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

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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.

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/s/ *Joshua N. Turner* December 20, 2023
Joshua N. Turner

No. 23-3787

UNITED STATES COURT OF APPEALS
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LOURDES MATSUMOTO, et al.,
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RAÚL LABRADOR, in his capacity as
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The Honorable Debora K. Grasham

EXCERPTS OF RECORD VOLUME 1

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE, Plaintiffs, v. RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho, Defendant.	Case No. 1:23-cv-00323-DKG MEMORANDUM DECISION AND ORDER

INTRODUCTION

Before the Court is Defendant's Motion to Dismiss. (Dkt. 35.) The motion is fully briefed. (Dkt. 37, 39.) Having carefully reviewed the submissions and the entire record, the Court finds the facts and legal arguments relevant to Defendant's Motion to Dismiss are adequately presented in the record. Accordingly, in the interest of avoiding delay, and because the decisional process would not be significantly aided by oral argument,

Defendant's Motion will be decided based on the record. For the reasons explained below, the Court will grant in part and deny in part Defendant's Motion.[1]

BACKGROUND

In this lawsuit, Plaintiffs contest the constitutionality of Idaho's criminal abortion trafficking statute, Idaho Code Section 18-623. (Dkt. 1.)[2] The statute provides that: "[a]n adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion, as described in Section 18-604, Idaho Code, or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking." Idaho Code § 18-623(1). The offense is punishable by imprisonment for no less than two years and no more than five years. Idaho Code § 18-623(5). The statute allows for an affirmative defense where a parent or guardian of the pregnant minor consented. Idaho Code § 18-623(2). It is not an affirmative defense "that the abortion provider or the abortion-inducing drug provider is located in another state." Idaho Code § 18-623(3). The statute was signed into law by

[1] The parties have consented to proceed before a United States Magistrate Judge in this matter pursuant to 28 U.S.C. § 636(c)(1) and Local Civil Rule 72.1(a)(1). (Dkt. 26.)

[2] The statute will be referred to by the title used in Idaho Code Section 18-623 – "abortion trafficking."

Idaho Governor Brad Little on April 5, 2023, and went into effect May 5, 2023 due to its emergency clause.[3]

On July 11, 2023, Plaintiffs Lourdes Matsumoto, Northwest Abortion Access Fund, and Indigenous Idaho Alliance (collectively Plaintiffs) filed this action under 42 U.S.C. Section 1983 against Defendant Raúl Labrador, in his official capacity as the Attorney General for the State of Idaho. (Dkt. 1.) Plaintiffs are an individual and two organizations who provide assistance to pregnant people, including minors, who are located within and outside of Idaho, with accessing legal abortion care.

The Complaint raises four claims challenging Idaho Code Section 18-623. (Dkt. 1.) Claim one asserts the statute is unconstitutionally void for vagueness in violation of Plaintiffs' due process rights protected by the Fourteenth Amendment. Claim two asserts the statute infringes on the Plaintiffs' fundamental right to interstate travel. Claim three asserts the statute infringes on the Plaintiffs' fundamental right to intrastate travel. Claim four asserts the statute infringes on the Plaintiffs' First Amendment rights to freedom of speech, assembly, association, and petition. Plaintiffs seek a declaratory judgment concluding that, among other things, Idaho Code Section 18-623 is unconstitutional, and to enjoin Defendant Labrador from enforcing the statute.

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[3] The statute was introduced first as House Bill 98, and later amended and reintroduced as House Bill 242. It was codified as Idaho Code Section 18-623 on July 1, 2023.

On July 24, 2023, Plaintiffs filed a Motion for Temporary Restraining Order or, in the alternative, a Preliminary Injunction. (Dkt. 12.) Defendant filed an opposition to Plaintiffs' Motion. (Dkt. 32.) The Attorney General for the State of Washington, on behalf of nineteen states and the District of Columbia (collectively Amici States), submitted an amici curiae brief in support of Plaintiffs' Motion. (Dkt. 20, 31.) Following a hearing, the Court granted Plaintiffs' Motion and preliminarily enjoined Defendant from enforcing Idaho Code Section 18-623. (Dkt. 40.) On September 12, 2023, Defendant filed the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6), that is presently before the Court. (Dkt. 35.)

LEGAL STANDARDS

1. Motion to Dismiss Rule 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), an action may be dismissed for lack of subject matter jurisdiction. Challenges to Article III standing are properly raised in a Rule 12(b)(1) motion to dismiss. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) ("Standing is a threshold matter central to our subject matter jurisdiction."); *Planned Parenthood Arizona, Inc. v. Brnovich*, 172 F.Supp.3d 1075, 1086-87 n. 9 (D. Ariz. 2016).

Motions made under Rule 12(b)(1) may be factual or facial. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A factual attack presents extrinsic evidence disputing the truth of the allegations of the complaint that would otherwise invoke federal jurisdiction, whereas a facial attack challenges that the allegations contained in the complaint are

insufficient on their face to invoke federal jurisdiction. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Here, Defendant's motion to dismiss presents both factual and facial challenges. *See* (Dkt. 35, 39) (relying on Attorney General Opinion 23-1, dated April 27, 2023, and challenging the pleadings).

For factual challenges, the Court may consider factual information presented outside of the pleading, including affidavits or other evidence, without converting the motion to a motion for summary judgment and need not presume the truthfulness of the allegations in the complaint. *Safe Air*, 373 F.3d at 1039; *White*, 227 F.3d at 1242.[4]

For facial challenges, the allegations in the Complaint are accepted as true and inferences are drawn in favor of Plaintiffs when determining whether the allegations are sufficient to invoke the Court's jurisdiction. *Jones v. L.A. Central Plaza LLC*, 74 F.4th 1053, 1056, n. 1 (9th Cir. 2023); *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). To survive a Rule 12(b)(1) facial challenge at the pleading stage, the Complaint must "clearly allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

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[4] The jurisdictional issue presented here is separate from the merits of the case. *See Jones v. L.A. Central Plaza LLC*, 74 F.4th 1053, 1057 n. 2 (9th Cir. 2023) ("Where the jurisdictional issue is separable from the merits of the case," a court presented with a factually-based motion to dismiss "may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary.").

Additionally, "[i]n determining constitutional standing, 'it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (in assessing standing, the court may consider "the complaint and any other particularized allegations of fact in affidavits or in amendments to the complaint")); *see also Reeves v. Nago*, 535 F.Supp.3d 943, 950. In doing so, the court "'must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party'" when "'ruling on a motion to dismiss for want of standing.'" *Reeves*, 535 F.Supp.3d at 950 (quoting *Warth*, 422 U.S. at 501 and citing *Confederated Tribes & Bands of Yakama Nation v. Yakima Cnty.*, 963 F.3d 982, 989 (9th Cir. 2020)).

2. Motion to Dismiss Rule 12(b)(6)

Motions made under Rule 12(b)(6) test the legal sufficiency of the allegations underlying the claims made in a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). When assessing the sufficiency of a complaint, all well-pleaded factual allegations are taken as true and construed in the light most favorable to the nonmoving party, *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018), and all reasonable inferences are to be drawn in favor of that party as well. *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). To overcome a Rule 12(b)(6) motion, 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) (internal quotation marks omitted). "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." *Id.*

DISCUSSION

Defendant moves to dismiss all claims for lack of subject matter jurisdiction and because Plaintiffs' have failed to state plausible claims for relief. (Dkt. 35, 39.) Defendant's subject matter jurisdiction arguments are substantively the same as those raised in response to Plaintiffs' Motion for Preliminary Injunction. (Dkt. 32, 35, 39.) The Court considered and denied Defendant's subject matter jurisdiction assertions in its Order granting a preliminary injunction. (Dkt. 40.) For the reasons stated in the prior Order, Defendant's Motion to Dismiss under Rule 12(b)(1) will be denied.[5] The Court will discuss below Defendant's Motion to Dismiss under Rule 12(b)(6).

Plaintiffs' claims are brought under 42 U.S.C. Section 1983. (Dkt. 1.) To state a claim under Section 1983, Plaintiffs must plead sufficient facts to establish that "(1) the defendant[ ] acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Williams v. California*, 764 F.3d 1002, 1009 (9th Cir. 2014) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986)).

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[5] The Court's Order granting a preliminary injunction is expressly incorporated herein as it considered and discussed the same arguments raised by the parties related to subject matter jurisdiction, justiciability, and the first and fourth claims for relief. (Dkt. 40.)

1. Claims One and Four – Vagueness and First Amendment

Defendant moves to dismiss claims one and four alleging violations of the First and Fourteenth Amendments. These claims were the subject of the Court's Order granting the preliminary injunction. (Dkt. 40.) Defendant's arguments for dismissal under Rule 12(b)(6) contest the merits of the claims and are substantively the same as the arguments raised in response to Plaintiffs' request for an injunction – asserting Idaho Code Section 18-623 is not unconstitutionally vague and does not infringe on Plaintiffs' First Amendment Rights. (Dkt. 32, 35, 39.)

For the reasons discussed in the preliminary injunction decision, the Court finds Plaintiffs have stated plausible claims that Idaho Code Section 18-623 violates their constitutional rights under the First and Fourteenth Amendments. While the standards for a preliminary injunction and Rule 12(b)(6) differ, the reasons underlying the Court's preliminary injunction decision also establish that Plaintiffs' first and fourth claims are based on cognizable legal theories and are supported by sufficient facts. *See Zamani v. Carnes*, 491 F.3d 990, 996-97 (9th Cir. 2007); *accord Ashcroft*, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Namely, that terms used in Idaho Code Section 18-623 fail to provide fair notice of what conduct is proscribed and invite arbitrary enforcement; and its proscriptions infringe on Plaintiffs' constitutionally protected speech and expression.

Defendant's arguments challenging the merits of the claims are unavailing on this Motion. "A Rule 12(b)(6) motion tests the legal sufficiency of a claim." *Navarro*, 250 F.3d at 732. "The relevant inquiry ... is not whether the plaintiff has demonstrated a likelihood of success on the merits" but whether "there is no cognizable legal theory or absence of sufficient facts alleged to support a cognizable legal theory." *Zamani*, 491 F.3d at 996. The Court will briefly address two of Defendant's contentions.

Defendant asserts the first and fourth claims fail because accepting Plaintiffs' position would invalidate other criminal statutes that use the same terms. (Dkt. 35 at 5.) The fundamental flaw in Defendant's reasoning is that the other statutes he refers to involve transportation of individuals for a criminal purpose; namely, human and sex trafficking. Here, Plaintiffs desire and intent is to assist minors in procuring and obtaining lawful abortions. As Plaintiffs astutely point out: "abortion trafficking is not a thing," because abortion remains legal in states outside of Idaho. (Dkt. 34 at 7-8, and Dkt. 37 at 10-11.) That the abortion trafficking statute criminalizes lawful activity and, even more egregious, proscribes constitutionally protected activity, makes it wholly different from the other criminal statutes Defendant attempts to liken it to.

Defendant further argues that Idaho Code Section 18-623 is not vague because its terms are found in other criminal statutes – "recruiting, harboring, transporting." (Dkt. 39 at 2-3.) That the statute adopts the same words used in other criminal statutes does not mean the words are "clear" in all applications, nor does it automatically render the statute constitutional, as Defendant suggests. (Dkt. 39 at 2.) Just the opposite, the Complaint is

replete with allegations that are more than sufficient to plausibly claim the statute is unconstitutionally vague and violates Plaintiffs' constitutional rights protected by the First and Fourteenth Amendments. (Dkt. 1 at ¶¶ 60-68, 72, 82-101, 122-132.)

For these reasons, the Court finds Plaintiffs have stated plausible claims under the First and Fourteenth Amendments. Defendant's Motion to Dismiss as to the first and fourth claims in the Complaint will be denied.

2. Claim Two – Right to Interstate Travel

The Supreme Court has long-recognized the right to interstate travel. *United States v. Guest*, 383 U.S. 745, 757-58 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969).[6] The Ninth Circuit has further confirmed that "[t]he constitution guarantees the fundamental right to interstate travel." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citing *Shapiro*, 394 U.S. at 629). Thus, where a state law burdens the right to travel, strict scrutiny applies. *Attorney Gen. of N.Y. v. Soto-Lopez*,

[6] The right to go from one place to another, including the right to cross state borders while en route, was recognized in *Edwards v. California*, 314 U.S. 160 (1941), and was reaffirmed in *United States v. Guest*, 383 U.S. 745 (1966). *Saenz v. Roe*, 526 U.S. 489, 500-01 (1999) (discussing *Edwards* and *Guest*). In *Edwards*, the court invalidated a state law that impeded the free interstate passage of the indigent. *Id.* In *Guest*, the court "afforded protection to the 'right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia.'" *Id.* More recently, one member of the Supreme Court recognized the right to interstate travel applies in the very context presented here. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2309 (2022) (J. Kavanaugh concurring) (stating it is "not especially difficult" to conclude that a state may not bar its residents from traveling to another state to obtain an abortion, "based on the constitutional right to interstate travel.").

476 U.S. 898, 904-905 and n. 4 (1986) (citations omitted); *accord Saenz v. Roe*, 526 U.S. 489, 499 (1999).

The right to travel embraces at least three components: 1) the right to enter one state and leave another; 2) the right to be treated as a welcome visitor rather than an "unfriendly alien" when temporarily present in another state; and 3) the right to be treated equally to native-born citizens when becoming a permanent resident of a state. *Saenz*, 526 U.S. at 500. Only the first component is implicated in this lawsuit - the right to enter one state and leave another. (Dkt. 35 at 4, and Dkt. 37 at 6.)

"A state law implicates the right to travel when it actually deters such travel, …when impeding travel is its primary objective,… or when it uses any classification which serves to penalize the exercise of that right." *Soto-Lopez*, 476 U.S. at 902 (citations and marks omitted); *see also Matsuo v. United States*, 586 F.3d 1180, 1182 n. 2 (9th Cir. 2009) (same). Here, Defendant argues Idaho Code Section 18-623 does not deter or prevent Plaintiffs from entering or leaving the state and, therefore, the second claim for relief is not plausible as a matter of law. (Dkt. 35 at 4-5.) Plaintiffs maintain the statute's predominate purpose and effect impedes and deters interstate travel and, therefore, they have stated a plausible claim. (Dkt. 37 at 7-10.) Construing the factual allegations as true, the Court finds Plaintiffs have stated a plausible claim for relief.

The Complaint alleges Idaho Code Section 18-623 unreasonably burdens Plaintiffs' right to enter and leave a state; was enacted to restrict the travel of both Plaintiffs and the pregnant minors they serve; and deters travel, including travel by

Plaintiffs who seek to assist pregnant minors. (Dkt. 1 at ¶¶ 73-75, 79, 105-107.) Plaintiffs allege they fear prosecution under Idaho Code Section 18-623 for traveling with a pregnant minor from Idaho to another state, which has chilled their constitutionally protected conduct. (Dkt. 1 at ¶¶ 108-109.)

The legislative materials quoted in the Complaint are evidence going to show that Idaho Code Section 18-623 was enacted for the purpose of prohibiting and deterring interstate travel. (Dkt. 1 at ¶¶ 12, 13, 75.) The quoted statements in the materials initially represent that the statute is a "parents' rights bill," and insist it "does not impair interstate travel." (Dkt. 1 at ¶¶ 12, 13.)[7] However, the remainder of the statements quite clearly demonstrate that the statute's intended purpose is to impede interstate travel, stating: "this does have to do with abortion trafficking and that would be…taking a minor from Idaho and trafficking that minor to another state to receive an abortion," and "[HB 242] seeks only to prevent unemancipated minor girls from being taken across state lines for an abortion without the knowledge and consent of her parent or guardian." (Dkt. 1 at ¶¶ 12, 13.) More than bare conclusions or mere assertions, these statements establish a plausible claim that Idaho Code Section 18-623 was enacted for the purpose of impeding interstate travel. Defendant's arguments to the contrary may be relevant to a later motion, but do

[7] The state has a legitimate interest in protecting parent's rights and minors. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). That interest is not at issue on this Motion, however.

not defeat the plausibility of the claim stated in the Complaint for purposes of this Motion. (Dkt. 39 at 4) (arguing the statute is intended to protect parental rights).

Further, Plaintiffs have plausibly alleged that the statute facially impedes and deters their right to interstate travel by unreasonably burdening their ability to enter and leave the state, and by criminalizing travel to another state with a pregnant minor to procure or obtain lawful abortion services. (Dkt. 1 at ¶¶ 72, 79, 103-105, 107-109.) For example, Idaho Code Section 18-623 plainly prohibits adults from transporting a pregnant minor to procure an abortion or obtain an abortion inducing drug. Plaintiffs allege the statute prevents them from traveling within Idaho to reach a state where abortion is lawful and has deterred Plaintiffs' travel in to and out of Idaho with a pregnant minor. (Dkt. 1 at ¶¶ 73-74.) Plaintiffs further allege the vagueness of the statute has deterred and chilled them from traveling with minors to procure legal abortion services. (Dkt. 1 at ¶¶ 30, 42-44, 71-73, 108.) The Court finds these allegations state a plausible claim of infringement on Plaintiffs' right to interstate travel.

3. Claim Three – Right to Intrastate Travel

The third claim for relief alleges Idaho Code Section 18-623 unreasonably burdens, impermissibly restricts, and deters Plaintiffs' right to intrastate travel and freedom of movement. (Dkt. 1 at ¶¶ 115, 116, 117.) Plaintiffs state they have in the past assisted pregnant minors with obtaining lawful abortion care by driving the minor wherever they need to go, which necessarily requires traveling on public roads within

Idaho. (Dkt. 1 at ¶¶ 41, 42, 116-119.) Plaintiffs allege they desire to continue these activities but fear prosecution under the statute. (Dkt. 1 at ¶¶ 26, 115, 118-119.)

This claim appears to arise from the substantive Due Process Clause of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV, § 1.[8] To plead a substantive due process violation, a plaintiff must allege facts showing a government deprivation of a protected life, liberty, or property interest in a manner that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998). Here, Plaintiffs have not satisfied the threshold requirement of showing a liberty interest protected by the Constitution. *Id.; Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006).

Unlike the right to interstate travel, "neither the Supreme Court nor the Ninth Circuit has recognized a constitutional right to intrastate travel." *Mendoza v. Garrett*, 358 F.Supp.3d 1145, 1173 (D. Or. 2018) (citing *Nunez ex rel.*, 114 F.3d at 944 n.7; *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 255-56 (1974) (declining to decide whether the

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[8] The Complaint does not expressly identify the constitutional provision that Plaintiffs allege is the source for the right to intrastate travel claim. However, the allegations and federal caselaw cited in the Complaint in relation to the right to travel or freedom of movement claim are based on the Fourteenth Amendment's substantive due process clause. (Dkt. 1 at ¶¶ 69-81, 113-119.) Yet, some of the allegations supporting the claim appear to arise from other sources: right to access to public roads and highways, and the First Amendment. (Dkt. 1 at ¶¶ 115, 119.) To the extent the claim arises from a basis different from substantive due process, the Court finds the allegations in the Complaint lacks sufficient definiteness to plead a plausible claim for violation of a right to intrastate travel.

Constitution guarantees the fundamental right of intrastate travel)); *see also Potter v. City of Lacey*, 46 F.4th 787, 800 (9th Cir. 2022) (J. Bennett dissenting) (same).

Other Circuits are split on whether there is a federal constitutional right to intrastate travel. *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (finding a right to intrastate travel or the right to free movement under the Equal Protection Clause); *Johnson v. City of Cincinnati*, 310 F.3d 484, 493-98 (6th Cir. 2002) (holding the Constitution protects a right to travel locally); *Lutz v. City of York*, 899 F.2d 255, 267 (3d Cir. 1990) (holding the Due Process Clause protects the right to intrastate travel); *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1080-81 (10th Cir. 2020) (acknowledging other circuits have found a fundamental right to freedom of movement, but concluding the fundamental right to freedom of movement applies only to interstate travel); *Hammel v. Tri-County Metro. Transp. Dist. of Or.*, 955 F.Supp.2d 1205, 1210 (D. Or. 2013) (citing cases). District Courts in the Ninth Circuit have declined to recognize a right to intrastate travel. *Disbar Corp. v. Newsom*, 508 F.Supp.3d 747, 753 (E.D. Cal. 2020) (declining to find a fundamental right to travel within the community); *Hammel*, 955 F.Supp.2d at 1210; *Daly v. Harris*, 215 F.Supp.2d 1098, 1114 (D. Haw. 2002); *Klock v. Cain*, 813 F.Supp. 1430, 1433 (C.D. Cal. 1993); *Fruitts v. Union Cty.*, No. 2:14-cv-00309-SU, 2015 WL 5232722, at *6 (D. Or. Aug. 17, 2015) (finding no constitutional right to intrastate travel and that district courts in the Ninth Circuit have "refused to expand" the constitutional interest in interstate travel to include such a right under the due process clause).

Nevertheless, Plaintiffs ask this Court to recognize the right to intrastate travel or freedom of movement as a fundamental right, and to find that Idaho Code Section 18-623 unconstitutionally infringes upon that right. (Dkt. 1 at 23-24, n. 26.) The Court respectfully declines Plaintiffs' invitation.

Courts are cautioned to "exercise the utmost care" when asked to expand the substantive due process liberty protections. *Brittain*, 451 F.3d at 990-91; *Nunez*, 147 F.3d at 871 n. 4 (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.")); *Willis v. Town of Marshall, N.C.*, 426 F.3d 251, 265 (4th Cir. 2005) (declining to decide whether the rights to intrastate travel or accessing a public forum are fundamental rights, as courts "must be reluctant to expand the concept of substantive due process."). While the Court does not find Plaintiffs' intrastate travel claim is brought in bad faith or frivolous given the caselaw from other Circuits, there is simply no authority in this Circuit at this time upon which to recognize a liberty interest in the right to intrastate travel, let alone a fundamental right. For this reason, the Court will grant Defendant's Motion and will dismiss the third claim for relief. The dismissal will be without prejudice and subject to a motion for leave to amend if new authority or a different basis exists upon which the claim can be plausibly stated. Fed. R. Civ. P. 15(a)(2), 41(b).

The Court notes that the Complaint cites one Idaho case in support of the intrastate travel claim: *Adams v. City of Pocatello*, 416 P.2d 46, 48 (Idaho 1966). (Dkt. 1 at ¶¶ 76, 115.) There, the Idaho Supreme Court stated: "[t]he right to operate a motor vehicle upon the public streets and highways is not a mere privilege. It is a right or liberty, the enjoyment of which is protected by the guarantees of the federal and state constitutions." *Adams*, 416 P.2d at 48 (citing cases).

Where "a violation of state law causes the deprivation of a right protect by the United States Constitution, that violation may form the basis for a Section 1983 action." *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996). "However, Section 1983 limits a federal court's analysis to the deprivation of rights secured by the federal 'Constitution and laws.'" *Lovell*, 90 F.3d at 370 (quoting 42 U.S.C. § 1983). "To the extent that the violation of a state law amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution, Section 1983 offers no redress." *Id.* at 370-71. As discussed above, the Ninth Circuit and the Supreme Court do not presently recognize a right to intrastate travel protected by federal law. Thus, to the extent Plaintiffs' third claim for relief is based on state law, it is not redressable under Section 1983.

Further, Idaho courts have recognized the right found in *Adams* is subject to reasonable regulation, and have applied a rational basis standard of review. *Adams*, 416 P.2d at 48; *State v. Wilder*, 67 P.3d 839, 841 (Idaho Ct. App. 2003) (asking whether the driver's license requirement is a reasonable regulation in furtherance of the state's police

power); *Gordon v. State*, 697 P.2d 1192, 1193 (Idaho Ct. App. 1985) (finding vehicle registration requirement is reasonably related to a legitimate state interest). Thus, even if Idaho recognizes an intrastate right to travel, it is not a fundamental right subject to strict scrutiny as Plaintiffs seek here.

ORDER

THEREFORE IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (Dkt. 35) is **GRANTED IN PART AND DENIED IN PART**. The Motion is granted as to the third claim for relief, which is **DISMISSED WITHOUT PREJUDICE**. The Motion is denied as to the first, second, and fourth claims for relief.

DATED: November 8, 2023

Honorable Debora K. Grasham
United States Magistrate Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE, Plaintiffs, v. RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho, Defendant.	Case No. 1:23-cv-00323-DKG MEMORANDUM DECISION AND ORDER

INTRODUCTION

Before the Court is Plaintiffs' Motion for Temporary Restraining Order, or, in the alternative, a Preliminary Injunction. (Dkt. 12.) Plaintiffs seek to enjoin the Defendant from enforcing Idaho's abortion trafficking statute, Idaho Code Section 18-623. The Motion is fully briefed and at issue. On September 14, 2023, the Court heard oral argument and took the Motion under advisement.

Having carefully reviewed and considered the entire record and the parties' arguments, the Court will grant Plaintiff's Motion and will preliminarily enjoin Defendant from enforcing Idaho Code Section 18-623. For the reasons explained below, the Court finds Plaintiffs have named the proper Defendant, demonstrated both subject matter jurisdiction and Article III justiciability, and established the requirements for a preliminary injunction.[1]

BACKGROUND

In this lawsuit, Plaintiffs contest the constitutionality of Idaho's criminal abortion trafficking statute, Idaho Code Section 18-623. (Dkt. 1.)[2] The statute provides that: "[a]n adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion, as described in Section 18-604, Idaho Code, or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking." Idaho Code § 18-623(1). The offense is punishable by imprisonment for no less than two years and no more than five years. Idaho Code § 18-623(5). The statute allows for an affirmative defense where a parent or

[1] The parties have consented to proceed before a United States Magistrate Judge in this matter pursuant to 28 U.S.C. § 636(c)(1) and Local Civil Rule 72.1(a)(1). (Dkt. 26.)

[2] The statute is entitled "abortion trafficking" in the Idaho Code. *See* Idaho Code § 18-623. However, other descriptions have been used to refer to the statute, including: abortion travel ban, parental consent bill, and parents' rights bill. (Dkt. 1, 12, 32, 34.) In this Order, the statute will be referred to by the title used in Idaho Code Section 18-623.

guardian of the pregnant minor consented. Idaho Code § 18-623(2). It is not an affirmative defense "that the abortion provider or the abortion-inducing drug provider is located in another state." Idaho Code § 18-623(3). The statute was signed into law by Idaho Governor Brad Little on April 5, 2023, and went into effect May 5, 2023, due to its emergency clause.[3]

On July 11, 2023, Plaintiffs Lourdes Matsumoto, Northwest Abortion Access Fund, and Indigenous Idaho Alliance (collectively Plaintiffs)[4] filed this action under 42 U.S.C. Section 1983 against Defendant Raúl Labrador, in his official capacity as the Attorney General for the State of Idaho. (Dkt. 1.) Plaintiffs are an individual and two organizations who provide assistance to pregnant people, including minors, who are located both within and outside of Idaho, with accessing legal abortion care.

The Complaint raises four claims challenging Idaho Code Section 18-623. (Dkt. 1.) Claim one asserts the statute is unconstitutionally void for vagueness in violation of Plaintiffs' due process rights protected by the Fourteenth Amendment. Claim two asserts the statute infringes on the Plaintiffs' fundamental right to interstate travel. Claim three asserts the statute infringes on the Plaintiffs' fundamental right to intrastate travel. Claim four asserts the statute infringes on the Plaintiffs' First Amendment rights to freedom of

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[3] The statute was introduced first as House Bill 98, and later amended and reintroduced as House Bill 242. It was codified as Idaho Code Section 18-623 on July 1, 2023.

[4] When referring to all three of the named Plaintiffs collectively, the Court will use the term "Plaintiffs." When discussing a particular Plaintiff, the Court will use the party's name or initials.

speech, assembly, association, and petition. Plaintiffs seek a declaratory judgment concluding that, among other things, the abortion trafficking statute is unconstitutional, and to enjoin Defendant Labrador from enforcing the statute.

On July 24, 2023, Plaintiffs filed a Motion for Temporary Restraining Order or, in the alternative, a Preliminary Injunction. (Dkt. 12.) Plaintiffs' Motion is supported by the declaration of Plaintiffs' counsel and declarations of each of the Plaintiffs. (Dkt. 12-2, 12-7, 12-8, and 12-9.) Defendant was granted an extension of time to file a response, and Plaintiffs filed a timely reply. (Dkt. 27, 31, 34.) On July 31, 2023, the Attorney General for the State of Washington, on behalf of nineteen states and the District of Columbia (collectively Amici States), filed a Motion for Leave to submit an amici curiae brief in support of Plaintiffs' Motion. (Dkt. 20.) Neither party opposed the Amici States' Motion, and the Court granted the same on August 22, 2023. (Dkt. 30, 31.) Having taken Plaintiffs' Motion under advisement, the Court now finds as follows.

LEGAL STANDARD

Temporary restraining orders and preliminary injunctions generally serve the same purpose of "preserv[ing] the status quo ante litem pending a determination of the action on the merits." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980); Fed. R. Civ. P. 65. "A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

"A party seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) likely irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities weighs in favor of an injunction; and (4) that an injunction is in the public interest." *Hecox v. Little*, 479 F.Supp.3d 930, 971 (D. Idaho 2020) (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008)). When the government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). The Court may consider and rely upon declarations in deciding a motion for preliminary injunction. *Earth Island Institute v. Muldoon*, 630 F.Supp.3d 1312, 1335 n. 10 (E.D. Cal. 2022); *Brinton Bus. Ventures, Inc. v. Searle*, 248 F.Supp.3d 1029, 1032 (D. Or. 2017) ("[I]n deciding a motion for a preliminary injunction, the Court has broad discretion to consider all arguments and evidence, including hearsay and other inadmissible evidence, [and] declarations from interested parties[.]") (citing *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009); *Lane v. Dep't of Interior*, 523 F.3d 1128, 1140 (9th Cir. 2008)).[5]

DISCUSSION

Federal courts are courts of limited jurisdiction and may only hear cases as authorized by Article III of the United States Constitution and statutes enacted by

[5] Defendant has not submitted any counter-declarations that substantially controvert the factual allegations in the Complaint or contest the declarations submitted by Plaintiffs. Thus, the factual allegations in the Complaint and Plaintiffs' declarations may serve as the basis for a preliminary injunction. *See McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012).

Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, federal courts cannot consider claims for which they lack jurisdiction. *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992). The burden is on the party invoking the court's jurisdiction to prove that the case is properly in federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001).

Because subject matter jurisdiction and Article III justiciability are prerequisites to a federal court exercising its authority to adjudicate a case, the Court will first address those challenges raised by Defendant before turning to the Plaintiffs' request for injunctive relief. *Kokkonen*, 511 U.S. at 377; C*ity of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) ("[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy."); *Wang*, 975 F.2d at 1415 ("Federal courts have no power to consider claims for which they lack subject matter jurisdiction.").

1. Subject Matter Jurisdiction and Justiciability

Defendant contends Plaintiffs have not shown an injury in fact or threat of prosecution, which are fatal to subject matter jurisdiction under both the Eleventh Amendment and Article III. (Dkt. 32.) Plaintiffs maintain they have demonstrated the requirements for Article III jurisdiction and named the proper Defendant. (Dkt. 12, 34.)

A. Eleventh Amendment Sovereign Immunity Exception

The Eleventh Amendment bars federal jurisdiction over suits by individuals against a State and its instrumentalities, including official-capacity suits, absent the State

consenting to waive its sovereign immunity or Congress's abrogation. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984). "However, under *Ex parte Young*,…this immunity is subject to an exception for actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law so long as the state officer has some connection with enforcement of the act." *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) (marks and citations omitted); *see also Sullivan v. Ferguson*, 636 F.Supp.3d 1276, 1287 (W.D. Wash. 2022) ("*Ex parte Young* provides an exception to state sovereign immunity by permitting parties to sue state officials in their official capacity for prospective injunctive and declaratory relief from unconstitutional state laws so long as there is some connection between the officer and enforcement of the allegedly unconstitutional act.") (citing *Ex parte Young*, 209 U.S. 123, 157 (1908)).

"The 'connection' required under *Ex parte Young* demands merely that the implicated state official have a relevant role that goes beyond 'a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision.'" *Mecinas*, 30 F.4th at 903-04 (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004)). While the connection to the enforcement of the challenged act must be "fairly direct," the Ninth Circuit describes this as a "modest requirement." *Id.* In the context of a state attorney general, the requisite connection exists where the attorney general can "direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law or bring his own

prosecution." *Wasden*, 376 F.3d at 919. Concurrent legal authority to prosecute is sufficient to establish a connection with enforcement of the act being challenged. *Id.*

Under Idaho law, the Attorney General does not generally direct or exercise supervisory powers over county prosecutors, but may be appointed to assist in the prosecution of a criminal case at the request of the county prosecutor and upon the approval of the district court. Idaho Code § 31-2603. However, the statute challenged in this lawsuit expressly gives the Attorney General the authority, at his sole discretion, to prosecute a person for a criminal violation of the statute if the county prosecutor refuses to do so. Idaho Code § 18-623(4). That provision of the statute plainly vests the Attorney General with the authority to prosecute a person in the absence of the county prosecutor doing so, at his sole discretion. As such, the Attorney General possesses at least some concurrent legal authority to prosecute a person under Idaho Code Section 18-623. That, the Court finds, establishes Attorney General Labrador has "some connection with enforcement of the act" as required under *Ex parte Young*. *Mecinas*, 30 F.4th at 903; *Wasden*, 376 F.3d at 919-20. Accordingly, the Attorney General is not entitled to Eleventh Amendment immunity under *Ex parte Young*.

In his response brief, Defendant argues he "*has no authority* to threaten criminal prosecutions of the Abortion Trafficking Ban at this time." (Dkt. 32 at 26) (emphasis in original). During the hearing, defense counsel further argued that Attorney General Labrador has "disavowed" his authority to deputize himself, as the decision in *Wasden*

demands. (Dkt. 36 at 48-50.)[6] In support of his position, Defendant points to his April 27, 2023 opinion (AG Opinion 23-1), discussing his authority to prosecute violations of Idaho Code Sections 18-622 and 18-623. (Dkt. 32-2, Dec. Wilson, Ex. 1.)[7] Defendant argues his "definitive construction of the limits of his own powers supersedes the Ninth Circuit's interpretation of Idaho law in *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004)…." (Dkt. 32 at 26.)[8] The Court respectfully disagrees.

Attorney General Labrador's opinion does not "supersede" Ninth Circuit caselaw. "Supersede" is defined as "[t]o annul, make void, or repeal by taking the place of…." Black's Law Dictionary (11th ed. 2019). Ninth Circuit caselaw, however, can only be overturned or superseded by the Ninth Circuit itself, or by the United States Supreme Court. *See e.g., Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Circuit law…binds all courts within a particular circuit," and "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court."). Thus, while the Attorney General may

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[6] The transcript of the September 14, 2023 hearing is filed at Docket Number 36.

[7] Idaho Code Section 18-622 makes it a crime for any person to perform or attempt to perform an abortion except in certain enumerated circumstances. The Attorney General is presently enjoined from enforcing Idaho Code Section 18-622. *Planned Parenthood Greater Northwest v. Labrador, et al.* (*Planned Parenthood GNW*), Case No. 1:23-cv-00142-BLW, 2023 WL 4864962 (D. Idaho July 31, 2023). That decision is currently on appeal.

[8] Attorney General Labrador has also argued the Ninth Circuit's decision in *Wasden* is "immaterial" and "inapplicable" to the sovereign immunity issue. *See* (Dkt. 32-2, AG Op. 23-1 at 4, n. 2); *Planned Parenthood GNW*, 2023 WL 4864962, at *8. For the reasons stated herein, the Court finds to the contrary.

disagree with Ninth Circuit caselaw, his opinion concerning his authority to prosecute under Idaho Code Section 18-622, let alone Idaho Code Section 18-623, does not "supersede" the Ninth Circuit's caselaw concerning waiver of sovereign immunity.

Nor is Attorney General Labrador the final arbiter of Idaho law. *Oregon Clinic, PC v. Fireman's Fund Insur. Co.*, 75 F.4th 1064, 1069 (9th Cir. 2023) (quoting *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021) ("When interpreting state law, [federal courts] are bound to follow the decisions of the state's highest court, and when the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises."); *Doe v. Wasden*, 558 F.Supp.3d 892, 906 (D. Idaho 2021) ("When determining whether a state statute is constitutional the court should defer to the state supreme court's interpretation of the statute. This is because a State's highest court is the final judicial arbiter of the meaning of state statutes.") (internal citations and marks omitted). Nevertheless, the Attorney General's opinion, while not final or binding on this Court, undoubtedly should be and will be considered in deciding the issues presented.

A careful review of AG Opinion 23-1 makes clear that Attorney General Labrador is not entitled to Eleventh Amendment immunity under *Ex parte Young*. The opinion was written in response to a request related to a different statute, Idaho Code Section 18-622, not Idaho Code Section 18-623.[9] In distinguishing the two statutes, the opinion expressly

[9] In *Planned Parenthood GNW*, the Court concluded that Attorney General Labrador was not entitled to Eleventh Amendment immunity under *Ex parte Young*. *Planned Parenthood GNW*, 2023 WL

recognizes that the Idaho Legislature has conferred prosecutorial authority to the Attorney General to prosecute violations of Idaho Code Section 18-623 if the county prosecuting attorney refuses to do so. (Dkt. 32-2, Dec. Wilson, Ex. 1.)

Defendant's briefing likewise recognizes the existence of the Attorney General's prosecutorial authority, albeit couched as a "limited legislative grant of prosecutorial authority." (Dkt. 32 at 27.) Further, during the hearing, defense counsel conceded that Attorney General Labrador has not disavowed his authority to prosecute should either circumstance provided for in the statute present itself. (Dkt. 36 at 53-54.) It is self-evident from AG Opinion 23-1, the plain language of the abortion trafficking statute, and Defendant's own arguments in this lawsuit, that the Attorney General does in fact possess the authority to prosecute violations of Idaho Code Section 18-623, under certain conditions. (Dkt. 32-2, Dec. Wilson, Ex. 1); Idaho Code § 18-623(4) ("The Idaho attorney general has the authority, at the attorney general's sole discretion, to prosecute a person for a criminal violation of this section 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."). It

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4864962, at *7-9 (discussing *Wasden*, 376 F.3d at 919). However, as Defendant notes, AG Op. 23-1 was not considered in *Planned Parenthood GNW* for reasons particular to that case, which are not present here. (Dkt. 32 at 27, n. 2); *Planned Parenthood of GNW*, Case No. 1:23-cv-00142-BLW, at Dkt. 114.

necessarily follows that the Attorney General can threaten to exercise that authority, which is the case here.[10]

Defendant maintains that he is without prosecutorial authority "at this time" because the two conditions required for the Attorney General to prosecute a violation of Idaho Code Section 18-623 – referral by a county prosecutor, or a specific legislative grant – are not currently present. (Dkt. 32 at 26-28.) As discussed above, the statute itself contains a legislative grant of prosecutorial authority to the Attorney General. That a county prosecutor has not referred or refused to prosecute a case "at this time," does not "limit" the Attorney General's authority to prosecute a person if either event transpires. Nor does it minimize the Attorney General's threat to do so, which is apparent based on his written Opinions and failure to disavow prosecution of Plaintiffs if the circumstances provided in the statute arise. (Dkt. 12-4, 12-5.) Indeed, defense counsel stated as much during the hearing. (Dkt. 36 at 53-54.)[11]

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[10] The threat of future prosecution is discussed more fully below as it relates to Article III standing.

[11] It is that threat of enforcement and refusal by the Attorney General to disavow his authority to prosecute if the circumstances provided for in the statute arise, which has caused Plaintiffs' alleged injury – refraining from engaging in constitutionally protected speech and expression out of fear of prosecution. This belies Defendant's arguments that Plaintiffs have not shown an injury in fact and that standing did not exist at the time this litigation was filed. The threat of enforcement is discussed more fully below as it relates to standing.

For these reasons, the Court finds Attorney General Labrador is properly named as the Defendant in this lawsuit under *Ex parte Young* because he has a fairly direct connection to the enforcement of the challenged state law.

B. Article III Justiciability

Article III of the Constitution confines the jurisdiction of federal courts only to "cases" and "controversies" – known as "justiciability" – which, as relevant here, encompasses standing and ripeness.[12] The requirements of standing and ripeness are applied "less stringently in the context of First Amendment claims," such as Plaintiffs' claims here. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022).

i. Standing

Standing ensures a plaintiff has a "personal stake in the outcome of the controversy" by requiring that the plaintiff establish: 1) an injury in fact that is concrete and particularized, and actual or imminent; 2) the injury is fairly traceable to the challenged conduct of the defendant; and 3) the injury would likely be redressed by a favorable decision. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (An injury in fact is "an invasion

[12] Article III justiciability also includes considerations of mootness. "A case becomes moot—and therefore no longer a case or controversy for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (internal quotation marks omitted). Neither party presents arguments related to mootness. For completeness, the Court has reviewed the record and finds the issues presented are live disputes and the parties have a legally cognizable interest in the outcome.

of a legally protected interest…."). "Each element of standing 'must be supported with the manner and degree of evidence required at the successive stages of the litigation.'" *Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1209 (9th Cir. 2022) (quoting *Maya v. Centex Corp*., 658 F.3d 1060, 1068 (9th Cir. 2011)).

Here, Plaintiffs are an individual and two organizations. (Dkt. 1.) The standing inquiry is the same for individuals and organizations, directing the Court to evaluate the three aforementioned requirements to ensure a plaintiff has "'alleged such a personal stake in the outcome of the controversy as to warrant…invocation of federal-court jurisdiction.'" *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)). Where "at least one plaintiff has standing, the suit may proceed." *Biden v. Nebraska*, 143 S.Ct. 2355, 2365 (2023) (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 53 n. 2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.")); *see also Isaacson v. Mayes*, ___ F.4th ___, No. 23-15234, 2023 WL 7121091, at *3 n. 3 (9th Cir. Oct. 30, 2023).

a. Injury in Fact

Plaintiffs' claims raise pre-enforcement challenges to Idaho Code Section 18-623, arguing the statute is facially unconstitutional in violation of the First and Fourteenth Amendments. (Dkt. 1, 12.)[13]

"First Amendment challenges 'present unique standing considerations' because of the 'chilling effect of sweeping restrictions' on speech." *Porter v. Martinez*, 68 F.4th 429, 437 (9th Cir. 2023) (quoting *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) (quoting *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003))); *see also Tingley v. Ferguson*, 47 F.4th 1055, 1066-67 (9th Cir. 2022). To avoid this chilling effect, the "Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Italian Colors Rest.*, 878 F.3d at 1171 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)); *see also Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (recognizing "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief."). The inquiry tilts "'dramatically toward a finding of standing' when a plaintiff brings a pre-enforcement challenge," because the "chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Tingley*, 47 F.4th at 1066-67 (quoting

[13] Because Plaintiffs' motion for injunctive relief raises arguments only as to the First and Fourteenth Amendment claims, the Court will not discuss the claims involving the right to travel in deciding Plaintiffs' Motion.

Lopez v. Candaele, 630 F.3d 775, 781 (9th Cir. 2010); and *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013)).

In pre-enforcement challenges, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List*, 573 U.S. at 159 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (2014)). Under this relaxed standard, a plaintiff asserts a justiciable injury in fact affecting a constitutional interest by arguing the challenged law burdens their intended protected First Amendment activity. *Tingley*, 47 F.4th at 1067. The relaxed standard also applies to pre-enforcement vagueness challenges based on the Fourteenth Amendment where First Amendment interests are implicated. *Arce v. Douglas*, 793 F.3d 968, 987-88 (9th Cir. 2015); *Isaacson*, 2023 WL 7121091, at *6.

The mere existence of a proscriptive statute alone is insufficient to establish a justiciable claim. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). Rather, to establish standing, a plaintiff must demonstrate the existence of a concrete plan to engage in protected activities violating the challenged law, and a credible threat of enforcement. *Id*.

Here, Defendant argues Plaintiffs are without standing because they lack a cognizable and justiciable injury. (Dkt. 32.) Plaintiffs maintain they satisfy all of the requirements for standing and, as relevant to Defendant's contention, assert their injury is

the invasion of their constitutional rights under the First and Fourteenth Amendment. (Dkt. 12, 34.)

1. Intent to Engage in a course of conduct affecting a constitutional interest, but proscribed by the challenged statute

Plaintiffs allege that their past and desired future activities are affected with a constitutional interest proscribed by the abortion trafficking statute. Specifically, that Idaho Code Section 18-623 causes Plaintiffs to self-censor their speech and expressive activities due to fear of prosecution in violation of the First Amendment, and because the statute is unconstitutionally vague in violation of the Fourteenth Amendment.

The First Amendment to the Constitution of the United States provides that "Congress shall make no law... abridging the freedom of speech." U.S. CONST. AMEND. I. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). The United States Supreme Court recently reaffirmed that the First Amendment's protections encompass the right to freedom of speech and expression. *See e.g.*, *303 Creative LLC v. Elenis*, 143 S.Ct. 2298, 2311-12 (2023) (discussing cases recognizing the freedom to think, speak, and acts of expressive

association).[14] These principles are applicable to the states under the Fourteenth Amendment. *See Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975).

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV, § 1. A state violates due process by depriving an individual of their life, liberty, or property under a law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015).

Here, Plaintiffs' intended activities involve providing information, funding, assistance, and other forms of support to minors located in Idaho who seek to procure or obtain legal abortion services in other states, without ensuring the knowledge of or obtaining the consent of the minors' parents or guardians. (Dkt. 1 at ¶¶ 1-6, 40-57, 84-89,94-98, 124-126); (Dkt. 12-7, 12-8, 12-9). Defendant recognizes as much in his response brief. (Dkt. 32 at 9) (describing Plaintiffs' declarations as "clear" evidence "that Plaintiffs want to violate the specific intent requirement…."). Plaintiffs undertook these

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[14] Plaintiffs allege the statute infringes on their right of association. (Dkt. 1 at ¶ 126.) The right to associate is protected under the First Amendment. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). The Court need not resolve this aspect of the First Amendment claim at this time, because the rights to speech and expression found herein are sufficient to find standing.

activities in the past and desire to do so in the future based on their core beliefs, missions, and purposes of protecting the rights of individuals, including minors, in maintaining their personal bodily autonomy, seeking reproductive justice, and accessing all reproductive options. (Dkt. 12-7, 12-8, 12-9.)

Plaintiffs' activities aimed at providing information, support, and assistance about reproductive health options, including legal abortion services, to pregnant individuals constitute protected speech. *Bigelow v. Virginia*, 421 U.S. 809, 824-825 (1975) (holding an advertisement providing information about legal abortion services available in other states was constitutionally protected speech). Plaintiffs have demonstrated an intention to continue to speak, advocate, fundraise, and use their funds to communicate their core beliefs and missions of ensuring the availability of and support for individual's seeking reproductive options, including legal abortion services. Such activities are inherently protected speech. *See e.g.*, *Bigelow*, 421 U.S. at 824; *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc*., 487 U.S. 781, 789 (1988) ("[T]he solicitation of charitable contributions is protected speech[.]"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("[A] prohibition on corporate independent expenditures is thus a ban on speech.").

Further, the assistance and supportive activities Plaintiffs provide to pregnant minors clearly encompass expressive activity in furtherance of Plaintiffs' beliefs,

missions, and purposes.[15] "[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments'" where "[a]n intent to convey a particularized message was present, and…the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999). However, not all forms of conduct "can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (collecting early ballots is not expressive conduct). Context is determinative of whether others will likely understand the intended message conveyed through expressive conduct. *Edge v. City of Everett*, 929 F.3d 657, 669 (9th Cir. 2019).

Here, Plaintiffs' intended activities are protected expression that communicates their particularized messages of support and solidarity for individuals seeking legal

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[15] The Court finds instructive the Supreme Court's recent decision finding a plaintiff's anticipated expressive acts of designing wedding websites consistent with her beliefs were "pure speech" protected by the First Amendment sufficient to confer standing in the First Amendment pre-enforcement context. *See 303 Creative*, 143 S.Ct. at 2312. There, the Supreme Court recognized the breadth of the First Amendment's protections, stating: "The framers designed the Free Speech Clause of the First Amendment to protect the 'freedom to think as you will and to speak as you think.'" *Id.* at 2310 (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 660-61 (2000)). And, that the "First Amendment protects an individual's right to speak his [or her] mind regardless of whether the government considers [their] speech sensible and well-intended or deeply 'misguided." *Id.* at 2312. While that case involved government compelled speech, which is not at issue in this litigation, these general principles still hold true here. Plaintiffs planned activities are speech and expressive activities intended to communicate their particular beliefs, purposes, and missions regarding bodily autonomy and reproductive rights and should be afforded the same broad First Amendment protections afforded the website designer in *303 Creative* sufficient to confer standing in the pre-enforcement context. (Dkt. 12-7, 12-8, 12-9.)

reproductive options, including abortion, through the exchange of information, assistance, funding, and other practical support. (Dkt. 1, 12-7, 12-8, 12-9.) A discussion of each Plaintiff follows.

a. Lourdes Matsumoto

The individually named Plaintiff, Lourdes Matsumoto, works as an attorney, advocate, and trusted resource for advocates and survivors of sexual and gender violence and abuse. (Dkt. 1 at ¶ 1 and Dkt. 12-7 at ¶¶ 10, 16, 22-24, 28.) In those roles, Matsumoto expresses her belief in bodily autonomy for all individuals and solidarity with abuse survivors through her words and actions. (Dkt. 1 at ¶¶ 1, 40, 43 and Dkt. 12-7 at ¶¶ 12, 16.) Matsumoto engages in expressive activities in her professional capacity when representing private clients; providing advice on how to legally and properly advise abuse survivors; speaking to and working with other advocates; and speaking at conferences and training seminars on topics related to domestic, sexual, and gender violence. (Dkt. 1 at ¶¶ 1, 43 and Dkt. 12-7.) Matsumoto would like to continue providing support and assistance to pregnant minors seeking to obtain an abortion, without the consent of the parents, in the form of communicating the existence of reproductive options counseling, transportation, and temporary shelter; and would further like to provide financial assistance to organizations that support pregnant minors seeking abortions as she has done in the past. (Dkt. 1 at ¶ 43 and Dkt. 12-7.) Matsumoto alleges she is unable to speak about legal abortion care or engage in her desired activities expressive of her personal beliefs and professional obligations because she is unsure about what activities would

violate Idaho Code Section 18-623, and because she fears an imminent threat of criminal prosecution. (Dkt. 1 at ¶¶ 1, 43, 95-98, 124-130 and Dkt. 12-7 at ¶¶ 47-50.) Further, Matsumoto alleges that but for the statute's lack of clarity and her fear of imminent prosecution, she would assist minors in traveling to other states to get a lawful abortion. (Dkt. 1 at ¶ 68 and Dkt. 12-7 at ¶¶ 47-50.) The Court finds Matsumoto has shown her intended activities affect a constitutional interest for purposes of Article III standing. *Tingley*, 47 F.4th at 1066-67.

b. Entity Plaintiffs

Each of the entity Plaintiffs, Northwest Abortion Access Fund (NWAAF) and Indigenous Idaho Alliance (IIA), engage in activities to assist pregnant individuals, including minors, with procuring and obtaining abortion services in furtherance of their beliefs and missions. (Dkt. 1 at ¶¶ 2-6, 44-56.) Notably, IIA and NWAAF describe their past methods for providing support and assistance to pregnant minors seeking abortion services, which did not include notification, knowledge, or the consent of the minors' parent or guardian. (Dkt. 1 at ¶¶ 2-6, 44-56 and Dkt. 12-8, 12-9.)

NWAAF is a non-profit independent abortion fund serving the Pacific Northwest. (Dkt. 1 at ¶ 44 and Dkt. 12-9 at ¶¶ 4, 7.) NWAAF provides emotional, financial, logistical, practical, and informational assistance to pregnant individuals considering abortion, including minors without the knowledge or consent of their parents. (Dkt. 12-9 at ¶¶ 4, 9, 13.) NWAAF's activities include providing information, travel funds, travel logistics and organization, and actually driving patients, to legal abortion providers. (Dkt.

12-9 at ¶¶ 6, 12, 14, 15.) NWAAF provides these services in support of and as part of its mission, commitment, and beliefs in reproductive justice, which recognizes and supports the human right to maintain personal bodily autonomy, to have children or not, and to parent children in safe and sustainable communities. (Dkt. 12-9 at ¶¶ 9, 10.) NWAAF provides these services as a way to communicate its mission to the community. (Dkt. 12-9 at ¶ 11.) NWAAF states that Idaho Code Section 18-623 "directly impacts the mission and work of NWAAF" (Dkt. 12-9 at ¶ 20.) NWAAF alleges it desires to continue these forms of assistance as it has in the past, but fears prosecution under Idaho Code Section 18-623. (Dkt. 1 at ¶¶ 3, 7, 68 and Dkt. 12-9.)

IIA is a non-profit organization working to pursue justice for victims of gender-based violence, ensuring individuals' rights to bodily autonomy, and promoting reproductive choice. (Dkt. 12-8.) In furtherance of its mission and purpose, IIA provides assistance to pregnant minors, with obtaining abortion services without obtaining the knowledge or consent of the minors' parents. IIA alleges it is unsure of what conduct the statute prohibits and that it would continue its activities assisting pregnant Idaho minors in obtaining legal abortions in states outside of Idaho, but is uncertain whether it would be prosecuted for such actions. (Dkt. 1 at ¶¶ 68, 95-98 and Dkt. 12-8.)

NWAAF and IIA allege the statute has and will continue to have a chilling impact on their ability to uphold their missions and may undermine their relationships with donors and members, and their ability to recruit and retain volunteers. (Dkt. 1 at ¶ 128 and Dkt. 12-8, 12-9.) Both entity Plaintiffs allege they receive charitable donations and

use their funds in furtherance of their missions for activities proscribed by the statute. (Dkt. 1 at ¶¶ 84, 86 and Dkt. 12-8, 12-9.) Both entities state their ability to engage in these activities in furtherance of their missions, as they have in the past, relies on the support of donors and volunteers. (Dkt. 12-8 at ¶ 45 and Dkt. 12-9 at ¶¶ 24, 28.)

c. Conclusion

The Court finds the Plaintiffs' intended activities are sufficiently imbued with elements of communication to fall within the First Amendment. Plaintiffs have demonstrated an intention to convey particularized messages through their actions – preservation and availability for all individuals to reproductive justice and bodily autonomy - and a great likelihood that their messages will be understand by others when considering the context in which Plaintiffs will perform their expressive activities. *Texas v. Johnson*, 491 U.S. at 404.

Matsumoto is well-known and regularly asked for advice and to speak on her beliefs about the importance of bodily autonomy and for providing assistance and solidarity for abuse survivors seeking reproductive options, including abortion. (Dkt. 1 at ¶¶ 1, 43-56.) NWAAF receives volunteer and financial support from donors based on the contributors' shared belief in the NWAAF's purpose and work ensuring that all individuals are able to access the full range of reproductive options, including abortion. (Dkt. 1 at ¶¶ 2-3, 44-52, 125-128.) IIA likewise has shown that to serve its mission, IIA affiliates with and recruits others to assist pregnant individuals, including minors, to access abortion care and to communicate its message that abuse survivors are not alone

and have support. (Dkt. 1 at ¶¶ 6, 40-41, 56, 125-128.) Importantly, the context of Plaintiffs' activities - speaking publicly, receiving donations intended to support their particularized missions, recruitment of others to work in furtherance of their beliefs, and using their funds to advance their missions - are indicative of expressive communication that conveys each of the Plaintiffs' intended messages. Plaintiffs have therefore shown that their intended activities are constitutionally protected expressive conduct as their particularized messages conveyed through their actions are understood by others.

While Idaho Code Section 18-623 does not overtly prohibit speech or expression, it plainly prevents Plaintiffs from engaging in their intended protected activities of communicating information, advocacy, support, assistance, funding, and association with minors located in Idaho who are seeking to procure or obtain legal abortion services. The statute's prohibition on procuring or obtaining abortion services for minors by "recruiting, harboring, or transporting" necessarily forbids, and has chilled, Plaintiffs from continuing to provide information, practical and emotional support, funding, and assistance to pregnant minors in Idaho who seek to obtain lawful abortion services as they have in the past and intend to do in the future but for the threat of prosecution by Defendant.

Moreover, the Court finds Plaintiffs' facial vagueness challenge further establishes a constitutional interest upon which Article III standing can be tested pre-enforcement. *Isaacson*, 2023 WL 7121091, at *6. As more fully explained below in the discussion of the likelihood of success, Idaho Code Section 18-623 presents serious due process

concerns. Where, as here, there is an imminent threat of future harm, Plaintiffs' liberty interests are implicated for purposes of Article III, because a violation of Idaho Code Section 18-623 could result in imprisonment. *Id.*

For these reasons, the Court finds Plaintiffs have clearly shown they intend to engage in a course of conduct affecting a constitutional interest proscribed by the statute. Namely, to assist pregnant minors in obtaining lawful abortion services by engaging in activities that could constitute "recruiting, harboring, or transporting," without requiring the knowledge or consent of the minors' parents or guardians. Plaintiffs activities are undertaken as an expression of their core beliefs, particularized messages, and purposes. The statute's proscriptions encompass the very expressive activities Plaintiffs have performed in the past and that they seek to continue in the future. Further, the statute fails to provide notice of the point at which Plaintiffs' intended activities violate the statute and allows for arbitrary enforcement. Consequently, Plaintiffs have refrained from engaging in their constitutionally protected activities due to fear of prosecution under Idaho Code Section 18-623, a violation of which could result in imprisonment. This undeniably establishes an injury in fact for standing purposes. *Susan B. Anthony List*, 573 U.S. at 162-63; *Tingley*, 47 F.4th at 1067 (Plaintiff need only demonstrate a threat of enforcement will cause him or her to self-censor.).

Defendant's contentions - that no constitutional interest is proscribed because the statute "affects conduct" not speech, and because the specific intent requirement satisfies constitutional scrutiny - are unavailing to defeat standing. (Dkt. 32 at 11-19); (Dkt. 36 at

35, 39-41, 56-57.) Idaho Code Section 18-623 clearly and substantially affects Plaintiffs' constitutionally protected speech and expressive activities.

Despite Defendant's assurances that Plaintiffs are free to talk about abortion and provide truthful information to minors about abortion services, nothing in the language of Idaho Code Section 18-623 limits its reach as Defendant contends. Indeed, defense counsel acknowledged during the hearing that "recruitment" in violation of Idaho Code Section 18-623 "could be through speech" and by "talk[ing] to people." (Dkt. 36 at 36) (stating recruitment could include speech where "you could also talk to people. Hey, I can get you an abortion. Let's go get you an abortion as well."). Further, defense counsel conceded during the hearing that some of Plaintiffs' intended expressive activities would violate the statute. (Dkt. 36 at 30-31, 36) (stating that transporting a minor to an abortion facility in another state and paying for an abortion with the intent to conceal it from the minor's parents would constitute procuring an abortion in violation of the statute). By Defendant's own admissions, the statute is not limited to conduct.

Defendant's contention that the statute's specific intent requirement limits any unconstitutional restriction on speech goes to the merits of Plaintiffs' claims, not Article III standing.[16] *See E. Bay Sanctuary Covenant*, 993 F.3d at 665 ("[A] plaintiff can have standing despite losing on the merits.") (citation omitted); *Maya v. Centex Corp.*, 658

[16] The merits of Plaintiffs' claims are addressed below, where the Court finds Plaintiffs have shown a substantial likelihood of success on their First Amendment claim.

F.3d 1060, 1068 (9th Cir. 2011) ("[T]he threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim. Rather, the jurisdictional question of standing precedes, and does not require, analysis of the merits.") (brackets and citations omitted)); *Cath. League for Religious & C.R. v. City & County of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc) ("Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true.").

For these reasons, the Court finds Plaintiffs have satisfied the first requirement for pre-enforcement standing by demonstrating they intend to engage in a course of conduct affected with a constitutional interest that is proscribed by the statute.

2. Credible Threat of Future Prosecution

The Court now turns to the second requirement for pre-enforcement standing – a credible threat of prosecution. To assess whether a claimed threat of prosecution is genuine enough to confer an Article III injury, the Ninth Circuit applies a three factor inquiry asking: "(1) whether the plaintiff has a 'concrete plan' to violate the law, (2) whether the enforcement authorities have 'communicated a specific warning or threat to initiate proceedings,' and (3) whether there is a 'history of past prosecution or enforcement.'" *Tingley*, 47 F.4th at 1066-67 (quoting *Thomas*, 220 F.3d at 1139).

Defendant challenges the credibility of the claimed threat of prosecution under the first and second *Thomas* factors: 1) whether Plaintiffs have a concrete plan to violate the law; and 2) whether there is a credible threat of prosecution. (Dkt. 32.)[17]

a. Concrete Plan to Violate the Law

First, relying on *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010), Defendant argues Plaintiffs' have not shown a sufficiently specific and particularized intention to violate Idaho Code Section 18-623, and therefore have not established an injury in fact. Defendant's reliance on *Lopez* is misplaced. In *Lopez*, the court stated pre-enforcement plaintiffs must show an intention to violate the challenged law by giving "some degree of concrete details" about future conduct. *Lopez*, 630 F.3d at 786-87. However, specific details of future plans are not required to establish a concrete plan to violate the law where plaintiff demonstrates having "already violated the law in the past" or describes "specific past instances" of having undertaken actions that would violate the law. *Tingley*, 47 F.4th at 1068 (plaintiffs do not need to specify when, who, where, or under what circumstances they intend to violate the law.). *Id.* Rather, in the First Amendment

[17] Although Defendant does not contest the third *Thomas* factor, the Court has considered the factor to ensure jurisdiction is appropriate. The history of enforcement carries "little weight" given the statute is newly enacted. *See Tingley*, 47 F.4th at 1068 ("The third factor, concerning the history of enforcement, carries 'little weight' when the challenged law is 'relatively new' and the record contains little information as to enforcement."). While it appears there have been no prosecutions in the short time since Idaho Code Section 18-623 was enacted, the minimal weight afforded to the third factor does not discredit the genuineness of the threat of enforcement found herein based on the other *Thomas* factors, which the Court finds sufficient for standing purposes.

context, a plaintiff need only show that a threat of potential enforcement caused them to self-censor. *Id.*

Here, Plaintiffs' declarations establish a concrete plan to violate Idaho Code Section 18-623. Plaintiff Matsumoto is an attorney and advocate who previously provided assistance to minors seeking abortion services in the form of information, support, advocacy, and other forms of assistance. (Dkt. 12-7 at ¶¶ 47, 50, 53.) Matsumoto provided this assistance unaware of whether the minor's parents or guardian knew about the abortions. Matsumoto desires to continue providing the same kind of assistance to pregnant minors in Idaho who seek abortion in the same ways she did before the enactment of Idaho Code Section 18-623. Further, Matsumoto states she would like to provide minors seeking reproductive options, including abortion, with counseling, transportation, temporary shelter, and practical financial and logistical assistance in the future. (Dkt. 12-7 at ¶¶ 48, 49, 53, 56.)

Plaintiff NWAAF provides emotional, financial, logistical, practical, and informational assistance to pregnant minors seeking abortion services in the form of information, travel funds, travel logistics and organization, driving patients to abortion providers, and food and lodging assistance. (Dkt. 12-9 at ¶¶ 4-6, 8, 12, 15, 17, 18.) These actions have been provided by NWAAF without requiring or obtaining the knowledge and consent of parents or guardians of the minors. (Dkt. 12-9 at ¶¶ 13, 19.) NWAAF desires to continue providing these services to pregnant minors without seeking or obtaining consent from any parent or guardian. (Dkt. 12-9 at ¶¶ 14, 21-23, 37, 40.)

Plaintiff IIA has provided pregnant minors with information about reproductive health care options, including abortion, and assisted with accessing abortion services. (Dkt. 12-8 at ¶¶ 37, 38.) IIA has coordinated transportation of pregnant minors to obtain lawful abortion care; provided financial assistance to pay for travel, meals, and medical care expenses incurred in the process of obtaining abortions where they are legal; and obtained and distributed abortion-inducing drugs to minors. (Dkt. 12-8 at ¶¶ 41, 43, 49, 52.) IIA provides these services without obtaining the consent or knowledge of the minor's parents or guardian. (Dkt. 12-8 at ¶¶ 39, 50, 53.) IIA seeks to continue providing these services without fear of imprisonment. (Dkt. 12-8 at ¶¶ 37, 40, 42, 58-59, 61.)

Plaintiffs' declarations detail their past activities providing assistance and support to pregnant minors seeking to obtain abortion services without requiring the consent or knowledge of the minors' parents or guardians, which would violate Idaho Code Section 18-623, and their desire to continue those activities but have not because of fear of prosecution. *Tingley*, 47 F.4th at 1067-68. This is sufficient for Article III standing. *Id.*

The Court is not required to speculate or guess as to the Plaintiffs' intended course of conduct or the content of their message. *Lopez*, 630 F.3d at 787. Their declarations makes clear that if it were legal to do so, Plaintiffs would engage in protected activities proscribed by Idaho Code Section 18-623. Namely, providing information, assistance, funding, transportation, housing, support, and the like to pregnant minors in Idaho seeking lawful abortion services without obtaining the consent of the parents or guardians. This establishes more than a mere generalized, hypothetical

intention to violate the law and is sufficient to demonstrate a concrete plan necessary for standing. *Thomas*, 220 F.3d at 1139. Plaintiffs have modified their speech and expressive activities by refraining from engaging in the specified actions which they have previously undertaken because of a credible threat of prosecution under Idaho Code Section 18-623. *Italian Colors Rest.*, 878 F.3d at 1174. Defendant's assertions to the contrary are unpersuasive and demand more than is required here to find a concrete plan to violate the law sufficient for Article III standing. *See Tingley*, 47 F.4th at 1067-68 (allegations of past work and expected future work sufficient to show a plan to violate the law).

That Plaintiffs have a concrete plan to violate the specific intent required under Idaho Code Section 18-623 is further evidenced by their vagueness claim. There, Plaintiffs again argue that they ceased their expressive speech and activities out of fear of prosecution because they do not know whether their past or intended future activities fall within the statute's prescription on "recruiting," which is undefined.[18] Plaintiffs further allege it is unknown what culpability attaches to communications or lack thereof with a pregnant minor's parents or guardians, what is required by the intent to conceal provision, and what is needed to invoke the statute's affirmative defense. (Dkt. 1 at ¶¶ 63-64, 97-98); (Dkt. 12 at 16); (Dkt. 34 at 8-10).

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[18] The statute prohibits "recruiting, harboring, and transporting." Plaintiffs argue all three terms, as well as other terms and aspects of the statute, are unconstitutionally vague and violate their First Amendment rights. For purposes of this motion, the Court will primarily discuss the argument's related to the term "recruiting," as it is the obvious and strongest support for finding Plaintiffs have standing and have shown a likelihood of success on the merits.

Based on the foregoing, the Court finds that the Complaint and Plaintiffs' Declarations establish Plaintiffs have a concrete and particularized intention to engage in activities proscribed by Idaho Code Section 18-623, including violating the specific intent element. *See e.g.*, (Dkt. 1 at ¶¶ 26-32, 47, 55, 63-64, 98); (Dkt. 12-7, 12-8, 12-9).

b. Threat to Initiate Proceedings

Next, Defendant argues Plaintiffs have not shown the Attorney General made a specific warning or threat to initiate prosecution proceedings under the statute. (Dkt. 32 at 25-28.)

In the pre-enforcement context, a plaintiff asserting a First Amendment claim "need only demonstrate that a threat of potential enforcement will cause him [or her] to self-sensor." *Tingley*, 47 F.4th at 1068 (quoting *Protectmarriage.com-YES on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014)). "[W]here a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury as long as it is based on an actual and well-founded fear that the challenged statute will be enforced." *Libertarian Party of L.A.*, 709 F.3d at 870 (quoting *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1001 (9th Cir. 2010)).

However, "[i]n the free speech context, such a fear of prosecution will only inure if the plaintiff's intended speech arguably falls within the statute's reach." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). A claim of future harm lacks credibility when the challenged statute, by its terms, does not apply to plaintiff, or

the enforcing authority has disavowed the applicability of the challenged law. *Lopez*, 630 F.3d at 788; *Barke v. Banks*, 25 F.4th 714, 719-20 (9th Cir. 2022). However, the government's failure to disavow enforcement of the law weighs in favor of standing. *Tingley*, 47 F.4th at 1068.

Here, Plaintiffs' intended activities fall within the reach of Idaho Code Section 18-623. By its terms, Idaho Code Section 18-623 criminalizes "recruiting, harboring, or transporting" a pregnant minor in Idaho for the purpose of procuring an abortion or an abortion-inducing drug. Those acts – "recruiting, harboring, or transporting" pregnant minors to obtain abortion services – plainly encompass the very speech and expressive activities which Plaintiffs have declared that they have engaged in in the past and, were it not for Idaho Code Section 18-623, would continue to engage in today and in the future, as expressive of their core beliefs and purposes in advocating for and supporting reproductive freedom. (Dkt. 12-7, 12-8, 12-9.) Thus, Plaintiffs' fear of prosecution is well-founded as their intended speech falls within the statute's reach.

Critically, Attorney General Labrador has not disavowed his authority to prosecute Plaintiffs under the statute if any county prosecutor refuses to do so, or refers a case. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (government's non-disavowal of future enforcement is a relevant factor in determining standing). Defense counsel expressly acknowledged during the hearing that Attorney General Labrador has not disavowed his authority to prosecute if a case is referred to his office. (Dkt. 36 at 53-54.)

Further evidence of a genuine threat to initiate prosecution is Attorney General Labrador's legal opinion dated March 13, 2023, which concludes: House Bill 242, later enacted as Idaho Code Section 18-623, is constitutional; a proper exercise of the State's broad police power; and enforceable in all respects. (Dkt. 12-5.) The opinion expressly recognizes the statute's provision "which authorizes the Attorney General to prosecute violations of Idaho Code section[]…18-623 if the local prosecuting attorney refuses to." (Dkt. 12-5 at 3 n. 2.)

Similarly, Attorney General Labrador has indicated his intent to enforce Idaho's criminal abortion ban where the abortion occurs in another state. In a now withdrawn letter dated March 27, 2023, Attorney General Labrador stated "Idaho law prohibits an Idaho medical provider from either referring a woman across state lines to access abortion services or prescribing abortion pills for the woman to pick up across state lines" as such actions violate Idaho Code Section 18-622. (Dkt. 12-4.) The March 27, 2023 letter was recently found to constitute a genuine threat of enforcement by Attorney General Labrador against medical providers for violations of Idaho Code Section 18-622 sufficient for Article III standing. *Planned Parenthood GNW*, 2023 WL 4864962. While the letter is not determinative of Article III standing for the parties and statute at issue in this lawsuit, the Attorney General's broad position concerning enforcement of Idaho's criminal abortion statutes is telling and lends support to the legitimacy of Plaintiffs' fear of being prosecuted by the Attorney General under Idaho Code Section 18-623.

Based on the foregoing, the Court finds Plaintiffs have established an injury in fact that is sufficiently concrete, particular, and imminent sufficient to establish Article III standing in this pre-enforcement context.

b. Causal Connection and Redressability

Turning to the remaining two elements of Article III standing – a fairly traceable causal connection and redressability – Defendant does not contest these elements independent from the injury in fact and Eleventh Amendment inquires, which are addressed elsewhere in this decision. Still, the Court has an independent obligation to ensure all of the requirements for the exercise of its jurisdiction exist. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

As to traceability, Plaintiffs' alleged injury - violation of their First and Fourteenth Amendment rights - stems from their legitimate fear of prosecution by Attorney General Labrador if they engage in their past and intended future activities of assisting Idaho minors with obtaining legal abortion services without the knowledge or consent of the parents or guardians.[19] Consequently, Plaintiffs have refrained from pursuing activities that involve their constitutionally protected freedoms of speech, expression, and association. Further, Plaintiffs claim they have self-censored their expressive activities

[19] For the reasons discussed herein, the Court finds Plaintiffs have establish Attorney General Labrador has the authority to prosecute under the statute, in certain circumstances, and that the threat of future enforcement by Attorney General Labrador is substantial.

because the statute is unconstitutionally vague such that it is unknown what is prohibited, and it allows for and encourages arbitrary enforcement. This, the Court finds, establishes a substantial likelihood of future enforcement that is fairly traceable to Defendant. *California v. Texas*, 141 S.Ct. 2104, 2114 (2021) (The fairly traceable requirement for Article III standing to challenge the constitutionality of a statute, requires a plaintiff to assert an injury that is the result of the statute's actual or threatened enforcement, whether today or in the future, and in the absence of contemporary enforcement, plaintiffs must show that the likelihood of future enforcement is substantial) (quoting *Susan B. Anthony List*, 573 U.S. at 164).

As to redressability, Plaintiffs have demonstrated that they have suffered an injury which would be redressed by enjoining Attorney General Labrador from exercising his enforcement powers under Idaho Code Section 18-623. "To determine whether an injury is redressable, a court will consider the relationship between 'the judicial relief requested' and the 'injury'" suffered. *California v. Texas*, 141 S.Ct. at 2115 (quoting *Allen v. Wright*, 468 U.S. 737, 753, n. 19 (1984)). Here, Plaintiffs seek to enjoin Attorney General Labrador from enforcing Idaho Code Section 18-623, to the extent he has the authority to do so, and, thereby, alleviate Plaintiffs' genuine concerns of being prosecuted by Defendant for exercising their constitutionally protected rights. The Court finds the relief requested is sufficiently redressable for standing purposes.

Granting the requested relief would preclude Attorney General Labrador from enforcing Idaho Code Section 18-623, to the extent he has authority, and thus relieve a

discrete injury by ensuring Plaintiffs will not be prosecuted for abortion trafficking by Defendant if a county prosecutor refuses to do so or refers a case to the Attorney General. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury."). That there is a possibility of Plaintiffs being prosecuted by county prosecutors, does not nullify the redress Plaintiffs will receive by the Court enjoining Attorney General Labrador in this matter. The existence of other obstacles to complete relief does not foreclose standing, as plaintiffs are "not required to solve all roadblocks simultaneously and [are] entitled to tackle one roadblock at a time." *Ibrahim v. Dep't of Homeland Sec*., 669 F.3d 983, 993 (9th Cir. 2012).

For these reasons, the Court finds Plaintiffs meet all of the requirements for standing. Plaintiffs have demonstrated a causal connection between the harm alleged and the conduct complained of that is fairly traceable to Defendant, and that the relief they seek is redressable by a favorable decision.

c. Entity Standing

Plaintiffs NWAAF and IIA assert both associational and organizational standing. (Dkt. 1 at ¶¶ 3-6, and Dkt. 12 at 10.) The Court will address the particulars of these Plaintiffs' standing at this juncture, before concluding the discussion of standing. "Organizations can assert standing on behalf of their own members [associational

standing], or in their own right [organizational standing]." *E. Bay Sanctuary Covenant*, 993 F.3d at 662 (citations omitted).

Associational standing exists where a plaintiff establishes that: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021). Organizational standing exists where a plaintiff "establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose," or "by showing that [it] would have suffered some other injury had [it] not diverted resources to counteracting the problem." *Fellowship of Christian Athletes v. San Jose Unified School Dist. Bd. Of Ed.*, 82 F.4th 664, 682-83 (9th Cir. 2023) (citations omitted).

Here, both entities have identified a member with standing to sue in their own right. Named in the Complaint is IIA founder and organizer, Tai Simpson. (Dkt. 1 at ¶¶ 5, 6.) Simpson submitted a Declaration attesting that she and members of IIA have in the past provided assistance to pregnant minors to procure or obtain abortion services in furtherance of and as expression of their core beliefs, which align with those of IIA. (Dkt. 12-8.) Simpson states that she wants to keep providing this assistance, but fears prosecution. (Dkt. 12-8.) For its part, NWAAF submitted a declaration of Megan Kovacs, a board member. (Dkt. 12-9.) Kovacs states that she shares the mission and purpose of

NWAAF and that she wants to continue providing the same assistance and services to minors seeking to obtain abortions, but fears prosecution. (Dkt. 12-9 at ¶¶ 14, 21-23, 29.)

Like Plaintiff Matsumoto, Simpson and Kovacs have expressed an intention to engage in speech and expressive activities in furtherance of their particularized beliefs, which are consistent with their respective organizations, but are prohibited to do so by the challenged statute. Thus, Simpson and Kovacs would have individual standing to sue in their own right.

Further, the claims raised here are clearly germane to their organizations purposes and missions. IIA is a non-profit organization established in 2012, who's work includes pursuing justice for victims of gender-based violence, ensuring individual bodily autonomy, and promoting reproductive choice. (Dkt. 12-8.) IIA's mission activities include assisting pregnant individuals, including minors, with procuring and obtaining abortion services, without the knowledge or consent of parents. (Dkt. 1 at ¶¶ 6, 55, and Dkt. 12-8.) Similarly, NWAAF is a non-profit, independent abortion fund that provides emotional, financial, logistical, practical, and informational assistance to pregnant individuals, including minors, seeking abortion as an option. (Dkt. 1 at ¶¶ 2-3 and Dkt. 12-9 at ¶ 4.) NWAAF provides these services as part of its "commitment and support of reproductive justice, which recognizes and supports the human right to maintain personal bodily autonomy" and to decide whether to have or not have children. (Dkt. 12-9 at ¶ 9.) Both entities engage in these activities as an expression of their beliefs, missions, and purposes, but now fear prosecution if they continue to do so. (Dkt. 1 at ¶¶ 40-41, 56, 84-

86, and Dkt. 12-8, 12-9.) Neither the claims asserted nor the relief requested requires the participation of the individual members in the lawsuit. Accordingly, the Court finds Plaintiffs NWAAF and IIA have established associational standing.

ii. Ripeness

The next justiciability requirement of ripeness is "peculiarly a question of timing." *Thomas*, 220 F.3d at 1138 (quoting *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974)). "The 'basic rationale' of the ripeness requirement is 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022). Ripeness is separated into constitutional and prudential components. *Id.*; *Tingley*, 47 F.4th at 1070.

"[T]he constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry," addressed above. *Twitter*, 56 F.4th at 1173 (quoting *Cal. Pro-Life Council, Inc.*, 328 F.3d at 1094 n. 2); *see also Thomas*, 220 F.3d at 1138 (noting that "in many cases, ripeness coincides squarely with standing's injury in fact prong"). Based on the standing discussion above, the Court finds Plaintiffs have established the constitutional component for ripeness.

The prudential component considers "the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration." *Tingley*, 47 F.4th at 1070 (quoting *Thomas*, 220 F.3d at 114). Fitness of the issues is established when "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Id.* Hardship requires looking at whether the challenged law

"requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Id.* at 1071.

Defendant argues Plaintiffs have not shown a specific and credible threat of adverse action or, stated differently, "a genuine threat of imminent prosecution." (Dkt. 32 at 25, 28.) Further, Defendant contends this case is not fit for judicial review because any individuals with whom the Plaintiffs intend to engage are not 'identifiable' and the case presents no 'concrete factual scenario' to which the law applies." (Dkt. 32 at 28.) The Court finds otherwise.

As to fitness of the issues, the claims raised in this lawsuit are purely legal facial challenges to the constitutionality of Idaho Code Section 18-623. No further factual development is required and the challenged action is final because the claims involve alleged infringement on Plaintiffs' First and Fourteenth Amendment rights based on the threat of prosecution by Defendant under a statute that has been enacted into law. *Tingley*, 47 F.4th at 1070. Such contests are properly raised pre-enforcement. *Id.* at 1067.

The hardship requirement is easily met here. Plaintiffs immediately and significantly changed their activities upon the enactment of Idaho Code Section 18-623, most notably by refraining from specified constitutionally protected activities due to fear of prosecution. (Dkt. 12-7, 12-8, 12-9.) Each of the Plaintiffs have demonstrated a desire to resume their expressive actions without fear of being prosecuted. For these reasons, the Court finds Plaintiffs have demonstrated that they will suffer significant hardship without judicial consideration of their claims.

Based on the foregoing, the Court finds Plaintiffs' claims are ripe for adjudication.

2. Preliminary Injunction

Turning to the merits of the Motion for Preliminary Injunction, the Court finds Plaintiffs have demonstrated that: 1) they are likely to succeed on the merits of their First and Fourteenth Amendment claims; 2) they are likely to suffer irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in their favor; and 4) an injunction is in the public interest.

A. Likelihood of Success on the Merits

i. First Amendment Claim

Plaintiffs assert that Idaho Code Section 18-623 is facially overbroad in violation of the First Amendment. In this type of facial challenge, "a law may be invalidated 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) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6)). The first step in the overbreadth analysis is to construe the challenged statute. *Id.* at 474 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). Where a law regulates expression based on content, it is "'presumptively invalid,' and the Government bears the burden to rebut the presumption.'" *Id.* at 468 (2010) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000)).

Here, Plaintiffs claim Defendant's threatened enforcement of the abortion trafficking statute violates their First Amendment rights of speech and expression by preventing them from providing information, assistance, advocacy and monetary support to individuals seeking lawful reproductive options and has chilled Plaintiffs' ability to uphold their missions. (Dkt. 12 at 10-12.) In opposition, Defendant argues the statute does not prohibit speech or expression. Rather, Defendant contends Idaho Code Section 18-623 is narrowly tailored to prohibit only conduct that "intentionally causes a pregnant minor's abortion with an intent to conceal the abortion from the minor's parents" and therefore does not threaten Plaintiffs' First Amendment rights. (Dkt. 32 at 6.)

The Court finds Idaho Code Section 18-623 is a content-based regulation of protected speech and expression.[20] The statute plainly regulates expression based on content by restricting adults from engaging in activities that advocate, assist, and communicate information and support to pregnant minors about legal abortion options. Namely, the abortion trafficking statute forbids adults from "recruiting, harboring, or transporting" a pregnant minor to "procure" an abortion or "obtain" abortion-inducing drugs – the very constitutionally protected activities that Plaintiffs have performed in the

[20] Even if the statute is viewed as content-neutral, Plaintiffs have demonstrated a likelihood of showing the statute fails the standard articulated in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), because Idaho Code Section 18-623 imposes more than an incidental restriction on Plaintiffs' constitutionally protected speech and expressive activities, and its restrictions are greater than necessary to further the state's interest. As discussed throughout this decision, the statute substantially affects Plaintiffs' First Amendment activities and is sweepingly overbroad.

past and intend to engage in in the future. (Dkt. 12-8, 12-8, 12-9.) In particular, the statute's restriction on "recruiting" squarely quashes Plaintiffs' speech and expression about abortion as a viable and legal reproductive option. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (A speech regulation is content-based if it "target[s] speech based on its communicative content."). Indeed, that the statute targets certain speech and expression is evident from the fact that it excludes from its prohibitions "the providing of information regarding a health benefit plan." Idaho Code § 18-623(1). By its own terms, the statute expressly allows some speech about a health benefit plan, but forbids other speech about abortion options. A law restricting speech or expression about a particular topic or viewpoint is unmistakably content-based. *See National Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2378 (2018) (The Supreme Court's "precedents are deeply skeptical of laws that 'distinguish among different speakers, allowing speech by some but not others.'"); *Reed*, 576 U.S. at 163-64 (holding a speech regulation is content-based, and thus presumptively invalid, if it "draws distinctions based on the message a speaker conveys."). Because the statute is a content-based regulation of constitutionally protected expression, it is subject to strict scrutiny. *Stevens*, 559 U.S. at 468; *Holder*, 561 U.S. at 26-28 (applying strict scrutiny where the conduct triggering coverage under the statute consists of communicating a message).

Under strict scrutiny, a law must be narrowly tailored to serve a compelling state interest. *Reed*, 576 U.S. at 163. At this preliminary stage of the litigation, the Court finds Defendant has failed to show that Idaho Code Section 18-623 is narrowly tailored to

serve a compelling state interest. *Id.* at 155. The statute's broad restrictions on "procuring" or "obtaining" abortion services, and "recruiting, harboring, and transporting" encompass a wide swath of protected activities and are not narrowly tailored to serve the state's stated interests in protecting parental rights.[21]

Nothing in the statute defines or narrows the breadth of activities encompassed in the proscriptions on "recruiting, harboring, and transporting," or "procuring" and "obtaining" abortion services - including the specific intent provision that Defendant relies upon. (Dkt. 32 at 18.) To be sure, the statute contains several elements that must be met for a person to be convicted. However, the existence of other elements needed to complete the crime does not narrow or limit the spectrum of activities encompassed within the crime of abortion trafficking, particularly when the language of the statute is undefined and vague. To the extent the intent to conceal requirement provides any limitation on the statute's sweeping restrictions, it is not sufficiently narrow.[22] Rather, the statute's broad and undefined proscriptions on "recruiting, harboring, and transporting," and "procuring" or "obtaining" abortion services, easily capture Plaintiffs' protected speech and expressive activities within their reach.

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[21] The state has a legitimate interest in protecting parental rights, which is discussed more fully below.

[22] That the specific intent element fails to narrow the reach of the statute is further evidenced by the statute's vagueness, as discussed next.

The Court further finds Plaintiffs have demonstrated a colorable claim that their constitutionally protected speech and expressive activities have been infringed, or are threatened with infringement, by the abortion trafficking statute. The statute's broad restrictions on "recruiting, harboring, and transporting" cast a wide net that ensnares in its prohibitions Plaintiffs' speech and expressive activities that are plainly permissible and protected under the First Amendment. *Bigelow*, 421, U.S. at 824-25; *Texas v. Johnson*, 491 U.S. at 404. Most tellingly, many of Plaintiffs' speech and expressive activities fall within the prescription on "recruiting." For instance, Plaintiffs' constitutionally protected activities advocating for reproductive choice and bodily autonomy by providing emotional, symbolic, and practical support to assist minors with procuring or obtaining legal abortion services without the minor's parents being notified or having knowledge. This advocacy necessarily includes speech and expressive activities falling within the statute's reach. (Dkt. 36 at 36) (Defendant arguing that talking to people, offering rides, and paying for an abortion in another state all can constitute recruiting.). Similarly, the statute forbids "procur[ing]" or "obtain[ing]" an abortion or an abortion inducing drug for a pregnant minor. Both are activities Plaintiffs have engaged in in the past and want to continue in the future as an expression of their beliefs in bodily autonomy and reproductive choice, and their missions and messages communicating their support to those who seek reproductive options - such as survivors of abuse and minors. Plaintiffs have ceased and refrained from engaging in their protected expressive activities due to fear of being prosecuted for abortion trafficking.

This, the Court finds, demonstrates Plaintiffs are likely to establish that the statute is unconstitutionally overbroad in a substantial number of its applications by restricting Plaintiffs from engaging in expressive activities that are at the very core of their beliefs, missions, and messages – assisting pregnant minors in procuring and obtaining lawful abortion services without obtaining the knowledge or consent of the minors' parents or guardians. (Dkt. 12-7, 12-8, 12-9.) The burden on Plaintiffs' protected speech is disproportionate to any legitimate sweep of the statute. Without the ability to engage in their protected activities and to provide the services and support prohibited by Idaho Code Section 18-623, Plaintiffs are effectively muted from meaningfully communicating and expressing their messages and beliefs consistent with their missions and purposes.

For these reasons, the Court finds Plaintiffs have shown a likelihood of success on the merits of their First Amendment claim. Plaintiffs have demonstrated that their First Amendment rights have been infringed and that the number of impermissible unconstitutional applications swept up in the statute's proscriptions are substantial when viewed in relation to the statute's stated purpose of protecting parental rights. Further, the statute's proscriptions are not narrowly tailored to serve a compelling government interest.

ii. Fourteenth Amendment Claim

Plaintiffs also facially challenge Idaho Code Section 18-623 as unconstitutionally vague in violation of the Fourteenth Amendment. "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair

enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498 (1982). Relevant here, criminal laws are subject to the most exacting scrutiny because "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan v. De George*, 341 U.S. 223, 230 (1951). Likewise, vagueness concerns are heightened where a statute "threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates*, 455 U.S. at 499. "[W]hen a statute 'interferes with the right of free speech or of association, a more stringent vagueness test should apply.'" *Holder*, 561 U.S. at 18 (quoting *Village of Hoffman Estates*, 455 U.S. at 499).

A statute is unconstitutionally vague if it fails to provide "a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). "But, 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Williams*, 553 U.S. at 304 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). The vagueness doctrine is comprised of two theories: fair notice and arbitrary enforcement. *Tingley*, 47 F.4th at 1089. Plaintiffs argue both here.

As to the first, "[t]he operative question under the fair notice theory is whether a reasonable person would know what is prohibited by law." *Tingley*, 47 F.4th at 1089. "But where First Amendment freedoms are at stake, an even greater degree of specificity

and clarity of laws is required, and courts ask whether language is sufficiently murky that speakers will be compelled to steer too far clear of any forbidden areas." *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2019) (internal citations and marks omitted). "This enhanced standard protects against laws and regulations that might have the effect of chilling protected speech or expression by discouraging participation." *Id*. Additionally, "[w]here a statute imposes criminal sanctions, a more demanding standard of scrutiny applies" *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011) (internal quotation marks omitted). Both bases for enhanced scrutiny apply here.

As to the second, the vagueness doctrine's restriction on "arbitrary and discriminatory enforcement," demands that laws "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law that "relies on a subjective standard," or "lacks any ascertainable standard for inclusion and exclusion" is "constitutionally suspect." *Tingley*, 47 F.4th at 1090; *Edge*, 929 F.3d at 665.

Here, Idaho Code Section 18-623 fails to provide fair notice or ascertainable standard of what is and what is not abortion trafficking. The terms "recruiting, harboring, or transporting" are undefined, overbroad, and vague, making it impossible for a reasonable person to distinguish between permissible and impermissible activities. Indeed, the co-sponsor of the legislation recognized as much during testimony to the Idaho Senate State Affairs Committee. (Dkt. 12-6, Dec. Olson, Ex. 4) (Sen. Todd Lakey's March 27, 2023 Testimony on Idaho H.B. 242 that "recruiting, harboring, and

transporting, those are descriptive words, I guess the court would have to decide if the conduct constitutes one of those three things.").

Most notably, as relevant to Plaintiff's intended activities, there is no definition for what constitutes "recruiting." Defense counsel argued during the hearing that something more than merely providing information about abortion services is required to violate the statute, and listed examples of conduct that he believed could amount to recruiting – offering rides to abortion clinics, paying for an abortion, and encouraging or offering to help an individual get an abortion. (Dkt. 36 at 30, 36.) However, nothing in the statute itself defines "recruiting" or provides any objective measure of what constitutes "recruiting" as proscribed by the statute.

Moreover, the statute expressly excludes "providing information regarding a health benefit plan" from its prohibitions. Idaho Code Section 18-623(1). It is entirely unclear whether the exclusion means that other acts of "providing information" fall within the statute's proscriptions. And, there is no definition of what constitutes a "health benefit plan." The statute offers no clear guidance to individuals or those charged with its enforcement as to what actions violate the statute. For example, it is unknown whether the provision of information about abortion services to a minor, unrelated to a health benefit plan, is itself a violation of the statute assuming the other elements of the statute are met. The statute's indefinite language and inconsistent provisions belies defense counsel's assurances that Plaintiffs are free to speak and provide truthful information about abortion services without fear of prosecution.

Further, the intent to conceal element and affirmative defense are inconsistent and unconstitutionally vague. The lack of clarity in these provisions is best evidenced by Defendant's varied and conflating arguments concerning when culpability attaches. Defendant's briefing asserts the statute's specific intent requirement is violated where the minor's parents are not notified, informed, or have knowledge that their minor child is seeking to procure abortion services. (Dkt. 32 at 3, 9, 18, 23.) During the hearing, defense counsel argued that intent to conceal required a union of act and intent determined by looking at the totality of the circumstances – suggesting that intent to conceal requires something more than failure to notify the parents and that a parent's knowledge would defeat finding an intent to conceal. (Dkt. 36 at 32-35.) However, the intent to conceal an abortion turns on the mind of the individual charged, not notification or knowledge of the minor's parent. Further, parental notification or knowledge does not save an individual from being convicted under Idaho Code Section 18-623. The only affirmative defense to the statute requires that a parent consented to trafficking of the minor. Idaho Code § 18-623(2).

Accordingly, the Court finds Plaintiffs have shown a likelihood of success on their Fourteenth Amendment claim that the statute fails to provide a reasonable person with fair notice of what conduct is forbidden and what activities are lawful, and allows for arbitrary enforcement. *Johnson*, 576 U.S. at 595; *Tingley*, 47 F.4th at 1089.

B. Irreparable Harm

"Irreparable harm is relatively easy to establish in a First Amendment case." *CTIA – The Wireless Ass'n v. City of Berkley*, 928 F.3d 832, 845 (9th Cir. 2019). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury[.]" *Planned Parenthood GNW*, 2023 WL 4864962, at *22 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Where a plaintiff establishes "a colorable First Amendment claim, they have demonstrated that they likely will suffer irreparable harm." *American Beverage Assn. v. City and Cnty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (citing *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief.")). Indeed, where an alleged deprivation of any constitutional right is involved, courts will generally find irreparable injury. *See e.g. Campbell v. Miller*, 373 F.3d 834, 840 (7th Cir. 2004).

Plaintiffs have demonstrated that without injunctive relief, they have been and will continue to be chilled from providing minors in Idaho with information about lawful abortion services, referrals to legal abortion providers, and assistance on how and where to travel to obtain a lawful abortion. (Dkt. 12 at 17.) Plaintiffs' speech and expressive conduct are clearly implicated, if not targeted, by the statute such that Plaintiffs have ceased engaging in their expressive speech and activities protected under the First Amendment. This establishes irreparable harm. *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012) (where Plaintiffs' "First Amendment rights

[are] being chilled daily, the need for immediate injunctive relief without further delay is, in fact, a direct corollary of the matter's great importance.").

C. Balance of Equities and Public Interest

Where, as here, Plaintiffs have "raised serious First Amendment questions compels a finding that…the balance of hardships tip sharply in [Plaintiffs'] favor." *Am. Bev. Assn.*, 916 F.3d at 758 (quoting *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (internal quotation marks omitted)). Indeed, the Ninth Circuit has "'consistently recognized the significant public interest in upholding First Amendment principles.'" *California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468 (9th Cir. 2022) (quoting *Doe*, 772 F.3d at 583); *see also Am. Bev. Assn.*, 916 F.3d at 758. Moreover, Plaintiffs have also established a likelihood of showing the statute is unconstitutionally vague in violation of their Due Process rights. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quotation marks and citations omitted).

However, this case presents important countervailing interests that must be considered. Namely, protecting parent's rights and minors. *See e.g., Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979) (Recognizing three reasons that "the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of

children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (recognizing parents have a liberty interest "in the care, custody, and control of their children."); *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000) (recognizing a parental right to consent to the medical treatment of one's minor child.); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 951-952 (9th Cir. 1997) (recognizing parent's fundamental right to rear their children without undue interference). While these interests have long been recognized, they are not without limitation.

Courts have allowed restrictions and interventions on parental rights in certain situations. *Troxel*, 530 U.S. at 68 (parental rights may be limited where the parent is unfit or fails to provide adequate care for their child); *Parents for Privacy v. Barr*, 949 F.3d 1210, 12031-33 (9th Cir. 2020) (parental rights do not extend to educational policies); *Mueller v. Auker*, 576 F.3d 979, 995 (9th Cir. 2009) (holding state may compel medical treatment over parents' objection where there is reasonable cause to believe the child is in imminent danger); *Branch-Noto v. Sisolak*, 576 F.Supp.3d 790, 799 (D. Nev. 2021) (discussing cases concluding that parents do not have a fundamental right to direct public education policy or undermine public health efforts.).

Here, the interest asserted by Defendant in protecting parental rights, while important, cannot be advanced by enacting and enforcing an unconstitutional statute.

(Dkt. 32.)[23] The same is true of the State's interest in enforcing its own laws. There is simply no legitimate equitable or public interest in the enforcement of a statute that has been shown likely to violate the Constitution.

On balance, the Court finds the equities and public interest weigh in favor of granting preliminary injunctive relief because Plaintiffs have demonstrated a likelihood of success on the merits of their First and Fourteenth Amendment claims challenging the constitutionality of Idaho Code Section 18-623. *Padilla*, 953 F.3d at 1141 (merging the last two factors when the government is a party). In so concluding, the Court does not find the rights and interests asserted by Plaintiffs are more important or more sincere than any other right or interest. Rather, the determination here is based on the strong showing that the statute does not pass constitutional muster and, as such, cannot be upheld even if it was intended to promote and secure recognized and important parental rights and interests.

CONCLUSION

This lawsuit is not about the right to an abortion.[24] It is about much more. Namely, long-standing and well recognized fundamental rights of freedom of speech, expression,

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[23] Further, Idaho has statutes in place to protect these interests. *See e.g.*, Idaho Code §§ 16-1605, 18-1509, 18-1510, 18-4501, 18-4506, 32-1011. Defendant recognizes as much in his briefing. (Dkt. 32 at 2, 14.) That these interests receive protection from existing laws weighs in favor of granting the injunction.

[24] That Idaho Code Section 18-623 applies to abortion is not dispositive here. The Court's analysis, reasoning, and conclusions would be the same were the challenged statute a prohibition on

due process, and parental rights. These are not competing rights, nor are they at odds. No one right is more important than another. Indeed, these rights can co-exist in harmony as they have for decades with existing child protection laws and criminal laws protecting the important rights of parents, while still preserving the fundamental rights of all individuals to due process and freedom of expression. The State can, and Idaho does, criminalize certain conduct occurring in its own borders such as abortion, kidnapping, and human trafficking. What the state cannot do is craft a statute muzzling the speech and expressive activities of a particular viewpoint with which the state disagrees under the guise of parental rights, as Idaho Code Section 18-623 does here. Nor can the state enact a criminal law that is so unconstitutionally vague that ordinary individuals, including the proponents of the legislation themselves, are without fair notice of what conduct is proscribed and that subjects individuals to arbitrary enforcement.

For all of the reasons stated herein, the Court finds Plaintiffs have named the proper defendant, demonstrated both subject matter jurisdiction and Article III justiciability, and established the requirements for a preliminary injunction. Accordingly, the Court will grant Plaintiffs' motion and will preliminarily enjoin Attorney General Labrador from enforcing Idaho Code Section 18-623.

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obtaining or procuring different services or products legally available outside of Idaho – e.g., prenatal care, non-abortion obstetrical care, or gynecological care.

The Court will not require Plaintiffs to post a bond, as there appears no realistic likelihood of harm to Attorney General Labrador from issuance of the preliminary injunction. *See* Fed. R. Civ. P. 65(c) ("[t]he court may issue a preliminary injunction or temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."); *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) ("[T]he district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct.").

ORDER

NOW, THEREFORE IT IS HEREBY ORDERED that Plaintiffs' Motion for Preliminary Injunction (Dkt. 12) is **GRANTED**. Attorney General Raúl Labrador, in his official capacity as Attorney General of the State of Idaho, is **HEREBY ENJOINED** from enforcing Idaho Code Section 18-623, effective as of the date of this order and lasting until otherwise ordered by the Court.

DATED: November 8, 2023

Honorable Debora K. Grasham
United States Magistrate Judge

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

EXCERPTS OF RECORD VOLUME 2

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UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

SOUTHERN DIVISION

LOURDES MATSUMOTO, et al,	)	Case No. 1:23-CV-00323-DKG
	)	
Plaintiffs,	)	
	)	Boise, Idaho
vs.	)	September 14, 2023
	)	
RAUL LABRADOR, et al,	)	
	)	
Defendants.	)	
	)	
. . . . .	)	

VOLUME I OF I
MOTION HEARING
BEFORE THE HONORABLE DEBORA K. GRASHAM
UNITED STATES MAGISTRATE JUDGE

COURT RECORDER:	TRANSCRIPTION BY:
A. Tate U.S. District Court	TAMARA A. WEBER, CSR P.O. Box 387 Caldwell, Idaho 83606

Proceedings recorded by electronic recording. Transcript produced by transcription service.

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I N D E X

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(Proceedings begin.)

CLERK: All rise. The United States District Court for the District of Idaho is now in session. The Honorable Debora K. Grasham presiding.

COURT: Please be seated.

CLERK: The Court will now hear Case CIV23-233-S-DKG, Lourdes Matsumoto versus Raul Labrador, et al. Counsel, please state your appearances for the record beginning with counsel for the plaintiff.

MS. OLSON: Yes. Thank you. Good afternoon, Your Honor. Wendy Olson from Stole Rives, LLP, for the plaintiffs along with my co-counsel Wendy Heipt and Kelly O'Neill who are with the Lawyering Project and Jamila Johnson and Paige Suelzle -- sorry, they're for Legal Voice. Jamila Johnson and Paige Suelzle are with the Lawyering Project. Thank you, Your Honor.

COURT: Thank you.

MR. WILSON: Good afternoon, Your Honor. Lincoln Wilson with the Idaho Attorney General's Office and here with my Deputy Division Chief, James Craig, who will be presenting argument today.

COURT: All right. Well, good afternoon, counsel. And everybody, welcome. It's good to see you all here. I've been (inaudible) your briefs so it's good to see some of the faces that are behind these briefs.

All right. Counsel, as you know, this is the time set

for the hearing on plaintiffs' motion for temporary restraining order or in the alternative for a preliminary injunction. It's seeking to enjoin Defendant Labrador from enforcing Idaho Code Section 18-623.

Counsel, I can assure you that I have spent a considerable amount of time reviewing your briefs and your submissions and I am familiar with your arguments presented here today.

And so (inaudible) there's a lot to cover if we're going to cover everything. My hope is that we don't have to spend all day doing this and that we can cover what's most important or specifically I'm going to be asking you to address a couple of different issues that I see as particularly important for the Court's consideration as I move forward.

Now, I know I've told or I've informed you that I'd like to (inaudible) this argument to 30 minutes because I just fear that this case could go on and on and on and we could keep talking about it. Now, that said, I'm asking you questions. I'll be giving you as much time as you need to answer those questions but that is my hope to kind of get to the heart of the matter and some of the key issues that are going to be presented here today.

Now, as I said, the plaintiffs are here today contesting the constitutionality of Idaho's criminal abortion trafficking statute found in Idaho Code Section 18-623 which

went into effect on May 5, 2023.

Now, specifically the plaintiffs have asserted four claims for relief in support of that argument that that statute is unconstitutional. They claim that the statute is void for vagueness under the due process clause of the 14th Amendment, that this statute infringes on the fundamental right to both inter and intrastate travel and then finally that the statute violates the First Amendment and their right to freedom of speech, expression and/or association.

The plaintiffs have filed a motion for the TRO or, alternatively, for a preliminary injunction seeking to enjoin just Defendant Labrador from enforcing the statute.

Now, as I mentioned, I had (inaudible) the submissions in this case which are excellent and I want to commend both parties for their excellent briefing on these very important issues. I do want -- just in terms of the motion itself, the plaintiffs have not addressed the travel inter or intrastate arguments that they've asserted in their Complaint and rather have focused on both the First Amendment and their due process arguments.

Now, for purposes of today's hearing, you're free to present the arguments that you think are most important for the Court. There are a couple of key issues that should not be a surprise to you that the Court is specifically interested in hearing about from each of you.

The first relates to standing. Now, I see that the plaintiffs have not (inaudible) Idaho's 44 elected prosecutors in this case and I want the parties to specifically address the effect, if any, of that decision on standing. And whether the Court does issue a preliminary injunction, the Court's ability to enjoin enforcement of the statute by (inaudible) prosecutors. So standing is obviously something very essential to today's argument.

And (inaudible) to the First Amendment and due process arguments that have been presented, I want the parties to address and answer the question very simply put does the statute regulate speech, expression and association or is it just conduct? That seems to be central to both of your arguments. I'd like you to go into that and then specifically once you give me your positions what I don't think is going to be a surprise to this Court, I would like you to address the standard that applies to the Court's consideration of the issue given your stance on that. And then I'd also like the plaintiffs to talk about whether or not the challenge is statute as applied or facially. So that is as to the First Amendment.

As to the due process, the big argument there is whether or not the statute is vague. And so, again, I'd like the parties to specifically look at that. I may have specific questions or examples that highlight the Court's questions in that area and it will come up but I hope that we can keep this

not all day, this argument, even though I think they're very interesting arguments and we could be here but hopefully we can get right to the heart of the matter.

Ms. Olson, are you going to be arguing on behalf the plaintiffs?

MS. OLSON: I am. Thank you, Your Honor.

COURT: Very well. Please proceed.

MS. OLSON: May it please the Court, as the Court recognized, the plaintiffs here (inaudible).

COURT: Ms. Olson, hold on.

CLERK: I'm having difficulty with audio, Your Honor.

COURT: If you can remain just one second.

I'm sorry, Ms. Olson. Please proceed.

MS. OLSON: Thank you, Your Honor. And I think -- I don't know if I need to start completely over again or if I should start from where we left off.

COURT: You can go where -- I was following you. They may not have heard you but --

MS. OLSON: Okay. All right. Well, Your Honor, I wanted to take the opportunity to introduce the Court to the plaintiffs in this case. The plaintiffs are organizations with long histories of assisting pregnant persons seeking abortion care, including minors, and an individual with a long history of working with sexual violence survivors, including minors, and with advocates who assist pregnant minors.

The plaintiff Lourdes Matsumoto who is here in the courtroom is an attorney who works for a nonprofit that provides emergency assistance, counseling and resources to victims of domestic and sexual violence.

The Northwest Abortion Access Fund which has a representation here today provides emotional, financial, logistical, practical and informational assistance to pregnant persons who may need or who may choose to obtain an abortion. NWAAF is the only independent abortion fund in the Pacific Northwest and covers the largest geographic area of any abortion fund in the United States.

Its work includes booking and paying for bus tickets, plane tickets and ride shares and providing volunteers to drive patients to abortion appointments in states where abortion is legal.

The Indigency Idaho Alliance is an Idaho nonprofit organization that is centered around asserting the sovereignty of indigenous people and there are representatives from the Indigenous Idaho Alliance here today as well.

The Indigenous Idaho Alliance's work serves the five tribes whose traditional, usual and accustomed lands encompass territory within Idaho and whose traditional usual and accustom lands are often recognized as transecting and incorporating land within the United States/Canadian province -- provincial boundaries of Washington, Idaho, Montana, Nevada, Utah, Wyoming,

California, British Columbia and Alberta.

They have coordinated the travel of pregnant people, including minors, from locations across the region, including Idaho, to and across state lines to access abortion where it is lawful and they have provided a financial assistance. The defendant, as he made clear in his opposition brief, sees these people as criminals.

Your Honor, at the heart of plaintiffs' challenge is their desire to engage in lawful and constitutional conduct and to do so free from the threat of prosecution for engaging in that lawful and constitutional conduct.

Your Honor, a fundamental and significant difference between the parties and their understanding of this statute also includes the understanding of where and whether abortion is lawful reproductive health care and where it is a crime. The plaintiffs well understand that abortion has been made a crime in almost all instances by the State of Idaho. But it's also undisputed, Your Honor, that abortion is lawful in Washington and it is lawful in Oregon and it is lawful in the majority of states in the country. And it's also undisputed that in Washington and Oregon, minors, persons under the age of 18, can obtain an abortion without a parent's consent.

Now, the Court asked about standing in this case and of course standing has three components. Plaintiffs have to demonstrate that they have suffered an injury in fact that is

concrete and particularized and actual and imminent. With respect to that element of standing, we would submit the threat of prosecution is precisely that. And then the second part of that is the --

COURT: Ms. Olson, on that threat of prosecution, what I hear the defendant saying is we haven't threatened anybody. There's no specific threat out there and what I know they're going to say is that we're not the ones to do it. It's going to be the local prosecutors who are going to do it. And when and only if they decide not to prosecute, not for looking at the facts of the case but because they won't do it, then we'll have the ability to step in and prosecute then. That's the threat of prosecution but it's not an imminent threat. It's not something that anyone has been threatened with at this point in time.

MS. OLSON: Well, Your Honor, I would submit that the existence of the statute which has criminal penalties for activities that our clients, the plaintiffs, have traditionally engaged in where they're trying to engage in lawful conduct that the statute itself and the notion that the -- you know, frankly the defendant in this case was already given an opportunity to say I'm not going to prosecute under that statute even while the Court waited to hear this particular motion and he did not avail himself of that.

And then, Your Honor, I think the question I anticipated is the Court's real concern with standing is this

argument that they have made that the Attorney General is not the appropriate defendant in this case. And I would submit to Your Honor, first of all, that question has already been addressed by the Ninth Circuit in the Wasden case from 2004 and it was addressed by Judge Winmill I think just last month in the decision that he issued with respect to the Planned Parenthood versus Labrador case.

The fact that there is the ability for the defendant, the Attorney General, to prosecute under this statute is sufficient to find, first of all, the ex parte young exception applies but also that there's that threat of prosecution.

There was -- and this Attorney General has made statements that he would prosecute people who obtain abortions in other states and I would submit, Your Honor, that's enough to show that the threat is imminent and that this defendant is the right defendant.

And I think the other question that the Court posed at the outset was whether -- why aren't the other -- why aren't the 44 county prosecuting attorneys charged in this as well. Well, there's several reasons for that. One, that's a lot more defendants. That's a lot more expense in a lawsuit so that's 45 defendants instead of one. Second, Your Honor, the Attorney General is the only one who can prosecute this case in any part of the state. The individual district attorneys -- prosecuting attorneys can only prosecute in their counties.

And I think, Your Honor, given the nature of the work that plaintiffs do that they could be assisting a pregnant minor or a pregnant person in any part of the state and any county of the state, it would be difficult to predict where some event that might trigger investigation and prosecution because it's hard to know also what investigation and prosecution would be, it would be hard to predict where that conduct would occur.

But it's the Attorney General who can do this at his sole discretion so even if a county prosecutor said, "I don't think this set of facts violates the statute," the Attorney General could swoop in and say, "You know what? I have the authority under the statute to do this," and he certainly hasn't disavowed that at all, Your Honor.

And then just as a practical matter, Your Honor, I would anticipate that the 44 county prosecuting attorneys in the State of Idaho, if this Court were to enjoin enforcement of the statute as to Attorney General Labrador, they would also, for reasons it's unconstitutional, they being people who would follow the law would also not prosecute under it.

COURT: And that's kind of -- this is a much later question but let's just assume for that argument using that right there, if the Court did issue an injunction as requested, it's going to be just against the defendant, against Raul Labrador. It will not be against the 44 prosecutors. So what would prevent the prosecutors from enforcing this statute even

if the defendant is enjoined. And does that defeat basically the ability for this Court to redress any harm that the plaintiffs have alleged?

MS. OLSON: No, Your Honor, not at all. Again, for the reason that if this Court were to enjoin Attorney General Labrador, presumably the Court would enter an order that explains its reasoning and the grounds that we have asked the Court to do so on or that the statute is not constitutional and, again, I would contemplate that those 44 prosecutors who have followed that order from the federal court, otherwise it wouldn't take much back to get into court with that particular defendant so it's -- it is a remedy that addresses conduct that the Attorney General could engage in at any part of the state and I think it would have the effect of -- even though they wouldn't technically be enjoined, it would be exceptionally unlikely for someone else to prosecute and say, you know, it's really constitutional when I do it. It was just when Attorney General Labrador did it that it was unconstitutional.

COURT: No. And I follow that and I would hope that any prosecutor in the state would follow valid decisions out of any court but technical or not, I have no ability to enjoin any of the 44 prosecutors, correct?

MS. OLSON: Understood, yes.

COURT: Okay. Very well.

MS. OLSON: That's not the relief that we requested

here --

COURT: All right.

MS. OLSON: -- Your Honor.

COURT: Thank you.

MS. OLSON: All right. And so, Your Honor, that's the plaintiffs' position with respect to the questions that the Court posed on standing. I think for a more detailed legal analysis of why Attorney General Labrador is the correct defendant, it's in our reply brief at the very end and it's in detail in the Wasden case and in detail in Judge Winmill's decision in Planned Parenthood versus Labrador.

So, Your Honor, sort of to go back to that place that I was before I talked about standing, what the plaintiffs in this case seek to do when they're engaged in the activity they want to engage in is to provide assistance to pregnant people in Idaho, including minors, who want to obtain a lawful abortion in a place where it is lawful.

That assistance may take the form of providing information about where abortion is lawful and it's abundantly clear that providing information regarding lawful abortion is a First Amendment right. In Bigler versus Virginia, the Supreme Court overturned the conviction of a Virginia newspaper editor for publishing advertisements about lawful abortion care in New York. So that speech which is speech, not conduct, that speech is protected by the First Amendment and it's a core component of

what plaintiffs do. And it's also a core component of what 18-623 attempts to criminalize.

So, Your Honor, I would submit that, for example, recruiting. Recruiting is something that typically involves talking to other people about an activity. Here, the activity they would want to talk about is how to obtain lawful abortion.

When we talk about recruiting sort of generically, we might talk about recruiting, you know, for a position on a basketball team somewhere or a volleyball team somewhere. We might talk about you're trying to bring somebody into our law firm. That all involves direct speech, Your Honor. And that's one of the activities that is prohibited under 623. We submit that that's in violation of the First Amendment.

COURT: Ms. Olson, I understand that argument and that is a straight forward argument but I see the defendants muddy the water on that argument. They're saying, look, it's not just providing information. It's providing information with the intent to conceal an abortion from the parents or guardian of a pregnant unemancipated minor which results in either an abortion or obtaining the abortion-inducing drugs.

And so -- and they're saying, look, you can talk all you want but really when you do it with that specific intent, that's when we have the power to criminalize activities that happen in our state. How do you respond to that?

MS. OLSON: Two things, Your Honor. When they talk

about with the intent to conceal, we would submit that that too is vague under -- as it's written in the statute. And the way they argue about it in their brief illustrates that it's a vague term.

The phrase "intent to conceal," in and of itself, we might try to figure out what that means but what they say it means is that you didn't tell the parents. The parents don't know. This statute is really about the parents' need to know what their kid is doing.

There's two problems with that, Your Honor. So that's different from the intent to conceal. I mean knowledge about something is -- you're providing knowledge is different from intending to conceal. And even in one of the examples the defendants give in their brief, they talk about, well, you know, maybe a prosecutor would have an argument that there was the intent to conceal if you just didn't tell the parents.

But they didn't choose -- the legislature didn't choose those words in the statute. They didn't say anything about whether you have to tell or don't tell. They chose this phrase "intent to conceal." But what they're telling us it means, at least with respect to them prosecuting it, it means you didn't tell the other person. They don't know about it. And that's how they phrase their whole justification for this -- you know, their parental rights compelling interest is the parent has the right to know about the care of their kid.

The other reason, Your Honor, that you can't really -- that the speech is not relating to intent to conceal and is not relating to the end result is the end result is not criminal conduct. It's not one long crime. The end result is a lawful abortion in a state where it is lawful. So I guess they're criminalizing First Amendment speech because you didn't speak enough to tell the parents that they need to know what their kid is doing and then it's only part of the crime if -- that we call the crime if the kid then goes and has the -- the minor has the abortion.

So you can talk to people about something and you have a First Amendment right I guess but if that person then goes and gets an abortion, you really don't have a First Amendment right to begin with.

So I think -- so I think it's -- I understand that they're linking it up, Your Honor, but I don't think that's really the way it would work and I don't think you can really link speech with this, you know, vague specific intent and then lawful conduct at the back end. There is -- there is no doubt that this is lawful conduct at the back end. These are lawful abortions.

COURT: And on that point, is that how you distinguish the defendants' arguments that this is just like sex trafficking? And so all these terms that have been used for years and years and you yourself as U.S. Attorney enforced those

laws that that is the same. Are you saying, no, it's not because at the end, it's not a crime that is being committed but rather lawful conduct?

MS. OLSON: Absolutely, Your Honor. I spent, as the Court knows, a long time prosecuting cases. Some of that involved responsibility for sex trafficking statutes. There are drug trafficking statutes. There's harboring a fugitive. And the difference, Your Honor, is that in each of those instances, these words are connected with what at the back end is clearly other criminal conduct.

I mean you can have harboring a fugitive and when you're harboring a fugitive and that person has committed a crime, I mean you don't get to help people who commit crimes hide out. But it's all about criminal activity.

When you have drug trafficking, when the drugs are transported across state lines, it's the product that is illegal and is being trafficked. Here, what they're saying -- I think, you know, as we said in our brief, Your Honor, abortion trafficking isn't a thing because abortion is lawful in the places where these people are traveling to. It's not -- it's not inherently criminal conduct.

In Idaho, as you know the Supreme Court said they could, Idaho made it a crime. And in Washington and Oregon and the majority of states, it's just not. And I think that's the difference, Your Honor.

It's also, Your Honor, one of the problems when you take words from one criminal statute and just drop them into another criminal statute without thinking through the context and why they would make sense in one criminal statute and why they don't make sense in another criminal statute. Because, Your Honor, the words "harboring," "recruiting" and "transporting," that's not inherently criminal conduct.

I mean I'm going to drive to Portland, Oregon tomorrow and take one of my daughter's dogs with us and we're going to transport that dog across state lines. That transportation is, you know, I don't think -- that is not inherently criminal conduct, Your Honor. So it's not always that the terms that we think might be everyday language, harboring, recruiting, transporting, become ways to execute a crime.

The only ways they come to be executing a crime is if the thing at the back end is criminal and that's why when you have sex trafficking or human trafficking, that person is being moved, harbored, recruited into something that is illegal and is against their will. And you also have the human trafficking sometimes they'll end -- ends up in labor trafficking or bring somebody to work. You don't pay them. It's that kind of activity but, again, abortion trafficking just isn't a thing, Your Honor.

COURT: I understand that argument. Thank you, Ms. Olson. One of the questions I had is to ask -- and I'm going to

ask each of the parties -- is what is their position on what is the kind of speech that the statute prohibits? I understand the providing of information. That is -- that is pure speech as I -- just providing information. Truthful information. But the statute doesn't just say recruiting. It says harboring and transporting which involves some type of conduct. So even if the statute only regulates conduct, does it still implicate the First Amendment from your perspective?

MS. OLSON: It does, Your Honor. And for two reasons. One, harboring and transporting may both involve expressive conduct. It may also involve the First Amendment right to association which is -- it's right there in the First Amendment along with speech, same right. If an adult is driving a minor in Idaho and, you know, they're clearly taking them in their car, does that become transporting for purposes of 18-623? So there's that associational right. With respect to harboring, there would be an associational right.

If I have a pregnant minor in my home as a place for them to stay perhaps before they travel to another state to have a lawful abortion, does giving them that place to stay, associating with them there, that's a First Amendment right.

And then I think, Your Honor, there's the expressive conduct part of this and that's where the -- it's important to know who the plaintiffs are and why I provided the Court that description of the plaintiffs.

These are not people who once 18-623 was passed said, you know, let's chin up a group and see if we can thwart the State of Idaho. These are two organizations and an individual who have long been involved in trying to help people access lawful abortion including minors. And they're known for that and when they provide that assistance, they are expressing support for lawful abortion and access to lawful abortion.

COURT: I ask you what kind of speech it is because there's different standards that the courts apply --

MS. OLSON: Right.

COURT: -- depending on the speech that's at issue. So maybe you can address the standard that you think the Court should be applying in this instance.

MS. OLSON: Well, Your Honor, I think the Court should be applying strict scrutiny which would require then to show that they have a compelling government interest that is narrowly tailored to achieve that compelling government interest.

And the reason for that, Your Honor, is two-fold. Certainly, Your Honor, pure speech, that is always strict scrutiny and I think, Your Honor, probably the best discussion of it that I found that sort of summarizes it well is in Holder versus Humanitarian Law Project which we refer to in our brief. It's 561 US 1 and there are some discussion there. The statute was also challenged on vagueness and First Amendment grounds.

And there, there was a -- there was a speech part of

the whole thing and the Supreme Court said, look, people are talking. That's speech so it's just not this intermediate scrutiny that you get from O'Brien. And then later on when they're discussing, you know, what standard applies, they get to strict scrutiny. Now in that case, it's correct. The Court said, you know, the government's compelling interest in preventing terrorism, you know, justifies this particular infringement on speech. It's narrowly tailored. It gets at just those things because the speech is prohibited with groups that are known to be terrorist groups. So that's I think, Your Honor, why we look to strict scrutiny.

I would also say, Your Honor, the point I didn't touch on yet on what kind of First Amendment violation there is or infringement they were alleging, the statute also discriminates by viewpoint and content. So only -- only if an adult, you know, harbors or traffics -- excuse me, harbors or transports or recruits a pregnant minor and then they end up getting abortion care, we don't like that so we don't want you to express support for abortion because the state disagrees with that. But it doesn't prohibit any other sort of adult taking a pregnant minor and harboring, transporting or recruiting, whatever those things mean, across state lines to get prenatal care or to go to a birthing center that's, you know, nicer in Ontario, Oregon, than you have in Boise, Idaho or any other place. It's directly aimed at this support for this speech about abortion care in

places where it's lawful.

And so for that reason, Your Honor, we think because it's content based, viewpoint based, another reason the Court has to provide -- has to apply strict scrutiny review, Your Honor.

I think, Your Honor, hopefully we've covered the things that the Court listed out at the beginning but I want to just emphasize to the Court and it's in our brief -- you said you looked at our briefs -- that the terms in the statute are -- violate the First Amendment and they're vague in part -- well, in part because they were adopted sort of wholesale from some other statute where it made sense. And then again to just emphasize that here, we're talking about lawful conduct at the back end and the state statute should not be able to get at that kind of conduct by infringing on the First Amendment rights and creating vagueness.

Your Honor, with respect to the state's asserted state interest, there are a couple of things I want to touch on before I cede the floor to Mr. Craig and would possible, if possible, like to have some time for rebuttal, Your Honor.

The State's asserted compelling interest is that parents have a right to know about care for their children. I think that -- you know, that comes. That's one of the headings out of their brief. And also, Your Honor, I think that's an important interest and I think parents, there are case law --

there is case law that stands for the proposition that there are certain things that the state can't interfere in when a parent is trying to parent their child. And they rely on Troxel versus Granville but that case didn't hold that parental rights are unlimited. The (inaudible) there recognized that there are situations where intervention in a family is warranted. And courts really haven't extended that beyond visitation.

And again, Your Honor, the Court in Troxel was dealing with a statute passed by the state that infringed on a parent's right to provide care, custody and control of their child. So the concern with the statute was that it infringed on those parental rights. So it's those parental rights vis-a-vis state action. That case doesn't stand for the proposition that the state can pass statutes that give parents more rights than they might otherwise have.

And Your Honor, also, with respect to how this parental rights issue plays out in the State of Idaho, you know, as we argued in our brief, it's a selective rationale. The same legislature and the same session passed a statute that says, "Guess what, parents, you don't have a right to provide gender affirming care to your child." So that's -- apparently parents need to know whether their child is going to cross state borders to obtain lawful abortion care and they can maybe weigh in on that.

But if it's trans -- if it's gender affirming care for

minors, sorry, parents, we know better than you do. And there are plenty of places within Idaho Code that the legislature has said minors do have the right to make certain medical decisions for themselves. And we set those out on pages 13 and 14 of our brief. Minors 14 or older can consent to medical treatment for affordable, infectious, contagious or communicable diseases and the consent of the parent -- parents or legal guardian of the minor shall not be necessary. Minors 16 and older can request drug treatment medical services.

COURT: Ms. Olson, I understand those line of cases as minors have certain rights to do certain things even under Idaho law. But we don't have a plaintiff that is a minor here asserting to get those rights, to recognize those rights. I understand that's part of the argument about why the state's interest is maybe not as strong or in your view as valid as they would otherwise do.

But in this instance, we're not having -- we don't have a plaintiff that's saying, "Look, I'm 16 and I have a right to get this information. I have a right to receive lawful information, truthful information so that I can make choices about my own care." That's not the case we have.

MS. OLSON: It's not, Your Honor. The Court is both right on the law. There are absolutely -- minors absolutely have those rights particularly with respect to free speech but the plaintiffs here are not asserting any rights of the minors.

And the reason we bring this to the attention of the Court is just to simply say this notion of parental rights that -- and when they say that the parents have a right to know about care for their children, again, first of all, that's not what the statute says but it's also -- it's just not quite as complete and absolute as they paint it to the Court in their argument, Your Honor.

And so we would submit that because this asserted state interest is not -- is narrowly tailored to the right they assert which is to know if my kid's going to get an abortion, then it means it failed strict scrutiny analysis, Your Honor.

And so, Your Honor, with all due respect to the legislature and learned honored counsel on the other side, it's plaintiffs' position that Idaho Code 18-623 is not about the state's compelling interest in parents having a right to know about care for their children. It's about the state seeking to criminalize abortion care that is provided in states where it is lawful.

And it is about a statute that infringes on the rights of these plaintiffs to speak freely about that abortion care in another state, to provide resources to people who seek abortion care in another state, whose donors express their First Amendment rights by providing funding to these organizations to support lawful abortion.

And, Your Honor, because that infringes on plaintiffs'

First Amendment rights and because there is not a compelling state interest that is narrowly tailored in this case, we would ask the Court to enjoin its enforcement. And we'll rest on our briefs, Your Honor, for the other three portions of the standard for a preliminary injunction or TRO.

COURT: Thank you, Ms. Olson. All right. Mr. Craig.

MR. CRAIG: Thank you, Your Honor. It's a privilege to represent the State of Idaho, the Attorney General and appear in front of Your Honor, so thank you.

COURT: You're welcome.

MR. CRAIG: This case is not about abortion. This case is about parental rights and who has the authority to make decisions concerning the care, custody and control of minor children.

I think the question presented in this case is really quite simple. Does an uninterested third party have a constitutional right to procure a medical procedure for a minor with the intent to conceal that medical procedure from the minor's parents or guardian?

If we are talking about any other medical procedure other than abortion, we wouldn't be here to even talk about it because the answer would be so clear. Can an uninterested third party take a minor to procure a tonsillectomy for the minor with the intent to conceal that tonsillectomy from the minor's parents? Of course not. Can an uninterested third party take a

minor to one of the neighboring states where medical marijuana is legal to obtain medical marijuana for a minor child with the intent to conceal that provision or the obtaining of the medical marijuana for the child from the parents? Of course not. There's nothing about abortion that changes that context or that standard.

The plaintiffs, as we've just heard, are trying to make this case about abortion talking about how the State of Idaho is trying to criminalize abortion in other states and in their brief, they use the word "oppressive." They refer to Idaho's abortion laws as the oppressive abortion laws. They argue that this statute, Idaho Code 18-623, quote, criminalize conduct by adults who assist pregnant minors in receiving abortion care.

But the statute does no such thing. Under Idaho Code 18-623, minors can still get an abortion in another state. The plaintiffs can still help minors get an abortion in another state.

In fact, in some circumstances, minors can even get an abortion legally in the State of Idaho. What the plaintiffs cannot do is procure an abortion for a minor or obtain an abortion-inducing drug by recruiting, transporting or harboring a minor with the intent to conceal that abortion from the minor's parents.

COURT: One second, Mr. Craig. I want to make sure I'm following you here. You said that the plaintiffs could help

minors get an abortion in another state but what they can't do is -- basically cited the statute. I think what plaintiffs are arguing is trying to figure out where assistance turns into illegal or prohibited activity under 18-63 (sic) is not defined and is just telling a minor you can go to Oregon where abortion is provided legally and you can seek those services in Oregon. Is providing that information, does that amount to recruiting even if they have the intent to keep it from their parents?

MR. CRAIG: Well, that's where you can go through all the elements of the statute. One, did they procure an abortion for a minor child or did they obtain an abortion-inducing drug for the minor child? If they're simply talking about an abortion in another state, that it is legal in another state, are they procuring the abortion for that child? No, they're not. They're not obtaining the abortion for that child in another state if you're just giving information about what is legal in another state.

COURT: So okay. I'm trying to figure out where this is because you're saying just providing information -- truthful information about where minors may go to obtain an abortion lawfully, that doesn't fall within 18-623. Okay.

MR. CRAIG: That's correct.

COURT: So we got that as a standard. Just providing that information. So there must be something more. There's got to be more than just providing truthful information. There's a

clinic in Ontario, Oregon where you can seek legal abortion care. That's not enough. So what more? Now, again, let's just presume that whoever's assisting that minor has the intent to keep it from the parents. So what is the activity then that then triggers 18-623?

MR. CRAIG: So I will go through some hypotheticals that I think will meet that. But first, I think it's clear that when we're talking about vagueness standard that, you know, the Supreme Court has said we can always come up with hypotheticals to muddy the water and make it unclear and all that. That's not the standard for determining whether it's vague or not. But what we'll assume, that the plaintiffs intend to conceal an abortion from the minors. Now, that is bad --

COURT: From the parents.

MR. CRAIG: Or from the parents. Thank you. Now, that's bad enough but if they're intending to conceal abortion from the minor's parents and they, for example, transport the minor to an abortion facility in Oregon or Washington or any of the other places and pay for the abortion for example. I think that would clearly violate the statute. They're procuring the abortion by transporting the minor to the other state with the intent to conceal it from the minor's parents.

COURT: And then tell me about the intent to conceal. You heard Ms. Olson talk about -- and I saw in their briefing that they take issue with those words. The statute says, "With

the intent to conceal an abortion from the parents." So -- and I think the plaintiffs have raised a couple of questions about when you were describing that in your brief how it wasn't just intent to conceal. But is not telling the parents not enough? Is it just not seeking the parents to be involved in it and just kind of passively just not even asking the minor child, "Do your parents know about this? Do we need to --" just providing that without asking the question do your parents know, do we need to do that, is that intent to conceal?

MR. CRAIG: So Idaho law requires there to be a union of act and intent obviously for there to be a prosecution and a criminal conviction and Idaho statutes -- case law when you're talking about an intent, a specific intent, you look at the totality of the circumstances and so you'd have to evaluate the totality of the circumstances as to what their actions are.

Are they taking steps to affirmatively conceal it from the parents? You know, for example, not allowing the minor child to call the parents or, you know, transporting them immediately without giving them an opportunity to consult with their parents, some of those, that's what you would all consider as part of the totality of the circumstances.

COURT: So there's got to be an affirmative action. Something affirmative on the plaintiffs to not inform the parents. Not just I'm not going to tell them, I'm not going to ask about them but I'm going to affirmatively prevent that minor

or I'm not -- I'm affirmatively choosing not to inform the parents.

MR. CRAIG: Again, you have to look at all of the totality of the circumstances. I think that there could be situations -- and again, we're getting into the hypotheticals that the Supreme Court warned us against getting into the hypotheticals.

COURT: Well, vagueness -- I mean the whole point about vagueness is it's supposed to give people, you know, fair notice of what they're going to be held criminally accountable to. So if there's not a clear answer about what is intent to conceal or if you guys have a different interpretation of what that means, it's worth asking. It's what does that mean? I'm asking you what does that statute intent to conceal mean? What is required to hit that?

MR. CRAIG: Well, the intent to conceal, I mean I'm just going to repeat the statute because it's plain. Means an intent to conceal from the parents and so, again, you'd look at the totality of the circumstances. Did they try to inform the parents or not? Do they have a pattern in over and over and over again of purposely not informing the parents? Did this child have an opportunity to talk to the parents but the plaintiff took that away from the child? Again, you look at the totality of circumstances in all those things.

Now, to directly answer your question, is simply not

informing the parents by itself an intent to conceal, if that's all you have, probably not. But it's very unlikely that in any case that that's going to be all that you have.

COURT: Okay.

MR. CRAIG: So again, the plaintiffs are calling this an abortion travel ban and they're talking about Idaho Code 623 criminalizing conduct but, as we just talked about, it doesn't criminalize abortion. It doesn't criminalize the ability of a minor to get an abortion. It doesn't criminalize the ability of the plaintiffs to transport a minor somewhere to get an abortion.

And so they're asking the Court to rule on a statute that does not exist and they're asking the Court to declare unconstitutional a statute that the legislature has not passed because it does not prohibit a minor from getting an abortion. It does not prohibit the plaintiffs from helping a minor get an abortion.

COURT: Well, to an extent, right? So you just said it doesn't prohibit the plaintiffs from helping a minor get an abortion. Isn't exactly what this is supposed to be done?

MR. CRAIG: Only if they do it with the intent to conceal that abortion from the parents.

COURT: So if the parents know about it, it's okay?

MR. CRAIG: Yes, because that would defeat -- well, for two reasons. One, it would likely defeat the intent to conceal

from the parents and then, two, that's also an affirmative defense to the statute as well.

COURT: And I think you just said that the statute isn't making abortion illegal. I don't think that's what the plaintiffs have argued. I think what they're arguing is exactly the opposite. That you're criminalizing protected conduct that is related to First Amendment speech and associational rights. So let me ask you that question I started at the beginning, Mr. Craig.

MR. CRAIG: Sure.

COURT: What kind of speech is at issue in this case?

MR. CRAIG: There is no speech at issue in this case because the statute does not affect speech. It affects conduct. You look at the five elements of the statute. The adult must procure an abortion or obtain an abortion-inducing drug for a pregnant unemancipated minor. That's conduct. Procuring an abortion or obtaining an abortion inducing drug, that's conduct.

They then must do that by -- so the next part, recruiting, harboring or transporting is kind of a subcomponent of the procuring or obtaining abortion. They have to procure the abortion by recruiting, harboring or transporting the pregnant minor within the State of Idaho.

Again, recruiting, harboring and transporting is conduct. It's conduct that's used in statute after statute by the federal government, by the State of Idaho, by the state --

by the (inaudible) states, probably every state in the union uses that language. Recruit, harbor or transport.

COURT: Well, two questions about that, Mr. Craig. So recruiting, how do you recruit without speech?

MR. CRAIG: Well, there's a number of different ways but case law also makes it clear that conduct is not governed by First Amendment free speech standards just because you have to use speech to engage in that conduct. That doesn't --

COURT: I get that. I know those line of cases but I'm just trying to figure out how do you recruit someone without speech?

MR. CRAIG: Well, again, it could be through speech. It could be through your actions in terms of offering rides to people to abortion clinics. That could be recruiting. It could be paying for the abortion in other states. That could be recruiting as well. So there's a number of different ways that you can recruit without speech in addition to using your speech and not under the First Amendment speech because of the case, it says using speech for conduct is not speech. But you could also talk to people. Hey, I can get you an abortion. Let's go get you an abortion as well.

COURT: Mr. Craig, respond to the plaintiffs' argument that because of the particular plaintiffs at issue in here, it's not just speech. It's their associational rights. That they have this interest as reflected in their members to associate

with these individuals to provide support for them in those situations and to assist them in making those tough life decisions. How do you respond to that aspect of their speech argument?

MR. CRAIG: Well, under Idaho Code 18-623, they can still associate with anyone they want to. They can still associate with pregnant unemancipated minors. They can still associate with members of their organizations. They can still take pregnant unemancipated minors across state borders to get an abortion in another state. So it doesn't prohibit any of that association. What it prohibits -- and you're probably going to get sick of me saying this. It prohibits them taking those actions with an intent to conceal the abortion from the parents.

Now, state -- U.S. Supreme Court case law and Idaho Supreme Court case law is clear that the right of association does not extend to joining with others to deprive third parties of their rights. And in this case, as I stated in the beginning, this case is not about abortion. This case is about protecting the parental rights.

It is clear that in Idaho, in the U.S. Supreme Court and in the Ninth Circuit, the parents have a fundamental right to make decisions concerning the care, custody and control of their children. And in fact, America legal tradition has a presumption that the minor's parents are going to act in the

best interest of their child and that they're going to use the wisdom that they have for their life experience and this unique knowledge that they have as the child's parents to make a decision in the best interests of the children.

COURT: Mr. Craig, I think that is a very important interest for the state and for parents to be able to raise their children and to raise them the way that they think and to be involved with their families. Now, what the plaintiffs have said is unfortunately not every minor has the ideal situation and they're in places where they can't rely on their families.

The one question I wanted to push back on you, Mr. Craig, is you keep telling me that 1863 (sic) is not about abortion and while it doesn't prohibit abortion because it's already prohibited in this state, the only thing it relates to in terms of speech and conduct is if it results in an abortion.

It doesn't say parents are supposed to be provided with information any time a child is seeking any type of medical -- medical intervention whatsoever. It's specific to abortion. It doesn't -- and I agree with you. Parents have a right to know. But that's not what this -- this statute doesn't say parents have a right to know whenever their child is going to get any kind of medical procedure. It says parents have a right to know and we're singling out this one activity of abortion which is legal in a different state but through the actions that otherwise occur in Idaho to assist that minor in obtaining that

legal abortion.

So I understand that it's not prohibiting abortion but it's all about abortion. It's all about activity related to trying to prevent abortion in another state with a minor whose parents don't know.

MR. CRAIG: With the plaintiffs acting with an intent to conceal the abortion from the minors.

COURT: Right.

MR. CRAIG: So absolutely. Idaho Code 18-623 is related to the abortion procedure. Absolutely. This case is not about abortion though. This case is about parental rights. The parental right to know when their kids, when their children are undergoing a medical procedure, an abortion. The state doesn't believe in most cases that abortion is an appropriate medical procedure but that's what the plaintiffs are referring to this, as a medical procedure.

So this is -- the statute absolutely applies to abortion. This case is not about abortion though. This case is about parental rights.

Now, the plaintiffs in their argument conceded that the rights of parents in this case, the fundamental right of parents to control the care, custody and control of their children is an important interest. And so they have just conceded the first element of the O'Brien standard. You were asking what standard might apply. Well --

COURT: You're saying the O'Brien standard applies because you're saying it's conduct, not speech, pure speech, so we should apply the lesser standard.

MR. CRAIG: At most, the O'Brien standard should apply. I actually think that this is not affected by the First Amendment at all so you would apply rational basis. But at most, you would apply the O'Brien standard with the important interests. And the plaintiffs have conceded that that is an important interest. That the first element has been met in terms of that statute.

And so you simply have to look at, you know, the next statute. I'll even argue the strict scrutiny standard that the plaintiffs argue that it is narrowly tailored to further that interest and it's narrowly tailored because of the specific intent part of the statute.

The legislature could have written this as a general intent crime. They could have written it as you can't help a minor procuring abortion unless the parents consent to it or without the parents' consent. That would have been a general intent crime. They could have written it like that.

But instead, they narrowly tailored it. They narrowed the statute by adding in the specific intent to conceal the abortion from the minor's parents. That's a much tougher standard for a prosecutor to meet in terms of the general intent versus the specific intent.

And so they've narrowed it even further and so it meets that narrow tailoring to further the government's important interest of -- all right, I would even say compelling interest of furthering parental rights in this case.

And you know, clearly, the government has the authority to enforce these statutes, to impose the statutes. The U.S. Supreme Court has stated that when we're talking about the fundamental rights of some parents, state legislators have the ability to pass laws to help protect those rights. They have the ability to protect parental rights.

So the government has the authorized. It's an important government interest and, again, I'll use the higher standard of strict scrutiny and it's narrowly tailored to further that important interest.

So even under the O'Brien standard or the lenient standard that is the most the Court should apply, it meets that for the First Amendment free speech.

COURT: Mr. Craig, I have a couple -- I just am looking back at the statute and I made a note to myself that the statute starts off with it's an adult --

MR. CRAIG: Correct.

COURT: -- who does this. So if the minor's 17-year-old boyfriend or best friend that's under 18 decides to take that minor who's pregnant across state lines, provide harboring, transport, support, all those things and purposely

doesn't want to tell mom and dad, they're not affected by this statute.

MR. CRAIG: That's correct.

COURT: And then the other -- so I'm asking the beginning of the end of no. 1. So at the end, there's this sentence that I'm trying to get my head around. "As used in this subsection, the terms 'procure' and 'obtain' shall not include the providing of information regarding a health benefit plan." I'm not entirely sure what that means but what I'm concerned about is if the statute says that this does not -- providing of information for this purpose doesn't fall within the statute, does that mean that everything else in providing information does?

MR. CRAIG: I don't think so. I think by saying that one thing is prohibited, it doesn't mean everything or one thing is allowed that nothing else is allowed or prohibited. And I think that that's actually a case that's not presented in this situation. The plaintiffs aren't health care providers. They're not planning on providing information about a health care plan or anything like that. And so when you -- when the Court's evaluating this case and the Court's asking about at the beginning, is this a facial challenge or an as-applied challenge and I think this is a good example. This is an as-applied challenge.

Under the United States versus Salerno case, that

requires a facial challenge to show that there are no circumstances in which the law's constitutional and the plaintiffs haven't pled that. They've made no argument to that so this is clearly an as-applied challenge and as applied to their circumstances, that provision of the statute is inapplicable because they're not a health care plan. They're not talking about providing information about a health care plan.

COURT: I'm sorry. If I miss -- I'm probably mis-communicating this. I'm not suggesting that the plaintiffs are claiming that they're a health benefit plan. I'm trying to look at it from the vagueness perspective what all of this means and what does "procure" and what does "obtain" and what does "providing of information" mean? What is allowed? What isn't allowed? Those are the words of the statute.

MR. CRAIG: Correct.

COURT: This is the one place where the statute tells me what they think providing of information means or doesn't mean and is allowed. And it tells me here that it shall not include providing information regarding a health benefit plan. It specifically for whatever reason called that out.

MR. CRAIG: Correct.

COURT: So that's not included. But does that mean that any other information that's provided could constitute procure and obtain which is pure speech? Providing of

information. That's why I'm asking.

MR. CRAIG: Right, right.

COURT: I'm not claiming that the plaintiffs are a health benefit plan but I'm looking at the statute and trying to grapple with is it vague? Are the terms defined? What did the legislature mean?

MR. CRAIG: Yeah. So by itself, providing information about an abortion with nothing else going along with it, would not be procuring an abortion, no.

COURT: Okay. Very well.

MR. CRAIG: So the Court has also asked what is essentially the burden of proof in this case and that was one of the questions at the beginning is what -- what burden should be applied in this case and, you know, the standard for preliminary injunction is pretty clear. That the plaintiff has the burden -- the quote from the (Inaudible) vs. U.S. Immigration Customs Enforcement case is that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant by a clear showing carries the burden of persuasion. So they have this burden of showing by clear showing that they are entitled to it.

And when you look at what we have here, they haven't met that burden. They have not shown that this statute violates their First Amendment free speech rights or their free association rights. Even if this statute affects speech, we

have a fundamental right of the parents to control the care and custody of their children. And the plaintiffs concede that that is an important right and it is narrowly tailored to further that right.

Now, when we're talking about the balance of equities and public interest, I think that concession regarding the importance of the parents' fundamental rights is critical because the fundamental right of a parent is one of the oldest, if not the oldest of the fundamental rights recognized by the Supreme Court. It existed decades before Roe v. Wade was ever decided and it still stands today after Roe v. Wade has been overturned.

This is an extremely important fundamental right of a parent and when we're talking about the plaintiffs who want to interfere with the rights of a parent to know about the medical procedures of their kids, the balance of equities has to tip in favor of the parents. The parents are the ones who are presumed to know -- to act in the best interests of the parents. There's no presumption that the plaintiffs are going to act in the best interests of somebody else's children.

And in fact, the law -- any such presumption would not be viable. Plaintiffs don't know the situation of children, their medical history, their mental health history, their psychological history. All those things that a parent will know that a parent will be able to apply.

Now, the plaintiffs will say, well, sure. That's fine. But then some parents will actually abuse or neglect their kids and for that reason, they should be able to act as an entrusted adult. Well, Idaho statute already has a comprehensive scheme for dealing with those cases and that starts with a phone call to the Idaho Department of Health & Welfare or the local law enforcement to report their reasonable belief about the abuse or the neglect or the abandonment.

It doesn't involve the plaintiffs deciding whether a parent is fit and then taking it upon themselves to conceal information from the parents. That involves a trusted adult. The Department of Health & Welfare, the police, the law enforcement and, in appropriate circumstances, the courts through a Child Protection Act.

So the balance of equities in this case has to fall in favor of the parents and the parental rights in determining what is the best interests of their children.

So you'd asked at the beginning about standing so if the Court's okay, I'll move on to the standing argument.

COURT: That will be great. Thank you, sir.

MR. CRAIG: And the Court's specific question was whether -- how they should be affected that the plaintiffs did not name all 44 of the county prosecutors. And frankly, that's fatal to their case, fatal to their standing in this case. And that's simply because the Attorney General has no authority at

this time as it stands today to prosecute violations of this statute. In fact, the Attorney General has specifically disavowed his authority to prosecute without a referral from a prosecuting attorney. And that goes both to standing and the Attorney General's 11th Amendment immunity.

Now, the plaintiffs write in their reply brief, quote, defendant Raul Labrador acknowledges in his opposition that he intends to prosecute plaintiffs for exercising their First Amendment rights to assist pregnant Idaho minors obtain lawful abortion in neighboring states. That's the exact opposite of what the Attorney General wrote in his brief.

On page 26 of his brief, the Attorney General wrote, quote, the Attorney General has no authority to threaten criminal prosecutions on the abortion trafficking ban. Now, if that wasn't clear enough, on page 38, the Attorney General wrote that, quote, he lacks any prosecutorial authority under the abortion trafficking ban at this time.

COURT: And I see "at this time" which means the AG has authority in limited circumstances to do these prosecutions so he doesn't have no authority. He has some authority and isn't that enough under the Wasden case and more recently Judge Winmill of this court's decision saying that that's enough. And in Judge Winmill's case, you didn't even have the language that we have here in 623 that does give the Attorney General authority to prosecute when the local prosecutor declines to do

so. So how is that not enough under either Wasden or Judge Winmill's most recent decision?

MR. CRAIG: So the Wasden case uses language and Judge Winmill quoted the exact same language so his decision is based on that same language from Wasden that the Attorney General can essentially -- and this is the language, quote, deputize himself to prosecute cases. So the Ninth Circuit decision was based upon the assumption that the Attorney General can deputize himself or the governor can deputize him to go forward. The Attorney General has specifically disavowed that authority and said I have no authority to deputize myself. That's what the Attorney General has said. That the only way he can come in and prosecute these cases is with a referral from the prosecuting attorney or in those limited circumstances in 18-623(4) where a prosecuting attorney refuses to prosecute the violations without regard to the facts or circumstances.

So that's not just looking at a case and saying, I don't think this person has met the elements of the crime beyond a reasonable doubt so I'm not going to go forward. That's a prosecutor saying I'm never going to prosecute any violations of this statute under any circumstances.

The plaintiffs have not alleged that those circumstances are present here and there are none of those circumstances. No prosecutor has referred one of these cases to the Attorney General and there's no evidence that it has. And

so because of that, the Attorney General has no authority to deputize himself to prosecute these cases.

And so at the time when Wasden was decided, the Ninth Circuit believed that the Attorney General could deputize himself. That's the language right in that statute. The Attorney General has disavowed that authority and says I don't have the authority to deputize myself and therefore the Attorney General's not the proper defendant. He still enjoys the 11th Amendment immunity in this case and the plaintiffs lack standing in that situation.

COURT: So Mr. Craig, I appreciate the Attorney General's opinion on his authority. This Court is governed by the Ninth Circuit and the U.S. Supreme Court unless and until that authority is overruled. And so I appreciate that but I am bound to follow the law right now. And the law as I said is the Wasden case and most recently is Judge Winmill's. I realize that's up on appeal as well, sir.

MR. CRAIG: Correct.

COURT: And so of course I'm going to look at that but I can tell you what is binding on this Court is the Ninth Circuit and the U.S. Supreme Court decisions on that area.

MR. CRAIG: Right. And in the Ninth Circuit case in Wasden, you did not have the situation where the Attorney General specifically disavowed that authority so that's what distinguishes this from Wasden. I'm not saying you're not bound

by Wasden or not saying that you're not bound by the Ninth Circuit case. I'm saying that the situation is different now because the Attorney General has specifically disavowed that authority to deputize himself and that's what was critical to the holding in the Wasden case.

COURT: I understand. Thank you, Mr. Craig.

MR. CRAIG: So to conclude, I just want to make a final point about the plaintiffs' likelihood of success on the merits and I think this also goes to the balance of equities.

So in this case, the plaintiffs challenged only Idaho Code Section 18-623. But Idaho Code 18-623 is but one statute in a suite of numerous statutes that Idaho has passed that's designed to protect and uphold parental rights and make decisions concerning the care, custody and control of their children.

So if they have a constitutional right to violate the parental rights like they're arguing that they do in this case and if the Court issues the injunction that they're requesting against Idaho Code 623, then the Court needs to ask the question do they have a constitutional right to violate Idaho's other statutes relating to parental rights that they have not challenged but their actions also violate that they have talked about.

You know, in our brief in opposition to the plaintiffs' motion, we talked about child custody interference. Idaho Code

18-4506 and the plaintiffs acknowledge that in their reply brief and say, well, but the Attorney General didn't talk about the kidnapping statute. And the reason the Attorney General didn't talk about the kidnapping statute they speculated was because that required somebody to be held against their will.

Well, what the plaintiffs did not do is then, quote, the second subsection of the kidnapping statute, subsection 2, which makes it illegal to, quote, lead, take, entice away or detain a child under the age of 16 years with intent to keep or conceal it from its custodial parent, guardian or other person having lawful care or control thereof.

So if they have the right to act with an intent to conceal an abortion from the minor's parents in this case and to transport the minor with the intent to conceal that abortion, does that then call into question the constitutionality of the kidnapping statute?

We have Idaho Code Section 18-1510, providing shelter to a runaway child, which makes it illegal to, quote, knowingly and intentionally provide housing or other accommodations to a child 17 years of age or younger without -- without the authority of, A, the custodial parent or guardian of the child, B, the State of Idaho or a political subdivision thereof or, C, the one having legal custody of the child.

The plaintiffs have already mentioned in their briefing and in the Complaint and in their declarations an intent to

violate this. That they want to provide shelter to children going to get an abortion without the knowledge of the parents. That's a violation according to what they're saying in their Complaint of providing shelter to a runaway child, 18, section -- Section 18-1510. So if they have a constitutional right to violate 18-623, do they have a constitutional right to violate 18-1510.

And then we also have Idaho Code Section 16-1605, subsection 1, which requires people to make a report to law enforcement or the Department of Health & Welfare if they have a reason to believe that a child has been abused, neglected or abandoned.

Now, the plaintiffs say that many of the children that they help, they have reason to believe that they were subjected to abuse, neglect or abandonment but nowhere do we see in their complaint or in their declarations or in their memos that they have complied with their obligation to report that to the Department of Health & Welfare or to local law enforcement.

So if they have the right to violate 18-623 as they're talking about in this situation, do they have the right to withhold that information from the Department of Health & Welfare or from local law enforcement contrary to Idaho's Child Protection Act.

So the plaintiffs described actions in their case violate numerous Idaho statutes. Statutes which they have not

challenged in this case. So they're coming before this Court as a court of equity asking the Court to grant them equitable relief while indicating and providing information that they want to violate numerous Idaho statutes that are not before this Court.

This indicates that, one, they're not likely to succeed on the merits and, two, I think the Court then has to question whether they're coming to the Court with clean hands given their stated intention to violate all these other statutes.

If the Court grants the plaintiffs their request for relief, it calls into question the constitutionality of the run-away statute, Idaho Code 18-1510; the kidnapping statute, 18-4501; the child custody interference statute, 18-4506, and probably numerous other Idaho statutes.

COURT: Mr. Craig, you were coming down to the end here and I think we've hit the 30-minute mark but I've given both parties plenty of time because I want to make sure we get the questions answered.

MR. CRAIG: Correct. Thank you.

COURT: I do have one follow-up question that I forgot to ask. You're using the word "disavowed." I'm coming back here to something you talked about. You talk about the Attorney General has not disavowed his authority to self-deputize under 18-623. Has he disavowed his intent to prosecute under that statute?

MR. CRAIG: So he has disavowed his authority to prosecute at this time.

COURT: I understand that. That's not my question.

MR. CRAIG: Right. Oh, I understand that.

COURT: Yeah, yeah.

MR. CRAIG: So if a prosecutor appropriately refers the case to the Attorney General which we have no allegations that that's met in this case or if a prosecutor says that, you know, he or she's not going to prosecute the statute under any circumstances meeting that Idaho Code 623(4), then the Attorney General in those limited circumstances could have the authority to do it and he has not disavowed in those circumstances.

But the plaintiff has not pled that those circumstances are present in this case. So as we stand here today or -- and actually I think the Court has to look at at the time the Complaint was filed, as we stand at the time that the Complaint was filed, the Attorney General has no authority to prosecute cases under 18-623.

COURT: I understand that argument but he also hasn't disavowed at the time the Complaint was filed that he's not going to prosecute if he was referred that case? Correct?

MR. CRAIG: That's correct, yes.

COURT: All right. Anything further, Mr. Craig?

MR. CRAIG: Thank you.

COURT: Thank you, sir. Ms. Olson.

MS. OLSON: Thank you, Your Honor. And at the outset, I will apologize because it dawns on me there was one of your questions that you posed at the outset that I didn't answer and that was whether we were opposing the facial or as-applied challenge. And Your Honor, I think it's pretty clear ours is a facial challenge to the statute. We're alleging that the terms are vague and that it infringes on First Amendment rights. And there's no particular as-applied because there's not a specific circumstance yet where the statute has sought to be enforced. And it may be because the conduct is so chilled by the statute that no one has -- that it has not been identified publicly yet, Your Honor.

I want to sort of go in somewhat reverse order of Mr. Craig's comments. And I would say first, Your Honor, this opinion that the Attorney General wrote and I wrote the Court it's not binding on this Court and we said that in our reply but if he disavowed it with the stroke of a pen, he can also undisavow it with the stroke of a pen. That would mean -- that would make things solely within his discretion and I don't think that -- one, I don't think he has the ability to overrule the Ninth Circuit and, two, I think then it would be -- you know, he could change it just as he did when he changed it to this particular thing.

And then, Your Honor, with respect to all these other statutes he discussed and of course no one's challenging those

other statutes but I'll say one thing about those that is significantly different than the statute that plaintiffs challenge is that those are sort of general applicability statutes. And 18-623 is not. The only thing that 18-623 purports to criminalize is when the adult does these things that may be speech, expressive conduct, and are vague and then the person gets an abortion.

The rest of those statutes are, you know, we really don't want people who aren't the kids' parents taking care of them and there's some other parts of that but it's -- this is specific to abortion so it gets us back to that argument, Your Honor, about the viewpoint and content based.

And then, Your Honor, with respect to this argument about this is also -- it's narrow because of this intent to conceal element. Your Honor, what I would say to the Court about that is, Your Honor, first of all, what the defendant said in their brief is different from what Mr. Craig argued at the outset and then different what he ended on which was, well, you know, the parents need to know about this.

Those words truly are not in the statute but if to them intent to conceal means not informing the parent, then those are two different things and for sure that term is vague, Your Honor.

And he gave this description of, you know, if the person who -- the adult who recruits, harbors or transports

doesn't let the minor call their parents, well, that might be intent to conceal. Well, Your Honor, that probably also would be like kidnapping and we said in our brief that we're not -- we're not asserting that the kidnapping statute is no longer enforced. In fact, the kidnapping statute is there. The Attorney General is free to prosecute under that statute if he finds facts that violate that. But the conduct that we're talking about here and the free speech that we're talking about here and the association that we're talking about here is not kidnapping.

These are young people who come to people who express that message of support for abortion who are looking for that assistance and then the plaintiffs and others like them provide that assistance and they help those young people get lawful abortion care. And Idaho Code 18-623 takes direct aim at those people because of the message of support that they provide, because of the information that they provide, because of the funding that they get from their donors for that precise message.

Abortion is the only thing, the only subject matter of this statute. It's not (inaudible) neutral. It is vague and we would ask the Court to enjoin it. Thank you.

COURT: Thank you, counsel. This is -- it's clearly very important issues that have been presented. I appreciate the good argument of counsel.

Before we go, I do want to -- I want to address one thing while I have the parties here. I see that the defendant filed a motion to dismiss plaintiffs' Complaint earlier this week on September 12, 2023, and that motion raises many of the same issues that we have here but in greater detail. Namely subject matter jurisdiction of this Court, standing and sovereign immunity claims under the 11th Amendment among others.

I'd like to hear from the parties as to what their positions are with respect to whether or not the Court should take up both motions together at the same time or to go ahead with the preliminary injunction and then obviously go through the briefing schedule and address that at a later time.

So Ms. Olson, I know that this is taking probably longer than your clients would already like but I don't know if you've thought about that at all and what are the parties' positions on that.

MS. OLSON: Yes, Your Honor. May I stay?

COURT: Yes, of course.

MS. OLSON: Those are sort of tight quarters. Your Honor, our position is that the Court should hear -- it's heard and decide the motion that is ripe before it. The state decided to wait a substantial period of time before filing their motion to dismiss. They kept saying they were going to do it. That is a tactic, Your Honor, respectfully. That in fact does impose greater harm on the plaintiffs in this case. So we would ask

the Court to decide this motion first and then we will -- I think our response is due October 3 on the motion to dismiss?

COURT: Yes.

MS. OLSON: We will respond by that deadline and then they can file their reply and then the Court can decide whether it should dismiss the action or not and if the Court enjoins the enforcement of the statute and then decides from looking at the briefing on the motion to dismiss that in fact there is a reason to dismiss the lawsuit, I assume that the Court would just, you know, get rid of its injunction. But we would ask the Court to make a decision on the motion that's currently before the Court.

COURT: Thank you, Ms. Olson.

MR. WILSON: Your Honor, our position would be that since our motion to dismiss raises issues of the Court subject matter jurisdiction, the Court would be constitutionally obliged to decide that challenge to its jurisdiction before reaching the preliminary injunction motion in connection with it.

I'm flattered that Ms. Olson thinks that we are making tactical decisions. I wish we were but we're really just overwhelmed with about nine preliminary injunction motions right now and we actually filed one week before the deadline that we had based on the waiver of service that she gave us for our motion to dismiss. So we're actually ahead of schedule at this point.

COURT: All right. I appreciate that from the parties.

Mr. Wilson, I understand that, sir, and I understand the plaintiffs' argument. They are both valid arguments. The Court is always worried about issues of jurisdiction. Obviously I don't want to act outside the bounds of what I am otherwise set to do.

This motion is now ripe and so the Court will take this motion under advisement and issue a decision in due course.

Again, I truly want to thank counsel here today for some excellent argument and briefing. The Court again has spent an inordinate amount of time trying to get up to speed on these arguments and good counsel always make for good arguments and good cases and so we clearly have a good case here. So I want to thank everyone that's been involved in this in presenting the arguments here today.

So with that, the Court will be in recess. Thank you.

CLERK: All rise. The Court is adjourned.

(Proceedings concluded.)

I, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Tamara A. Weber _____ 9/29/23_____

Signature of Approved Transcriber Date

Tamara A. Weber _____

Typed or Printed Name

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

EXCERPTS OF RECORD VOLUME 3

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

MOTION TO STAY INJUNCTION PENDING APPEAL

Defendant Raúl Labrador hereby moves the Court to stay the preliminary injunction previously entered by it on November 8, 2023. *See* Dkt. 40; *see also* F.R.C.P. 62(d); Fed. R. App. P. 8(a)(1). This motion is supported by the memorandum in support of the motion, filed herewith.

DATED: November 27, 2023

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *James E. M. Craig*
JAMES E. M. CRAIG
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CERTIFICATE OF SERVICE

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

MEMORANDUM IN SUPPORT OF MOTION TO STAY INJUNCTION PENDING APPEAL

INTRODUCTION

On November 8, 2023, this Court issued two decisions. The first decision, Dkt. 40, granted the Plaintiffs' Motion for Preliminary Injunction and enjoined the Attorney General from enforcing Idaho Code § 18-623. The second decision, Dkt. 41, granted in part and denied in part the Attorney General's motion to dismiss. The Court dismissed the third claim of relief without prejudice but

denied the Attorney General's motion related to the remaining claims. Among other reasons, the Attorney General opposed the Motion for Preliminary Injunction, and asked the Court to grant his Motion to Dismiss, because the Eleventh Amendment to the U.S. Constitution grants the Attorney General immunity from suit. Dkt. 32 at 25; Dkt. 35-1 at 11. On November 22, 2022, the Attorney General filed a notice of appeal, appealing the Court's decision granting the preliminary injunction and appealing the Court's decision finding that the Attorney General is not immune from suit under the Eleventh Amendment. The appeal of the Court's decision regarding the Eleventh Amendment immunity issue divests this Court of jurisdiction to conduct further proceedings. *See Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Christian v. Commonwealth of the N. Mariana Islands*, No. 1:14-CV-00010, 2016 WL 406340, at *2 (D.N. Mar. Is. 2016) (holding that when a state "files its interlocutory appeal" of a decision denying Eleventh Amendment Immunity, "that action 'divests the district court of jurisdiction to proceed with trial.'" (quoting *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992)).

The Attorney General now requests that the Court stay its decision granting the Motion for Preliminary Injunction pending his appeal of the Court's decisions. Even though the appeal of the Eleventh Amendment immunity issue divests the Court of authority to conduct further proceedings, the Court retains the authority to rule on the Attorney General's Motion to Stay the Injunction Pending Appeal. F.R.C.P. 62(d).

ARGUMENT

In determining whether to grant a stay to an order granting a preliminary injunction, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4)

where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). When the government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken*, 556 U.S. at 435).

I. The Attorney General is likely to succeed on the merits on appeal

A. The Court erred in determining that the *Ex Parte Young* exception to Eleventh Amendment Immunity applies.

First, the Attorney General is likely to succeed on the merits of his Eleventh Amendment Immunity argument. The U.S. Supreme Court has made it clear that, under the Eleventh Amendment, the Attorney General is immune from suit before the federal courts, which are, of course, courts of limited jurisdiction, unless specific circumstances are present:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

Ex Parte Young, 209 U.S. 123, 157 (1908).

Thus, the U.S. Supreme Court warned against exactly what the Plaintiffs are doing in this case—suing the Attorney General "as a representative of the state [of Idaho], and thereby attempting to make the state a party." *Id.* To sue the State of Idaho, the Plaintiffs must sue the State of Idaho in the courts of the State of Idaho, not the federal court. *Cf. Planned Parenthood Great NW v. Idaho*, 171 Idaho 374, 400, 522 P.3d 1132, 1158 (Idaho 2023) ("It is neither procedurally improper nor unusual to name the State of Idaho as a party in a case seeking declaratory relief when a constitutional violation is alleged.").

To successfully defeat the Attorney General's claim of immunity, the Plaintiffs must show that the Attorney General's connection to the enforcement of the statute is "fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for

enforcing the challenged provision will not subject an official to suit." *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (citations omitted). In the instant case, the Attorney General's authority to enforce the law is not direct. Rather, the Attorney's General's authority to enforce the law is quite indirect, being dependent upon decisions made by independently elected government officials and situations over which he has no control, which are not currently present, which have not been pled by Plaintiffs, and which may never come to fruition.

The Attorney General has the authority to enforce Idaho Code § 18-623 under only two limited circumstances: 1) "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); or 2) a county prosecutor or Board of County Commissioners requests the assistance of the Attorney General *and* the Attorney General is appointed by the district court to assist with the prosecution, Idaho Code §§ 31-2603; 67-1401(7).

The Plaintiffs have not pled or argued that any county prosecuting attorney "refuses to prosecute violations of any of the provisions of this section by any person without regard to the facts or circumstances." Thus, the first circumstance is not present, and the Attorney General has no authority at this time under that provision to prosecute violations of Idaho Code § 18-623. The Court, however, stated in its decision that "the statute challenged in this lawsuit expressly gives the Attorney General the authority, at his sole discretion, to prosecute a person for a criminal violation of the statute if the county prosecutor refuses to do so. Idaho Code § 18-623(4). That provision of the statute plainly vests the Attorney General with the authority to prosecute a person in the absence of the county prosecutor doing so, at his sole discretion." Dkt. 40 at 8. The Court in analyzing this section did not acknowledge the provision of this statute that limits that Attorney General's "sole discretion" to only those situations in which the county prosecutor "refuses to prosecute violations

of any of the provisions of this section by any person without regard to the facts or circumstances." The Attorney General has no authority to second guess a county prosecutor's prosecutorial decision. The Attorney General has no authority to unilaterally decide to prosecute a violation of this section. Rather, first there must be a prosecutor who "refuses to prosecute violations of any of the provisions of this section by any person without regard to the facts or circumstances." If that situation exists, then, and only then, may the Attorney General exercise his discretion to step in to prosecute violations of this section. That situation does not presently exist, and the Court's reliance on that section to defeat Eleventh Amendment immunity was in error.

The second basis for the Attorney General's potential authority is likewise quite limited. The Attorney General's general prosecutorial authority arises *only* when his assistance is requested by the county prosecutor, or the Board of County Commissioners, *and* an Idaho District Court issues an order authorizing him to either assist a prosecutor or exercise the authority of the prosecutor. *See* Idaho Code § 31-2603; *see also* Att'y Gen. Op. 23-1 (available at Dkt. 32-2). Again, the Plaintiffs have not pled, and have not argued, that the Attorney General has been asked by a prosecutor or Board of County Commissioners to assist with any prosecution. Thus, as the facts stand today, and at the time the Complaint was filed, the Attorney General has *no* authority to prosecute violations of Idaho Code § 18-623.

Where the Attorney General's prosecutorial authority depends upon facts and decisions made by independently elected government officials over whom he has no supervisory authority, his authority to enforce the law is indirect and not sufficient to defeat Eleventh Amendment immunity.

For the Plaintiffs to succeed in defeating the Attorney General's claim of immunity, in addition to the direct connection from the Attorney General to the enforcement of the statute, there must also be a "real likelihood" that the Attorney General will employ his authority "against plaintiffs' interests," otherwise "the Eleventh Amendment bars federal court jurisdiction." *See Long*

v. Van de Kamp, 961 F.2d 151, 152 (9th Cir. 1992) ("Absent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction."). Given the lack of independent authority to prosecute violations of the act, this "real likelihood" that the Attorney General will employ his authority against the Plaintiffs' interests is absent, and therefore "the Eleventh Amendment bars federal court jurisdiction." *Id.*

The Court, however, relied on *Planned Parenthood v. Wasden*, 376 F.3d 908 (9th Cir. 2004), in rejecting the Attorney General's claim of immunity. *See* Dkt. 40 at 7-8. In *Wasden*, the Ninth Circuit held that the direct connection required to meet the *Ex Parte Young* exception existed because "the attorney general may in effect deputize himself … to stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute the prosecutor would have. That power demonstrates the requisite causal connection for standing purposes." *Wasden*, 376 F.3d at 920. However, as made clear by the above discussion, the Attorney General has *no* authority to deputize himself to prosecute violations of Idaho Code § 18-623. As discussed above, in order to prosecute violations, the Attorney General must either, in effect, be deputized by the county prosecutor, or a county prosecutor must make an attempt at prosecutorial nullification by refusing to prosecute any violations of the statute regardless of the facts of the case. If either of those two situations were present, then the *Ex Parte Young* exception might apply. But, those situations are not present, and therefore that exception does not apply. As such, the Eleventh Amendment provides immunity to the Attorney General, and he is likely to succeed on the merits of his appeal.

B. The Court erred in finding that the Plaintiffs have standing and that they are likely to succeed on the merits of their constitutional First Amendment and Fourteenth Amendment claims.

The Court also erred in finding that the Plaintiffs have standing and that they are likely to succeed on the merits of their constitutional arguments. For standing, the Court erred in finding,

among other things, that the Plaintiffs have suffered an injury in fact at the hands of the Attorney General in that the Plaintiffs have not successfully pled a credible fear of prosecution given that the Attorney General, under the facts pled in the Complaint and as the facts that exist at this time, lacks the authority to prosecute violations of Idaho Code § 18-623.

Further, the Court erred in finding that "Idaho Code § 18-623 is a content-based regulation of protected speech and expression," and therefore prohibited by the First Amendment. Dkt. 40 at 44. The Court based this finding on the Court's belief that the statute "plainly regulates expression based on content by restricting adults from engaging in activities that advocate, assist, and communicate information and support about legal abortion options." *Id.* This is not so. Idaho Code § 18-623 prohibits conduct, and specifically conduct which results in a pregnant minor having obtained an abortion or an abortion inducing drug. The defendant must engage in conduct—recruiting, harboring, or transporting the minor child—to violate the statute. The mere fact that speech may be used in recruiting, harboring, or transporting the child is immaterial: "[a]n illegal course of conduct is not protected by the first amendment merely because the conduct was in part carried out by language in contrast to direct action." *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987).

The Court also erred in finding that Idaho Code § 18-623 is vague under the Fourteenth Amendment. Dkt. 40 at 52. The challenged language—recruiting, harboring, or transporting—is language that is used in dozens, if not hundreds, of trafficking statutes across the country. The Court's finding that it is vague in this case when applied to abortion, specifically trafficking a minor to obtain an abortion with the intent to conceal that abortion from the minor's parents, is more evidence of the U.S. Supreme Court's admonition that *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) should be overturned, in part, because they

"have led to the distortion of many important but unrelated legal doctrines." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 142 S.Ct. 2228, 2275 (2022).

II. The Attorney General will be irreparably injured absent a stay of the injunction.

The second factor for the Court to consider in determining whether to grant a stay of the injunction pending appeal is whether the Attorney General will be irreparably injured without a stay of the Court's decision. "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). In this case, that is exactly what has happened—the Court has abrogated the Attorney General's Eleventh Amendment Immunity in a situation in which the Attorney General himself has said he has no authority to prosecute the statute in question, subjecting the State of Idaho, through the Attorney General, "to the coercive process of judicial tribunals at the instance of private parties." *Id.* Given that the Court's injunction applies only to the Attorney General, and not to any county prosecutor with actual authority to enforce the law, it appears that there is no purpose for the Court's preliminary injunction but to force the Attorney General, and therefore the State of Idaho, to suffer the "indignity" of the "coercive process of judicial tribunals." Thus, the mere existence of the preliminary injunction against the Attorney General is an irreparable injury that can only be repaired by the Court granting the stay of its injunction pending the appeal.

Further, any "'time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (alterations in original) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Even though the Court's order only applies to

the Attorney General, *see* Dkt. 40 at 58, the Court's order effects an irreparable injury upon the Attorney General and the State of Idaho.

III. The issuance of the stay will not injure the Plaintiffs, and the public interest lies in granting the stay.

The last two factors for the Court to consider are whether issuance of the stay will substantially injure the other parties interested in the proceeding and where the public interest lies. *Nken*, 556 U.S. at 434 (citation omitted). As stated above, when the government is a party, the last two factors merge. *Drakes Bay,* 747 F.3d at 1092 (citation omitted). In the instant case, the Plaintiffs will not be injured by granting the stay of the injunction pending appeal. As argued extensively above, the Attorney General, as the facts currently stand, has no authority to enforce the statute in question, so lifting the stay will not subject the Plaintiffs to a threat or risk of enforcement. Rather, to the extent the Plaintiffs decide to violate the statute, it is the county prosecutors who have the authority to prosecute the Plaintiffs, and the Court's injunction does not prohibit any county prosecutor from enforcing the statute.

Further, the public interest lies in granting the stay of the injunction. The Plaintiffs have admitted in the Complaint and other filings that they have, and intend to, engage in conduct that violates Idaho Code §§ 18-1510 (Providing Shelter to a Runaway Child); 16-1605 (Reporting Abuse or Neglect of a Child); 18-4501(2) (kidnaping); and 18-4506(1)(a) (child custody interference); and perhaps other statutes as well. *See, e.g.*, Dkt. 1 ¶¶ 26–30, 32, 47–51, 55; Dkt. 12-1 at 9, 14, 18–19; Dkt. 12-7 ¶¶ 43–45, 47–51, 53–54; Dkt. 12-8 ¶¶ 39–41, 50–54; Dkt. 12-9 ¶¶ 12–14, 17–23, 26–27. The public interest cannot endorse granting an injunction in a case to allow Plaintiffs to engage in criminal conduct in violation of numerous criminal statutes designed to protect the welfare of children simply because Plaintiffs believe that their view of what is in the best interests of a minor

should trump the wishes of that minor's parents, or the policy decision of the people of the State of Idaho through their elected representatives.

CONCLUSION

Because the Attorney General is likely to succeed on the merits of his argument that he is immune from suit in this case under the Eleventh Amendment, he is irreparably harmed by the existence of the injunction, the Plaintiffs will not be injured by a stay of the injunction, and the public interest lies in the State's favor, the Attorney General respectfully requests that this Court stay its injunction pending the Attorney General's appeal of the Court's decisions.

DATED: November 27, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *James E. M. Craig*
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Counsel for Defendant Attorney General Raúl Labrador

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UNITED STATES DISTRICT COURT
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LAURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs do not challenge Idaho Code § 18-623 as it exists. In service of a policy argument, Plaintiffs instead make straw man arguments about speech, association, and travel. They do not raise a constitutional challenge to the activity actually prohibited by the statute, ignoring the plain language requiring a specific intent to conceal an abortion from the parent of a minor. States can act to protect the rights of their citizens, including the right of a parent to protect their children from Plaintiffs. *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000). Plaintiffs believe because abortion is legal elsewhere, they can take a minor without a parent's permission or knowledge. This belief does not grant them a constitutional right to interfere with medical decision making for children. They cannot veto Idaho's choice to protect parental rights just because abortion is involved. Claims of vagueness and First Amendment challenges do not give rights to criminals seeking to cart minors off under any other circumstances. The Court should grant the motion to dismiss.

ARGUMENT

I. The Plaintiffs have failed to state a claim.

a. The Plaintiffs' first claim for relief fails, because Idaho Code § 18-623 is not vague.

When looking at whether a law is vague on its face, "a court should consider the words of the ordinance, interpretations given to analogous statutes, and 'the interpretation of the statute given by those charged with enforcing it.'" *Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574 (S.D. Cal. 1993) (quoting *Grayned v.*

City of Rockford, 408 U.S.104, 110 (1972)). Whether Plaintiffs have "difficulty … determining whether certain marginal offenses fall" under the law is not relevant. *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). "[T]he more important aspect of vagueness doctrine 'is not actual notice, but … the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). A scienter requirement "can mitigate any vagueness in a statute." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1494 (9th Cir. 1996). The court must also attempt to construe the Abortion Trafficking Ban as constitutional. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (superseded by statute on other grounds *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020)).

The terms used in Idaho Code § 18-623 are clear to both the average person and to law enforcement. Plaintiffs' subjective claim of confusion comes from twisting of the statute by separating it into multiple out of context portions to fit the rights they wish to claim are violated. Plaintiffs have not shown any instance in which the words "recruit, harbor, and transport" used have been found unconstitutionally vague. *Or. Firearms Fed. v. Kotek*, ___ F. Supp. 3d ____, 2023 WL 4541027 *55 (D. Or. 2023). Idaho added a specific intent requirement, the intent to "conceal an abortion from the parents or guardian of a pregnant, unemancipated minor." I.C. § 18-623(1). The common use of these terms, and intent requirement, all favor dismissal.

Kotek 2023 WL 4541027 at *55. Here, the text gives notice that obtaining an abortion or an abortion inducing drug for an unemancipated minor by recruiting, harboring, or transporting her with the specific intent to conceal the abortion from the minor's parents is prohibited. The words used have well-established meanings, both in dictionaries[1] and in the context of other statutes.[2] They do not entrust undue authority to prosecutors who could *already* prosecute Plaintiffs for "harboring" or "transporting" a minor, regardless of any "back end conduct" in another state. *See* I.C. § 18-1510. Plaintiffs offer no rebuttal to the myriad of cases holding similar statutes constitutional.[3] This too weighs in favor of dismissal. *Kotek*, 2023 WL 4541027 at *55.

Plaintiffs argue that the statute does not give notice of when a person violates the law. Dkt. 37 at 4–5. But there is no infirmity in the "prohib[ition] of acts that occur well before an abortion takes place." *Id.* "[A] statute is not void for vagueness merely because an individual could take affirmative steps to come close to breaking the law." *Kotek*, 2023 WL 4541027 at *55 (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)). It is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct [to] take the risk that he may cross

[1] *Recruit*, Merriam Webster's Online Dictionary; *Harbor*, *id.*; *Transport*, *id.*
[2] *See e.g.*, 18 U.S.C. § 1591(a)(1); Ind. Stat. 35-42-3.5-1; Mich. Stat. 750.462e; Nev. Stat. 200.464(1).
[3] *See* Dkt 32 at 22 (citing *United States v. Snead*, 2022 WL 17975015 at *4 (4th Cir. 2022); *Alonso v. State*, 228 So.3d 1093, 1101–2 (Ala. Crim. App. 2016); *State v. Scotia*, 146 Ariz. 159, 160 (Ariz. App. 1985) (collecting cases); *State v. Bryant*, 953 So.2d 585, 587 (Fla. App. 2007) (reversing trial court finding "transport" vague).

the line." *Id.* (quoting *Boyce*, *supra*). A person of ordinary intelligence can understand what is prohibited by I.C. § 18-623.

b. The Plaintiffs' second claim for relief fails, because Idaho Code § 18-623 does not infringe on the interstate right to travel.

Plaintiffs' difficulty raising a travel claim is that the Abortion Trafficking Ban does not prohibit travel in and of itself. The right to travel, as relevant here, "protects the right of a citizen of one State to enter and to leave another State." *Saenz v. Roe*, 526 U.S. 489, 501 (1999). This is not an unlimited right, for instance "[t]here is no constitutional right to . . . flee the scene of an accident," *California v. Byers*, 402 U.S. 424, 434 (1971) (plur. op.), and this right does not supplant other laws. *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996) (citing *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1165 (Cal. 1995)).Defendant's own citations support the proposition that the primary objective is to protect parental rights. Dkt. 37 at 7–8. (quoting Rep. Ehardt, "it's *all about* parental permission."). It bears repeating: Plaintiffs can travel in and out of Idaho. Pregnant minors can too. Plaintiffs and minors can still travel together to an abortion appointment. It is not the right of travel that is restricted, but the procurement of an abortion with specific intent to conceal it from the minor's parents.[4]

[4] Defendant cited *Matsuo v. United States*, 586 F.3d 1180, 1182–83 (9th Cir. 2009) for the proposition that actual deterrence of travel is a threshold showing for a right to travel claim. On review, Defendant agrees that calling it a threshold showing was error. But Plaintiffs make no better case under a "primary objective" analysis—violating a right to travel requires something other than the legislature acting to protect parental rights.

Plaintiffs cite *Edwards v. California* in support of their claim. Dkt. 37 at 8–9. The express purpose of the law at issue was "to prohibit the transportation of indigent persons across the California border." 314 U.S. 160, 174 (1941). The Court was "not [] called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent non-residents into [it]." *Id. Edwards* concerned discrimination against out of state residents. *Edwards* does not stand for the rule that a state cannot bar a minor from getting in a car with a stranger for a medical procedure, let alone an abortion. *Crandall v. Nevada* 73 U.S. 35 (1867) is further remote: a tax on *all* movement, *regardless* of purpose or specific intent, impedes travel. Extending *Crandall* and *Edwards* for the proposition that states cannot bar private acts that violate a fundamental right is unsupported.[5] *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 776 (1994). Whether any "back end" conduct is illegal is irrelevant—and in this case, Plaintiffs' front-end conduct is also illegal. *See* I.C. §§ 18-1509, 18-1510, 18-4506, 16-1605. The interstate travel claim fails.

c. The Plaintiffs' third claim for relief fails because Idaho Code § 18-623 does not infringe on the claimed intrastate right to travel.

As for intrastate travel, Plaintiffs argue that the State raises only the lack of a right to intrastate travel in the Ninth Circuit as a rationale for dismissal of that claim. Dkt. 37 at 12. While lack of legal foundation for a claim *is* a good reason for

[5] Similarly unsupported are Plaintiffs' bare legal conclusions that their travel is hindered or that the Abortion Trafficking Ban was intended to hinder travel. Bare assertions are not before the Court on a Motion to Dismiss. *Ashcroft*, *infra.* Plaintiff's "additional support" does the opposite – the quotes highlight the Act's purpose is to protect parents' rights, not impede travel. *See* Dkt. 37 at 7–8.

dismissal, *see Sabra v. Maricopa Cnty. Comm. Coll. Dist.*, 44 F.4th 867, 893 (9th Cir. 2022), it is not the only one here. Plaintiffs' claims fail because it is not travel that is burdened, it is procurement of an abortion by, among other things, transporting the minor with a specific intent—to conceal an abortion from a minor's parents. As for Plaintiffs' argument that "impact" on travel is sufficient to state a claim, Dkt. 37 at 5, 10 n.4, this is at odds with the weight of caselaw. *See e.g.*, *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999, *see also Matsuo*, 586 F.3d at 1183 ("[N]ot everything that deters travel burdens the fundamental right to travel.").

d. The Plaintiffs' fourth claim for relief fails because Idaho Code § 18-623 does not infringe on Plaintiffs' First Amendment Rights.

The challenged statute regulates conduct, or at most, speech incident to criminal conduct, and is therefore permissible.[6] Plaintiffs say their conduct is expressive. But this is not enough to challenge the constitutionality of a statute. As the Idaho Supreme Court held, "[t]he freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *Id.* at 424 (quoting *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 776 (1994)). In this case, recruiting an unemancipated pregnant minor to obtain an abortion with the specific intent to conceal that abortion from those who have the

[6] Plaintiffs argue that reliance on an argument raised in opposition to a preliminary injunction motion to prevail on a motion to dismiss is inappropriate. Dkt. 37 at 3–4. The same reasons that render Plaintiffs unlikely to succeed on the merits render their claims susceptible to a motion to dismiss: a legally meritless claim cannot bring either preliminary or permanent relief. F.R.C.P. 12(b)(6); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

right to supervise and direct the medical treatment of the minor deprives parents of their rights and is rightfully criminalized. *State of Idaho v. Manzanares*, 152 Idaho 410, 425, 272 P.3d 382, 397 (Idaho 2012). Harboring children without their parents' authority is already criminalized under I.C. § 18-1510. Moreover, a parent has the right to control medical treatment that minors receive. *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Wallis v. Spencer*, 202 F.3d 1126, 1142 (9th Cir. 2000). This claim fails.

II. Plaintiffs lack standing.

Plaintiffs' response highlights exactly why the Court should grant the Motion: when pressed to respond with specific facts demonstrating a concrete and particularized injury, Plaintiffs take portions of the statute out of context and assert mere legal conclusions. The Court considers only well pleaded allegations before it, *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009), and need not accept Plaintiffs' misrepresentation of what the Act does and does not do. The Ninth Circuit requires Plaintiffs to plead "a concrete plan to violate" Idaho law "by giving details . . . such as when, to whom, where, or under what circumstances," they will violate the law.[7] *Lopez v. Candaele,* 630 F.3d 775, 787 (9th Cir. 2010) (cleaned up); *see* Dkt. 35-1 at 8; *see also Thomas v. Anchorage Equal Rts. Comm'n,* 220 F.3d 1134, 1139 (9th Cir. 2000) (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). Plaintiffs

[7] Granted, they *do* appear to plead past violations or proposed violations of laws prohibiting interference with various laws protecting children—but they do not challenge these. *Compare* I.C. §§ 18-1509, 18-1510, 18-4506, 16-1605 *with* Dkt. 1 at ¶¶ 41-42, 51, 55, 57.

give none of these details. Because Plaintiffs do not plead a specific plan to violate the law, they lack a credible fear of enforcement: and standing.

Plaintiffs cite statements in their complaint that they say allege an injury. Dkt. 37 at 5–6, 15–16. But merely stating *pro forma* that one is injured, or assuming one will violate the law by performing a specific act are both mere legal conclusions, insufficient to withstand a motion to dismiss. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Plaintiffs nowhere identify a plan to violate the statute by recruiting, harboring, or transporting a specific minor *with the specific intent to conceal*. *Lopez*, 630 F.3d at 787. Despite citing *Tingley v. Ferguson* 47 F.4th 1055 (9th Cir. 2022) for the rule that a plaintiff may have standing where she has violated the law in the past, Plaintiffs do not allege—even as a legal conclusion—that they have. *Tingley*, 47 F.4th at 1067–68 (Plaintiff had practiced therapy now prohibited by Washington). No scienter is pled, and without this key allegation, Plaintiffs' complaint is hypothetical.

Absent something more than the most general allegations about past conduct, Plaintiffs must indeed plead "when, to whom, where, or under what circumstances" Plaintiffs would violate the challenged Act—*Tingley* distinguished *Thomas*, it did not overrule it. *Id.* at 1068 (quoting *Thomas*, 220 F.3d at 1139). Plaintiffs nowhere plead this specific intent to conceal from the parents in the future, and rest upon a mere maybe desires to violate the law "some day." *Lopez.*, 630 F.3d at 787–88 (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)). Plaintiffs nowhere plead a specific threat of enforcement. While Plaintiffs persistently urge their sincerely held beliefs, including that the challenged Act harms their

advocacy in some way, Dkt. 37 at 2, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982). With only a hypothetical intent to violate the law (although not the law as worded in Idaho Code § 18-623), Plaintiffs have no credible fear of enforcement, and no injury.

For this same reason, the two organizational Plaintiffs lack standing. For organizational standing, Plaintiffs need to "include at least one member with standing to present, in his or her own right, the claim . . . pleaded by the association," *United Food & Com. Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996), and must identify this injured member with specific allegations. *Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). Plaintiffs do not plead that any member has standing to present the claims of their associations, and so they cannot meet this test.

The Ninth Circuit has also held that an organization has standing to sue on a showing that "it shows a drain on its resources from both a diversion of its resources and frustration of its mission," *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (quoting *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012)). However, Plaintiffs allege only an "unconstitutional statute interfere[ing] with the way a plaintiff would normally conduct its affairs." Dkt. 37 at 16 (citing *Valle del Sol*, 732 F.3d at 1015). But this test concerns *Valle Del Sol*'s discussion of *an individual* plaintiff's standing. *Id.* Having pled neither injury on behalf of an identified member as in *Summers v. Earth Island Inst.*,

555 U.S. 488, 498–99 (2009), nor alleging diversion as in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982), neither Plaintiff organization may bring a claim.

a. The Attorney General is not a proper party.

Suit against the Attorney General is barred under the Eleventh Amendment where he has no enforcement authority under present conditions. Here, Idaho Code § 18-623 provides the Attorney General with limited authority to prosecute the statute in situations in which a county prosecutor in all circumstances refuses to enforce the law, a situation that the Plaintiffs have not alleged. This is clearly meant to defeat prosecutorial nullification, not provide a free hand to pursue investigations as the office deems fit under any circumstance as Plaintiffs argue. Dkt. 37 at 19. Further, the Defendant need not relitigate *Wasden*—it is factually distinguishable since the Attorney General has disavowed his authority to *sua sponte* prosecute without a direct grant of authority from the legislature or being requested by a county prosecutor and appointed by the district court. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919–20 (9th Cir. 2004); Att'y Gen. Op. 23-1. Therefore, the Attorney General lacks a connection to the law under *Ex parte Young*, 209 U.S. 123, 155–56 (1908).

CONCLUSION

The Court should grant the Motion to Dismiss.

DATED: October 17, 2023

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *James E. M. Craig*
JAMES E. M. CRAIG
Acting Division Chief
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CERTIFICATE OF SERVICE

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

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Six weeks after Plaintiffs filed a motion for preliminary injunctive relief, more than a month after this Court extended the time for Defendant to oppose the motion for preliminary injunctive relief and allowed him 10 additional pages to respond, and after that motion was fully briefed by the parties, Defendant filed a motion to dismiss. Dkt. 35. In his memorandum in support of his motion (Dkt. 35-1), Defendant incorporates his arguments from his opposition to the motion for preliminary injunctive relief and adds a bare-boned and unsupported argument seeking to dismiss Plaintiffs' interstate and intrastate right-to-travel claims. Defendant also challenges this Court's subject matter jurisdiction and Plaintiffs' standing.

Defendant's arguments were not persuasive in opposition to Plaintiffs' motion for preliminary injunctive relief, and they are not persuasive here. Plaintiffs' complaint set forth sufficient facts to support each of their claims, this Court has jurisdiction, and Plaintiffs handily demonstrate standing. This Court should deny Defendant's motion to dismiss in its entirety.

FACTUAL BACKGROUND

Plaintiffs filed their complaint on July 11, 2023, bringing four claims challenging the constitutionality of Idaho Code § 18-623. Dkt. 1. Plaintiffs are two organizations with long histories of assisting pregnant persons seeking abortion care, including minors, and an individual with a long history of working with sexual violence survivors, including minors, and with advocates who assist pregnant minors. *Id.* at ¶¶ 1-6. They are all helpers who are unsure what conduct Idaho Code § 18-623 prohibits, and they are unsure whether they will be prosecuted under that statute if they work with minors in any way to obtain abortions in states where abortions remain legal. *Id.* at ¶¶ 43, 47, 49-52, 67-68. The complaint shows that these helpers have previously provided information to pregnant minors regarding lawful abortion. They have also assisted in providing travel funds and travel logistics and have helped transport minors who

sought abortion care to medical providers. *Id.* at ¶¶ 1-6, 26, 42-57. The complaint further alleges that minors will "need to rely on trusted adults to drive them from Boise, or other cities in the Treasure Valley" to medical appointments in states where those minors are lawfully permitted to make decisions about their own medical care. *Id*. at ¶ 26. And Plaintiffs detailed the explosion of abortion travel since the abortion ban. *Id.* at ¶¶ 23-25.

Plaintiffs also pled that they wish to continue to assist people, including minors, access legal abortion services outside of Idaho. *Id.* at ¶ 108 ("Plaintiffs seek to continue helping pregnant minors in Idaho travel out of state for lawful abortions but face an imminent threat of prosecution under the Abortion Travel Ban. They fear prosecution for traveling with a pregnant minor from Idaho into another state."). And that they have put all of these activities on hold because they are unsure what conduct the Abortion Travel Ban punishes and whether they will be prosecuted. *Id.* at ¶¶ 42-57, 67-68. Plaintiffs all explained that speaking with minors about abortion, and helping minors and others access legal abortion care, is an integral part of their missions, what they are known for in the communities in which they work, why many donors support them, and an expression of their sincerely held beliefs. *Id.* at ¶¶ 1-6, 40-57, 67-68. In short, they allege in their complaint that Idaho Code § 18-623 chills them and the activities that form their individual and organizational missions and infringes on their interstate and intrastate right to travel.

ARGUMENT

The complaint properly alleges claims for violation of Plaintiffs' Fourteenth Amendment rights because the statute is vague, violates Plaintiffs' right to interstate travel, violates Plaintiffs' right to intrastate travel, and violates Plaintiffs' First Amendment rights of speech and association. In addition, all Plaintiffs allege sufficient imminent injury redressable through the

injunctive relief sought in the complaint. Nonetheless, Defendant moves to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiffs in their complaint fail to state any claim on which relief can be granted and, under Federal Rule of Civil Procedure 12(b)(1), arguing that this Court lacks subject matter jurisdiction. Both bases for a motion to dismiss fail. This Court should deny Defendant's motion to dismiss in full.

I. PLAINTIFFS' COMPLAINT STATES FOUR CLAIMS FOR WHICH RELIEF CAN BE GRANTED.

Dismissal for failure to state a claim under Rule 12(b)(6) is appropriate only where the Plaintiffs fail to allege enough facts in their complaint to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In assessing whether the Plaintiffs have met this burden, the Court may only consider allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation*, 524 F.3d 1090, 1096 (9th Cir. 2008). The Court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the Plaintiffs. *Id.*

A. Plaintiffs Properly Pled Their Vagueness and First Amendment Claims.

For their motion to dismiss Plaintiffs' vagueness (Claim One) and First Amendment (Claim Four) claims, Defendants rely only on their opposition to Plaintiffs' motion for preliminary injunctive relief. Dkt. 35-1 at 3-4. This approach fails for two reasons. First, Plaintiffs' motion for preliminary injunctive relief is governed by a different standard than Defendant's motion to dismiss for failure to state a claim. On a motion for preliminary injunctive relief, the moving party must show "(1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of

equities tips in favor of the moving party; and (4) that an injunction is in the public interest." *Idaho v. Coeur d'Alene Tribe*, 49 F. Supp. 3d 751, 762 (D. Idaho 2014) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Whether a complaint states a claim on which relief can be granted is governed by a lesser bar. Defendant fails to show (or argue) how Plaintiffs' vagueness and First Amendment claims fail to state a claim on which relief can be granted. Defendant's Rule 12(b)(6) motion to dismiss Plaintiffs' vagueness and First Amendment claims should be denied for this reason alone.

Second, Plaintiffs' complaint easily meets the Rule 12(b)(6) standard for its vagueness and First Amendment claims. A criminal law that is so vague that it "fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" violates the Fourteenth Amendment Due Process Clause. *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). The operative question is whether a reasonable person would know what is prohibited by the law. *Tingley v. Ferguson*, 47 F.4th 1055, 1089 (9th Cir. 2022). Vague statutes are particularly objectionable when, as here, they "involve sensitive areas of First Amendment freedoms" because "they operate to inhibit the exercise of those freedoms." *Cal. Tchrs. Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

The complaint adequately alleges that Idaho Code § 18-623 is vague. Dkt. 1 at ¶¶ 60-68, 72. For example, the complaint alleges that the "statute purports to make criminal where one 'procures' an abortion or 'obtains' an abortion-inducing medication, both completed acts, but also purports to prohibit actions that occur well before an abortion takes place such as recruiting, harboring, or transporting. A person of ordinary intelligence would be unable to identify at what

point she violates the statute, and at what point ordinary counseling or mentoring a pregnant minor, or traveling with such a minor within Idaho, may cross a line into attempt." *Id.* at ¶ 62. It further alleges that "Plaintiff Matsumoto is unsure of what conduct Idaho Code § 18-623 prohibits. But for the statute's lack of clarity over whether she would be prosecuted, she would assist minors in traveling to Oregon or Washington getting abortions in states where abortion remains legal," *id.* at ¶ 67, and that "Plaintiffs NWAAF and IIA likewise are unsure of what conduct Idaho Code § 18-623 prohibits. They wish to continue all of their activities that assist pregnant Idaho minors in obtaining abortions in states where abortion is legal but are uncertain whether they will be prosecuted for such actions," *id.* at ¶ 68. These allegations sufficiently state a claim that Idaho Code § 18-623 fails to give ordinary people fair notice of the conduct it punishes.

The First Amendment guarantees the rights to free speech, assembly, association, and petition. U.S. Const. amends. I, XIV; *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1193 (9th Cir. 2018). Further, the "'First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). Thus, Plaintiffs have First Amendment rights to associate freely with each other and with pregnant Idahoans and to engage in speech and expressive conduct, including by providing information, funding, or practical support for pregnant Idahoans traveling to access out-of-state abortion care that is legal where rendered. The complaint sets forth sufficient facts alleging violations of each of these First Amendment rights. Dkt. 1 at ¶¶ 40, 41, 43, 50, 56, 82-89. For example, the complaint alleges "each Plaintiff engages in protected First Amendment activities to share and support these messages and missions. Each Plaintiff also seeks to convey accurate and complete

information about minors' lawful options when faced with a pregnancy." *id*. at ¶ 41, and that "Plaintiffs' provision of information regarding abortion access to pregnant persons in Idaho, including pregnant minors, is likewise speech and is protected by the First Amendment. . . . Idaho Code § 18-623 infringes on these rights by criminalizing speech about lawful activity," *id.* at ¶ 85. These allegations sufficiently state a claim that Idaho Code § 18-623 infringes on Plaintiffs' First Amendment speech and association rights.

Thus, this Court should deny Defendant's motion to dismiss Plaintiffs' vagueness and First Amendment claims for failure to state a claim upon which relief can be granted.

B. Plaintiffs Adequately Pled Their Interstate Travel Claim.

The U.S. Supreme Court has firmly established and repeatedly recognized a right to travel. *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). It is a right that ensures people can enter and leave any state. *Saenz v. Roe*, 526 U.S. 489, 500 (1999). The right to travel is "so elementary" that it inherently accompanies the Union that the Constitution established. *United States v. Guest*, 383 U.S. 745, 757-58 (1966). How else could a loose confederation of states be transformed into one nation? *See Zobel*, 457 U.S. at 67; *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (noting "the important role [the right to travel] . . . has played in transforming many States into a single Nation"); *Crandall v. Nevada*, 73 U.S. 35, 43 (1867) ("The people of these United States constitute one nation."). The right to travel has three components, and Plaintiffs agree with Defendant that only the first component is active in this litigation—the right to travel freely to and from any state. *See* Dkt. 1 at ¶¶ 103-04; Dkt. 35-1 at 11. That, unfortunately, is where the parties' agreement ends.

1. Plaintiffs Pled a Viable Cause of Action Because They Show Impeding Travel Is the Predominant Purpose of the Law.

Plaintiffs may establish a right-to-travel violation by showing that the primary or predominant object of the law is to restrict travel or punish those who exercise their rights. *Soto-Lopez*, 476 U.S. at 903; *see also Guest*, 383 U.S. at 760. Strangely, Defendant in his motion asserts that Plaintiffs must establish actual deterrence. Dkt. 35-1 at 11. In fact, that is just one of three ways Plaintiffs may establish a right-to-travel claim. *Id.*[1] Defendant's omission of these additional options for showing a violation is suspect, as they are omitted despite being in the same sentence in *Soto-Lopez* that Defendant cites in his motion.[2]

Plaintiff's complaint sufficiently alleges that Idaho Code § 18-623's primary objective is to impede travel or punish those who exercise their rights. *See* Dkt. 1 at ¶ 106 ("The intent behind the passage of the Abortion Travel Ban was to impermissibly restrict the travel of both Plaintiffs and the pregnant minors they serve"). Plaintiffs also presented additional support for this contention. For instance, Plaintiffs allege that Representative Barbara Ehardt testified to the purpose of the legislation during the March 27, 2023, Senate State Affairs Committee hearing, stating, "it's all about parental permission, taking a minor from Idaho and trafficking that minor to another state to receive an abortion." *Id.* at ¶ 12. They further alleged that Governor Brad Little explained the legislation he signed as seeking to "prevent unemancipated minor girls from being taken across state lines for an abortion without the knowledge and consent of her parent or

[1] Defendant also omits the third way, by showing """any classification which serves to penalize the exercise of that right."""" *Soto-Lopez*, 476 U.S. at 903 (citation omitted).

[2] The only other case Defendant cites in his motion to dismiss also explicitly recognizes that a plaintiff can succeed by establishing that the primary objective of the law at issue is to impede travel, and yet he inexplicably argues actual deterrence is required. *Matsuo v. United States*, 586 F.3d 1180, 1182 n.2 (2009) ("Plaintiffs have provided no evidence that 'impeding travel is [the Act's] primary objective,' so we won't address that final prong of *Soto–Lopez*." (alteration in original; citation omitted)); *see also* Dkt. 35-1 at 11.

guardian." *Id.* at ¶ 13. Plaintiffs have more than sufficiently laid out a *prima facie* case, and discovery will allow them to further establish that the primary objective of the law is to impede travel or punish those who would exercise their right to travel.

2. The Abortion Travel Ban Impedes Plaintiffs' Right to Travel.

The Abortion Travel Ban interferes with Plaintiffs' right to travel, contrary to Defendant's assertions. Notably he cites no cases for his position that there cannot be a right to travel infringed here. Dkt. 35-1 at 4-5. The law is clear, however, that prohibiting a person from traveling with another across state lines does impede the driver's right to travel. *Edwards v. California*, 314 U.S. 160, 174 (1941); *Crandall*, 73 U.S. at 43.

In *Edwards*, California resident Fred Edwards drove from California to Texas in late December 1939 with the goal of collecting his brother-in-law and then driving him back to California. *Edwards*, 314 U.S. at 171. His brother-in-law had $20 to his name, and because of his indigency, he believed that a family move to California would offer him new opportunities. *Id.* At the time, California law criminalized helpers like Mr. Edwards, specifically making it unlawful to transport indigent people into the state. *Id.* The trial court sentenced Mr. Edwards to six months in the county jail for coming to the aid of his brother-in-law. *Id.*

The U.S. Supreme Court found that no single state could "isolate itself" by prohibiting indigent people from entering and held that fundamental constitutional rights were at play—rights we now call "the right to travel." *Id.* at 173. The Court was not unsympathetic to the "grave and perplexing social and economic dislocation" that led California to seek to use its police power to restrict travel. *Id.* It was, after all, during what would be later known as the Great Depression. However, the state's interests in exercising its police power, no matter the import of

the goal, were not to be balanced against the importance of preserving the free movement of people across state lines, and the Court ultimately found the restriction impermissible. *Id.*[3]

Similarly, *Crandall* also establishes that Plaintiffs have had their right to travel impeded. In 1865, Nevada enacted a law that levied a tax of $1 upon any person leaving the state by railroad, stagecoach, or other vehicle for hire. *Crandall*, 73 U.S. at 35-39. Nevada argued that this tax was "not a tax upon the passenger, but upon the business of the carrier who transports him"—an argument rejected by the U.S. Supreme Court. *Id.* at 39. The Court found Nevada's actions in conflict with the Constitution, discussing the havoc that would befall the nation if the government could place such conditions on the right to leave a state. "The people of these United States constitute one nation. They have a government in which all of them are deeply interested." *Id.* at 43. The Court explained that it is against the principles of our nation to erect barriers to leaving a state, as such a precedent would interfere with the activities of national citizenship. *Id.* at 43-44. "[N]o power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established." *Id.* at 44.

In summary, Defendant's only arguments—that Plaintiffs can travel if (1) the passengers in their vehicles are not young people on their way to abortion appointments (perhaps whether or not that abortion actually happens) or (2) a parent somehow (and it is vague as to how) knows—are contrary to established law. The state cannot restrict the types of passengers in one's car when moving between states. *See Edwards*, 314 U.S. at 174. And it cannot condition exiting a state on performance of some sort of act—whether it be paying $1 in *Crandall* or ensuring some

[3] Notably, each U.S. Supreme Court case cited by Defendant in his motion relating to the right to travel favorably cites to *Edwards*. *See* Dkt. 35-1 at 11 (citing *Saenz*, 526 U.S. at 500 (where the court discusses *Edwards*)); *Soto-Lopez*, 476 U.S. at 902, 903 (citing *Edwards*, 314 U.S. 160).

sort of parental knowledge here.[4] State laws that inhibit or restrict the free interstate movement of their citizens interfere with this national project, "enabl[ing] [states] to defeat the purposes for which the [national] government was established," a power that they "very clearly do not possess." *Crandall*, 73 U.S. at 44, 49. By criminalizing interstate travel, the Abortion Travel Ban violates these core, constitutional principles. Except in narrow, exceptional circumstances neither present here nor argued by Defendant, Idaho cannot obstruct and penalize travel in this way. As such, Defendant's motion to dismiss on this basis fails.

3. Plaintiffs' Claims Neither Invite nor Require the Invalidation of Sex Trafficking Statutes.

In a few passing sentences, Defendant suggests that Plaintiffs' claims invite or require invalidation of sex trafficking statutes. They do not. Sexual coercion and slavery are universally condemned activities that constitute crimes in all 50 states.[5] Defendant's comparison of abortion to these activities may reflect his personal values, but it ignores both reality and the laws of the majority of states, where abortion is a lawful activity.[6] Indeed, in many states abortion access is

[4] Defendant repeatedly changes his interpretation of what this law requires. About half of the time, he classifies the statute as requiring notice to a parent. As is true with all the claims in this litigation, the right-to-travel claim is also affected by the significant confusion about what exactly this statute allows or does not allow. Dkt. 1 at ¶¶ 71-73. Plaintiffs also assert that their right to travel is being impacted by conditions it cannot reasonably predict. As a result, Plaintiffs do not know if they can travel in all the circumstances the statute may or may not permit, and therefore the statute at issue is indeed deterring travel that may be lawful but is not clear under the text of the statute. *See id.* Moreover, because of the confusion created by the disconnect between Defendant's briefs and his arguments, Plaintiffs are in an even more uncertain space.

[5] Defendant frequently ignores that sex trafficking and coerced sex work are not analogous because sex trafficking and coerced sex work are illegal in all 50 states, including Nevada. *See* Nev. Rev. Stat. § 201.301. Moreover, neither minor sex work nor forced labor is lawful anywhere in this country.

[6] Only 13 states criminalize most abortion. Ala. Code § 26-23H-4 (Alabama); Ark. Code Ann. § 5-61-304 (Arkansas); Idaho Code § 18-622 (Idaho); S.B. 1, 122nd Leg., 1st Spec. Sess. (Ind. 2022) (Indiana); Ky. Rev. Stat. Ann. § 311.772 (Kentucky); La. Stat. Ann. § 40:1061 (Louisiana); Miss. Code Ann. § 41-41-45 (Mississippi); Mo. Rev. Stat. § 188.017 (Missouri); S.B. 2150, 68th Leg. Sess., Reg. Sess. (N.D. 2023) (North Dakota); Okla. Stat. Ann. tit. 21, §

(continued . . .)

statutorily or constitutionally protected. A ruling that Idaho may not impose criminal liability on people who help their neighbors travel for the purpose of engaging in conduct lawful in the destination jurisdiction poses no threat to laws that prohibit transporting people for purposes that are unlawful everywhere. Defendant's slippery slope argument to the contrary is not supported by logic or by precedent. Moreover, the courts have never approved of a law in a right-to-travel challenge that criminalizes travel to engage in activity that is expressly lawful where it occurs.

C. Plaintiffs Have Sufficiently Alleged a Claim for a Right to Intrastate Travel.

Plaintiffs have also stated a claim that the Abortion Travel Ban infringes on their freedom of movement, Dkt. 1 at ¶¶ 76-78, which courts have also referred to as the right to intrastate travel. *See Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003). "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. . . . It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

In the Ninth Circuit, it is unquestionable that "[c]itizens have a fundamental right of free movement, 'historically part of the amenities of life as we have known them.'" *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972)). "'In all the [s]tates from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective [s]tates, to move at will from place to place therein, and to have free ingress thereto

861 (Oklahoma); S.D. Codified Laws § 22-17-5.1 (South Dakota); Tenn. Code Ann. § 39-15-213 (Tennessee); Tex. Health & Safety Code Ann. § 170A.002 (Texas); W. Va. Code § 16-2R-3 (West Virginia); Wis. Stat. § 940.04 (Wisconsin).

and egress therefrom . . . .'" *Id.* (alterations in original) (quoting *United States v. Wheeler*, 254 U.S. 281, 293 (1920)). This right of free movement necessarily entails not only the ability to cross state borders, but also the ability to move freely within a state. In fact, it defies logic to argue that a person can cross a state border, but that they are not permitted to reach that border by traveling within their home state. *See id.* at 946 (holding that in a challenge to a juvenile curfew ordinance, minors had a right to free movement); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.").

Plaintiffs have sufficiently alleged throughout their complaint their desire to travel within the state of Idaho to reach the border, and that their ability to do so is impacted by the Abortion Travel Ban. *See, e.g.*, Dkt. 1 at ¶ 26 ("Under Idaho Code § 18-623, the simple act of driving a minor to the Oregon border to get an abortion without the minor's parent or guardian knowing—or even providing advice on how to do that—could result in a mandatory minimum of two years and up to five years in prison."); *id.* at ¶ 42 ("Each of the Plaintiffs wishes to drive pregnant minors within the State of Idaho in furtherance of securing, for those who desire it, lawful abortion medical care, as one of many important services offered."). Plaintiffs' right to travel intrastate is implicated by the Abortion Travel Ban because they cannot exercise their rights to cross state borders to where abortion is lawful without first traveling within the state of Idaho. *See id.* at ¶ 118 ("In order to travel out of state, Plaintiffs must travel freely in state.").

The only argument raised by Defendant for why this Court should dismiss Plaintiffs' intrastate travel claim is that the Ninth Circuit has not yet directly recognized a right to intrastate travel. This is not grounds for dismissal. Plaintiffs are permitted to advance good-faith arguments

for extending or modifying the law. *See Woodrum v. Woodward Cnty., Okla.*, 866 F.2d 1121, 1127 (9th Cir. 1989) (discussing how the court is "[m]indful of the potential chilling effects on civil rights plaintiffs who argue in good faith for the modification or extension of rights and remedies under § 1983" when deciding to impose Rule 11 sanctions); *Larez v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994) (holding that claims were not frivolous because the court "must exercise extreme caution in sanctioning attorneys under Rule 11, *particularly* where such sanctions emerge from an attorney's efforts to secure the court's recognition of new rights"). As stated, the Ninth Circuit has already recognized a right to free movement. Plaintiffs should have the opportunity to build their case through discovery.

II. PLAINTIFFS PROPERLY INVOKE FEDERAL SUBJECT MATTER JURISDICTION.

Rule 12(b)(1) provides that an action may be dismissed for lack of subject matter jurisdiction. Federal courts have "limited jurisdiction" and the plaintiff bears the burden to prove federal subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A facial 12(b)(1) motion involves an inquiry confined to the allegations in the complaint. Defendant here challenges the allegations in Plaintiffs' complaint, arguing that it fails to establish subject matter jurisdiction for three reasons: (1) Plaintiffs lack standing because they lack a cognizable injury; (2) the entity Plaintiffs lack associational and organizational standing; and (3) Plaintiffs' claims are barred by the Eleventh Amendment. Each argument fails.

To establish standing, a plaintiff must demonstrate "that (1) they have suffered an injury-in-fact" that is "'concrete and particularized' and 'actual and imminent,' (2) the alleged injury is 'fairly traceable' to the defendants' conduct, and (3) it is 'more than speculative' that the injury

is judicially redressable." *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "Organizations can assert standing on behalf of their own members or in their own right." *Id.* (citation omitted). "'Each element of standing "must be supported with the manner and degree of evidence required at the successive stages of the litigation."'" *Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1209 (9th Cir. 2022) (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011)).

A. Plaintiff Matsumoto, as an Individual, Has Standing.

Plaintiff Matsumoto has sufficiently alleged standing as an individual. It is well established that a plaintiff need not "'first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights'" but may bring a pre-enforcement challenge seeking injunctive or declaratory relief where, as here, they face a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (brackets and citation omitted). Pre-enforcement standing is particularly favored in cases like this one, involving violations of the First Amendment right to free speech. *Tingley*, 47 F.4th at 1066-67 ("The 'unique standing considerations' in the First Amendment context 'tilt dramatically toward a finding of standing' when a plaintiff brings a pre-enforcement challenge." (quoting *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010))); *see Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) ("In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences.").

The Ninth Circuit applies a three-factor inquiry to "determine whether a threat of enforcement is genuine enough to confer an Article III injury" for pre-enforcement standing: "(1) whether the plaintiff has a 'concrete plan' to violate the law, (2) whether the enforcement authorities have 'communicated a specific warning or threat to initiate proceedings,' and (3) whether there is a 'history of past prosecution or enforcement.'" *Tingley*, 47 F.4th at 1067 (citation omitted). Defendant ignores the facts and this binding precedent and instead argues that a plaintiff must allege "when, to whom, where, or under what circumstances" Plaintiffs intend to violate the statute, Dkt. 35-1 at 8, a proposition expressly rejected by the Ninth Circuit in *Tingley, see* 47 F. 4th at 1068 ("But we do not require plaintiffs to specify 'when, to whom, where, or under what circumstances' they plan to violate the law when they have already violated the law in the past." (citation omitted)). Finally, the Ninth Circuit has repeatedly recognized that the history of enforcement is entitled to "little weight" for recent laws, such that standing must be found where the other two factors are satisfied. *Id.* at 1069 (citation omitted); *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021).

Plaintiff Matsumoto has alleged facts necessary to establish standing for this pre-enforcement challenge on constitutional, and particularly First Amendment, grounds. Dkt. 1 at ¶¶ 1, 17-18, 42-43, 57, 67. Plaintiff Matsumoto has a concrete plan to violate the law because she wishes to engage in speech and conduct that is prohibited by the Abortion Travel Ban. Plaintiff Matsumoto alleges that Defendant's enforcement of Idaho Code § 18-623 will effectively bar her from assisting pregnant minors obtain lawful abortion care in Idaho's neighboring states. *Id.* at ¶¶ 42-43, 57, 67. She must choose between providing information, travel assistance, and shelter to pregnant minors in Idaho, and thereby risking criminal prosecution, or refrain from engaging in these constitutionally protected activities altogether. *Id.* As an individual, she faces a credible

threat of prosecution under the Abortion Travel Ban for the speech and acts she wishes to engage in. Thus, she will suffer imminent and concrete injuries to her rights protected by the First Amendment, the Fourteenth Amendment's Due Process Clause, and the rights to interstate and intrastate travel. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (recognizing loss of First Amendment freedoms as a cognizable harm). In addition, these injuries are more than fairly traceable to Defendant's enforcement of Idaho Code § 18-623 and would be redressed by an order enjoining enforcement.

B. NWAAF and IIA Have Organizational Standing.

Because Plaintiff Matsumoto has established standing, the Court need not consider the standing of the organizational Plaintiffs. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) ("Because of the presence of this plaintiff [with standing], we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit."). It is well settled that, where one plaintiff has standing to assert a claim for relief, a federal court need not consider the standing of other plaintiffs asserting the same claim. *Preminger v. Peake*, 552 F.3d 757, 764 (9th Cir. 2008) (the general rule applicable to federal court is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others). The organizational Plaintiffs assert all of the same claims here as Plaintiff Matsumoto. If the Court nevertheless elects to consider the standing of the organizational Plaintiffs, NWAAF and IIA have still satisfied the requirements of organizational standing, and Defendant misunderstands those requirements.

A constitutional challenge grows out of a genuine dispute where the allegedly unconstitutional statute interferes with the way a plaintiff would normally conduct its affairs. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 (9th Cir. 2013) (finding a case and controversy when a plaintiff planned to provide shelter and transportation for undocumented

people, which the challenged law purported to prohibit). The manner in which the unconstitutional statute interferes with the way a plaintiff would ordinarily conduct its affairs must be specifically pled, as was done here. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (holding that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *see also Lopez*, 630 F.3d at 790, 792 (finding no injury in fact because plaintiff had not "adequately proven his intent to violate the policy" at issue and that "self-censorship alone is insufficient to show injury"). Organizational Plaintiffs NWAAF and IIA have sufficiently pled that they have an injury that is "concrete and particularized" and "actual and imminent," and "fairly traceable" to Defendant's conduct, and judicially redressable through the relief sought. *See* Dkt. 1 at ¶¶ 1-6, 43, 47, 49-52, 67-68.

Defendant's insistence that to establish organizational standing Plaintiffs NWAAF and IIA must also specifically allege that they have diverted resources based on the unconstitutional features of the Abortion Travel Ban misunderstands Ninth Circuit case law and basic standing requirements. As set forth in *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662-63 (9th Cir. 2021), to determine whether organizational standing requirements have been satisfied, courts "'conduct the same inquiry as in the case of an individual: Has the plaintiff "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction?"'" *Id.* at 662 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)). While organizations *may* establish standing by showing a frustration of mission *and* diversion of resources, *id.* at 663, that does not mean that a direct showing of injury, without a diversion of resources, is insufficient. *See, e.g.*, *Valle del Sol Inc.,* 732 F.3d at 1015. Indeed, *East Bay Sanctuary Covenant v. Biden* and other Ninth Circuit cases that refer to frustration of mission and diversion of resources are interpreting the Supreme Court's directive from *Havens.*

Here, the allegations of Plaintiffs NWAAF and IIA establish a personal stake in the outcome of the controversy more than sufficient to warrant the invocation of federal court jurisdiction. Their missions have not just been frustrated, with respect to their assistance of and support for pregnant minors, their missions have been halted altogether by the unclear threat of prosecution under the Abortion Travel Ban. They have standing and this Court has subject matter jurisdiction.

C. Idaho Attorney General Raúl Labrador Is the Proper Defendant.

The Eleventh Amendment generally prohibits federal courts from hearing lawsuits brought against the state or its instrumentality in the absence of consent. *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) (citing *Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999)). *Ex parte Young*, 209 U.S. 123 (1908), creates an exception for actions seeking "'injunctive relief against state officers in their official capacities for their alleged violations of federal law' so long as the state officer has 'some connection with enforcement of the act.'" *Mecinas*, 30 F.4th at 903 (quoting *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012)). In the Ninth Circuit, this "modest [connection] requirement" merely demands that the implicated state official have a relevant role that goes beyond "'a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision.'" *Id.* at 903-04 (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004)).

Defendant argues nonetheless that this Court lacks subject matter jurisdiction because the Attorney General is not the proper Defendant and has disavowed any authority or intent to prosecute violations of Idaho Code § 18-623. Dkt. 35-1 at 12-14. Defendant's argument has been squarely rejected by the Ninth Circuit and by this Court. *Planned Parenthood of Idaho, Inc.*, 376 F.3d at 919 (even where the Attorney General does not have direct enforcement power, his assistance powers make it possible for him to have enforcement authority and bring him within

the exception in *Ex parte Young*); *Planned Parenthood Greater Nw.*, Memorandum Decision and Order, at 18-21 (July 31, 2023) (same). Here, where the statute at issue specifically provides authority for the Attorney General to enforce the law where a county prosecutor will not, the *Ex parte Young* exception is even more availing.

Defendant simply cites and relies on case law that does not set forth the applicable standard. Dkt. 35-1 at 12-13. He also improperly argues that his informal opinion construing the limits of his prosecutorial powers issued April 27, 2023, supersedes the Ninth Circuit's interpretation of his powers in *Wasden*. *Id.* at 13-14. Defendant identifies no authority for this proposition. Until and unless the Ninth Circuit overrules *Wasden* or establishes a different test for determining when an attorney general has sufficient connection to enforcement of a statute, Attorney General Labrador is the proper Defendant.

CONCLUSION

For the reasons set forth above, this Court should deny Defendant's motion to dismiss.

DATED: October 3, 2023.

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LAURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE, Plaintiff, v. RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho, Defendant.	Case No. 1:23-cv-00323-DKG **MOTION TO DISMISS**

Defendant hereby moves to dismiss this action under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant submits the accompanying memorandum of law, which sets forth the reasons supporting dismissal of this action.

DATED: September 12, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *James E. M. Craig*
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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LAURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiffs say they have constitutional rights to help minors travel to other states to get abortions without their parents' knowledge or consent and that Idaho's criminal prohibition of the practice is void. But Plaintiffs themselves acknowledge that "[p]regnancy, childbirth and parenting significantly impact an individual's physical and mental health, finances, and personal relationships" and that "[t]he decision to impact one's health with a pregnancy or to become a parent is extremely personal and permanent." Dkt. 1 ¶ 27. Given the "profound moral and religious concerns" associated with abortion, *Bellotti v. Baird*, 443 U.S. 622, 640 (1979), and the "potentially grave emotional and psychological consequences of the decision to abort[,]" *H.L. v. Matheson*, 450 U.S. 398, 412–13 (1981), "a girl of tender years, under emotional stress, may be ill-equipped to make" a decision of whether to have an abortion. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J. concurring). So it is critically important that a minor receive the advice and support of her parents, who have a "fundamental right 'to make decisions concerning the care, custody and control of their children.'" *Bartosz v. Jones*, 146 Idaho 449, 465, 197 P.3d 310, 326 (Idaho 2008) (Eismann, J., concurring) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

Idaho thus lawfully criminalized the practice of third-party adults procuring abortions for minors with the intent to conceal the abortion from the minor's parents or guardian. Idaho Code § 18-623 makes it illegal for an adult, acting with the intent

to conceal an abortion from the parents or guardian of a pregnant unemancipated minor, to procure an abortion or an abortion inducing drug for the pregnant minor by recruiting, harboring, or transporting the minor within the State of Idaho. The constitution does not recognize the right Plaintiffs argue for—to the contrary it protects the rights of parents to not only make those medical decisions for their children, but also to "be with their children while they are receiving medical attention." *Wallis v. Spencer*, 202 F.3d 1126, 1142 (9th Cir. 2000). Plaintiffs' claims fail as a matter of law and should be dismissed under Rule 12(b)(6).

In addition to failing to state a claim on the merits, Plaintiffs fail to properly invoke the Court's Article III jurisdiction. Plaintiffs say in briefing that the Attorney General "acknowledges … that he intends to prosecute Plaintiffs" for helping pregnant Idaho minors obtain lawful abortions in neighboring states. Dkt. 34 at 1. But this is patently false, since the Attorney General's briefing said the exact opposite: that he "*has no authority* to threaten criminal prosecutions of the Abortion Trafficking Ban at this time." Dkt. 32 at 26. The Attorney General cannot threaten prosecution and has not threatened prosecution. Nor have Plaintiffs adequately pled a concrete plan to violate the law. Under settled Ninth Circuit caselaw, that precludes Plaintiffs both from establishing standing and from reaching past the Attorney General's Eleventh Amendment immunity. The Court thus lacks jurisdiction and this case should be dismissed under Rule 12(b)(1) as well.

STANDARD OF DECISION

"Although for the purposes of this motion to dismiss [the Court] must take all the factual allegations in the complaint as true, [the Court is] not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (cleaned up). "Rule 8(a)(2) . . . requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at n.3.

Standing is a necessary predicate to federal subject matter jurisdiction under Article III. *Cetacean Comm. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). If a plaintiff has not alleged an injury in fact sufficient to invoke federal jurisdiction, "the suit should be dismissed under [Federal Rule of Civil Procedure] 12(b)(6)." *Id.* at 1175. "An Eleventh Amendment defense 'is quasi-jurisdictional in nature and may be raised in either a Rule 12(b)(1) or 12(b)(6) motion.'" *Michael Mogan v. State Bar of Cal.*, Case No. CV 23-903-MWF, 2023 WL 5505909 at *2 (C.D. Cal. July 7, 2023) (quoting *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 927 (9th Cir. 2017)).

ARGUMENT

I. Plaintiffs fail to state a claim.

The Attorney General provided extensive argument regarding the legal defects in Plaintiffs' First Amendment and vagueness arguments in his opposition to Plaintiffs' motion for preliminary injunction and incorporates those arguments by

reference here. Dkt. 32. The Attorney General thus addresses in this motion the one claim as to which Plaintiffs did not seek a preliminary injunction: their claim that the Abortion Trafficking Ban violates the right to travel.

Plaintiffs fail to allege a cognizable violation of their right to interstate travel. The right to interstate travel contains three components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). It is only the first of these that Plaintiffs' Complaint alleges has been violated. Dkt. 1 ¶¶ 103–04. "A state law implicates the right to travel when it actually deters such travel." *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). This is a threshold showing for the purpose of injury sufficient to invoke standing. *Matsuo v. United States*, 586 F.3d 1180, 1182–83 (9th Cir. 2009). Plaintiffs fail to meet that standard here.

The Abortion Trafficking Ban does not interfere with Plaintiffs' right to travel as a matter of law. Idaho Code § 18-623 does not prevent Plaintiffs from entering or leaving the state. It does not prevent pregnant minor Idahoans from entering or leaving the state. It does not prevent Plaintiffs and pregnant minor Idahoans from leaving the state together for the purpose of aborting an unborn child in Washington or Oregon, or wherever else such a practice is legal. The thing it prohibits is not travel, but rather an adult procuring the abortion for the minor by, among other

things, transporting the minor *with the intent to conceal an abortion from the minor's parents*. Put another way, the statute does not restrict Plaintiffs in their travels into and out of the state with *any* person, rather it prohibits the acts done with the intent to conceal the procuring of a minor's abortion from the parents or guardians of that minor. Plaintiffs can legally enter and leave Idaho.

As with their First Amendment theories, this claim fails because accepting it would require the Court to invalidate many other human trafficking statutes. If a prohibition on trafficking a minor for the criminal purpose of abortion violates the right to travel, then it also violates the right to travel to prohibit trafficking a minor for sex or for slavery. But as noted in the Attorney General's preliminary injunction brief, Dkt. 32 at 21, Idaho law prohibits that conduct, Idaho Code § 18-8602(1)(a)(ii), and Plaintiffs' counsel previously enforced the provisions of federal law that prohibit sex trafficking. 18 U.S.C. § 1591(a)(1). A theory of the right to travel that would make room for such crimes is grossly overbroad.

Nor can Plaintiffs ground their interstate travel claims in speculation. Their fears that Idaho Code § 18-623 will lead to "an arbitrary enforcement scheme" that includes "traffic stops of reproductive age female minors" are not grounded in the law or in any enforcement action that they allege has actually occurred. Dkt. 12-1 at 15. That is not enough to state a claim.

Finally, Plaintiffs rightly acknowledge that there is no right to intrastate travel in the Ninth Circuit but ask this Court to reach out and find one. Dkt. 1 at 23–24, n.26; *see also Wright v. City of Jackson*, 506 F.2d 900, 901–903 (5th Cir. 1975)

(rejecting extension of right to travel to cover intrastate activity). But even if this court finds a right to intrastate travel, Plaintiffs have no constitutional injury based on that right as it has been applied in any other circuit. The circuits that have recognized a right to intrastate travel construe it as a "right to travel locally through public spaces and roadways," *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990), or as being "correlative" to the interstate right to travel with the three prongs described by *Saenz*. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971). But this too is no use to Plaintiffs because they do not plead that the Abortion Trafficking Ban restricts any travel, intrastate or otherwise. Idaho Code § 18-623 does not prohibit any act of travel, unless such act is done to procure an abortion for a minor with the intent to conceal the abortion from the pregnant minor's parents or guardian.

II. The Court lacks subject matter jurisdiction.

A. Plaintiffs lack standing because they lack a cognizable injury.

Because Plaintiffs have not pled a reasonable fear of prosecution under Section 18-623(1) they lack a concrete and particularized injury and thus lack standing. The judicial power of federal courts, "extends only to 'Cases' and 'Controversies,' [U.S. Const.] Art. III, § 2. And 'no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (brackets omitted). "'The law of Article III standing . . . serves to prevent the judicial process from being used

to usurp the powers of the political branches' . . . and confines the federal courts to a properly judicial role." *Id* at 338. (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407 (2013)) (cleaned up).

Key to standing is "injury in fact that is both concrete and particularized[,] and actual or imminent, not conjectural or hypothetical." *Dep't of Educ. v. Brown*, 600 U.S. ___, 143 S.Ct. 2343, 2351 (2023) (citations and internal quotation marks omitted). Plaintiffs bear the burden of demonstrating the existence of such an injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Without it, "the case begins and ends with standing." *Carney v. Adams*, 592 U.S. ___, 141 S.Ct. 493 (2020). Here, Plaintiffs' concerns about their intended conduct fail to get their action airborne.

When standing is asserted by plaintiffs prior to enforcement of a statute, plaintiffs must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 160 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). To successfully plead a credible fear of prosecution, the Ninth Circuit considers three things: "[1] whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, [2] whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and [3] the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). As the Attorney General

has already shown in his preliminary injunction brief, he has not threatened and cannot threaten any prosecution under the Abortion Trafficking Ban. And as set forth below, Plaintiffs have also not shown that they have a concrete plan to violate that law either.

Pre-enforcement standing "requires something more than a hypothetical intent to violate the law." *Thomas,* 220 F.3d at 1139. Plaintiffs must "articulate a concrete plan to violate" Idaho law "by giving details . . . such as when, to whom, where, or under what circumstances," they will violate the law. *Lopez v. Candaele,* 630 F.3d 775, 787 (9th Cir. 2010) (cleaned up). Put another way, while standing doctrine permits a "hold your tongue and challenge now" posture, *Ariz. Right Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), it still requires that Plaintiffs plead that they are, in fact, holding their proverbial tongues with some specificity. "The plaintiffs' allegations must be specific enough so that a court need not 'speculate as to . . . the contents of their proposed public statements or the circumstances of their publication.'" *Lopez*, 630 F.3d at 787 (quoting *United Pub. Workers (C.I.O.) v. Mitchell*, 330 U.S. 75, 90 (1947)). These requirements exist whether Plaintiffs assert a vagueness challenge or a First Amendment one. *Carrico v. City and Cnty. of S.F.*, 656 F.3d 1002, 1006 (9th Cir. 2011).

Even pleading a chill of their First Amendment rights, Plaintiffs must satisfy "the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction." *Lopez*, 630 F.3d at 785 (quoting *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 999 (9th Cir. 2004)). Nor is general fear of

prosecution in the absence of concrete plans to violate the law "a genuine controversy." *Younger v. Harris,* 401 U.S. 37, 42 (1971). Looking at each activity that Plaintiffs say the law curbs, there are only three claims: (1) "providing information regarding conduct legal in another state [where] it is illegal in this one" Dkt. 1 ¶ 124; (2) "funding or other practical support for Idahoans seeking to undertake legal conduct in another state" Dkt. 1 ¶ 125; and (3) "associat[ing] freely with each other and with pregnant Idahoans." Dkt. 1 ¶ 126.

But Plaintiffs nowhere plead the specific intent necessary to violate the law connected with a plan to traffic. To commit the crime of Abortion Trafficking, an adult must act "with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor." Idaho Code § 18-623(1). This specific intent as to a particular pregnant minor Idahoan is absent from the complaint, and this fact breaks the union of act and intent that is required to violate Idaho law. Idaho Code § 18-114.

Stating only a mere desire to violate the specific intent requirement, *see* Dkt. 32 at 9–10, their case fails for the reasons in *Younger* and *Lopez*: they have not articulated anything illegal beyond "mere 'some day intentions,' which 'do not support a finding of the actual or imminent injury that our cases require.'" *Lopez*, 630 F.3d at 787–88 (quoting *Thomas*, 220 F.3d at 1139). Plaintiffs have not had the law enforced against them, and there is no pending threat of enforcement. *Carrico*, 656 F.3d at 1006 (quoting *Lopez*, 630 F.3d at 786). Indeed, the Attorney General cannot enforce the challenged law absent circumstances not pled here, and so is not a proper

defendant. Dkt. 32 at 19–23. Plaintiffs lack a concrete and particularized injury, and therefore Article III standing.

B. Entity Plaintiffs lack associational and organizational standing.

Plaintiffs NWAAF and IIA assert to the Court their standing as organizations to sue on behalf of their constituents. *See* Dkt. 12-1 at 10. But they do not provide any analysis for either associational or organizational standing. Plaintiffs have not alleged any basis to sue "as the representative of [their] members." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977). Associational standing requires an organization to "allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Id.* They must "include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association," *United Food & Com. Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 555 (1996), and must identify this injured member with specific allegations. *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.,* 713 F.3d 1187, 1194 (9th Cir. 2013). Plaintiffs do not come close to this threshold requirement, and this failure to name any member affected by these laws is fatal to associational standing. *Summers v. Earth Island Inst.,* 555 U.S., 488, 498 (2009).

The same analysis applies to organizational standing: it too requires "(1) injury in fact, (2) causation, and (3) redressability." *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1134 (9th Cir. 2019). Beyond this, it requires an organizational plaintiff to

allege "(1) frustration of its organizational mission; and (2) diversion of its resources" to mitigate the effects of the challenged action. *Smith v. Pac. Props. And Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (citation omitted). An organizational plaintiff must allege "more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Rather, there must be "*concrete* and *demonstrable* injury to the organization's activities—with the consequent drain on the organization's resources." *Id.* (emphasis added). Plaintiffs do not allege such injury.

Organizational plaintiffs allege nothing more than a bare ideological "injury"—for much the same reasons as the individual plaintiffs. They too do not allege the specific intent necessary to commit the crime. Dkt. 1 ¶¶ 48–57. They nowhere allege an intent to engage in a specific plan that would violate the law. *Id.* The entity Plaintiffs themselves have pled no injury, and their claims should be dismissed for lack of standing.

C. Plaintiffs' claims are barred by the Eleventh Amendment.

Even beyond the lack of an injury in fact, the Attorney General's inability to enforce the statute means he is not a proper party. Plaintiffs' suit against the Attorney General is barred by sovereign immunity because Idaho Code § 18-623 provides no legal authority to initiate prosecutions. Sovereign Immunity is a jurisdictional defense as provided by the Eleventh Amendment. U.S. CONST. amend. XI. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States." *Id.*

The potentially available exception to sovereign immunity—an official capacity suit for prospective relief under *Ex parte Young*, 209 U.S. 123 (1908)—does not apply here. Whether a state official is appropriately named under *Young* overlaps with the traceability and redressability components of standing doctrine in the Ninth Circuit. *Sullivan v. Ferguson*, 636 F.Supp.3d 1276, 1287 (W.D. Wash. 2022) (citing *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004). The *Ex parte Young* exception to Eleventh Amendment immunity in challenges to the constitutionality of a statute only applies where the named public official has some special relationship with the challenged statute. *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *see also Ex parte Young*, 209 U.S. 123, 155–56 (1908). The "special relation" "must be fairly direct; a generalized duty to enforce state law or general supervisory power . . . for enforcing the challenged provision will not subject an official to suit." *Eu*, 979 F.2d at 704; *see also McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010). That connection does not exist here.

Cases such as *Whole Women's Health v. Jackson* make clear that to have a redressable constitutional injury against a state official, that official must be in a position where he "may or must" take an enforcement action under law. 142 S.Ct. 522, 535 (2021). Mere contingencies, separate from the discretionary authority of the official, do not count. *Id.* at 534 (rejecting *Ex parte Young* exception as to Texas Attorney General). This lack of "real likelihood" is the problem here: the legislature has authorized the Attorney General to proceed of his own initiative only where local

prosecutors attempt to nullify the statute by declaring that they would never prosecute a crime under that section with no consideration of the facts and circumstances surrounding the crime. Idaho Code § 18-623. Where the legislature expresses that an act may be done under certain conditions, the omission of other conditions operates as an exclusion of other cases. *See Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1055 (9th Cir. 2018). Because the Attorney General is only expressly authorized to act under this section if referred by a county prosecutor or if a county prosecutor declines to perform his or her duties, the Attorney General is powerless to enforce the act in other circumstances. Formal Att'y Gen. Op. 23-1. An injunction against him would not address the harms alleged by Plaintiffs and their alleged injury traceable to him: the Act may only be enforced by county prosecutors yet unnamed. *See Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1033 (6th Cir. 2022).

The Attorney General does not have the freestanding ability to enforce the criminal laws of the State of Idaho. *Newman v. Lance*, 129 Idaho 98, 102-3, 922 P.2d 395, 399 (1996). It is the legislature that prescribes the scope of the Attorney General's enforcement authority. *See State v. Summer*, 139 Idaho 219, 224, 76 P.3d 963, 968 (Idaho 2003) (recognizing legislature's limitation on such authority). This has been recognized by the Attorney General himself in an opinion delineating his enforcement authority: absent a motion by a county prosecutor, the Attorney General may not enforce general criminal law. Att'y Gen. Op. 23-1 (April 27, 2023). This is particularly true where, as here, the legislature has specified that the sole condition

in which the attorney general may enforce the Abortion Trafficking Law is where 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) (emphasis added). Put another way, absent an attempt at prosecutorial nullification of this section, the Attorney General has no self-starting authority to enforce this section.

The Attorney General recently explained and clarified these principles in a formal opinion construing the limits on his own prosecutorial powers. Att'y Gen. Op. 23-1 (April 27, 2023). As he explained, he has prosecutorial authority only "if requested by county prosecutors and approved by a state district judge" or "if specifically conferred by the Legislature." *Id*. at 2. That definitive construction of the limits of his own powers supersedes the Ninth Circuit's interpretation of Idaho law in *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004), which stated that the Attorney General was a proper defendant to a challenge to the State's abortion laws because "the attorney general may in effect deputize himself (or be deputized by the governor) to stand in the role of a county prosecutor." Since neither of the two conditions for the Attorney General's prosecutorial authority—referral by a county prosecutor or a specific legislative grant—are met here, the Attorney General has no authority to stand in the role of the county prosecutor.

First, no county prosecutor has referred any case under the Abortion Trafficking Ban to the Attorney General, and Plaintiffs do not allege otherwise. The Attorney General would not have referral authority to prosecute violations of this

statute unless there were a specific case considered by a specific county prosecutor who asked the Attorney General for help. Plaintiffs do not allege that such a case exists. They want to violate the law, sure enough, but they do not allege any specific circumstances in which they intend to do so. Nor have they sued any of the county prosecutors who would have direct prosecutorial authority if they did violate the law. Instead, they have only sued the Attorney General, whose purely derivative authority has not yet been triggered.

Second, the limited legislative grant of prosecutorial authority to the Attorney General under the Abortion Trafficking Ban has not been triggered here. See Att'y Gen. Op. 23-1 at 2–3. That limited authority is still contingent on actions by county prosecutors: he "has the authority, at [his] sole discretion, to prosecute a person for a criminal violation of this section 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) (emphasis added). Thus, the Attorney General does not have any prosecutorial authority unless a county prosecutor first refuses to exercise his or her authority. Plaintiffs have alleged no facts that indicate that any prosecutor in Idaho has so refused to enforce this section of code. Indeed, none have. The Attorney General thus lacks any prosecutorial authority under the Abortion Trafficking Ban at this time.

Because the Attorney General would have authority under this statute only based on actions of county prosecutors that have not yet occurred, he is not a proper defendant under *Ex parte Young*, and retains his Eleventh Amendment immunity.

CONCLUSION

For these reasons, the Court should dismiss the Complaint for failure to state a claim and for lack of jurisdiction. The Attorney General reserves his right to seek attorneys' fees under 42 U.S.C. § 1988 for actions "found to be unreasonable, frivolous, meritless, or vexatious." *Legal Servs. of N. Cal., Inc. v. Arnett*, 114 F.3d 135, 141 (1997) (cleaned up).

DATED: September 12, 2023

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *James E. M. Craig*
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Deputy Chief, Civil Litigation and
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER, OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

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Am. Acad. of Pediatrics, Comm. on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion*, 139 Pediatrics e20163861 (2017) 21

EugeneVolokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones,
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Rachel *K. Jones et al., Adolescents' Reports of Parental Knowledge of Adolescents' Useof Sexual Health Services and Their Reactions to Mandated Parental Notificationfor Prescription Contra*ception, 293 JAMA 340 (2005). 21

Defendant Raúl Labrador acknowledges in his Opposition that he intends to prosecute Plaintiffs for exercising their First Amendment rights to assist pregnant Idaho minors obtain lawful abortions in neighboring states. He admits that in his interpretation of the statute, persons who fail to affirmatively notify a pregnant minor's parents have violated Idaho Code § 18-623, although that language is not in the statute. In short, Defendant's Opposition underscores that Idaho's Abortion Travel Ban violates Plaintiffs' First and Fourteenth Amendment rights. This Court should enjoin him from enforcing it.

ARGUMENT

Plaintiffs seek preliminary injunctive relief. They ask this Court to enjoin Defendant from enforcing Idaho Code § 18-623, which seeks to punish adults who assist pregnant minors obtain lawful abortion care outside of Idaho. Plaintiffs do not seek to replace or become anyone's parents. Rather, they wish to continue expressive activity in support of pregnant minors who seek their assistance. Plaintiffs understand that Idaho has chosen to criminalize abortion care. Thus, Plaintiffs intend to engage in expressive activity that assists pregnant minors obtain abortion care only where it is lawful. Plaintiffs also understand that to prove a violation of a criminal statute, Defendant must prove every element beyond a reasonable doubt. That basic constitutional requirement for a criminal conviction does not mean that it is permissible for some words or phrases or a single element within a criminal statute to be unconstitutionally vague, however.

Plaintiffs in their motion for a preliminary injunction assert that Idaho Code § 18-623 violates their First and Fourteenth Amendment rights. Plaintiffs argue that the statute infringes on their First Amendment rights to associate freely with each other and with pregnant Idahoans; to engage in expressive conduct, including providing funding or practical support for pregnant minors traveling to access out-of-state services that are legal where rendered; and to receive and

provide information on specific content: abortion care. Defendant's Opposition addresses only the first two arguments and insists that Plaintiffs' expressive conduct is not protected because it relates to a crime. Defendant ignores that Plaintiffs seek to assist pregnant minors obtain *lawful* abortion care, that is, abortion care outside of Idaho. Idaho Code § 18-623 unconstitutionally chills Plaintiffs' exercise of First Amendment rights related to that lawful abortion care outside of Idaho; hence, it is an Abortion Travel Ban.

Plaintiffs also argue that the statute is unconstitutionally vague because it fails to give persons of ordinary intelligence fair notice of the conduct it punishes. Idaho Code § 18-623 is vague in at least three respects. First, it is unclear what conduct it targets, and it appears to target behaviors that are otherwise legal in the states where those behaviors occur. Defendant does not address this argument. Second, it uses terms that are vague and for which no definitions are provided. Third, it is unclear what contact adults who help and mentor youth would need to have with a pregnant minor's parent or guardian to avoid liability or avail themselves of the statute's so-called affirmative defense. Defendant's Opposition addresses only the last two arguments.

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

Defendant's Opposition boils down to four arguments: (1) § 18-623 punishes conduct, not speech; (2) Plaintiffs ignore the statute's intent to conceal element; (3) § 18-623 is just like sex trafficking, so it is not vague; and (4) § 18-623 is narrowly tailored to serve Idaho's compelling interest in preserving parental rights, thereby justifying the statute's infringement on the constitutional rights of Plaintiffs and others. Each argument fails. At bottom, Defendant's position is that a minor cannot obtain an abortion in a state where it is lawful without the permission of their parents or guardian. But if that is what they seek to accomplish, that is not the

statute the Legislature passed. And it ignores Idaho's long-standing statutory support for minors making decisions about their own medical care.

A. The Abortion Travel Ban Infringes on Plaintiffs' First Amendment Rights of Speech, Association, and Expressive Conduct.

Defendant's Opposition insists that because abortion is a crime in Idaho, this Court's First Amendment analysis must view Plaintiffs' expressive conduct and associational rights through that lens. Defendant's Opposition to Plaintiffs' Motion for TRO or Preliminary Injunction ("Opp.") at 11-12. But the cases Defendant cites do not support that argument. And First Amendment case law makes clear that the Abortion Travel Ban infringes on Plaintiffs' First Amendment rights to speech and association.

Relying on a 1949 U.S. Supreme Court decision, *Giboney v. Empire Storage & Ice. Co.*, 336 U.S. 490 (1949), Defendant argues that any speech at issue is part of "'a single and integrated course of conduct' in violation of a valid criminal statute." *Id.* at 12-13. Setting aside the continuing validity of *Giboney*,[1] this argument fails for two reasons. First, it presumes that Idaho Code § 18-623 is a valid criminal statute. For the reasons set out in Plaintiffs' complaint, memorandum in support of motion for a temporary restraining order, or, in the alternative, a preliminary injunction, and this reply, it is not. Second, it ignores that abortions are legal in the states in which Plaintiffs will be assisting pregnant minors obtain abortions. Abortions remain legal in the overwhelming majority of states, and in some where legislatures made it a crime,

[1] In *King v. Governor of the State of New Jersey*, 767 F.3d 216, 225 (3d Cir. 2014), *abrogated on other grounds by National Institute of Family and Life Advocates v. Bacerra*, 138 S. Ct. 2361 (2018), the Third Circuit noted that the passages upon which the defendants rely in *Giboney* have "been the subject of much confusion. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1314-22 (2005) (discussing eight distinct interpretations of *Giboney*'s "course of conduct" language).

citizen initiatives passed statutes or constitutional amendments codifying the right to abortion. To be sure, Idaho is not one of them. Yet. But Idaho's criminalization of reproductive choice does not make abortion care inherently criminal. Indeed, when discussing obtaining abortion care in another state, Plaintiffs are not discussing a crime, and when driving or providing travel money for someone to receive abortion care in another state, Plaintiffs are not assisting a crime. And when Plaintiffs' donors fund these activities, they are not funding criminal activity. They are discussing, providing travel assistance for, and receiving donations related to lawful conduct.

By contrast, Idaho Code § 18-623 runs afoul of basic First Amendment principles. The First Amendment protects the right of all people to make their own decisions about "the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994), even when those ideas and beliefs are unpopular. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023). The plain language of Idaho Code § 18-623 demonstrates how the statute infringes on Plaintiffs' First Amendment rights.

First, the Abortion Travel Ban criminalizes "harboring" a pregnant minor. Idaho Code § 18-623(1). By doing so, the statute impinges on protected associational rights because Plaintiffs are chilled from associating with pregnant minors and volunteers, such as by providing a place to stay, if during that stay the minor decides to access a lawful abortion. Criminalization of "harboring" also targets expressive conduct. If Plaintiffs or their volunteers hold themselves out as providing a refuge for pregnant minors, such as by offering accommodations, Plaintiffs are intending to convey a particularized message of abortion support, and this message is likely to be understood by those who view it—that Plaintiffs support lawful abortion and will help a minor access it. *See Texas v. Johnson*, 491 U.S. 397, 410, 411 (1989).

Next, the Abortion Travel Ban criminalizes "recruiting" a pregnant minor. Idaho Code § 18-623(1). This is unconstitutional because the term "recruiting" targets a wide swath of protected speech, and it is unclear exactly what would count as recruiting. Speech that constitutes "recruiting" could include a trusted adult speaking to a minor about the availability of lawful abortion, furnishing information about abortion clinics in Washington and Oregon, and offering transportation assistance. "Recruiting" also targets expressive conduct because Plaintiffs could be seen as "recruiting" pregnant minors if they hold themselves out as trusted organizations and adults who help minors and are advocating for the accessibility of lawful abortion. "Recruiting" likewise targets protected association. It prevents Plaintiffs from working together with pregnant minors in support of lawful abortion. It amounts to the State imposing its views on groups that express views the State finds disagreeable. *See Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (laws are content-based regulations on speech if they were "adopted by the government because of disagreement with the message [the speech] conveys") (brackets in original; internal quotation marks and citation omitted).

Additionally, the Abortion Travel Ban criminalizes "transporting" pregnant minors, which also invades Plaintiffs' protected speech and expressive conduct. Idaho Code § 18-623(1). Plaintiffs are unsure if their speech that involves sharing information on travel will be punished by the Abortion Travel Ban. The prohibition on "transporting" a minor also targets protected association. It is unclear if the statute would criminalize a trusted adult who is associating with a minor by transporting them in their vehicle.

An adult who "procures" an abortion or "obtains" an abortion-inducing medication for a pregnant minor is also targeted by the Abortion Travel Ban. *Id.* By forbidding the "procuring" or "obtaining" of an abortion or abortion-inducing medication, the statute impermissibly restricts

Plaintiffs' ability to spend money in support of lawful abortion. Plaintiff Northwest Abortion Access Fund, as an abortion fund, spends money on lawful abortion as a core component of its mission. Plaintiff Indigenous Idaho Alliance provides financial assistance to pregnant minors to obtain lawful abortions. Both Plaintiffs expend funds to cover the cost of the procedure, medication, travel, accommodations, and other logistics, and in doing so they convey a message of support for lawful abortion.

Finally, by purporting to criminalize only those individuals and organizations that assist pregnant minors in Idaho obtain lawful abortions outside of Idaho, Idaho Code § 18-623 prohibits speech based on content and viewpoint. Laws that target speech based on its content "are presumptively unconstitutional." *Reed*, 576 U.S. at 163. "Viewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). By criminalizing conduct by individuals and organizations who support and fund lawful out-of-state abortions, Idaho Code § 18-623 targets speech and conduct that expresses the view that abortion care should be accessible. For example, "recruiting" could punish those who generally speak in favor of lawful abortion, including Plaintiffs holding themselves out as a resource for pregnant minors, expressing support for lawful abortion, and communicating the availability of their services. This prohibition on "recruiting" targets speech based on its content: lawful abortion. It is also viewpoint-based because it generally targets speech that is in support of lawful abortion, a viewpoint with which the State disagrees. *See Planned Parenthood Greater N.W. v. Labrador*, No. 1:23-cv-001420, 2023 WL 4864962, at *22 (D. Idaho July 31, 2023) (threats to prosecute health care providers for referring people for out-of-state abortion care were content- and viewpoint-based restrictions because they silence health

care providers "on a single topic—abortion," while permitting them to "provide information and referrals about out-of-state resources like anti-abortion counseling centers or prenatal care").

Plaintiffs are likely to succeed on the merits of their claim that Idaho Code § 18-623 infringes on their First Amendment speech and association rights, and this Court should enjoin Defendant. from enforcing it.

B. The Abortion Travel Ban Is Vague Because Its Language Is Unclear and as Defendant Interprets Its Intent Element, It Does Not Provide Notice to a Person of Ordinary Intelligence.

Defendant insists that because the words "harboring," "recruiting," and "transporting" appear in state and federal sex trafficking and human trafficking statues, use of them in Idaho Code § 18-623 does not violate Plaintiffs' Fourteenth Amendment rights. Opp. at 3, 21-22. But abortion trafficking is not a thing. Abortion care remains legal in the majority of states, including both of Idaho's neighboring states to the west. Traveling to receive abortion care in a state where it is legal is not trafficking. Prohibiting such travel or imposing criminal penalties for such travel (even if you also have to prove the intent to conceal) is an Abortion Travel Ban.

The Abortion Travel Ban is not just like a sex trafficking statute. Sex trafficking statutes prohibit conduct that brings vulnerable people, usually women, into the commercial sex trade through some sort of force. The conduct into which the person is brought is illegal, and it is done in some fashion against the will of the trafficked person. Here, by contrast, Defendant seeks to punish Plaintiffs who assist pregnant minors obtain *lawful* abortion care the pregnant minor seeks to obtain. Moreover, Plaintiffs, unlike sex traffickers, are not scouting for vulnerable young women to bring into illegal activity. The people they assist in obtaining abortions seek Plaintiffs' assistance. Idaho Code § 18-623 purports to criminalize conduct that is lawful in the state where it occurs. It is in that context, which is unlike the trafficking context, that

"harboring," "recruiting," and "transporting" are unconstitutionally vague. Plaintiffs, and other adults who wish to assist pregnant Idaho minors, must discern how or when ordinary acts of assistance become "harboring," "recruiting," and "transporting" for purposes of the statute.

And, for the reasons set forth above in Section I.A, these provisions infringe on Plaintiffs' First Amendment rights. Vague statutes are particularly objectionable when, as here, they "involve sensitive areas of First Amendment freedoms" because "they operate to inhibit the exercise of those freedoms." *Cal. Tchrs. Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

Finally, Defendant's insistence that Plaintiffs have ignored the "intent to conceal" element actually underscores that the statute is vague. Plaintiffs do not suggest that the State would not have to prove every element of Idaho Code § 18-623 beyond a reasonable doubt to obtain a conviction. Plaintiffs also well understand that one of those elements the State would have to prove is that a person acted with the "intent to conceal" the abortion from the pregnant minor's parents or guardian. Plaintiffs' vagueness argument is that they are not certain what that means, particularly in the same statute where consent of a parent is an affirmative defense.

Defendant's Opposition admits that, as Plaintiffs argued in their opening brief, the statute fails to provide adequate notice regarding what culpability attaches to communication or the lack thereof with a minor's parents and/or guardians. Memorandum in Support at 16. At least five times Defendant conflates "intent to conceal" from the pregnant minor's parent with the parent's lack of knowledge. First, Defendant argues that the specific "intent to conceal" element demonstrates that the statute is narrowly tailored to the State's interest of "helping ensure *parental involvement in the pregnant minor's decision* as to whether to have an abortion." Opp. at 18. Second, Defendant argues that "the State's interest is unrelated to the

restriction of free expression. Ensuring that any assistance for out-of-state abortions take place *only with the knowledge of a child's parents* has no relation to free speech." *Id.* Third, Defendant argues that "providing parents with notice and advance knowledge would likely prevent a prosecutor from bringing a case, while a prosecutor might be able to argue the *specific intent requirement was met if a defendant provided no notice to the child's parents*." *Id.* at 23. Fourth, Defendant asserts that "Plaintiffs' contention that the Constitution gives them the right to get minors to travel across state lines *without their parents' knowledge* is truly shocking." *Id.* at 3. Finally, Defendant asserts that "it is clear that Plaintiffs want to violate the specific intent requirement that they gloss over. Plaintiff Matsumoto, a member of the bar, "'would like to provide temporary shelter for pregnant minors . . . who are traveling to obtain . . . abortion care . . . *whether those minors' parents know or do not know'*." *Id.* at 9.

In all five instances, Defendant's own arguments suggests he is unsure what "intent to conceal" means and he contends that lack of knowledge by the pregnant minor's parent is the same as intending to conceal. But those are two different things. One is an affirmative act (intent to conceal), and the other can arise from lack of action. And if *Defendant* is confused by what "intent to conceal" means, how can the statute possibly provide adequate notice to a person of ordinary intelligence? In all five instances, Defendant also makes clear what his interpretation of the statute is and what conduct he would prosecute.

Suggesting that "intent to conceal" is the same as "without a parent's knowledge" is not the only time Defendant asks this Court to accept Defendant's interpretation of the statute different from how it is written. Defendant argues that "[t]he law does not threaten [Plaintiffs'] speech – instead it prohibits only specified conduct that *intentionally causes* a pregnant minor's abortion with an intent to conceal the abortion from the minor's parents." Opp. at 5. The words

"intentionally causes" are not in Idaho Code § 18-623, however. Does telling a minor where abortion is legal "intentionally cause" an abortion? Does providing travel money "intentionally cause" an abortion? Does providing a pregnant minor a place to stay before the pregnant minor travels across state lines "intentionally cause" the abortion? To Defendant the answer to all of these questions is apparently yes. And Defendant's grafting of "intentionally causes" onto the statute is not an interpretation that a person of ordinary intelligence would understand.

This Court should find that Plaintiffs are substantially likely to succeed on the merits of their Fourteenth Amendment vagueness claim and enjoin Defendant from enforcing the Abortion Travel Ban.

C. Defendant's Asserted State Interest Is Not Narrowly Tailored.

Plaintiffs are helpers in the community seeking to deliver accurate information to young people, who themselves have certain rights to receive that information, even if Plaintiffs' lawsuit does not bring their claims. Defendant distorts this into a parental rights issue. To distract from Idaho Code § 18-623's unconstitutional intrusion into Plaintiffs' rights, Defendant paints a picture of nefarious Plaintiffs coercing minors into obtaining abortions and invading and usurping the right to parent. In reality, Plaintiffs do not contend that they can substitute themselves for the role of the parent. Plaintiffs merely contend that they are trusted adults in the community who young people can come to for support, including by engaging in constitutional speech and expressive conduct that help young people obtain lawful out-of-state abortions. Plaintiffs are not intruding upon parental rights. Further, to the extent that parental rights are implicated, the statute is not narrowly tailored to a compelling state interest, and thus does not survive strict scrutiny.

Defendant contends that "[t]he Plaintiffs are asserting the right to determine for themselves whether a parent is fit in order to decide whether it is okay to conceal information about a pregnant minor's abortion from the parents." Opp.at 24. That is false. Plaintiffs make no judgment about a pregnant minor or the pregnant minor's parents or guardians. They know from experience that the pregnant minors who seek their assistance do so for a variety of reasons, including because Plaintiffs are trusted adults or because there is no parent in the pregnant minor's life, or because the pregnant minor does not have or feel the ability to place trust in their parents, or because the pregnant minor has been the victim of sexual or domestic abuse that makes seeking the guidance of a parent or guardian unsafe. Plaintiffs' assisting those minors involves no judgment of a parent.

In its effort to find legal support for its argument that Plaintiffs are intruding on established parental rights, and thus that Idaho Code § 18-623 is narrowly tailored to a compelling state interest, Defendant first points to Idaho Code § 18-4506, Child Custody Interference. Defendant claims that Plaintiffs' actions in assisting a minor access a legal abortion already violate this law, and that Idaho Code § 18-623 is simply a more specific way to protect a parent's right to know, particularly on the sensitive topic of abortion. Opp. at 2, 6-7, 14.

But Idaho Code § 18-4506, properly understood, does not proscribe Plaintiffs' conduct, and Defendant's reliance on it is misplaced. Idaho Code § 18-4506 was enacted to protect the custody rights of parents, to prevent parental abduction, and to provide specific defenses for parents accused under the statute. The statement of purpose accompanying the child custody interference bill confirms this, stating: "The purpose of this bill is to provide a definition of child custody and visitation and to provide penalties for violation. Under present law there is no enforceable remedy for a parent or custodian except for an expensive, usually lengthy, court

battle . . . .” This comports with the intention of the forwarding legislators, as reflected in the Committee Minutes, where the statute is referred to as “parental kidnapping.” February 13, 1987, House Judiciary, Rules & Administration Committee Minutes.

This purpose of Idaho Code § 18-4506 to address issues of custody interference in divorce, domestic violence, and parental alienation situations is reflected in Idaho court cases. *See, e.g., Boe v. Boe*, 163 Idaho 922, 933-34, 422 P.3d 1128, 1139-40 (2018) (divorce appeal addressing issues of education and custody); *Hopper v. Swinnerton*, 155 Idaho 801, 317 P.3d 698 (2013) (domestic dispute case noting that § 18-4506 does not create a private cause of action for damages); *Danti v. Danti*, 146 Idaho 929, 204 P.3d 1140 (2009) (§ 18-4506 mentioned in case involving custody disputes in a divorce); *Hopper v. Hopper*, 144 Idaho 624, 167 P.3d 761 (2007) (divorce action involving lack of statutory defenses under § 18-4506); *State v. Levicek,* 131 Idaho 130, 953 P.2d 214 (1998) (appeal on restitution amount in case where father pled guilty under § 18-4506 after improperly taking his daughter out of the United States). In short, Idaho Code § 18-4506 was not intended to, and does not, address the issues at hand.

The State also relies on *Troxel v. Granville*, 530 U.S. 57 (2000), as further support for its overall assertion of the supremacy of parental rights and its argument that assuring a parent’s right to know is a compelling state interest. Opp. at 6, 7. While *Troxel*, a case with two concurring opinions and three separate dissents, recognizes parental interests, it does not stand for the proposition that those rights are unlimited. The plurality opinion in *Troxel* recognized that there are situations where intervention in a family is warranted. *Troxel*, 530 U.S. at 68-69. Further, *Troxel*’s applicability outside the context of third-party visitation has been questioned, both in the Ninth Circuit and beyond. *See Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (*Troxel* was a visitation case and could not be extended to educational policies); *Gabriel v.*

Lavison, No. 2:22-cv-00006, 2022 U.S. Dist. LEXIS 36025, at *6 (W.D. Wash. Mar. 1, 2022) (noting *Troxel* "involves the visitation rights of grandparents" and did not apply in another context); *Case v. Ivey*, No. 21-12276, 2022 U.S. App. LEXIS 18433, at *8 (11th Cir. July 5, 2022) (noting no case has extended *Troxel* to situations involving how to dress one's child or what medical care to provide for them); *McGee v. Va. High Sch. League*, 801 F. Supp. 2d 526 (W.D. Va. 2011) ("Although it is well-established that the Constitution protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children, it is equally apparent that the right is neither absolute nor unqualified." (citation omitted)).[2]

Even in Idaho, parental rights are not absolute. Like most states, Idaho allows minors to consent to certain medical services themselves, without parental consent or even notification. This confidentiality improves outcomes for minors and does not stop minors from consulting with their parents, in situations where it is safe to do so.[3] What mandatory notification does not

[2] Other cases relied on by Defendant to support his parental rights argument address far different circumstances than the case before the Court. *See, e.g., Nelson v. Evans*, 170 Idaho 887, 517 P.3d 816 (2022) (visitation statute unconstitutional as, *inter alia*, not narrowly tailored); *Bartosz v. Jones*, 146 Idaho 449, 465, 197 P.3d 310, 326 (2008) (Eismann, J., concurring) (parent's ability to relocate out of state with a shared minor child); *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000) (case involving false allegations of sexual abuse and satanic ritual, which led authorities to remove two minors from their home and have them undergo intrusive medical examinations); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (inquiry by a neutral factfinder, and not formal hearings, required when a parent sought to admit a minor to a mental health facility and recognizing that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (court affirmed conviction for violation of state labor laws where a minor was street preaching as "neither rights of religion nor rights of parenthood are beyond limitation"); *Martin v. Vincent*, 34 Idaho 432, 201 P. 492 (Idaho 1921) (case involving a minor who was physically detained at the Idaho Industrial Training School and his parents given no opportunity to challenge his detention in court).

[3] One study found that 60 percent of adolescents receiving confidential sexual health care services had told their parents or guardian. Rachel K. Jones *et al., Adolescents' Reports of Parental Knowledge of Adolescents' Use of Sexual Health Services and Their Reactions to Mandated Parental Notification for Prescription Contraception*, 293 JAMA 340 (2005).

protect, however, are those minors who are not living in Defendant's idealized world. These minors face the prospect of being parents themselves while living in situations of instability, violence, or dysfunction; have been the victims of sexual violence or coercion; and suffer from mental and physical health challenges.[4]

In Idaho, minors 14 or older can consent to medical treatment for reportable infectious, contagious, or communicable diseases. Idaho Code § 39-3801 ("The consent of the parent, parents, or legal guardian of such minor shall not be necessary . . . ."). Minors 16 or older may request drug treatment medical services without parental notification. Idaho Code § 37-3102. Minors 17 or older may donate blood without parental permission. Idaho Code § 39-3701(1). Idaho allows doctors to provide contraceptive prescriptions and devices to "any person" they deem able to understand the information, Idaho Code § 18-603, and allows minors to place their own child for adoption without parental consent. Idaho Code § 16-1504(7). Minors may consent to any medical care for their own child without parental consent, in recognition of the reality that pregnant or parenting minors are the appropriate decision makers in these circumstances.[5]

Defendant ignores that minors have constitutional rights in other contexts as well, including in the criminal justice system. *In re Gault*, 387 U.S. 1, 13 (1967) (juvenile defendants

[4] *See* Am. Acad. of Pediatrics, Comm. on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion*, 139 Pediatrics e20163861 (2017); J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 Berkeley Women's L.J. 61 (2003).

[5] Idaho allows minors to consent to their own health care more generally. Idaho Code 39-4503 ("Any person . . . who comprehends the need for, the nature of, and the significant risks ordinarily inherent in any contemplated health care services is competent to consent . . . ."). This makes sense, as medical standards and ethics already govern the doctor patient relationship and allow the doctor to do what is best for the person seeking their care. *See generally* Marcia D. Greenberger & Katherine Connor, *Parental Notice and Consent for Abortion: Out of Step with Family Law Principles and Policies*, Family Planning Perspectives, vol. 23, no. 1 (1991).

have rights to counsel, notice of charges, confront and cross-examine witnesses, be free from self-incrimination, review discovery, and appellate review). "[W]hatever may be their precise impact, neither the Fourteenth Amendment, nor the Bill of Rights, is for adults alone." *Id.* "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976). Defendants in the juvenile justice system do not have all the same rights as defendants in criminal court because the juvenile justice system does not operate at the same level of severity and permanence as the adult system. Pregnancy, and becoming a parent, however, have the same impact of severity and permanence on all individuals, regardless of age.

The exceptions to mandatory parental involvement in adolescent care set out above evince Idaho's understanding that while familial involvement in all aspects of a young person's life may be the ideal the State desires, that hope must be reconciled with the reality that many minors will not or cannot avail themselves of important services if they must involve their parents. The fact that, post-*Dobbs*, Idaho can criminalize abortion health care for most of its citizens does not mean that the State also has the authority to subject minors in the state to a rigid and expanded definition of parental rights, especially where that definition would limit the First Amendment rights of other citizens and would put many minors in harm's way. Idaho's many statutes allowing minors to make a variety of health and welfare decisions for themselves are consistent with the long-standing awareness that while Idaho may wish that every family were a happy one and every teenager an open book, minors need access to legal health care and Plaintiffs have the constitutional right to discuss and support this access. Defendant's attempt to use parental rights as cover for an unconstitutional statute should not be permitted to stand.

And if a pregnant minor truly were taken across state lines against their will, Idaho already has a statute that proscribes such conduct: kidnapping. Idaho Code § 18-4501, *et seq.* Defendant does not refer to the state kidnapping statute in his Opposition, likely because the kidnapping statute requires that the act be committed "with intent" to hold someone "against [their] will." Idaho Code § 18-4501(1). Should any person run afoul of the state's kidnapping statute, Defendant has been and remains free to prosecute them. But Defendant knows that no one has or will be held against their will in the situations at issue here, and no kidnapping law has been or will be broken.

II. PLAINTIFFS WILL BE IRREPARABLY HARMED BY VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Defendant insists there is no injury because there is no constitutional violation. He thus concedes, as he must, that if there is constitutional injury, there is irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009); *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012). Plaintiffs face the real threat of prosecution, by Defendant's own admissions, for having conversations with pregnant minors about legal abortion care if that minor then travels outside of Idaho to obtain abortion care.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVORS AN INJUNCTION.

Defendant also insists that the balance of equities and public interest weigh against injunctive relief, again, because there is no constitutional violation. They thus concede, as they must, that if there is constitutional injury, the balance of equities and public interest fall strongly in Plaintiffs' favor. "[E]nforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

IV. IDAHO ATTORNEY GENERAL RAÚL LABRADOR IS THE PROPER DEFENDANT.

Defendant argues that Plaintiffs have no injury because the Attorney General is not the proper defendant. Opp. at 25-27. Defendant's argument has been rejected by the Ninth Circuit and by this Court. *Planned Parenthood of Idaho, Inc., v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (even where the Idaho Attorney General does not have direct enforcement power, his assistance powers make it possible for him to have enforcement authority and bring him within the exception in *Ex Parte Young,* 209 U.S. 123 (1908), allowing federal court actions against state officers in their official capacities); *Planned Parenthood Greater Nw.*, Memorandum Decision and Order, at 18-21 (July 31, 2023) (same); *see also Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). Here, where the statute specifically provides authority to enforce the at-issue statute where a county prosecutor will not, the *Ex Parte Young* exception is even more availing.

Defendant also argues that his formal opinion construing the limits of his prosecutorial powers issued April 27, 2023, supersedes the Ninth Circuit's interpretation of his powers in *Wasden*. Opp. at 26-27. Defendant identifies no authority for this proposition and acknowledges in a footnote that *Planned Parenthood Greater Northwest* is to the contrary. *Id.* at 27 n.2. Until and unless the Ninth Circuit overrules *Wasden* or establishes a different test for determining when an attorney general has sufficient connection to enforcement of a statute, Attorney General Labrador is the proper defendant.

CONCLUSION

For the reasons set forth above, and in Plaintiffs' opening memorandum, this Court should enter an order enjoining the Defendant from enforcing Idaho Code § 18-623.

DATED: September 11, 2023.

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LAURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

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INTRODUCTION

This is a lawsuit over the constitutionality of Idaho Code § 18-623, which Plaintiffs call the "Abortion Travel Ban." *See* Dkt. 12-1 at 2. But that is an egregious misnomer. The law does not ban anyone from traveling to another state, much less doing so to obtain an abortion that might be illegal in Idaho. The law prohibits not abortion travel, but rather abortion *trafficking*: recruiting, harboring, or transporting a pregnant minor for an abortion with *intent to conceal from the minor's parents or guardian*. Idaho Code § 18-623(1). It is an Abortion *Trafficking* Ban, not an Abortion *Travel* Ban. Plaintiffs still challenge it: they say they have a First Amendment right to help other people's children go to other states for abortions without their parents' knowledge, much less consent. But the Constitution recognizes no such thing.

To the contrary, the Constitution recognizes the rights of parents to be involved in medical decisions about their children. Plaintiffs' own allegations show that abortion is exactly that kind of decision. They allege that "[p]regnancy, childbirth and parenting significantly impact an individual's physical and mental health, finances, and personal relationships" and that becoming a parent "is extremely personal and permanent." Dkt. 1 ¶ 27. That is why "[a]n intimate decision of this magnitude," *id.*, should be made with the support and wisdom of at least one of a child's parents or guardians. "After all, there is the traditional presumption that a fit parent will act in the best interest of his or her child." *Nelson v. Evans*, 170 Idaho 887, 896, 517 P.3d 816, 825 (Idaho 2022) (internal quotation omitted).

Yet Plaintiffs turn this presumption on its head by taking it upon themselves to determine whether a parent is fit and whether they should get to decide their children's decisions. Plaintiffs believe that they, not a pregnant minor's parents, get to decide what is in her best interests:

- that *they* have a right to hide a minor child from that child's parents if *they* believe that is appropriate;
- that *they* have a right to help transport a minor child across state lines for an abortion while concealing this transportation from the minor's parents;
- that *they* have a right to determine whether it is appropriate to notify a minor's parents about "an intimate decision of this magnitude."

Dkt. 1 ¶¶ 26–30, 32; *see also* Dkt. 12-9 ¶¶ 17–19; Dkt. 1 ¶¶ 26–30, 32, 47–51, 55; Dkt. 12-1 at 14, 21, 25–26; Dkt. 12-7 ¶¶ 43–45, 47–51, 53–54; Dkt. 12-8 ¶¶ 39–41, 50–54; Dkt. 12-9 ¶¶ 12–14, 18–19, 20–23, 26–27.

In any other context, Plaintiffs' statements about their plans would readily be recognized for what they are: the crime of child custody interference. That offense is when one "intentionally and without lawful authority … takes, entices away, keeps or withholds any minor child from a parent or another person or institution having custody, joint custody, visitation, or other parental rights." *See* Idaho Code § 18-4506(1)(a). That is exactly what Plaintiffs want to do here. And if they do it for the additional purpose of helping a pregnant minor to obtain an abortion with an intent to conceal the abortion from the minor's parents, they also commit the crime of abortion trafficking.

In this light, Plaintiffs do not meet any of the requirements for a preliminary injunction. The law does not violate their freedom of speech, but rather regulates their conduct: helping other people's children cross state lines for an abortion with the intent to conceal the abortion from the minor's parents. That does not violate Plaintiffs' freedom of association either. Neither is the law vague, since the conduct it prohibits—recruiting, harboring, or transporting a minor—is the same conduct prohibited by other human trafficking statutes, including federal statutes that Plaintiffs' counsel enforced as U.S. Attorney. The balance of harms and public interest overwhelmingly favor the parents whom the Abortion Trafficking Ban protects, and whom Plaintiffs seek to prevent from knowing about major decisions affecting their children. Finally, Plaintiffs are not even injured with a threat of prosecution. They have not alleged any threat to actual protected speech, and the Attorney General has no authority to prosecute them until a county prosecutor either requests his assistance or refuses to enforce the law. That lack of prosecutorial authority is not just fatal to Plaintiffs' claims on the merits, but also to the Court's jurisdiction.

Plaintiffs' contention that the Constitution gives them the right to get minors to travel across state lines for an abortion without their parents' knowledge is truly shocking. That shocking contention does not entitle them to a preliminary injunction.

STANDARD OF DECISION

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of

persuasion." *Fraihat v. U.S. Immigr. and Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021) (internal quotations omitted, emphasis removed). To obtain this extraordinary relief, Plaintiffs must show (1) that they are likely to succeed on the merits; (2) that they are likely to suffer irreparable harm without injunctive relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Couns., Inc.*, 555 U.S. 7, 20 (2008). "Likelihood of success on the merits is the most important factor." *Fraihat*, 16 F.4th at 635 (internal quotations and citation omitted). A "possibility" of irreparable injury is not sufficient, rather plaintiffs seeking preliminary relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 20 (emphasis in original). And a court cannot grant a preliminary injunction if it lacks subject matter jurisdiction. *See Ex parte McCardle*, 74 U.S. 506, 514.

A temporary restraining order follows the same test as for a preliminary injunction, but "should be restricted to ... preserving the status quo" pending a full hearing. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Loc. No. 70 of Alameda Cnty*, 415 U.S. 423, 439 (1974). The Ninth Circuit holds that, for a challenge to state law, the status quo presumes that the legislation will go into effect as enacted. *See Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). Thus, a temporary restraining order here would disturb, rather than preserve, the status quo.

ARGUMENT

I. Plaintiffs are not likely to succeed on the merits.

While Plaintiffs nominally complain about the Abortion Trafficking Ban, their true grievance is with Idaho's abortion policy in general. Thus, they begin their brief with the assertion that "Idaho has some of the most oppressive criminal abortion statutes in the United States," since "'[e]very person who performs or attempts to perform an abortion … commits the crime of criminal abortion.'" Dkt. 12-1 at 1 (quoting Idaho Code § 18-622(1)). But no matter Plaintiffs' views that these laws are "oppressive," the Supreme Court of the United States in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), held that the U.S. Constitution does not impose any barriers on enacting them. And shortly thereafter, the Idaho Supreme Court held the Constitution of the State of Idaho also does not "protect abortion as a fundamental right," and that Idaho's criminal laws on abortion are constitutional. *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 522 P.3d 1132, 1148–49 (Idaho 2023). So, there is no question that Idaho can lawfully prohibit criminal abortion. And here too, despite Plaintiffs' many grievances about Idaho's laws, the question is not whether Idaho's Abortion Trafficking law "is good policy," but simply whether it is constitutional. *Id.* at 381, 522 P.3d at 1149. Plainly, it is.

None of Plaintiffs' claims are likely to succeed. They sidestep over the important purposes of the Abortion Trafficking Ban in protecting parents' rights. The law does not threaten their speech—instead, it prohibits only specified conduct that intentionally causes a pregnant minor's abortion with an intent to conceal the

abortion from the minor's parents. The law does not prohibit them from associating with anyone. Nor is it vague: the same three verbs that Plaintiffs challenge—recruit, harbor, and transport—are used in many human trafficking statutes, including the federal statutes that Plaintiffs' counsel previously enforced and the statutes of various State Amici. The Court should deny a preliminary injunction.

A. The Abortion Trafficking Ban protects parents' rights.

The Abortion Trafficking Ban is targeted legislation designed to protect a fundamental right secured by both the Idaho and the U.S. Constitutions—parents' "fundamental right 'to make decisions concerning the care, custody and control of their children.'" *Bartosz v. Jones*, 146 Idaho 449, 465, 197 P.3d 310, 326 (Idaho 2008) (Eismann, J., concurring) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)). Thus, the Abortion Trafficking Ban does not punish those who take a pregnant minor across state lines for an abortion *unless* they do so with the specific intent to conceal it from her parents or guardian. Doing so is not constitutionally protected conduct.

1. Parents have a right to know about care for their children.

States have an important and compelling interest in protecting a parent's right to make healthcare decisions for their children. For almost 80 years, U.S. Supreme Court precedent has stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and

capacity for judgment required for making life's difficult decisions." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). "More important, historically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." *Id.* at 603. "Parents can and must make those judgments." *Id.* And so "parents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention." *Wallis v. Spencer*, 202 F.3d 1126, 1142 (9th Cir. 2000).

Idaho law has recognized the same thing for over a century: "[t]he right of a parent to the custody, control, and society of his child is one of the highest known to the law." *Martin v. Vincent*, 34 Idaho 432, 201 P. 492, 493 (Idaho 1921). Idaho law says that parents have a fundamental right to make child rearing decisions. *Nelson,* 170 Idaho at 894–95, 517 P.3d at 823–24 (citing *Troxel v. Granville*, 530 U.S. 57 (2000)). "[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court of the United States." *Id.* at 896, 517 P.3d at 825 (internal quotations omitted).

Because the Constitution protects these rights *from* governmental interference, legislatures necessarily have authority to enact laws to further these rights. As the Supreme Court of the United States has recognized, because "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," a state legislature may "properly

conclude that parents … are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968). That is just what the Abortion Trafficking Ban does.

2. The Abortion Trafficking Ban protects parents' right to know.

The Abortion Trafficking Ban protects the fundamental rights of parents to give—and, in turn, their minor children to receive—help and advice to their minor children if they become pregnant. The law does so by making it an essential element of the offense, to be proved beyond a reasonable doubt, that it is done with "intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor." Idaho Code § 18-623(1). "Crimes in Idaho are categorized as either 'general intent' or 'specific intent' crimes. *State v. Stiffler*, 117 Idaho 405, 406, 788 P.2d 220, 221 (1990)[,]" and a "specific intent" crime is one that, like this statute, "refers to that state of mind which in part defines the crime and is an element thereof." *State v. Guerra*, 169 Idaho 486, 503, 497 P.3d 1106, 1123 (Idaho 2021). Here, the specific intent required for Abortion Trafficking is the intent to conceal the abortion from the pregnant minor's parents or guardian. Simply assisting a pregnant child in obtaining an abortion, without that specific intent, does not violate the statute.

Plaintiffs largely ignore this important element of the crime. They erroneously assert that the statute "made it unlawful to provide travel assistance within Idaho, including helping minors reach or cross Idaho's borders." Dkt. 1 at 3. And they omit the specific intent element of the Abortion Trafficking statute repeatedly throughout

Plaintiffs' filings.[1] The State Amici make the same mistake, not once addressing the intent to conceal requirement of the statute in their brief. *See generally* Amicus Brief of the States in Support of Plaintiff's Motion for a Temporary Restraining Order, Dkt. 20-1. But Plaintiffs plainly cannot prevail on a challenge to a state statute without acknowledging all of its essential elements.

Still, it is clear that Plaintiffs want to violate the specific intent requirement that they gloss over. Plaintiff Matsumoto, a member of the bar, "would like to provide temporary shelter for pregnant minors … who are traveling to obtain … abortion care … *whether those minors' parents know or do not know*" by "assisting them obtain transportation from Idaho to those states." *See* Dkt. 12-1 at 4 (emphasis added). And Plaintiff NWAAF says that "[p]arents and guardians *may or may not have known or approved* of NWAAF's support of these minors," which support includes "provid[ing] food and lodging assistance" to minors seeking abortions. Dkt. 12-9 ¶¶ 17-19. Plaintiff Indigenous Idaho Alliance states that its mission and belief includes "providing financial, transportation, and logistical assistance to pregnant minors

[1] *See, e.g.*, Dkt. 1 ¶ 26 (stating that "the simple act of driving a minor to the Oregon border to get an abortion without the minor's parent or guardian knowing" is illegal, but ignoring the specific intent element of the statute); *id.* ¶ 74 (stating that the statute "prevents Plaintiffs and pregnant minors from traveling within Idaho to reach a state where abortion is lawful," but ignoring the specific intent requirement of the statute); *id.* ¶ 79 (stating that the statute "prevent[s] minors from accessing abortion care that is legal in Idaho's neighbor states by criminalizing a trusted adult's travel," but ignoring the specific intent requirement of the statute); *id.* ¶ 106 (failing to recognize the specific intent requirement of the statute); *id.* ¶ 116 (failing to recognize the specific intent requirement of the statute); Dkt. 12-1 at 1 (stating that "Idaho criminalized conduct by adults who assist pregnant minors in receiving abortion care," but ignoring the specific intent element of the statute).

within the region seeking legal abortion, *with or without the knowledge or consent of their parents or guardians*." Dkt. 12-8 ¶ 61.; *see also* Dkt. 1 ¶¶ 26–30, 32, 47–51, 55; Dkt. 12-1 at 14, 21, 25–26; Dkt. 12-7 ¶¶ 43–45, 47–51, 53–54; Dkt. 12-8 ¶¶ 39–41, 50–54; Dkt. 12-9 ¶¶ 12–14, 18–19, 20–23, 26–27.

The Amici States note that their laws allow minors to obtain an abortion without parental consent. Dkt. 20-1 at 2–4. But that does not diminish in the least the State of Idaho's choice to protect parents' fundamental right over these important decisions. Indeed, even in the *Roe* era, the Supreme Court of the United States recognized that parental involvement in these decisions is critical. There are "potentially grave emotional and psychological consequences of the decision to abort," which "has potentially traumatic and permanent consequences." *H. L. v. Matheson*, 450 U.S. 398, 412–13 (1981). Consultation with parents is "particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns." *Bellotti v. Baird*, 443 U.S. 622, 640 (1979). As Justice Stewart so poignantly stated, "[t]here 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), *abrogated as to the right to abortion by Dobbs*, 142 S. Ct. 2228 (2022). "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.*

Thus, now that the Supreme Court has recognized that no federal right to abortion exists, ensuring that a pregnant minor child receives the advice and support of her parents before making a decision to receive an abortion is all the more compelling. If anything, the laws of the Amici States—not Idaho—risk running afoul of the U.S. Constitution because they reject parental rights in this manner.

B. The Abortion Trafficking Ban does not punish speech.

1. The law criminalizes conduct, not speech.

Plaintiffs are not likely to succeed on the merits because their claims do not implicate the First Amendment's free speech protections. "The first step of First Amendment analysis is to determine whether the regulation implicates protected expression." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th. Cir. 2017). That is not the case here: the Abortion Trafficking Ban regulates conduct, not speech, and does not implicate protected expression.

All of the key terms of the Abortion Trafficking Ban relate to conduct, not speech. The conduct it prohibits is procuring an abortion or obtaining an abortion-inducing drug for a pregnant minor "by recruiting, harboring, or transporting the pregnant minor within this state[.]" *See* Idaho Code § 18-623(1). Procuring an abortion is not protected expression—rather, it is a crime, Idaho Code § 18-622, one that the Supreme Court of the United States and the Idaho Supreme Court have concluded the State may lawfully punish. *Dobbs*, 142 S. Ct. 2228; *Planned Parenthood Great Nw.*, 171 Idaho at 380–81, 522 P.3d at 1148–49. Nor does the First

Amendment protect "recruiting, harboring, or transporting" a minor for the purpose of that crime.

Plaintiffs say that their intended activities are "expressive conduct" because their assistance to the pregnant unemancipated minors "conveys a message of support for pregnant minors seeking to obtain lawful abortion care" and "conveys a clear message of support for abortion itself." Dkt. 12-1 at 11–12. But that is true of all criminal conduct. Paying a hitman for a murder conveys a message of support for murder for hire. Propositioning a prostitute conveys a message of support for transactional sexual relationships. Possessing large quantities of methamphetamine conveys a message of support for the drug trade. Everything and anything conveys a message of support for something, but that does not make it protected under the First Amendment. And conduct lawfully criminalized by statute does not become speech simply because it necessarily "conveys a message."

Thus, the Supreme Court of the United States has specifically rejected the argument 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). In that case, the speech at issue, picketing outside a business, was part of a "single and integrated course of conduct" "to compel Empire to agree to stop selling ice to nonunion peddlers" in violation of Missouri law. *Id.* Similarly, in the instant case, to the extent the Abortion Trafficking statute impacts speech, it only does so when that speech is part of a "single and integrated course of conduct" to procure an

abortion or obtain an abortion-inducing drug for a pregnant unemancipated minor child with the intent to conceal that abortion from the minor's parents or guardian.

Nor is there support for Plaintiffs' claims in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). The statute there, which prohibited the material support for terrorist organizations, "regulate[d] speech on the basis of its content," and whether the plaintiffs were able to speak to certain groups depended solely on "what they say." *Id.* at 27. In contrast, the Abortion Trafficking Ban does not prohibit speech of any kind. It does not stop Plaintiffs from sharing their views about abortion, or any other subject, to any person they want, including pregnant unemancipated minor children. But what they cannot do is take certain steps to procure an abortion or obtain an abortion-inducing drug for that pregnant minor with the intent to conceal it from the child's parents or guardian. The mere fact that speech may be used in recruiting, harboring, or transporting the child is immaterial: "[a]n illegal course of conduct is not protected by the first amendment merely because the conduct was in part carried out by language in contrast to direct action." *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987).

Plaintiffs say they need to take these actions as to *all* pregnant minors because *some* of them may be abused or neglected by their parents. Dkt. 12-1 at 1. But "the statist notion" that Plaintiffs have the unilateral right to substitute themselves for a child's parents "in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Parham*, 442 U.S. at 603. And if Plaintiffs have concerns about abuse and neglect, Idaho already has in effect a comprehensive

statutory scheme for protecting children from parents who abuse or neglect their children. *See* Child Protective Act, Title 16, Chapter 16, Idaho Code. This statutory scheme starts not with Plaintiffs determining for themselves whether parents are fit or not, but a report to the Idaho Department of Health and Welfare or local law enforcement. In fact, Plaintiffs, should they have a "reason to believe" that a pregnant minor they are trying to help "has been abused, abandoned, or neglected," have a *duty* to report the matter, within 24 hours, to the proper law enforcement agency or the Idaho Department of Health and Welfare. Idaho Code § 16-1605(1). Failing to make the report is a misdemeanor. *See* Idaho Code § 16-1605(4).

Plaintiffs do not have a First Amendment interest in frustrating Idaho's presumption of parental custody over children. "It is incumbent upon him who seeks to invade the home and remove a child from its protection, and from the custody of its natural guardians to show facts sufficient to justify his action[s] under the law." *Martin*, 34 Idaho 432, 201 P. at 493. "Parents are not required in the first instance to take upon themselves the burden of proving their fitness to have the care of their children, or that they are properly exercising their parental control." *Id.* That is why Idaho law makes it a crime, not a right, to interfere with a parent's custody, which is what Plaintiffs seek to do here. Idaho Code § 18-4506(1)(a). Plaintiffs' mere speculation that some parents might abuse their children is not sufficient to justify their argument that they should be allowed to remove all pregnant minors from the protection and custody of their parents regarding the decision as to whether to have an abortion or not.

The State Amici, quoting *Bigelow v. Virginia*, 421 U.S. 809, 824–25 (1975), argue that the State of Idaho "cannot 'bar a citizen of another State from disseminating information about an activity that is legal in that State,' even if it does so 'under the guise of exercising internal police powers.'" Dkt. 20-1 at 5. But this is not a situation like in *Bigelow* involving an attempt to prosecute the mere advertisement of something that is legal in another state. 421 U.S. at 815 n.5. The Abortion Trafficking Ban does not criminalize the mere act of publicizing the fact that abortion is legal in another state, but instead punishes specific conduct furthering specific crimes with specific intent. And as long as the defendant commits "any essential element of the crime" within the State of Idaho, Idaho courts have jurisdiction over the crime, even if other elements of the crime are committed outside Idaho's borders. *See State v. Villafuerte*, 160 Idaho 377, 379, 373 P.3d 695, 697 (2016) (citing Idaho Code §§ 18-202(1), 19-301(1), and 19-302). And just as the State of Idaho cannot criminalize abortion in the state of Washington, or any other state, those states cannot force Idaho to allow Plaintiffs, or any other person, to violate Idaho's criminal laws.

2. Any minimal speech restriction passes constitutional scrutiny.

Even if the Abortion Trafficking Ban had some minimal effect on speech, it would easily be upheld under applicable First Amendment standards. Plaintiffs say the law is "subject to strict scrutiny," but they fail to show the critical premise for applying that test: that the law regulates speech by its content. Dkt. 12-1 at 13. That premise is not met here.

"A content-based law is one that targets speech based on its communicative content or applies to particular speech because of the topic discussed or message expressed." *Recycle for Change*, 856 F.3d at 670 (internal quotations and brackets omitted). The first step to determining "whether a law is content based is to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id.* (internal quotations omitted). But the Abortion Trafficking Ban does not reference speech at all, much less do so based on its content. Plaintiffs may express any message they like under the Abortion Trafficking Ban. To the extent the law even implicitly addresses speech, it addresses only its effects, not the message it expresses. Thus, the statute focuses on transitive action verbs—to "procure" or "obtain" an abortion or to "recruit," "harbor," or "transport" a pregnant minor—not on expressive verbs. The law does not discriminate on the basis of the content of any speech, but "on the basis of non-expressive, non-communicative conduct." *Id.* at 672. Speakers may express any message they wish, so long as they do not cause a pregnant minor to obtain an abortion with the specific intent to conceal the fact from the minor's parents.

That this may have "an incidental effect of some speakers or messages but not others" is immaterial because the law "serves purposes unrelated to the content of expression[.]" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, that purpose is the protection of the fundamental rights of parents to "make decisions concerning the care, custody and control of their children." *Bartosz*, 146 Idaho at 465 (Eismann, J. concurring). And that purpose is unrelated to the content of a message

Plaintiffs, or any other person, may wish to express through their conduct. The law is therefore content-neutral.

So, at the very most, if any speech-related test must be applied to the Abortion Trafficking Ban, the Court should apply the "relatively lenient" standard from *United States v. O'Brien*, 391 U.S. 367, 376 (1968). *Texas v. Johnson*, 491 U.S. 397, 407 (1989). This test applies to statutes in which "speech and nonspeech elements are combined in the same course of conduct." *Id.* (internal quotations omitted). Under this test, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* "Under *O'Brien*, a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Recycle for Change*, 856 F.3d at 674 (internal quotations omitted, brackets in original). The Abortion Trafficking Ban meets all of these elements.

First, there is no question that Idaho has the power to enact this law. As noted above, a state legislature may "properly conclude that parents … are entitled to the support of laws designed to aid discharge" of their responsibility to care for their children. *Ginsberg*, 390 U.S. at 639.

Second, the Abortion Trafficking Ban furthers an important government interest. The law protects the fundamental right of parents to make medical

decisions for their children, and thus also protects the children themselves by helping ensure that they have the guidance of their parents. The fact that Plaintiffs are so eager to obtain and conceal abortions from children's parents shows the compelling need for a statute like this. Plaintiffs do not believe it is important for minors to have their parents' input in getting an abortion decision. And they believe that they have a right to help traffic children out of state for that purpose, regardless of whether their parents know. The State has a compelling interest in ensuring otherwise.

Third, the State's interest is unrelated to the restriction of free expression. Ensuring that any assistance for out-of-state abortions take place only with the knowledge of a child's parents has no relation to free speech.

Fourth, any incidental restriction on speech is no more than is necessary to protect parental rights. The Abortion Trafficking Ban satisfies this standard with its specific intent requirement concerning parental consent. Idaho Code § 18-623(1). That element goes directly to the interest served by the statute—helping ensure parental involvement in the pregnant minor's decision as to whether to have an abortion. The statute could have been written as a general intent crime, and simply required as an element of the crime that the parents or guardian did not affirmatively consent to the abortion. *Cf. Holder*, 561 U.S. at 17–18. Instead, the legislature narrowed the statute to require an intent to conceal the abortion from the pregnant minor's parents or guardian. That requirement quite arguably removes the conduct at issue entirely from First Amendment protections. *See id.* at 56–57 (Breyer, J.

dissenting). But at the very least, it amply satisfies the lenient *O'Brien* test—the most rigorous test that could apply to the law.

The Abortion Trafficking Ban thus does not infringe on free speech.

C. The Abortion Trafficking Ban does not limit association.

Neither does the Abortion Trafficking Ban violate Plaintiffs' "First Amendment rights of association." Dkt. 12-1 at 12. "The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *State v. Manzanares*, 152 Idaho 410, 424, 272 P.3d 382, 396 (Idaho 2012) (quoting *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 776 (1994)). That is exactly what the statute prohibits by requiring proof the intent to conceal an abortion from the pregnant minor's parents or guardian. Nothing about that offends the Constitution.

At bottom, the law does not prohibit Plaintiffs from associating with anyone, including minor children. What it prohibits is conduct related to such an association: procuring an abortion or obtaining an abortion inducing drug for a pregnant minor by recruiting, harboring, or transporting that minor with the intent to conceal the abortion from the minor's parents or guardian. The Supreme Court of the United States in *Holder* summarily dismissed the notion that the statute there "prohibit[ed] being a member of one of the designated groups," since what it in fact "prohibits is the act of giving material support." 561 U.S. at 39–40. The Court should reach the same conclusion here.

D. The Abortion Trafficking Ban is not vague.

Finally, the Abortion Trafficking Ban does not fall afoul of constitutional vagueness principles. A statute is impermissibly vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder*, 561 U.S. at 18. While a more stringent test applies in the First Amendment context, Plaintiffs have not shown that the law restricts any protected speech. And even in the First Amendment context, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* at 19. (internal quotations omitted). As the Supreme Court noted in *Hill v. Colorado*, "while there is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language." 530 U.S. 703, 733 (2000) (cleaned up).

Plaintiffs argue that the statute is unconstitutionally vague because it "does not contain or refer to a definitions section that would tell Plaintiffs when their conduct would constitute recruiting, harboring, or transporting." Dkt. 12-1 at 15. But these are not unfamiliar terms used in isolation that only lawyers could understand. Rather, these terms are well within common understanding, which is why they are so commonly used in state and federal criminal trafficking statutes across the country:

Idaho law: In addition to the Abortion Trafficking Ban, Idaho's general human trafficking statute criminalizes those same three verbs—"recruitment, harboring, transportation"—if in furtherance of subjecting a person "to involuntary servitude, peonage, debt bondage, or slavery." Idaho Code § 18-8602(1)(a)(ii). If those verbs are vague when used to prevent abortion, they are also vague when used to prevent slavery.

Federal law: The U.S. criminal code likewise makes it a crime to "recruit[],… harbor[], [or] transport[] … a person … knowing … that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a)(1). When Plaintiffs' counsel served as United States Attorney for the District of Idaho, she evidently believed the same three words—recruit, harbor, and transport—were clear enough that she could prosecute not just violations of the law, but even attempts to interfere with its enforcement. *See United States. v. Swinson*, No. 1:12-CR-279-EJL, Dkt. 2 at 8 (D. Idaho. Oct. 26, 2012); Press Release, Washington Man Sentenced in Idaho Sex Trafficking Case, U.S. Attorney, Dist. of Idaho (Mar. 25, 2013), https://tinyurl.com/bddbupa2. How she now claims those verbs are unconstitutionally vague is a mystery.

Other states: Several other states, including some of the Amici States, use similar verbiage to criminalize human trafficking. *See, e.g.*, Wash. Rev. Code § 9A.40.100 (2017) ("A person is guilty of trafficking in the first degree when such person recruits, harbors, transports ... by any means another person ....") (cleaned up); Ariz. Rev. Stat. Ann. § 13-1307 (2021) ("'Traffic' means to entice, recruit, harbor,

provide, transport or otherwise obtain another person."); Colo. Rev. Stat. § 18-3-504 (2019) ("A person commits human trafficking of a minor for sexual servitude if the person knowingly sells, recruits, harbors, transports ... by any means, maintains, or makes available a minor for the purpose of commercial sexual activity.").

Sex traffickers have repeatedly argued these terms are unconstitutionally vague. And courts have repeatedly held otherwise. *See, e.g.*, *United States v. Snead*, 2022 WL 17975015 at *4 (4th Cir. 2022) (stating that each of the verbs "recruits, entices, harbors, transports, provides" has an ordinary meaning that would provide a person of ordinary intelligence fair notice of what conduct is prohibited"); *Alonso v. State*, 228 So. 3d 1093, 1101–02 (Ala. Crim. App. 2016) (upholding a statute that assigning criminal liability to an individual who "knowingly obtains, recruits, ... harbors, ... transports, provides, or maintains any minor for the purpose of causing a minor to engage in sexual servitude" and rejecting a vagueness challenge to its constitutionality); *State v. Scotia*, 146 Ariz. 159, 160 (Ariz. App. 1985) (collecting cases regarding the use of the term "transport" for drug transport statute); *State v. Bryant*, 953 So.2d 585, 587 (Fla. App. 2007) (reversing trial court finding of unconstitutional vagueness based on word "transport"). The fact that the statute concerns abortion does not magically transform a plain word into an unclear one. Plaintiffs' vagueness challenge is thus wholly lacking in merit.

Plaintiffs also argue that the "statute fails to provide adequate notice regarding what culpability attaches to communication or the lack thereof with a minor's parents and/or guardians." Dkt. 12-1 at 16. But the many questions they

ask on this point do not move the needle. The elements of the statute do not depend upon any communication or lack of communication with the parents, but rather whether the defendant takes action to procure an abortion for a pregnant minor *with intent to conceal from the parents*. Idaho Code § 18-623(1). A prosecutor must prove that element of specific intent beyond a reasonable doubt. Thus, providing parents with notice and advance knowledge would likely prevent a prosecutor from bringing a case, while a prosecutor might be able to argue the specific intent requirement was met if a defendant provided no notice to the child's parents.

State Amici also raise other hypothetical arguments about what the statute may or may not cover. Dkt. 20-1 at 5. But this case involves challenges from the Plaintiffs, and as such the Court can only look at "the particular facts at issue," since a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *See Holder*, 561 U.S. at 18–19; *see also* Dkt. 31 at 3 ("The Amici States … may not initiate, create, extend, or enlarge the issues."). And the Supreme Court of the United States has admonished that "while there is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill*, 530 U.S. at 733 (cleaned up). One can ask unending questions in an attempt to raise hypothetical situations in which the applicability of the statute might be in question. But the terms the Abortion Trafficking Ban employs have long been used by a variety of different trafficking statutes in a variety of different jurisdictions. So

Idaho Code § 18-623 provides more than ample notice to a person of ordinary intelligence of what it prohibits.

II. The balance of harms and public interest do not favor an injunction.

The balance of equities and the public interest weigh heavily in favor of the Attorney General and against issuing a temporary restraining order or preliminary injunction. The Plaintiffs are asserting the right to determine for themselves whether a parent is fit in order to decide whether it is okay to conceal information about a pregnant minor's abortion from the parents. Allowing the Plaintiffs to decide what is in the best interests of someone else's child and conceal that from the pregnant minor's parents actively undermines a parent's fundamental right and obligation to determine what is in the best interests of their children. Given this fundamental right of parents to direct the care and upbringing of their children and to be involved in the medical decisions of their minor children, the State of Idaho's policy in favor of protecting those rights is in the public interest. The constitutional rights of parents to determine what is in the best interests of their children heavily outweigh the desires of third parties to lead children into such consequential actions without their parents' knowledge or consent.

III. Plaintiffs have no irreparable injury.

Finally, the Court should deny Plaintiffs' motion for preliminary injunction for lack of an irreparable injury. At the outset, Plaintiffs have no irreparable injury because, for the reasons set forth in Section I.B, they allege only an effect on their intended conduct, not on any protected speech that would be otherwise chilled. As

Plaintiffs' own cases acknowledge, they must "present more than allegations of a subjective chill" and must instead show "specific present objective harm or a threat of specific future harm." *Bigelow*, 421 U.S. at 816–17 (internal quotations omitted). They have not made that showing here.

But in truth, and even more important, Plaintiffs have no injury at all, much less an irreparable one. And as will be set forth more fully in the Attorney General's forthcoming motion to dismiss, that deficiency is fatal to jurisdiction—under both the Eleventh Amendment and Article III justiciability—just as it is to the merits.

In the pre-enforcement context here, both Eleventh Amendment immunity and Article III justiciability turn on whether there is a threat of prosecution. The *Ex parte Young* exception to the Attorney General's Eleventh Amendment immunity applies only if he is "clothed with some duty in regard to the enforcement of the laws of the state, and ... threaten and are about to commence proceedings ... to enforce against parties affected [by] an unconstitutional act." *Ex parte Young*, 209 U.S. 123, 155–56 (1908). And proving a justiciable controversy in the pre-enforcement context also requires a threat: for standing, "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1174, and for ripeness, a "specific and credible threat of adverse action." *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010). That essential threat is wholly absent here.

Aside from the fact that Plaintiffs do not allege the Attorney General has made any statement regarding the enforcement of the Abortion Trafficking Ban, Plaintiffs'

attempt to show injury falters based on a more fundamental proposition of law: the Attorney General *has no authority* to threaten criminal prosecutions of the Abortion Trafficking Ban at this time. Under Idaho statutory law, "the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." Idaho Code § 31-2227. Thus, while the Attorney General is Idaho's "chief legal officer," he is not its chief law enforcement officer, *Newman v. Lance*, 922 P.2d 395, 399 (Idaho 1996), and county prosecutors do not answer to him. Idaho Code § 31-2604. In fact, Idaho law previously allowed the Attorney General to "exercise supervisory powers over prosecuting attorneys in all matters pertaining to their duties," *Newman*, 129 Idaho at 102, 922 P.2d at 399, but the Legislature struck that provision in 1998, limiting the Attorney General's criminal enforcement authority to the ability to "assist the prosecuting attorney" in each respective county. *State v. Summer*, 139 Idaho 219, 224, 76 P.3d 963, 968 (Idaho 2003).

The Attorney General recently explained and clarified these principles in a formal opinion construing the limits on his own prosecutorial powers. Att'y Gen. Op. 23-1 (April 27, 2023). As he explained, he has prosecutorial authority only "if requested by county prosecutors and approved by a state district judge" or "if specifically conferred by the Legislature." *Id.* at 2. That definitive construction of the limits of his own powers supersedes the Ninth Circuit's interpretation of Idaho law in *Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004), which held that the Attorney General was a proper defendant to a challenge to the State's

abortion laws.[2] And neither of the two conditions for the Attorney General's prosecutorial authority—referral by a county prosecutor or a specific legislative grant—are met here.

First, no county prosecutor has referred any case under the Abortion Trafficking Ban to the Attorney General, and Plaintiffs do not allege otherwise. The Attorney General would not have referral authority to prosecute violations of this statute unless there were a specific case considered by a specific county prosecutor who asked the Attorney General for help. Plaintiffs do not allege that such a case exists. They want to violate the law, sure enough, but they do not allege any specific circumstances in which they intend to do so. Nor have they sued any of the county prosecutors who would have direct prosecutorial authority if they did violate the law. Instead, they have only sued the Attorney General, whose purely derivative authority has not yet been triggered.

Second, the limited legislative grant of prosecutorial authority to the Attorney General under the Abortion Trafficking Ban has not been triggered here. *See* Att'y Gen. Op. 23-1 at 2–3. That limited authority is still contingent on actions by county prosecutors: he "has the authority, at [his] sole discretion, to prosecute a person for a criminal violation of this section *if the prosecuting attorney authorized to prosecute* criminal violations of this section *refuses to prosecute* violations of any of the

[2] Judge Winmill ruled to the contrary in *Planned Parenthood v. Labrador*, but refused to consider the effect of the Att'y Gen. Op. 23-1 in construing the limits of his own authority. Case No. 1:23-CV-00142-BLW, Slip. Op., 2023 WL 5237613 (D. Idaho August 15, 2023), Judge Winmill's decision is now on appeal to the Ninth Circuit.

provisions of this section by any person *without regard to the facts or circumstances*." Idaho Code § 18-623 (emphasis added). Thus, the Attorney General does not have any prosecutorial authority unless a county prosecutor first refuses to exercise his or her authority. Plaintiffs have alleged no facts that indicate that *any* prosecutor in Idaho has so refused to enforce this section of code. Indeed, none have. The Attorney General thus lacks any prosecutorial authority under the Abortion Trafficking Ban at this time.

Because the Attorney General would have authority under this statute only based on actions of county prosecutors that have not yet occurred, he is not a proper defendant under *Ex parte Young* and Plaintiffs have not alleged a justiciable controversy against him under Article III. There is no "special relation" between the Attorney General and the law as required to overcome sovereign immunity, *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992), much less "a '*genuine* threat of *imminent* prosecution'" by the Attorney General as required for ripeness. *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (citation omitted). The case is not fit for review because any individuals with whom the Plaintiffs intend to engage are not "identifiable" and the case presents no "concrete factual scenario" to which the law applies. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (citation omitted); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999). Plaintiffs have not shown any irreparable injury that warrants an injunction—in fact, they have not alleged any injury at all, and the Court lacks jurisdiction.

CONCLUSION

The Court should deny Plaintiffs' motion for a temporary restraining order or preliminary injunction both on the merits and for lack of jurisdiction.

DATED: August 28, 2023

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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RAÚL R. LABRADOR
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Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LAURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE, Plaintiff, v. RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho, Defendant.	Case No. 1:23-cv-00323-DKG **DECLARATION OF LINCOLN DAVIS WILSON**

I, LINCOLN DAVIS WILSON, declare and state as follows:

1. I am a Deputy Attorney General and Chief of Civil Litigation and Constitutional Defense for the Idaho Attorney General.

2. Attached hereto as Exhibit 1 is a true and correct copy of Attorney General Opinion 23-1.

3. Attached hereto as Exhibit 2 is a true and correct copy of a Rule 11 Plea Agreement, *United States v. Swinson*, No. 1:12-CR-279-EJL (D. Idaho), Dkt. 2, dated October 26, 2012.

4. Attached hereto as Exhibit 3 is a true and correct copy of a press release issued by the U.S. Attorney's Office, District of Idaho, titled "Washington Man Sentenced in Idaho Sex Trafficking Case," dated March 25, 2013.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: August 28, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief of Civil Litigation and
Constitutional Defense

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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Chief, Civil Litigation and
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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

ATTORNEY GENERAL OPINION NO. 23-1

TO: The Honorable Bruce Skaug
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038

You have requested an opinion from the Attorney General on the Attorney General's authority to prosecute violations of Idaho Code § 18-622. Your request raises important questions of Idaho law in the public interest and therefore this opinion is published as an official opinion of the Idaho Office of the Attorney General.

QUESTION PRESENTED

What authority does the Idaho Attorney General have to bring prosecutions for criminal abortion under Idaho Code § 18-622?

ANSWER

The Idaho Attorney General's criminal prosecutorial authority exists only where specifically conferred by statute or upon referral or request by county prosecutors. The Legislature has not granted the Attorney General any authority to prosecute violations of Idaho Code § 18-622. Thus, the Idaho Attorney General may bring or assist in a prosecution under Idaho Code § 18-622 only if specifically requested by a county prosecutor pursuant to an appointment made by a district court under Idaho Code § 31-2603.

EXECUTIVE OFFICE
P.O. BOX 83720, BOISE, IDAHO 83720-0010
TELEPHONE: (208) 334-2400, FAX: (208) 854-8071
LOCATED AT 700 W. JEFFERSON STREET, SUITE 210

EXHIBIT
1

ANALYSIS

The Attorney General is Idaho's "chief legal officer," but not its chief law enforcement officer. *Newman v. Lance*, 129 Idaho 98, 102, 922 P.2d 395, 399 (1996). Rather, Idaho Code dictates that it is "the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." Idaho Code § 31-2227. Those elected county prosecutors have plenary criminal enforcement authority to prosecute crimes that occur in their respective jurisdictions and do not answer to the Attorney General. Idaho Code § 31-2604. In fact, while Idaho law previously allowed the Attorney General to "exercise supervisory powers over prosecuting attorneys in all matters pertaining to their duties," *Newman,* 129 Idaho at 102, 922 P.2d at 399, the Legislature struck that provision in 1998, limiting the Attorney General's criminal enforcement authority to the ability to "assist the prosecuting attorney" in each respective county. *State v. Summer*, 139 Idaho 219, 224, 76 P.3d 963, 968 (2003). Even the Governor's authority in the matter is limited to "requir[ing] the attorney general to aid any prosecuting attorney in the discharge of his duties." Idaho Code § 67-802(7). The Governor may not require the Attorney General to assume those duties himself.

The Attorney General's ability to prosecute criminal cases as referrals from county prosecutors comes in two forms. First, when a county prosecutor cannot perform his or her duties, the county prosecutor may refer a case to the Attorney General and move for a court order appointing him as special prosecutor to assume "all the powers of the prosecuting attorney." Idaho Code § 31-2603(a). Second, a county prosecutor who wants to utilize the resources of the Attorney General's Office may seek the appointment of a special assistant Attorney General to prosecute or assist in prosecuting a criminal case. Idaho Code § 31-2603(b). Thus, under Idaho law, the Attorney General has prosecutorial authority only if specifically conferred by the Legislature or if requested by county prosecutors and approved by a state district judge.

I. The Legislature Has Not Given the Attorney General Independent Authority to Prosecute Violations of Idaho Code § 18-622.

The Legislature has conferred prosecutorial authority on the Attorney General to prosecute specific crimes in specific circumstances. For example, the Legislature has granted the Attorney General authority to prosecute violations of criminal law by county elected officials acting in their official capacity. Idaho Code § 31-2002. In addition, the Legislature recently enacted a new law to take effect May 5, 2023 that would give the Attorney General discretion to prosecute violations of Idaho Code § 18-623, but only "if the prosecuting attorney … refuses to prosecute violations." H.B.

242, § 18-623(4). The Legislature has not granted the Attorney General any such authority to prosecute violations of Idaho Code § 18-622.[1] Thus, the Attorney General has no power to bring independent prosecutions under that statute.

II. The Attorney General May Prosecute Violations of Idaho Code § 18-622 Only Upon Request by a County Prosecutor.

In the absence of a specific grant of prosecutorial authority, the Attorney General has that power only where his assistance is requested by a county prosecutor. That power is set forth in Idaho statutory law, which gives the Attorney General the "duty," "[w]hen required by the public service, to repair to any county in the state and assist the prosecuting attorney thereof in the discharge of duties." Idaho Code § 67-1401(7). As construed by the Idaho Supreme Court, the Attorney General's authority under this statute is entirely derivative: it exists only if the county prosecutor specifically requests the assistance of the Attorney General via an appointment by the district court under Idaho Code § 31-2603.

The Idaho Supreme Court construed these principles in *Newman*, where it rejected the Attorney General's attempt "to appear in a criminal case and assume control and direction of the case on behalf of the state." 129 Idaho at 99, 922 P.2d at 396. At the time the *Newman* case was decided, Idaho statutory law still gave the Attorney General supervisory authority over county prosecutors. *See id.* Nevertheless, the Idaho Supreme Court relied on the fact that "[t]he legislature has made it the primary obligation of the Prosecutor to enforce the state penal laws" by making it "the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." 129 Idaho at 103, 922 P.2d at 400. Thus, the Idaho Supreme Court granted a writ "prohibiting the Attorney General from asserting dominion and control over the cases" absent a request by the county prosecutor. 129 Idaho at 104, 922 P.2d at 401.

The Idaho Supreme Court further explained these principles in *Summer*. There, the Court observed that "in 1998 the Legislature deleted the provision allowing the Attorney General to exercise supervisory powers over prosecuting attorneys," which it said "apparently reduc[ed] the authority of the Attorney General in relation to county prosecuting attorneys." 139 Idaho at 224, 76 P.3d at 968. And, in any event, "[e]ven prior to the 1998 amendment ..., *Newman* made it clear that the prosecuting attorney has primary responsibility for the enforcement of state penal

[1] The original version of this bill would have given the Attorney General discretion to prosecute violations of Idaho Code § 18-622 as well. *See* H.B. 242, original bill text Feb. 28, 2023. However, those references were removed in subsequent amendments to the bill, which were ultimately passed by the Legislature and signed by the Governor.

laws." *See id.* The Idaho Supreme Court thus reaffirmed that, absent a specific statutory grant of prosecutorial authority, the Attorney General has independent authority to prosecute only upon motion by the county prosecuting attorney under Idaho Code § 31-2603.[2]

Finally, the foregoing limitations on the Attorney General's authority also mean he has no separate referral power. While county prosecutors have statutory power to refer a matter to the Attorney General for prosecution by requesting his assistance and appointment by the district court, *see* Idaho Code §§ 67-1401(7), 31-2603, Idaho law does not grant a reciprocal right to the Attorney General to refer a matter to county prosecutors. In those circumstances, the Attorney General stands in the same shoes as any citizen: he has the right to apprise a county prosecutor of facts that they believe constitute a prosecutable crime that the prosecutor may or may not decide to pursue. So whether it is the Attorney General or any other private citizen who apprises the prosecutor of those matters, it remains within the county prosecutor's discretion to bring charges absent an express referral to the Attorney General and an appointment by the district court. Idaho Code § 31-2603.

CONCLUSION

For the reasons above, I conclude that the Idaho Attorney General may not bring or assist in a prosecution under Idaho Code § 18-622 unless a county prosecutor specifically so requests and an appointment is made by the district court under Idaho Code § 31-2603.

AUTHORITIES CONSIDERED

1. Idaho Code:

H.B. 242, 2023 Legislative Session
Idaho Code § 18-622
Idaho Code § 18-623
Idaho Code § 31-2002
Idaho Code § 31-2227
Idaho Code § 31-2603
Idaho Code § 31-2604
Idaho Code § 67-802
Idaho Code § 67-1401

[2] The Ninth Circuit's decision in *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004), is immaterial to this analysis, since a federal court's ruling on sovereign immunity under *Ex parte Young*, correct or not, cannot create state-law powers that do not exist under operative state law.

2. Idaho Cases:

Newman v. Lance, 129 Idaho 98, 922 P.2d 395 (1996).
Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 (9th Cir. 2004).
State v. Summer, 139 Idaho 219, 76 P.3d 963 (2003).

* * * *

Dated this 27th day of April, 2023.

Raúl R. Labrador

RAÚL R. LABRADOR
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Analysis by:

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U.S. COURTS
OCT 26 2012
Rcvd_____Filed_____Time_____
ELIZABETH A. SMITH
CLERK, DISTRICT OF IDAHO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. DYRELL ROBERT SWINSON, Defendant.	)	CR 12-0279-SEJL Case No. **RULE 11 PLEA AGREEMENT**

Rev. April 2011 (General)

EXHIBIT 2

I. GUILTY PLEA

A. Summary of Terms. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A) and (B), defendant, the attorney for the defendant, and the Government[1] agree that the defendant will waive his right to indictment and plead guilty to Count One of the Information, which charges the defendant with Obstructing a Sex Trafficking of Children investigation, in violation of 18 U.S.C. Section 1591(d).

As consideration for the defendant's plea of guilty, the Government agrees not to charge the defendant with any other violations of law related to the course of conduct described herein currently known to the Government. In addition, the Prosecuting Attorney in Payette County, Idaho, has agreed to dismiss related charges upon the defendant's plea of guilty and sentencing in this case.

Forfeiture Allegation: In connection with the violation set out above, the defendant agrees to forfeiture of the property referred to in the Forfeiture count of the Information.

This plea is voluntary and did not result from force, threats, or promises, other than any promise made in this Plea Agreement. Upon acceptance of the defendant's guilty plea, and the defendant's full compliance with the other terms of this Agreement, the Government will recommend a sentence within the range specified by the United States Sentencing Guidelines, as determined by the Court, followed by a term of Supervised Release to be determined after consideration of the Presentence Report.

B. Oath. The defendant will be placed under oath at the plea hearing. The

[1] The word "Government" in this Agreement refers to the United States Attorney for the District of Idaho.

Government may use any statement that the defendant makes under oath against the defendant in a prosecution for perjury or false statement.

II. WAIVER OF CONSTITUTIONAL RIGHTS AT TRIAL

The defendant understands that by pleading guilty, waives the following rights: 1) the right to plead not guilty to the offense charged against the defendant and to persist in that plea; 2) the right to a trial by jury, at which the defendant would be presumed innocent and the burden would be on the Government to prove the defendant's guilt beyond a reasonable doubt; 3) the right to have the jury agree unanimously that the defendant was guilty of the offense; 4) the right, at trial, to confront and cross-examine adverse witnesses; 5) the right to present evidence and to compel the attendance of witnesses; and 6) the right not to testify or present evidence without having that held against the defendant. If the District Court accepts the defendant's guilty plea, there will be no trial.

III. NATURE OF THE CHARGES

A. Elements of the Crime. The elements of the crime of Obstructing a Sex Trafficking of Children investigation as charged in Count One of the Information are:

> First: The defendant knowingly obstructed, attempted to obstruct, interfered with or prevented the enforcement of Title 18, United States Code, Section 1591(a)(1) and (b)(2).

B. Factual Basis. If this matter were to proceed to trial, the Government and the defendant agree that the following facts would be proven beyond a reasonable doubt:

On March 8, 2012, Idaho State Trooper Justin Klitch and Payette County Deputy Sheriff Patrick Weber observed the occupants of a white Lexus with Washington plates eastbound on the Interstate 84 freeway. The car passed Deputy Weber and drove into the rest area near milepost

two in Payette County, Idaho. Both law enforcement officers noticed behavior by the occupants they considered suspicious. Swinson was driving the car. "AT" was the lone passenger.

Trooper Klitch made contact with Swinson and "AT" shortly after they came out the rear exit of the restroom building, and engaged them in a consensual contact. After introductions, the trooper asked where they were coming from, and Swinson said "Ontario." [Ontario, Oregon is approximately two miles west of their location.] The trooper asked where they were heading, and Swinson said, "Boise." Trooper Klitch asked Swinson if he lived in Ontario and he said, "No." He asked where they were originally coming from, and Swinson said, "Tacoma." The trooper asked Swinson how long he was going to be in Boise and he said, "Just this weekend." The trooper asked Swinson if he had a valid driver's license. Swinson replied that he did not, and added that his license was suspended. Trooper Klitch conducted a driver's check via his dispatcher and confirmed Swinson's date of birth (9-11-92) and that his Washington state driver's license was suspended.

Trooper Klitch spoke with "AT" and asked for her identification. She told him she did not have any identification on her or in the vehicle. He then separated the two and spoke with "AT" apart from Swinson.

Trooper Klitch asked "AT" about her identity, since it seemed unusual that she would be traveling from Tacoma to Boise for a weekend trip without any identification. She said her name was "Layline Nichole Daniels," date of birth June 12, 1992. Trooper Klitch asked her how old she was and she replied that she was 19. Based on her appearance, Trooper Klitch did not believe her; he thought she appeared more like she was around age 16. When the trooper asked "AT" about the spelling of her name, she fumbled and made errors that seemed inconsistent with

someone identifying herself. It appeared to the trooper that she was reciting information she had memorized rather than providing her true identity. Trooper Klitch checked through Idaho State Police dispatch, which revealed no record for a person with that name and date of birth. He continued to ask "AT" about her true identity, and she persisted in denying she was being untruthful.

Trooper Klitch went back to Swinson and asked him what the female's name was and he said, "Layline." He asked for her last name, and Swinson responded, "Daniels." He asked Swinson how he knew Daniels, and Swinson said, "That's my cousin." He asked Swinson if she was a prostitute and Swinson said, "No way."

Trooper Klitch asked Swinson if the vehicle was his, and he said, "It's my mother's." He asked Swinson if he minded if he looked in the vehicle to try and find something to identify Daniels and Swinson consented. During a search of the vehicle, the trooper located various items that seemed inconsistent with cousins going to Boise for a weekend trip. Through his training and experience, he became increasingly suspicious that he had encountered an individual (Swinson) who was transporting a minor for purposes of prostitution. Trooper Klitch asked Swinson how long he'd known the female, and he said, "She's my cousin, so I've known her since she was knee high."

Trooper Klitch found a black LG Virgin Mobile cellular telephone (with the number 253-592-3324) in the door pocket on the passenger side of the car, next to where "AT" had been sitting. He asked Swinson about the phone, and Swinson indicated the phone was his and "AT" uses the phone. He also asked "AT" about the phone and she said it was Swinson's, but he lets her use it.

Swinson was arrested for driving without privileges.

Both "Daniels" and Swinson were transported to the Payette County jail. At the jail, "Daniels" advised a jail deputy of her true identity and age. She stated that her true name is "AT",[2] that she is 15 years old, and that her date of birth is July 5, 1996. Trooper Klitch conducted a check through Idaho State Police dispatch with the female's true identity and discovered that she was a missing person out of Olympia, WA. He contacted a sergeant at the Olympia Police Department who informed him that "AT" was a runaway, and at the time of her disappearance on November 22, 2011, she was a ward of the state of Washington, residing at the Haven House in Olympia. Her birth certificate confirms that "AT" was born July 5, 1996 in Tacoma, WA.

On March 9 and 10, 2010, Swinson initiated several telephone calls from the Payette County Jail that were recorded by the jail's automatic recording system. Each call begins with the admonition that it is being recorded. During each call, Swinson made requests of other parties to assist him by altering or deleting electronic records. For example:

1. Telephone call on 03/09/2012 at 20:30 to telephone number 253-269-8465. This number is subscribed to by Angela Ressler, Dyrell Swinson's mother. During this call Swinson is talking to a female and tells her there was a warrant to go through the phones and that the girl was a runaway. Swinson explains he was going to be charged with trafficking, slavery and kidnapping. At time counter 12:49, Swinson asked the female to write down some information

[2] The full name of "AT" is redacted pursuant to 18 U.S.C. 3509(d) but has been disclosed to the defense.

and tells her to go to e-mail accounts "makingitalone_04@yahoo.com" and "alone35@yahoo.com" and "trash everything that you can." Swinson says "I love you Mom" at the end of the conversation.

2. Telephone call on 03/10/2012 at 13:30 to telephone number 253-269-8465, Angela Ressler. At time counter 2:14, Swinson asked the female if she did what he asked her to do last night. The female responded, "yeah." Swinson went on to ask did you see where said edit, delete and stuff and whether she did it. At the 8:15 time counter, Swinson asked the female to call "Mariah" at 306-5866 and find out "anything she know."

3. Telephone call on 03/10/2012 at 13:58 to telephone number 253-269-8465, Angela Ressler. At time counter 12:56, Swinson gives the female who answered the phone information on two more e-mail accounts, which he identified as: "s and then my name at yahoo.com" (sdyrell@yahoo.com). Swinson described the password as the white pants that don't fit anymore and tells the female (presumably Ressler) not to say it, then "LV." Swinson also gives the female the e-mail address, "dyrell.swinson@yahoo.com," with the same password with "500" or "LV" at the end. Swinson tells the female to "do what I told you to do yesterday."

4. Telephone call on 03/10/2012 at 14:35 to telephone number 678-497-5011, answered by an unknown male. The unknown male talks about when he was in jail. They talk about bond and Swinson's preliminary hearing. At time counter 5:20, the name "Isaiah" is mentioned. At time counter 8:50 Swinson

tells the unknown male about three e-mail accounts. Swinson first gives e-mail address "dyrell.swinson@yahoo.com," and says the password is his favorite kind of clothes with a "g" and "500" or if not that one put "gucciLV." Swinson next says "makingitalone_04@yahoo.com" with password "alone35." The next e-mail Swinson says is "memefranklin@rocketmail.com," and he then tells the unknown male that the password is "all$in." The unknown male says "delete everything," and Swinson replied "yeah" and "like ASAP." It will say like edit, delete or pretty close to something like that, so click on that.

Further investigation revealed that between January and March 2012 Swinson used these email addresses at Yahoo.com, including "dyrell.swinson@yahoo.com," "memefranklin@rocketmail.com," and "makingitalone_04@yahoo.com," to purchase advertisements in the adult entertainment and escorts sections of the Internet site, "Backpage.com," for the cities of Bellingham, Everett, Tacoma, Yakima and Tri-Cities in Washington State, and for Boise, Idaho. "Backpage.com" is an Internet business operated from offices in Phoenix, Arizona and Dallas, Texas, that allows users to post classified advertisements, including with photos, for cities they choose as simply as sending an email.[3] The "Backpage.com" advertisements that Swinson posted include provocative photographs of "AT," clad in revealing lingerie displaying her bare buttocks and partially exposed breasts. Some of the images depict her on a bed posed in a sexually suggestive manner. The text portion of the ads offer, among other things, "companionship," "ultimate pleasure with me," and to "caress and pamper you - I can be your excape [sic] from reality." The ads include telephone numbers for

[3] *See* http://www.Backpage.com/gyrobase/AboutUs/

interested customers to call. For example, a Backpage.com listing for Boise, Idaho, created on March 2, 2012 includes the call-back number 253-592-3324, listed the girl's name as "kAyLoNI," and included four sexually provocative photographs of "AT" posing on a bed wearing skimpy pink lingerie.

The same name and phone number along with pictures of "AT" appeared in a similar Backpage.com advertisement in Yakima, Washington, created on February 18, 2012, and in Tri-Cities, Washington, created on February 12, 2012, as well as other ads with photos "AT" for other cities in the Pacific Northwest. Despite disclaimers on these ads offering the personal services of "AT", a reasonable person would conclude they were solicitations for prostitution.

The parties agree that Swinson's solicitations of other persons to alter, eliminate or destroy evidence stored online at Yahoo.com, and Rocketmail.com was an attempt to obstruct, interfere with or prevent the enforcement of Title 18, United States Code, Section 1591(a), involving sex trafficking of a minor. This evidence was material to the activities or decisions of the Idaho State Police and the Federal Bureau of Investigation, which assumed responsibility for the investigation in mid-March 2012, and had a natural tendency to influence, or was capable of influencing, the decisions or activities of the investigating agencies.

IV. SENTENCING FACTORS

A. Maximum Penalties. A violation of 18 U.S.C. § 1591(d), as charged in Count One, is punishable by at term of imprisonment of up to 20 years, a term of supervised release of at least 5 years up to life, a maximum fine of $250,000, and a special assessment of $100.

B. Supervised Release. Following release from prison, the defendant must be placed on supervised release for at least 5 years, up to life.

The law permits the combined prison time and term of supervised release to exceed the maximum term of incarceration for the crimes to which the defendant is pleading guilty. Violation of any condition of supervised release may result in further penalties and/or prosecution.

C. Fines and Costs. The Court may impose a fine. No agreement exists as to the amount of the fine. The Court may also order the defendant to pay the costs of imprisonment, probation, and supervised release.

D. Special Assessment. The defendant will pay the special assessment of $100 before sentencing and will furnish a receipt at sentencing. Payment will be made to the United States District Court, Clerk's Office, Federal Building and United States Courthouse, 550 West Fort Street, Fourth Floor, Boise, Idaho 83724.

E. Restitution. In addition to any fine or costs imposed, the Court pursuant to 18 U.S.C. § 1593, shall order the defendant to pay restitution equal to the loss caused to any victim of the offense charged in the Information. Other general restitution statutes may also apply.

F. Forfeiture.

The defendant understands that the Court will, upon acceptance of guilty plea, enter an order of forfeiture as part of sentence, and that the order of forfeiture may include assets directly traceable to the offense, assets used in the commission of the offense, substitute assets and/or a money judgment equal to the value of the property derived from, or otherwise involved in, the offense. Specifically, the defendant agrees to immediately forfeit to the United States the property set out in the Forfeiture Allegations of the Information.

Waiver of Further Challenge or Review of Forfeiture.

The defendant further agrees to waive all constitutional, legal and equitable challenges (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. The defendant also agrees not to challenge or seek review of any civil or administrative forfeiture of any property subject to forfeiture under this Agreement, and will not assist any third party with regard to such challenge or review or with regard to the filing of a petition for remission of forfeiture.

Court Shall Retain Jurisdiction.

The defendant agrees to forfeit the properties as stated above, or to substitute properties of equal value, at the Government's option. The United States District Court for the District of Idaho shall retain jurisdiction to settle any disputes arising from application of the foregoing forfeiture provisions.

V. UNITED STATES SENTENCING GUIDELINES

A. Application of Sentencing Guidelines. The Court must consider the United States Sentencing Guidelines (USSG) in determining an appropriate sentence under 18 U.S.C. § 3553. The defendant agrees that the Court may consider "relevant conduct" in determining a sentence pursuant to USSG § 1B1.3.

The Court is not a party to the Plea Agreement. The Plea Agreement does not bind the Court's determination of Sentencing Guidelines range. The Court will identify the factors that will determine the sentencing range under the Sentencing Guidelines. While the Court may take the defendant's cooperation, if any, and the recommendations of the parties into account, the Court has complete discretion to impose any lawful sentence, including the maximum sentence possible.

Recognizing that the Court is not bound by this Agreement, the parties agree to the recommendations and requests set forth below.

B. Sentencing Guidelines Recommendations and Requests.

1. **Acceptance of Responsibility.** If the defendant clearly accepts responsibility for the offense, the defendant will be entitled to a reduction of two levels in the combined adjusted offense level, under USSG § 3E1.1(a). The Government will move for an additional one-level reduction in the combined offense level under § 3E1.1(b) if the following conditions are met: (1) the defendant qualifies for a decrease under § 3E1.1(a); (2) the offense is level 16 or greater; and (3) the defendant has timely notified authorities of the defendant's intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently. If, before sentence is imposed, the defendant fails to meet the criteria set out in USSG § 3E1.1, or acts in a manner inconsistent with acceptance of responsibility, the Government will withdraw or not make such a recommendation.

2. **Joint Recommendations.** The parties jointly make the following recommendations, and agree that the following shall be included as terms of the defendant's sentence, expressly bargained for as a part of this plea agreement:

a) **Psycho-Sexual Assessment** --The defendant will submit to a sex offender evaluation pursuant to Title 18, United States Code, Section 3552(b) prior to sentencing in this case. It is the defendant's obligation to secure this evaluation from a mental health professional certified by the Idaho Sex Offender Classification Board (see, http://www2.state.id.us/socb/). The evaluation shall follow the format for psycho sexual evaluations set forth by the Idaho Sex Offender Classification Board and the Practice Standards and Guidelines for Members of the

Association for the Treatment of Sexual Abusers (ATSA). The defendant agrees to submit to all evaluation procedures at the direction of the treatment provider, including phallometry and polygraph testing if the treatment provider deems them necessary.

b) **Waiver of Confidentiality** -- The defendant agrees to waive any right to confidentiality and allow the provider conducting the psycho-sexual evaluation (and any subsequent treatment) to supply a written report(s) to the United States Probation Department, the Court and the United States Attorney.

c) **Contact with Minors** -- The Defendant may not have direct or indirect contact with children under the age of eighteen, unless approved in advance, in writing, by his probation officer.

d) **Access to Minors** -- The Defendant will not reside or loiter within 300 feet of schoolyards, playgrounds, arcades or other places, establishments and areas primarily frequented by children under the age of eighteen, unless approved, in advance, in writing, by his probation officer.

e) **Occupational Restriction** – The defendant may not engage in any paid occupation or volunteer service that exposes him either directly or indirectly to minors, unless approved in advance, in writing, by his probation officer.

f) **Polygraph Testing** -- The Defendant agrees to participate in polygraph testing to monitor his compliance with supervised release and any applicable treatment conditions, at the direction of his probation officer and/or treatment staff.

g) **Post-Incarceration Treatment** -- The Defendant will successfully complete any course of treatment related to his offense, as directed by his probation officer, including but not limited to cognitive/behavioral treatment for sexual deviancy under the

direction of a qualified mental health professional who is experienced in treating and managing sexual offenders, such as a member of the Association for the Treatment of Sexual Abusers (ATSA). The defendant will follow the rules of the treatment program as if they are the orders of the Court.

h) **Search Provision** -- The Defendant will be subject to a search of his person, home or vehicle, and any objects or materials (including computers and other types of electronic storage media) found therein, at the discretion of his probation officer.

I) **Conditional Use/Derivative Use Immunity** - As a condition of court-mandated evaluation and treatment, the defendant will be required truthfully to reveal his entire sexual history, including the possibility of other sexual crimes. In recognition of the fact that full disclosure of that history is a necessary component of effective treatment, the government agrees that the defendant's admissions during psycho-sexual evaluation and sex offender treatment, to sexual crimes (*excluding homicide*) previously undisclosed to any law enforcement entity, will not be used against the defendant in a new criminal prosecution. *See United States v. Antelope,* 395 F.3d 1128 (9th Cir. 2005), and *Kastigar v. United States*, 406 U.S. 441 (1972). However, the parties agree that this use immunity and derivative use immunity, is expressly conditioned, upon: 1) the defendant successfully completing sexual deviancy treatment, and 2) the defendant not materially violating the rules of supervised release, and/or committing a sexual crime or a crime involving the sexual exploitation of children after the date of this agreement. If the defendant fails to complete all aspects of treatment, or fails to comply with all material supervised release requirements, or reoffends as described above, then this immunity agreement is rescinded and the government may use defendant's statements against him.

3. **Stipulation Regarding Sentencing Guidelines.** The defendant understands that the United States Sentencing Guidelines apply in an advisory manner and are not binding on the Court. The parties agree that the applicable Guideline for Count One starts at USSG § 2J1.2(c) and is cross referenced to USSG § 2X3.1 and § 2G1.3(a)(2). The parties agree that the offense level for Count One is as follows: Base level 30 plus 2 under § 2G1.3(b)(3)(B), for the use of a computer or interactive computer service to entice, encourage, offer or solicit a person to engage in prohibited sexual conduct with the minor. That is reduced by 6 levels, to level 26, pursuant to USSG 2X3.1.

4. **Stipulation Regarding Reduction for Time Served in State Custody**

The government agrees to recommend that the Court reduce its selected sentence for the federal offense by the amount of time the defendant has already served in state custody since his arrest.

5. **Downward Departure or Variance Request by Defendant.** Unless otherwise specified in this paragraph, the defendant will not seek a downward departure, or a variance under 18 U.S.C. § 3553(a), without first notifying the Government and informing it of the basis, in writing, not less than 21 days before the date set for sentencing.

VI. COOPERATION

A. Truthful Information and Assistance. The defendant promises to provide truthful and complete information to the Government and its investigative agencies, including testimony in legal and administrative proceedings, concerning the roles of others involved in other criminal activity. The defendant shall not attempt to protect anyone through false information or omission. The defendant will not falsely implicate anyone. Any intentional deviation from the truth in any of the defendant's testimony may result in prosecution for perjury

and obstruction of justice . The defendant's duty under the terms of this Agreement is to tell the truth whether or not it bolsters the Government's case against any particular individual. The defendant specifically understands that this Agreement is not contingent upon the conviction of any person.

The defendant agrees to cooperate in good faith. This means the defendant will not only respond truthfully and completely to all questions asked, but will also volunteer all information that is reasonably related to subjects discussed. In other words, the defendant may not omit facts about crimes, participants, or defendant's involvement, and then claim not to have breached the Agreement because he was not specifically asked. This Agreement is breached by any action or statement inconsistent with continued cooperation.

The defendant agrees to be available for interviews to prepare for testimony. If necessary, the defendant will submit, upon request, to government-administered polygraph examinations.

B. Use of Information Against Defendant. In exchange for the defendant's agreement, the Government will not use new information the defendant provides (pursuant to this Agreement) about his own criminal conduct. The Government may reveal such information to the Court. There shall be no restrictions, however, on the use of information: 1) previously known to law enforcement agencies; 2) revealed to law enforcement agencies by, or discoverable through, an independent source; or 3) in the event there is a breach of this Agreement.

C. Substantial Assistance Determination. If the Government determines, in good faith, that the defendant's cooperation amounts to "substantial assistance" in the investigation of others, the Government will request that the Court depart downward from the applicable sentencing range, pursuant to USSG § 5K1.1, pursuant to 18 U.S.C. § 3553(e). At this time, the

Government has advised that it intends to make a request for a downward departure based upon the defendant's "substantial assistance."

The Government's final decision as to the extent of a motion under § 5K1.1 will be made after evaluating the defendant's cooperation with regards to: 1) the significance and usefulness of the defendant's cooperation, 2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant, 3) the nature and extent of the defendant's assistance, 4) any injury suffered, or any danger or risk of injury to the defendant or defendant's family resulting from the defendant's cooperation, and 5) the timeliness of the defendant's cooperation. The Government's specific recommendation will turn on the facts of the case, the sentence that likely would have been imposed absent an agreement, and the extent and value of the cooperation provided.

D. Defendant's Assumption of Risk. The defendant agrees freely and voluntarily to cooperate with the Government, knowing the possible consequences of cooperation. The defendant's attorney knows of the defendant's cooperation and agrees that the defendant shall enter into this Agreement. The defendant hereby absolves the Government, including its employees, from any liability associated with this cooperation.

VII. WAIVER OF APPEAL AND 28 U.S.C. § 2255 RIGHTS

A. In exchange for this Agreement, and except as provided in subparagraph B, the defendant waives any right to appeal or to collaterally attack the conviction, entry of judgment, and sentence.

The defendant acknowledges that this waiver shall result in the dismissal of any appeal or collateral attack the defendant might file challenging the plea, conviction or sentence in this case. Further, if the defendant violates this waiver it will be a breach of this Agreement and the

Government may withdraw from this Plea Agreement and take other remedial action.

If the defendant believes the Government has not fulfilled its obligations under this Agreement, the defendant will object at the time of sentencing; further objections are waived.

B. Notwithstanding subparagraph A, the defendant shall retain the right to file one direct appeal only if one of the following unusual circumstances occur; the defendant understands that these circumstances occur rarely and that in most cases this Agreement constitutes a complete waiver of all appellate rights:

1. the sentence imposed by the District Court exceeds the statutory maximum;

2. the District Court arrived at an advisory Sentencing Guidelines range by applying an upward departure under Chapter 5K of the Guidelines; or

3. the District Court exercised its discretion under 18 U.S.C. § 3553(a) to impose a sentence that exceeds the advisory Sentencing Guidelines range as determined by the District Court.

4. the District Court applies a Sentencing Guideline offense level that is higher than contemplated by this agreement [base offense 30 plus 2 under § 2G1.3(b)(3)(B), for the use of a computer or interactive computer service to entice, encourage, offer or solicit a person to engage in prohibited sexual conduct with the minor; reduced by 6 levels, to level 26, pursuant to USSG 2X3.1].

Notwithstanding subparagraph A, the defendant may file one habeas petition (motion under 28 U.S.C. § 2255) for ineffective assistance of counsel only if: (1) the motion is based solely on information not known to the defendant at the time the District Court imposed

sentence; and (2) in the exercise of reasonable diligence, the information could not have been known by the defendant at that time.

VIII. PROVIDING INFORMATION FOR THE PRESENTENCE REPORT

The defendant agrees to provide material financial and other information requested by a representative of the United States Probation Office for use in preparing a presentence report. Failure to execute releases and provide such information violates this Agreement. Such failure will subject the defendant to additional penalties, including an enhancement under USSG § 3C1.1, or an upward departure under § 5K2.0, and relieve the Government of the obligations in this Agreement. Such failure will not, however, constitute grounds for withdrawing the plea of guilty unless the Government so requests.

IX. NO RIGHT TO WITHDRAW PLEA

The defendant understands that the Court may not follow the recommendations or requests made by the parties at the time of sentencing. The defendant cannot withdraw from this Plea Agreement or the guilty plea, regardless of the Court's actions.

X. CONSEQUENCES OF VIOLATING AGREEMENT

A. Government's Options. If the defendant fails to keep any promise in this Agreement or commits a new crime, the Government is relieved of any obligation not to prosecute the defendant on other charges, including charges not pursued due to this Plea Agreement. Such charges may be brought without prior notice. In addition, if the Government determines after sentence is imposed that the defendant's breach of the Agreement warrants further prosecution, the Government may choose between letting the conviction(s) under this Plea Agreement stand or vacating such conviction(s) so that such charge(s) may be re-

prosecuted. If the Government determines that a breach warrants prosecution before sentencing, it may withdraw from the Plea Agreement in its entirety.

B. Defendant's Waiver of Rights. If the defendant fails to keep any promise made in this Agreement, the defendant gives up the right not to be placed twice in jeopardy for the offense(s) to which the defendant entered a plea of guilty or which were dismissed under this Agreement. In addition, for any charge that is brought as a result of the defendant's failure to keep this Agreement, the defendant gives up: (1) any right under the Constitution and laws of the United States to be charged or tried in a more speedy manner; and (2) the right to be charged within the applicable statute of limitations period if the statute of limitations expired after the defendant entered into this Agreement.

XI. MISCELLANEOUS

A. No Other Terms. This Agreement is the complete understanding between the parties, and no other promises have been made by the Government to the defendant or to the attorney for the defendant. This Agreement does not prevent any governmental agency from pursuing civil or administrative actions against the defendant or any property. Unless an exception to this paragraph is explicitly set forth elsewhere in this document, this Agreement does not bind or obligate governmental entities other than the United States Attorney's Office for the District of Idaho. The Government will bring the defendant's cooperation and pleas to the attention of other prosecuting authorities at the defendant's or defendant's counsel's request.

B. Plea Agreement Acceptance Deadline. This plea offer is explicitly conditioned on the defendant's notification of acceptance of this Plea Agreement no later than **5:00 p.m. on October 26, 2012**.

XII. UNITED STATES' APPROVAL

I have reviewed this matter and the Plea Agreement. I agree on behalf of the United States that the terms and conditions set forth above are appropriate and are in the best interests of justice.

WENDY J. OLSON
UNITED STATES ATTORNEY
By:

James M. Peters
Assistant United States Attorney

10-26-12
Date

XIII. ACCEPTANCE BY DEFENDANT AND COUNSEL

I have read and carefully reviewed every part of this Plea Agreement with my attorney. I understand the Agreement and its effect upon my potential sentence. Furthermore, I have discussed all of my rights with my attorney and I understand those rights. No other promises or inducements have been made to me, directly or indirectly, by any agent of the Government, including any Assistant United States Attorney, concerning the plea to be entered in this case. In addition, no one has threatened or coerced me to do, or to refrain from doing, anything in connection with this case, including to enter a guilty plea. I am satisfied with my attorney's advice and representation in this case.

D. Swinson — 10/19/2012

DYRELL ROBERT SWINSON
Defendant

Date

I have read this Plea Agreement and have discussed the contents of the Agreement with my client. The Plea Agreement accurately sets forth the entirety of the Agreement. I concur in my client's decision to plead guilty as set forth above.

10/19/12

THOMAS MONAGHAN
Attorney for the Defendant

Date

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EXHIBIT 3

PRESS RELEASE

Washington Man Sentenced In Idaho Sex Trafficking Case

Monday, March 25, 2013

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For Immediate Release

U.S. Attorney's Office, District of Idaho

BOISE – Dyrell Robert Swinson, 20, of Tacoma, Washington, was sentenced this morning in United States District Court to 57 months in federal prison for his role in a child sex trafficking case, U.S. Attorney Wendy J. Olson announced. U.S. District Judge Edward J. Lodge also ordered Swinson to be supervised by a probation officer for five years after he is released from custody. He will also be required to register as a sex offender. Swinson pleaded guilty in November 2012 to obstructing a sex trafficking of children investigation.

According to the plea agreement, on March 8, 2012, law enforcement observed suspicious behavior by the occupants of a vehicle eastbound on Interstate 84 in Payette County, Idaho. The vehicle was intercepted at a rest area and the two occupants of the vehicle were questioned by an Idaho State Police trooper. The officer determined that Swinson, the driver of the vehicle, had a suspended Washington driver's license. The passenger, a young female who Swin was his cousin, was unable to provide identification. The trooper, believing the female's age to be false, conducted a consensual search of the vehicle and discovered items

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inconsistent with statements made by the vehicle's occupants. Swinson was arrested for driving without privileges and both individuals were taken to the Payette County Jail. During an interview at the jail, the passenger admitted her true age – 15 – and identity. A check with Idaho State Police dispatch revealed the juvenile was a ward of the state of Washington and a runaway who had disappeared on November 22, 2011.

According to the plea agreement, Swinson, after being advised that telephone calls from the jail were being recorded, made several calls requesting other parties to alter or delete electronic records. During the investigation, law enforcement discovered that Swinson had posted provocative photographs of the 15-year-old on Internet advertisement web sites with telephone numbers for customers to call. Swinson admitted that his solicitations of other persons to alter, eliminate, or destroy evidence stored online was an attempt to obstruct the enforcement of federal law involving sex trafficking of a minor.

“Sex trafficking victimizes vulnerable teens, often forcing them into a desperate lifestyle so that others may profit,” said Olson. “Law enforcement agencies and prosecutors in Idaho are working together to identify and rescue these victims and to ensure that the traffickers are punished.”

The case was investigated by the Federal Bureau of Investigation, the Idaho State Police, and the Payette County Sheriff's Office.

This case was brought as part of Project Safe Childhood, a nationwide initiative launched in May 2006 by the Department of Justice to combat the growing epidemic of child sexual exploitation and abuse. Led by the United States Attorneys' Offices and the Criminal Division's Child Exploitation and Obscenity Section, Project Safe Childhood marshals federal, state, and local resources to locate, apprehend, and prosecute individuals who sexually exploit children, and to identify and rescue victims. For more information about Project Safe Childhood, please visit www.usdoj.gov/psc. For more information about internet safety education, please visit www.usdoj.gov/psc and click on the tab "resources."

Updated December 15, 2014

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

ORDER RE: MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND CROSS MOTION FOR LEAVE TO EXCEED PAGE LIMITATIONS (DKTS. 20, 30)

INTRODUCTION

Before the Court are a Motion for Leave to File Amici Curiae Brief in support of Plaintiffs' Motion for a Temporary Restraining Order or, in the alternative, a Preliminary Injunction; and Defendant's Non-Opposition to the Proposed Amici's Motion and Cross-Motion for Leave to Exceed Page Limitations. (Dkt. 20, 30.) Having fully reviewed the record, the Court finds the facts and legal arguments are adequately presented in the record. Accordingly, in the interest of avoiding delay, and because the decisional process would not be significantly aided by oral argument, the motions will be decided based on the record.

DISCUSSION

Plaintiffs initiated this lawsuit by filing their Complaint on July 11, 2023, contesting the constitutionality of Idaho Code Section 18-623. (Dkt. 1.) They filed a Motion for Temporary Restraining Order (TRO) or, in the alternative, a Preliminary Injunction (PI) on July 24, 2023. (Dkt. 12.) Defendant's response to that Motion is due August 28, 2023, and Plaintiffs' reply is due fourteen days thereafter. (Dkt. 27); Dist. Loc. Civ. R. 7.1(b)(3).

On July 31, 2023, the Attorney General for the State of Washington, on behalf of nineteen states and the District of Columbia (collectively "Amici States"), filed a Motion for leave to submit an amici curiae brief in support of Plaintiffs' Motion. (Dkt. 20.)[1] Neither Plaintiffs nor Defendant oppose the Amici States' Motion. (Dkt. 30); Dist. Loc. Civ. R. 7.1(c) (the time for filing a response to the Amici States' motion has passed). However, the parties have agreed to and have requested leave to file briefing exceeding the standard page limitations relevant to Plaintiffs' Motion For TRO/PI, so that they can address arguments raised by the Amici States. (Dkt. 30.) Having carefully review the entire record, the Court will grant the Amici States' unopposed Motion to file the proposed amicus curiae brief and the Motion to exceed page limitations. (Dkt. 20, 30.)

[1] The Amici States are as follows: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Commonwealth of Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, and Washington. (Dkt. 20.) The Amici States have been granted Pro Hac Vice status and have designated local counsel as required under Local Civil Rule 83.4(e). (Dkt. 17.)

"The district court has broad discretion to appoint amici curiae." *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995). District courts may consider amicus curiae briefs from non-parties "concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Macareno v. Thomas*, 378 F.Supp.3d 933, 940 (W.D. Wash. 2019) (quoting *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005)) (internal quotation marks omitted). Amici may be either impartial or interested individuals, whose function is to advise or make suggestions to the court. *See Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986); *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

Here, the Amici States have information and perspectives that are distinct from those of the named parties and are relevant to the issues presented in this litigation, which may be useful to the Court in deciding Plaintiffs' Motion for TRO/PI. Accordingly, the Amici States' Motion will be granted. However, the Amici States are not a party to this litigation. *Miller-Wohl Co.*, 694 F.2d at 204 (citing *Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953)). The Amici States may not assume the functions of a party and may not initiate, create, extend, or enlarge the issues; participate in oral argument at any hearing; or make additional filings unless granted leave to do so. *Id*.

Further, the Court finds the additional pages agreed to and proposed by the parties are appropriate and reasonable under the particular circumstances presented in this case. Dist. Loc. Civ. R. 7.1(a)(2). Accordingly, the Motion for leave to file briefing relevant to Plaintiffs' Motion for TRO/PI that exceeds the page limitations will be granted. (Dkt. 30.)

ORDER

NOW THEREFORE IT IS HEREBY ORDERED as follows:

1. The Motion for Leave to File Amici Curiae Brief (Dkt. 20) is **GRANTED**. The Amici Curiae brief attached to the motion (Dkt. 20-1) is now part of the record and will be considered by the Court for purposes of deciding Plaintiffs' Motion for Temporary Restraining Order or, in the alternative, a Preliminary Injunction.
2. The Motion for Leave to Exceed Page Limitations (Dkt. 30) is **GRANTED**. Defendant's response to Plaintiffs' Motion for Temporary Restraining Order or, in the alternative, a Preliminary Injunction may be a total of thirty (30) pages. Plaintiffs' reply brief may be a total of seventeen (17) pages.

DATED: August 22, 2023

Honorable Debora K. Grasham
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Lourdes Matsumoto Plaintiff, vs. Raul Labrador Defendant	Case No. 1:23−cv−00323−DKG **NOTICE OF ASSIGNMENT TO A UNITED STATES MAGISTRATE JUDGE AND CONSENT FORM**

In accordance with District of Idaho General Order No. 324, you are notified that the above entitled action has been assigned to a United States Magistrate Judge to conduct all proceedings in this case, including trial and entry of final judgment.

Exercise of this jurisdiction by a United States Magistrate Judge is, however, permitted only if all parties file a written consent form, a copy of which is part of this notice. You may also, without adverse consequences, request immediate reassignment to a District Judge. No Judge will be informed of a party's response to this notification, unless all parties have consented to the assignment of the matter to a United States Magistrate Judge. All parties are requested to return this form within 60 days of receipt to the Clerk of Court. Any party deciding to proceed before a United States Magistrate Judge should sign the consent to proceed form and return it to the Clerk of Court by e−mailing the same in .pdf format to the following address: consents@id.uscourts.gov. If you are a pro se litigant, you should mail this form to the following address: U.S. District Court, 550 W. Fort St. Room 400, Boise, ID 83724. The parties may submit a joint consent, similar to a stipulation, before or after receiving this Notice. If consents are not received from all parties, the case will be randomly reassigned to a District Judge in the District of Idaho. The parties should be aware, however, that the District Judge may reassign the case to a District Judge visiting from another District.

An appeal from a judgment entered by a United States Magistrate Judge will be directly to the United States Court of Appeals for the Ninth Circuit in the same manner as an appeal from any other judgment of this District Court. 28 U.S.C. § 636(c); Fed.R.Civ.P. 73.

CONSENT TO THE EXERCISE OF JURISDICTION
BY A UNITED STATES MAGISTRATE JUDGE

In accordance with provisions of 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and District of Idaho General Order No. 324, the undersigned party to this case consents to have a United States Magistrate Judge conduct any and all proceedings in this case, including the trial, and order the entry of a final judgment.

Party Represented	Signature	
Defendant Labrador	/s/ Lincoln Davis Wilson	Date 8-3-2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Lourdes Matsumoto Plaintiff, vs. Raul Labrador Defendant	Case No. 1:23−cv−00323−DKG **NOTICE OF ASSIGNMENT TO A UNITED STATES MAGISTRATE JUDGE AND CONSENT FORM**

In accordance with District of Idaho General Order No. 324, you are notified that the above entitled action has been assigned to a United States Magistrate Judge to conduct all proceedings in this case, including trial and entry of final judgment.

Exercise of this jurisdiction by a United States Magistrate Judge is, however, permitted only if all parties file a written consent form, a copy of which is part of this notice. You may also, without adverse consequences, request immediate reassignment to a District Judge. No Judge will be informed of a party's response to this notification, unless all parties have consented to the assignment of the matter to a United States Magistrate Judge. All parties are requested to return this form within 60 days of receipt to the Clerk of Court. Any party deciding to proceed before a United States Magistrate Judge should sign the consent to proceed form and return it to the Clerk of Court by e−mailing the same in .pdf format to the following address: consents@id.uscourts.gov. If you are a pro se litigant, you should mail this form to the following address: U.S. District Court, 550 W. Fort St. Room 400, Boise, ID 83724. The parties may submit a joint consent, similar to a stipulation, before or after receiving this Notice. If consents are not received from all parties, the case will be randomly reassigned to a District Judge in the District of Idaho. The parties should be aware, however, that the District Judge may reassign the case to a District Judge visiting from another District.

An appeal from a judgment entered by a United States Magistrate Judge will be directly to the United States Court of Appeals for the Ninth Circuit in the same manner as an appeal from any other judgment of this District Court. 28 U.S.C. § 636(c); Fed.R.Civ.P. 73.

CONSENT TO THE EXERCISE OF JURISDICTION
BY A UNITED STATES MAGISTRATE JUDGE

In accordance with provisions of 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and District of Idaho General Order No. 324, the undersigned party to this case consents to have a United States Magistrate Judge conduct any and all proceedings in this case, including the trial, and order the entry of a final judgment.

Party Represented	Signature	Date
Plaintiffs	/s/ Wendy J. Olson	08/08/23

THE CONSENT PROCESS: WHAT IS IT?

In accordance with 28 U.S.C. § 636(c), FRCP 73, and Local Rule 73.1, a Magistrate Judge is available to preside over all aspects of this case, including the jurisdictional authority to:

- Schedule, hear, and decide all dispositive and non−dispositive matters;
- Schedule, hear, and decide all interlocutory matters;
- Conduct jury or non−jury trials;
- Enter final orders and judgment; and
- Decide all post−trial motions.

Appeals from any final order or judgment entered by a Magistrate Judge are directly to the United States Court of Appeals for the Ninth Circuit. See 28 U.S.C. § 636(c)(3); Fed. R. Civ. P. 73(c). However, a Magistrate Judge's exercise of this jurisdiction is permitted only if all parties voluntarily consent.

How Does It Benefit Me?

Speedy trial rights in felony criminal cases require the District's two District Judges to give priority to trying those cases, sometimes requiring that civil trial dates be moved. Magistrate Judges do not preside over felony criminal trials. As a result, a Magistrate Judge's trial docket is generally less crowded than those of the District Judges.

Magistrate Judges usually are able to provide earlier and firmer dates for both hearings and trials than might otherwise be possible by a District Judge. Because this District is very busy and the criminal docket is growing rapidly, consenting to proceed before a Magistrate Judge often means your civil case will be resolved more quickly than if before a District Judge.

Additionally, even if parties do not consent, the District Judge to whom the matter is assigned may nonetheless refer all pre−trial proceedings to a Magistrate Judge pursuant to 28 U.S.C. § 636(b), FRCP 73, and Local Rule 72.1. For any dispositive matters so referred, the Magistrate Judge will enter a Report and Recommendation for the District Judge's consideration. At that point, the review process by a District Judge generally takes 60 days. Thus, by consenting to Magistrate Judge jurisdiction at the outset, the parties also can avoid the delays and expense of this review process, while still preserving their appeal rights.

How Do I Consent?

After the case is filed, the Clerk of the Court will send the appropriate notice and consent form as provided by the General Order. The consent form affords each party an initial opportunity to consent to having a Magistrate Judge assume complete jurisdiction over the case, including trial and entry of judgment. Each party should make a decision whether to consent to or decline Magistrate Judge jurisdiction as soon as possible. The parties may also file a joint consent, similar to a stipulation, at any time.

You may, without adverse substantive consequences, withhold your consent, which would preclude Magistrate Judge jurisdiction. If any party withholds consent, the identity of the parties consenting and/or withholding consent will not be communicated to any Judge.

1. This insert is for information purposes only and is not intended to supersede the applicable rules, including General Order No. 324, addressing the consent process.

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District of Idaho (LIVE) NextGen 1.7

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Docket entry only - CONSENT to Magistrate Judge filed. (ac)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 23-cv-00323-DKG

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

I. INTRODUCTION

Proposed Amici States request leave to file an amicus brief in support of Plaintiffs' Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction (ECF No. 12). Plaintiffs seek to enjoin the enforcement of Idaho Code § 18-623, which prohibits adults from "recruiting, harboring, or transporting" a pregnant minor within Idaho for the purpose of procuring an abortion. Idaho's Attorney General has explicitly stated that he interprets the law to apply even to abortions performed outside Idaho's borders, in states where they are lawful. ECF No. 12-5.

Idaho Code § 18-623 will therefore have a significant and immediate impact on Amici States, medical professionals who practice within their borders, and trusted adults who wish to assist pregnant Idahoans in receiving legal abortion care in Amici States. Given these impacts, this Court would benefit from hearing Amici States' perspective on the threatened application of a law to speech and conduct outside of Idaho, which will endanger the timely availability of abortion care in their States. Amici States thus request that this Court grant leave to file the attached amicus brief detailing the federal constitutional and state sovereignty concerns that support granting Plaintiffs' motion and preliminarily enjoining Idaho Code § 18-623.

II. IDENTITIES AND INTERESTS OF PROPOSED AMICI

Proposed Amici States are the States of Washington, Arizona, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, and Rhode Island, and the District of Columbia.

Proposed Amici States have important sovereign interests in preserving the authority to regulate activities within their borders, including public health. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). As states that are committed to protecting access to reproductive healthcare, Proposed Amici have an interest in ensuring that patients, including those from other states, can avail themselves of healthcare services that are legal in Amici States. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (finding it "not especially difficult as a constitutional matter" to conclude that a

State may not "bar a resident of that State from traveling to another State to obtain an abortion"). These interests include protecting patient access to legal healthcare services, including for patients who are residents of other states, and the ability of residents in Proposed Amici States to counsel and assist patients, including Idaho patients, in doing so.

In addition, Proposed Amici States are themselves providers or administrators of healthcare to many, offering a range of reproductive care, including abortion. Proposed Amici States own and operate public hospital systems, employ healthcare personnel, and license and regulate the many healthcare providers that operate within their jurisdictions. Accordingly, Proposed Amici States have an interest in preventing uncertainties for those healthcare providers that the Attorney General's interpretation and enforcement of Idaho Code § 18-623 may cause.

III. ARGUMENT

The district court has broad discretion to appoint amicus curiae. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). The classic role of amicus curiae is "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982); *see, e.g.*, *Knox v. U.S. Dep't of Interior*, No. 4:09-cv-162-BLW, 2011 WL 2837219, at *1 (D. Idaho July 9, 2011) (granting tribes' motion to file amicus brief in case involving challenge to tribal gaming compacts with the state). An amicus may not present a "highly partisan" account of the facts, but may take a legal position and present legal arguments in support of that position. *Funbus Sys., Inc. v. State of Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (denying motion to strike amicus briefing by States of Washington and New Jersey in case involving proper application of Administrative Procedure Act to agency regulation of intrastate motor carrier services). Courts generally consider whether the proposed amici's proffered argument is timely, useful, or otherwise necessary to the effective administration of justice. *Hoptowit*, 682 F.2d at 1260.

This Court should grant leave for the proposed Amici States to file an amicus brief in support of Plaintiffs' motion for a temporary restraining order or, in the alternative, a preliminary

injunction. Proposed Amici States seek to provide the Court with their position on the application of law to Idaho Code § 18-623—which will, if applied to activity occurring outside of Idaho, inherently impact them, their residents, and their medical providers. More specifically, the proposed amicus brief maintains that Idaho Code § 18-623, as explicitly interpreted by Attorney General Labrador (*see* ECF No. 12-5), threatens to impermissibly criminalize medical providers and trusted adults in Amici States giving care and assistance to Idaho minors accessing abortion care in States where such care is lawful. The brief will also provide the Court with facts about Amici States' policy choices on abortion care, the post-*Dobbs* reality of patients traveling from Idaho to Amici States to receive abortion care, and the harm that could occur to Amici States' healthcare systems, patients, and providers due to enforcement of Idaho Code § 18-623, including the chilling of speech and conduct that is lawful in Amici States.

Because this case indisputably involves issues of public interest and Proposed Amici would provide information and argument "otherwise necessary to the effective administration of justice," *Hoptowit*, 682 F.2d at 1260, the Court should exercise its discretion and allow Proposed Amici to file the attached amicus brief.

IV. CONCLUSION

Proposed Amici States respectfully request that this Court grant leave and permit Amici States to submit their proposed amicus brief.

RESPECTFULLY SUBMITTED this 31st day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 31st day of July 2023, at Olympia, Washington.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 23-cv-00323-DKG

AMICUS BRIEF OF THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, AND RHODE ISLAND AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

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Glick v. McKay,
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Hodgson v. Minnesota,
497 U.S. 417 (1990) 15

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410 U.S. 113 (1973) 5

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 2

State v. Koome,
530 P.2d 260 (Wash. 1975) 3

United States v. Idaho,
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Virginia v. Hicks,
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Constitutional Provisions

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Statutes

775 ILCS 55/1-15 4

Ariz. Rev. Stat. § 36-2152 5

Cal. Health & Safety Code § 123462 4

Col. Rev. Stat. § 13-22-705 4

Col. Rev. Stat. § 25-6-403 4

Col. S.B. 23-188 (Colo. 2023),
to be codified at Colo. Rev. Stat. § 12-30-121 *et seq* 4

Idaho Code § 18-622 11

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Idaho Code § 18-623(3) 6

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Nev. Rev. Stat. § 442.250 4

Or. Rev. Stat. § 109.640 3

Or. Rev. Stat. § 659.880 3

Wash. Rev. Code § 9.02.100 3

Wash. Rev. Code § 9.02.110 3

Other Authorities

Am. Acad. of Pediatrics, Comm. on Adolescence,
Policy Statement: The Adolescent's Right to Confidential Care When Considering Abortion,
139 Pediatrics e20163861 (2017) 11

American College of Obstetricians and Gynecologists,
Facts Are Important: Understanding Ectopic Pregnancy,
https://www.acog.org/advocacy/facts-are-important/understanding-ectopic-pregnancy 11

Aria Bendix, *Idaho becomes one of the most extreme anti-abortion states with law restricting travel for abortions*, NBC News (April 6, 2023), https://www.nbcnews.com/health/womens-health/idaho-most-extreme-anti-abortion-state-law-restricts-travel-rcna78225 7

Center for Reproductive Rights, *After Roe Fell: Abortion Laws by State*, https://reproductiverights.org/maps/abortion-laws-by-state/ 4

Elizabeth G. Raymond & David E. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215 (2012) 10

Interstate Medical Licensure Compact Commission, Rule on Coordinated Information System, Joint Investigations and Disciplinary Actions, https://www.imlcc.org/wp-content/uploads/2022/11/IMLCC-Rule-Chapter-6-Coordinated-Information-System-Joint-Investigations-and-Disciplinary-Actions-Adopted-November-16-2018-Amended-11-8-2022.pdf..... 9

Interstate Medical Licensure Compact, https://imlcc.org..... 9

J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 Berkeley Women's L.J. 61(2003) 11

Jessica Hill, *Las Vegas sees big spike in out-of-state abortion seekers*, Las Vegas Review-Journal (updated June 27, 2023), https://www.reviewjournal.com/news/politics-and-government/nevada/las-vegas-sees-big-spike-in-out-of-state-abortion-seekers-2800219/ 7

Kaitlin Washburn, *Planned Parenthood of Illinois reports spike in abortion patients since Roe v. Wade was overturned,* Chicago Sun Times, (June 12, 2023), https://chicago.suntimes.com/2023/6/12/23758431/planned-parenthood-of-illinois-reports-spike-in-abortion-patients-since-roe-v-wade-overturned..... 8

Kandra Kent, *Oregon sees uptick in abortion travel, most out-of-staters come from Idaho*, KPTV (Nov. 8, 2022), https://www.kptv.com/2022/11/08/oregon-sees-uptick-abortion-tourism-most-out-of-staters-come-idaho// 7

Margaret Moon, *Adolescents' Right to Consent to Reproductive Medical Care: Balancing Respect for Families with Public Health Goals*, 12 Am. Med. Ass'n J. of Ethics 805, 806 (2012) 11

Megan Burbank, *Who is traveling to Washington for abortion care?* Crosscut, (Nov. 14, 2022), https://crosscut.com/equity/2022/11/who-traveling-washington-abortion-care. .. 7

National Abortion Federation, A Year After Dobbs, More People Than Ever Are Traveling For Abortion Care, (June 7, 2023), https://prochoice.org/a-year-after-dobbs-more-people-than-ever-are-traveling-for-abortion-care/.....10

National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States* 12, 77–78 (National Academies Press 2018), http://nap.nationalacademies.org/24950.....10

Nicole Rideout, *One year since the overturn of Roe, OB/GYNs report devastating impacts from lack of abortion access*, OSHU News (June 24, 2023), https://news.ohsu.edu/2023/06/24/one-year-since-the-overturn-of-roe-obgyns-report-devastating-impacts-from-lack-of-abortion-access..... 7

Nina Shapiro, *She secretly traveled 2,000 miles for her WA abortion. Why patients from the South are coming here*, The Seattle Times (Feb. 26, 2023), https://www.seattletimes.com/seattle-news/she-secretly-traveled-2000-miles-for-her-wa-abortion-why-patients-from-the-south-are-coming-here/ 10

Reuters Fact Check, *Fact Check-Termination of Pregnancy Can Be Necessary to Save a Woman's Life, Experts Say*, Reuters (Dec. 27, 2021), https://www.reuters.com/article/factcheck-abortion-false/fact-check-termination-ofpregnancy-can-be-necessary-to-save-a-womans-life-experts-say-idUSL1N2TC0VD.....10

Society of Family Planning, *#We Count Report*, Oct. 28, 2022, https://societyfp.org/wp-content/uploads/2022/10/SFPWeCountReport_AprtoAug2022_ReleaseOct2022-1.pdf..... 6

U.S. Senator Maria Cantwell, *SNAPSHOT: Abortion Care in the State of Washington One Year Post* Dobbs, Press Release (June 23, 2023), https://www.cantwell.senate.gov/download/06232023-dobbs-anniversary-report 10

I. INTRODUCTION

Amici are States bordering and neighboring Idaho, as well as States across the country, that protect access to abortion and allow minors to independently consent to abortion care in some or all circumstances. Under Attorney General Labrador's interpretation of Idaho Code § 18-623, Idaho threatens to punish medical providers and residents of Amici States for giving information and assistance to minors who access lawful abortion care outside Idaho's borders, in Amici States.[1] This cannot be reconciled with Supreme Court precedent, under which States cannot prevent their residents from accessing abortion care in other states where it is legal—much less from even accessing information about such lawful care.

Idaho's law spells grave harm for Amici States. First, many Amici States are already flooded with Idahoans seeking abortion care. Attorney General Labrador's interpretation of Idaho Code § 18-623 threatens to punish, and will chill, the ability of healthcare providers, counselors, and trusted adults in Amici States to provide their Idaho patients, clients, relatives, and friends with vital information and support about lawful healthcare in Amici States. Second, the threatened criminalization of travel and provision of information will delay patients' ability to access lawful care, leading to increased health risks, illness, and death. This is true not only for Idahoans but also for residents of Amici States who are traveling in or who happen to be in Idaho and who need urgent reproductive healthcare. These risks will fall disproportionately on the most vulnerable young people who may be unable to inform their parents due to fear for their safety.

Idaho cannot, consistent with the Constitution, threaten to punish residents of Amici States for giving information about and helping young people access lawful healthcare within our borders. Amici States request that the Court grant Plaintiffs' request for a temporary restraining order or preliminary injunction.

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[1] Amici States are responding to the broad reading of Idaho Code § 18-623 by Attorney General Labrador, the official primarily responsible for its enforcement. *See* ECF No. 12-5. Amici States do not concede that this interpretation is legally correct or that the law could not be interpreted more narrowly either on its face or pursuant to a limiting construction.

II. INTERESTS OF AMICI CURIAE

Amici States have protected the right to give and receive abortion care, including allowing some or all minors to independently consent to such care. *See infra* § III(a). Idaho Code § 18-623 purports to criminalize adults—including residents of Amici States—who "recruit," "harbor," or "transport" minors to receive care that is legal in other states.

Amici States have important sovereign interests in preserving the authority to regulate public health within their borders. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). These interests include protecting patient access to legal healthcare services, including patients who are residents of other states, and the ability of residents in Amici States to counsel and assist patients, including Idaho patients, in doing so. In addition, Amici States are themselves providers or administrators of healthcare to many, offering a range of reproductive care, including abortion. Amici States own and operate public hospital systems, employ healthcare personnel, and license and regulate the many healthcare providers that operate within their jurisdictions. Accordingly, Amici States have an interest in preventing uncertainties for those healthcare providers that Idaho's law may cause.

III. ARGUMENT

A. Amici States Have Chosen to Protect Minors' Ability to Access Abortion Care

Amici States acknowledge that Idaho can make sovereign decisions regarding abortion within its borders (to the degree consistent with federal and state constitutional limitations). Likewise, Amici States have a longstanding and significant interest in exercising their police power over public health policy within their own borders. Some Amici States have enacted laws permitting minors to access reproductive healthcare. Although these laws differ in specifics, they allow minors in at least some circumstances to independently consent to abortion care without requiring parental consent or notification, including in states bordering and neighboring Idaho.

In Washington, voters codified the right to choose abortion into state law, "declar[ing] that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions," including the "right to choose or refuse to have an abortion." Wash. Rev.

Code § 9.02.100; *see also* Wash. Rev. Code § 9.02.110 ("The state may not deny or interfere with a pregnant individual's right to choose to have an abortion prior to viability of the fetus, or to protect the pregnant individual's life or health."). People of any age—including minors—have the right to independently consent to their own abortion care; parental consent is not required. Wash. Rev. Code § 9.02.100; *State v. Koome*, 530 P.2d 260 (Wash. 1975) (striking down a law requiring an unmarried minor to obtain parental consent before receiving abortion care).

In Oregon, state law ensures that a "consenting individual" cannot be deprived of "the choice of terminating the individual's pregnancy[,]" nor can a healthcare provider "who is acting within the scope of the health care provider's license" be prohibited from "terminating or assisting in the termination of a patient's pregnancy." Or. Rev. Stat. § 659.880. Minors aged 15 and older can independently consent to abortion care, and minors under 15 can independently consent when the provider reasonably believes involving the parent may result in abuse or neglect, or would not be in the minor's best interest. Or. Rev. Stat. § 109.640.

In California and Nevada, parental consent and notification requirements for minors have been invalidated by court order for decades, meaning minors can independently consent to abortion care in both states. *See Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 883-89 (Cal. 1997) (invalidating Cal. Health & Safety Code § 123450); *Glick v. McKay*, 937 F.2d 434, 442 (9th Cir. 1991) (invalidating Nev. Rev. Stat. § 442.255). In the meantime, California has enshrined the right of every individual to choose an abortion not only in statute, *see* Cal. Health & Safety Code § 123462 (declaring the public policy of the state that every individual has "the fundamental right to choose to bear a child or to choose and to obtain an abortion"), but also constitutionally, with voters recently approving an amendment protecting the "fundamental right to choose to have an abortion." Cal. Const., art. 1, § 1.1. And in Nevada, individuals have the legal right to choose to have an abortion when performed by a licensed physician within the first 24 weeks of pregnancy, and the legislature enacted a law this year protecting legal abortion care from out-of-state interference, including preventing Nevada from assisting in the arrest or extradition of someone

charged in another state for a crime related to reproductive healthcare services such as abortion. Nev. Rev. Stat. § 442.250; S.B. 131, 82nd Leg., Reg. Sess. (Nev. 2023).

Colorado enacted a statutory provision for abortion as a fundamental right in 2022. Col. Rev. Stat. § 25-6-403. In 2023, it enacted a law similar to Nevada's, providing protections for persons engaging in legal reproductive healthcare in Colorado against criminal, civil, or professional sanctions from other states. Col. S.B. 23-188 (Colo. 2023), *to be codified at* Colo. Rev. Stat. § 12-30-121 *et seq*. For minors, parental notification is not required in Colorado in circumstances including where the minor declares that she is a victim of child abuse or neglect, or when there is a medical emergency. Col. Rev. Stat. § 13-22-705. In Illinois, the Reproductive Health Act enshrines in statute the right to choose an abortion, recognizing "every individual has a fundamental right to make autonomous decisions about the individual's own reproductive health[.]" 775 ILCS 55/1-15. Parental notification for minors seeking an abortion is no longer required in Illinois. Ill. Pub. Act. 102-0685 (eff. June 1, 2022).

Many other states across the country, including the other Amici States, have similarly protected the individual right to choose their own reproductive care. *See, e.g.*, Center for Reproductive Rights, *After Roe Fell: Abortion Laws by State*, https://reproductiverights.org/maps/abortion-laws-by-state/ (last visited July 31, 2023) (interactive map showing state policies on rights to abortion care). Indeed, even in some of the Amici States with more restrictive abortion laws, their legislatures have still recognized the need, under certain circumstances, for minors to be able to make their own reproductive healthcare decisions without parental consent. *E.g.*, Ariz. Rev. Stat. § 36-2152.

B. Idaho Code § 18-623 Purports to Impermissibly Criminalize Legal Activity in Amici States

In overruling *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court said that it would return the power to decide the "basic legality" of abortion to each of the States, via their "people and . . . elected representatives." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228, 2284 (2022); *see also id*. at 2309 (Kavanaugh, J., concurring). The people of the Amici

States, through these "constitutional processes of democratic self-government," *id.* at 2309 (Kavanaugh, J., concurring), have chosen to protect the right to access, and independently consent to, abortion care.

Amici States recognize Idaho may regulate abortion within its borders. But Idaho cannot purport to criminalize the lawful provision of abortion care outside the state. At a minimum, as Justice Kavanaugh indicated in *Dobbs*, a State cannot bar one of its residents from "traveling to another State to obtain an abortion"—and the question is "not especially difficult as a constitutional matter." *Dobbs,* 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

Yet Idaho has gone even further than a ban on travel to obtain an abortion. Idaho's Attorney General explicitly interprets Idaho Code § 18-623 to cover prosecutions for "recruitment," "harboring," and "transporting" even when "the abortion occurs in another state where it is legal." ECF No. 12-5 at 2 (Olson Decl., Ex. 3); *see also* Idaho Code § 18-623(3). These criminal prohibitions, as interpreted by Attorney General Labrador, potentially cover and therefore chill speech and activity that is lawful in Amici States. *See* ECF No. 12-1 at 20-24 (Pls.' Mot. for a TRO). Consider this example. A teenage girl in Moscow, Idaho, calls her aunt in Pullman, Washington, less than ten miles away, to say she is pregnant and feels she cannot safely tell her parents. If the aunt tells her niece about a clinic in Pullman that offers abortion care and counseling, is that "recruitment"? What if the aunt texts her niece a web link to the clinic's informational material? Or if the niece books an appointment and the clinic's office manager emails her a pre-appointment information sheet? If the aunt pays for her niece's bus ticket to Pullman, is that "transportation"—or, as the Idaho law would have it, "trafficking"?

In view of the minor's right to interstate travel, the lawfulness of abortion care in Amici States, and the chilling effect that Idaho's law has on the provision of abortion-related information, such prosecutions would not withstand legal scrutiny. As the Supreme Court has held, a State cannot "bar a citizen of another State from disseminating information about an activity that is legal in that State," even if it does so "under the guise of exercising internal police powers." *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975). The Court expressly applied this principle to abortion care

in *Bigelow*, reversing the conviction of a Virginia newspaper editor who published an advertisement for a New York referral service that helped women obtain legal abortions in New York, at a time when abortion was illegal in Virginia. *Bigelow*, 421 U.S. at 811-12. Under the First Amendment, the Court held that Virginia had no legitimate interest in "regulating what [its own residents] may hear or read about the New York services"—in other words, "shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach." *Id*. at 827-28.

So too here. Idaho may enact abortion laws within its borders. But basic principles of federalism and state sovereignty, as recognized in *Dobbs*, do not allow it to chill speech to prevent its citizens from learning about or accessing legal healthcare outside Idaho's borders—healthcare Idaho has no power to regulate.

C. Idaho Code § 18-623 Will Impose Significant Harms on Amici States

1. Idaho's Restrictive Abortion Laws Have Caused Sharp Rises in Patients Seeking Care in Neighboring Amici States

Dobbs has led to a patchwork of abortion laws across the country, with some states adopting near-total bans on abortion, and others (including many Amici States) providing robust protections for reproductive healthcare, including abortion. As a result, many Amici States have experienced an influx of out-of-state residents seeking care within their borders. Between April and August 2022, just before and after the *Dobbs* decision was released, Idaho saw a decrease in abortion care of 48 percent.[2] Meanwhile, providers in Amici States have endeavored to keep up with increased demand, especially in more rural areas where access is already limited.[3] In Washington, between January 2022 and early 2023, clinics reported an unprecedented 75%

[2] Society of Family Planning, *#We Count Report*, Oct. 28, 2022, https://societyfp.org/wp-content/uploads/2022/10/SFPWeCountReport_AprtoAug2022_ReleaseOct2022-1.pdf (last visited July 28, 2023).

[3] Eilis O'Neill, *Longer wait times, discouraged patients: What abortion rights advocates in Washington expect post-Roe*, KUOW (July 01, 2022), https://www.kuow.org/stories/longer-wait-times-discouraged-patients-what-abortion-rights-advocates-in-washington-expect-post-roe (last visited July 28, 2023).

increase in Idaho patients.[4] Planned Parenthood's clinic in Pullman, Washington—just eight miles from the Idaho border—reported that 62% of patients in June 2022 were Idahoans.[5] By July, that share increased to 78%.[6] Planned Parenthood reported serving Idaho residents at clinics even further into Washington, as far as Kennewick and Walla Walla, with drive times of more than four hours from Boise.[7]

In Oregon, providers report an average of 100 to 300 additional abortions performed per month post-*Dobbs*.[8] Providers at Oregon Health & Science University have noted that, prior to *Dobbs*, they mainly cared for individuals from Oregon and Washington. However, last year, the majority of OHSU's out-of-state patients were from Idaho and Texas—states with some of the most restrictive anti-abortion laws in the country.[9] Similarly, Planned Parenthood Columbia Willamette shared that most of their out-of-state patients seeking abortions are from Idaho.[10] And in Nevada, since June 2022, Las Vegas has seen a 37% increase in out-of-state patients at Planned Parenthood health centers. More than 1,200 patients came to Las Vegas from out of state, including Idaho.[11] Other states that have protected abortion access have likewise seen a rise in out-of-state

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[4] Aria Bendix, *Idaho becomes one of the most extreme anti-abortion states with law restricting travel for abortions*, NBC News (April 6, 2023), https://www.nbcnews.com/health/womens-health/idaho-most-extreme-anti-abortion-state-law-restricts-travel-rcna78225 (last visited July 28, 2023).

[5] Megan Burbank, *Who is traveling to Washington for abortion care?* Crosscut, (Nov. 14, 2022), https://crosscut.com/equity/2022/11/who-traveling-washington-abortion-care. (last visited July 28, 2023)

[6] *Id.*

[7] *Id.*

[8] Nicole Rideout, *One year since the overturn of Roe, OB/GYNs report devastating impacts from lack of abortion access*, OSHU News (June 24, 2023), https://news.ohsu.edu/2023/06/24/one-year-since-the-overturn-of-roe-obgyns-report-devastating-impacts-from-lack-of-abortion-access (last visited July 28, 2023).

[9] *Id.*

[10] Kandra Kent, *Oregon sees uptick in abortion travel, most out-of-staters come from Idaho*, KPTV (Nov. 8, 2022), https://www.kptv.com/2022/11/08/oregon-sees-uptick-abortion-tourism-most-out-of-staters-come-idaho// (last visited July 28, 2023).

[11] Jessica Hill, *Las Vegas sees big spike in out-of-state abortion seekers*, Las Vegas Review-Journal (updated June 27, 2023), https://www.reviewjournal.com/news/politics-and-government/nevada/las-vegas-sees-big-spike-in-out-of-state-abortion-seekers-2800219/ (last visited July 28, 2023).

patients seeking abortion care. For example, the leading abortion care provider in Connecticut, Planned Parenthood of Southern New England, has experienced a 59% increase in patients coming to Connecticut to seek abortion care from the 19 states that have banned all or some abortions. Planned Parenthood Illinois reported that the number of patients seeking abortions rose 54% in the last year. During that time, almost 25% of patients at Planned Parenthood clinics traveled from other states, compared with only 7% before *Dobbs*.[12]

Amici States' healthcare providers are endeavoring to meet the needs of providing abortion and other reproductive care to Idaho residents. In the midst of this hugely increased demand, Idaho Code § 18-623 now imposes the fear of criminal prosecution on medical professionals and others for the provision of legal healthcare, as discussed further below.

2. Idaho Code § 18-623 Harms Amici States' Healthcare Providers, Residents, and Youth

Idaho Code § 18-623 imposes immediate harms on Amici States. First, by imposing the threat of criminal prosecution on medical professionals and others, it chills the ability of providers, organizations, and others in Amici States to convey necessary information to minor patients. Second, it forces costly delays for adolescents traveling to receive care, not only for Idahoans but also for residents of Amici States finding themselves traveling in or temporarily residing in Idaho. As the Governor of Washington warned, Idaho Code § 18-623 will endanger women and girls from Washington (and other Amici States) "if they travel to [Idaho] and find themselves in need of urgent reproductive health care services." Letter from Gov. Jay Inslee to Gov. Brad Little, Apr. 4, 2023 (attached as Appendix A). Both harms will most acutely affect care involving vulnerable young people, who may be unable to safely discuss their care with their parents.

First, under Attorney General Labrador's interpretation of Idaho Code § 18-623, medical professionals, reproductive health organizations, and others in Amici States will fear criminal

[12] Kaitlin Washburn, *Planned Parenthood of Illinois reports spike in abortion patients since Roe v. Wade was overturned,* Chicago Sun Times, (June 12, 2023), https://chicago.suntimes.com/2023/6/12/23758431/planned-parenthood-of-illinois-reports-spike-in-abortion-patients-since-roe-v-wade-overturned (last visited July 28, 2023).

prosecution and may be chilled from providing appropriate care, information, and counseling to their patients, clients, relatives, and friends.[13] For example, it is unclear whether a Washington medical provider who, while consulting with a pregnant Idahoan, offers a pamphlet detailing options or providing pre-appointment information could be guilty of "recruiting." It is likewise unclear whether an adult, such as a close family member, who knows about transportation options for a minor Idahoan seeking to end a pregnancy, could be guilty of "abortion trafficking" by sharing that information. Given this uncertainty, providers, counselors, and others in Amici States may choose to self-censor rather than face the risk of criminal prosecution—inhibiting the free flow of information about protected healthcare within Amici States' borders. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (in context of an overbreadth challenge, self-censorship "harm[s] not only [the speaker] but society as a whole, which is deprived of an uninhibited marketplace of ideas."). This fear is only exacerbated for dually-licensed providers, for whom a licensing enforcement action in Idaho for violation of Idaho Code § 18-623 could also result in restrictions, fines, and even enforcement action in other states due to reciprocal licensing schemes.[14]

Second, Idaho Code § 18-623 will increase barriers to access by impacting patients' ability to arrange travel and housing, find funds, and manage other logistics—causing delays in care that increase medical risks, affecting not only patients but also healthcare providers in Amici States

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[13] Idaho's Attorney General has also opined that referring a patient across state lines to obtain out-of-state abortion care could violate Idaho Code § 18-622. *See* ECF No. 12-4 (Olson Decl., Ex. 2) at 2. This Court has preliminarily enjoined the Attorney General's enforcement of § 18-622 under that interpretation. *Planned Parenthood Greater Nw. v. Labrador*, No. 1:23-cv-00142 (D. Idaho July 31, 2023), ECF No. 153.

[14] *See, e.g.*, Interstate Medical Licensure Compact, https://imlcc.org (last visited July 28, 2023) (showing over 41 states as members of the Compact); Interstate Medical Licensure Compact Commission, Rule on Coordinated Information System, Joint Investigations and Disciplinary Actions, at ⁋ 6.5(a), https://www.imlcc.org/wp-content/uploads/2022/11/IMLCC-Rule-Chapter-6-Coordinated-Information-System-Joint-Investigations-and-Disciplinary-Actions-Adopted-November-16-2018-Amended-11-8-2022.pdf (last visited July 28, 2023) ("Any disciplinary action by a disciplining Board shall be considered unprofessional conduct and may be a basis for discipline by other member Boards. This includes any action that does not have a corresponding ground by the other member Board's Medical Practice Act . . . ."). State constitutional or statutory protections in some states may alleviate the reciprocal licensing concerns, but other states may not have such explicit protections.

endeavoring to provide high-quality, safe, and effective care. This only exacerbates the existing delays in care arising from the logistical challenges of the post-*Dobbs* patchwork itself.[15] University of Washington doctors say that, since *Dobbs*, they have seen an increase in the gestational ages at which patients first come to see them to obtain abortion care.[16] The medical director for Cedar River Clinics in Washington has said the same: "Patients are further along in their pregnancies when they come to see us."[17]

While abortion is safe at virtually any stage—and, without question, far safer than carrying a pregnancy to term—delays in receiving abortion care make treatment more intensive, increasing both the risks for the patient and the financial costs.[18] In addition, many pregnancy and miscarriage complications require time-sensitive treatment, including abortion care, to stabilize emergency conditions. In such circumstances, any failure or delay in providing necessary abortion care puts the patient's life or health at risk.[19] *See United States v. Idaho*, 623 F. Supp. 3d 1096, 1116 (D.

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[15] The National Abortion Hotline reported sharp increases in their provision of financial assistance in the year following *Dobbs*: 235% for plane or bus fares, 195% for hotel rooms, and 403% for rideshares. National Abortion Federation, *A Year After Dobbs, More People Than Ever Are Traveling For Abortion Care*, (June 7, 2023), https://prochoice.org/a-year-after-dobbs-more-people-than-ever-are-traveling-for-abortion-care/ (last visited July 28, 2023)

[16] U.S. Senator Maria Cantwell, *SNAPSHOT: Abortion Care in the State of Washington One Year Post* Dobbs, Press Release (June 23, 2023), https://www.cantwell.senate.gov/download/06232023-dobbs-anniversary-report (last visited July 28, 2023)

[17] Nina Shapiro, *She secretly traveled 2,000 miles for her WA abortion. Why patients from the South are coming here*, The Seattle Times (Feb. 26, 2023), https://www.seattletimes.com/seattle-news/she-secretly-traveled-2000-miles-for-her-wa-abortion-why-patients-from-the-south-are-coming-here/ (last visited July 28, 2023).

[18] Elizabeth G. Raymond & David E. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 215 (2012) (concluding the risk of death associated with childbirth is approximately 14 times higher than that with abortion); National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States* 12, 77–78 (National Academies Press 2018), http://nap.nationalacademies.org/24950 (last visited July 28, 2023).

[19] *E.g.*, Reuters Fact Check, *Fact Check-Termination of Pregnancy Can Be Necessary to Save a Woman's Life, Experts Say*, Reuters (Dec. 27, 2021), https://www.reuters.com/article/factcheck-abortion-false/fact-check-termination-ofpregnancy-can-be-necessary-to-save-a-womans-life-experts-say-idUSL1N2TC0VD (last visited July 28, 2023); American College of Obstetricians and Gynecologists, *Facts Are Important: Understanding Ectopic Pregnancy*, https://www.acog.org/advocacy/facts-are-

Idaho Aug. 24, 2022) (identifying pregnancy-related complications that require emergency care and the harms caused by discouraging healthcare professionals from providing abortion care that would be necessary to save a patient's life). These delays affect not just Idahoans, but healthcare providers in Amici States, as well as minors traveling to, or temporarily residing in, Idaho and finding themselves urgently needing reproductive care. Further, as providers of health insurance for state employees and their children who may be temporarily visiting or residing in Idaho, Amici States have a direct financial interest in preventing increased risk to patients and increased costs of medical care from undue delays or impeded continuity of care.

Finally, Amici States, including our healthcare providers, recognize that the young people choosing not to disclose their pregnancies or their intent to terminate to their parents are often those at greatest risk from violence, family conflict, and other dangers.[20] Not all young people have the support of "capable parents."[21] One study found that one-third of minors who choose not to inform their parents about their reproductive healthcare decisions "have already experienced family violence and fear it will recur."[22] As the American Academy of Pediatrics' position statement explains, "risks of violence, abuse, coercion, unresolved conflict, and rejection are significant in unsupportive or dysfunctional families when parents are informed of a pregnancy against the adolescent's considered judgment."[23] This is why Amici States do not require forced involvement of parents or guardians where doing so would be unsafe or not in the minor's best interests. *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417, 439 (1990) (discussing district court

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important/understanding-ectopic-pregnancy (last visited July 28, 2023) ("[U]ntreated ectopic pregnancy is life threatening; withholding or delaying treatment can lead to death.").

[20] *Cf.* Am. Acad. of Pediatrics, Comm. on Adolescence, *Policy Statement: The Adolescent's Right to Confidential Care When Considering Abortion*, 139 Pediatrics e20163861, at 4 (2017); J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 Berkeley Women's L.J. 61, 94 (2003).

[21] Margaret Moon, *Adolescents' Right to Consent to Reproductive Medical Care: Balancing Respect for Families with Public Health Goals*, 12 Am. Med. Ass'n J. of Ethics 805, 806 (2012).

[22] Am. Acad. of Pediatrics, *supra*, at 4.

[23] *Id.*

finding of adverse effects of two-parent notification requirements, particularly where family violence is a problem). Idaho impermissibly seeks to punish those in Amici States for lawful acts taken within Amici's borders.

IV. CONCLUSION

This Court should grant Plaintiffs' motion for a temporary restraining order or, in the alternative, a preliminary injunction.

RESPECTFULLY SUBMITTED this 31st day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 31st day of July 2023, at Olympia, Washington.

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STATE OF WASHINGTON
OFFICE OF GOVERNOR JAY INSLEE

April 4, 2023

The Honorable Brad Little
Governor
Office of the Governor
700 West Jefferson, Second Floor
Boise, ID 83702

Sent Via Email

Governor Little:

I write this letter to urge your veto of Engrossed House Bill 242 (EHB 242), a bill that will most certainly have many unacceptable consequences that cannot be cured.

Among the harmful impacts that this legislation will have, particularly when combined with Idaho's recently passed abortion bans, are the exodus of some healthcare professionals from your state as well as the certain resulting increased mortality rate of Idahoan women and girls.

I question the constitutionality of this law and I know you are aware of the costly legal challenges that await should you choose to sign this bill, but, as the governor of a neighboring state, I am also deeply concerned about the impacts that EHB 242 will have on Washington residents traveling to and from Idaho. I fear that our residents, in particular the women and girls of Washington, will be in grave danger if they travel to your state and find themselves in need of urgent reproductive health care services. This bill would also attempt to punish some Washington residents who happen to be in your state for any length of time, a gross abuse of their right to travel between our states. As a result, all Washingtonians have a stake in this matter.

Regardless of your decision on this bill, we welcome Idaho's patients and health care providers with open arms in Washington. And, as we did during COVID, we will care for your residents in a manner consistent with their health care needs as determined by trained medical professionals, not politicians. But, make no mistake, Governor Little, the laws of another state that seek to punish anyone in Washington for lawful actions taken in Washington will not stand. We will protect our providers, and we will harbor and comfort your residents who seek health care services that are denied to them in Idaho.

Very truly yours,

Jay Inslee
Governor

cc: Zach Hauge, Chief of Staff, State of Idaho, zach.hauge@gov.idaho.gov

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

EXCERPTS OF RECORD VOLUME 4

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELMINARY INJUNCTION

Pursuant to Rule 65 of the Idaho Rules of Civil Procedure, Plaintiffs Lourdes Matsumoto, Northwest Abortion Access Fund, and Indigenous Idaho Alliance, by and through

undersigned counsel, hereby move the Court for the entry of a temporary restraining order, or, in the alternative, a preliminary injunction, against Defendant Raúl Labrador. This motion is based on the accompanying memorandum, and the Declarations of Wendy J. Olson, Lourdes Matsumoto, tai simpson, and Megan Kovacs.

For the reasons set forth in the accompanying memorandum, Plaintiffs respectfully request that the Court enter a temporary restraining order or preliminary injunction prohibiting Defendant Raúl Labrador from enforcing Idaho Code § 18-623. A proposed order is provided herewith.

DATED: July 24, 2023.

STOEL RIVES LLP

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Wendy J. Olson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, the NORTHWEST ABORTION ACCESS FUND, and the INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

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

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Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 81 Contraception 316-17.....8

https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2013/02/reproductive-and-sexual-coercion.pdf.....8

https://www.reuters.com/article/us-health-teens-abortions/parental-notification-law-appears-to-limit-delay-abortions-idUSKBN1EJ0QO;.....7

Idaho Reports (Apr. 5, 2023), https://blog.idahoreports.idahoptv.org/2023/04/05/abortion-trafficking-bill-signed-despite-washington-governors-plea/ 2

KTVB.com (Mar. 10, 2023), https://www.ktvb.com/article/news/health/planned-parenthood-ontario-oregon-clinic-soft-opens-for-staff-training/277-972e8464-89b1-4685-bd93-1e8c42c6d032 6

The Seattle Times (June 28, 2023), https://www.seattletimes.com/seattle-news/politics/in-the-wa-v-idaho-abortion-wars-data-shows-idaho-is-losi 6

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Plaintiffs Lourdes Matsumoto, Northwest Abortion Access Fund ("NWAAF"), and Indigenous Idaho Alliance ("IIA") seek a Temporary Restraining Order, or, in the alternative, a Preliminary Injunction, enjoining Defendant Raúl Labrador from enforcing Idaho Code § 18-623.

I. INTRODUCTION

Idaho has some of the most oppressive criminal abortion statutes in the United States. Under its Total Abortion Ban, "[e]very person who performs or attempts to perform an abortion . . . commits the crime of criminal abortion." Idaho Code § 18-622(1). Understanding that many of its neighboring states recognize a person's right to control their reproductive health, that Idahoans in need of reproductive health care services that might include abortion would travel to these states, and that other Idahoans and out-of-state reproductive health advocacy organizations would assist Idahoans obtain lawful abortion health care outside of Idaho, the Idaho Legislature acted again.

This time, through Idaho Code § 18-623, Idaho criminalized conduct by adults who assist pregnant minors in receiving abortion care. Apparently aware that they cannot control the availability of abortions (or receipt of medications used in medical abortions) in other states, Idaho instead made it unlawful to provide an unclear amount of undefined assistance to minors, including travel assistance within Idaho provided to help minors reach or cross Idaho's borders to access legal health care. Ignoring that some minors may seek an abortion because they were sexually abused by a parent or guardian, that they have consulted with trusted adults who support their position, or that they are actual victims of human trafficking, Idaho instead seeks to stop pregnant minors from reaching or crossing state lines to receive legal abortion health care.

The statute is unconstitutional. It is poorly written. It is vague and unclear in the conduct it prohibits. It infringes on First Amendment rights to speak about abortion, and to associate and to engage in expressive conduct, including providing monies, transportation, and other support for

pregnant minors traveling within and outside of Idaho to access out-of-state legal abortion care. Plaintiffs are organizations that have in the past assisted pregnant Idaho minors obtain abortions in states where it is lawful and seek to continue assisting pregnant Idaho minors obtain abortion care, and an individual who works with minor survivors and the advocates that assist them and would like to provide that service in the future. This Court should enjoin the statute's enforcement.

II. FACTUAL BACKGROUND

A. Idaho Enacts Its Abortion Travel Ban.

The Abortion Travel Ban, House Bill 242 ("H.B. 242"), was signed into law on April 5, 2023. Governor Brad Little and Representative Barbara Ehardt attempted to justify H.B. 242 as a parental consent bill. Governor Little wrote that the law "seeks only to prevent unemancipated minor girls from being taken across state lines for an abortion without the knowledge and consent of her parent or guardian."[1] During a March 27, 2023, Senate State Affairs Committee hearing, Representative Ehardt testified that "it's all about parental permission, taking a minor from Idaho and trafficking that minor to another state to receive an abortion." Declaration of Wendy J. Olson ("Olson Decl."), ¶2, Ex. 1. Whether a parent, parents, or guardian of the pregnant minor consents to the activity is not an element of the offense under Idaho Code § 18-623, however. Parental consent is only an affirmative defense asserted by a person charged under the statute, after the charges are brought, just like any affirmative defense. I.C. § 18-623(2).

H.B. 242 went into effect May 5, 2023. It provides that:

> (1) An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion, as described in section 18-604, Idaho Code, or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state

[1] Ruth Brown, 'Abortion trafficking' bill signed, despite Washington governor's plea, Idaho Reports (Apr. 5, 2023), https://blog.idahoreports.idahoptv.org/2023/04/05/abortion-trafficking-bill-signed-despite-washington-governors-plea/ (citation omitted).

> commits the crime of abortion trafficking. As used in this subsection, the terms "procure" and ""obtain" shall not include the providing of information regarding a health benefit plan.
>
> (2) It shall be an affirmative defense to a prosecution under subsection (1) of this section that a parent or guardian of the pregnant minor consented to trafficking of the minor.

Idaho Code § 18-623.

Idaho Attorney General Raúl Labrador has the sole discretion to prosecute a person for a violation of the statute if the authorized prosecuting attorney refuses to do so. I.C. § 18-623(4). He has made clear that he is willing to enforce Idaho criminal abortion statutes even where an abortion occurs in another state. In a now "rescinded" legal opinion letter dated March 27, 2023, he stated that medical professionals who refer pregnant patients across state lines for abortions violate Idaho Code § 18-622(2), Idaho's Total Abortion Ban. Olson Decl., ¶3, Ex. 2. He also opined that the Abortion Travel Ban is constitutional. *Id.*, ¶4, Ex. 3.

B. Plaintiffs Are Unable to Exercise Their Fundamental Rights Because of Threat of Prosecution Under Idaho Code § 18-623.

Plaintiffs are organizations with long histories of assisting pregnant persons seeking abortion care, including minors, and an individual with a long history of working with sexual violence survivors, including minors, and with advocates who assist pregnant minors. Declaration of Lourdes Matsumoto ("Matsumoto Decl."), ¶¶22-24; Declaration of Megan Kovacs ("Kovacs Decl."), ¶¶4-9; Declaration of tai simpson ("simpson Decl."), ¶¶37, 38. They wish to continue providing these services to pregnant Idaho minors but are uncertain what conduct may run afoul of Idaho Code § 18-623. Matsumoto Decl., ¶¶26, 27, 39, 42, 53; Kovacs Decl., ¶30; simpson Decl., ¶¶58-59.

Plaintiff Matsumoto is an attorney who works for a non-profit that provides emergency assistance, counseling, and resources to victims of domestic and sexual violence. Matsumoto Decl., ¶¶8, 10, 11. She participates in trainings and provides advice on how pregnant people, including minors, can legally access abortions. *Id.*, ¶¶28, 30-33. She is a trusted adult whom others have turned

to with questions regarding how much help, advice, and support they can provide to pregnant minors in Idaho. *Id.*, ¶¶37, 38. Plaintiff Matsumoto would like to provide information and options counseling to pregnant people, including pregnant minors, about abortion. *Id.*, ¶¶11, 47. She would also like to assist minors obtain abortions in states where abortion is legal, including by transporting them or assisting them obtain transportation from Idaho to those states. *Id.*, ¶48. Plaintiff Matsumoto fears prosecution under the Abortion Travel Ban. *Id*. Due to the proximity of her residence to the Oregon border, Plaintiff Matsumoto would like to provide temporary shelter for pregnant minors within Idaho who are traveling to obtain reproductive counseling and abortion care in states where that care remains legal, whether those minors' parents know or do not know. *Id.*, ¶3, 49. Plaintiff Masumoto has contributed financially to organizations that practically support pregnant minors, including those in Idaho, access abortion care, whether or not those minors' parents or guardian are aware of those actions, and she would like to continue to provide this support. *Id.*, ¶50. Due to the lack of clarity in Idaho Code § 18-623, she is concerned that even this activity may subject her to criminal prosecution. *Id*. Plaintiff Matsumoto would also like to provide clear advice and support to organizations assisting pregnant minors who are domestic violence and sexual assault survivors and to minors themselves but is currently unable to do so. *Id.*, ¶51.

Plaintiff NWAAF is a non-profit organization composed of a working board, paid staff, and trained volunteers. Kovacs Decl., ¶4. NWAAF provides emotional, financial, logistical, practical, and informational assistance to pregnant persons who may need or choose to consider abortion. *Id.* NWAAF is the only independent abortion fund in the Pacific Northwest and covers the largest geographic area of any abortion fund in the United States. *Id.*, ¶7. Its work includes booking and paying for bus tickets, plane tickets, and ride shares, and providing volunteers to drive patients to abortion appointments in states where abortion is legal. *Id.*, ¶15. NWAAF also provides food

assistance, funding to abortion providers for their work, and lodging assistance. *Id.*, ¶¶16-17. NWAAF provides this assistance to adults and minors in Idaho. *Id.*, ¶17. These minors' parents or guardians may or may not know about or consent to these actions. *Id*., ¶19.

IIA is an Idaho non-profit organization that is centered around asserting the sovereignty of all Indigenous people. IIA's work serves the five tribes whose traditional, usual, and accustomed lands encompass territory within Idaho, and whose traditional, usual, and accustomed lands are often recognized as transecting and incorporating land within the U.S. state/Canadian provincial boundaries of Washington, Idaho, Montana, Nevada, Utah, Wyoming, California, British Columbia, and Alberta ("the region"). simpson Decl., ¶¶9-11. IIA co-founder and organizer tai simpson and others affiliated with IIA have provided pregnant people, including minors, with reproductive health care information, including information about abortion. *Id.*,¶38. They have coordinated the travel of pregnant people, including minors, from locations across the region, including Idaho, to and across state lines to access abortion, and have provided financial assistance. *Id.*, ¶¶41, 43. These minors' parents or guardians may or may not have been aware of these actions. *Id.*, ¶¶39, 50.

Both NWAAF and IIA are funded by donors committed to supporting their mission. Kovacs Decl., ¶¶24-26; simpson Decl., ¶45. All Plaintiffs associate with pregnant minors as a show of solidarity, communicating a message to minors who find themselves pregnant. That message is often that minors are not alone. Plaintiffs' support also communicates a message to those who may seek to isolate and abuse minors that these minors will have the support of trusted adults. Matsumoto Decl., ¶16; Kovacs Decl., ¶38; simpson Decl., ¶¶55-57.

C. The Abortion Travel Ban Has Harmful Effects.

Because of Idaho's Total Abortion Ban, the number of in-state abortions has declined, but out-of-state health care providers who offer abortion care have seen a dramatic increase in patients coming from Idaho for abortions.[2] This places a strain on providers in states where abortion is legal.[3]

Plaintiff NWAAF likewise experienced an increase in demand for its assistance for those seeking out-of-state abortion care after the *Dobbs* decision. It has seen a 149% increase in its travel expenditures and a 46% increase in its abortion care funding expenditures, all of which help pay for the transportation and other support that pregnant people need to access safe and legal abortions. Kovacs Decl., ¶¶33, 35. NWAAF has seen a 146% increase in travel requests from Idaho residents in the last year. *Id.*, ¶34. As a result of these requests, in the last year, NWAAF provided assistance to 205 Idahoans, some of whom were minors. *Id.*, ¶18.

Since the Abortion Travel Ban went into effect on May 5, 2023, Plaintiff Matsumoto has received even more questions about what remains legal. This includes questions about what information can be given to minors or to those who want to assist pregnant minors, and she is uncertain what the statute prohibits. Matsumoto Decl., ¶¶33-36. If adults cannot assist pregnant minors access safe abortion care out of state, and if pregnant minors cannot access abortion care, the Abortion Travel Ban will force some minors to terminate their unwanted pregnancies outside a clinical setting. *Id.*, ¶44.

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[2] Danny Westneat, In the WA v. Idaho abortion wars, data shows Idaho is losing, The Seattle Times (June 28, 2023), https://www.seattletimes.com/seattle-news/politics/in-the-wa-v-idaho-abortion-wars-data-shows-idaho-is-losing; Andrew Baertlein, Planned Parenthood 'soft opens' Ontario clinic for staff training, KTVB.com (Mar. 10, 2023), https://www.ktvb.com/article/news/health/planned-parenthood-ontario-oregon-clinic-soft-opens-for-staff-training/277-972e8464-89b1-4685-bd93-1e8c42c6d032.

[3] *Id.*

Although many minors faced with an unintended pregnancy choose to involve their parents, others do not. Some minors do not have access to their parents, and some are afraid to anger or disappoint their parents. Others face the threat of violence in their homes. For many minors, it is best to seek help from an adult who is not a parent or guardian and who can provide the trust-based aid they need. simpson Decl., ¶51. *Requiring* parental involvement for abortion care can increase the risk of harm or delay care.[4] When abortion was a recognized constitutional right, Idaho had a judicial bypass that allowed pregnant minors to obtain abortions without parental consent to address these potential harms. I.C. § 18-609A(1)(b). If a pregnant minor in Idaho cannot go to a parent, cannot seek judicial bypass, and cannot seek help from a trusted adult (who fears prosecution), to whom can they turn? For these reasons, Plaintiffs, who wish to remain in positions of trust with the minors they serve, do not seek parental consent when they provide assistance to pregnant minors. Matsumoto Decl., ¶¶43, 46; Kovacs Decl., ¶19; simpson Decl., ¶39.

The risk of abuse is especially acute for Black, Indigenous, People of Color (BIPOC), and LGBTQ+ communities. *See* simpson Decl., ¶¶16, 17. The Abortion Travel Ban will disproportionately negatively impact these communities, which already face travel barriers to accessing health care. *Id.*, ¶¶22, 24, 26, 30, 32-34. Plaintiffs have provided, and wish to continue providing, assistance to pregnant Idaho minors in all communities, including historically marginalized communities. Matsumoto Decl., ¶45; Kovacs Decl., ¶37; simpson Decl., ¶40.

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[4] Sophia Naide, Guttmacher Institute, "Parental Involvement" Mandates for Abortion Harm Young People, But Policymakers Can Fight Back (Feb. 19, 2020), https://www.guttmacher.org/article/2020/02/parental-involvement-mandates-abortion-harm-young-people-policymakers-can-fight-back#:~:text=Research%20also%20shows%20that%20most,people%20by%20delaying%20medical%20care.HYPERLINK "https://www.reuters.com/article/us-health-teens-abortions/parental-notification-law-appears-to-limit-delay-abortions-dUSKBN1EJ0QO "https://www.reuters.com/article/us-health-teens-abortions/parental-notification-law-appears-to-limit-delay-abortions-idUSKBN1EJ0QO;

The law also negatively and disproportionately impacts victims of Intimate Partner Violence ("IPV"), who are often the subject of "unwanted or coercive pregnancy."[5] Reproductive coercion can involve using rape to force victims into unwanted pregnancies to increase dependency. It can involve interfering with a victim's contraceptive use, removing prophylactics during sex without consent, forcibly removing internal-use contraceptives, or retaliating for contraceptive use.[6] IIA and NWAAF have experience working with pregnant minors, some of whom may be victims of IPV and coercive pregnancy, including by helping them access legal abortion care, but they will not be able to continue doing so for fear of prosecution. Kovacs Decl., ¶¶11, 14; simpson Decl., ¶¶17, 19, 22, 40, 59. Others who work with this population, including domestic and sexual violence advocates, cannot reasonably be expected to provide critical victim support, especially when those services include providing practical and actionable advice to pregnant young victims, without fear of prosecution under Idaho Code § 18-623. Matsumoto Decl., ¶¶35, 40.

III. ARGUMENT

Plaintiffs are entitled to a Temporary Restraining Order or, in the alternative, a Preliminary Injunction, which are governed by identical standards. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). For either, a moving party must show "(1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and

[5] Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 81 Contraception 316–17; *see also ACOG Committee Opinion No. 554: Reproductive and Sexual Coercion*, 121 Obstetrics & Gynecology 411, 411–15 (2013 *reaffirmed* 2022), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2013/02/reproductive-and-sexual-coercion.pdf.

[6] Ann L. Coker, *Does Physical Intimate Partner Violence Affect Sexual Health? A Systematic Review*, 8 Trauma, Violence, & Abuse 149, 151–53 (2007); *see also* Miller et al., *supra* note 6, at 319.

(4) that an injunction is in the public interest." *Idaho v. Coeur d'Alene Tribe*, 49 F. Supp. 3d 751, 762 (D. Idaho 2014) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *Coffman v. Queen of Valley Med. Ctr.*, 895 F.3d 717, 725 (9th Cir. 2018). "Where, as here, 'the government is a party, these last two factors merge.'" *Hecox v. Little*, 479 F. Supp. 3d 930, 971 (D. Idaho 2020) (quoting *Drakes Bay Oyster Co., v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)). The court may apply a sliding scale test, balancing the elements of the preliminary injunction standard "such that a stronger showing of one element may offset a weaker showing of another." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017) (citation omitted). Injunctive relief is particularly important in cases, like this one, where later relief could not make Plaintiffs whole again, should they be prosecuted. *See Moses v. Lake*, No. 3:22-cv-0063, 2023 WL 4546242 (D.V.I. July 14, 2023).

A. Plaintiffs Are Likely to Succeed on Their Claims That Idaho Code § 18-623 Is Void for Vagueness and Violates Their First Amendment Rights.

Plaintiffs are likely to succeed on their claims that Idaho Code § 18-623 is void for vagueness and infringes on their First Amendment rights to associate freely with each other and with pregnant Idahoans; to engage in expressive conduct, including providing funding or practical support for pregnant minors traveling to access out-of-state services that are legal where rendered; and to receive and provide information on specific content – abortion care. Thus, this Court should enjoin Defendant from enforcing Idaho Code § 18-623 pending the outcome of this action.

1. Plaintiffs Have Standing.

To establish standing, a plaintiff must demonstrate "that (1) they have suffered an injury-in-fact" that is "'concrete and particularized' and 'actual and imminent,' (2) the alleged injury is 'fairly traceable' to the defendants' conduct, and (3) it is 'more than speculative' that the injury is judicially redressable." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) (quoting

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Organizations can assert standing on behalf of their own members or in their own right." *Id.*

Plaintiffs easily satisfy these tests. Defendant's enforcement of Idaho Code § 18-623 will effectively bar the Plaintiffs and their constituents from continuing to assist pregnant minors obtain lawful abortion care in Idaho's neighboring states. They must choose between providing support, travel assistance, financial assistance, and information to pregnant minors in Idaho, and thereby risking criminal prosecution, and stopping these constitutionally protected activities altogether.

Thus, Plaintiffs will suffer imminent and concrete injuries to their rights protected by both the First Amendment and the Fourteenth Amendment's Due Process Clause. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (recognizing loss of First Amendment freedoms as a cognizable harm). In addition, these injuries are fairly traceable to Defendant's enforcement of Idaho Code § 18-623 and would be redressed by an order enjoining enforcement.

2. Defendant's Enforcement of § 18-623 Violates Plaintiffs' First Amendment Rights of Free Speech and Association.

The First Amendment to the U.S. Constitution, applied to the states through the Fourteenth Amendment, guarantees the rights to free speech, assembly, association, and petition. U.S. Const. amends. I, XIV; *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1193 (9th Cir. 2018). The "First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

Plaintiffs have First Amendment rights to associate freely with each other and with pregnant Idahoans and to engage in speech and expressive conduct, including by providing information, funding, or practical support for pregnant Idahoans traveling to access out-of-state abortion care that is legal where rendered. The Abortion Travel Ban infringes on each of these First Amendment rights.

First, Plaintiffs' provision of information regarding abortion access to pregnant persons in Idaho, including pregnant minors, is speech and is protected by the First Amendment. *See Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975) (overturning conviction of Virginia newspaper editor for publishing advertisements for lawful abortion care in New York). The First Amendment does not permit Idaho to prohibit or criminalize speech providing information about conduct legal in another state just because it is illegal in Idaho. Plaintiffs provide, and wish to continue to provide, pregnant minors, and adults who help them, with information and advice regarding reproductive options, including abortion, where abortion is available, where it is legal, and how and from whom to obtain transportation and other support. Kovacs Decl., ¶¶12, 14-17, 21; simpson Decl., ¶40; Matsumoto Decl., ¶43. They fear that continuing to do so could subject them to prosecution under Idaho Code § 18-623. Kovacs Decl., ¶¶20-23, 37; simpson Decl., ¶¶58, 59; Matsumoto Decl., ¶¶54, 55. Banning speech on the basis of a legal intended purpose is a violation of all Plaintiffs' free speech rights.

Second, Idaho Code § 18-623 infringes on Plaintiffs' First Amendment expressive conduct rights, including their rights to express themselves through monetary support. In *Texas v. Johnson*, 491 U.S. 397 (1989), the U.S. Supreme Court recognized that "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). To determine whether conduct is entitled to First Amendment protection, courts consider whether: (1) the actor intended to convey a particularized message, and (2) it was likely that the message would be understood by those who viewed it. *Id.* (citing *Spence*, 418 U.S. at 410-11).

Plaintiffs' activities are expressive conduct. Plaintiffs' assistance to pregnant minors by supplying travel money or providing direct assistance conveys a message of support for pregnant minors seeking to obtain lawful abortion care. Kovacs Decl., ¶¶9-11; simpson Decl., ¶¶55-57;

Matsumoto Decl., ¶¶48, 50, 54. Plaintiffs' behavior in providing accommodations, transport or other support also conveys a clear message of support for abortion itself. That message is understood by those who observe the conduct, which is why the Idaho Legislature sought to punish it.

Third, § 18-623 infringes on Plaintiffs' First Amendment rights of association. The U.S. Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am.*, 530 U.S. at 647-48. As it is intended to do, § 18-623 chills Plaintiffs from associating with pregnant minors and with their own organizational volunteers.

Idaho Code § 18-623 has and will continue to have a chilling impact on NWAAF's and IIA's ability to uphold their missions. It may also undermine their relationships with donors and members and their ability to recruit and retain volunteers. Kovacs Decl., ¶¶27-29; simpson Decl., ¶¶45-48. It prevents all Plaintiffs from associating with each other and with pregnant minors for the purpose of expressing their affirmation of every pregnant person's right of self-determination.

Fourth, Idaho Code § 18-623 is impermissibly content based. The government may not regulate speech because of its message, ideas, subject matter, or content, and laws that do so are presumptively unconstitutional. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Indeed, speech restrictions that target specific views taken by speakers on a subject (rather than targeting all views on a given subject) are particularly egregious. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Idaho Code § 18-623(1) impermissibly regulates the content of the speech because it includes a carve out for certain speech related to abortion care. It states that "[a]s

used in this subsection, the terms 'procure' [an abortion] and 'obtain' [an abortion-inducing drug] shall not include the providing of information regarding a health benefit plan." In other words, adults who discuss how to procure an abortion or obtain an abortion-inducing drug in the context of a health benefit plan are not subject to the statute. But that same adult could not provide that same information when discussing how to procure an abortion or obtain an abortion-inducing drug in a conversation that did not focus on a health benefit plan. Thus, Idaho Code § 18-623 impermissibly targets Plaintiffs' speech and expressive conduct because of the message it communicates. It criminalizes Plaintiffs' direct assistance in support of pregnant minors' choice to have an abortion precisely because the expressive conduct supports abortions and abortion care.

Because of the fundamental nature of First Amendment rights, state-imposed restrictions on them are subject to strict scrutiny, which requires the government to prove that the restriction is narrowly tailored to serve a compelling state interest. This statute does not meet that test. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010).

3. Defendant's Enforcement of Idaho Code § 18-623 Violates Plaintiffs' Fourteenth Amendment Due Process Rights Because § 18-623 Does Not Provide Fair Notice of the Conduct It Prohibits and Invites Arbitrary Enforcement.

The government violates the Fourteenth Amendment's due process guarantee through a criminal law that is so vague that it "fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). "The operative question under the fair notice theory is whether a reasonable person would know what is prohibited by the law." *Tingley v. Ferguson*, 47 F.4th 1055, 1089 (9th Cir. 2022)). "The terms of a law cannot require 'wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'" *Id.* (quoting *Holder*, 561 U.S. at 20).

Vague statutes are particularly objectionable when, as here, they "involve sensitive areas of First Amendment freedoms" because "they operate to inhibit the exercise of those freedoms." *Cal. Tchrs. Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Further, criminal laws receive the most exacting scrutiny because "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan v. De George*, 341 U.S. 223, 230 (1951).

Idaho Code § 18-623 lacks clarity, fails to provide fair notice of the conduct it punishes, and invites arbitrary enforcement. It is vague in at least three respects. First, it is unclear what conduct it targets, and it appears to target only behaviors that are otherwise legal in the states where those behaviors occur. Second, it uses terms that are vague and for which no definitions are provided. Third, it is unclear what contact adults who help and mentor youth would need to have with a pregnant minor's parent or guardian to avoid liability or avail themselves of the statute's so-called affirmative defense. Adults who have been helping and mentoring youth will now be in the precarious position of navigating a confusing law while trying to help a pregnant minor who has nowhere else to turn and must make a decision in a short period of time.

First, it is unclear whether the statute is targeting behavior that occurs just before an abortion takes place or is targeting the abortion itself. Or perhaps the statute is attempting to punish behaviors that happen prior to the abortion, including legal behaviors that do not culminate in the procedure itself. One cannot tell. If the statute is attempting to criminalize abortion after the fact, it is attempting to punish adults for medical procedures obtained by others that are legal where the procuring or obtaining took place. Thus, a person of ordinary intelligence would be unable to identify how and exactly when she violated this aspect of the

statute, as at the time the minor she is helping has an abortion, she is in a jurisdiction where those actions violate no law.

And if the legislature meant to target the "attempt" of such procurement or obtaining, a person of ordinary intelligence would be hard-pressed to discern at what point ordinary counseling or mentoring a pregnant minor, or traveling with such a minor within Idaho, may cross a line into attempt. *See* I.C. § 18-306 ("[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof," is punishable for the attempt). Does meeting with a pregnant minor in an office to discuss her options and provide information constitute "recruiting" or "harboring" only if the pregnant minor does in fact receive abortion care? Idaho Code § 18-623 also raises the specter of an arbitrary enforcement scheme that targets "attempt" conduct and casts a wide net, including traffic stops of reproductive age female minors, in an effort to stop pregnant minors traveling to another state from even reaching the border.

Second, it appears that in the Legislature's rush to block persons in Idaho from traveling to states where abortions are lawful, it is attempting to prevent legal behaviors by criminalizing undefined actions such as "recruiting," "harboring," or "transporting." Idaho Code § 18-623 does not contain or refer to a definitions section that would tell Plaintiffs when their conduct would constitute recruiting, harboring, or transporting. Does a person "recruit" a pregnant minor by telling the minor that the Planned Parenthood in Kennewick, Washington, provides abortion care? Or by letting the minor stay at a home in Fruitland before the minor travels to Ontario, Oregon, for abortion care? This statute does not make clear when lawful mentoring stops and unlawful conduct begins, or if the statute allows for mentoring at all. A person of ordinary intelligence must discern when helpful information regarding abortion becomes "recruiting" or when a meeting becomes "harboring." And she must hope that the line she draws in her own mind is the same

line that law enforcement and prosecutors draw. This vagueness impacts Plaintiffs and their actions, their ability to advise others, and their ability to support the communities they serve. *See* Matsumoto Decl., ¶¶40-42.

Third, the statute fails to provide adequate notice regarding what culpability attaches to communication or the lack thereof with a minor's parents and/or guardians. The statute fails to provide adequate notice regarding whether the intent to conceal must be directed at one or more parent, and whether there is an affirmative defense if one parent provided consent but the other did not. Does the intent to conceal mean affirmatively hide the fact of an abortion? Or apply only if the adult providing assistance knows that the pregnant minor has a parent? Here, for safety and privacy of the minors, Plaintiffs do not affirmatively seek consent, and do not wish to in the future. Matsumoto Decl., ¶¶43, 47; Kovacs Decl., ¶¶13, 19, 21; simpson Decl., ¶¶39, 50.[7]

Even the Idaho legislators who sponsored H.B. 242 were unsure when a violation would occur, or even what a violation would be. In an exchange with another state senator, Senator Todd Lakey, who was responsible for the bill's language as its co-sponsor, stated that "recruiting, harboring and transporting, those are descriptive words, I guess the court would have to decide if the conduct constitutes one of those three things." Olson Decl., ¶5, Ex. 4. A law that requires a court to decide after the fact whether conduct violates the law is not one that puts an ordinary person on notice of what it prohibits.

In sum, Plaintiffs are unsure of what specific behavior Idaho Code § 18-623 prohibits. And they "should not have to guess at whether their conduct is on the right or the wrong side of the law."

[7] "An affirmative defense is an excuse, not an exception. The difference is not academic." *United States v. Idaho*, 623 F. Supp. 3d 1096, 1109 (D. Idaho 2022). An affirmative defense under § 18-623 can only be raised by an adult after she has been investigated, charged, arrested, and suffered the indignity of publicity and community and employment consequences.

Isaacson v. Brnovich, 610 F. Supp. 3d 1243, 1254 (D. Ariz. 2022). But for the statute's lack of clarity over whether she would be prosecuted, Plaintiff Matsumoto would assist minors in traveling to Oregon or Washington in getting abortions in states where abortion remains legal. Matsumoto Decl., ¶54. Plaintiffs NWAAF and IIA wish to continue assisting pregnant Idaho minors obtain abortions in states where abortion is legal but are uncertain whether they will be prosecuted for such actions. Kovacs Decl., ¶30; simpson Decl., ¶¶58, 59.

B. Plaintiffs Will Be Irreparably Harmed by Violation of Their Constitutional Rights.

To establish irreparable harm, injury need not be certain to occur. Rather "a strong threat of irreparable injury before trial is an adequate basis." *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990) (citation omitted). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Klein*, 584 F.3d at 1207-08 (9th Cir. 2009); *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012). Here, in the absence of injunctive relief, Plaintiffs will suffer irreparable harm because they will be chilled from providing information about lawful abortion care, including options counseling, referrals to abortion providers in jurisdictions where abortion remains legal, and guidance on how and where to travel to obtain a lawful abortion. Matsumoto Decl., ¶¶55, 56; Kovacs Decl., ¶¶39, 40; simpson Decl., ¶¶60, 61.

Significantly, without injunctive relief, Plaintiffs, and others in the state, also face the very real threat of criminal prosecution, should any of their behaviors cross the unclear line that Defendant controls. Under the statute, Defendant has "the authority, at the attorney general's sole discretion, to prosecute a person for a criminal violation of this section 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." I.C. § 18-

623(4). In other words, without relief from this Court, the Defendant in this case can choose to prosecute any Plaintiff for an alleged crime under this law. Even if the statute is later found to be unconstitutional, any Plaintiff, or other person, so prosecuted will be irreparably harmed. *McCormack v. Heideman*, 900 F. Supp. 2d 1128 (D. Idaho 2013).

Finally, absent injunctive relief, the ability of Plaintiffs NWAAF and IIA to accomplish their organizational mission will be irreparably damaged, as they cannot provide information and resources to pregnant minors to obtain out-of-state abortion care that they would otherwise recommend and provide. Kovacs Decl., ¶¶39, 40; simpson Decl., ¶¶60, 61.

C. The Balance of Equities and Public Interest Favors an Injunction.

Finally, both of the remaining factors—the public interest and the balance of equities—fall strongly in the Plaintiffs' favor. "[E]nforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

Allowing this law to remain in effect for any additional length of time presents significant harm to all Plaintiffs and, most critically, to the communities they seek to serve. As explained above, Plaintiffs serve as trusted adults for minors at a critical point in their lives, including minors who may be survivors of abuse and those who may not have a safe or trusted parent or guardian. While Plaintiffs regularly serve this role, other adults in the state may on occasion serve a similar purpose in the life of a minor. Allowing this law to stand during the pendency of this lawsuit would expose to criminal prosecution every adult in the state who wishes to speak about abortion with pregnant minors, wishes to logistically or practically support pregnant minors' access to abortions, wishes to provide shelter for minors traveling to access legal abortion care, or wishes to provide transportation for pregnant minors. Every day this unconstitutional law remains in effect, the specter of prosecution, and prison time, looms over every adult in the state who may, during the course of this

lawsuit, find themselves in this position. Plaintiffs will most certainly be in this position. There is no doubt that the balance of equities weighs in favor of Plaintiffs.

Defendant will suffer no cognizable harm by injunctive relief in this case. Idaho's first-in-the-nation prohibition has been in effect barely 60 days. Thus, injunctive relief would simply preserve the status quo that this state has enjoyed for hundreds of years. *See All. for Wild Rockies v. Pierson*, 550 F. Supp. 3d 894, 898 (D. Idaho 2021), *vacated on other grounds*, 68 F.4th 475 (9th Cir. 2023). And, in the context of First Amendment claims like Plaintiffs,' a likelihood of success on the merits "compels a finding that . . . the balance of the hardships tips sharply in Plaintiff[s'] favor." *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (internal quotation marks and brackets omitted; ellipsis in original).

Granting the injunction would allow Plaintiffs to continue to act in accordance with their organizational missions and continue to communicate fully with pregnant minors about their options. It would not harm the State's alleged public interest, as abortions would remain largely illegal in Idaho (a prohibition that Idaho apparently believes is in the public interest) and would permit Plaintiffs to continue providing support, travel assistance, financial assistance, and information to pregnant minors in Idaho seeking lawful medical care in other states.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion and enter an Order preliminarily enjoining Defendant from enforcing Idaho Code § 18-623.

DATED: July 24, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson
Wendy J. Olson

LEGAL VOICE

/s/ Wendy S. Heipt
Wendy S. Heipt
Kelly O'Neill

THE LAWYERING PROJECT

/s/ Jamila A. Johnson
Jamila A. Johnson
Paige Suelzle

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

Lincoln Davis Wilson
Lincoln.wilson@ag.idaho.gov

/s/ Wendy J. Olson
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

DECLARATION OF WENDY J. OLSON IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, PRELIMINARY INJUNCTION

WENDY J. OLSON, being first duly sworn, declares and states:

1. I am a partner with the law firm of Stoel Rives LLP, counsel for Plaintiffs in the above-captioned matter. As such, I have personal knowledge of the facts and statements contained in this declaration.

2. Attached hereto as **Exhibit 1** is a true and correct copy of an eight (8) second video recording of Representative Barbara Ehardt testifying before the Idaho Senate State Affairs Committee on March 27, 2023, on Idaho House Bill 242, obtained from the "Digital Media Archive" on the Idaho Legislature's website.

3. Attached hereto as **Exhibit 2** is a true and correct copy of a letter dated March 27, 2023, written by Idaho Attorney General Raul Labrador to state Representative Brent Crane purporting to provide a legal opinion regarding Idaho House Bill 341, which appears in the public domain, and the authenticity of which has never been challenged by either the author or the recipient.

4. Attached hereto as **Exhibit 3** is a true and correct copy of a letter dated March 13, 2023, written by Idaho Attorney General Raul Labrador to state Representative Ilana Rubel purporting to provide a legal opinion regarding Idaho House Bill 242, which appears in the public domain, and the authenticity of which has never been challenged by either the author or the recipient.

5. Attached hereto as **Exhibit 4** is a true and correct copy of an eleven second video recording of Senator Todd Lakey testifying before the Idaho Senate State Affairs Committee on March 27, 2023 on Idaho House Bill 242, obtained from the "Digital Media Archive" on the Idaho Legislature's website.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: July 24, 2023.

/s/ Wendy J. Olson
Wendy J. Olson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

Lincoln Davis Wilson
Lincoln.wilson@ag.idaho.gov

/s/ Wendy J. Olson
Wendy J. Olson

EXHIBIT 1

Rep. Ehardt March 27, 2023 Testimony

Via Hand Delivery
on Flash Drive

EXHIBIT 2

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

March 27, 2023

BY HAND DELIVERY

The Honorable Brent Crane
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street, Rm. EW46
Boise, Idaho 83702

Re: Request for AG Analysis

Dear Representative Crane:

This letter is in response to your recent inquiry regarding Idaho's criminal prohibitions on abortion. Specifically, you asked whether Idaho's abortion prohibitions preclude 1) the provision of abortion pills, 2) the promotion of abortion pills, and 3) referring women across state lines to obtain abortion services or prescribing abortion pills that will be picked up across state lines. Idaho law prohibits each of these activities.

1) Idaho's criminal prohibition on performing an abortion includes providing abortion pills. Idaho's criminal law defines abortion to mean "the use of *any means* to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." Idaho Code § 18-604(1) (emphasis added). The criminal abortion statute, to which the statutory definition of "abortion" applies, does not distinguish between an abortion carried out as a medical procedure and an abortion carried out by pills or chemicals; the use of *any means* to carry out an abortion is prohibited. *See* Idaho Code § 18-622.

2) Two Idaho criminal statutes prohibit promoting abortion pills to the public. Idaho Code section 18-603 prohibits the promotion of abortion pills, unless the promoter is a licensed physician: "Every person, except licensed physicians . . ., who willfully publishes any notice or advertisement of any medicine or means for

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producing or facilitating a miscarriage or abortion . . . is guilty of a felony." Idaho Code § 18-603. Similarly, under Idaho Code section 18-607, "[a] person who . . . offers to sell, . . . advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor for that purpose, commits a misdemeanor." The statute has several exceptions, but none of them apply to the promotion of abortion pills to the public.

3) Idaho law prohibits an Idaho medical provider from either referring a woman across state lines to access abortion services or prescribing abortion pills for the woman to pick up across state lines. Idaho law requires the suspension of a health care professional's license when he or she "*assists* in performing or attempting to perform an abortion." Idaho Code § 18-622(2) (emphasis added). The plain meaning of assist is to give support or aid. An Idaho health care professional who refers a woman across state lines to an abortion provider or who prescribes abortion pills for the woman across state lines has given support or aid to the woman in performing or attempting to perform an abortion and has thus violated the statute.

Please let me know if you have any additional questions.

Sincerely,

Raúl R. Labrador

RAÚL R. LABRADOR
Attorney General

RRL:kw

EXHIBIT 3

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

March 13, 2023

The Honorable Ilana Rubel
Minority Leader
Idaho House of Representatives
700 W. Jefferson Street
Boise, Idaho 83702

Dear Representative Rubel:

You have requested a legal opinion on three questions concerning House Bill 242. As relevant to your questions, House Bill 242 establishes a new criminal offense for adults who recruit, harbor, or transport pregnant minors within the State of Idaho under certain circumstances. House Bill 242 creates a new criminal statute, Idaho Code section 18-623.[1]

QUESTIONS PRESENTED

1. House Bill 242 provides it is not an affirmative defense to abortion trafficking if the abortion provider or the abortion-inducing drug provider is located in another state. Is Idaho permitted to prosecute an adult for abortion trafficking if the abortion occurs in another state where it is legal or the abortion-inducing drug provider is located within a state where he or she can legally dispense that drug?

2. Does this bill trigger problems under right to travel, other Constitutional protections insofar as it purports to criminalize actions that are to be legally conducted in other states?

3. Does this bill conflict with any executive orders in place to protect travel for the purpose of having abortions, or any other federal or constitutional provisions?

[1] The bill also amends one section with the Fetal Heartbeat Preborn Child Protection Act, but that change is not relevant to this letter.

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CONCLUSIONS

After reviewing House Bill 242, we answer your questions as follows.

1. Idaho law permits a defendant to be charged with a crime where elements of the crime occur both in Idaho and another state. House Bill 242 establishes a crime involving the recruiting, harboring, or transporting of a pregnant minor within this State. That crime's reference to an abortion, and Idaho Code section 18-623(3)'s note that the abortion provider or the abortion-inducing drug provider can be located in another state, mean that an adult who traffics a pregnant minor within Idaho can be charged with abortion trafficking, even if an abortion provider or an abortion-inducing drug provider is in another state where abortion is legal.

2. House Bill 242, which is an exercise of the State's police power to regulate conduct within its borders, does not offend the right to travel found in the U.S. Constitution. The bill does not block out-of-state citizens from entering this State and does not block citizens of Idaho from leaving this State. The bill does not discriminate against out-of-state citizens nor treat newly arrived citizens of Idaho differently from any other person.

3. House Bill 242's recognition of a crime incident to abortion—a specific form of human trafficking—is within Idaho's "police power." After *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), recognized that there is no federal constitutional right to abortion, the regulation of abortion involving acts incident to abortion is within the power of the states. House Bill 242 does not conflict with the President's two executive orders, as they do not prohibit states from regulating conduct within their borders.

BACKGROUND

House Bill 242, if enacted, would add Idaho Code section 18-623, which concerns abortion trafficking. A person who commits abortion trafficking commits a felony subject to imprisonment for 2-5 years. Abortion trafficking is defined in Idaho Code section 18-623(1), which provides:

> An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion, as described in section 18-604, Idaho Code, or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking.

House Bill 242 also adds two provisions relevant to this statute.[2] It establishes Idaho Code section 18-623(2), which provides an affirmative defense to the trafficking if the pregnant minor's parent or guardian consented to the trafficking of the minor. And, it also adds Idaho Code section 18-623(3), which says it is not an affirmative defense if the abortion provider or the abortion-inducing drug provider is located in another state.

ANALYSIS

I. Idaho can prosecute an adult for abortion trafficking, even if the abortion provider or the abortion-inducing drug provider is in another state.

Your first question asks about an abortion that occurs out of state. Idaho Code section 18-623(1) explains that the crime of abortion trafficking involves the following elements: (a) an adult; (b) who has the intent to conceal an abortion from the parents or guardians of a pregnant, unemancipated minor; (c) recruited, harbored, or transported the pregnant minor within this State; and (d) procured an abortion, as described in Idaho Code section 18-604, or obtained an abortion-inducing drug for the pregnant minor to use for an abortion. Idaho Code section 18-623(3) makes clear that the abortion provider or the abortion-inducing drug provider can be located in another state.

The fact that part of a crime occurs outside of Idaho is not an issue. Idaho has adopted a statute, Idaho Code section 18-202, which provides that "[a]ll persons who commit, in whole or in part, any crime within this state" are liable to punishment in Idaho. According to the Idaho Supreme Court, through this statute "the legislature intended to punish any person who should commit any portion of a crime within this state to the same extent and in the same manner as though all of the acts which constitute the crime had been committed here."[3]

In a criminal prosecution, the prosecutor must establish criminal jurisdiction over the defendant. According to Idaho Code section 19-301, that can be shown by evidence "that a prosecutable act was committed within the State of Idaho." A prosecutable act is "any essential element of a crime."[4] Thus, Idaho's courts "have

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[2] House Bill 242 also adds Idaho Code section 18-623(4), which authorizes the Attorney General to prosecute violations of Idaho Code sections 18-622 or 18-623 if the local prosecuting attorney refuses to.

[3] *State v. Villafuerte*, 160 Idaho 377, 379, 373 P.3d 695, 697 (2016) (quoting *State v. Sheehan*, 33 Idaho 553, 196 P. 532 (1921)).

[4] *State v. Doyle*, 121 Idaho 911, 913, 828 P.2d 1316, 1318 (1992). In addition, Idaho provides for jurisdiction where the crime is commenced out-of-state but the result of the crime is "consummated

subject matter jurisdiction over a crime if any essential element of the crime, including the result, occurs within Idaho."[5]

One of the essential elements of Idaho Code section 18-623(1) is that an adult recruited, harbored, or transported a pregnant minor *within* Idaho. By establishing this, a prosecutor can establish criminal jurisdiction over a defendant. The prosecutor can meet its burden of proof regarding abortion trafficking by establishing beyond a reasonable doubt, in relevant part, that the adult procured an abortion for the pregnant minor out of state or obtained an abortion-inducing drug from an out-of-state provider.

II. House Bill 242 does not offend the U.S. Constitution's right to travel.

You next ask whether the crime established by House Bill 242 violates the U.S. Constitution's right to travel. The U.S. Supreme Court's most recent explication of the right to travel was in *Saenz v. Roe*, 526 U.S. 489 (1999). There, the Court identified "at least three different components" of the right to travel from its cases.

The first is the "right to go from one place to another." The Court has not identified "the source of that particular right in the text of the constitution."[6] The second component of the right to travel protects citizens of other states who temporarily enter a state from discrimination based on their out-of-state citizenship "where there is no substantial reason for discrimination." This right originates from the Privileges and Immunities Clause of Article IV, § 2 of the U.S. Constitution. The third component protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." The *Saenz* court held that this component is protected by the Privileges *or* Immunities Clause of the Fourteenth Amendment.

Clearly the second and third components of the U.S. Constitution's right to travel are not at issue with Idaho Code section 18-623(1). Section 623(1) does not discriminate against out-of-state citizens over in-state citizens. And it does not treat newly arrived citizens of Idaho differently than any other citizen of Idaho.

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within Idaho." Idaho Code § 19-302. The *Doyle* court explained that "consummated" meant "that the result of the crime must be an essential element of the offense."

[5] *Doyle*, 121 Idaho at 914, 828 P.2d at 1319.

[6] The dissenting justices in *Saenz*, Chief Justice Rehnquist and Justice Thomas, acknowledged the first component's existence and noted that "what the Court today calls the first 'component' of the right to travel, [citation], was the entirety of this right" for most of the United States' history. *Saenz*, 526 U.S. at 512 (1999) (Rehnquist, C.J., dissenting).

The first component of the right to travel—the right to go from one place to another—is also not implicated with Idaho Code section 18-623(1). The first component is concerned with "the erection of actual barriers to interstate movement."[7] Idaho's regulation of conduct within its State, a regulation applicable to all persons within the State, is not an attempt to block citizens of any state from entering Idaho or leaving Idaho.

The situations that implicate the first component of the right to travel are very different than the situation here. In *Edwards v. California*, 314 U.S. 160 (1941), the Court addressed whether a state could prohibit the transportation of indigent persons into the state. In *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), the Court addressed whether a state could tax railroad passengers carried out of state—or as the Court described it, a tax imposed "upon the passenger for the privilege of leaving the State, or passing through it by the ordinary mode of passenger travel." In *United States v. Guest*, 383 U.S. 745 (1966), the Court held that a criminal indictment could properly assert that defendants were conspiring to deny black citizens "the right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia."

House Bill 242 does not place actual barriers to interstate movement. House Bill 242 represents an exercise of Idaho's police power in an area touching on abortion—a right not protected by the U.S. Constitution.[8] It seeks to regulate the in-state recruiting, harboring, or transporting of a pregnant minor. House Bill 242 does not offend a right to travel in the U.S. Constitution.

III. House Bill 242 does not conflict with Executive Orders.

You also asked about executive orders issued by the President and whether House Bill 242 conflicts with them. We have identified two executive orders issued by the President that concern "reproductive healthcare services."

Executive Order 14076 of July 8, 2022, "Protecting Access to Reproductive Healthcare Services" in relevant part requested a report to the President from the Secretary of Health and Human Services and authorized the Attorney General of the United States and Counsel to the President to convene a meeting.[9] House Bill 242 does not conflict with this order.

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[7] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n.6) (1982)).
[8] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
[9] Exec. Order No. 14,076, 87 Fed. Reg. 42053-42055 (July 13, 2022).

Executive Order 14079 of August 3, 2022, "Securing Access to Reproductive and Other Healthcare Services" in relevant part directed the Secretary of Health and Human Services to "consider actions to advance access to reproductive healthcare services, including, to the extent permitted by Federal law, through Medicaid for patients traveling across State lines for medical care."[10] We have not located any published rulemaking from the U.S. Department of Health and Human Services in the Federal Register. As such, there is no existing conflict involving House Bill 242 and this executive order.

We also located a Presidential Memorandum, "Further Efforts to Protect Access to Reproductive Healthcare Services" which discussed the Food and Drug Administration's recent changes to the Risk Evaluation and Mitigation Strategies (REMS) regarding Mifepristone.[11] That memorandum directed the Secretary of Health and Human Services, the U.S. Attorney General, and the Secretary of Homeland Security to consider issuing guidance and to take other action to educate individuals about access to Mifepristone. It also directed these officials to provide information to a task force regarding barriers concerning access to Mifepristone. House Bill 242 does not conflict with this memorandum.

We are not aware of any other federal law that preempts the abortion trafficking crime established in House Bill 242. In fact, states have broad authority to enact laws like this as part of their "police power," something which the U.S. Congress does not have.[12] And because abortion is not a right protected within the federal constitution, abortion and crimes incident to abortion, are certainly within the State's realm of regulation.

* * * *

Please feel free to contact me if you have any questions.

Sincerely,

Raúl R. Labrador

RAÚL R. LABRADOR
Attorney General

RRL:kw

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[10] Exec. Order No. 14,079, 87 Fed. Reg. 49505-49507 (Aug. 11, 2022).
[11] Mem. of Jan. 22, 2023, 88 Fed. Reg. 4895-4897 (Jan. 26, 2023).
[12] *See United States v. Morrison*, 529 U.S. 598, 617-619 (2000).

EXHIBIT 4

Sen. Lakey March 27, 2023 Testimony

Via Hand Delivery on Flash Drive

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

DECLARATION OF LOURDES ANNETTE MATSUMOTO

I, Lourdes Annette Matsumoto, declare and state as follows:

1. I am over 21 years of age. I have personal knowledge of the facts contained in this declaration, and I am competent to testify about them.
2. At all times pertinent to this Declaration, I have been a legal adult in the State of Idaho.
3. My workplace and primary place of residence is in Canyon County, State of Idaho.
4. I am proud to declare that I am a descendant of homesteaders, and a third generation Idahoan.
5. I am an American with direct heritage to immigrants who came to the United States from Mexico and from Japan.
6. In spite of my heritage of long-standing American citizenship, my own family were racially-targeted victims of Executive Order 9066 in 1942, which ordered establishment of concentration camps known as Japanese Internment Camps in Minnedoka, Idaho.
7. After graduation at Middleton High School in 2004, I attended college at the College of Idaho (then known as Albertson's College of Idaho), and then law school at Gonzaga University and the University of Idaho.
8. I became an Idaho attorney in 2016, and I remain a member in good standing of the Idaho State Bar.
9. I have been deputy general counsel in a position of high public trust in a highly technical environment.
10. I have also been an attorney in private practice, and simultaneously provide legal services and policy counsel to a local nonprofit that provides emergency assistance, counseling, and resources to victims of domestic and sexual violence.

11. I estimate that I have represented eleven private clients, in Idaho, in the past two years who were survivors of sexual violence. Several of these clients were Idaho minors.
12. I believe every person deserves to live their lives, according to their truth, with respect and dignity, and free of violence, including minors.
13. I have spent a majority of my legal career advocating for civil rights.
14. In 2017, I became a victim of egregious workplace harassment that escalated into gender-based violence.
15. I have been a visible face in Idaho, representing what would become the "#metoo movement", even before the strength of numbers emerged from public celebrity cases.
16. Through my words and actions I have continually sought to communicate my solidarity with abuse survivors, including pregnant minor abuse survivors, and my belief in bodily autonomy for all, including minors, and that I am a trusted resource, both professionally and personally, for minors experiencing abuse.
17. I am also a parent of minor children.
18. I am also a trusted adult who friends and family come to with questions about how to respond to gender-based violence (GBV), intimate partner violence (IPV), domestic violence (DV) and sexual assault (SA).
19. I personally know the courage it takes to hold a sexually violent perpetrator to account in the face of a fear that your life is in danger and that you won't be believed.
20. Due to the publicity of my own case and the compelling nature of my survivorship, I have been a speaker for a statewide association of trial attorneys, to discuss the effort to change the tide of sexual harassment and hostile workplace environments.

21. I have also been asked to speak to this same statewide association of trial attorneys about how to identify abuse in minors, especially those minors who have been subjected to sexual abuse in kindergarten through Grade 12 in public schools.
22. I continue to represent private clients, and I keep my practice open especially for minors and other survivors of sexual violence resulting in pregnancy.
23. In my professional capacity I work with, and focus on, survivors between the ages of 11 and 24, many of whom are victims of sexual assault.
24. In my professional capacity I also work with other advocates who also focus on minor survivors between the ages of 11 and 24, and these advocates have turned to me with questions about how they can best assist minor survivors who have become pregnant as a result of their abuse.
25. In 2023, the Idaho Legislature created I.C. 18-623, resulting from House Bills 98 and 242. The short title of this new first-in-the-nation "crime" is "Abortion Trafficking".
26. Even as a law trained person with years of knowledge, I believe this new code is so vague that it must be unenforceable.
27. The code has both a criminal and a civil enforcement section, and neither section is clear to me.
28. Advocates and domestic violence program professionals often reach out to me for expert advice on how to legally and properly advise survivors of gender-based violence and intimate partner violence who come to them for services.
29. Often, this expert advice is for minor Idahoans with unwanted pregnancies, which are the results of GBV and IPV.

30. In September 2022, during a training I participated in, I was unable to answer questions from other attendees who expressed confusion how to answer questions by survivors who were traveling in Idaho and then crossing state lines to access abortion in states where it is legal. Some of those questions involved how far they could go, whether they could use untraceable gas cards or financial assistance, whether law enforcement surveillance was an issue, and other similar questions. Among three well-trained and experienced attorneys at this training event, each had a different belief about what conduct would have the lowest legal risk.

31. After H.B. 242 was signed by Gov. Little in April 2023, I received several calls from domestic violence programs about best practices and what to do in specific circumstances. These calls came because program staff feared prosecution for disseminating correct information to adults and to minors. Idaho law does not recognize a legal advocate/client privilege, so many of these advocates are front-line navigators assisting survivors who may not be as protected as they hope when they share available resources. I had a difficult time advising them.

32. On April 24, 2023, I participated in a training open to the public and tailored for school administrators, related to an increase in sexual abuse and gender violence in children from kindergarten through 12th grade. This training went over what to identify, what to do, and who to talk with if you suspect that sexual abuse or gender violence are occuring. The training also focused on the survivors' right of autonomy to decide what reports they would like to make and whether they want to pursue the options they are given.

33. A similar training was given on May 8, 2023. Here I faced many questions from confused parents and school administrators. Participants expressed concern and unsurety over what behaviors were legal and which crossed the line.

34. I have continued to field questions and concerns regarding what conduct would be permitted by this statute.

35. Based on my knowledge and first-hand experience with DV response training, there remains great professional and general uncertainty and confusion about what I.C. 18-623 specifically allows or prohibits.

36. Some of the specific questions I have tried to field involve giving advice to pregnant people or minors; how to handle financial support or transportation for those seeking abortion; and after May 5, 2023, there have been even more questions about what information can even be given to minors or to those who want to help minors by transporting them through Idaho and into states where abortion is legal.

37. Because of my years of advocacy work in the field of domestic violence, I am known in the general community as an expert resource.

38. I have been asked specific questions from friends, family and acquaintances about what resources are available to handle an unwanted pregnancy resulting from IPV / GBV.

39. The vagueness of I.C. 18-623 has made it difficult to provide accurate legal advice to guide even professionally-trained advocates, whose mission, like mine, is to serve survivors.

40. The impact is that the professional community of domestic violence advocacy cannot reasonably be expected to provide critical victim support services, especially when those

services include providing practical and actionable advice to pregnant minor survivors of GBV / IPV.

41. I recognize the dangers of ambiguity in the law when I advise and advocate for DV/SA survivors. Survivors need to know specifically what actions can help them restore their lives.

42. I.C. 18-623 is a law that is fundamentally unfair and anti-American; but it is also infused with unworkable ambiguity.

43. I want to be able to provide reliable advice, including advice about abortion, to pregnant minors and to those who want to support them. I know that it is not always safe for minor survivors or for me to seek or obtain parental consent.

44. Without reliable legal advice, these pregnant minors may turn to less desired options, and will decrease their reliance upon trusted adults in their communities who want to help resolve these crises.

45. In traditionally marginalized communities, people are often taught, through unjust experiences, to not trust adults or the legal system or any "system" to help them out.

46. Survivors, especially minor survivors, who bravely leave abusive homes or relationships often have no one to turn to except specialized survivor resources like DV/SA coalitions or locally known resources like myself. Once an adult does not come through for a minor, the abused minor is less likely to trust another adult.

47. I have previously provided abortion information and options counseling through trainings and to advocates to better guide their work with pregnant minors. These minors parents may or may not have consented to this. I would like to continue to provide this

information and communicate my support, but I fear an imminent threat of criminal prosecution, from which I need relief from this Court.

48. I have not yet been asked to provide transportation for a pregnant minor seeking abortion, but if I were asked, I would like to, whether or not the minors parents or guardian consented. Unfortunately, if I did so, I fear I would face an imminent threat of criminal prosecution.

49. I would like to provide temporary shelter for pregnant Idaho minors traveling to obtain abortions in states where they are legal, regardless of parental or guardian consent, without the threat of criminal prosecution.

50. I have previously provided financial assistance to organizations and funds that support pregnant minors seeking abortions. I am unaware if the parents or guardians of the pregnant minor knew about the abortions that I helped to fund. In the future, I would like to continue to do this, but I fear an imminent threat of criminal prosecution, from which I need relief from this Court.

51. I have been asked to advise other programs as to how much information, support, and transportation given to pregnant minors seeking abortions is legal and when those behaviors become illegal under the law and I wish to be able to provide clear guidance.

52. Although I am a licensed attorney in Idaho, I remain unclear about what degree of communication or contact with parents I am required to provide or withhold under I.C. 18-623.

53. I have been willing to help pregnant minors obtain reproductive options counseling and healthcare, including abortion, without the consent of the minors' parents, and I want to be able to provide this kind of assistance in the future.

54. Based on my beliefs, I want to continue to support pregnant Idaho minors seeking abortion in all the ways detailed herein, but I am unsure about the exact reach of this law and fear criminal prosecution.

55. Without relief from this court, my ability to speak about legal abortion care in accordance with my personal beliefs and my professional obligations will be irreparably harmed.

56. Without relief from this court, my ability to act in accordance with my beliefs, including providing practical financial and logistical assistance to pregnant minors seeking legal abortions, and to the individuals and organizations that assist them, will be irreparably harmed.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

DATED: July 24, 2023.

/s/ Lourdes Annette Matsumoto
Lourdes Annette Matsumoto

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

Declaration of tai simpson

I, tai simpson ("tai simpson"), declare and state as follows:

1. I am over 21 years of age, I have personal knowledge of the facts contained in this declaration, and I am competent to testify about them.
2. At all times pertinent to this Declaration, I have been a legal adult in the boundaries and jurisdiction commonly described as Idaho.
3. At all times pertinent to this Declaration, I have been a resident of the State of Idaho, with a principal residence within the County of Ada.
4. I am a member of the Nimiipuu Nation, also called the Nez Perce Tribe of Idaho.
5. The traditional, usual, and accustomed lands of my people, like that of other tribes whose territory encompasses land within Idaho, are often recognized as transecting and incorporating land within the U.S. state/Canadian provincial boundaries of Washington, Idaho, Montana, Wyoming, British Columbia, and Alberta.
6. My life's calling is to continue to serve the storied culture of my people through trust-based mutual care and aid.
7. To that end, I co-founded and helped organize Indigenous Idaho Alliance (IIA), under the laws of the state of Idaho, in order to facilitate that mutual care and aid.
8. I have been an officer or director of Indigenous Idaho Alliance, Inc., an Idaho 501(c)(3) non-profit organization, since 2012.
9. IIA's work includes serving the five tribes whose traditional, usual, and accustomed lands encompass territory within Idaho, and whose traditional, usual, and accustomed lands are often recognized as transecting and incorporating land within the U.S. state/Canadian provincial boundaries of Washington, Idaho, Montana, Nevada, Utah, Wyoming,

California, British Columbia, and Alberta. In this declaration, I may occasionally refer to these lands as "the region."

10. The region has one of the highest per capita populations of Indigenous people in the political boundaries of the United States. IIA's work also includes serving Indigenous people from other tribes across the U.S. who are in this area and far from their reservations and homelands.

11. Our work at IIA is centered around asserting the sovereignty of all Indigenous people by focusing on education, community care, awareness, and collaboration in order to empower a healthy and just Indigenous community in Idaho.

12. Among our priorities and efforts is seeking justice for the Missing and Murdered Indigenous People (MMIP) and their families.

13. IIA also prioritizes the health and wellness of the Indigenous communities we serve.

14. My academic background is in Political Philosophy & Public Law at Boise State University, where I served as the vice president and president of the Intertribal Native Council student organization.

15. The assertions within this document are based upon my own experience, cultural knowledge, research, education, and study, of prevailing scholarship in these subjects.

16. I know that in the United States, Indigenous women and girls are the victims of gender-based violence at a statistical rate twice that of Anglo-American women and girls.

17. Gender-based violence perpetrated against Indigenous women and girls is almost always power-focused with the use of sexual assault and sexual battery including forcible intercourse, by male perpetrators.

18. Unwanted pregnancy or coercive pregnancy is often the result of this high rate of gender-based violence which includes rape.

19. Indigenous women and girls, facing unwanted or coerced pregnancy, are often victims of violence, including murder, in order to conceal the crimes of rape or to punish these pregnant people who seek protection, self-care, or reproductive healthcare including abortion.

20. This is the context that the IIA and I work in as we pursue justice for MMIP and their families.

21. Law enforcement investigation and criminal prosecution of gender-based violent crime against Indigenous women and girls is woefully lacking behind standard policing and prosecutorial standards that protect Anglo-American populations.

22. In my experience, abortions are often sought by the pregnant Indigenous victims of gender-based violence.

23. Since abortion is also sought by other victims of gender-based violence, my organization has and will continue to serve non-Indigenous people, including non-Indigenous minors.

24. With Idaho's 2022 restrictions on abortion care, many people working to make ends meet, especially Black people, Indigenous people, Asian people, Latinx ("Hispanic") people, young people, Lesbian-Gay-Bisexual-Trans-Queer-and nonbinary ("LGBTQ+") people, immigrant people, disabled people, and gender-nonconforming people, have been denied a fundamental aspect of their own bodily autonomy, including the right to make personal and individualized decisions about their own healthcare.

25. Indigenous people everywhere, including in Idaho, suffer from systemic racism and chronic economic insecurity, which are massive barriers to all health care, but especially abortion care, even in jurisdictions where it is legal.

26. Abortion bans, like those which exist in Idaho, cause even greater harm to those already subject to systemic racism and economic injustice, like the Indigenous people I serve.

27. Pregnancy is less safe for some than for others because of historic and ongoing racism and discrimination in healthcare settings, and people of color face two to three times the risk of dying from pregnancy-related causes, including maternal mortality and fetal, newborn and infant mortality.

28. States like Idaho that ban or severely restrict access to abortion care also have worse maternal health outcomes.

29. Forced pregnancy is always unconscionable, and particularly so for individuals facing heightened risk of maternal mortality and morbidity, where pregnancy is less safe for some than for others because of historic and ongoing racism and discrimination in healthcare settings.

30. The criminalization of abortion care in Idaho forces people to travel hundreds of miles out of their communities to try to get care, and studies show that longer travel distances are associated with lower abortion rates, forcing people to seek other options.

31. As in other forms of criminalization, the systemic result is that people targeted for pregnancy loss and self-managed abortion prosecution are disproportionately people of color and people experiencing economic insecurity, especially including the Indigenous communities where I live and serve.

32. Many of the communities where I live and serve are on or near “Indian Reservations”.

33. "Indian Reservations" are a population-concentration system designed to restrict free movement of Indigenous people and to limit the reach of our cultural expression under the guise of tribal self-determinism, and are typically located in rural or isolated areas.
34. Indigenous women and girls who are victims of gender-based violence including rape resulting in unwanted or coercive pregnancy are further restricted from basic reproductive healthcare, including abortion, due to the remote nature of reservation life, where independent modes of travel, coercion through domestic abuse and violence, complicit tribal or nontribal law enforcement officials, or sheer cost and distance make access to healthcare extremely difficult.
35. Abortion needs to be safe and accessible where people live, and where they access other forms of healthcare.
36. Abortion is almost entirely unavailable in Idaho.
37. In order to serve my people and others in the communities where I live and work, I and the IIA have in the past assisted pregnant people, including minors, access abortions. I want to keep doing this throughout the region in which we work, including in Idaho, without fear of imprisonment.
38. IIA has provided pregnant people, including minors, with information regarding reproductive health care options, including abortion.
39. The parents and guardians of the minors to whom we provide information about abortion may or may not be aware of, or consent to, the provision of information regarding abortions.
40. I and my organization wish to continue providing pregnant people, including minors, throughout the region with information regarding reproductive health care options,

including abortion, without the legal requirement of seeking or obtaining parental consent and without fear of imprisonment.

41. In order to provide the mutual assistance IIA supports, through my organization, I have in the past also coordinated the transportation of pregnant women and girls from locations across the region, including locations within Idaho, to and across state lines and provincial borders, where abortion care can be lawfully obtained in neighboring jurisdictions.

42. As a founder and organizer of IIA, I can attest that our organizational mission includes this kind of mutual assistance, and that I and members of IIA wish to continue to provide this type of assistance to both adults and minors.

43. In addition to transporting and coordinating transport of pregnant people, including pregnant minors, into states where abortion is legal, it is even more common for IIA to support pregnant people, including minors, with "rapid response" financial assistance, which can be used to pay for travel, meals, and medical care expenses incurred in the process of obtaining abortions where they are legal.

44. The most common way IIA distributes "rapid response" financial assistance is with prepaid debit cards.

45. The ability to provide these types of financial assistance comes through the receipt of unsolicited donations from individuals, as well as from local, regional, and national organizations who, through "word-of-mouth," have become aware of the work we do to ensure abortion care access by members of my community.

46. A majority of our donors are anonymous.

47. Several times per year, IIA can expect to receive tens of thousands of dollars in donations, many of which are from first-time donors.

48. IIA sometimes applies for and receives funding through federal and non-governmental grant programs, but unsolicited gifts and donations through "word-of-mouth" are the primary sources of the financial assistance we provide to pregnant people and girls seeking abortion.

49. IIA distributes the funding we receive in accordance with our commitment to trust-based mutual care and aid. This has included providing funding and other support to pregnant women and girls seeking abortions.

50. Sometimes, in the past, when we have provided direct or financial assistance to a pregnant minor seeking an abortion, the parents or guardians may or may not have been aware about the minor's intent to seek an abortion.

51. While we are not always aware of how a minor became pregnant, our focus is always on the pregnant minor and getting them the trust-based aid that they need.

52. IIA is also in the practice of obtaining and distributing "Plan B" to pregnant minors, in some cases transmitting Plan B through overnight couriers or through clandestine drop-offs, when that is more convenient or appropriate.

53. IIA distributes Plan B to all community members who request it, including to minors. I do not know whether all of the parents or guardians of these minors were aware of the minors' receipt of Plan B.

54. I and IIA have taken all of these actions as part of our community commitment to trust-based mutual care and aid. All of these actions are in furtherance of our goals and traditions.

55. I and IIA also undertake these actions as a visible sign of support and solidarity with our community.

56. I and IIA also undertake these actions as a visible sign of support and solidarity with the pregnant people, including the pregnant minors, that we serve, that they are not alone and have community support.

57. We also undertake these actions as a visible sign of support to others, that we serve as trusted community members supporting and centering the needs of our people, including the needs of pregnant minors seeking abortion care in places where that care is legal.

58. While I and other members of the IIA wish to continue to support pregnant girls, including providing information and support to help them access abortion care where it is legal, I am uncertain of the line the law draws between legal and illegal conduct.

59. I and my organization wish to continue providing pregnant people, including minors, throughout the region with practical, financial, and other support in order to help them access abortions, including transportation, monies and gift cards, and accommodation, without fear of imprisonment.

60. Without relief from this court, my ability to speak about legal abortion care for minors in accordance with the mission of IIA and my own personal beliefs will be irreparably harmed.

61. Without relief from this court, my ability, and the ability of IIA, to act in accordance with our missions and beliefs, will be irreparably harmed. These actions include, but are not limited to, providing financial, transportation and logistical assistance to pregnant minors within the region seeking legal abortions, with or without the knowledge or consent of their parents or guardians.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

DATED: July 24, 2023.

/s/ tai simpson
tai simpson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

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/s/ Wendy J. Olson
Wendy J. Olson

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

DECLARATION OF MEGAN KOVACS

I, Megan Kovacs, declare and state as follows:

1. I am over 21 years of age. I have personal knowledge of the facts contained in this declaration, and I am competent to testify about them. The statements within this Declaration are within my personal knowledge, and are true and correct.
2. At all times pertinent to this Declaration, I have been a resident of the State of Oregon.
3. I am a board member of the Northwest Abortion Access Fund ("NWAAF").
4. NWAAF is a non-profit entity comprised of a working board, paid staff, and trained volunteers. NWAAF provides emotional, financial, logistical, practical, and informational assistance to those who may become pregnant and need or choose to consider abortion as an option.
5. NWAAF's assistance includes the provision of information, travel funds, travel logistics and organization, and actually driving patients, to abortion providers.
6. NWAAF's work, and travel assistance, extends to minors. We provide information, travel funds, travel logistics, travel organization, and actually drive minor patients, to abortion providers.
7. NWAAF operates in Idaho as well as in Washington, Oregon and Alaska. NWAAF is the only independent abortion fund serving the Pacific Northwest and covers the largest geographic area of any abortion fund in the United States.
8. NWAAF has always provided its services, which include the provision of information and travel related needs, to minors, including to minors in the state of Idaho.
9. NWAAF provides these services as part of its commitment and support of reproductive justice, which recognizes and supports the human right to maintain personal bodily autonomy, to have children, to not have children, and to parent children in safe and

sustainable communities. NWAAF's actions are all taken in support of these commitments and beliefs.

10. NWAAF provides these services as part and parcel of our mission, which includes letting pregnant minors know that we are here to support them in their decision to have, or not to have, an abortion.
11. NWAAF also provides these services as a way to let the community know that all pregnant persons, including minors in abusive situations, will have the support of trusted adults.
12. NWAAF regularly provides pregnant people, including minors, with information regarding reproductive health care options, including abortion.
13. The parents and guardians of the minors to whom we provide information about abortion may or may not be aware of, or consent to, the provision of information regarding abortions.
14. I and my organization wish to continue providing pregnant people, including minors, throughout the region with abortion information regarding reproductive health care options, including abortion, without fear of imprisonment.
15. NWAAF's work also includes booking and directly paying for bus tickets, plane tickets and ride shares, as well as providing adult volunteers to drive patients, including minor patients, to abortion appointments in states where abortion is legal. This travel assistance is provided for pregnant people, including minors, for travel within the state of Idaho in order to reach neighboring states where abortion remains legal.
16. NWAAF also provides funding to abortion providers for their work, in states where that work is legal.

17. NWAAF also provides food and lodging assistance to persons seeking abortions. NWAAF provides this assistance to both adults and minors in the state of Idaho.

18. In the last year, NWAAF provided practical abortion assistance, including travel assistance and lodging when necessary, to 205 individuals living in Idaho, including minors who live in Idaho.

19. When transporting or facilitating transportation for minors, NWAAF has not sought parental consent. Parents and guardians may or may not have known about or approved of NWAAF's support of these minors.

20. I.C. 18-623, the so-called "Abortion Trafficking" statute in Idaho directly impacts the mission and the work of NWAAF.

21. NWAAF, including myself, wish to continue funding legal, out-of-state abortions for pregnant minor Idahoans (i.e., including directly paying and/or reimbursing out-of-state licensed providers of abortion services and providing financial aid to pregnant Idahoans for that purpose) without seeking or obtaining consent from any parent or guardian.

22. NWAAF, including myself, wish to continue providing informational materials and planning assistance (such as organizing and funding transportation and lodging) to pregnant minor Idahoans for obtaining legal, out-of-state abortions.

23. NWAAF, including myself, wish to continue transporting pregnant minor Idahoans to out-of-state licensed providers of safe, legal abortion.

24. All of the actions we have taken, and wish to continue taking, rely on the finnaical support we receive from donors.

25. NWAAF's donors contribute to our organization because they believe in and want to support our work ensuring that individuals in our region, including minors, are able to access abortion care, if that is the choice they make.
26. Our donors contribute to our organization with the knowledge that when we have supported pregnant minors, including pregnant minors in Idaho, access abortions, we have not sought parental consent. Parents and guardians may or may not have know about or approved of NWAAF's support of these minors.
27. NWAAF's continued ability to fulfill our mission and attract donors depends on our continued ability to support (financially, logistically and otherwise) pregnant people to access abortion care, including pregnant minors in Idaho, even if others disagree with their choice.
28. Our work also relies on the support we have from volunteers, who work with us specifically to support our mission of ensuring that all persons, including minors in Idaho, are able to access the full range of reproductive options, including abortion care.
29. This law, I.C. 18-623, violates NWAAF's constitutional and statutory rights. The state of Idaho, through this law and through the actions of its actors, is threatening criminal prosecution of myself, Idaho state staff, our board members, and volunteers, and out of state staff, board members, and volunteers if we continue to do the work of our organization.
30. I.C. 18-623 is a law so vague that neither NWAAF, nor I, are certain of which of our usual activities and statements would run afoul of the law.
31. NWAAF, including myself, seek to enjoin Defendant from applying this law for the legal exercise of our rights.

32. Pregnant people, including pregnant minors, seeking abortion care in the Northwest rely upon NWAAF to provide necessary assistance to access safe and legal abortion care.
33. Since the Dobbs decision in June 2022, NWAAF has seen a 149% increase in its travel expenditures, which help pay for the transportation that pregnant people need to access safe and legal abortion care.
34. We have seen a 146% increase in travel expenditures in the last year from Idaho residents.
35. Since the Dobbs decision in June 2022, NWAAF has seen a 46% increase in its abortion care funding expenditures that pregnant people need to access safe and legal abortion.
36. Due to NWAAFs public statements and actions, we expect that minors, including minors in Idaho, will continue to seek our information and our support for help obtaining abortions.
37. Because we are committed to this and believe strongly in this mission, we want to continue to provide all of our usual services to pregnant people and minors, including pregnant people and minors in the state of Idaho without the threat of criminal prosecution.
38. We have done this, and want to continue to do so, as a show of support and solidarity with pregnant minors; to let them and to let the community at large know that they are not alone.
39. Without relief from this court, NWAAF's ability to speak about abortions, including speaking with Idaho minors who contact us, in accordance with our mission and with my own personal beliefs, will be irreparably harmed.

40. Without relief from this court, the ability of NWAAF to act in accordance with our missions and beliefs, will be irreparably harmed. These actions include, but are not limited to, providing financial, transportation and logistical assistance to pregnant Idaho minors seeking legal abortions, with or without the knowledge or consent of their parents or guardians.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

DATED: July 24, 2023.

/s/ Megan Kovacs
Megan Kovacs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person:

Lincoln Davis Wilson
Lincoln.wilson@ag.idaho.gov

/s/ Wendy J. Olson
Wendy J. Olson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Lourdes Matsumoto Plaintiff, vs. Raul Labrador Defendant	Case No. 1:23−cv−00323−DKG **NOTICE OF ASSIGNMENT TO A UNITED STATES MAGISTRATE JUDGE AND CONSENT FORM**

In accordance with District of Idaho General Order No. 324, you are notified that the above entitled action has been assigned to a United States Magistrate Judge to conduct all proceedings in this case, including trial and entry of final judgment.

Exercise of this jurisdiction by a United States Magistrate Judge is, however, permitted only if all parties file a written consent form, a copy of which is part of this notice. You may also, without adverse consequences, request immediate reassignment to a District Judge. No Judge will be informed of a party's response to this notification, unless all parties have consented to the assignment of the matter to a United States Magistrate Judge. All parties are requested to return this form within 60 days of receipt to the Clerk of Court. Any party deciding to proceed before a United States Magistrate Judge should sign the consent to proceed form and return it to the Clerk of Court by e−mailing the same in .pdf format to the following address: consents@id.uscourts.gov. If you are a pro se litigant, you should mail this form to the following address: U.S. District Court, 550 W. Fort St. Room 400, Boise, ID 83724. The parties may submit a joint consent, similar to a stipulation, before or after receiving this Notice. If consents are not received from all parties, the case will be randomly reassigned to a District Judge in the District of Idaho. The parties should be aware, however, that the District Judge may reassign the case to a District Judge visiting from another District.

An appeal from a judgment entered by a United States Magistrate Judge will be directly to the United States Court of Appeals for the Ninth Circuit in the same manner as an appeal from any other judgment of this District Court. 28 U.S.C. § 636(c); Fed.R.Civ.P. 73.

CONSENT TO THE EXERCISE OF JURISDICTION
BY A UNITED STATES MAGISTRATE JUDGE

In accordance with provisions of 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and District of Idaho General Order No. 324, the undersigned party to this case consents to have a United States Magistrate Judge conduct any and all proceedings in this case, including the trial, and order the entry of a final judgment.

Party Represented	Signature	Date
_____	_____	_____

THE CONSENT PROCESS: WHAT IS IT?

In accordance with 28 U.S.C. § 636(c), FRCP 73, and Local Rule 73.1, a Magistrate Judge is available to preside over all aspects of this case, including the jurisdictional authority to:

- Schedule, hear, and decide all dispositive and non−dispositive matters;
- Schedule, hear, and decide all interlocutory matters;
- Conduct jury or non−jury trials;
- Enter final orders and judgment; and
- Decide all post−trial motions.

Appeals from any final order or judgment entered by a Magistrate Judge are directly to the United States Court of Appeals for the Ninth Circuit. See 28 U.S.C. § 636(c)(3); Fed. R. Civ. P. 73(c). However, a Magistrate Judge's exercise of this jurisdiction is permitted only if all parties voluntarily consent.

How Does It Benefit Me?

Speedy trial rights in felony criminal cases require the District's two District Judges to give priority to trying those cases, sometimes requiring that civil trial dates be moved. Magistrate Judges do not preside over felony criminal trials. As a result, a Magistrate Judge's trial docket is generally less crowded than those of the District Judges.

Magistrate Judges usually are able to provide earlier and firmer dates for both hearings and trials than might otherwise be possible by a District Judge. Because this District is very busy and the criminal docket is growing rapidly, consenting to proceed before a Magistrate Judge often means your civil case will be resolved more quickly than if before a District Judge.

Additionally, even if parties do not consent, the District Judge to whom the matter is assigned may nonetheless refer all pre−trial proceedings to a Magistrate Judge pursuant to 28 U.S.C. § 636(b), FRCP 73, and Local Rule 72.1. For any dispositive matters so referred, the Magistrate Judge will enter a Report and Recommendation for the District Judge's consideration. At that point, the review process by a District Judge generally takes 60 days. Thus, by consenting to Magistrate Judge jurisdiction at the outset, the parties also can avoid the delays and expense of this review process, while still preserving their appeal rights.

How Do I Consent?

After the case is filed, the Clerk of the Court will send the appropriate notice and consent form as provided by the General Order. The consent form affords each party an initial opportunity to consent to having a Magistrate Judge assume complete jurisdiction over the case, including trial and entry of judgment. Each party should make a decision whether to consent to or decline Magistrate Judge jurisdiction as soon as possible. The parties may also file a joint consent, similar to a stipulation, at any time.

You may, without adverse substantive consequences, withhold your consent, which would preclude Magistrate Judge jurisdiction. If any party withholds consent, the identity of the parties consenting and/or withholding consent will not be communicated to any Judge.

1. This insert is for information purposes only and is not intended to supersede the applicable rules, including General Order No. 324, addressing the consent process.

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE, Plaintiffs, v. RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho, Defendant.	Case No. 1:23-cv-323 WAIVER OF THE SERVICE OF SUMMONS Fed. R. Civ. P. (4) Judge Debora K. Grasham

To Wendy J. Olson, Attorney for Plaintiffs:

I have received your request to waive service of a summons in this action along with a copy of the complaint and this copy of the waiver form, with an advisement containing information about waiving or not waiving service of the summons (appended hereto).

The Office of the Attorney General agrees to save the expense of serving a summons and complaint in this case.

I understand that the Office of the Attorney General will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that the Office of the Attorney General must file and serve an answer or a motion under Rule 12 within 60 days from July 18, 2023, the date when this request was received. If I fail to do so, a default judgment will be entered against the Office of the Attorney General.

I agree to electronically transmit this executed waiver back to you forthwith for filing with the Court.

Date: July 18, 2023

STATE OF IDAHO
Office of the Attorney General

/s/ Lincoln Davis Wilson
Lincoln Davis Wilson
Division Chief, Civil Litigation and
Constitutional Defense
M: 208-809-1077

APPENDIX

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No.

COMPLAINT FOR DECLARATORY JUDGMENT

I. INTRODUCTION

Idaho has some of the most oppressive criminal abortion statutes in the United States. Its Total Abortion Ban, codified at Idaho Code § 18-622, was passed in 2020, prior to the U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 597 U.S. ___ (2022), and "triggered" when the *Dobbs* decision overruled *Roe v. Wade*, 410 U.S. 113 (1973). Under Idaho's Total Abortion Ban, "[e]very person who performs or attempts to perform an abortion . . . commits the crime of criminal abortion." Idaho Code § 18-622(2). Idaho's Total Abortion Ban initially had no exceptions. Not for rape, or incest, or to save the life of the pregnant person. Those were only affirmative defenses. Idaho Code § 18-622(3).[1] A Total Abortion Ban in Idaho wasn't enough. Understanding that many of Idaho's neighboring states continue to recognize a person's right to control their reproductive health, that Idahoans in need of reproductive health care services that might include abortion health care would travel to these states, and that other Idahoans and out-of-state reproductive health advocacy organizations would assist Idahoans obtain lawful abortion health care outside of Idaho, the Idaho Legislature acted again.

This time, under the guise of protecting parents' rights (a selective rationale in Idaho at best),[2] the Idaho Legislature passed, and Governor Brad Little signed, a statute seeking to isolate minors from those who might help them access abortion health care.[3] Specifically, the legislature

[1] The Idaho Legislature amended Idaho Code § 18-622(3) in 2023 to make the affirmative defenses into exceptions. *See* 2023 Idaho Laws Ch. 298 (H.B. 374).

[2] In the 2023 session, the Idaho Legislature also passed, and Governor Little signed, H.B. 71, 67th Leg., which banned gender affirming medical care for transgender minors, even where a parent wanted their child to receive such medical care. Two families of transgender girls have sued the state alleging, among other claims, that it violates parental rights. *See* Audrey Dutton, *Families of Transgender Teen Girls Sue over Idaho's Ban on Gender Care for Youth*, Idaho Capital Sun (June 1, 2023), https://idahocapitalsun.com/2023/06/01/families-of-transgender-teen-girls-sue-over-idahos-ban-on-gender-care-for-youth/.

[3] 2023 Idaho Laws Ch. 310 (H.B. 242).

criminalized adults who help minors travel for abortion care, if the adult has the intent to conceal the abortion from a parent or guardian. Apparently aware that they can't make abortions — or receipt of medications used in medical abortions — that occur in other states unlawful, they instead made it unlawful to provide travel assistance within Idaho, including helping minors reach or cross Idaho's borders. They call it abortion trafficking. Ignoring that some of the minors may seek an abortion because they were sexually abused by a parent or guardian, that they have consulted with trusted adults who support their position, or that they are actual victims of human trafficking, they instead seek to stop pregnant minors from crossing state lines to receive abortion health care.

The statute is unconstitutional. It is poorly written. It is vague and unclear in the conduct it prohibits. It infringes on the right to interstate travel, which United States Supreme Court Justice Brett Kavanaugh expressly stated was not implicated by *Dobbs*. It infringes on the right to intrastate travel. It infringes on First Amendment rights to speak about abortion and to associate and to engage in expressive conduct, including providing monies and transportation (and other support) for pregnant minors traveling within and outside of Idaho to access out-of-state legal abortion care. Plaintiffs, by contrast, are an individual and two organizations that seek to assist Idaho minors obtain reproductive health care that is lawful outside of Idaho — abortion, which necessitates some form of travel within Idaho to reach its borders. They now bring this civil action for declaratory and injunctive relief and allege as follows:

I. PARTIES

1. Plaintiff Lourdes Matsumoto is an individual and a resident of Idaho. She is an attorney who routinely works with victims of domestic and sexual violence, including minors. Her work includes representing victims of sexual violence resulting in pregnancy. In her work with minors who become pregnant, and in her individual capacity, she would like to discuss abortion options and assist minors in getting abortions in states where abortion remains legal, including by

transporting them or assisting them obtain transportation from Idaho to those states. Plaintiff Matsumoto fears prosecution under the Abortion Travel Ban.

2. Plaintiff Northwest Abortion Access Fund ("NWAAF") is an abortion fund, made up of a working board, paid staff, and trained volunteers. NWAAF serves Idaho, Oregon, Washington, and Alaska. NWAAF helps people in these states access abortion care in various ways, including by transporting them across state lines. In the last year, NWAAF has provided assistance to 768 people in the Pacific Northwest. Idahoans made up 166 of that group, some of whom were Idaho minors.

3. NWAAF, through its paid staff and trained volunteers, uses funds it raises to speak about abortion and to associate and to engage in expressive conduct, including providing monies and transportation (and other support) for pregnant minors traveling within and outside of Idaho to access out-of-state legal health care services, including abortion. NWAAF wishes to continue the assistance it provides but fears prosecution under the Abortion Travel Ban.

4. Plaintiff Indigenous Idaho Alliance ("IIA") is an Idaho 501(c)(3) non-profit. IIA is organized to serve Indigenous peoples. This includes serving the five tribes whose traditional, usual, and accustomed lands encompass territory within Idaho, and whose traditional, usual, and accustomed lands are often recognized as transecting and incorporating land within the U.S. state/Canadian provincial boundaries of Washington, Idaho, Montana, Nevada, Utah, Wyoming, California, British Columbia, and Alberta. This area has one of the highest *per capita* populations of Indigenous people in the political boundaries of the United States. IIA's work also includes serving Indigenous people from other tribes across the U.S. who are in this area and far from their reservations and homelands.

5. IIA Founder and Organizer tai simpson is a member of the Nimiipuu Nation, also called the Nez Perce Tribe of Idaho. The traditional, usual, and accustomed lands of the Nimiipuu people, like that of the other tribes whose territory encompasses land within Idaho, are often recognized as transecting and incorporating land within the U.S. state/Canadian provincial boundaries of Washington, Idaho, Montana, Wyoming, British Columbia, and Alberta.

6. Through IIA and to serve its mission, Founder and Organizer tai simpson and others affiliated with IIA have assisted pregnant people, including minors in Idaho, access abortion care across the traditional, usual, and accustomed lands of the Indigenous people they serve. IIA wishes to continue to provide this assistance but fears prosecution under the Abortion Travel Ban.

7. Defendant Raúl Labrador is the Attorney General for the State of Idaho and he is named in his official capacity. A state attorney general is the proper defendant where the state attorney general "intends either to enforce a statute or to encourage local law enforcement agencies to do so." *See Culinary Workers Union, Loc. 266 v. Del Papa*, 200 F.3d 614, 618–19 (9th Cir. 1999) (internal quotation marks and citation omitted). Defendant Labrador has authority to prosecute violations of Idaho Code § 18-623, at his sole discretion, if the authorized prosecuting attorney refuses to do so. Idaho Code § 18-623(4).

II. JURISDICTION AND VENUE

8. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343. This is an action to enforce civil and constitutional rights pursuant to 42 U.S.C. § 1983 and the United States Constitution.

9. This Court has authority to award the requested declaratory and injunctive relief under 28 U.S.C. §§ 2201, 2202, and 1343, Federal Rules of Civil Procedure 57 and 65, and the general legal and equitable powers of the Court.

10. Venue is appropriate under 28 U.S.C. § 1391(b) because the Defendant engages in his official duties within this District and because a substantial part of the acts or omissions giving rise to this action arose from events occurring within this District.

III. FACTUAL ALLEGATIONS

A. IDAHO ENACTS ITS ABORTION TRAVEL BAN.

11. "Abortion Trafficking" (the "Abortion Travel Ban") was first introduced in the Idaho Legislature on February 7, 2023, as Idaho House Bill 98, by Representative Barbara Ehardt. The bill was later amended and re-introduced as House Bill 242 ("H.B. 242") by Senator Todd Lakey and passed on March 30, 2023, with a 27–7–1 vote in the Idaho Senate and a 58–11–1 vote in the House.

12. Representative Ehardt repeatedly referred to the bill as a "parents' rights" bill. During a March 27, 2023 Senate State Affairs Committee hearing, she testified, "[l]et me just say a couple things from my perspective, this is a parental rights bill, it really, it's a parental rights bill and as we just basically lay this out, this does have to do with abortion trafficking and that would be taking a minor from, without parental permission, it's all about parental permission, taking a minor from Idaho and trafficking that minor to another state to receive an abortion."

13. H.B. 242 was signed into law on April 5, 2023, by Governor Brad Little. In a letter explaining his decision, Governor Little wrote that the law does not interfere with interstate travel; instead, it "seeks only to prevent unemancipated minor girls from being taken across state lines for an abortion without the knowledge and consent of her parent or guardian."[4]

[4] Ruth Brown, *'Abortion Trafficking' Bill Signed, Despite Washington Governor's Plea*, Idaho Reports (Apr. 5, 2023), https://blog.idahoreports.idahoptv.org/2023/04/05/abortion-trafficking-bill-signed-despite-washington-governors-plea/.

14. In response to a request from Washington Governor Jay Inslee to veto the Abortion Travel Ban, Idaho Governor Little again stated that the law does not criminalize interstate travel for reproductive care, but rather prevents minors from traveling across state lines for an abortion without parental consent.[5] Governor Little has further stated that Idaho has "the right and duty" to make laws regarding abortion after the overturning of *Roe*.

15. Due to its "emergency clause," H.B. 242 went into effect May 5, 2023, even though it was not an official part of the Idaho Code until July 1, 2023. It is codified at Idaho Code § 18-623.

16. Idaho Code § 18-623 provides that:

> **(1)** An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion, as described in section 18-604, Idaho Code, or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking. As used in this subsection, the terms 'procure' and 'obtain' shall not include the providing of information regarding a health benefit plan.
>
> "**(2)** It shall be an affirmative defense to a prosecution under subsection (1) of this section that a parent or guardian of the pregnant minor consented to trafficking of the minor.
>
> "**(3)** It shall not be an affirmative defense to a prosecution under subsection (1) of this section that the abortion provider or the abortion-inducing drug provider is located in another state.
>
> "**(4)** The Idaho attorney general has the authority, at the attorney general's sole discretion, to prosecute a person for a criminal violation of this section 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.
>
> "**(5)** Any person who commits the crime of abortion trafficking, as provided in subsection (1) of this section, shall be punished by imprisonment in the state prison for no less than two (2) years and no more than five (5) years.

[5] While parental consent is an affirmative defense to prosecution under the Abortion Travel Ban, nothing within the Abortion Travel Ban requires parental consent.

17. Idaho Attorney General Raúl Labrador has made clear that he is willing to enforce Idaho criminal abortion statutes even where any abortion occurs in another state. In a now-"rescinded" legal opinion letter dated March 27, 2023, he stated that medical professionals who refer pregnant patients across state lines for either medical or chemical abortions violate Idaho Code § 18-622(2), Idaho's Total Abortion Ban.

18. He also opined that the Abortion Travel Ban, which he noted provides him with the authority to prosecute violations, is constitutional. *See* Constitutionality of H.B. 242, Op. Att'y Gen. (Mar. 13, 2023).

B. THE ABORTION TRAVEL BAN HAS HARMFUL EFFECTS.

19. Idaho's draconian abortion statutes — the worst in the nation — have harmed Idahoans' reproductive health and their options for reproductive health care. Idaho trails far behind other states regarding its number of physicians per capita.[6] A January 2023 report by the Idaho Department of Health and Welfare shows that 98.2% of areas in Idaho have a primary care professional shortage.[7] Indeed, Idaho has the fewest active physicians in the United States.[8]

[6] *Understanding Idaho's Doctor Shortage*, Boise State Public Radio, https://bit.ly/3doQyFO (last visited Apr. 20, 2023).

[7] Idaho Dep't Health & Welfare, *Bureau of Rural Health & Primary Care Brief* (Jan. 2023), https://bit.ly/3QEEcrp.

[8] *See* Association of American Medical Colleges, *2021 State Physician Workforce Data Report* (Jan. 2022), https://store.aamc.org/downloadable/download/sample/sample_id/506/. Idaho is also the only state "without a legal requirement or specialized committee to review maternal deaths related to pregnancy." Natalie Schachar, *As US maternal mortality rates surge, Idaho abandons panel investigating pregnancy-related deaths*, Idaho Capital Sun (June 30, 2023), https://idahocapitalsun.com/2023/06/30/as-us-maternal-mortality-rates-surge-idaho-abandons-panel-investigating-pregnancy-related-deaths.

20. Idaho is also one of the states most affected by the nationwide OB-GYN shortage.[9] Its abortion statutes criminalizing and chilling reproductive health care have OB-GYNs fleeing the state,[10] and at least two hospitals closing their labor and delivery departments.[11] This shortage is exacerbated by the lack of an OB-GYN residency program in Idaho,[12] meaning that every OB-GYN physician must be recruited to Idaho from out of state. Few are willing to work in a state where they face criminal prosecution for providing reproductive health care routine in other states.

21. Some health care providers and clinics that provide a full array of reproductive health services, including abortion services, have modified their operations to comply with Idaho's Total Abortion Ban and still provide all appropriate reproductive health care services to persons in Idaho and the Pacific Northwest. Idaho's Total Abortion Ban has not changed the number of people seeking abortion care, it just changed where Idahoans must go to receive abortion care.

22. For example, Planned Parenthood has opened a clinic in Ontario, Oregon, that provides full reproductive health services, including abortions. Ontario is 53 miles west of Boise

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[9] U.S. Dep't of Health & Human Servs. et al., Projections of Supply and Demand for Women's Health Service Providers: 2018-2030 (Mar. 2021), https://bit.ly/3PhGagh (projecting demand of OB-GYNs to exceed supply in Idaho).

[10] Kylie Cooper, *I Came to Provide Care for Complicated Pregnancies; I'm Leaving Because of Idaho's Abortion Bans*, Idaho Capital Sun (Feb. 10, 2023), https://idahocapitalsun.com/2023/02/10/i-came-to-provide-care-for-complicated-pregnancies-im-leaving-because-of-idahos-abortion-bans/.

[11] Press Release, Bonner General Health, Discontinuation of Labor & Delivery Services at Bonner General Hospital (Mar. 17, 2023), https://bonnergeneral.org/wp-content/uploads/2023/03/Bonner-General-Health-Press-Release-Closure-of-LD-3.17.2023.pdf; Press Release, Valor Health, Discontinuation of Labor & Delivery Services at Valor Health Hospital (Mar. 29, 2023), https://www.valorhealth.org/wp-content/uploads/2023/03/Press-Release-3.29-scaled.jpg (notice that as of June 1, 2023, Valor Health Hospital is no longer offering labor and delivery services).

[12] Kelcie Moseley-Morris, *Idaho Medical School Director to Budget Committee: Residencies Still a Challenge for Students*, Idaho Capital Sun (Jan. 27, 2023), https://bit.ly/43IenOC (noting Idaho lacks residencies in pediatrics and OB-GYN).

along Interstate 84, and the most practical way to get there is by car since there is no public transportation on that route.

23. In addition to modifying their operations, many out-of-state health care providers who offer abortion services have seen a dramatic increase in the number of patients coming from Idaho for abortion care. Although there have been fewer abortions performed in Idaho since *Roe* was overturned, there has been an increase in abortions performed in Idaho's neighboring states, according to data from the Society of Family Planning.[13] Washington and Oregon saw an increase in abortions of 1,490 and 1,320, respectively.[14] Additionally, Nevada performed 2,580 more abortions than before.[15] Patients who reside in states where abortion care is severely restricted, or banned entirely, are forced to travel out of state to get the abortion care they need, which in turn places a strain on abortion care providers in states where abortion is legal.

24. The inherent barriers of out-of-state travel coupled with the finite number of abortion providers has resulted in a significant strain for out-of-state providers. Planned Parenthood clinics in Central and Eastern Washington experienced an overall 56% increase in abortion patients coming from Idaho in 2023 compared to the year before.[16]

25. This influx of patients traveling from Idaho seeking abortion care out of state is particularly heightened at Planned Parenthood clinic locations that offer in-clinic abortions (also known as surgical abortion) in addition to medication abortion. The Planned Parenthood clinic in Kennewick, Washington, which is 130 miles from Lewiston, Idaho, offers in-clinic abortion

[13] Danny Westneat, *In the WA v. Idaho Abortion Wars, Data Shows Idaho Is Losing*, Seattle Times (June 28, 2023), https://www.seattletimes.com/seattle-news/politics/in-the-wa-v-idaho-abortion-wars-data-shows-idaho-is-losing.

[14] *Id.*

[15] *Id.*

[16] *Id.*

services. That location saw a 4,450% increase in patients coming from Idaho within the first five months of 2023 (91 versus 2, respectively).[17]

26. Minors will need to rely on trusted adults to drive them from Boise, or other cities in the Treasure Valley, to the Planned Parenthood clinic in Oregon, where minors may get an abortion without parental consent if they are over age 15, or to the Planned Parenthood clinic in Washington, where minors may get an abortion without parental consent. Minors may need to rely on trusted adults for advice regarding reproductive health options, including abortion, where those options are available and legal, and how and from whom to obtain transportation. Under Idaho Code § 18-623, the simple act of driving a minor to the Oregon border to get an abortion without the minor's parent or guardian knowing — or even providing advice on how to do that — could result in a mandatory minimum of two years and up to five years in prison.

27. Pregnancy, childbirth, and parenting significantly impact an individual's physical and mental health, finances, and personal relationships. The decision to impact one's health with a pregnancy or to become a parent is extremely personal and permanent. An intimate decision of this magnitude must be left to the individual to determine without governmental interference, regardless of age. While parents and guardians most times will provide guidance to minors on these life altering decisions, not all minors have a strong, trusting, or stable relationship with a parent or guardian.

28. Guided by their individual health needs, values, and circumstances, minors may seek guidance and help about abortion from other trusted adults for a variety of deeply personal reasons, including medical, familial, and financial concerns. Those reasons can include preserving

[17] Annette Carey, *Huge out-of-state surge in E. Washington abortions since Idaho, Texas bans*, Tri-City Herald (June 26, 2023), https://www.tricityherald.com/news/local/article276713511.html (noting increase in out of state abortions).

their health, financial concerns about the ability to work or go to school while pregnant or parenting, complicated family circumstances, or facts related to how the minor became pregnant. Without the ability to ask for help from their chosen trusted adult regarding their health, including the risks of continuing a pregnancy, minors will lose the right to make critical decisions about their health, bodies, and lives.

29. If adults cannot assist minors in accessing safe abortion care out of state, and if minors cannot otherwise make the trip out of state because of uncertainty of how to access that care, the Abortion Travel Ban will force some minors to terminate their unwanted pregnancies outside a clinical setting, which would not be the preferred choice for some of these minors.

30. Although many minors faced with an unintended pregnancy choose to involve their parents, many do not. There are minors who cannot or do not have access to their parents. There are minors who are afraid to anger or disappoint their parents, as well as those who face the threat of violence in their homes. For many minors, it is best to seek the help of a trusted adult who is not a parent or guardian. Young people are the ones in the best position to decide whom they trust to involve in their care. The Abortion Travel Ban will delay or prevent pregnant minors' access to abortion, which in turn will endanger their health and safety. Additionally, this law has and will continue to have a chilling effect on adults who are supportive of a young person's choice to have an abortion but are hesitant to help because they are concerned about going to prison.

31. History has shown that requiring parental involvement for abortion care can increase the risk of harm or abuse, delay care, and lead minors to seek out dangerous alternatives.[18]

[18] Sophia Naide, *"Parental Involvement" Mandates for Abortion Harm Young People, But Policymakers Can Fight Back*, Guttmacher Institute (Feb. 19, 2020),

32. Indeed, when abortion was a recognized constitutional right, Idaho, like other states, had judicial bypass statutes that allowed pregnant minors to obtain abortions in Idaho without parental consent to address precisely these potential harms. Idaho Code § 18-609A(1)(b) (2015). If a pregnant minor in Idaho is not in a situation where that minor can go to a parent, can no longer seek judicial bypass, and trusted adults cannot help without fear of prosecution, who can a pregnant minor turn to for help?

33. The risk of abuse is especially acute for the Black, Indigenous, People of Color ("BIPOC"), and LGBTQ+ communities. There are already great healthcare disparities for historically marginalized communities in anti-abortion states. These states tend to limit access to health care, lack choices for effective birth control, and have ineffective and inadequate sex education curriculum in schools. The Abortion Travel Ban will result in a disproportionately negative impact on persons in these same marginalized groups, who will likely have the hardest time traveling to neighboring states to terminate pregnancies and may struggle to raise children they otherwise would not have chosen to have.

34. Incidents of sexual violence go unreported to law enforcement at a significantly higher rate than other violent crimes, with less than 25% reported overall. While the reasons for a

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https://www.guttmacher.org/article/2020/02/parental-involvement-mandates-abortion-harm-young-people-policymakers-can-fight-back#:~:text=Research%20also%20shows%20that%20most,people%20by%20delaying%20medical%20care.HYPERLINK "https://www.reuters.com/article/us-health-teens-abortions/parental-notification-law-appears-to-limit-delay-abortions-dUSKBN1EJ0QO"https://www.reuters.com/article/us-health-teens-abortions/parental-notification-law-appears-to-limit-delay-abortions-idUSKBN1EJ0QO;

survivor to not report a sexual assault are varied, one of the top cited reasons is distrust and fear of law enforcement, according to a poll conducted by the Rape and Incest National Network.[19]

35. This distrust and fear of law enforcement is especially heightened in BIPOC individuals whose communities experience a disproportionate rate of criminalization and police harassment. A 2022 Gallup poll among American adults found that while 53% of White Americans have "a great deal" or "quite a lot of confidence" in the police, only 30% of non-White Americans share that same trust.[20]

36. The distrust and fear of law enforcement from survivors of sexual violence, coupled with that same distrust towards the police from BIPOC communities, significantly reduces the likelihood that a minor from a BIPOC community who is pregnant as a result of sexual violence will report this act to the police.[21]

37. The Abortion Travel Ban also negatively and disproportionally impacts victims of Intimate Partner Violence (IPV). Along with other forms of abuse, those enduring IPV are often the subject of "reproductive coercion."[22] The American College of Obstetricians and

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[19] Moira Donegan, '*Who Will Protect You from Rape Without Police?' Here's My Answer to That Question*, Guardian (June 17, 2020), https://www.theguardian.com/commentisfree/2020/jun/17/abolish-police-sexual-assault-violence.

[20] Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS NewsHour (June 5, 2020), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do#:~:text=white%2Damericans%2Ddo-,Two%2Dthirds%20of%20black%20Americans%20don%27t%20trust%20the%20police,Most%20white%20Americans%20do.&text=Nearly%20half%20of%20black%20Americans,NewsHour%2DNPR%2DMarist%20poll; https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx

[21] Donegan, *supra* note 19.

[22] Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 81 Contraception 316, 316–17, note 23 (Jan. 29, 2010); Anne M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United*

Gynecologists recognizes reproductive coercion as behavior that interferes with contraception use and pregnancy, often involving sabotage of contraceptive methods, sexual coercion, and pregnancy pressure.

38. This can include hiding, withholding, or destroying oral contraceptives; breaking or damaging condoms on purpose; removing condoms during sex as an attempt to promote pregnancy; not withdrawing when that was the agreed upon method of contraception; removing vaginal rings, contraceptive patches, or intrauterine devices; and may include coercing a woman into sex, into unprotected sex, or into pregnancy. Additionally, it can include coercing a woman to have an abortion, or, conversely, taking steps to prevent a woman from having an abortion, such as restricting her travel or money in a way that would prevent her from accessing a lawful abortion.[23] Reproductive coercion can involve using rape to force victims into unwanted pregnancies to increase dependency and make it harder for the survivor to escape.

39. When the National Domestic Violence Hotline surveyed over 3,000 women seeking help, more than 25% reported that their abusive partner sabotaged birth control and tried to coerce pregnancy.[24]

States, 70 Soc. Sci. & Med. 1737, 1738 note 23 (2010); *see also ACOG Committee Opinion No. 554: Reproductive and Sexual Coercion*, 121 Obstetrics & Gynecology 411, 411–15 (2013, *reaffirmed* 2022), https://www.acog.org/- /media/project/acog/acogorg/clinical/files/committee-opinion/articles/2013/02/reproductive-and-sexual-coercion.pdf.

[23] Ann L. Coker, *Does Physical Intimate Partner Violence Affect Sexual Health? A Systematic Review*, 8 Trauma, Violence, & Abuse 149, 151–53 (2007); *see also* Miller et al., *supra* note 22, at 319; Lauren Maxwell et al., *Estimating the Effect of Intimate Partner Violence on Women's Use of Contraception: A Systematic Review and Meta- Analysis*, 10 PLoS One 1 (2015); Moore et al., *supra* note 22; Sanctuary for Families, *Access to Abortion – A Lifeline for Survivors of Domestic Violence* (June 24, 2022), https://sanctuaryforfamilies.org/abortion-domestic-violence.

[24] Nat'l Domestic Violence Hotline, *1 in 4 Callers to the National Domestic Violence Hotline Report Birth Control Sabotage and Pregnancy Coercion* (Feb. 15, 2011), https://www.thehotline.org/news/1-in-4-callers-to-the-national-domestic-violence-hotline-report-birth-control-sabotage-and-pregnancy-coercion/; *see also* Heike Thiel de Bocanegra et al., *Birth*

C. PLAINTIFFS SEEK TO ASSIST MINORS IN OBTAINING LAWFUL ABORTION SERVICES.

40. The Plaintiffs are individuals and organizations with long histories of serving as trusted adults for minors who find themselves pregnant. They associate with pregnant minors as a show of solidarity, communicating a message to minors who find themselves pregnant. That message is often that minors are not alone. Plaintiffs' support also communicates a message to those who may seek to isolate and abuse minors that these minors will have the support of trusted adults.

41. While each Plaintiff has a slightly different message and mission, each Plaintiff engages in protected First Amendment activities to share and support these messages and missions. Each Plaintiff also seeks to convey accurate and complete information about minors' lawful options when faced with a pregnancy. Such options could include where and how to obtain a lawful abortion; how to get there; support with childcare and other needs; payment for abortion health care services; food assistance in transit; and often involve offering to drive the minor wherever the minor needs to go, if that minor is without transportation, in order for the minor to investigate and follow through with a reproductive decision.

42. Each of the Plaintiffs wishes to drive pregnant minors within the State of Idaho in furtherance of securing, for those who desire it, lawful abortion medical care, as one of many important services offered.

43. Plaintiff Matsumoto is an attorney who works with survivors of domestic and sexual violence, including minor survivors. As a result of this violence, some of these survivors, including minors, have become pregnant. In both her professional and private capacities, she

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Control Sabotage and Forced Sex: Experiences Reported by Women in Domestic Violence Shelters, 16 Violence Against Women 601 (2010).

wishes to assist those persons, including minors, access legal abortion services outside of Idaho. Although she is trained as a lawyer and has been practicing law for several years, she is unsure what conduct in that process would violate Idaho Code § 18-623. Plaintiff Matsumoto is driven by her belief in bodily autonomy for every citizen, including minors, and her words and actions seek to convey this belief.

44. Plaintiff NWAAF is a non-profit entity comprised of a working board, paid staff, and trained volunteers that provides emotional, financial, logistical, practical, and informational assistance to those who may become pregnant and need or choose to consider abortion as an option. NWAAF serves Idaho, Oregon, Washington, and Alaska. It is the only independent abortion fund in the Pacific Northwest. NWAAF's assistance includes the provision of travel funds, travel logistics and organization, and actually driving patients to abortion providers. NWAAF's work and travel assistance extends to minors, including driving minor patients to abortion providers.

45. NWAAF's work includes booking and directly paying for bus tickets, plane tickets, and ride shares, as well as providing adult volunteers to drive patients, including minor patients, to abortion appointments in states where abortion is legal. NWAAF also provides food assistance, funding to abortion providers for their work, and lodging assistance. NWAAF provides this assistance to both adults and minors in the State of Idaho.

46. In the last year, NWAAF has provided this assistance to 768 people in the Pacific Northwest. Idahoans made up 166 of that group, some of whom were Idaho minors.

47. When transporting or facilitating transportation for minors, NWAAF does not seek or obtain parental consent. Parents and guardians may or may not know about or approve of NWAAF's support of these minors. Idaho Code § 18-623 directly impacts the mission and the work of NWAAF.

48. As NWAAF noted after Governor Little signed H.B. 242 into law, "Many minors do not have supportive or safe parents or guardians in their lives who they can ask to help them get an abortion. It's remarkable that lawmakers believe that young Idahoans don't have the capacity to make reproductive healthcare choices for themselves or deserve bodily autonomy, but believe that those same young people should have the capacity to raise and care for children on their own, without any major social or economic support."

49. NWAAF wishes to continue funding legal, out-of-state abortions for pregnant minor Idahoans, including by directly paying and/or reimbursing out-of-state licensed providers of abortion services and providing financial aid to pregnant minor Idahoans for that purpose.

50. NWAAF wishes to continue providing informational materials and planning assistance (such as organizing and funding transportation and lodging) to pregnant minor Idahoans for obtaining legal, out-of-state abortions.

51. NWAAF wishes to continue transporting pregnant minor Idahoans to out-of-state licensed providers of safe, legal abortions.

52. NWAAF's working board, paid staff, and trained volunteers are concerned that continuing these efforts may subject them to prosecution under Idaho Code § 18-623.

53. Among the priorities of IIA is seeking justice for the Missing and Murdered Indigenous People (MMIP) and their families. IIA is aware that in the United States, Indigenous women and girls are the victims of gender-based violence at a statistical rate twice that of Anglo-American women and girls.

54. In the experience and observations of IIA, unwanted pregnancy or coercive pregnancy is often the result of the high rate of gender-based violence, which includes rape, experienced by Indigenous women and girls. The Indigenous women and girls who face unwanted

and coerced pregnancy are then often victims of further violence to conceal the crime of rape or to punish them for seeking protection, self-care, or reproductive health care including abortion care.

55. IIA has provided direct assistance or financial assistance for pregnant minors seeking abortion care, with awareness that the pregnant minor's parents do not know about the minor's intent to seek abortion care. In some instances where it is providing assistance, IIA knows, or has reason to believe, that a parent or sibling or other close relative is the perpetrator of the sexual violence that caused the minor to become pregnant. In some instances where it is providing assistance, IIA knows, or has reason to believe, that a person of authority such as a law enforcement officer, or teacher, or coach, etc., is the perpetrator of the sexual violence that caused the minor to become pregnant. Thus, in these instances, IIA believes it is unsafe and harmful to the pregnant minor to disclose information to the pregnant minor's parent or guardian.

56. Plaintiff IIA is driven by their desire to serve the storied culture of their people through trust-based mutual care and aid, which includes ensuring access to abortions, including access for minors. All of their words and actions are in furtherance of these beliefs.

57. All Plaintiffs support and aid pregnant minors at a difficult time in their lives. They lend their support, time, and money, so that young people can make informed decisions—based on accurate information—without judgment and without concern that they or their families may lack the resources to carry out the decisions those young people wish to make. Plaintiffs provide this assistance at moments when time is of the essence, and when young people might feel they have nowhere to turn for a host of complicated and deeply personal reasons.

D. THE U.S. CONSTITUTION REQUIRES THAT CRIMINAL STATUTES PROVIDE ADEQUATE NOTICE OF WHAT CONDUCT IS PROHIBITED.

58. The United States Constitution's guarantee of due process requires that the Plaintiffs have fair notice of which activities are lawful and which activities may put them within

the crosshairs of law enforcement. It violates due process to force Plaintiffs to operate in a regulatory framework that is so standardless that it invites arbitrary enforcement and chills lawful conduct.

59. The government violates the Fourteenth Amendment's due process guarantee by taking a person's life, liberty, or property under a criminal law that is so vague that it "fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595-96 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). A criminal statute violates the "fair notice" requirement if it fails to give a person of ordinary intelligence fair notice that her contemplated conduct is forbidden by the statute. *United States v. Adams*, 343 F.3d 1024, 1035 (9th Cir. 2003); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

60. Idaho Code § 18-623 lacks clarity, fails to provide fair notice of the conduct it punishes, and invites arbitrary enforcement. It is vague both in scope and effect. Under the present statute, adults who have been helping and mentoring youth will now be in the precarious position of navigating a confusing law while trying to help a pregnant minor who has nowhere else to turn and must make a decision in a short period of time.

61. In the Idaho Legislature's rush to block persons in Idaho from traveling to other states where abortion care is lawful, they have created a statute that makes unclear when lawful mentoring support stops, and unlawful conduct begins. A person of ordinary intelligence must discern what is helpful information regarding abortion for a pregnant minor and what constitutes recruiting; she must determine when an in-person meeting with that

person becomes harboring. And she must hope that the line she draws in her own mind is the same line that law enforcement and prosecutors draw.

62. The statute purports to make criminal where one "procures" an abortion or "obtains" an abortion-inducing medication, both completed acts, but also purports to prohibit actions that occur well before an abortion takes place such as recruiting, harboring, or transporting. A person of ordinary intelligence would be unable to identify at what point she violates the statute, and at what point ordinary counseling or mentoring a pregnant minor, or traveling with such a minor within Idaho, may cross a line into attempt.[25]

63. The statute also fails to provide adequate notice regarding what culpability attaches to communication or the lack thereof with a pregnant minor's parents and/or guardians. The statute's intent provision fails to provide adequate notice regarding whether the intent to conceal must be directed at one or more parent, and whether there is an affirmative defense if one parent provided consent but the other did not.

64. Indeed, although Representative Ehardt and Governor Little described the Abortion Travel Ban as criminalizing an abortion without parental consent, the lack of parental consent is not an element of the offense. Rather, parental consent is only an affirmative defense. Thus, an adult who obtains consent still violates the statute and can assert the defense of parental consent only after the fact.

65. Even the Idaho legislators who sponsored H.B. 242 are unsure when a violation occurs, or even what constitutes a violation. In an exchange with another state senator at the March 27, 2023 Senate State Affairs Committee hearing, Senator Lakey acknowledged that

[25] Idaho Code § 18-306 provides that "[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof" is punishable for the attempt.

"recruiting, harboring and transporting, those are descriptive words, I guess the court would have to decide if the conduct constitutes one of those three things."

66. A law that requires *a court* to decide after the fact whether conduct violates the law is not one that puts an ordinary person on notice of what it prohibits.

67. Plaintiff Matsumoto is unsure of what conduct Idaho Code § 18-623 prohibits. But for the statute's lack of clarity over whether she would be prosecuted, she would assist minors in traveling to Oregon or Washington getting abortions in states where abortion remains legal.

68. Plaintiffs NWAAF and IIA likewise are unsure of what conduct Idaho Code § 18-623 prohibits. They wish to continue all of their activities that assist pregnant Idaho minors in obtaining abortions in states where abortion is legal but are uncertain whether they will be prosecuted for such actions.

E. THE U.S. CONSTITUTION GUARANTEES AND PROTECTS PLAINTIFFS' RIGHT TO TRAVEL FREELY AMONG AND ACROSS STATE BORDERS.

69. "[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901 (1986) (citation omitted). Recognition of the right to travel dates to the earliest period of self-government in the United States, under the Articles of Confederation, Article IV, which guaranteed the right of "free ingress and regress to and from" neighboring states.

70. A state may not unreasonably burden a person's right to (1) enter and leave that state, (2) be treated fairly when temporarily present in another state, or (3) be treated the same as other citizens of a state when moving there permanently. *Saenz v. Roe*, 526 U.S. 489, 500 (1999). At issue here is the ability to enter and leave the state.

71. Plaintiffs are having their rights to interstate and intrastate travel infringed in two ways by the Abortion Travel Ban. First, the vagueness of the statute impermissibly chills their

right to travel. Second, any interpretation of the statute facially deprives them of their right to travel.

72. As described above, Plaintiffs need to know what is prohibited by this law so that they can comply with it. The law is so uncertain that Plaintiffs cannot tell if it is criminal to operate a motor vehicle on the streets and highways of Idaho because a pregnant minor is in the car, and Plaintiffs' own rights to travel are implicated and effectively chilled.

73. Any of the many interpretations of the Abortion Travel Ban imposes a clear government action intended to stop travel to another state of both the young person and an adult. The state may not constitutionally ban the use of its roads and highways for the purpose of preventing people from exercising their constitutional rights, particularly when that travel is to exercise lawful rights in other states.

74. Idaho Code § 18-623 applies to every foot of highway and street in Idaho, making this ban necessarily an interstate travel ban, as it prevents Plaintiffs and pregnant minors from traveling within Idaho to reach a state where abortion is lawful.

75. The legislative history shows that impeding travel is the primary objective of Idaho Code § 18-623. Governor Little repeatedly referred to H.B. 242 as criminalizing interstate travel to access abortion services. Idaho legislators also made it clear that the purpose of this bill is to criminalize "putting a pregnant person in your car and travelling up to the border."

76. This right to travel is not only a right to travel interstate but a recognized right to travel intrastate, sometime referred to as the right to movement. Of the four circuits that have squarely decided cases about the right to intrastate travel, three have recognized such a right.[26] The

[26] *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971); *Selevan v. New York Thruway Auth.*, 584 F.3d 82 (2d Cir. 2009); *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990);

Idaho Supreme Court has also recognized the right to operate a motor vehicle on public streets and highways as constitutionally protected. *Adams v. City of Pocatello*, 416 P.2d 46, 48 (1966).

77. Idaho legislators who supported H.B. 242 made clear that their objective is to punish lawful activity outside of Idaho by criminalizing the routine act of travel within Idaho's borders. Senator Lakey made clear that H.B. 242 targets *intrastate* conduct. "We have the authority and the obligation and the opportunity to establish criminal laws in Idaho, . . . [i]t doesn't happen when they cross the state line. It happens when they take the furtherance and act in this capacity to facilitate and procure an abortion, and then get that minor to travel within the state to pursue that abortion."[27]

78. Senator Lakey confirmed that position in an exchange with another senator at the March 27, 2023 Senate State Affairs Committee hearing:

> Sen. James Ruchti: Thank you Mr. Chairman and Senator Lakey, I'm, I'm just fascinated by this concept of making unlawful the travel across state lines. Because we, we do have an act in the travel to state that's legal, in Idaho it's illegal, could the prohibition on travel across state lines to obtain services that are illegal in the travel to state, but legal, excuse me, illegal in Idaho, but legal in the travel to state be used in other areas like purchasing marijuana for example?
>
> Sen. Todd Lakey: Mr. Chairman and Senator Ruchti, let me make sure we're clear, on lines 19 and 20, we're talking about the recruiting, harboring, or transporting for the attempt to procure or in the furtherance of the procurement

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Ramos v. Town of Vernon, 353 F.3d 171 (2d Cir. 2003); *Lutz v. City of York, Pa.*, 899 F.2d 255 (3d Cir. 1990); *Wardwell v. Bd. of Educ. of City Sch. Dist. of City of Cincinnati*, 529 F.2d 625 (6th Cir. 1976); *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002); *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016); *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768 (10th Cir. 2010) (finding no right); *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020) (finding no right). The Ninth Circuit has yet to decide whether there is such a right. *Potter v. City of Lacey*, 46 F.4th 787 (9th Cir. 2022); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997). The Plaintiffs in this case ask this Court to recognize this right and find it infringed by the Abortion Travel Ban.

[27] Kelcie Moseley-Morris, *Nation's First Interstate Abortion Ban Bill Awaits Idaho Governor's Signature*, Idaho Capital Sun (Mar. 30, 2023), https://idahocapitalsun.com/2023/03/30/nations-first-interstate-abortion-ban-bill-awaits-idaho-governors-signature/.

> of an abortion unlawful in Idaho. But, it, it, it's the activity that occurs within the state, not the transport across state lines. That's um, it, it says transporting the pregnant minor within the state commits the crime. So it's not the across state lines portion. And what we're saying is, abortion is illegal in Idaho, if you're furthering that, without the knowledge of the parents, then that conduct is illegal.
>
> Sen. James Ruchti: Thank you Mr. Chairman and Senator Lakey, but that's what fascinates me. Is because, in putting a pregnant person in your car and travelling up to the border, you haven't committed a crime at all, there's no crime that's been committed, so how is that made illegal?
>
> Sen. Todd Lakey: Mr. Chairman and Senator Ruchti, as a legislature, we define what crimes are in Idaho, so in this case, we are saying that conduct constitutes a crime.
>
> Sen. James Ruchti: And so, by that same reasoning, if you put somebody in your car with the intent of heading to Oregon to go purchase marijuana, we, the state legislature, under this reasoning, could make traveling from Boise to the border illegal?
>
> Sen. Todd Lakey: Mr. Chairman and Senator Ruchti, yes, if we decide to go down that road.

Mar. 27, 2023 Meeting of Senate State Affairs Committee, Audio/Video recording at 0:34:17 - 0:36:44;https://lso.legislature.idaho.gov/MediaPub/2023/AgendaMinutes/230327_ssta_0800AM-Minutes.pdf.

79. Idaho Code § 18-623 is nothing more than the Idaho Legislature preventing minors from accessing abortion care that is legal in Idaho's neighbor states by criminalizing a trusted adult's travel. The age of consent to get an abortion in Oregon is 15, and a minor can get an abortion without parental consent in Washington.

80. Even worse, Idaho Code § 18-623 raises the specter of an enforcement scheme that targets "attempt" conduct and casts a wide net, including traffic stops of reproductive age female minors, in an effort to stop pregnant minors traveling to another state from even reaching the border.

81. For Plaintiffs and others similarly situated who seek to travel through Idaho and across state lines to assist pregnant minors in receiving lawful abortion care in neighboring states,

their own right to travel is infringed. They are prohibited from traveling to engage in lawful conduct in another state.

F. THE U.S. CONSTITUTION PROTECTS PLAINTIFFS' RIGHTS TO FREELY ASSOCIATE, SPEAK, AND FUND OTHERS' TRAVEL ACROSS STATE BORDERS.

82. Plaintiffs have First Amendment rights to associate freely with each other and with pregnant Idahoans, to provide information, and to engage in expressive conduct, including providing funding or practical support for pregnant Idahoans traveling to access out-of-state services that are legal where rendered, including abortion. U.S. Const. amends. I, XIV; *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1193 (9th Cir. 2018).

83. Pregnant Idahoans, including those who seek Plaintiffs' assistance, have constitutional rights to receive information from Plaintiffs and to travel to states where full reproductive health care—including abortions—is legal.

84. Plaintiff NWAAF's and Plaintiff IIA's use of funds in furtherance of their missions is considered speech and is protected by the First Amendment.

85. All Plaintiffs' provision of information regarding abortion access to pregnant persons in Idaho, including pregnant minors, is likewise speech and is protected by the First Amendment. *See Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975). Idaho Code § 18-623 infringes on these rights by criminalizing speech about lawful activity.

86. Charitable donations are a protected form of freedom of speech and association under the First Amendment. Organizations and their donors have a strong privacy interest in their affiliation—including the funding relationship—that is grounded in the First Amendment.

87. A law that subjects donors or volunteers to prosecution on the basis of their exercise of First Amendment rights (such as donating funds and/or time to a charitable organization)

violates the First Amendment, even if the organization itself were accused of illegal activity. *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966).

88. To the extent Idaho Code § 18-623's prohibition on "procuring" or "obtaining" an abortion by "recruiting, harboring, or transporting" encompasses activities funded by Plaintiffs' donors, Idaho Code § 18-623 infringes on the donors' First Amendment rights.

89. Idaho Code § 18-623 criminalizes only speech that supports those seeking abortion care. Under the First Amendment, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Aschcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
(Idaho Code § 18-623 Is Unconstitutionally Void for Vagueness)

90. Paragraphs 1 through 89 are realleged and incorporated as if fully set forth herein.

91. The Fourteenth Amendment to the United States Constitution prohibits a state from depriving a person of property without due process of law.

92. A criminal law that is so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement, violates due process.

93. Idaho Code § 18-623 is unconstitutionally vague because it lacks clarity, fails to provide fair notice of the conduct it punishes, and invites arbitrary enforcement.

94. Idaho Code § 18-623 prohibits "recruiting" and "harboring," but Plaintiffs Matsumoto, NWAAF, and IIA are unable to determine under these vague terms where lawful mentoring support stops, and unlawful conduct begins.

95. Plaintiffs Matsumoto, NWAAF, and IIA are unable to determine what is helpful information regarding abortion for a pregnant minor and what constitutes recruiting. They

cannot tell what conversations with a pregnant minor are permissible, and what conversations violate the statute. If Plaintiffs inform a pregnant minor that the Planned Parenthood clinic in Ontario provides abortion services, are they recruiting?

96. Plaintiffs Matsumoto, NWAAF, and IIA are unable to determine when an in-person meeting with a pregnant person becomes harboring, particularly if that in-person meeting occurs relatively near an Idaho border.

97. Idaho Code § 18-623 criminalizes conduct by an adult acting with the "intent to conceal" the abortion from a pregnant minor's "parents or guardian." Plaintiffs Matsumoto, NWAAF, and IIA are unable to determine what contact, lack of contact, communication, or lack of communication, with a pregnant minor's parent, parents, or guardian constitutes an intent to conceal, nor whether that communication must be with all parents and guardians.

98. Idaho Code § 18-623 also provides an affirmative defense if a "parent or guardian . . . consented to [the] trafficking." Plaintiffs Matsumoto, NWAAF, and IIA are unable to determine what contact, lack of contact, communication, or lack of communication, with a pregnant minor's parent, parents, or guardian constitutes an affirmative defense, whether that communication must be with a single parent or guardian, and to what activity the parent or guardian must consent.

99. For these reasons, Idaho Code § 18-623 is vague both in scope and effect and deprives Plaintiffs of their due process rights under the United States Constitution.

100. The Abortion Travel Ban is enforced by Defendant under color of state law.

101. Accordingly, Plaintiffs are entitled to a declaratory judgment, judgment awarding temporary, preliminary, and permanent injunctive relief, declaratory relief, attorneys' fees, costs, and any other relief the Court deems just and appropriate.

SECOND CLAIM FOR RELIEF
(Infringement on the Fundamental Right to Interstate Travel)

102. Paragraphs 1 through 101 are realleged and incorporated as if fully set forth herein.

103. The right to travel is protected by the Constitution. *Saenz*, 526 U.S. at 503. Specifically, the constitutional right to travel "protects the right of a citizen of one State to enter and to leave another State." *Id.* at 500. This includes "the right to go from one place to another, including the right to cross state borders while en route." *Id.* (citing *Edwards v. California*, 314 U.S. 160 (1941)).

104. A state may not unreasonably burden a person's right to enter and leave that state. *Id.* at 499. Free interstate migration is vital and fundamental to transform "many States into a single Nation." *Soto-Lopez*, 476 U.S. at 902–03.

105. The Abortion Travel Ban unreasonably burdens Plaintiffs' right to enter and leave a state.

106. The intent behind the passage of the Abortion Travel Ban was to impermissibly restrict the travel of both Plaintiffs and the pregnant minors they serve.

107. The Abortion Travel Ban deters travel, including the travel of the Plaintiffs who seek to assist pregnant minors.

108. Plaintiffs seek to continue helping pregnant minors in Idaho travel out of state for lawful abortions but face an imminent threat of prosecution under the Abortion Travel Ban. They fear prosecution for traveling with a pregnant minor from Idaho into another state.

109. Plaintiffs' lawful and constitutionally protected conduct has been chilled by the passage of the Abortion Travel Ban, as described herein.

110. The Abortion Travel Ban is enforced by Defendant under color of state law.

111. Accordingly, Plaintiffs are entitled to a declaratory judgment, judgment awarding injunctive relief, declaratory relief, attorneys' fees, costs, and any other relief the Court deems just and appropriate.

THIRD CLAIM FOR RELIEF
(Infringement on the Fundamental Right to Intrastate Travel)

112. Paragraphs 1 through 111 are realleged and incorporated as if fully set forth herein.

113. The right to travel within a state is no less fundamental than the right to travel between the states. Intrastate travel "is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function." *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002).

114. This right is sometimes described interchangeably as freedom of movement, the right to travel freely on public fora, and right to intrastate travel. "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. . . . It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

115. The Abortion Travel Ban unreasonably burdens Plaintiffs' right to intrastate travel, and that right for the pregnant minors they serve. The Abortion Travel Ban also violates Plaintiffs' right, as recognized by the Idaho Supreme Court, to operate a motor vehicle on public roads and highways.

116. The intent behind the passage of the Abortion Travel Ban is to impermissibly restrict the travel, including travel within the State of Idaho, of both Plaintiffs and the pregnant minors they serve.

117. The Abortion Travel Ban deters travel, including travel within the State of Idaho, by Plaintiffs who seek to assist pregnant minors.

118. Plaintiffs seek to continue helping pregnant minors in Idaho travel out of state for lawful abortions but face an imminent threat of prosecution under the Abortion Travel Ban and cannot safely do so without relief from this Court. In order to travel out of state, Plaintiffs must travel freely in state.

119. Plaintiffs' lawful and constitutionally protected conduct has been chilled by the passage of the Abortion Travel Ban, as described herein.

120. The Abortion Travel Ban is enforced by Defendant under color of state law.

121. Accordingly, Plaintiffs are entitled to a declaratory judgment awarding injunctive relief, declaratory relief, attorneys' fees, costs, and any other relief the Court deems just and appropriate.

FOURTH CLAIM FOR RELIEF
(Infringement on First Amendment Rights)

122. Paragraphs 1 through 121 are realleged and incorporated as if fully set forth herein.

123. The First Amendment to the United States Constitution guarantees its citizens the rights to free speech, assembly, association, and petition. U.S. Const. amend. I.

124. The U.S. Constitution does not permit Idaho to bar providing information regarding conduct legal in another state just because it is illegal in this one. All Plaintiffs wish to provide information on conduct legal in other states. Banning speech on the basis of a legal intended purpose is a violation of all Plaintiffs' free speech rights.

125. The U.S. Constitution does not permit Idaho to prohibit funding or other practical support for Idahoans seeking to undertake legal conduct in another state. Plaintiffs IIA and NWAAF's use of funds is protected speech. Banning the use of funds on the basis of a legal intended purpose is a violation of Plaintiffs' free speech rights.

126. Idaho Code § 18-623 infringes on all Plaintiffs' rights to associate freely with each other and with pregnant Idahoans and to engage in expressive conduct, including providing funding or practical support for pregnant Idahoans traveling to access out-of-state services that are legal where rendered, including abortion.

127. Idaho Code § 18-623 has a chilling impact on all Plaintiffs' behavior.

128. Idaho Code § 18-623 has and will continue to have a chilling impact on Plaintiffs NWAAF and IIA's ability to uphold their missions. It may also undermine their relationships with donors and members and their ability to recruit and retain volunteers.

129. Idaho Code § 18-623 further infringes on Plaintiffs' First Amendment free speech right to provide to pregnant persons in Idaho, including pregnant minors, information regarding abortion access in states where it is legal.

130. Idaho Code § 18-623 targets the content of Plaintiffs' speech, criminalizing speech and expressive conduct that is about only one specific type of reproductive health care, therefore it is a content or viewpoint based prohibition.

131. The Abortion Travel Ban is enforced by Defendant under color of state law.

132. Accordingly, Plaintiffs are entitled to a declaratory judgment, judgment awarding temporary, preliminary, and permanent injunctive relief, declaratory relief, attorneys' fees, costs, and any other relief the Court deems just and appropriate.

IV. PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment in their favor and against Defendant Labrador:

1. Declaratory judgment relief:

    a. That the Abortion Travel Ban, Idaho Code § 18-623, is unconstitutional under the First Amendment;

    b. That the Abortion Travel Ban, Idaho Code § 18-623, is unconstitutionally vague;

c. That the Abortion Travel Ban, Idaho Code § 18-623, is an unconstitutional infringement on the right to interstate travel;

d. That Idahoans have a protected right to intrastate travel and that the Abortion Travel Ban, Idaho Code § 18-623, unconstitutionally infringes on that right;

e. That enforcement of the Abortion Travel Ban, Idaho Code § 18-623, against any of the Plaintiffs or any of their agents, board members, staff, or volunteers, for speech or other expressive conduct with minors related to the provision of legal abortion services regardless of parental consent, is unconstitutional, including but not limited to:

i. Counseling about legal abortion services;

ii. Informing about legal abortion services;

iii. Recommending legal abortion services;

iv. Informing about legal abortion providers;

v. Informing about sources of funding, travel, expenses and accommodations in or outside of Idaho related to legal abortion services;

f. That enforcement of the Abortion Travel Ban, Idaho Code § 18-623, against any of the Plaintiffs or any of their agents, board members, staff, or volunteers, for providing transport services or any other support to minors related to the provision of legal abortion services is unconstitutional, regardless of parental consent, including but not limited to:

i. Funding or otherwise financially supporting such transport;

ii. Driving or otherwise traveling in order to seek abortion services where such services are legal;

iii. Housing or otherwise helping to effectuate travel in order to access abortion services where such services are legal.

2. Enjoining Attorney General Raúl Labrador from enforcing Idaho Code § 18-623.

3. Reasonable attorneys' fees and costs.

4. Any other relief that the Court deems just and proper.

DATED: July 11, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson
Wendy J. Olson

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/s/ Wendy S. Heipt
Wendy S. Heipt
Kelly O'Neill

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

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

Defendant.

Case No. 1:23-cv-00323-DKG

NOTICE OF APPEAL

PRELIMINARY INJUNCTION APPEAL

ELEVENTH AMENDMENT IMMUNITY APPEAL

Defendant Raúl Labrador, in his capacity as Attorney General for the State of Idaho, hereby appeals the district court's November 8, 2023 Memorandum Decision and Order [Dkt. 40], granting Plaintiffs' motion for preliminary injunction against him to the Ninth Circuit Court of Appeals. *See* 28 U.S.C. § 1292(a)(1). The Attorney General also appeals the district court's November 8, 2023 Memorandum Decision and Order [Dkt. 41] denying Attorney General Labrador Eleventh Amendment Immunity to the Ninth Circuit Court of Appeals. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) ("We hold that States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity.").

FORM 1 INFORMATION

- Date case was first filed in U.S. District Court: July 11, 2023.
- Date of judgment or order being appealed: November 8, 2023 (for both orders).
- Docket entry number of judgment or order appealed from: 40 (Memorandum Decision and Order); 41 (Memorandum Decision and Order).
- Docketing fee of $505 paid to the U.S. District Court for the District of Idaho.
- Appellant: Defendant Raúl Labrador.
- This is not a cross-appeal.

- A representation statement follows on the next page.

DATED: November 22, 2023

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ James E. M. Craig*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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APPEAL,CONMAG,LC22

U.S. District Court
District of Idaho (LIVE) NextGen 1.7 (Boise - Southern)
CIVIL DOCKET FOR CASE #: 1:23-cv-00323-DKG

Matsumoto, et al. v. Labrador
Assigned to: US Magistrate Judge Debora K Grasham
Case in other court: USCA, 23-03787
Cause: 42:1983 Civil Rights Act

Date Filed: 07/11/2023
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Lourdes Matsumoto

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V.

Defendant

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Date Filed	#	Docket Text
07/11/2023	1	COMPLAINT *for Declaratory Judgment* against Raul Labrador (Filing fee $ 402 receipt number AIDDC-2596238.), filed by Lourdes Matsumoto, Northwest Abortion Access Fund, Indigenous Idaho Alliance. (Attachments: # 1 Summons to Raul Labrador, # 2 Cover Sheet Civil Cover Sheet)(Olson, Wendy)
07/11/2023	2	Corporate Disclosure Statement by Indigenous Idaho Alliance. (Olson, Wendy)
07/11/2023	3	Corporate Disclosure Statement by Northwest Abortion Access Fund. (Olson, Wendy)
07/11/2023	4	MOTION FOR PRO HAC VICE APPEARANCE by Wendy Heipt. (Filing fee $ 250 receipt number AIDDC-2596306.)Wendy Olson appearing for Plaintiffs Indigenous Idaho Alliance, Lourdes Matsumoto, Northwest Abortion Access Fund. Responses due by 8/1/2023 (Olson, Wendy)
07/11/2023	5	MOTION FOR PRO HAC VICE APPEARANCE by Paige Butler Suelzle. (Filing fee $ 250 receipt number AIDDC-2596315.)Wendy Olson appearing for Plaintiffs Indigenous Idaho Alliance, Lourdes Matsumoto, Northwest Abortion Access Fund. Responses due by 8/1/2023 (Olson, Wendy)
07/11/2023	6	MOTION FOR PRO HAC VICE APPEARANCE by Jamila Johnson. (Filing fee $ 250 receipt number AIDDC-2596319.)Wendy Olson appearing for Plaintiffs Indigenous Idaho Alliance, Lourdes Matsumoto, Northwest Abortion Access Fund. Responses due by 8/1/2023 (Olson, Wendy)
07/11/2023	7	DOCKET ENTRY ORDER approving dkt. 4 , dkt 5 and dkt. 6 Motion for Pro Hac Vice Appearance of attorney Wendy Heipt,Paige Butler Suelzle, and Jamila Johnson for Lourdes Matsumoto, et al. Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ac) (Entered: 07/12/2023)
07/12/2023	8	Summons Issued as to Raul Labrador. (Print attached Summons for service.) (ac)
07/18/2023	9	WAIVER OF SERVICE Returned Executed by Lourdes Matsumoto, Northwest Abortion Access Fund, Indigenous Idaho Alliance. Raul Labrador waiver sent on 7/18/2023, answer

		due 9/18/2023. (Olson, Wendy)
07/19/2023	10	NOTICE of Appearance by Lincoln Davis Wilson on behalf of Raul Labrador (Wilson, Lincoln)
07/20/2023	11	NOTICE of Assignment to Magistrate Judge and Requirement for Consent sent to counsel for Indigenous Idaho Alliance, Raul Labrador, Lourdes Matsumoto, Northwest Abortion Access Fund re dkt. 1 Complaint, and dkt. 10 Notice of Appearance. Consent/Objection to Magistrate due by 9/18/2023. (ac)
07/24/2023	12	MOTION for Temporary Restraining Order *or, in the Alternative, a Preliminary Injunction* Wendy Olson appearing for Plaintiffs Indigenous Idaho Alliance, Lourdes Matsumoto, Northwest Abortion Access Fund. Responses due by 8/14/2023 (Attachments: # 1 Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order, or in the Alternative, A Preliminary Injunction, # 2 Declaration of Wendy J. Olson, # 3 Exhibit 1 to Declaration of Wendy J. Olson, # 4 Exhibit 2 to Declaration of Wendy J. Olson, # 5 Exhibit 3 to Declaration of Wendy J. Olson, # 6 Exhibit 4 to Declaration of Wendy J. Olson, # 7 Declaration of Lourdes Annette Matsumoto, # 8 Declaration of tai simpson, # 9 Declaration of Megan Kovacs)(Olson, Wendy) Lodging received of 1 Flash drive and maintained in the clerk's office file room. Modified on 7/24/2023 to add lodging info.(ac).
07/24/2023	13	DOCKET ENTRY ORDER - Upon review of the docket in this matter, and Plaintiffs motion for a temporary restraining order or, alternative, a preliminary injunction (Dkt. 12), the Court finds good cause to shorten the deadline within which to consent to the jurisdiction of a magistrate judge. (Dkt. 11.) The parties shall have up through and including **August 8, 2023**, within which to consent to proceed before a magistrate judge. Signed by US Magistrate Judge Debora K Grasham. by (lt)
07/28/2023	14	MOTION FOR PRO HAC VICE APPEARANCE by Christina Sepe. (Filing fee $ 250 receipt number AIDDC-2605747.)Emily A Mac Master appearing for Amicus Proposed Amici State of Washington et al.. Responses due by 8/18/2023 (Mac Master, Emily)
07/28/2023	15	MOTION FOR PRO HAC VICE APPEARANCE by Emma Grunberg. (Filing fee $ 250 receipt number AIDDC-2605755.)Emily A Mac Master appearing for Amicus Proposed Amici State of Washington et al.. Responses due by 8/18/2023 (Mac Master, Emily)
07/31/2023	16	MOTION for Extension of Time to File Response/Reply as to 12 MOTION for Temporary Restraining Order *or, in the Alternative, a Preliminary Injunction* Lincoln Davis Wilson appearing for Defendant Raul Labrador. Responses due by 8/21/2023 (Wilson, Lincoln)
07/31/2023	17	DOCKET ENTRY ORDER approving 14 Motion for Pro Hac Vice Appearance of attorney Cristina Sepe and Emma Grunberg for Proposed Amici State of Washington et al. Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk); granting 15 Motion for Pro Hac Vice Appearance of attorney Cristina Sepe,Emma Grunberg for Proposed Amici State of Washington et al. Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
07/31/2023	18	DISREGARD - NOTICE of Assignment to Magistrate Judge and Requirement for Consent sent to counsel for Proposed Amici State of Washington et al. re 14 and 15 Motion for Pro Hac Vice Appearance. Consent/Objection to Magistrate due by 9/29/2023. (jd) Modified on 8/2/2023, see corrective entry (jd).
07/31/2023	19	DISREGARD - Amicus Curiae APPEARANCE entered by Emma Grunberg on behalf of Proposed Amici State of Washington et al.. (Attachments: # 1 Amicus Brief)(Grunberg, Emma) Modified on 8/1/2023, duplicate filing please refer to dkt. 20 (jd).

07/31/2023	20	First MOTION to File Amicus Brief Emma Grunberg appearing for Amicus Proposed Amici State of Washington et al.. Responses due by 8/21/2023 (Attachments: # 1 Amicus Brief)(Grunberg, Emma)
08/02/2023		CORRECTIVE ENTRY - The entry docket number 18 Notice of Assignment Setting Deadline was filed in error. Please disregard.(jd)
08/02/2023	21	DOCKET ORDER Setting Briefing Deadlines. Plaintiffs' Response to Defendant's Motion for Extension of Time (Dkt. 16) is due on or before **August 4, 2023 at noon (MT)**. Any Reply must be filed no later than **August 8, 2023**. Signed by US Magistrate Judge Debora K Grashamby (lt)
08/02/2023		Set/Reset Deadlines as to dkt. 16 MOTION for Extension of Time to File Response/Reply as to 12 . Responses due by 8/4/2023 Replies due by 8/8/2023. (ac) (Entered: 08/03/2023)
08/03/2023	22	Docket entry only - CONSENT to Magistrate Judge filed. (ac)
08/03/2023	23	RESPONSE to Motion re 16 MOTION for Extension of Time to File Response/Reply as to 12 MOTION for Temporary Restraining Order *or, in the Alternative, a Preliminary Injunction* filed by Indigenous Idaho Alliance, Lourdes Matsumoto, Northwest Abortion Access Fund. Replies due by 8/17/2023. (Attachments: # 1 Declaration of Olson in Support of Response, # 2 Exhibit A to Olson Declaration)(Olson, Wendy)
08/04/2023	24	REPLY to Response to Motion re 16 MOTION for Extension of Time to File Response/Reply as to 12 MOTION for Temporary Restraining Order *or, in the Alternative, a Preliminary Injunction* filed by Raul Labrador.Motion Ripe Deadline set for 8/7/2023. (Wilson, Lincoln)
08/07/2023	25	ORDER RE: DEFENDANT'S MOTION FOR EXTENSION OF TIME (DKT. 16) - IT IS HEREBY ORDERED that the Motion for Extension of Time (Dkt. 16) is GRANTED. Defendant's response to the Motion for Temporary Restraining Order or, in the alternative, Preliminary Injunction is due on or before August 28, 2023. Responses due by 8/28/2023. Signed by US Magistrate Judge Debora K Grasham. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ac)
08/08/2023	26	ALL PARTIES HAVE CONSENTED TO PROCEED BEFORE A US MAGISTRATE JUDGE(ac)
08/09/2023	27	AMENDED ORDER RE: DEFENDANTS MOTION FOR EXTENSION OF TIME (DKT. 16) - IT IS HEREBY ORDERED that the Motion for Extension of Time (Dkt. 16) is GRANTED. Defendants response to the Motion for Temporary Restraining Order or, in the alternative, Preliminary Injunction is due on or before August 28, 2023. Signed by US Magistrate Judge Debora K Grasham. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ac)
08/10/2023		Set/Reset Deadlines as to dkt. 12 MOTION for TRO. Responses due by 8/28/2023 (ac)
08/17/2023	28	DOCKET ENTRY NOTICE of Hearing on Motions: 12 MOTION for Temporary Restraining Order *or, in the Alternative, a Preliminary Injunction*; 20 First MOTION to File Amicus Brief - Motion Hearing set for 9/14/2023 01:30 PM in Boise - Courtroom 6 before US Magistrate Judge Debora K Grasham. (at)
08/18/2023	29	NOTICE of Appearance by James Edward Monroe Craig on behalf of Raul Labrador (Craig, James)
08/21/2023	30	RESPONSE to Motion re 20 First MOTION to File Amicus Brief *Non-Opposition to Motion* filed by Raul Labrador. Replies due by 9/5/2023.(Craig, James)

08/22/2023	31	ORDER RE: MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND CROSS MOTION FOR LEAVE TO EXCEED PAGE LIMITATIONS (DKTS. 20 , 30) - IT IS HEREBY ORDERED as follows: The Motion for Leave to File Amici Curiae Brief (Dkt. 20) is GRANTED. The Amici Curiae brief attached to the motion (Dkt. 20-1) is now part of the record and will be considered by the Court for purposes of deciding Plaintiffs' Motion for Temporary Restraining Order or, in the alternative, a Preliminary Injunction. The Motion for Leave to Exceed Page Limitations (Dkt. 30) is GRANTED. Defendant's response to Plaintiffs' Motion for Temporary Restraining Order or, in the alternative, a Preliminary Injunction may be a total of thirty (30) pages. Plaintiffs' reply brief may be a total of seventeen (17) pages. Signed by US Magistrate Judge Debora K Grasham. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ac)
08/28/2023	32	MEMORANDUM in Opposition re 12 MOTION for Temporary Restraining Order *or, in the Alternative, a Preliminary Injunction* filed by Raul Labrador. Replies due by 9/11/2023. (Attachments: # 1 Declaration of Lincoln Davis Wilson, # 2 Exhibit 1 to Declaration of Lincoln Davis Wilson, # 3 Exhibit 2 to Declaration of Lincoln Davis Wilson, # 4 Exhibit 3 to Declaration of Lincoln Davis Wilson)(Wilson, Lincoln)
09/06/2023	33	AMENDED DOCKET ENTRY NOTICE of Hearing on Motion: 12 MOTION for Temporary Restraining Order *or, in the Alternative, a Preliminary Injunction* - Motion Hearing set for 9/14/2023 01:30 PM in Boise - Courtroom 2 before US Magistrate Judge Debora K Grasham. (same date/time as previously set, change in courtroom location only) (at)
09/11/2023	34	REPLY to Response to Motion re 12 MOTION for Temporary Restraining Order *or, in the Alternative, a Preliminary Injunction* filed by Indigenous Idaho Alliance, Lourdes Matsumoto, Northwest Abortion Access Fund.Motion Ripe Deadline set for 9/12/2023. (Olson, Wendy)
09/12/2023	35	MOTION to Dismiss James Edward Monroe Craig appearing for Defendant Raul Labrador. Responses due by 10/3/2023 (Attachments: # 1 Memorandum in Support of Motion to Dismiss)(Craig, James)
09/29/2023	36	Notice of Filing of Official Transcript of Proceedings held on 09/14/2023 before Judge Debora K. Grasham. Transcriber Tamara Weber, Email tammy@canyontranscription.com. Transcript may be viewed at the court public terminal or purchased through the Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. This transcript is not available to the general public and as such is sealed until release of transcript restriction. Redaction Request due 10/20/2023. Redacted Transcript Deadline set for 10/30/2023. Release of Transcript Restriction set for 12/28/2023. (dmv) (Entered: 10/02/2023)
10/03/2023	37	RESPONSE to Motion re 35 MOTION to Dismiss filed by Indigenous Idaho Alliance, Lourdes Matsumoto, Northwest Abortion Access Fund. Replies due by 10/17/2023.(Olson, Wendy)
10/06/2023	38	NOTICE by Raul Labrador *of Withdrawal of Counsel* (Wilson, Lincoln)
10/17/2023	39	REPLY to Response to Motion re 35 MOTION to Dismiss filed by Raul Labrador.Motion Ripe Deadline set for 10/18/2023.(Craig, James)
11/08/2023	40	MEMORANDUM DECISION AND ORDER - IT IS HEREBY ORDERED that Plaintiffs' Motion forPreliminary Injunction (Dkt. 12) is GRANTED. Attorney General Ral Labrador, in his official capacity as Attorney General of the State of Idaho, is HEREBY ENJOINED from enforcing Idaho Code Section 18-623, effective as of the date of this order and lasting until otherwise ordered by the Court. Signed by US Magistrate Judge

		Debora K Grasham. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ac)
11/08/2023	41	MEMORANDUM DECISION AND ORDER - IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (Dkt. 35) is GRANTED IN PART AND DENIED IN PART. The Motion is granted as to the third claim for relief, which is DISMISSED WITHOUT PREJUDICE. The Motion is denied as to the first, second, and fourth claims for relief. Signed by US Magistrate Judge Debora K Grasham. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ac)
11/13/2023	42	LITIGATION ORDER AND NOTICE OF TELEPHONIC SCHEDULING CONFERENCE - On or before November 29, 2023, the parties must file with the Court the joint Litigation Plan and Discovery Plan. Telephonic Scheduling Conference set for 12/6/2023 09:00 AM in Telephonic Hearing - Boise Chambers before US Magistrate Judge Debora K Grasham. Signed by US Magistrate Judge Debora K Grasham. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jd)
11/22/2023	43	NOTICE OF APPEAL as to 41 Order on Motion to Dismiss, 40 Order on Motion for TRO,, by Raul Labrador. Filing Fee Due. $ 505, receipt number AIDDC-2664390. (Notice sent to Court Reporter & 9th Cir) (Craig, James)
11/27/2023	44	MOTION to Stay re 40 Order on Motion for TRO,, James Edward Monroe Craig appearing for Defendant Raul Labrador. Responses due by 12/18/2023 (Attachments: # 1 Memorandum in Support of Motion to Stay Injunction Pending Appeal)(Craig, James)
11/29/2023	45	USCA Case Number 23-3787 for dkt. 43 Notice of Appeal. (ac)
11/29/2023	46	Consent MOTION to Vacate 42 Litigation Order, *Unopposed* James Edward Monroe Craig appearing for Defendant Raul Labrador. Responses due by 12/20/2023 (Craig, James)
11/30/2023	47	ORDER RE: MOTION TO VACATE LITIGATION ORDER (DKT. 46) - IT IS HEREBY ORDERED that the Motion to Vacate (Dkt. 46) is GRANTED. The Litigation Order and December 6, 2023 Telephonic Scheduling Conference are VACATED. Signed by US Magistrate Judge Debora K Grasham. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (ac)

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