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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IDAHO FEDERATION OF TEACHERS, et al.,

Plaintiffs,

v.

RAÚL LABRADOR, in his official capacity as Attorney General of the State of Idaho, et. al.

Defendants.

Case No. 1:23-cv-00353-DCN

REPLY IN SUPPORT OF MOTION TO DISMISS [Dkt. 42]

INTRODUCTION

Attempting to save their case, Plaintiffs paradoxically put forth an interpretation of the No Public Funds for Abortion Act ("Act") that would subject them to criminal liability, when no Defendant to this case interprets the statute in that manner, and which is contrary to the plain language of the statute. This case is a textbook example of Plaintiffs imagining and speculating about a non-existent injury. Yet federal courts have long held that this does not get a plaintiff into court. *E.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Plaintiffs' plea to this Court to not end this case "without any binding judgment," Dkt. 52 at 18, is a half-veiled plea for an advisory opinion. While Plaintiffs may call on students to answer hypothetical questions in lecture halls, Plaintiffs cannot come to a federal court to ask it to resolve a hypothetical case. Federal courts do not issue advisory opinions because they constitutionally cannot. The complaint must be dismissed due to Plaintiffs' lack of standing.

Finally, even if this Court thought it could get to the merits of the case, Plaintiffs have not presented legally cognizable claims. The plain language of the statute does not apply to Plaintiffs' alleged conduct. Moreover, governmental proscription of the use of public funds to counsel in favor of or promote abortion has long been held acceptable, even in the *Roe* era. *See Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* itself dealt with regulations that prohibited funded projects from *promoting* abortion as a method of family planning and *counseling* concerning the use of abortion as a method of family planning. *Id.* at 179–80. Though Defendants raised this point and cited *Rust* in their opening brief, *see* Dkt. 42 at 12–14, Plaintiffs not once attempt to counter *Rust*, *see* Dkt. 52. Plaintiffs fail to even cite *Rust*. Instead, Plaintiffs attempt to cast doubt on the Attorney General's Opinion and the points relayed in the motion to dismiss. But their arguments simply attempt to create ambiguity where none exists. There is neither a viable First Amendment (through the Fourteenth Amendment) claim nor a viable vagueness claim. Plaintiffs' complaint is also subject to dismissal under Rule 12(b)(6).

ARGUMENT

I. Plaintiffs are trying to create standing.

A. The individual Plaintiffs cannot manufacture standing.

The primary argument addressed by both sides is whether Plaintiffs have standing to bring a pre-enforcement challenge to the Act. An alleged injury arising out of the enforcement of a law against a plaintiff requires a plaintiff to 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 threat 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 (9th Cir. 2000) (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126–27 (9th Cir. 1996)).

The Ninth Circuit in *Lopez v. Candaele* noted that "[t]he touchstone for determining injury in fact is whether the plaintiff has suffered an injury or threat of injury that is credible, not 'imaginary or speculative.'" 630 F.3d 775, 786 (9th Cir. 2010) (quoting *Babbitt*, 442 U.S. at 298 (in turn quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). Consistent with *Thomas*, the *Lopez* court explained that the factors the Ninth Circuit applies examine "whether pre-enforcement plaintiffs have failed to show a reasonable likelihood that the government will enforce the challenged law against them[,]" "whether the plaintiffs have failed to establish, with some degree of concrete detail, that they intend to violate the challenged law[,]" and "whether the challenged law is inapplicable to the plaintiffs, either by its terms or as interpreted by the government." *Id.*

Starting with the third *Lopez* factor, Plaintiffs allege that the individual words—read alone, without the context of the statute—allow them to allege that the Act "arguably covers" their conduct. *See* Dkt. 52 at 7–8. But Plaintiffs' desire to read words out of context is not the way statutes are interpreted in Idaho. *See* Dkt. 42 at 11–12. And as *Lopez* instructs, just because a party alleges it is covered by the challenged law does not permit the Court to ignore the plain language of the law, which must be interpreted consistent with the home state's methods for statutory interpretation. *See Lopez*, 630 F.3d at 788 (citing *Ca. Pro-Life Council, Inc. v. Getman*, 528 F.3d 1088, 1095 (9th Cir. 2003) (citation omitted)); *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990, 998 (9th Cir. 2017).

Plaintiffs next argue that Defendants' silence is sufficient for a credible threat of prosecution, and argue that the Attorney General Opinion is irrelevant to the Court's standing analysis, suggesting it to be mere litigation position. Dkt. 52 at 9. As to Plaintiffs' first point, the problem for Plaintiffs is that their case is not like *Isaacson v. Mayes*, 84 F.4th 1089, 1100–01 (9th Cir. 2023), the case they cite, as there is no party here (there an intervenor county attorney and defendants health department and medical board) who has made clear its plans to enforce the law. Nor is this case like *Tingley v. Ferguson*, 47 F.4th 1055, 1068 (9th Cir. 2022), the other case cited by Plaintiffs, where Washington "confirmed that it will enforce the ban on conversation therapy 'as it enforces other restrictions on unprofessional conduct.'" Plaintiffs can point to nothing from any enforcement authority—let alone any Defendant—that threatened to enforce the Act against Plaintiffs for academic teaching and scholarship. As Prosecutor Bennetts aptly put it, "Plaintiffs cannot create such a duty [to write back to the ACLU] . . . call it 'disavowal,' and make it mandatory on a defendant to prevent being sued." Dkt. 38-1 at 8 (citing *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000)). Put another way, mere silence from agencies, especially following two years in which the statute has been in effect with no prosecution against Plaintiffs, does not create a credible fear of prosecution. This is why Plaintiffs' argument that

Defendant did not raise mootness, Dkt. 52 at 11, misses the mark: there's nothing to moot when no credible threat of enforcement exists.

As to Plaintiffs' request that the Court ignore the Attorney General's Opinion as part of its standing analysis, this argument fails on multiple fronts. The Attorney General's Opinion was the first of any Defendants to offer a view on the Act. And the Opinion, interpreting the plain language of the Act in the context of the Act, concludes that the Act does not apply to academic scholarship and teaching. A government defendant's view that a law does not apply to challenged conduct is certainly a factor the Court considers when examining standing. *Cf. Lopez*, 630 F.3d at 788 (9th Cir. 2010). Plaintiffs' contention that the Opinion is a mere litigation position, Dkt. 52 at 9–10, ignores that it is an official opinion issued by the Attorney General under a statutory duty. *See* Idaho Code § 67-1401(6). Finally, even with the Opinion removed from the equation, Plaintiffs are left with nothing from any enforcement authority, let alone Defendants. There is no credible threat of prosecution at issue here.

Further, the facts show that the Act was in effect for two years before Plaintiffs brought their challenge, Plaintiffs suffered no "chill" in the pre-*Dobbs* period, and that there has been no prosecution based on the Act in that period. These facts weigh against finding Plaintiffs' fear of prosecution credible. Nothing about *Dobbs* altered the landscape of First Amendment or due process jurisprudence in the academic speech context, and a law does not become vaguer because it tangentially deals with abortion. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 286–87 (2022) (noting unfortunate distortion of "important but unrelated legal doctrines" because of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). Plaintiffs' belated disquiet is not a credible, objective, fear.

B. The organizational Plaintiffs do not have standing.

The Union Plaintiffs, beyond failing to show an injury-in-fact through harm to their members, have not shown separately any diversion of resources and frustration of mission. *Fair Housing of Marin*

v. Combs, 285 F.3d 899, 905 (9th Cir. 2002); *see also La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). They must show they "would have suffered some other injury if [they] had not diverted resources to counteracting the problem." *Lake Forest*, 624 F.3d at 1088. Plaintiffs ask this Court to not apply *Lake Forest*, claiming it not to be "the Ninth Circuit's test." Dkt. 52 at 13. But Plaintiffs fail to grapple with *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc), which requires this Court apply *Lake Forest* unless the Supreme Court of the United States or an *en banc* Ninth Circuit have overruled it. *See also* Dkt. 42 at 10 n.2 (raising *Miller*).

As Defendants noted in their motion to dismiss, the Union Plaintiffs cannot manufacture standing here where there is no problem affecting their organization. Dkt. 42 at 9–10; *Lake Forest*, 624 F.3d at 1088 (Plaintiff " cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all."). The statute simply does not apply to the Union Plaintiffs' (or their members') alleged conduct. That issue, unrelated to *Lake Forest*, shows that Union Plaintiffs lack standing.

Second, contrary to their belated assertions, Plaintiffs do not plead that the Union's self-described missions of "recruiting new members" and "fighting to improve instructional opportunities and working conditions for its members" or "advocating for increased salaries" were in any respect frustrated by the Act—whether for the year it remained unchallenged or belatedly after *Dobbs*—and that they would have suffered some other injury. *See* Dkt. 1 at 34–35. Plaintiffs' footnote, Dkt. 52 at 14 n.5, cites no authority in their complaint to support their assertions.

C. Plaintiffs want this Court to issue an advisory opinion.

Plaintiffs apparently think the Court should disregard their lack of standing in light of the need for guidance to a population of academics. They don't want the Court to "end this case without any binding judgment…." Dkt. 52 at 18. They want "a clear and binding answer". *Id.* at 20. Although the plain language of the statute does not apply to Plaintiffs' alleged conduct—as the Attorney General

Opinion confirms—they want Court guidance. But this guidance is nothing more than an advisory opinion. Federal courts do not grant advisory opinions. *Carney v. Adams*, 592 U.S. 53, 58 (2020) (holding that Article III prohibits federal courts from issuing advisory opinions, which is implemented through the doctrine of standing).

Advisory opinions are forbidden under Article III, including when they may prove useful for other parties, such as the "other professors" noted in Plaintiffs' brief, not before the Court, or may indirectly benefit the parties in a future lawsuit. *See Haaland v. Brackeen*, 599 U.S. 255, 294 (2023) (quoting *United States v. Juv. Male*, 564 U.S. 932, 937 (2011) (per curiam) and *Carney*, 592 U.S. at 58). The Court cannot issue an advisory opinion based on the speculation of what "Defendants or their successors may well" do in the future. Dkt. 52 at 18. Rather, the facts before the Court show that there is no danger that Plaintiffs will be prosecuted by Defendants for the conduct they say they want to engage in. Such conduct is not proscribed by statute. Plaintiffs therefore lack a concrete injury, and the Court need not say anything to cure a constitutional violation that does not exist.

II. Plaintiffs' claims still fail as a matter of law.

Neither Plaintiffs' First Amendment claim nor Plaintiffs' vagueness claim are viable. Defendants explained how the plain language of the Act does not prohibit the pleaded conduct of Plaintiffs, and that the State is not penalizing through the Act Plaintiffs' academic teaching or scholarship. Dkt. 42 at 10–14. Plaintiffs' response is to try and create ambiguity within the statute. Plaintiffs' arguments with respect to the operative language of the statute lack merit. Plaintiffs argue that there is something in the use of counsel as a verb rather than a noun in the statute, Dkt. 52 at 15–16. But both the noun and verb forms of "counsel" require "advice" to be given, and the two examples given by the Oxford New American dictionary are professional advice and advice "recommend[ing] a cause of action." *Counsel*, The New American Dictionary (2001). The same is true of *Promote*, *supra*, which must be con-

strued as "support or actively encourage" rather than Plaintiffs' sweeping interpretation when considering the constitutional doubt canon. *United States v. Palomar-Santiago*, 593 U.S. 321, 329 (2021) (construction of statutes must avoid even "grave doubts" as to constitutionality).

Plaintiffs argue that *United States v. Williams*, 553 U.S. 285, 294–95 (2008), which construed a statute prohibiting "promotion" of child pornography in a manner that avoided catching First Amendment protected speech, does not apply. Dkt. 52 at 14–15. But in making this argument, Plaintiffs refer to the Supreme Court's interpretation of promote in context with the string of other verbs also prohibited. The other verbs in the Act are similar: "provide, perform, or induce an abortion; assist in the provision or performance of an abortion; promote abortion; counsel in favor of abortion; refer for abortion," or provide facilities for abortion training. Idaho Code § 18-8705(1). The context is clear, the prohibition is on funds going to actual, specific, abortions, not abstract abortion advocacy by university professors in the context of academic speech. *See Williams*, 553 U.S. at 294–95. *Niz-Chavez v. Garland*, 593 U.S. 155, 160–61 (2021) is not to the contrary. The Supreme Court did not go truffle hunting for whether the nouns at issue were countable or uncountable—it applied multiple rules of grammar in construing the statute. Nothing about the case stands for the proposition that the Court must rigidly apply one rule of grammar at the expense of other canons. *See id.* at 163 ("Of course this is just a clue."). This is particularly true given that, unlike in *Niz-Chavez*, the Court faces a choice here between constructions that are more and less *constitutional* rather than merely plausible.

What *noscitur a sociis* narrowed in *Williams*, it narrows here—funds may not be given to a professor counselling or promoting a specific abortion. This standard has not changed with *Dobbs*, as the government "may choose not to subsidize speech." *Rust*, 500 U.S. at 200. The speech at issue here is abstract advocacy by university professors in the context of academic speech, which is far afield from the speech covered by the Act. Dkt. 1 at ¶¶ 63–91 (describing the speech at issue).

As for the vagueness claim, Plaintiffs argue that the Court should decline to apply *noscitur a sociis* and context, Dkt. 52 at 18, and should instead find "counsel" and "promote" unconstitutional because they "can vary with context." Dkt. 52 at 17. Thus, Plaintiffs look to context to find vagueness, but then ignore context when it provides support for a non-vague definition. The statute is not vague, as Defendants described in their opening brief. *See* Dkt. 42 at 14–16. Plaintiffs do not meaningfully respond to Defendants' point, Dkt. 42 at 16, that the statute contains more than "minimal guidelines," supplemented now by the Attorney General Opinion, that prevent unbridled enforcement discretion. Finally, Plaintiffs do not respond to Defendants' point that the Act, because it is not vague as applied to the specific conduct they allege, cannot be subject to a facial vagueness challenge by them. *See* Dkt. 42 at 16 (citing *New York v. Feber*, 458 U.S. 747, 767 (1982)).

In sum, Plaintiffs craft their own interpretations of the statute, *see* Dkt. 52 at 14–17. But they offer nothing more compelling than attempts to distinguish definitions. What they have not done is provide an analysis that calls into question the plain language of the statute. The Court must construe the statute in a constitutional manner if possible. The plain language of the statute does not cover Plaintiffs' alleged conduct. The Attorney General Opinion confirms this. The Court should follow suit and reject Plaintiffs' attempt to interpret a constitutionally sound statute in a manner that is unconstitutionally sound for the sole purpose of allowing their case to move forward.

DATED: January 5, 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Brian V. Church*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 5, 2024, 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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