not know," Dkt. #20.1 at 21; and Plaintiff IIA's desire to coordinate the travel of pregnant minors in Idaho even if the minor's parents "may not have been aware" of the transportation, *id.* at 23; and Plaintiff NWAAF's desire to drive minors in Idaho to "abortion appointments in states where abortion is legal," provide "lodging assistance" to "minors within Idaho," and do so even when parents "may not have known about or consented to these actions," *id.* at 23. These are all straightforward violations of Idaho Code § 18-1510, which is not

challenged, has not been enjoined, and continues to prohibit the very actions Plaintiffs are seeking clearance to conduct.[2]

Plaintiffs attempt to answer their redressability issue by relying on *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983 (9th Cir. 2012). There, this Court held that a plaintiff facing a future "potential obstacle" does not need "to solve all roadblocks simultaneously and is entitled to tackle one roadblock at a time" for redressability purposes. *Id.* at 993. But that case does not address the issue here, which does not involve "potential" "roadblocks" or "obstacles" to relief but instead involves established criminal prohibitions that unquestionably bar relief. This case is controlled by the redressability rule in *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 107 (1998), namely that "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."

Plaintiffs next try to dismiss the redressability issue by arguing that the Attorney General cannot rely on their "declarations and arguments, and nothing more" to show that their actions violate other Idaho statutes." Dkt. #20.1 at 40. But the instant case is not a criminal prosecution, and the Attorney General does not have the burden of proving beyond a reasonable doubt that Plaintiffs lack standing. Rather, "[a]t the

[2] Other laws also prohibit Plaintiffs' desired actions, like Idaho Code § 18-4506 and Idaho Code § 18-4501(2). The fact that the Plaintiffs believe their actions are legal under existing Idaho law shows that Idaho Code § 18-623 also serves a compelling governmental interest by bringing the illegality of the conduct to the attention of Idaho's citizens and reinforcing the importance of parental rights.

preliminary injunction stage, the plaintiffs must make a clear showing of each element of standing." *LA All. for Hum. Rts. v. Cnty. of L.A.*, 14 F.4th 947, 956 (9th Cir. 2021) (internal quotation and citations omitted). Further, Plaintiffs have filed declarations swearing to the truth of the information contained in the declarations, and Plaintiffs' counsel, by signing the Complaint and pleadings, have certified that "the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b)(3). It is therefore disingenuous for Plaintiffs to complain that the Attorney General relies on these factual contentions.

Prohibiting enforcement of Idaho Code § 18-623 will not make it "likely" that the Plaintiffs could engage in their desired conduct because that conduct violates other statutes. *See Ibrahim*, 669 F.3d at 993. Plaintiffs have not demonstrated that their claimed injury is redressable by enjoining Idaho Code § 18-623.

III. Plaintiffs Have Not Shown An Entitlement To A Preliminary Injunction

Neither of Plaintiffs' First Amendment challenges is likely to succeed on the merits.[3] Speech that is integral to a crime is not protected by the First Amendment. Period. Although the Court's analysis should stop there, Plaintiffs are wrong that the law targets speech. It plainly targets conduct. And Idaho Code § 18-623 provides fair

[3] Plaintiffs incorrectly advance overbreadth and vagueness concerns against Idaho Code § 18-623 under the Fourteenth Amendment. But the First Amendment is the proper vehicle for those claims. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010); *O'Brien v. Welty*, 818 F.3d 920, 929-30 (9th Cir. 2016). Regardless, and however styled, Plaintiffs' overbreadth and vagueness claim lacks merit.

notice of the conduct proscribed. Plaintiffs' abstract and general arguments about free speech ignore the well-established principles that govern this case. When applied, this is an easy case on the merits.

The remaining injunction factors also favor the Attorney General, which flow from Plaintiffs' failure to show a likelihood of success on the merits—"the most important preliminary injunction factor." *See Tandon v. Newsom*, 992 F.3d 916, 933 (9th Cir. 2021). As Plaintiffs acknowledge, their ability to show irreparable harm and the public interest is tied to the merits of their claims. Dkt. #20.1 at 54-57. Accordingly, the district court's preliminary injunction should be reversed and remanded.

A. Idaho Code § 18-623 does not violate the First Amendment.

The issues Plaintiffs have with Idaho Code § 18-623 are just not implicated by any fair reading of the law. And Plaintiffs' failure to engage with the Attorney General's arguments cannot be overlooked. It is a telling indication of what a substantive consideration of Plaintiffs' claims will confirm: Idaho Code § 18-623 is a perfectly valid criminal prohibition on conduct injurious to society.

Any Speech under the Law is Integral to Criminal Conduct. The Attorney General pointed out in his opening brief that a person's mere use of words or expressive activity does not immunize criminal conduct. "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *United States v. Hansen*, 599 U.S. 762, 783

(2023) (cleaned up). Even Justice Black, known for his First Amendment absolutism, rejected the idea "that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

The First Amendment has never immunized persons from committing criminal acts so long as they do so with the assistance of words. "Many long established criminal proscriptions . . . criminalize speech (commercial or not) that is intended to induce or commence illegal activities." *United States v. Williams*, 553 U.S. 285, 298 (2008). Speech is not protected when it is "the vehicle through which" criminal activity takes place. *See United States v. Dhingra*, 371 F.3d 557, 561-62 (9th Cir. 2004). That was true in *Dhingra*, where this Court held that 18 U.S.C. § 2422(b)'s prohibition on "persuad[ing], induc[ing], entic[ing], or coerc[ing]" did not violate the First Amendment even though it proscribed conduct composed almost entirely of words. *Id.* at 561-62. And it is no less true of Idaho Code § 18-623.

Plaintiffs do not address this caselaw but instead simply assert Idaho Code § 18-623 does not involve criminal conduct. Dkt. #20.1 at 57-58 (arguing that here, "no illegal activity is being pursued"). Plaintiffs go further and say that the Attorney General "mistakenly conflates acts that he wants to be illegal with acts that are indeed illegal," contrasting Idaho Code § 18-623 with the anti-trafficking law at issue in *United States v. Thompson*, 896 F.3d 155 (2d Cir. 2018). Dkt. #20.1 at 57-58. That is a curious, and contradictory, claim. This case only exists because Plaintiffs claim that the conduct in

which they wish to engage is criminally prohibited by Idaho Code § 18-623. And it should hardly need to be said that an act that Idaho law makes criminal is, by definition, criminal.

Now, to the extent Plaintiffs are trying to argue that Idaho law is attempting to criminalize pure speech protected by the First Amendment, they are wrong. Consider what the law actually criminalizes: strange adults recruiting, harboring, or transporting pregnant minors to get abortions or abortion drugs, successfully doing so, and intending to conceal the abortion from the minor's parents or guardian. Idaho Code § 18-623. The law does not criminalize talking to minors about abortion, advising minors where abortions are legal, or raising money and soliciting public support for Plaintiffs' missions. *Cf.* Dkt. #20.1 at 13, 66-67. Nor does the law prevent Plaintiffs from providing financial support and travel assistance to pregnant minors and associating with others to do so—so long as Plaintiffs do not act with the specific intent to conceal an abortion or abortion drugs that are obtained from the minor's parents. *Cf. id.*

Any speech or expressive activity only becomes unlawful when it forms an integral part of the crime of trafficking a minor in Idaho to get an abortion with the specific intent to conceal those dealings from the minor's parents. *See United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). Adults who lack any legal relationship with a minor have no business recruiting, harboring, or transporting that minor, whether it is inside Idaho's borders or taking them outside the State of Idaho, to undergo a serious medical procedure, and that is all the more true when the adult acts with the specific

intent to conceal that serious medical procedure from the minor's parents. Idaho has good reasons to protect parents and minors from such trafficking, like ensuring proper informed medical consent, safeguarding vulnerable children (both minor mother and unborn child), and deterring interference with the parent-child relationship, to name just a few. And it is hard to imagine why Plaintiffs believe such injurious conduct has any constitutional protection. It does not.

Criminal codes are chock-full of laws that prohibit *some* expressive activity. For example, there is no First Amendment right to intentionally harass another person, even though offensive and harassing words on their own can be protected. *See United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014). Nor is there a First Amendment right to advocate for tax evasion or wire fraud when the advocacy is connected to illegal action, even though advocacy to avoid taxes on its own is protected. *See United States v. Meredith*, 685 F.3d 814, 819-23 (9th Cir. 2012). And there is no First Amendment right to persuade a minor to engage in criminal sexual activity, even if done with words alone. *See Dhingra*, 371 F.3d at 563. The dividing line between protected and unprotected First Amendment activity comes down to abstract advocacy, or mere encouragement, as compared to speech made integral to a crime—and that dividing line is all the brighter when a law contains a scienter element, as Idaho Code § 18-623 does. *See United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987) (explaining that intent element is "the determinative factor separating protected expression from unprotected criminal behavior"). This is why a state may criminalize burning crosses with the intent to

intimidate another but may not criminalize burning crosses to express an opinion. *See Virginia v. Black*, 538 U.S. 343, 365-66 (2003).

Plaintiffs' attempt to distinguish *United States v. Thompson* is shallow and unconvincing. They say that *Thompson* involved activities that "culminate in an illegal act." Dkt. #20.1 at 58. But here, they argue, as long as an abortion is obtained in a location where it is legal, then "no illegal activity is being pursued." In other words, under Plaintiffs' theory, Idaho lacks any power to regulate how strange adults deal with minors in the State of Idaho if the abortion itself is legal. Nonsense. For one, abortion isn't being regulated by the statute. Trafficking a minor through Idaho with the intent to conceal the purpose of that trafficking from the minor's parents is what the statute regulates. For another, Washington, Oregon, or any other state law on abortion does not strip Idaho of its power to protect minors and parents.

Plaintiffs' argument makes clear that they think abortion is a poison pill that renders any law unconstitutional. A law that criminalizes recruiting, harboring, or transporting a minor for sex is constitutional, but a law that criminalizes recruiting, harboring, or transporting a minor for an abortion suddenly becomes unconstitutional. Regardless of Plaintiffs' views on abortion, their policy preferences do not handcuff the people of Idaho from declaring certain conduct within Idaho unlawful. Here, Idaho Code § 18-623 only proscribes speech that is an integral part of the crime, so Plaintiffs' First Amendment challenge "is foreclosed," even if a prosecution were to rest "on words alone." *See Freeman*, 761 F.2d at 552.

Idaho Code § 18-623 does not Target Speech. For the reasons just explained, only speech integral to a crime is implicated, and such speech is unprotected. So Plaintiffs' claim that Idaho Code § 18-623 targets speech rather than conduct merits little attention. They rely on *Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180, 1188 (9th Cir. 2022), but that case is inapposite. As even a cursory reading of the law makes plain, Idaho Code § 18-623 regulates conduct, not protected speech or associational activity. It does not target First Amendment activity.

Start with a ground rule for facial First Amendment challenges. Plaintiffs' attack on Idaho Code § 18-623 "must fail unless, at a minimum, the challenged statute 'is directed narrowly and specifically at expression or conduct commonly associated with expression.'" *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996). It is not enough for Plaintiffs "to find some kernel of expression" in conduct that violates Idaho Code § 18-623, which is present "in almost every activity a person undertakes." *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). The law survives unless it prohibits "forms of conduct integral to, or commonly associated with, expression." *Roulette*, 97 F.3d at 305.

As discussed above, the law here regulates trafficking conduct. It does not "by its terms seek[] to regulate spoken words or patently expressive or communicative conduct, such as picketing or handbilling," nor does it "significantly restrict[] opportunities for expression." *See S. Or. Barter Fair v. Jackson Cnty., Or.*, 372 F.3d 1128, 1135 (9th Cir. 2004) (citation omitted). That makes this case very different from *Spirit of Aloha*. There, this Court held that a Maui land permitting scheme violated the First

Amendment because the regulations specifically targeted religious institutions and gave officials unbridled discretion to grant or deny permits under an arbitrary standard. 49 F.4th at 1192. The Second Circuit's reasoning in *Thompson*, 896 F.3d at 165, instead is the appropriate framework. It isn't surprising that Plaintiffs have no answer for *Thompson*—the court rejected the argument that the First Amendment protected the activities of charitable organizations interested in helping trafficking victims if such activities fell within the ambit of a law that also prohibited recruiting, harboring, and transporting a minor. *Id.* So too here.

The lack of targeting can also be seen by comparing the expressive activities that Plaintiffs say in their Response they wish to engage in against the conduct the law actually proscribes. In short, none of the expressive activities Plaintiffs list is prohibited by Idaho Code § 18-623. Plaintiffs can pursue their missions to help minors obtain abortion in other states, talk about and solicit support for their missions, and associate with others who share their missions. What Plaintiffs may not do under the law is recruit, harbor, or transport a minor to obtain an abortion and intend to conceal that activity from the minor's parents or guardian. To the extent Plaintiffs believe that they have a First Amendment right to associate with children not their own while intending to conceal that association from parents, they are mistaken. The conduct regulated by the law, therefore, is not protected by the First Amendment.

Plaintiffs' assumption about speech targeting leads them into strict-scrutiny analysis. But that analysis does not apply here. Even so, Idaho has a compelling

governmental interest in protecting minor decisionmaking from undue influences and parental rights. "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J. concurring). "That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support." *Id.* Plaintiffs' brief well proves the need for this law to protect Idaho's interest since they apparently believe that their conduct in transporting minors within Idaho without parental permission is legal. And because Idaho Code § 18-623 only applies to conduct done with an "intent conceal an abortion from the parents or guardian of a pregnant, unemancipated minor," the law is narrowly tailored to reach only conduct intended to strip away parents' rights to care for their children.

B. Idaho Code § 18-623 is not unconstitutionally vague.

The Attorney General is also likely to prevail on Plaintiffs' void-for-vagueness claim. The district court held that the words "recruit," "harbor," and "transport" are unconstitutionally vague. But the words are not vague at all. They provide fair notice of the prohibited conduct. They are the same words used in nearly every trafficking statute across state and federal jurisdictions. And as far as the Attorney General could find, no similar statute has been held unconstitutionally vague, which compels a similar finding here. *See Cal. Teachers Ass'n v. St. Bd. of Educ.*, 271 F.3d 1141, 1153 (9th Cir. 2001).

Under the First Amendment, "[t]he overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.'" *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988) (citation omitted). Plaintiffs must demonstrate that Idaho Code § 18-623 is "substantially overbroad," meaning Plaintiffs must provide "actual fact" that a "substantial number of instances exist in which [Idaho Code § 18-623] cannot be applied constitutionally." *Id.* The Court "vigorously enforce[s] the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292.

A court's first step in overbreadth analysis is to construe the statute because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id.* at 293. The Attorney General has repeatedly emphasized the targeted reach of Idaho Code § 18-623, which again, only bans an adult from recruiting, harboring, or transporting a pregnant, unemancipated minor to obtain an abortion or abortion drugs and does so with the intent to conceal the abortion from the minor's parents or guardian. Plaintiffs have not identified any protected speech, let alone substantial speech, that is encompassed by the law. The examples of expressive activity they provide are not banned because none involves an intent to conceal the conduct from a minor's parents. That intent requirement is key and "limit[s] criminal culpability to reach only conduct outside the protection of the First Amendment." *See Dhingra*, 371 F.3d at 561.

Plaintiffs also argue that the law is unconstitutionally vague and is chilling their

protected speech. But here again, the only speech they identify as being chilled is not banned by the law. And beyond simply "alleg[ing] that they are unsure what the statute proscribes," Plaintiffs make no effort to explain how or in what ways the statute is vague. Dkt. #20.1 at 66. Nor do they explain why their view of the law would not also invalidate the dozens of other trafficking laws that employ the same terms the district court here held are unconstitutionally vague. The same words are not rendered vague in Idaho Code § 18-623 just because Plaintiffs dislike their context.

Despite those words never having been found to be unconstitutionally vague, Plaintiffs argue that the words are vague since an Idaho State Senator stated that "I guess the court would have to decide if the conduct constitutes" recruiting, harboring or transporting. Dkt. #20.1 at 61-62. But that is inherent in our judicial system. In every prosecution, the finder of fact must determine the facts and then determine whether those facts constitute a violation of the applicable statute. The Senator's statement is not evidence of vagueness.

Similarly, the briefs for the State Amici and the Idaho Association of Criminal Defense Attorneys attempt to manufacture vagueness by setting forth a series of hypotheticals that they claim make it unclear as to whether the statute would apply to those situations. *See* Dkt. #26.1 at 31-35; Dkt. #28.1 at 19, 22. But there are two main problems with these lists of hypotheticals. First, there is no attempt to work through the elements of the crime of Abortion Trafficking by applying the law to the facts of the hypotheticals. Second, they all ignore the element requiring the specific intent to

conceal the abortion from the minor's parents. Even more fundamentally, their "basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 305-06 (citation omitted).

Finally, although Plaintiffs claim that Idaho Code § 18-623 is unconstitutionally vague, their allegations in support of standing contradict that assertion. In other words, Plaintiffs cannot on the one hand say that the law is muzzling them and preventing them from engaging in protected activity—which they must allege in order to have standing on a pre-enforcement challenge, *see Thomas*, 220 F.3d at 1139—but then allege on the other hand that the law is so vague they lack fair notice of what it proscribes. If Plaintiffs' intended conduct "is clearly covered by a statute[, they] cannot complain of the vagueness of the law as applied to the conduct of others." *Marquez-Reyes v Garland*, 36 F.4th 1195, 1207 (9th Cir. 2022) (cleaned up) (quoting *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1047 (9th Cir. 2017) and *Holder*, 561 U.S. at 19). These two claims are therefore logically inconsistent. Even where "a heightened vagueness standard applies," plaintiffs "whose speech is clearly proscribed" are not permitted to raise a successful vagueness challenge for lack of notice, especially on a facial challenge. *Holder*, 561 U.S. at 20.

The First Amendment does not require "perfect clarity" or "mathematical certainty." *Cal. Teachers Ass'n*, 271 F.3d at 1150-51. "Therefore, even when a law implicates First Amendment rights, the constitution must tolerate a certain amount of vagueness." *Id.* The vagueness test simply asks whether the law permits "persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *O'Brien*, 818 F.3d at 930. The answer here is an easy "yes."

First, the terms "recruit," "harbor," and "transport" are not "esoteric or complicated terms devoid of common understanding." *See Osinger*, 753 F.3d at 945. Second, these terms are made even clearer by their context. *See Williams*, 553 U.S. at 294 (using "the commonsense canon of *noscitur a sociis*" to give a word "more precise content by the neighboring words with which it is associated"). And third, any vagueness is mitigated by the law's scienter requirement. *See Cal. Teachers Ass'n*, 271 F.3d at 1154.

In sum, Plaintiffs have failed to identify a "realistic danger" that Idaho Code § 18-623 "significantly compromise[s] recognized First Amendment protections." *O'Brien*, 818 F.3d at 929-30 (citation omitted). So the law is not unconstitutionally overbroad. And Plaintiffs have also failed to show that a person of ordinary intelligence lacks reasonable notice of what the law prohibits. So they are unlikely to prevail on their vagueness claim as well.

C. The Other Injunction Factors Favor Granting a Stay.

A plaintiff seeking a preliminary injunction must allege not merely a possibility but "a likelihood of irreparable injury." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). Plaintiffs' claim of irreparable injury rests upon their claim that they want to assist minors to have abortions and, absent a preliminary injunction, they will be unable to provide "this assistance without fear of the Defendant prosecuting" the Plaintiffs." Dkt. #20.1 at 40, 67. But even if this Court affirms the preliminary injunction prohibiting enforcement of Idaho Code § 18-623, Plaintiffs will still be unable to transport minors within Idaho without parental permission and they will still be unable to provide shelter to minors within Idaho without parental permission, the two forms of primary assistance. As far as providing information to minors, Idaho Code § 18-623 does not prohibit them from providing any information about abortion they wish to any person. Thus, removing the injunction causes them no irreparable harm.

On the other hand, allowing the injunction to remain in place causes irreparable harm to Idaho by prohibiting Idaho from being able to protect its most vulnerable children by enforcing a law that merely requires a person to not act with an intent to conceal an abortion from a minor's parents. For the same reason, the balance of equities tips in Idaho's favor. Plaintiffs have no lawful interest in hiding their activities towards minor children from the child's parents, but states have a concrete interest both in protecting the rights of parents to their children and in enforcing democratically enacted criminal statutes. *See e.g. Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (parental rights

constitutionalized); *Parham v. J. R.*, 442 U.S. 584, 604 (1979) (parental rights to make medical decisions); *Alfred L. Snapp & Son, Inc. v. P.R. ex rel Barez*, 458 U.S. 592, 601 (1982) (state sovereign power in enforcing legal code). Plaintiffs assert only the non-existent rights of third parties to intrude on the fundamental relationship between parents and children. Neither the public interest nor equity favors allowing Plaintiffs to interfere in the medical decision making of someone else's child. This balance does not favor Plaintiffs and the district court erred by ruling otherwise.

CONCLUSION

Based on the above, the Attorney General respectfully request the Court reverse the district court's decision, remove the preliminary injunction, recognize that the Attorney General is immune from this suit, and dismiss the Attorney General from the case.

Date: February 7, 2024

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Circuit Case No.: 23-3787

I am the attorney representing Appellant.

This brief contains 6,345 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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/s/ Joshua N. Turner Date: February 7, 2024
Joshua N. Turner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing/attached documents on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Description of Documents:

Reply Brief

/s/ *Joshua N. Turner* Date: February 7, 2024
Joshua N. Turner