No. 24-5968

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL WELTY, ET AL.,

Plaintiffs-Appellees,

v.

BRYANT DUNAWAY, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Tennessee, No. 3:24-cv-768

BRIEF OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Rachel Welty and Aftyn Behn state that they are neither subsidiaries nor affiliates of any publicly owned corporation. They further state that there is no publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome.

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STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs-Appellees do not oppose Defendants-Appellants' request for oral argument in this important case concerning the violation of constitutional rights posed by the recruitment provision of Tenn. Code § 39-15-201.

STATEMENT OF ISSUES

1. Whether the district court correctly concluded Plaintiffs have standing.

2. Whether the district court correctly concluded the suit is not barred by sovereign immunity.

3. Whether the district court correctly concluded Plaintiffs are likely to prevail on their claim that the recruitment provision of Tenn. Code § 39-15-201 violates the First Amendment.

4. Whether the district court correctly concluded Plaintiffs are likely to prevail on their claim that the recruitment provision is void for vagueness.

5. Whether the district court acted within its discretion when it issued the preliminary injunction.

INTRODUCTION

The First Amendment "protect[s] the speech rights of all comers, no matter how controversial … many may find the message at hand." *303 Creative v. Elenis*, 600 U.S. 570, 600-01 (2023). That protection extends to those who wish to speak about lawful abortion. When the Supreme Court "return[ed] the issue of abortion to the people's elected representatives," *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 232 (2022), it did not disturb these bedrock principles. To the contrary, the Court made clear that the issue of abortion ought not "distort[] First Amendment doctrines." *Id.* at 287.

This case concerns a new Tennessee law that flouts those principles. In 2024, Tennessee enacted a ban on "abortion trafficking of a minor." Tenn. Code § 39-15-

201(a). Among other things, the law makes it a crime to "intentionally recruit[] … a pregnant unemancipated minor" in Tennessee "for the purpose of" either "[c]oncealing" or "[p]rocuring" an abortion that would be illegal in Tennessee or "[o]btaining an abortion-inducing drug … for the purpose of" such an abortion. *Id.* Critically, the law criminalizes recruiting a minor to procure an abortion (or abortion-inducing drugs) "regardless" of where the procedure occurs (or where the drugs are obtained). *Id.* That means the law prohibits recruiting related to out-of-state abortions that are completely legal where they occur.

The recruitment provision is unconstitutional. First, because the recruitment provision prohibits speech that encourages lawful abortion while leaving untouched speech that dissuades the same, it constitutes impermissible viewpoint discrimination. Moreover, because the recruitment provision's applications to protected speech far outweigh its plainly legitimate sweep, the provision is unconstitutionally overbroad. Indeed, the Ninth Circuit recently upheld a preliminary injunction against a substantially similar Idaho law on overbreadth grounds. *Matsumoto v. Labrador*, 122 F.4th 787, 808-15 (9th Cir. 2024). Second, the recruitment provision is impermissibly vague, offering no definition of recruitment and no way to discern what exactly is proscribed. Tennesseans are therefore left to guess whether a wide array of speech about lawful abortion—from public information about its availability to private counseling about its propriety—gives rise to criminal liability.

Plaintiffs Rachel Welty and Aftyn Behn are Tennesseans who exercise their First Amendment rights to advocate for and counsel young women seeking legal abortion care. They sought a preliminary injunction against enforcement of the recruitment provision. The district court granted their motion, holding that Plaintiffs are likely to succeed on their claims that the provision violates their freedom of speech and is unconstitutionally vague. This Court should affirm.

STATEMENT OF THE CASE

A. Statutory Background

Most abortion is a crime in Tennessee. Following the Supreme Court's decision in *Dobbs*, Tennessee's prohibition on abortion went into effect. *See* 2019 Tenn. Pub. Acts, ch. 351, § 3. Under that law, it is a felony "criminal abortion" to "perform[] or attempt[] to perform an abortion" in all but a few exceptional circumstances. *See* Tenn. Code § 39-15-213.

In May 2024, Tennessee enacted its ban on "abortion trafficking," with an effective date of July 1, 2024. *See* Bill, R.1-1, PageID ##16-18. Tenn. Code § 39-15-201 provides that it is a misdemeanor for an adult to "intentionally recruit[], harbor[], or transport[] a pregnant unemancipated minor within [Tennessee] for the purpose of" either (1) "[c]oncealing an act that would constitute a criminal abortion under" Tennessee law; (2) "[p]rocuring an act that would constitute a criminal abortion under" Tennessee law, "regardless of where the abortion is to be procured"; or (3) "[o]btaining an abortion-inducing drug … for the purpose of an act that would constitute a criminal

abortion under" Tennessee law, "regardless of where the abortion-inducing drug is obtained." The statute does not define the term "recruit." *Id.* The statute also provides that violators "may be held liable in a civil action for the wrongful death of an unborn child who was aborted." *Id.* § 39-15-201(e)(1).

The statute exempts from liability a pregnant minor's parent or legal guardian; a person who has obtained consent from such parent or guardian; common carriers transporting passengers in the ordinary course of business; and emergency medical personnel acting within the course of their duties. *Id.* § 39-15-201(c). The law also "does not apply to the provision of a medical diagnosis or consultation regarding pregnancy care of an unemancipated minor." *Id.* § 39-15-201(f)(1).

B. Factual Background

Plaintiff Rachel Welty is a family law attorney and outspoken abortion advocate. Hr'g Tr., R.35, PageID #354. In her legal practice, she has long helped minors access legal abortion care. *Id.* at PageID ##354-356. Before Tennessee's criminal abortion ban went into effect, Welty helped pregnant teens obtain judicial bypass authorization to access abortion care in the state. *Id.* Welty is a visible champion for young people seeking legal abortion care, and she receives outreach from pregnant minors "all over" the state. *See id.* at PageID #382. Other family lawyers, as well as advocacy groups, frequently refer minor clients to Welty. *Id.* at PageID #385. She "put[s] the word out" that she is available to counsel pregnant minors by "mak[ing] it clear" to "the legal

community" that she "will help" minors who "need information about abortion services." *Id.* at PageID ##385-386.

Just as she did before *Dobbs*, Welty continues to counsel pregnant minors seeking abortion care now that Tennessee's ban on abortion has gone into effect. *Id.* at PageID ##356-357. Welty does not generally inquire as to whether any given minor client has "the consent of their parent" to obtain an abortion. *Id.* Welty does not tell these clients whether they should or should not seek abortion care; rather, she provides them with information so they can "make these decisions for themselves." *Id.* at PageID ##357-360. When pregnant minors seek guidance, Welty informs them that abortion is safe, common, and normal. *Id.* at PageID #359. Welty knows that this information sometimes persuades her clients to seek abortion care. *Id.* at PageID ##359, 381. When her clients decide to obtain an abortion, Welty supports and encourages their decision. *Id.* She also facilitates their access to abortion care by "connecting them with resources" or informing them "what clinics are available for them," including ones "out of state." *Id.* at PageID ##374-375. But after the enactment of the recruitment provision, Welty became concerned that her discussions with minor clients could expose her to criminal or civil liability. *Id.* at PageID #363.

Welty also serves on the board of Abortion Care Tennessee (ACT), a fund that provides grants to abortion clinics outside Tennessee "earmarked" for use by Tennessee residents. *Id.* at PageID ##363-364. ACT provides minors with information about how to access legal abortion, including by traveling out of state or pursuing self-managed

medication abortions. *Id.* at PageID ##364-366. Welty personally hands out literature concerning these options on a regular basis, including to persons who are "likely" minors. *Id.* at PageID ##366-368; *see* Pamphlets, R.1-2, PageID ##19-21.

Welty also speaks publicly about abortion access. For example, she created a social media account "[t]o provide information to Tennesseans about abortion care," including that abortion is "safe." Hr'g Tr., R.35, PageID #369. She has posted "information about abortion pills and their safety and where they can be accessed." *Id.* Welty is confident that these posts, along with her speaking engagements, reach minors in Tennessee. *See id.* at PageID ##368-369. But Welty ceased using her social media account to post information about abortion after the enactment of the recruitment provision, fearing that her statements—like her legal work—might be subject to "criminalization." *Id.* at PageID ##369-370.

Welty's concerns about prosecution under the recruitment provision were so profound that she sought clarity on the law's scope from all district attorneys general in the Middle District of Tennessee. *See* Letter, R.1-4, PageID ##25-27. After Tenn. Code § 39-15-201 was enacted, but before it went into effect, Welty requested that the district attorneys general communicate their "position on what 'recruits' means" as used in the law. *Id.* at PageID #26. Welty further expressed concern that the recruitment provision reaches "pure speech and *advocacy*," and thus asked them to "disavow" enforcement of the provision against her. *Id.* at PageID #27. None of the district attorneys general responded to Welty's letter, Hr'g Tr., R.35, PageID #372, leaving her uncertain as to

the recruitment provision's meaning and whether it would be enforced against her speech.

Plaintiff Aftyn Behn is a licensed social worker and elected official who represents District 51 in the Tennessee House of Representatives. *Id.* at PageID ##387-389. She communicates with her constituents and other Tennesseans on a daily basis about topics including abortion access. *Id.* Behn does not verify the age of the Tennesseans who reach out to her, and they likely include minors. *Id.* at PageID ##389-390.

Behn is an outspoken advocate for reproductive rights. She has held herself out as a resource, both in person and on social media, for people seeking information about abortion. *Id.* at PageID ##390-391. She provides information about how Tennessee residents can obtain legal abortion care, including by going to clinics outside the state. *Id.*

Behn offers similar resources in her capacity as a social worker. While Behn does not pressure any pregnant client to obtain an abortion, she does give them "information so that they can make an informed decision," including how to procure a legal abortion. *Id.* at PageID ##392-395. When a client decides to seek abortion care, Behn validates, supports, and encourages that decision. *Id.*

In light of her advocacy for abortion access, Behn spoke out against the bill that became Tenn. Code § 39-15-201 prior to its passage, especially given the bill's failure to define recruitment. *Id.* at PageID #396. Before the bill came up for a vote in the Senate,

Behn posted a Tweet warning that the law "would criminalize supporting young people in Tennessee when they are considering or seeking an abortion." Twitter, R.1-5, PageID #38. Behn stated that the law could criminalize "publicly shar[ing] information about how to seek an abortion." *Id.* at PageID #39. Behn stressed her commitment to abortion access, writing, "I welcome the opportunity to take a young person out of state who wants to have an abortion even if it lands me in jail." *Id.* at PageID #40.

During the House debate on the bill, Behn's Tweets loomed large. When asked what recruitment under the bill "would look like," the bill's sponsor declined to define the term and instead offered two examples. House Tr., R.1-6, PageID ##60-61. First, he referred to Planned Parenthood in Missouri allegedly "recruiting children to take them across state lines to abort their babies." *Id.* Second, he highlighted Behn's post on social media about being willing "to take a young person out of state who wants to have an abortion." *Id.* Pointing at Behn's statement, the sponsor explained: "that is what recruitment looks like." *Id.* Behn took the episode as a "threat" that she could be prosecuted for her advocacy if the recruitment provision was enacted. Hr'g Tr., R.35, PageID ##401-402. She feared the law would criminalize "information sharing about abortion resources." *Id.*

C. Procedural History

Fearing prosecution, Plaintiffs brought a pre-enforcement challenge to the recruitment provision on June 24, 2024—before the law went into effect. *See* Compl., R.1. They named as Defendants eleven of Tennessee's district attorneys general.

Plaintiffs did not challenge either the harboring or transporting prongs of the statute, but only the prohibition on recruitment. Plaintiffs alleged that the recruitment provision is unconstitutionally vague; that, both on its face and as applied, it regulates speech on the basis of content and viewpoint in violation of the First Amendment; and that it is facially void under the First Amendment because it is overbroad. *Id.* at PageID ##9-14.

Plaintiffs moved for a preliminary injunction. Mot., R.18, PageID #157. Defendants, meanwhile, moved to dismiss. Mot., R.25, PageID #249. Following a hearing, the district court granted the motion for preliminary injunction. The court held that Plaintiffs have standing, with the exception of Plaintiff Welty as to four Defendants, and that Defendants lack sovereign immunity. Mem., R.40, PageID ##557-566. The district court also concluded that Plaintiffs are likely to succeed on their vagueness, content and viewpoint discrimination, and overbreadth arguments. *Id.* at PageID ##572, 578, 582. The district court enjoined Defendants from all enforcement of the recruitment provision, "other than in connection with obtaining or attempting to obtain an actually unlawful abortion." Order, R.41, PageID #587.

SUMMARY OF ARGUMENT

1. Plaintiffs have standing to challenge the recruitment provision. Plaintiffs' speech about lawful abortions is protected by the First Amendment, and that speech is arguably proscribed by the recruitment provision. The plain meaning of "recruit" covers public and private statements with the effect of persuading listeners to seek legal

abortion care. That is how the district court understood the law, and a Ninth Circuit panel came to the same conclusion with respect to a similarly worded statute.

Plaintiffs have also established a credible threat of enforcement. The law is a recent enactment, carries criminal penalties, and implicates First Amendment rights—factors that lend credibility to the threat of enforcement. Other circumstances further validate Plaintiffs' fears. Most strikingly, the recruitment provision's legislative sponsor directly stated that it would cover the speech of one of the Plaintiffs. Statutory mechanisms allowing private lawsuits, citizen-initiated prosecutions, and citizen arrests further increase the threat of enforcement. And Defendants have consistently refused to disavow enforcement. In this context, there is nothing speculative about Plaintiffs' fears.

2. Sovereign immunity does not shield Defendants from this challenge. Injuries sufficient for Article III standing are also sufficient to trigger *Ex parte Young*'s exception to sovereign immunity, so long as the named defendants have some connection to enforcement of the law at issue. Defendants do not merely have some connection to enforcement of the recruitment provision; Tennessee law *obligates* them to enforce it.

3. Plaintiffs are likely to prevail on their claim that the recruitment provision violates the First Amendment. On any interpretation, the recruitment provision regulates speech on the basis of content and viewpoint. Even under Defendants'

narrow construction, the law reaches speech that persuades another person to procure a legal abortion, but not speech with the opposite message.

Even if the recruitment provision covers something other than protected speech, it is still unconstitutional. For one, the law is invalid as applied to Plaintiffs, whose expression is clearly protected by the First Amendment. In addition, the law is overbroad: its manifest unconstitutional applications far outweigh its legitimate sweep.

4. Plaintiffs are also likely to succeed on their vagueness claim. Defendants concede that recruitment is susceptible to multiple definitions, and Defendants propose interpretations of the law that are at odds with any of these plain meanings. Plaintiffs are left with little sense of what the law covers and no way to conform their conduct to it without censoring themselves.

5. The district court did not abuse its discretion by enjoining Defendants from enforcing the recruitment provision. Plaintiffs face irreparable harm because the law chills their protected speech, and neither Defendants nor the public have any interest in the enforcement of an unconstitutional statute. Moreover, any legitimate state interests promoted by the recruitment provision are adequately served by other statutes that remain in force.

The district court properly crafted an injunction barring Defendants' enforcement of the law against anyone. That order was necessary to provide complete relief to Plaintiffs and appropriate given Plaintiffs' likely success on their overbreadth claim.

STANDARD OF REVIEW

A district court must "consider four factors when determining whether to grant a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Ohio v. Becerra*, 87 F.4th 759, 768 (6th Cir. 2023) (internal quotation marks omitted). This Court "review[s] de novo whether the movant is likely to succeed on the merits" and "review[s] the district court's ultimate determination as to whether the four factors weigh in favor of granting or denying preliminary injunctive relief for abuse of discretion." *Id.* The scope of the injunction is also reviewed for abuse of discretion. *See Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015). The Court reviews standing and the denial of sovereign immunity de novo. *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1031 (6th Cir. 2022).

ARGUMENT

I. Plaintiffs have standing to challenge the recruitment provision.

To have Article III standing, a plaintiff must "have suffered an injury in fact, that was caused by the conduct complained of, and which a favorable decision is likely to redress." *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1022 (6th Cir. 2024) (internal quotation marks omitted). Defendants do not challenge causation or redressability, nor could they. This Court has previously held that when a plaintiff seeks

to enjoin a "potential" prosecution, a Tennessee district attorney general "would cause that injury by filing the charges, and the district court could redress it by enjoining [him] from doing so." *See Nabors*, 35 F.4th at 1034. Defendants instead argue that Plaintiffs have failed to demonstrate an injury in fact.

To prevent plaintiffs from being "forc[ed] … to choose between refraining from core political speech" or "engaging in that speech and risking costly … criminal prosecution," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 168 (2014), the Supreme Court permits pre-enforcement challenges to laws that chill speech, *see id.* at 155, 161-67. A plaintiff has standing to maintain a pre-enforcement challenge if she "alleges (1) an intent 'to engage in a course of conduct' arguably 'affected with a constitutional interest,' (2) that this conduct is arguably 'proscribed by a statute,' and (3) that there is 'a credible threat' of the statute's enforcement against the plaintiff." *Christian Healthcare Ctrs., Inc. v. Nessel*, 117 F.4th 826, 843 (6th Cir. 2024) (quoting *Driehaus*, 573 U.S. at 159). Plaintiffs have met these requirements.

A. Plaintiffs' intended speech is arguably protected by the First Amendment and arguably prohibited by the recruitment provision.

For purposes of pre-enforcement standing, a plaintiff need not demonstrate that her intended speech is definitively protected by the First Amendment or definitively prohibited by the challenged law. A plaintiff need only show "an intent to engage in 'expression that the Free Speech Clause arguably protects'" and "that this expression is

arguably prohibited." *Kareem*, 95 F.4th at 1022 (quoting *Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022)).

Defendants do not contest that Plaintiffs' intended speech is arguably protected by the First Amendment. *See* Defs.' Br. 30-35. In any event, Plaintiffs intend to engage in a range of protected communications regarding lawful abortion. Both Plaintiffs publicly discuss lawful abortion in speeches and on social media, and they provide similar information directly to minor clients and constituents. *See supra* pp. 5-8. Their expression includes political advocacy, the provision of truthful information, individual counseling, and verbal encouragement and support—all of which are protected by the First Amendment. The Supreme Court has expressly held that speech urging women not to get abortions is constitutionally protected. *See McCullen v. Coakley*, 573 U.S. 464, 472-73, 487, 496 (2014); *Hill v. Colorado*, 530 U.S. 703, 708, 714-15 (2000). The same must be true of speech informing women about the safety and availability of abortion. *See Matsumoto*, 122 F.4th at 811-12. And because Plaintiffs promote only legal abortions, the First Amendment exception for speech integral to criminal conduct does not apply. *Cf. United States v. Hansen*, 599 U.S. 762, 783 (2023).

Plaintiffs' intended speech is also arguably prohibited by the recruitment provision. As explained more fully below with respect to the merits, and as the Ninth Circuit recognized in *Matsumoto*, although "recruit" has multiple definitions, it can encompass the sort of counseling and advocacy in which Plaintiffs engage. Defendants assert that Plaintiffs' activities are not covered by the provision "properly construed."

Defs.' Br. 32. But this argument improperly blurs standing with the merits. "For standing purposes," this Court must "accept as valid the merits of [Plaintiffs'] legal claims." *FEC v. Cruz*, 596 U.S. 289, 298 (2022); *see McKay v. Federspiel*, 823 F.3d 862, 868 & n.2 (6th Cir. 2016). On the merits, Plaintiffs claim that the recruitment provision either regulates their speech or is at least impermissibly vague as to whether it does. Assuming that is right, it follows that the provision sufficiently implicates Plaintiffs' speech for standing purposes.

Moreover, to establish standing, Plaintiffs need only show that their speech is "*arguably* proscribed by the statute." *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 437 (6th Cir. 2024). As the district court's decision demonstrates, there is at least a genuine dispute over the meaning and scope of the recruitment provision—and Plaintiffs' interpretation is surely arguable. In a case involving a similarly worded statute, the Ninth Circuit determined that the law covered protected speech like that of the Plaintiffs. *See Matsumoto*, 122 F.4th 809-10 (explaining that the plain meaning of "recruit" could encompass providing "information" about "the provider, time, place, or cost of an available abortion," as well as "[l]egal advice" and "[e]ven expressions of persuasive encouragement"). If a challenged law "when given one construction would establish jurisdiction and would defeat it when given another, then the plaintiff has established jurisdiction." *Kentucky v. Yellen*, 54 F.4th 325, 349 n.16 (6th Cir. 2022) (internal quotation marks omitted).

Even under Defendants' proposed construction of the recruitment provision, some of Plaintiffs' intended speech is nonetheless arguably covered. For instance, Defendants concede that "[o]f course, if someone were to intentionally target and induce a minor to be transported out of state without parental consent for the purpose of obtaining an elective abortion, liability might attach for 'recruiting.'" Defs.' Br. 28. Plaintiffs' speech includes discussing lawful abortion options with unemancipated minors and, on some occasions, supporting and encouraging minors who opt to seek out-of-state abortion care. *See* Hr'g Tr., R.35, PageID ##356-360, 391-395. That arguably meets Defendants' definition. And Tennessee permits prosecutions for inchoate offenses, broadening the recruitment provision's arguable scope on any interpretation. *See* Tenn. Code §§ 39-12-107, 39-11-402.

Defendants contend that Plaintiffs "disavowed trying to persuade anyone to obtain an abortion." Defs.' Br. 15. That argument is unavailing for several reasons. First, as already explained, the law's plain terms reach beyond intentional persuasion. Second, even if the law were limited to intentional persuasion, Plaintiffs' speech arguably meets that standard. Under Tennessee law, an act is intentional either if the actor intends the result or merely intends to engage in the conduct itself. *See* Tenn. Code § 39-11-302(a). And although Plaintiffs may not initially set out to persuade their minor clients one way or another, once the client decides to have an abortion, Plaintiffs speak with the purpose of helping and encouraging those minors to carry out their plans. *See, e.g.*, Hr'g Tr., R.35, PageID #360 ("[O]nce they choose a path, I help them execute it."); *id.* at PageID #381

(agreeing that providing minor clients with "accurate information is persuasive to some of them"); *id.* at PageID #395 ("If [minor clients] make [the] informed decision to obtain an abortion …. [I] support them in doing so."). Third, "a plaintiff who wishes to challenge the constitutionality of a law" is not required "to confess that he will in fact violate the law." *Driehaus*, 573 U.S. at 163. It is enough that Plaintiffs' intended speech at least arguably fits within the terms of the recruitment provision.

B. Plaintiffs face a credible threat of enforcement.

"To identify a credible threat of enforcement, the first and most important factor is whether the challenged action chills speech." *Fischer*, 52 F.4th at 307 (citing *McKay*, 823 F.3d at 869). Both Plaintiffs fear prosecution for their public advocacy and private conversations regarding lawful abortion. *See* Hr'g Tr., R.35, PageID ##361-363, 369-371, 401-402. And Plaintiff Welty has already limited her own protected expression as a result of this fear. *See id.* at PageID ##369-370. If the recruitment provision went into effect, Plaintiffs would further "curtail" their speech and "forgo full exercise of what they insist are their First Amendment rights." *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301 (1979).

Once chill is established, the question becomes whether a plaintiff's "fear of criminal prosecution" is credible rather than "imaginary or wholly speculative." *Id.* at 302. "Beyond chill, a variety of facts can demonstrate a credible threat of enforcement." *Fischer*, 52 F.4th at 307. The "inquiry distills to whether 'surrounding factual circumstances' plausibly suggest a credible fear of enforcement." *Nessel*, 117 F.4th at

848 (quoting *Nabors*, 35 F.4th at 1034). Here, the surrounding circumstances demonstrate the credibility of Plaintiffs' fears of prosecution.

In considering credible fear, this Court has previously looked to the "explanation" given for a law. *See Nabors*, 35 F.4th at 1034. Remarkably, in explaining the purpose of the recruitment provision, the bill's sponsors did not just point to speech similar to that of the Plaintiffs; they pointed to the words of Plaintiff Behn herself. *See* House Tr., R.1-6, PageID #61. Defendants cannot plausibly argue that there is no credible threat when one of the law's drafters specifically identified Plaintiff Behn's protected speech as exactly "what recruitment looks like." *Id.* The fear of prosecution here is anything but imaginary.

Other surrounding circumstances bolster the credibility of Plaintiffs' fear. For one, the statute is not an old law that "has fallen into desuetude." *Nabors*, 35 F.4th at 1035. It is recent, having been enacted less than a year ago. *See* Bill, R. 1-1, PageID #18. "The State has not suggested that the newly enacted law will not be enforced," and there is "no reason to assume otherwise." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). To the contrary, the law's fiscal note presumed actual prosecutions would occur under the recruitment provision. *See* Fiscal Note, R.29-1, PageID ##328-330. When dealing with a recently enacted law, this Court has found that "the statutory language" itself can "evince[] a credible threat of prosecution." *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987). Other courts of appeals have reached similar conclusions about the risk of prosecution under new laws.

See, e.g., *Bryant v. Woodall*, 1 F.4th 280, 286 (4th Cir. 2021); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020).

The criminal nature of the recruitment provision further supports pre-enforcement standing. This Court has explained that "criminal laws" are most likely to give rise to pre-enforcement standing. *Kareem*, 95 F.4th at 1025. This is because a law with "penal implications" can readily lead to "self-censorship." *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007); *see Am. Booksellers*, 484 U.S. at 393 (explaining that the "danger" of the criminal law at issue was "one of self-censorship … even without an actual prosecution").

Pre-enforcement standing is also especially appropriate because this case involves First Amendment rights. To prevent a law from chilling protected speech, standing may exist for an overbreadth claim "even if" a plaintiff has "not yet been affected by the policy" at issue. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) (internal quotation marks and alterations omitted); *see also Glenn v. Holder*, 690 F.3d 417, 421 (6th Cir. 2012) (explaining that "standing rules are relaxed" for overbreadth claims). Pre-enforcement standing for an overbreadth challenge thus requires only a "record [of] support" for Plaintiffs' fear of prosecution that makes the case something more than an "utterly abstract … debate." *See Connection Distrib. Co. v. Holder*, 557 F.3d 321, 341 (6th Cir. 2009). That standard is easily met here, given that the recruiting provision was enacted to target Plaintiff Behn's own words.

Beyond examining surrounding circumstances in general, this Court has sometimes "considered four factors" to inform the credible-threat inquiry, drawn from *McKay*: "(1) Have the defendants previously enforced the challenged provision against the plaintiffs or others? (2) Have the defendants sent warning letters to the plaintiffs? (3) Do aspects of the regulatory regime make enforcement easier or more likely, such as a provision allowing citizens to file complaints? and (4) Have the defendants refused to disavow enforcement of the challenged provision against the plaintiffs?" *Boone Cnty. Republican Party Exec. Comm. v. Wallace*, No. 24-5783, -- F.4th --, 2025 WL 842088, at *6 (6th Cir. Mar. 18, 2025). These "factors are not exhaustive, nor must each be established." *Nessel*, 117 F.4th at 848 (internal quotation mark omitted); *see also Nabors*, 35 F.4th at 1034-36 (conducting pre-enforcement standing analysis without marching through these factors). Viewing the factors "holistically," *Wallace*, 2025 WL 842088, at *7, they underscore that Plaintiffs' fear of enforcement is credible.

Enforcement History and Warning Letters. As the district court observed, Plaintiffs brought this lawsuit before the recruitment provision went into effect, so there was no history of enforcement or warning letters from prosecutors. Mem., R.40, PageID #559. Of course, to view the lack of enforcement history and warning letters as dispositive under these circumstances would "effectively be an outright bar on any suit challenging a newly enacted Tennessee criminal law." *Id.*; *see Nabors*, 35 F.4th at 1035 (noting that it was "unsurprising" that "no one ha[d] been prosecuted under" a law enjoined "[a]lmost as soon as [it] went into effect"). Accordingly, this Court has in

several cases found pre-enforcement standing where neither factor is present. *See, e.g.*, *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 452 (6th Cir. 2014); *Schlissel*, 939 F.3d at 766; *see also Nessel*, 117 F.4th at 848-49. And rightfully so: "[T]he Supreme Court and at least four other circuits have sustained pre-enforcement standing without a past enforcement action or an overt threat of prosecution directed at the plaintiff." *Vitagliano v. County of Westchester*, 71 F.4th 130, 140 (2d Cir. 2023). The state cannot rely on the fact that a "criminal penalty provision has not yet been applied and may never be applied" to defeat pre-enforcement review. *Babbitt*, 442 U.S. at 302.

Ease and Likelihood of Enforcement. The credibility of Plaintiffs' fear of prosecution is supported by several "attributes of the law that would make enforcement more likely." *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 551 (6th Cir. 2021). One such attribute previously recognized by this Court is a provision allowing "private plaintiffs" to "bring a damages action." *Id.* The law at issue here includes such a mechanism. *See* Tenn. Code. § 39-15-201(e).

Other features of Tennessee's criminal legal system further ease enforcement of the recruitment provision. Where "any person—not just a prosecutor or state agency—may initiate enforcement of" a law, that fact makes enforcement more credible. *Platt*, 769 F.3d at 452. The ability of members of the public "to file a complaint" that could lead to enforcement "bolster[s]" the credibility of a plaintiff's fear. *Driehaus*, 573 U.S. at 164; *see Nessel*, 117 F.4th at 849-50. In Tennessee, citizens are empowered to do far

more than file complaints. Grand jury meetings must be publicly announced, inviting "[a]ny person having knowledge or proof that an offense has been committed" to testify. Tenn. Code § 40-12-105(a); *see also id.* § 40-12-104(a). And a district attorney general who learns about an offense from such testimony "has both a 'constitutional and statutory obligation to prosecute.'" *Nabors*, 35 F.4th at 1035 (quoting *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 208 (Tenn. 1999)); *see* Tenn. Code § 8-7-103 ("Each district attorney general … [s]hall prosecute in the courts of the district all violations of the state criminal statutes …."); *see also* Tenn. Code § 8-7-106(a)(2) (providing for appointment of a "district attorney general pro tem" when a district attorney general "refuses to prosecute all instances of a criminal offense").

Further, just as Tennessee permits private citizens to initiate prosecutions, it also allows them to make arrests. *See* Tenn. Code § 40-7-109. If a system that simply permits citizens "to file a complaint," *Driehaus*, 573 U.S. at 164, or a "[g]rievance," *Platt*, 769 F.3d at 452, shows a credible prospect of enforcement, so too does a scheme permitting citizens to initiate prosecutions and make arrests. *Cf. Driehaus*, 573 U.S. at 165 ("[A]dministrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review.").

Finally, the likelihood of enforcement is magnified by the identities of the Plaintiffs and the nature of their speech. Both Plaintiffs are highly visible public figures, and one is an elected official. They are thus "easy targets," setting the stage for lawsuits, grand jury testimony, and arrests by Plaintiffs' "political opponents." *Id.* at 164. As the

district court observed, Plaintiffs speak out on a topic that is "strongly disfavored by many Tennesseans" and has thus created an "acrimonious environment." Mem., R.40, PageID #560. This is hardly a case in which the risk of politically motivated action is "too remote to confer standing." *White v. United States*, 601 F.3d 545, 554 (6th Cir. 2010).

Defendants counter that Tennessee's citizen-initiated prosecution scheme does not support standing because "district attorneys general retain 'the sole duty, authority, and discretion to prosecute criminal matters.'" Defs.' Br. 38 (quoting *Friends of George's*, 108 F.4th at 439). Specifically, Defendants assert that this Court's decision in *Friends of George's* "squarely rejected" a version of Plaintiffs' argument. *Id.* But *Friends of George's* does not conclusively answer whether Tennessee's citizen-initiated prosecution scheme bolsters pre-enforcement standing. In that case, this Court held that the plaintiff lacked pre-enforcement standing primarily because the plaintiff's intended conduct was neither arguably proscribed by the challenged law nor arguably affected with a constitutional interest. *See Friends of George's*, 108 F.4th at 438-39. The Court then discussed whether the plaintiff credibly feared enforcement—and, accordingly, the role of citizens in initiating prosecutions—only as an alternative ground for its decision. *See id.* at 439. Given this posture, the Court's discussion of citizen-initiated enforcement is of little precedential weight. *See Freed v. Thomas*, 976 F.3d 729, 738 (6th Cir. 2020) ("[J]ust because a court presents a statement as an alternative holding does not necessarily mean that the statement is entitled to adherence as binding precedent.").

Further, *Friends of George's* did not "squarely" address Plaintiffs' argument here. That decision considered whether the specific law at issue would "allow any member of the public to initiate an enforcement action." *Friends of George's*, 108 F.4th at 439 (internal quotation marks and alteration omitted). But here, Plaintiffs do not argue that the recruitment provision itself is what eases enforcement. Rather, Plaintiffs contend that Tennessee's broader criminal law scheme—which enables citizen arrests, permits citizen participation in grand juries, and obligates district attorneys general to prosecute state crimes—is what eases enforcement. The *Friends of George's* majority did not address that argument.

Defendants' overreading of *Friends of George's* is also in tension with prior precedents. *See, e.g.*, *Driehaus*, 573 U.S. at 152 (finding standing based in part on scheme allowing citizens to "file a complaint" with a commission that must independently find probable cause before proceeding); *Kareem*, 95 F.4th at 1024 & n.2 (explaining that in *Platt*, this Court found standing in part based on a scheme in which "individuals could bring grievances to the attention" of state officials who, in turn, were required to "independently review" the allegations before investigating). Those prior decisions remain controlling. *See Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

Refusal to Disavow Enforcement. Defendants have also consistently refused to disavow enforcement of the recruitment provision against Plaintiffs. Even where state officials have "not enforced or threatened to enforce" a law, a failure to "explicitly

disavow[] enforcing it in the future" supports pre-enforcement standing. *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015). The relevant question is whether Defendants have "provided clear assurances that they will *not* prosecute." *Nabors*, 35 F.4th at 1035.

Defendants have provided no such assurances, even when given the opportunity. Before commencing this litigation, Plaintiff Welty sent a letter to all Defendants asking them to "disavow" enforcement of the recruitment provision against her. *See* Letter, R.1-4, PageID ##25-27. None of Defendants responded. *See* Hr'g Tr., R.35, PageID #375. As the district court observed, Defendants also declined to clarify their intentions by testifying at the preliminary-injunction hearing or by providing signed declarations, even after being invited by the district court to do so. *See* Mem., R.40, PageID #562. Although Defendants insist that this "'post-filing' silence" cannot bear on standing, Defs.' Br. 40, this Court's precedent holds otherwise, *see Platt*, 769 F.3d at 452. Defendants have thus failed to disavow enforcement of the recruitment provision against Plaintiffs.

Defendants argue that despite their silence, they in fact "*have* disavowed enforcement." Defs.' Br. 40. They claim that their counsel's assertion, in briefing, that the recruitment provision is best read as not applying to Plaintiffs' intended speech amounts to a disavowal of enforcement. That is wrong. Courts often decline to construe a party's litigation position as a disavowal of enforcement. *See, e.g.*, *Cruz*, 596 U.S. at 299-301 (finding pre-enforcement standing despite "the Government arguing" that the

plaintiffs' intended conduct "would *not* violate the statute"). And as the district court observed, it is not obvious that counsel in a case like this has the power to bind their elected clients. *See* Mem., R.40, PageID #562; *see also Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1106 (6th Cir. 1995) (explaining that "nothing … *requires*" a court "to accept representations" from counsel regarding how a law "would be enforced").

In any event, Defendants have consistently argued in the alternative that they could constitutionally prosecute Plaintiffs for their speech, making any claim that they have disavowed prosecution unreliable. For instance, in the district court, Defendants argued that Plaintiffs' speech can be prohibited because it is speech integral to criminal conduct. *See* Resp. in Opp'n, R.22, PageID ##221-222. And Defendants' position *right now* is that Plaintiff Welty "[o]f course" has reason to fear liability. *See* Defs.' Br. 28. They assert that the recruitment provision applies to "intentionally target[ing] and induc[ing] a minor to be transported out of state without parental consent for the purpose of obtaining an elective abortion." *Id.* And they further state that "offering to arrange [for] transportation" concerning "an abortion out of state" is a "[r]eal-world" violation of the law. *Id.* at 49. These activities describe almost exactly what Plaintiff Welty does. *See* Hr'g Tr., R.35, PageID #364 (testifying about work with abortion fund that gives block grants to out-of-state abortion clinics earmarked for Tennessee residents and provides resources to minors seeking abortions out of state). Far from disavowing enforcement, Defendants have "*doubled down*." *Kareem*, 95 F.4th at 1024.

II. Defendants are not shielded by sovereign immunity.

Although the state generally enjoys sovereign immunity from suit, *Ex parte Young* provides a "traditional exception." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021). Where a plaintiff alleges that a defendant "seeks to enforce" a law that is "a violation of the Federal Constitution," the defendant is "stripped of his official … character" and thus his ability to rely on sovereign immunity. *Ex parte Young*, 209 U.S. 123, 159-60 (1908). The touchstone is whether the defendant has "some connection with the enforcement of the act," *id.* at 157, and whether there is a "realistic possibility" such enforcement authority will be employed, *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015).

This is a quintessential *Ex parte Young* action. As this Court held in another case brought against Tennessee district attorneys general, "plaintiffs may validly employ the *Young* framework here because the district attorneys general have the requisite enforcement connection to the challenged laws." *Nabors*, 35 F.4th at 1040. District attorneys general "have the direct authority (and even duty) to enforce Tennessee's criminal" laws, including the recruitment provision. *Id.* (citing Tenn. Const. art. VI, § 5; Tenn. Code § 8-7-103(1)).

Defendants suggest that the sovereign immunity analysis requires something more than a plaintiff with standing, a defendant with enforcement authority, and a realistic possibility of enforcement. They argue that *Ex parte Young* permits suit only against a state official who "has threatened and is 'about to commence proceedings.'"

Defs.' Br. 42 (quoting *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 445 (6th Cir. 2019)). Along the same lines, Defendants submit that "*Ex parte Young* requires 'likely' enforcement, not potential enforcement." *Id.* (quoting *Doe v. DeWine*, 910 F.3d 842, 848 (6th Cir. 2018)).

Contrary to Defendants' assertions, "at the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy this element of *Ex parte Young*." *Russell*, 784 F.3d at 1047. The cases cited by Defendants do not hold otherwise. Although some cases have suggested that enforcement must be likely or imminent to satisfy *Ex parte Young*, this language is best understood as reinforcing the requirement that enforcement be a "realistic possibility." *EMW*, 920 F.3d at 445 (quoting *Russell*, 784 F.3d at 1048). *EMW*, for example, granted the Kentucky Attorney General sovereign immunity from suit because he had no "duty to enforce" the challenged law. *Id.* That, of course, is not the case for Defendants, who are obligated to enforce the recruitment provision. *Doe*, meanwhile, permitted an *Ex parte Young* suit against the Ohio Attorney General and the Superintendent of the Ohio Bureau of Criminal Investigation because both officials were "actively involved with administering" the challenged laws, creating a "realistic possibility" of enforcement. 910 F.3d at 849 (quoting *Russell*, 784 F.3d at 1048). The same is true here. Neither case supports the idea that *Ex parte Young* demands a higher degree of enforcement imminence than the Article III standing analysis.

More broadly, Defendants suggest that this Court has characterized *Ex parte Young* as "a check on improper or unripe suits." Defs.' Br. 43. That is wrong. The case on which Defendants rely notes that Article III ensures that courts do not consider legal questions "in the abstract" but says nothing about sovereign immunity or *Ex parte Young*. *See L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 490 (6th Cir. 2023) (internal quotation marks omitted). The purpose of *Ex parte Young* is to ensure that parties may vindicate their rights by enjoining state officials from taking unconstitutional action.

III. Plaintiffs are likely to succeed on the merits of their claim that the recruitment provision violates the First Amendment.

On any interpretation, the recruitment provision prohibits pure speech on the basis of content and viewpoint, and therefore violates the First Amendment both as applied and on its face. The provision is also unconstitutionally overbroad because its unconstitutional applications to protected speech are substantial relative to its legitimate sweep.

A. The recruitment provision unconstitutionally regulates speech on the basis of content.

"If a party fails to address one of the district court's independent grounds for its decision on appeal, he forfeits any challenge to it, permitting [this Court] to affirm on that ground alone." *Cunningham v. Shelby County*, No. 24-5241, 2024 WL 4825338, at *2 (6th Cir. Nov. 19, 2024). Here, Plaintiffs asserted below—and the district court agreed—that the recruitment provision is likely unconstitutional because it regulates speech based on content and viewpoint, and Defendants failed to satisfy strict scrutiny.

See Pls.' Mem., R.19, PageID ##173-176; Mem., R.40, PageID #568 (holding that the recruitment provision is "a content-based, viewpoint-based distinction in its purest, most pernicious form"). But despite that holding, Defendants ignore this issue on appeal. Defendants have thus forfeited any challenge to the district court's holding that the recruitment provision discriminates against speech on the basis of content and viewpoint. Defendants therefore "cannot prevail," and this Court should affirm the district court's conclusion that Plaintiffs are likely to succeed on the merits on that basis alone. *Stewart v. IHT Ins. Agency Grp.*, 990 F.3d 455, 457 (6th Cir. 2021).

In any event, the recruitment provision is an unconstitutional content-based regulation. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). As a result, "[c]ontent-based laws … are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A law is considered content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* When "a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys," strict scrutiny applies. *Id.* at 163-64.

The recruitment provision is a paradigmatic facially content-based regulation. As a starting point, the provision is "a regulation of speech." *Id.* at 163. To "recruit" means "to seek or enlist new members, supporters, or employees" or "[t]o induce or enlist (a

person) to participate or provide assistance." *Recruit*, Oxford English Dictionary, https://www.oed.com/dictionary/recruit_v. As the Ninth Circuit explained, when used in the context of abortion, the word "recruit" is fairly understood to encompass providing "information" about "the provider, time, place, or cost of an available abortion," as well as "[l]egal advice" and "[e]ven expressions of persuasive encouragement." *Matsumoto*, 122 F.4th at 809-10. On any of those definitions, recruitment inherently involves speech. Although Defendants seek to cast the law as covering only "conduct," even their narrow construction of recruitment plainly sweeps in pure speech. *See, e.g.*, Defs.' Br. 25 ("To recruit means to persuade someone to join in or to help with some activity." (internal quotation marks omitted)). Indeed, it is difficult to conceive of any form of recruitment not involving speech.

The recruitment provision's exceptions further underscore that the law covers speech. For example, the recruitment provision does not apply to "a medical diagnosis or consultation." *See* Tenn. Code § 39-15-201(f)(1)-(2). Diagnoses and consultations, of course, take the form of speech. *See Rust v. Sullivan*, 500 U.S. 173, 193-95 (1991); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 767 (2018). If the law was not a regulation of speech in the first instance, this exception would be superfluous.

The recruitment provision regulates that speech on the basis of content. The law impermissibly defines speech by "the idea or message expressed." *Reed*, 576 U.S. at 163. The only speech prohibited under the law is speech done "for the purpose of" aiding pregnant minors to obtain lawful abortions. *See* Tenn. Code § 39-15-201(a). The law

does not, by contrast, regulate speech that has the purpose of dissuading minors from getting lawful abortions: adults remain fully able to counsel minors that they ought to carry their pregnancies to term, even without parental permission. In this way, the recruitment provision goes beyond discriminating based on content. It is viewpoint discrimination, "an egregious form of content discrimination" that punishes speech based on "the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829.

To the extent the recruitment provision covers anything other than pure speech, it is at the very least viewpoint discrimination *as applied* to Plaintiffs' intended speech. A content-based law can be invalid as applied to particular plaintiffs and those in a "similar" position, if application of the law requires the government to "consider[] … the content of [their] intended speech." *Zillow, Inc. v. Miller*, 126 F.4th 445, 457 (6th Cir. 2025). Plaintiffs engage in various forms of expression, including public advocacy and individual counseling regarding lawful abortion. *See supra* pp. 5-9. All of this expression is protected by the First Amendment, is covered by the statute, *see Matsumoto*, 122 F.4th at 809-13, and is banned solely based on the viewpoint that it expresses. While opponents of abortion will be free to publicly and privately discourage minors from seeking lawful abortion care, Plaintiffs will be unable to inform their clients that abortion is a safe and available choice. The recruitment provision thus criminalizes Plaintiffs' "speech because of its message," and is therefore "presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828.

Defendants have attempted to salvage the recruitment provision by asserting that "much of the speech covered" by the law is exempt from First Amendment protection because it is "incident to criminal conduct." Defs.' Br. 46; *see also* Reply in Supp. of Summ. J., R.75, PageID #936. But the vast majority of the speech to which the recruitment provision could be applied does not fit within that exception. That is because nearly all of the abortions that anyone would plausibly "recruit" a Tennessee minor to obtain are legal where they occur. At the very least, Plaintiffs' desired speech is not incident to criminal conduct because Plaintiffs intend to speak about lawful abortion. Of course, the out-of-state abortions that Plaintiffs recommend would be illegal if they occurred in Tennessee. But they do not occur there. And the Supreme Court has made clear that one state may not criminalize "disseminating information about an activity that is legal in [another] [s]tate." *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975);[1] *cf. Katt v. Dykhouse*, 983 F.2d 690, 696 n.3 (6th Cir. 1992) (explaining that "a city may not ban speech describing a lawful underlying commercial activity taking place outside the city's boundaries," even if the activity is illegal within the city).

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[1] Defendants insist that *Bigelow* is no longer good law because the decision "hinged on abortion's 'constitutionally protected' status," which has since changed. Defs.' Br. 52 (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345 (1986)). Defendants are incorrect. *Bigelow* was about whether a state could ban speech about legal abortion, not about whether a state can ban abortion. *Posadas de Puerto Rico*, meanwhile, held only that the power "to completely ban" an activity within a jurisdiction "necessarily includes the lesser power to ban advertising" of that activity. 478 U.S. at 345-46. But it said nothing about the power to ban non-commercial speech about an activity occurring in a separate jurisdiction where the activity is legal.

As the Ninth Circuit concluded, where an adult "recruits" a minor to procure a lawful abortion, "there is no underlying offense but the recruitment itself." *Matsumoto*, 122 F.4th at 814. Merely labeling recruitment a crime cannot turn recruitment into "speech integral to criminal conduct" because the recruitment provision "cannot serve to self-invalidate." *Id.*; *see also Yellowhammer Fund v. Marshall*, No. 2:23-cv-450, 2025 WL 959948, at *21-22 (M.D. Ala. Mar. 31, 2025) (declining to apply speech-integral-to-criminal-conduct exception to Alabama Attorney General's threatened prosecution of counseling services regarding *lawful* out-of-state abortions).

The recruitment provision is thus a content-based restriction on protected speech. It is therefore subject to strict scrutiny. *Reed*, 576 U.S. at 164. The law cannot satisfy that demanding standard. Defendants have made no attempt to meet their burden of showing that the law is "narrowly tailored" to serve a "compelling governmental interest." *Id.* at 171. If strict scrutiny applies, the recruitment provision must fall.

B. The recruitment provision is unconstitutionally overbroad.

The recruitment provision is also facially invalid because of its overbreadth. Under the First Amendment, "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." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (internal quotation marks omitted). When a law is overbroad because its "unconstitutional applications substantially outweigh its constitutional ones," it "may be struck down in

its entirety." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723-24 (2024). The overbreadth analysis requires courts to consider "the statute's effect on other parties not before the court." *Zillow*, 126 F.4th at 456.

"The first step" in assessing an overbreadth claim is to determine the law's "scope." *Moody*, 603 U.S. at 724. This inquiry focuses on "whether the enactment reaches a substantial amount of constitutionally protected conduct." *Speet v. Schuette*, 726 F.3d 867, 873 (6th Cir. 2013) (quoting *City of Houston v. Hill*, 482 U.S. 451, 458 (1987)). In conducting this assessment, courts must "scrutinize '[c]riminal statutes … with particular care.'" *Id.* (alterations in original) (quoting *City of Houston*, 482 U.S. at 459). After a court determines the law's coverage, it must "decide which of the laws' applications violate the First Amendment" and "measure them against the rest." *Moody*, 603 U.S. at 725. The question is whether "the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'" *Hansen*, 599 U.S. at 770 (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)). If it does, the law is "facially invalid." *Id.*

The recruitment provision is unconstitutionally overbroad no matter how this Court construes it. Start with the Ninth Circuit's interpretation of "recruit" in *Matsumoto*, which Defendants concede was "correct," Defs.' Br. 52. The Ninth Circuit explained that "recruit" means to "seek to persuade, enlist, or induce someone to join an undertaking or organization, to participate in an endeavor, or to engage in a particular activity or event." *Matsumoto*, 122 F.4th at 808. As applied in the context of abortion,

that definition can encompass "providing information," "especially information trying to persuade a girl to have an abortion or regarding the provider, time, place, or cost of an available abortion." *Id.* at 809. Recruiting could also include "subsidizing or fully funding an abortion—whether through donations or discounted services—by making the abortion more attractive (persuading) or more feasible (inducing)." *Id.* Things like "financial support and logistical assistance," "[l]egal advice" that "persuades a minor to obtain a legal abortion," and "expressions of persuasive encouragement" all "might be prosecuted" under this statute. *Id.* at 810.

Those potential applications involve protected speech. *See, e.g.*, *McCullen*, 573 U.S. at 472-73 (sidewalk counseling of abortion options); *Bigelow*, 421 U.S. at 824 (advertising of legal out-of-state abortions). The Supreme Court has held that "abstract advocacy" is constitutionally protected even when it promotes "illegality." *See Williams*, 553 U.S. at 298-99. Surely advocacy of *lawful*, out-of-state abortion is protected too, and yet the recruitment provision appears to criminalize all such speech.

Even if this Court adopts Defendants' limiting construction and interprets the recruitment provision to apply only to targeted persuasion, the law nonetheless has manifest unconstitutional applications. Consider an illustrative example: A young woman in Tennessee discovers she is pregnant and confides in her grandmother. The grandmother explains that an abortion would be illegal in Tennessee, but that the granddaughter could travel to Illinois or look into a self-managed medication abortion. The grandmother says that abortion is safe, and that if she were in her granddaughter's

shoes, she would seek one. Perhaps the grandmother believes the young woman *should* terminate the pregnancy, and speaks with the purpose of persuading her to do so. Even on Defendants' reading, the recruitment provision would turn this conversation into a criminal act—something the First Amendment would not tolerate. *See Hill*, 530 U.S. at 708, 714-15 (First Amendment protects "efforts to educate, counsel, persuade, or inform … about abortion" (internal quotation marks omitted)). As this Court has recognized, the state has no "legitimate interest" in "regulating the information heard" by its citizens about "legal" activities "in other locales"—even if they are illegal at home. *Katt*, 983 F.2d at 696 (internal quotation marks omitted).

Such unconstitutional applications far outstrip the recruitment provision's legitimate sweep. Defendants have proffered constitutional applications that are all but illusory. First, Defendants suggest that the law validly applies to "recruiting minors to obtain illegal abortions performed *in Tennessee*." Defs.' Br. 46. Likewise, Defendants' second proposed constitutional application involves "recruiting minors to obtain illegal abortions performed *in other States in which abortion is illegal*." *Id.* at 47. It is true that when applied to unlawful abortions, the recruitment provision may be constitutional under the First Amendment exception for speech incident to criminal conduct. But in the real world, these will be vanishingly rare applications of the statute, far outnumbered by applications to protected speech about lawful out-of-state abortions. Indeed, given the availability of legal, safe abortion care in many states, as well as the option of legal medication abortion, it would make little practical sense to recruit a minor for an illegal

abortion in Tennessee. And it would be especially bizarre to recruit a minor to travel out of state for an abortion, only to pick a state where the abortion is illegal.

Instead, the vast majority of Tennesseans advising minors on how to obtain abortion care will suggest they either travel to a state where it is legal or pursue self-managed medication abortions.[2] Every indication of what is actually happening on the ground supports this conclusion *See, e.g.*, *Find a Clinic*, ACT, https://www.abortioncaretn.org/find-a-clinic (listing "partner clinics" only in states with less restrictive abortion laws); Karen Diep et al., *Abortion Trends Before and After Dobbs*, KFF (Feb. 27, 2025), https://www.kff.org/womens-health-policy/issue-brief/abortion-trends-before-and-after-dobbs; *see also* Yvonne Lindgren, *When Patients Are Their Own Doctors:* Roe v. Wade *in an Era of Self-Managed Care*, 107 Cornell L. Rev. 151, 227 (2021) ("The symbolic coat hanger has been replaced by a two-drug regimen.").

Tennessee's broader statutory scheme further underscores that the recruitment provision is not primarily concerned with unlawful abortion. It is a felony in Tennessee to "perform[] or attempt[] to perform" an abortion in the state, with very few exceptions. *See* Tenn. Code § 39-15-213. Like all criminal laws in Tennessee, that law

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[2] Tennessee's prohibition on abortion applies to medication abortions, but the law exempts from liability "the pregnant woman upon whom an abortion is performed." Tenn. Code § 39-15-213(a)(1), (e). A pregnant woman who obtains abortion medication drugs—such as through a telehealth visit with an out-of-state doctor—can therefore lawfully take them. *See* Mem., R.40, PageID #540 n.2.

can be enforced against accomplices. *See id.* § 39-11-402. Whatever activity constitutes "recruiting" a criminal abortion within Tennessee was therefore already illegal as aiding and abetting—and could be punished more severely under that statute than under the recruitment provision. *See id.* § 39-15-213(b) ("Criminal abortion is a Class C felony."). If unlawful abortions in Tennessee were the heartland of the recruitment provision, the law would be superfluous.

The legislative record confirms that the recruitment provision is primarily aimed at speech encouraging pregnant Tennesseans to obtain lawful abortions out of state. When asked about the provision, the law's sponsor did not reference unlawful abortions in Tennessee or elsewhere. He offered two examples—one involving Planned Parenthood and the other involving Plaintiff Behn—that evoked Tennesseans going "across state lines" to get legal abortion care. *See* House Tr. R.1-6, PageID ##60-61. Those examples show what the provision really aims to criminalize: encouraging pregnant minors to seek abortion care in states where it is lawful. The statute's express application to recruiting "regardless of where the abortion is to be procured" confirms the legislature's intent to reach legal abortions out of state. Tenn. Code § 39-15-201(a)(2). And the law's fiscal note supports the same conclusion. It contemplates future prosecutions only in relation to abortions occurring in states "where abortion is legal in some capacity." Fiscal Note, R.29-1, PageID ##328-329. Other applications are not impossible, but the point is that recruitment related to unlawful abortions is far

from "the principal thing[] regulated" and is thus entitled to little "weight in the facial analysis." *Moody*, 603 U.S. at 726.

Defendants finally argue that the recruitment provision constitutionally applies to "speech intended to induce abortions through extortion, coercion, or to conceal criminal conduct." Defs.' Br. 50. But no reasonable definition of the word "recruit" encompasses extortion or coercion. Recruitment suggests encouragement, persuasion, and other means of convincing a person to voluntarily engage in an effort. One would be hard-pressed to describe an employer who coerces, blackmails, or threatens a person to join his company as engaging in "recruitment." Even if such activities could somehow be called recruitment, Defendants provide no reason to think they are common, particularly compared to what motivated the law: persuasive or informative speech about lawful abortion.

Whereas Plaintiffs have put forth "realistic" instances of the recruitment provision's unconstitutional applications, Defendants' efforts to illustrate "the statute's lawful sweep" are "fanciful." *Hansen*, 599 U.S. at 770. To the extent lawful applications exist, they are miles from the provision's heartland and are not the principal things regulated. But the law's restrictions on pure speech are significant. The law is therefore unconstitutionally overbroad.

IV. Plaintiffs are likely to succeed on the merits of their claim that the recruitment provision is unconstitutionally vague.

A law is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). Vagueness is especially problematic with respect to criminal laws, for which "the consequences of imprecision" are "severe." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Moreover, the Constitution is particularly inhospitable to vague laws that "threaten[] to inhibit the exercise of constitutionally protected rights," so "a more stringent vagueness test" applies to a law that "interferes with the right of free speech." *Id.* When a law "is a content-based regulation of speech," vagueness is "a matter of special concern … because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

The recruitment provision makes it a crime to "intentionally … recruit[]" an unemancipated minor for the purpose of "[c]oncealing" or "[p]rocuring" an abortion that would be illegal in Tennessee or "[o]btaining an abortion-inducing drug" in connection with an abortion that would be illegal in Tennessee. *See* Tenn. Code § 39-15-201(a). But the law provides no definition of what it means to "recruit," and neither dictionary definitions, nor the statutory context, nor the legislative history sheds sufficient light on the term. Plaintiffs and Tennesseans like them are thus unable to discern what conduct is proscribed by the statute, making it unconstitutionally vague.

The statute's vagueness results from the fact that "recruit"—as Defendants conceded below—is "susceptib[le] to a wide array of possible meanings." *See* Resp. in Opp'n, R.22, PageID #218. Those meanings are an awkward fit in the abortion context, and Defendants' efforts to clarify the meaning of the provision by adding criteria that do not appear in the text only confuse matters further.

As noted above, dictionaries provide multiple meanings for the word "recruit." Some say that "recruit" means to "to seek or enlist new members, supporters, or employees." *Recruit*, Oxford English Dictionary, *supra*; *see also id.* ("To acquire (a person) as an employee, member, or supporter of a society, organization, etc."); *Recruit*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/recruit ("to fill up the number of with new members" or "to seek to enroll"). Alternatively, "recruit" can mean "[t]o induce or enlist (a person) to participate or provide assistance." *Recruit*, Oxford English Dictionary, *supra*; *see also Recruit*, Merriam-Webster Dictionary, *supra* ("to secure the services of").

Courts have likewise acknowledged that "recruit" can mean different things. Recruit can mean "to 'hire or otherwise obtain to perform services,' to 'secure the services of' another, to 'muster,' 'raise,' or 'enlist.' Such recruitment does not require force or coercion." *Commonwealth v. Dabney*, 90 N.E.3d 750, 764 (Mass. 2018) (citation omitted). Recruiting can also involve "seek[ing] out a person to perform a specific task or service." *State v. Cartee*, 577 N.W.2d 649, 652 (Iowa 1998) (internal quotation mark

omitted). Other times, it might mean merely to "encourage." Tenn. Op. Att'y Gen. No. 07-64 (May 10, 2007).

A word having multiple meanings would not alone render the statute vague. But here, it is impossible to tell which if any of the usual meanings is intended. As the district court explained, "a review of preexisting statutes involving other kinds of 'trafficking' strongly suggests that the bill's authors simply imported the [word 'recruit'], without elaboration, from contexts in which it makes significantly more sense." Mem., R.40, PageID #542. The fact that a term appears in multiple laws does not mean its definition can readily be "transplanted" between them. *See George v. McDonough*, 596 U.S. 740, 746 (2022) (quoting *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019)). Abortion is not an organization that a recruited individual can join. *But see Recruit*, Black's Law Dictionary (12th ed. 2024) ("A new member of an organization, team, or group of people ….").

Because the usual meanings of "recruit" do not neatly apply in this context, the public is left to wonder if the statutory term might instead mean something else—like merely persuasive or supportive speech—as the bill's own sponsor indicated.

Indeed, there is little question that other trafficking laws cover substantial amounts of speech. But the key difference is that the underlying conduct in those other contexts is criminal, and the associated speech is thus unprotected by the First Amendment because it is "intended to bring about a particular unlawful act." *Hansen*, 599 U.S. at 783. Here, by contrast, the provision forbids "recruiting" aimed at actions that are perfectly legal.

Defendants' various efforts to define the term offer little clarity. Defendants argue that "'to recruit' involves some affirmative, targeted conduct that seeks to drive a person to engage in a particular action." Defs.' Br. 25. In their telling, the recruitment provision applies only "to targeted conduct intended to induce or enlist a pregnant, unemancipated minor for the purpose of obtaining an abortion considered unlawful in Tennessee." *Id.* at 24. This framing raises more questions than it answers, departing substantially from the ordinary meaning of "recruit." A person who "induces" a pregnant minor to obtain an abortion cannot easily be said either to enlist that minor in any organization or to seek assistance from that minor in performing any task or service.

What is more, Defendants offer competing definitions. In addition to describing recruiting as "targeted conduct" seeking to induce a particular action, Defendants endorse the Ninth Circuit's broader definition of the term that includes "persuad[ing]" persons "to engage in a particular activity." *Id.* at 52-53 (quoting *Matsumoto*, 122 F.4th at 808). In the district court, Defendants similarly suggested that recruitment includes persuasive speech. *See* Resp. in Opp'n, R.22, PageID ##218-219 (recruitment involves "*successful* persuasion to join a group or engage in an endeavor"). It is left unclear whether there is any daylight between "driving" someone to take an action, as opposed to "inducing" them, as opposed to merely "persuading" them.

Defendants' examples of what the recruitment provision covers only muddy the water further. For instance, Defendants suggest that under the plain meaning of

recruiting, "a rapist who coerces his underage victim to leave the State to get an abortion" would obviously qualify. Defs.' Br. 62. Defendants reiterate, on several occasions, that various forms of "coercion" constitute recruiting. *Id.* at 19, 50. But as a matter of ordinary speech, "recruitment" and "coercion" are different concepts. *See Dabney*, 90 N.E.3d at 764 (explaining that "the plain and ordinary meaning[s]" of "entice" and "recruit" do not typically include "force or coercion"). Recruitment suggests persuading a person to do something, whereas coercion means forcing them to do so. Defendants' efforts to explain recruitment have yielded only "hopeless indeterminacy"—further "evidence of vagueness." *Johnson*, 576 U.S. at 598.

Regardless, Defendants are incorrect that the ordinary meaning of recruit is limited to targeted conduct. To be sure, recruiting may describe efforts by "a college basketball coach" to bring "a particular candidate" to his team (though how that example would transfer to the abortion context is anyone's guess). Defs.' Br. 25. But recruiting is not always so targeted. Consider, for instance, a "recruiting event" hosted by an employer and open to members of the public. In that context, simply providing information about an opportunity is commonly recognized as a type of recruitment. Indeed, recruitment is often "indirect," including simply "'put[ting] out the word'" that an opportunity is available (which Plaintiff Welty does). *See Escobar v. Baker*, 814 F. Supp. 1491, 1503 (W.D. Wash. 1993). Defendants are wrong to suggest that recruiting "necessarily *excludes*" activities like "the generalized provision of information or advocacy to the public." Defs.' Br. 25-26.

The broader text of § 39-15-201 is also unhelpful in narrowing the meaning of recruitment. The statute prohibits not only recruiting but also "harbor[ing]" or "transport[ing]" an unemancipated minor for the purpose of procuring an abortion that would be unlawful in Tennessee. Defendants appeal to the *noscitur a sociis* canon, arguing that because harboring and transporting both "involve[] conduct tied to facilitating a particular minor's obtaining an elective abortion without parental consent," recruiting "should be read to similarly require targeted inducement or persuasion." Defs.' Br. 26.

Defendants' reliance on *noscitur a sociis* is misplaced. The canon "is no help absent some sort of gathering with a common feature to extrapolate." *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 379-80 (2006). "A list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 288 (2010). Where a list of words "do[es] not share any comparable core of meaning," *id.* at 289 n.7, the definition of one term cannot be determined by looking to the company it keeps. That is the case here: the word "recruit" has nothing in common with "harbor" or "transport." Defendants endeavor to link these words by pointing out that they are all "verbs" that "involve[] conduct." Defs.' Br. 26. That is no limiting principle at all. By their nature, verbs are action words, so they very often "involve[] conduct." *Id.* For the *noscitur a sociis* canon to be a useful tool, the commonality must be far more specific. Nor do all three terms even necessarily involve conduct. Whereas transporting and

harboring are forms of conduct, even Defendants acknowledge that recruiting involves speech.

The legislative history of § 39-15-201 reinforces the recruitment provision's vagueness. Vagueness problems are intensified if the legislative record is "opaque." *Wilson*, 559 U.S. at 298. When asked to "explain what [recruiting] would look like," House Tr., R.1-6, PageID #60, the law's sponsor failed to provide a definition. Instead, he gave two examples: The first was circular, as he instructed legislators to "Google the story of recruiting children to take them across state lines to abort their babies." *Id.* at PageID #61. The second, as noted, referred to a social media post by Plaintiff Behn in which she expressed her willingness "to take a young person out of state who wants to have an abortion." *Id.* That post, of course, amounted to pure speech that was not targeted at any particular pregnant minor.

The recruitment provision's scienter requirement also does not save the law. To be sure, "a scienter requirement may mitigate a law's vagueness." *Hoffman Estates*, 455 U.S. at 499. But such a requirement does not immunize a law from a vagueness challenge. *See Smith v. Goguen*, 415 U.S. 566, 579-80 (1974). The fact remains that what the recruitment provision proscribes is unclear. Even if the statute were clear about what must be intended (the mens rea), it remains unclear about what must be done (the actus reus). Consider a social worker who counsels a pregnant minor to get a lawful abortion in another state. Even if there is no doubt that the social worker had the purpose of persuading the minor to terminate her pregnancy, it remains uncertain

whether the conversation counts as recruitment. And any "mistake" about what recruitment means on the social worker's part "is no defense to criminal prosecution." *See State v. Casper*, 297 S.W.3d 676, 690 (Tenn. 2009).

And even a law with a scienter requirement is vague if "the contours" of that "requirement are themselves unclear." *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 535 (6th Cir. 1998). To be liable under the recruitment provision, a person must "intentionally recruit[]" a minor "for the purpose of" "[p]rocuring" an abortion that would be illegal in Tennessee. Tenn. Code § 39-15-201(a). The requirement that recruitment be "intentional[]" does little work because, as explained above, an act is intentional under Tennessee law if the actor intends the result of her conduct *or* merely intends to engage in the conduct itself. *See supra* p. 17. Virtually every discussion Plaintiffs have regarding abortion is covered, since they intend to "engage in the conduct" of having the conversation. Moreover, although Defendants assert that Plaintiffs do not act with the "'purpose of' facilitating a minor's abortion" because Plaintiffs have "disavowed" any intent to persuade minors to get abortions, Defs.' Br. 33, that is simply not true. While Plaintiffs do not set out to persuade their minor clients one way or another, they may end up speaking with the "purpose" of helping those minors procure lawful abortions and encouraging them to do so. *See supra* pp. 17-18. Defendants fail to engage with these nuances, leaving it unclear whether Plaintiffs' intentions are sufficient to trigger liability under the recruitment provision.

V. The district court did not abuse its discretion in weighing the remaining preliminary-injunction factors and granting Plaintiffs' motion.

Plaintiffs are likely to succeed on the merits and thus have satisfied "the most important" factor in the preliminary-injunction analysis. *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009); *see Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) ("In constitutional cases, the first factor is typically dispositive."). The remaining factors also support preliminary relief: Plaintiffs will suffer irreparable harm absent an injunction, and preliminary relief is in the public interest. The district court did not abuse its discretion by granting an injunction barring Defendants from enforcing the recruitment provision.

A. Plaintiffs would suffer irreparable harm absent a preliminary injunction.

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). That is particularly true in cases involving the freedom of speech because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (internal quotation marks omitted). Under these principles, Plaintiffs have demonstrated that they will suffer irreparable harm absent an injunction, as the recruitment provision serves to chill their constitutionally protected speech.

Defendants argue that any chill on Plaintiffs' speech amounts to "self-censorship" because the recruitment provision does not apply to their intended speech

when "properly construed." Defs.' Br. 63. But Plaintiffs have demonstrated that the law cannot be properly construed because it is impermissibly vague, and even accepting Defendants' limiting construction, the provision violates the First Amendment.

B. An injunction against enforcement of the recruiting provision serves the public interest.

In cases involving government defendants, "the public-interest factor merges with the substantial-harm factor" when assessing a preliminary injunction. *Daunt v. Benton*, 956 F.3d 396, 422 (6th Cir. 2020) (internal quotation marks and alteration omitted). "[N]o cognizable harm results from stopping unconstitutional conduct, so it is always in the public interest to prevent violation of a party's constitutional rights." *Vitolo*, 999 F.3d at 360 (internal quotation marks omitted). Because the recruitment provision is unconstitutional, the district court's preliminary injunction is in the public interest. In particular, an injunction against an overbroad and vague law serves the public by preventing the law from chilling speech.

Defendants assert that the injunction disserves the public interest because the recruitment provision promotes "health-and-welfare" considerations, guards minors from "coercive activities," and protects fetal life. Defs.' Br. 64-65. But as Plaintiffs have highlighted, other Tennessee statutes already serve these same interests without the same burden on protected speech. *See supra* pp. 39-40. Defendants themselves have recognized as much in this litigation. *See* Reply in Supp. of Summ. J., R.75, PageID ##936-937 (acknowledging that the recruitment provision is part of a scheme of

"overlapping criminal prohibitions"). Defendants therefore cannot demonstrate that enjoining the recruitment provision harms the state's interests.

C. The district court did not abuse its discretion by enjoining enforcement of the recruitment provision against nonparties.

The district court enjoined Defendants from enforcing the recruitment provision against anyone. Defendants argue that even if Plaintiffs are entitled to a preliminary injunction, relief should "cover only the parties." Defs.' Br. 65. But Defendants have failed to show that the district court's order ought to be narrowed.

"Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. IRAP*, 582 U.S. 571, 579 (2017). As such, "[a] district court has broad discretionary powers to craft an injunction" that remedies the "specific violations" at issue. *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994). That includes the authority to fashion an order "to prevent the irreparable harm identified." *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 614 (6th Cir. 2024).

The district court crafted its injunction to provide complete relief to Plaintiffs by remedying the recruitment provision's chilling effects and protecting "the free flow of information." Mem., R.40, PageID #585. In addition, the district court's injunction was appropriate in light of Plaintiffs' likelihood of success on their overbreadth challenge. When a law is unconstitutionally overbroad, "*all* enforcement of that law" may be enjoined. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *see also Moody*, 603 U.S. at 723 (an

overbroad law "may be struck down in its entirety"). Indeed, the overbreadth doctrine is designed to consider the interests of nonparties. *See Zillow*, 126 F.4th at 456. The district court—confronted with an overbroad law that threatens the First Amendment rights of countless Tennesseans—granted appropriate relief.

CONCLUSION

For the foregoing reasons, the district court properly issued a preliminary injunction. Its order should be affirmed.

Dated: April 4, 2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing brief complies with the type-volume requirements of Federal Rule 32(a)(7) because it contains 12,988 words, excluding those portions of the brief exempted by Federal Rule 32(f) and Sixth Circuit Rule 32(b). I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in 14-point Garamond font, a proportionally spaced typeface, using Microsoft Word.

/s/ William Powell
William Powell

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April 2025, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ William Powell
William Powell

ADDENDUM

Plaintiffs-Appellees' Designation of Relevant Court Documents

Pursuant to Sixth Circuit Rules 28(b) and 30(g), Plaintiffs-Appellees hereby designate the following relevant district court documents in the electronic record.

Record Entry No.	Description of Document	Page ID #
Middle District of Tennessee, No. 3:24-cv-768		
1	Complaint	1-15
1-1	Complaint Exhibit 1, Public Ch. 1032	16-18
1-2	Complaint Exhibit 2, Welty Informational Materials	19-21
1-3	Complaint Exhibit 3, NPR Article	22-24
1-4	Complaint Exhibit 4, Horwitz Letter to District Attorneys General	25-35
1-5	Complaint Exhibit 5, Rep. Behn Tweet with Infographics	36-40
1-6	Complaint Exhibit 6, Transcript of Hearing on H.B. 1895	41-78

1-7	Complaint Exhibit 7, Declaration of Rachel Welty	79-80
1-8	Complaint Exhibit 8, Declaration of Aftyn Behn	81-82
18	Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction	157-159
19	Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction	160-183
19-1	Exhibit 1 to Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Post-Trial Jury Instructions in *United States v. Withers*, No. 3:16-cr-5 (W.D. Wis. Apr. 28, 2017)	184-201
22	Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction	208-234
23	Plaintiffs' Reply in Support of Their Motion for Temporary Restraining Order and Preliminary Injunction	235-242
24	Memorandum and Order Denying Plaintiffs' Motion for Temporary Restraining Order and Setting Hearing on Plaintiffs' Motion for Preliminary Injunction	243-248

25	Defendants' Motion to Dismiss	249-251
26	Memorandum in Support of Defendants' Motion to Dismiss	252-272
29	Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss	300-327
29-1	Exhibit 1 to Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss, Fiscal Note to HB 1895–SB 1971	328-330
30	Plaintiffs' Supplemental Reply in Support of Their Motion for Temporary Restraining Order and Preliminary Injunction	331-337
33	Defendants' Reply in Support of Their Motion to Dismiss	342-349
35	Transcript of Preliminary Injunction Hearing	351-478
39	Defendants' Supplemental Response in Opposition to Plaintiffs' Motion for Preliminary Injunction	512-519
40	Memorandum Opinion	538-586

41	Order Granting Plaintiffs' Motion for Preliminary Injunction and Denying Defendants' Motion to Dismiss in Part	587-588
47	Notice of Appeal	601-603
75	Defendants' Reply in Support of Their Motion for Summary Judgment	932-938