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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

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

Plaintiffs,

v.

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

Defendant.

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

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

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

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

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

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

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

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

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

STANDARD OF DECISION

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

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

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

ARGUMENT

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

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

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

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

A. The Abortion Trafficking Ban protects parents' rights.

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

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

States have an important and compelling interest in protecting a parent's right to make healthcare decisions for their children. For almost 80 years, U.S. Supreme Court precedent has stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and

capacity for judgment required for making life's difficult decisions." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). "More important, historically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." *Id.* at 603. "Parents can and must make those judgments." *Id.* And so "parents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention." *Wallis v. Spencer*, 202 F.3d 1126, 1142 (9th Cir. 2000).

Idaho law has recognized the same thing for over a century: "[t]he right of a parent to the custody, control, and society of his child is one of the highest known to the law." *Martin v. Vincent*, 34 Idaho 432, 201 P. 492, 493 (Idaho 1921). Idaho law says that parents have a fundamental right to make child rearing decisions. *Nelson,* 170 Idaho at 894–95, 517 P.3d at 823–24 (citing *Troxel v. Granville*, 530 U.S. 57 (2000)). "[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court of the United States." *Id.* at 896, 517 P.3d at 825 (internal quotations omitted).

Because the Constitution protects these rights *from* governmental interference, legislatures necessarily have authority to enact laws to further these rights. As the Supreme Court of the United States has recognized, because "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," a state legislature may "properly

conclude that parents … are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968). That is just what the Abortion Trafficking Ban does.

2. The Abortion Trafficking Ban protects parents' right to know.

The Abortion Trafficking Ban protects the fundamental rights of parents to give—and, in turn, their minor children to receive—help and advice to their minor children if they become pregnant. The law does so by making it an essential element of the offense, to be proved beyond a reasonable doubt, that it is done with "intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor." Idaho Code § 18-623(1). "Crimes in Idaho are categorized as either 'general intent' or 'specific intent' crimes. *State v. Stiffler*, 117 Idaho 405, 406, 788 P.2d 220, 221 (1990)[,]" and a "specific intent" crime is one that, like this statute, "refers to that state of mind which in part defines the crime and is an element thereof." *State v. Guerra*, 169 Idaho 486, 503, 497 P.3d 1106, 1123 (Idaho 2021). Here, the specific intent required for Abortion Trafficking is the intent to conceal the abortion from the pregnant minor's parents or guardian. Simply assisting a pregnant child in obtaining an abortion, without that specific intent, does not violate the statute.

Plaintiffs largely ignore this important element of the crime. They erroneously assert that the statute "made it unlawful to provide travel assistance within Idaho, including helping minors reach or cross Idaho's borders." Dkt. 1 at 3. And they omit the specific intent element of the Abortion Trafficking statute repeatedly throughout

Plaintiffs' filings.[1] The State Amici make the same mistake, not once addressing the intent to conceal requirement of the statute in their brief. *See generally* Amicus Brief of the States in Support of Plaintiff's Motion for a Temporary Restraining Order, Dkt. 20-1. But Plaintiffs plainly cannot prevail on a challenge to a state statute without acknowledging all of its essential elements.

Still, it is clear that Plaintiffs want to violate the specific intent requirement that they gloss over. Plaintiff Matsumoto, a member of the bar, "would like to provide temporary shelter for pregnant minors … who are traveling to obtain … abortion care … *whether those minors' parents know or do not know*" by "assisting them obtain transportation from Idaho to those states." *See* Dkt. 12-1 at 4 (emphasis added). And Plaintiff NWAAF says that "[p]arents and guardians *may or may not have known or approved* of NWAAF's support of these minors," which support includes "provid[ing] food and lodging assistance" to minors seeking abortions. Dkt. 12-9 ¶¶ 17-19. Plaintiff Indigenous Idaho Alliance states that its mission and belief includes "providing financial, transportation, and logistical assistance to pregnant minors

[1] *See, e.g.*, Dkt. 1 ¶ 26 (stating that "the simple act of driving a minor to the Oregon border to get an abortion without the minor's parent or guardian knowing" is illegal, but ignoring the specific intent element of the statute); *id.* ¶ 74 (stating that the statute "prevents Plaintiffs and pregnant minors from traveling within Idaho to reach a state where abortion is lawful," but ignoring the specific intent requirement of the statute); *id.* ¶ 79 (stating that the statute "prevent[s] minors from accessing abortion care that is legal in Idaho's neighbor states by criminalizing a trusted adult's travel," but ignoring the specific intent requirement of the statute); *id.* ¶ 106 (failing to recognize the specific intent requirement of the statute); *id.* ¶ 116 (failing to recognize the specific intent requirement of the statute); Dkt. 12-1 at 1 (stating that "Idaho criminalized conduct by adults who assist pregnant minors in receiving abortion care," but ignoring the specific intent element of the statute).

within the region seeking legal abortion, *with or without the knowledge or consent of their parents or guardians*." Dkt. 12-8 ¶ 61.; *see also* Dkt. 1 ¶¶ 26–30, 32, 47–51, 55; Dkt. 12-1 at 14, 21, 25–26; Dkt. 12-7 ¶¶ 43–45, 47–51, 53–54; Dkt. 12-8 ¶¶ 39–41, 50–54; Dkt. 12-9 ¶¶ 12–14, 18–19, 20–23, 26–27.

The Amici States note that their laws allow minors to obtain an abortion without parental consent. Dkt. 20-1 at 2–4. But that does not diminish in the least the State of Idaho's choice to protect parents' fundamental right over these important decisions. Indeed, even in the *Roe* era, the Supreme Court of the United States recognized that parental involvement in these decisions is critical. There are "potentially grave emotional and psychological consequences of the decision to abort," which "has potentially traumatic and permanent consequences." *H. L. v. Matheson*, 450 U.S. 398, 412–13 (1981). Consultation with parents is "particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns." *Bellotti v. Baird*, 443 U.S. 622, 640 (1979). As Justice Stewart so poignantly stated, "[t]here can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J. concurring), *abrogated as to the right to abortion by Dobbs*, 142 S. Ct. 2228 (2022). "That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support." *Id.*

Thus, now that the Supreme Court has recognized that no federal right to abortion exists, ensuring that a pregnant minor child receives the advice and support of her parents before making a decision to receive an abortion is all the more compelling. If anything, the laws of the Amici States—not Idaho—risk running afoul of the U.S. Constitution because they reject parental rights in this manner.

B. The Abortion Trafficking Ban does not punish speech.

1. The law criminalizes conduct, not speech.

Plaintiffs are not likely to succeed on the merits because their claims do not implicate the First Amendment's free speech protections. "The first step of First Amendment analysis is to determine whether the regulation implicates protected expression." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th. Cir. 2017). That is not the case here: the Abortion Trafficking Ban regulates conduct, not speech, and does not implicate protected expression.

All of the key terms of the Abortion Trafficking Ban relate to conduct, not speech. The conduct it prohibits is procuring an abortion or obtaining an abortion-inducing drug for a pregnant minor "by recruiting, harboring, or transporting the pregnant minor within this state[.]" *See* Idaho Code § 18-623(1). Procuring an abortion is not protected expression—rather, it is a crime, Idaho Code § 18-622, one that the Supreme Court of the United States and the Idaho Supreme Court have concluded the State may lawfully punish. *Dobbs*, 142 S. Ct. 2228; *Planned Parenthood Great Nw.*, 171 Idaho at 380–81, 522 P.3d at 1148–49. Nor does the First

Amendment protect "recruiting, harboring, or transporting" a minor for the purpose of that crime.

Plaintiffs say that their intended activities are "expressive conduct" because their assistance to the pregnant unemancipated minors "conveys a message of support for pregnant minors seeking to obtain lawful abortion care" and "conveys a clear message of support for abortion itself." Dkt. 12-1 at 11–12. But that is true of all criminal conduct. Paying a hitman for a murder conveys a message of support for murder for hire. Propositioning a prostitute conveys a message of support for transactional sexual relationships. Possessing large quantities of methamphetamine conveys a message of support for the drug trade. Everything and anything conveys a message of support for something, but that does not make it protected under the First Amendment. And conduct lawfully criminalized by statute does not become speech simply because it necessarily "conveys a message."

Thus, the Supreme Court of the United States has specifically rejected the argument that "the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice. Co.*, 336 U.S. 490, 498 (1949). In that case, the speech at issue, picketing outside a business, was part of a "single and integrated course of conduct" "to compel Empire to agree to stop selling ice to nonunion peddlers" in violation of Missouri law. *Id*. Similarly, in the instant case, to the extent the Abortion Trafficking statute impacts speech, it only does so when that speech is part of a "single and integrated course of conduct" to procure an

abortion or obtain an abortion-inducing drug for a pregnant unemancipated minor child with the intent to conceal that abortion from the minor's parents or guardian.

Nor is there support for Plaintiffs' claims in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). The statute there, which prohibited the material support for terrorist organizations, "regulate[d] speech on the basis of its content," and whether the plaintiffs were able to speak to certain groups depended solely on "what they say." *Id.* at 27. In contrast, the Abortion Trafficking Ban does not prohibit speech of any kind. It does not stop Plaintiffs from sharing their views about abortion, or any other subject, to any person they want, including pregnant unemancipated minor children. But what they cannot do is take certain steps to procure an abortion or obtain an abortion-inducing drug for that pregnant minor with the intent to conceal it from the child's parents or guardian. The mere fact that speech may be used in recruiting, harboring, or transporting the child is immaterial: "[a]n illegal course of conduct is not protected by the first amendment merely because the conduct was in part carried out by language in contrast to direct action." *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987).

Plaintiffs say they need to take these actions as to *all* pregnant minors because *some* of them may be abused or neglected by their parents. Dkt. 12-1 at 1. But "the statist notion" that Plaintiffs have the unilateral right to substitute themselves for a child's parents "in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Parham*, 442 U.S. at 603. And if Plaintiffs have concerns about abuse and neglect, Idaho already has in effect a comprehensive

statutory scheme for protecting children from parents who abuse or neglect their children. *See* Child Protective Act, Title 16, Chapter 16, Idaho Code. This statutory scheme starts not with Plaintiffs determining for themselves whether parents are fit or not, but a report to the Idaho Department of Health and Welfare or local law enforcement. In fact, Plaintiffs, should they have a "reason to believe" that a pregnant minor they are trying to help "has been abused, abandoned, or neglected," have a *duty* to report the matter, within 24 hours, to the proper law enforcement agency or the Idaho Department of Health and Welfare. Idaho Code § 16-1605(1). Failing to make the report is a misdemeanor. *See* Idaho Code § 16-1605(4).

Plaintiffs do not have a First Amendment interest in frustrating Idaho's presumption of parental custody over children. "It is incumbent upon him who seeks to invade the home and remove a child from its protection, and from the custody of its natural guardians to show facts sufficient to justify his action[s] under the law." *Martin*, 34 Idaho 432, 201 P. at 493. "Parents are not required in the first instance to take upon themselves the burden of proving their fitness to have the care of their children, or that they are properly exercising their parental control." *Id.* That is why Idaho law makes it a crime, not a right, to interfere with a parent's custody, which is what Plaintiffs seek to do here. Idaho Code § 18-4506(1)(a). Plaintiffs' mere speculation that some parents might abuse their children is not sufficient to justify their argument that they should be allowed to remove all pregnant minors from the protection and custody of their parents regarding the decision as to whether to have an abortion or not.

The State Amici, quoting *Bigelow v. Virginia*, 421 U.S. 809, 824–25 (1975), argue that the State of Idaho "cannot 'bar a citizen of another State from disseminating information about an activity that is legal in that State,' even if it does so 'under the guise of exercising internal police powers.'" Dkt. 20-1 at 5. But this is not a situation like in *Bigelow* involving an attempt to prosecute the mere advertisement of something that is legal in another state. 421 U.S. at 815 n.5. The Abortion Trafficking Ban does not criminalize the mere act of publicizing the fact that abortion is legal in another state, but instead punishes specific conduct furthering specific crimes with specific intent. And as long as the defendant commits "any essential element of the crime" within the State of Idaho, Idaho courts have jurisdiction over the crime, even if other elements of the crime are committed outside Idaho's borders. *See State v. Villafuerte*, 160 Idaho 377, 379, 373 P.3d 695, 697 (2016) (citing Idaho Code §§ 18-202(1), 19-301(1), and 19-302). And just as the State of Idaho cannot criminalize abortion in the state of Washington, or any other state, those states cannot force Idaho to allow Plaintiffs, or any other person, to violate Idaho's criminal laws.

2. Any minimal speech restriction passes constitutional scrutiny.

Even if the Abortion Trafficking Ban had some minimal effect on speech, it would easily be upheld under applicable First Amendment standards. Plaintiffs say the law is "subject to strict scrutiny," but they fail to show the critical premise for applying that test: that the law regulates speech by its content. Dkt. 12-1 at 13. That premise is not met here.

"A content-based law is one that targets speech based on its communicative content or applies to particular speech because of the topic discussed or message expressed." *Recycle for Change*, 856 F.3d at 670 (internal quotations and brackets omitted). The first step to determining "whether a law is content based is to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id.* (internal quotations omitted). But the Abortion Trafficking Ban does not reference speech at all, much less do so based on its content. Plaintiffs may express any message they like under the Abortion Trafficking Ban. To the extent the law even implicitly addresses speech, it addresses only its effects, not the message it expresses. Thus, the statute focuses on transitive action verbs—to "procure" or "obtain" an abortion or to "recruit," "harbor," or "transport" a pregnant minor—not on expressive verbs. The law does not discriminate on the basis of the content of any speech, but "on the basis of non-expressive, non-communicative conduct." *Id.* at 672. Speakers may express any message they wish, so long as they do not cause a pregnant minor to obtain an abortion with the specific intent to conceal the fact from the minor's parents.

That this may have "an incidental effect of some speakers or messages but not others" is immaterial because the law "serves purposes unrelated to the content of expression[.]" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, that purpose is the protection of the fundamental rights of parents to "make decisions concerning the care, custody and control of their children." *Bartosz*, 146 Idaho at 465 (Eismann, J. concurring). And that purpose is unrelated to the content of a message

Plaintiffs, or any other person, may wish to express through their conduct. The law is therefore content-neutral.

So, at the very most, if any speech-related test must be applied to the Abortion Trafficking Ban, the Court should apply the "relatively lenient" standard from *United States v. O'Brien*, 391 U.S. 367, 376 (1968). *Texas v. Johnson*, 491 U.S. 397, 407 (1989). This test applies to statutes in which "speech and nonspeech elements are combined in the same course of conduct." *Id.* (internal quotations omitted). Under this test, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* "Under *O'Brien*, a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Recycle for Change*, 856 F.3d at 674 (internal quotations omitted, brackets in original). The Abortion Trafficking Ban meets all of these elements.

First, there is no question that Idaho has the power to enact this law. As noted above, a state legislature may "properly conclude that parents … are entitled to the support of laws designed to aid discharge" of their responsibility to care for their children. *Ginsberg*, 390 U.S. at 639.

Second, the Abortion Trafficking Ban furthers an important government interest. The law protects the fundamental right of parents to make medical

decisions for their children, and thus also protects the children themselves by helping ensure that they have the guidance of their parents. The fact that Plaintiffs are so eager to obtain and conceal abortions from children's parents shows the compelling need for a statute like this. Plaintiffs do not believe it is important for minors to have their parents' input in getting an abortion decision. And they believe that they have a right to help traffic children out of state for that purpose, regardless of whether their parents know. The State has a compelling interest in ensuring otherwise.

Third, the State's interest is unrelated to the restriction of free expression. Ensuring that any assistance for out-of-state abortions take place only with the knowledge of a child's parents has no relation to free speech.

Fourth, any incidental restriction on speech is no more than is necessary to protect parental rights. The Abortion Trafficking Ban satisfies this standard with its specific intent requirement concerning parental consent. Idaho Code § 18-623(1). That element goes directly to the interest served by the statute—helping ensure parental involvement in the pregnant minor's decision as to whether to have an abortion. The statute could have been written as a general intent crime, and simply required as an element of the crime that the parents or guardian did not affirmatively consent to the abortion. *Cf. Holder*, 561 U.S. at 17–18. Instead, the legislature narrowed the statute to require an intent to conceal the abortion from the pregnant minor's parents or guardian. That requirement quite arguably removes the conduct at issue entirely from First Amendment protections. *See id.* at 56–57 (Breyer, J.

dissenting). But at the very least, it amply satisfies the lenient *O'Brien* test—the most rigorous test that could apply to the law.

The Abortion Trafficking Ban thus does not infringe on free speech.

C. The Abortion Trafficking Ban does not limit association.

Neither does the Abortion Trafficking Ban violate Plaintiffs' "First Amendment rights of association." Dkt. 12-1 at 12. "The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *State v. Manzanares*, 152 Idaho 410, 424, 272 P.3d 382, 396 (Idaho 2012) (quoting *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 776 (1994)). That is exactly what the statute prohibits by requiring proof the intent to conceal an abortion from the pregnant minor's parents or guardian. Nothing about that offends the Constitution.

At bottom, the law does not prohibit Plaintiffs from associating with anyone, including minor children. What it prohibits is conduct related to such an association: procuring an abortion or obtaining an abortion inducing drug for a pregnant minor by recruiting, harboring, or transporting that minor with the intent to conceal the abortion from the minor's parents or guardian. The Supreme Court of the United States in *Holder* summarily dismissed the notion that the statute there "prohibit[ed] being a member of one of the designated groups," since what it in fact "prohibits is the act of giving material support." 561 U.S. at 39–40. The Court should reach the same conclusion here.

D. The Abortion Trafficking Ban is not vague.

Finally, the Abortion Trafficking Ban does not fall afoul of constitutional vagueness principles. A statute is impermissibly vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder*, 561 U.S. at 18. While a more stringent test applies in the First Amendment context, Plaintiffs have not shown that the law restricts any protected speech. And even in the First Amendment context, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* at 19. (internal quotations omitted). As the Supreme Court noted in *Hill v. Colorado*, "while there is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language." 530 U.S. 703, 733 (2000) (cleaned up).

Plaintiffs argue that the statute is unconstitutionally vague because it "does not contain or refer to a definitions section that would tell Plaintiffs when their conduct would constitute recruiting, harboring, or transporting." Dkt. 12-1 at 15. But these are not unfamiliar terms used in isolation that only lawyers could understand. Rather, these terms are well within common understanding, which is why they are so commonly used in state and federal criminal trafficking statutes across the country:

Idaho law: In addition to the Abortion Trafficking Ban, Idaho's general human trafficking statute criminalizes those same three verbs—"recruitment, harboring, transportation"—if in furtherance of subjecting a person "to involuntary servitude, peonage, debt bondage, or slavery." Idaho Code § 18-8602(1)(a)(ii). If those verbs are vague when used to prevent abortion, they are also vague when used to prevent slavery.

Federal law: The U.S. criminal code likewise makes it a crime to "recruit[],… harbor[], [or] transport[] … a person … knowing … that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a)(1). When Plaintiffs' counsel served as United States Attorney for the District of Idaho, she evidently believed the same three words—recruit, harbor, and transport—were clear enough that she could prosecute not just violations of the law, but even attempts to interfere with its enforcement. *See United States. v. Swinson*, No. 1:12-CR-279-EJL, Dkt. 2 at 8 (D. Idaho. Oct. 26, 2012); Press Release, Washington Man Sentenced in Idaho Sex Trafficking Case, U.S. Attorney, Dist. of Idaho (Mar. 25, 2013), https://tinyurl.com/bddbupa2. How she now claims those verbs are unconstitutionally vague is a mystery.

Other states: Several other states, including some of the Amici States, use similar verbiage to criminalize human trafficking. *See, e.g.*, Wash. Rev. Code § 9A.40.100 (2017) ("A person is guilty of trafficking in the first degree when such person recruits, harbors, transports ... by any means another person ....") (cleaned up); Ariz. Rev. Stat. Ann. § 13-1307 (2021) ("'Traffic' means to entice, recruit, harbor,

provide, transport or otherwise obtain another person."); Colo. Rev. Stat. § 18-3-504 (2019) ("A person commits human trafficking of a minor for sexual servitude if the person knowingly sells, recruits, harbors, transports ... by any means, maintains, or makes available a minor for the purpose of commercial sexual activity.").

Sex traffickers have repeatedly argued these terms are unconstitutionally vague. And courts have repeatedly held otherwise. *See, e.g.*, *United States v. Snead*, 2022 WL 17975015 at *4 (4th Cir. 2022) (stating that each of the verbs "recruits, entices, harbors, transports, provides" has an ordinary meaning that would provide a person of ordinary intelligence fair notice of what conduct is prohibited"); *Alonso v. State*, 228 So. 3d 1093, 1101–02 (Ala. Crim. App. 2016) (upholding a statute that assigning criminal liability to an individual who "knowingly obtains, recruits, ... harbors, ... transports, provides, or maintains any minor for the purpose of causing a minor to engage in sexual servitude" and rejecting a vagueness challenge to its constitutionality); *State v. Scotia*, 146 Ariz. 159, 160 (Ariz. App. 1985) (collecting cases regarding the use of the term "transport" for drug transport statute); *State v. Bryant*, 953 So.2d 585, 587 (Fla. App. 2007) (reversing trial court finding of unconstitutional vagueness based on word "transport"). The fact that the statute concerns abortion does not magically transform a plain word into an unclear one. Plaintiffs' vagueness challenge is thus wholly lacking in merit.

Plaintiffs also argue that the "statute fails to provide adequate notice regarding what culpability attaches to communication or the lack thereof with a minor's parents and/or guardians." Dkt. 12-1 at 16. But the many questions they

ask on this point do not move the needle. The elements of the statute do not depend upon any communication or lack of communication with the parents, but rather whether the defendant takes action to procure an abortion for a pregnant minor *with intent to conceal from the parents.* Idaho Code § 18-623(1). A prosecutor must prove that element of specific intent beyond a reasonable doubt. Thus, providing parents with notice and advance knowledge would likely prevent a prosecutor from bringing a case, while a prosecutor might be able to argue the specific intent requirement was met if a defendant provided no notice to the child's parents.

State Amici also raise other hypothetical arguments about what the statute may or may not cover. Dkt. 20-1 at 5. But this case involves challenges from the Plaintiffs, and as such the Court can only look at "the particular facts at issue," since a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *See Holder*, 561 U.S. at 18–19; *see also* Dkt. 31 at 3 ("The Amici States … may not initiate, create, extend, or enlarge the issues."). And the Supreme Court of the United States has admonished that "while there is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill*, 530 U.S. at 733 (cleaned up). One can ask unending questions in an attempt to raise hypothetical situations in which the applicability of the statute might be in question. But the terms the Abortion Trafficking Ban employs have long been used by a variety of different trafficking statutes in a variety of different jurisdictions. So

Idaho Code § 18-623 provides more than ample notice to a person of ordinary intelligence of what it prohibits.

II. The balance of harms and public interest do not favor an injunction.

The balance of equities and the public interest weigh heavily in favor of the Attorney General and against issuing a temporary restraining order or preliminary injunction. The Plaintiffs are asserting the right to determine for themselves whether a parent is fit in order to decide whether it is okay to conceal information about a pregnant minor's abortion from the parents. Allowing the Plaintiffs to decide what is in the best interests of someone else's child and conceal that from the pregnant minor's parents actively undermines a parent's fundamental right and obligation to determine what is in the best interests of their children. Given this fundamental right of parents to direct the care and upbringing of their children and to be involved in the medical decisions of their minor children, the State of Idaho's policy in favor of protecting those rights is in the public interest. The constitutional rights of parents to determine what is in the best interests of their children heavily outweigh the desires of third parties to lead children into such consequential actions without their parents' knowledge or consent.

III. Plaintiffs have no irreparable injury.

Finally, the Court should deny Plaintiffs' motion for preliminary injunction for lack of an irreparable injury. At the outset, Plaintiffs have no irreparable injury because, for the reasons set forth in Section I.B, they allege only an effect on their intended conduct, not on any protected speech that would be otherwise chilled. As

Plaintiffs' own cases acknowledge, they must "present more than allegations of a subjective chill" and must instead show "specific present objective harm or a threat of specific future harm." *Bigelow*, 421 U.S. at 816–17 (internal quotations omitted). They have not made that showing here.

But in truth, and even more important, Plaintiffs have no injury at all, much less an irreparable one. And as will be set forth more fully in the Attorney General's forthcoming motion to dismiss, that deficiency is fatal to jurisdiction—under both the Eleventh Amendment and Article III justiciability—just as it is to the merits.

In the pre-enforcement context here, both Eleventh Amendment immunity and Article III justiciability turn on whether there is a threat of prosecution. The *Ex parte Young* exception to the Attorney General's Eleventh Amendment immunity applies only if he is "clothed with some duty in regard to the enforcement of the laws of the state, and ... threaten and are about to commence proceedings ... to enforce against parties affected [by] an unconstitutional act." *Ex parte Young*, 209 U.S. 123, 155–56 (1908). And proving a justiciable controversy in the pre-enforcement context also requires a threat: for standing, "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1174, and for ripeness, a "specific and credible threat of adverse action." *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010). That essential threat is wholly absent here.

Aside from the fact that Plaintiffs do not allege the Attorney General has made any statement regarding the enforcement of the Abortion Trafficking Ban, Plaintiffs'

attempt to show injury falters based on a more fundamental proposition of law: the Attorney General *has no authority* to threaten criminal prosecutions of the Abortion Trafficking Ban at this time. Under Idaho statutory law, "the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." Idaho Code § 31-2227. Thus, while the Attorney General is Idaho's "chief legal officer," he is not its chief law enforcement officer, *Newman v. Lance*, 922 P.2d 395, 399 (Idaho 1996), and county prosecutors do not answer to him. Idaho Code § 31-2604. In fact, Idaho law previously allowed the Attorney General to "exercise supervisory powers over prosecuting attorneys in all matters pertaining to their duties," *Newman*, 129 Idaho at 102, 922 P.2d at 399, but the Legislature struck that provision in 1998, limiting the Attorney General's criminal enforcement authority to the ability to "assist the prosecuting attorney" in each respective county. *State v. Summer*, 139 Idaho 219, 224, 76 P.3d 963, 968 (Idaho 2003).

The Attorney General recently explained and clarified these principles in a formal opinion construing the limits on his own prosecutorial powers. Att'y Gen. Op. 23-1 (April 27, 2023). As he explained, he has prosecutorial authority only "if requested by county prosecutors and approved by a state district judge" or "if specifically conferred by the Legislature." *Id.* at 2. That definitive construction of the limits of his own powers supersedes the Ninth Circuit's interpretation of Idaho law in *Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004), which held that the Attorney General was a proper defendant to a challenge to the State's

abortion laws.[2] And neither of the two conditions for the Attorney General's prosecutorial authority—referral by a county prosecutor or a specific legislative grant—are met here.

First, no county prosecutor has referred any case under the Abortion Trafficking Ban to the Attorney General, and Plaintiffs do not allege otherwise. The Attorney General would not have referral authority to prosecute violations of this statute unless there were a specific case considered by a specific county prosecutor who asked the Attorney General for help. Plaintiffs do not allege that such a case exists. They want to violate the law, sure enough, but they do not allege any specific circumstances in which they intend to do so. Nor have they sued any of the county prosecutors who would have direct prosecutorial authority if they did violate the law. Instead, they have only sued the Attorney General, whose purely derivative authority has not yet been triggered.

Second, the limited legislative grant of prosecutorial authority to the Attorney General under the Abortion Trafficking Ban has not been triggered here. *See* Att'y Gen. Op. 23-1 at 2–3. That limited authority is still contingent on actions by county prosecutors: he "has the authority, at [his] sole discretion, to prosecute a person for a criminal violation of this section *if the prosecuting attorney authorized to prosecute* criminal violations of this section *refuses to prosecute* violations of any of the

[2] Judge Winmill ruled to the contrary in *Planned Parenthood v. Labrador*, but refused to consider the effect of the Att'y Gen. Op. 23-1 in construing the limits of his own authority. Case No. 1:23-CV-00142-BLW, Slip. Op., 2023 WL 5237613 (D. Idaho August 15, 2023), Judge Winmill's decision is now on appeal to the Ninth Circuit.

provisions of this section by any person *without regard to the facts or circumstances*." Idaho Code § 18-623 (emphasis added). Thus, the Attorney General does not have any prosecutorial authority unless a county prosecutor first refuses to exercise his or her authority. Plaintiffs have alleged no facts that indicate that *any* prosecutor in Idaho has so refused to enforce this section of code. Indeed, none have. The Attorney General thus lacks any prosecutorial authority under the Abortion Trafficking Ban at this time.

Because the Attorney General would have authority under this statute only based on actions of county prosecutors that have not yet occurred, he is not a proper defendant under *Ex parte Young* and Plaintiffs have not alleged a justiciable controversy against him under Article III. There is no "special relation" between the Attorney General and the law as required to overcome sovereign immunity, *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992), much less "a '*genuine* threat of *imminent* prosecution'" by the Attorney General as required for ripeness. *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (citation omitted). The case is not fit for review because any individuals with whom the Plaintiffs intend to engage are not "identifiable" and the case presents no "concrete factual scenario" to which the law applies. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (citation omitted); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999). Plaintiffs have not shown any irreparable injury that warrants an injunction—in fact, they have not alleged any injury at all, and the Court lacks jurisdiction.

CONCLUSION

The Court should deny Plaintiffs' motion for a temporary restraining order or preliminary injunction both on the merits and for lack of jurisdiction.

DATED: August 28, 2023

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

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

I, LINCOLN DAVIS WILSON, declare and state as follows:

1. I am a Deputy Attorney General and Chief of Civil Litigation and Constitutional Defense for the Idaho Attorney General.

2. Attached hereto as Exhibit 1 is a true and correct copy of Attorney General Opinion 23-1.

3. Attached hereto as Exhibit 2 is a true and correct copy of a Rule 11 Plea Agreement, *United States v. Swinson*, No. 1:12-CR-279-EJL (D. Idaho), Dkt. 2, dated October 26, 2012.

4. Attached hereto as Exhibit 3 is a true and correct copy of a press release issued by the U.S. Attorney's Office, District of Idaho, titled "Washington Man Sentenced in Idaho Sex Trafficking Case," dated March 25, 2013.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: August 28, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ *Lincoln Davis Wilson*
LINCOLN DAVIS WILSON
Chief of Civil Litigation and
Constitutional Defense

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

ATTORNEY GENERAL OPINION NO. 23-1

TO: The Honorable Bruce Skaug
Idaho House of Representatives
P.O. Box 83720
Boise, Idaho 83720-0038

You have requested an opinion from the Attorney General on the Attorney General's authority to prosecute violations of Idaho Code § 18-622. Your request raises important questions of Idaho law in the public interest and therefore this opinion is published as an official opinion of the Idaho Office of the Attorney General.

QUESTION PRESENTED

What authority does the Idaho Attorney General have to bring prosecutions for criminal abortion under Idaho Code § 18-622?

ANSWER

The Idaho Attorney General's criminal prosecutorial authority exists only where specifically conferred by statute or upon referral or request by county prosecutors. The Legislature has not granted the Attorney General any authority to prosecute violations of Idaho Code § 18-622. Thus, the Idaho Attorney General may bring or assist in a prosecution under Idaho Code § 18-622 only if specifically requested by a county prosecutor pursuant to an appointment made by a district court under Idaho Code § 31-2603.

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EXHIBIT
1

ANALYSIS

The Attorney General is Idaho's "chief legal officer," but not its chief law enforcement officer. *Newman v. Lance*, 129 Idaho 98, 102, 922 P.2d 395, 399 (1996). Rather, Idaho Code dictates that it is "the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." Idaho Code § 31-2227. Those elected county prosecutors have plenary criminal enforcement authority to prosecute crimes that occur in their respective jurisdictions and do not answer to the Attorney General. Idaho Code § 31-2604. In fact, while Idaho law previously allowed the Attorney General to "exercise supervisory powers over prosecuting attorneys in all matters pertaining to their duties," *Newman,* 129 Idaho at 102, 922 P.2d at 399, the Legislature struck that provision in 1998, limiting the Attorney General's criminal enforcement authority to the ability to "assist the prosecuting attorney" in each respective county. *State v. Summer*, 139 Idaho 219, 224, 76 P.3d 963, 968 (2003). Even the Governor's authority in the matter is limited to "requir[ing] the attorney general to aid any prosecuting attorney in the discharge of his duties." Idaho Code § 67-802(7). The Governor may not require the Attorney General to assume those duties himself.

The Attorney General's ability to prosecute criminal cases as referrals from county prosecutors comes in two forms. First, when a county prosecutor cannot perform his or her duties, the county prosecutor may refer a case to the Attorney General and move for a court order appointing him as special prosecutor to assume "all the powers of the prosecuting attorney." Idaho Code § 31-2603(a). Second, a county prosecutor who wants to utilize the resources of the Attorney General's Office may seek the appointment of a special assistant Attorney General to prosecute or assist in prosecuting a criminal case. Idaho Code § 31-2603(b). Thus, under Idaho law, the Attorney General has prosecutorial authority only if specifically conferred by the Legislature or if requested by county prosecutors and approved by a state district judge.

I. The Legislature Has Not Given the Attorney General Independent Authority to Prosecute Violations of Idaho Code § 18-622.

The Legislature has conferred prosecutorial authority on the Attorney General to prosecute specific crimes in specific circumstances. For example, the Legislature has granted the Attorney General authority to prosecute violations of criminal law by county elected officials acting in their official capacity. Idaho Code § 31-2002. In addition, the Legislature recently enacted a new law to take effect May 5, 2023 that would give the Attorney General discretion to prosecute violations of Idaho Code § 18-623, but only "if the prosecuting attorney … refuses to prosecute violations." H.B.

242, § 18-623(4). The Legislature has not granted the Attorney General any such authority to prosecute violations of Idaho Code § 18-622.[1] Thus, the Attorney General has no power to bring independent prosecutions under that statute.

II. The Attorney General May Prosecute Violations of Idaho Code § 18-622 Only Upon Request by a County Prosecutor.

In the absence of a specific grant of prosecutorial authority, the Attorney General has that power only where his assistance is requested by a county prosecutor. That power is set forth in Idaho statutory law, which gives the Attorney General the "duty," "[w]hen required by the public service, to repair to any county in the state and assist the prosecuting attorney thereof in the discharge of duties." Idaho Code § 67-1401(7). As construed by the Idaho Supreme Court, the Attorney General's authority under this statute is entirely derivative: it exists only if the county prosecutor specifically requests the assistance of the Attorney General via an appointment by the district court under Idaho Code § 31-2603.

The Idaho Supreme Court construed these principles in *Newman*, where it rejected the Attorney General's attempt "to appear in a criminal case and assume control and direction of the case on behalf of the state." 129 Idaho at 99, 922 P.2d at 396. At the time the *Newman* case was decided, Idaho statutory law still gave the Attorney General supervisory authority over county prosecutors. *See id.* Nevertheless, the Idaho Supreme Court relied on the fact that "[t]he legislature has made it the primary obligation of the Prosecutor to enforce the state penal laws" by making it "the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." 129 Idaho at 103, 922 P.2d at 400. Thus, the Idaho Supreme Court granted a writ "prohibiting the Attorney General from asserting dominion and control over the cases" absent a request by the county prosecutor. 129 Idaho at 104, 922 P.2d at 401.

The Idaho Supreme Court further explained these principles in *Summer*. There, the Court observed that "in 1998 the Legislature deleted the provision allowing the Attorney General to exercise supervisory powers over prosecuting attorneys," which it said "apparently reduc[ed] the authority of the Attorney General in relation to county prosecuting attorneys." 139 Idaho at 224, 76 P.3d at 968. And, in any event, "[e]ven prior to the 1998 amendment ..., *Newman* made it clear that the prosecuting attorney has primary responsibility for the enforcement of state penal

[1] The original version of this bill would have given the Attorney General discretion to prosecute violations of Idaho Code § 18-622 as well. *See* H.B. 242, original bill text Feb. 28, 2023. However, those references were removed in subsequent amendments to the bill, which were ultimately passed by the Legislature and signed by the Governor.

laws." *See id.* The Idaho Supreme Court thus reaffirmed that, absent a specific statutory grant of prosecutorial authority, the Attorney General has independent authority to prosecute only upon motion by the county prosecuting attorney under Idaho Code § 31-2603.[2]

Finally, the foregoing limitations on the Attorney General's authority also mean he has no separate referral power. While county prosecutors have statutory power to refer a matter to the Attorney General for prosecution by requesting his assistance and appointment by the district court, *see* Idaho Code §§ 67-1401(7), 31-2603, Idaho law does not grant a reciprocal right to the Attorney General to refer a matter to county prosecutors. In those circumstances, the Attorney General stands in the same shoes as any citizen: he has the right to apprise a county prosecutor of facts that they believe constitute a prosecutable crime that the prosecutor may or may not decide to pursue. So whether it is the Attorney General or any other private citizen who apprises the prosecutor of those matters, it remains within the county prosecutor's discretion to bring charges absent an express referral to the Attorney General and an appointment by the district court. Idaho Code § 31-2603.

CONCLUSION

For the reasons above, I conclude that the Idaho Attorney General may not bring or assist in a prosecution under Idaho Code § 18-622 unless a county prosecutor specifically so requests and an appointment is made by the district court under Idaho Code § 31-2603.

AUTHORITIES CONSIDERED

1. Idaho Code:

H.B. 242, 2023 Legislative Session
Idaho Code § 18-622
Idaho Code § 18-623
Idaho Code § 31-2002
Idaho Code § 31-2227
Idaho Code § 31-2603
Idaho Code § 31-2604
Idaho Code § 67-802
Idaho Code § 67-1401

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[2] The Ninth Circuit's decision in *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004), is immaterial to this analysis, since a federal court's ruling on sovereign immunity under *Ex parte Young*, correct or not, cannot create state-law powers that do not exist under operative state law.

2. Idaho Cases:

Newman v. Lance, 129 Idaho 98, 922 P.2d 395 (1996).
Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 (9th Cir. 2004).
State v. Summer, 139 Idaho 219, 76 P.3d 963 (2003).

* * * *

Dated this 27th day of April, 2023.

RAÚL R. LABRADOR
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Analysis by:

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. DYRELL ROBERT SWINSON, Defendant.	)	CR 12-0279-SEJL Case No. **RULE 11 PLEA AGREEMENT**

EXHIBIT
2

I. GUILTY PLEA

A. Summary of Terms. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A) and (B), defendant, the attorney for the defendant, and the Government[1] agree that the defendant will waive his right to indictment and plead guilty to Count One of the Information, which charges the defendant with Obstructing a Sex Trafficking of Children investigation, in violation of 18 U.S.C. Section 1591(d).

As consideration for the defendant's plea of guilty, the Government agrees not to charge the defendant with any other violations of law related to the course of conduct described herein currently known to the Government. In addition, the Prosecuting Attorney in Payette County, Idaho, has agreed to dismiss related charges upon the defendant's plea of guilty and sentencing in this case.

Forfeiture Allegation: In connection with the violation set out above, the defendant agrees to forfeiture of the property referred to in the Forfeiture count of the Information.

This plea is voluntary and did not result from force, threats, or promises, other than any promise made in this Plea Agreement. Upon acceptance of the defendant's guilty plea, and the defendant's full compliance with the other terms of this Agreement, the Government will recommend a sentence within the range specified by the United States Sentencing Guidelines, as determined by the Court, followed by a term of Supervised Release to be determined after consideration of the Presentence Report.

B. Oath. The defendant will be placed under oath at the plea hearing. The

[1] The word "Government" in this Agreement refers to the United States Attorney for the District of Idaho.

Government may use any statement that the defendant makes under oath against the defendant in a prosecution for perjury or false statement.

II. WAIVER OF CONSTITUTIONAL RIGHTS AT TRIAL

The defendant understands that by pleading guilty, waives the following rights: 1) the right to plead not guilty to the offense charged against the defendant and to persist in that plea; 2) the right to a trial by jury, at which the defendant would be presumed innocent and the burden would be on the Government to prove the defendant's guilt beyond a reasonable doubt; 3) the right to have the jury agree unanimously that the defendant was guilty of the offense; 4) the right, at trial, to confront and cross-examine adverse witnesses; 5) the right to present evidence and to compel the attendance of witnesses; and 6) the right not to testify or present evidence without having that held against the defendant. If the District Court accepts the defendant's guilty plea, there will be no trial.

III. NATURE OF THE CHARGES

A. **Elements of the Crime.** The elements of the crime of Obstructing a Sex Trafficking of Children investigation as charged in Count One of the Information are:

> First: The defendant knowingly obstructed, attempted to obstruct, interfered with or prevented the enforcement of Title 18, United States Code, Section 1591(a)(1) and (b)(2).

B. **Factual Basis.** If this matter were to proceed to trial, the Government and the defendant agree that the following facts would be proven beyond a reasonable doubt:

On March 8, 2012, Idaho State Trooper Justin Klitch and Payette County Deputy Sheriff Patrick Weber observed the occupants of a white Lexus with Washington plates eastbound on the Interstate 84 freeway. The car passed Deputy Weber and drove into the rest area near milepost

two in Payette County, Idaho. Both law enforcement officers noticed behavior by the occupants they considered suspicious. Swinson was driving the car. "AT" was the lone passenger.

Trooper Klitch made contact with Swinson and "AT" shortly after they came out the rear exit of the restroom building, and engaged them in a consensual contact. After introductions, the trooper asked where they were coming from, and Swinson said "Ontario." [Ontario, Oregon is approximately two miles west of their location.] The trooper asked where they were heading, and Swinson said, "Boise." Trooper Klitch asked Swinson if he lived in Ontario and he said, "No." He asked where they were originally coming from, and Swinson said, "Tacoma." The trooper asked Swinson how long he was going to be in Boise and he said, "Just this weekend." The trooper asked Swinson if he had a valid driver's license. Swinson replied that he did not, and added that his license was suspended. Trooper Klitch conducted a driver's check via his dispatcher and confirmed Swinson's date of birth (9-11-92) and that his Washington state driver's license was suspended.

Trooper Klitch spoke with "AT" and asked for her identification. She told him she did not have any identification on her or in the vehicle. He then separated the two and spoke with "AT" apart from Swinson.

Trooper Klitch asked "AT" about her identity, since it seemed unusual that she would be traveling from Tacoma to Boise for a weekend trip without any identification. She said her name was "Layline Nichole Daniels," date of birth June 12, 1992. Trooper Klitch asked her how old she was and she replied that she was 19. Based on her appearance, Trooper Klitch did not believe her; he thought she appeared more like she was around age 16. When the trooper asked "AT" about the spelling of her name, she fumbled and made errors that seemed inconsistent with

someone identifying herself. It appeared to the trooper that she was reciting information she had memorized rather than providing her true identity. Trooper Klitch checked through Idaho State Police dispatch, which revealed no record for a person with that name and date of birth. He continued to ask "AT" about her true identity, and she persisted in denying she was being untruthful.

Trooper Klitch went back to Swinson and asked him what the female's name was and he said, "Layline." He asked for her last name, and Swinson responded, "Daniels." He asked Swinson how he knew Daniels, and Swinson said, "That's my cousin." He asked Swinson if she was a prostitute and Swinson said, "No way."

Trooper Klitch asked Swinson if the vehicle was his, and he said, "It's my mother's." He asked Swinson if he minded if he looked in the vehicle to try and find something to identify Daniels and Swinson consented. During a search of the vehicle, the trooper located various items that seemed inconsistent with cousins going to Boise for a weekend trip. Through his training and experience, he became increasingly suspicious that he had encountered an individual (Swinson) who was transporting a minor for purposes of prostitution. Trooper Klitch asked Swinson how long he'd known the female, and he said, "She's my cousin, so I've known her since she was knee high."

Trooper Klitch found a black LG Virgin Mobile cellular telephone (with the number 253-592-3324) in the door pocket on the passenger side of the car, next to where "AT" had been sitting. He asked Swinson about the phone, and Swinson indicated the phone was his and "AT" uses the phone. He also asked "AT" about the phone and she said it was Swinson's, but he lets her use it.

Swinson was arrested for driving without privileges.

Both "Daniels" and Swinson were transported to the Payette County jail. At the jail, "Daniels" advised a jail deputy of her true identity and age. She stated that her true name is "AT",[2] that she is 15 years old, and that her date of birth is July 5, 1996. Trooper Klitch conducted a check through Idaho State Police dispatch with the female's true identity and discovered that she was a missing person out of Olympia, WA. He contacted a sergeant at the Olympia Police Department who informed him that "AT" was a runaway, and at the time of her disappearance on November 22, 2011, she was a ward of the state of Washington, residing at the Haven House in Olympia. Her birth certificate confirms that "AT" was born July 5, 1996 in Tacoma, WA.

On March 9 and 10, 2010, Swinson initiated several telephone calls from the Payette County Jail that were recorded by the jail's automatic recording system. Each call begins with the admonition that it is being recorded. During each call, Swinson made requests of other parties to assist him by altering or deleting electronic records. For example:

1. Telephone call on 03/09/2012 at 20:30 to telephone number 253-269-8465. This number is subscribed to by Angela Ressler, Dyrell Swinson's mother. During this call Swinson is talking to a female and tells her there was a warrant to go through the phones and that the girl was a runaway. Swinson explains he was going to be charged with trafficking, slavery and kidnapping. At time counter 12:49, Swinson asked the female to write down some information

[2] The full name of "AT" is redacted pursuant to 18 U.S.C. 3509(d) but has been disclosed to the defense.

and tells her to go to e-mail accounts "makingitalone_04@yahoo.com" and "alone35@yahoo.com" and "trash everything that you can." Swinson says "I love you Mom" at the end of the conversation.

2. Telephone call on 03/10/2012 at 13:30 to telephone number 253-269-8465, Angela Ressler. At time counter 2:14, Swinson asked the female if she did what he asked her to do last night. The female responded, "yeah." Swinson went on to ask did you see where said edit, delete and stuff and whether she did it. At the 8:15 time counter, Swinson asked the female to call "Mariah" at 306-5866 and find out "anything she know."

3. Telephone call on 03/10/2012 at 13:58 to telephone number 253-269-8465, Angela Ressler. At time counter 12:56, Swinson gives the female who answered the phone information on two more e-mail accounts, which he identified as: "s and then my name at yahoo.com" (sdyrell@yahoo.com). Swinson described the password as the white pants that don't fit anymore and tells the female (presumably Ressler) not to say it, then "LV." Swinson also gives the female the e-mail address, "dyrell.swinson@yahoo.com," with the same password with "500" or "LV" at the end. Swinson tells the female to "do what I told you to do yesterday."

4. Telephone call on 03/10/2012 at 14:35 to telephone number 678-497-5011, answered by an unknown male. The unknown male talks about when he was in jail. They talk about bond and Swinson's preliminary hearing. At time counter 5:20, the name "Isaiah" is mentioned. At time counter 8:50 Swinson

tells the unknown male about three e-mail accounts. Swinson first gives e-mail address "dyrell.swinson@yahoo.com," and says the password is his favorite kind of clothes with a "g" and "500" or if not that one put "gucciLV." Swinson next says "makingitalone_04@yahoo.com" with password "alone35." The next e-mail Swinson says is "memefranklin@rocketmail.com," and he then tells the unknown male that the password is "all$in." The unknown male says "delete everything," and Swinson replied "yeah" and "like ASAP." It will say like edit, delete or pretty close to something like that, so click on that.

Further investigation revealed that between January and March 2012 Swinson used these email addresses at Yahoo.com, including "dyrell.swinson@yahoo.com," "memefranklin@rocketmail.com," and "makingitalone_04@yahoo.com," to purchase advertisements in the adult entertainment and escorts sections of the Internet site, "Backpage.com," for the cities of Bellingham, Everett, Tacoma, Yakima and Tri-Cities in Washington State, and for Boise, Idaho. "Backpage.com" is an Internet business operated from offices in Phoenix, Arizona and Dallas, Texas, that allows users to post classified advertisements, including with photos, for cities they choose as simply as sending an email.[3] The "Backpage.com" advertisements that Swinson posted include provocative photographs of "AT," clad in revealing lingerie displaying her bare buttocks and partially exposed breasts. Some of the images depict her on a bed posed in a sexually suggestive manner. The text portion of the ads offer, among other things, "companionship," "ultimate pleasure with me," and to "caress and pamper you - I can be your excape [sic] from reality." The ads include telephone numbers for

[3] *See* http://www.Backpage.com/gyrobase/AboutUs/

interested customers to call. For example, a Backpage.com listing for Boise, Idaho, created on March 2, 2012 includes the call-back number 253-592-3324, listed the girl's name as "kAyLoNI," and included four sexually provocative photographs of "AT" posing on a bed wearing skimpy pink lingerie.

The same name and phone number along with pictures of "AT" appeared in a similar Backpage.com advertisement in Yakima, Washington, created on February 18, 2012, and in Tri-Cities, Washington, created on February 12, 2012, as well as other ads with photos "AT" for other cities in the Pacific Northwest. Despite disclaimers on these ads offering the personal services of "AT", a reasonable person would conclude they were solicitations for prostitution.

The parties agree that Swinson's solicitations of other persons to alter, eliminate or destroy evidence stored online at Yahoo.com, and Rocketmail.com was an attempt to obstruct, interfere with or prevent the enforcement of Title 18, United States Code, Section 1591(a), involving sex trafficking of a minor. This evidence was material to the activities or decisions of the Idaho State Police and the Federal Bureau of Investigation, which assumed responsibility for the investigation in mid-March 2012, and had a natural tendency to influence, or was capable of influencing, the decisions or activities of the investigating agencies.

IV. SENTENCING FACTORS

A. Maximum Penalties. A violation of 18 U.S.C. § 1591(d), as charged in Count One, is punishable by at term of imprisonment of up to 20 years, a term of supervised release of at least 5 years up to life, a maximum fine of $250,000, and a special assessment of $100.

B. Supervised Release. Following release from prison, the defendant must be placed on supervised release for at least 5 years, up to life.

The law permits the combined prison time and term of supervised release to exceed the maximum term of incarceration for the crimes to which the defendant is pleading guilty. Violation of any condition of supervised release may result in further penalties and/or prosecution.

C. Fines and Costs. The Court may impose a fine. No agreement exists as to the amount of the fine. The Court may also order the defendant to pay the costs of imprisonment, probation, and supervised release.

D. Special Assessment. The defendant will pay the special assessment of $100 before sentencing and will furnish a receipt at sentencing. Payment will be made to the United States District Court, Clerk's Office, Federal Building and United States Courthouse, 550 West Fort Street, Fourth Floor, Boise, Idaho 83724.

E. Restitution. In addition to any fine or costs imposed, the Court pursuant to 18 U.S.C. § 1593, shall order the defendant to pay restitution equal to the loss caused to any victim of the offense charged in the Information. Other general restitution statutes may also apply.

F. Forfeiture.

The defendant understands that the Court will, upon acceptance of guilty plea, enter an order of forfeiture as part of sentence, and that the order of forfeiture may include assets directly traceable to the offense, assets used in the commission of the offense, substitute assets and/or a money judgment equal to the value of the property derived from, or otherwise involved in, the offense. Specifically, the defendant agrees to immediately forfeit to the United States the property set out in the Forfeiture Allegations of the Information.

Waiver of Further Challenge or Review of Forfeiture.

The defendant further agrees to waive all constitutional, legal and equitable challenges (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. The defendant also agrees not to challenge or seek review of any civil or administrative forfeiture of any property subject to forfeiture under this Agreement, and will not assist any third party with regard to such challenge or review or with regard to the filing of a petition for remission of forfeiture.

Court Shall Retain Jurisdiction.

The defendant agrees to forfeit the properties as stated above, or to substitute properties of equal value, at the Government's option. The United States District Court for the District of Idaho shall retain jurisdiction to settle any disputes arising from application of the foregoing forfeiture provisions.

V. UNITED STATES SENTENCING GUIDELINES

A. Application of Sentencing Guidelines. The Court must consider the United States Sentencing Guidelines (USSG) in determining an appropriate sentence under 18 U.S.C. § 3553. The defendant agrees that the Court may consider "relevant conduct" in determining a sentence pursuant to USSG § 1B1.3.

The Court is not a party to the Plea Agreement. The Plea Agreement does not bind the Court's determination of Sentencing Guidelines range. The Court will identify the factors that will determine the sentencing range under the Sentencing Guidelines. While the Court may take the defendant's cooperation, if any, and the recommendations of the parties into account, the Court has complete discretion to impose any lawful sentence, including the maximum sentence possible.

Recognizing that the Court is not bound by this Agreement, the parties agree to the recommendations and requests set forth below.

B. Sentencing Guidelines Recommendations and Requests.

1. **Acceptance of Responsibility.** If the defendant clearly accepts responsibility for the offense, the defendant will be entitled to a reduction of two levels in the combined adjusted offense level, under USSG § 3E1.1(a). The Government will move for an additional one-level reduction in the combined offense level under § 3E1.1(b) if the following conditions are met: (1) the defendant qualifies for a decrease under § 3E1.1(a); (2) the offense is level 16 or greater; and (3) the defendant has timely notified authorities of the defendant's intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently. If, before sentence is imposed, the defendant fails to meet the criteria set out in USSG § 3E1.1, or acts in a manner inconsistent with acceptance of responsibility, the Government will withdraw or not make such a recommendation.

2. **Joint Recommendations.** The parties jointly make the following recommendations, and agree that the following shall be included as terms of the defendant's sentence, expressly bargained for as a part of this plea agreement:

a) **Psycho-Sexual Assessment** --The defendant will submit to a sex offender evaluation pursuant to Title 18, United States Code, Section 3552(b) prior to sentencing in this case. It is the defendant's obligation to secure this evaluation from a mental health professional certified by the Idaho Sex Offender Classification Board (see, http://www2.state.id.us/socb/). The evaluation shall follow the format for psycho sexual evaluations set forth by the Idaho Sex Offender Classification Board and the Practice Standards and Guidelines for Members of the

Association for the Treatment of Sexual Abusers (ATSA). The defendant agrees to submit to all evaluation procedures at the direction of the treatment provider, including phallometry and polygraph testing if the treatment provider deems them necessary.

b) **Waiver of Confidentiality** -- The defendant agrees to waive any right to confidentiality and allow the provider conducting the psycho-sexual evaluation (and any subsequent treatment) to supply a written report(s) to the United States Probation Department, the Court and the United States Attorney.

c) **Contact with Minors** -- The Defendant may not have direct or indirect contact with children under the age of eighteen, unless approved in advance, in writing, by his probation officer.

d) **Access to Minors** -- The Defendant will not reside or loiter within 300 feet of schoolyards, playgrounds, arcades or other places, establishments and areas primarily frequented by children under the age of eighteen, unless approved, in advance, in writing, by his probation officer.

e) **Occupational Restriction** – The defendant may not engage in any paid occupation or volunteer service that exposes him either directly or indirectly to minors, unless approved in advance, in writing, by his probation officer.

f) **Polygraph Testing** -- The Defendant agrees to participate in polygraph testing to monitor his compliance with supervised release and any applicable treatment conditions, at the direction of his probation officer and/or treatment staff.

g) **Post-Incarceration Treatment** -- The Defendant will successfully complete any course of treatment related to his offense, as directed by his probation officer, including but not limited to cognitive/behavioral treatment for sexual deviancy under the

direction of a qualified mental health professional who is experienced in treating and managing sexual offenders, such as a member of the Association for the Treatment of Sexual Abusers (ATSA). The defendant will follow the rules of the treatment program as if they are the orders of the Court.

h) **Search Provision** -- The Defendant will be subject to a search of his person, home or vehicle, and any objects or materials (including computers and other types of electronic storage media) found therein, at the discretion of his probation officer.

I) **Conditional Use/Derivative Use Immunity** - As a condition of court-mandated evaluation and treatment, the defendant will be required truthfully to reveal his entire sexual history, including the possibility of other sexual crimes. In recognition of the fact that full disclosure of that history is a necessary component of effective treatment, the government agrees that the defendant's admissions during psycho-sexual evaluation and sex offender treatment, to sexual crimes (*excluding homicide*) previously undisclosed to any law enforcement entity, will not be used against the defendant in a new criminal prosecution. *See United States v. Antelope,* 395 F.3d 1128 (9th Cir. 2005), and *Kastigar v. United States*, 406 U.S. 441 (1972). However, the parties agree that this use immunity and derivative use immunity, is expressly conditioned, upon: 1) the defendant successfully completing sexual deviancy treatment, and 2) the defendant not materially violating the rules of supervised release, and/or committing a sexual crime or a crime involving the sexual exploitation of children after the date of this agreement. If the defendant fails to complete all aspects of treatment, or fails to comply with all material supervised release requirements, or reoffends as described above, then this immunity agreement is rescinded and the government may use defendant's statements against him.

3. **Stipulation Regarding Sentencing Guidelines.** The defendant understands that the United States Sentencing Guidelines apply in an advisory manner and are not binding on the Court. The parties agree that the applicable Guideline for Count One starts at USSG § 2J1.2(c) and is cross referenced to USSG § 2X3.1 and § 2G1.3(a)(2). The parties agree that the offense level for Count One is as follows: Base level 30 plus 2 under § 2G1.3(b)(3)(B), for the use of a computer or interactive computer service to entice, encourage, offer or solicit a person to engage in prohibited sexual conduct with the minor. That is reduced by 6 levels, to level 26, pursuant to USSG 2X3.1.

4. **Stipulation Regarding Reduction for Time Served in State Custody**

The government agrees to recommend that the Court reduce its selected sentence for the federal offense by the amount of time the defendant has already served in state custody since his arrest.

5. **Downward Departure or Variance Request by Defendant.** Unless otherwise specified in this paragraph, the defendant will not seek a downward departure, or a variance under 18 U.S.C. § 3553(a), without first notifying the Government and informing it of the basis, in writing, not less than 21 days before the date set for sentencing.

VI. COOPERATION

A. Truthful Information and Assistance. The defendant promises to provide truthful and complete information to the Government and its investigative agencies, including testimony in legal and administrative proceedings, concerning the roles of others involved in other criminal activity. The defendant shall not attempt to protect anyone through false information or omission. The defendant will not falsely implicate anyone. Any intentional deviation from the truth in any of the defendant's testimony may result in prosecution for perjury

and obstruction of justice . The defendant's duty under the terms of this Agreement is to tell the truth whether or not it bolsters the Government's case against any particular individual. The defendant specifically understands that this Agreement is not contingent upon the conviction of any person.

The defendant agrees to cooperate in good faith. This means the defendant will not only respond truthfully and completely to all questions asked, but will also volunteer all information that is reasonably related to subjects discussed. In other words, the defendant may not omit facts about crimes, participants, or defendant's involvement, and then claim not to have breached the Agreement because he was not specifically asked. This Agreement is breached by any action or statement inconsistent with continued cooperation.

The defendant agrees to be available for interviews to prepare for testimony. If necessary, the defendant will submit, upon request, to government-administered polygraph examinations.

B. Use of Information Against Defendant. In exchange for the defendant's agreement, the Government will not use new information the defendant provides (pursuant to this Agreement) about his own criminal conduct. The Government may reveal such information to the Court. There shall be no restrictions, however, on the use of information: 1) previously known to law enforcement agencies; 2) revealed to law enforcement agencies by, or discoverable through, an independent source; or 3) in the event there is a breach of this Agreement.

C. Substantial Assistance Determination. If the Government determines, in good faith, that the defendant's cooperation amounts to "substantial assistance" in the investigation of others, the Government will request that the Court depart downward from the applicable sentencing range, pursuant to USSG § 5K1.1, pursuant to 18 U.S.C. § 3553(e). At this time, the

Government has advised that it intends to make a request for a downward departure based upon the defendant's "substantial assistance."

The Government's final decision as to the extent of a motion under § 5K1.1 will be made after evaluating the defendant's cooperation with regards to: 1) the significance and usefulness of the defendant's cooperation, 2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant, 3) the nature and extent of the defendant's assistance, 4) any injury suffered, or any danger or risk of injury to the defendant or defendant's family resulting from the defendant's cooperation, and 5) the timeliness of the defendant's cooperation. The Government's specific recommendation will turn on the facts of the case, the sentence that likely would have been imposed absent an agreement, and the extent and value of the cooperation provided.

D. Defendant's Assumption of Risk. The defendant agrees freely and voluntarily to cooperate with the Government, knowing the possible consequences of cooperation. The defendant's attorney knows of the defendant's cooperation and agrees that the defendant shall enter into this Agreement. The defendant hereby absolves the Government, including its employees, from any liability associated with this cooperation.

VII. WAIVER OF APPEAL AND 28 U.S.C. § 2255 RIGHTS

A. In exchange for this Agreement, and except as provided in subparagraph B, the defendant waives any right to appeal or to collaterally attack the conviction, entry of judgment, and sentence.

The defendant acknowledges that this waiver shall result in the dismissal of any appeal or collateral attack the defendant might file challenging the plea, conviction or sentence in this case. Further, if the defendant violates this waiver it will be a breach of this Agreement and the

Government may withdraw from this Plea Agreement and take other remedial action.

If the defendant believes the Government has not fulfilled its obligations under this Agreement, the defendant will object at the time of sentencing; further objections are waived.

B. Notwithstanding subparagraph A, the defendant shall retain the right to file one direct appeal only if one of the following unusual circumstances occur; the defendant understands that these circumstances occur rarely and that in most cases this Agreement constitutes a complete waiver of all appellate rights:

1. the sentence imposed by the District Court exceeds the statutory maximum;

2. the District Court arrived at an advisory Sentencing Guidelines range by applying an upward departure under Chapter 5K of the Guidelines; or

3. the District Court exercised its discretion under 18 U.S.C. § 3553(a) to impose a sentence that exceeds the advisory Sentencing Guidelines range as determined by the District Court.

4. the District Court applies a Sentencing Guideline offense level that is higher than contemplated by this agreement [base offense 30 plus 2 under § 2G1.3(b)(3)(B), for the use of a computer or interactive computer service to entice, encourage, offer or solicit a person to engage in prohibited sexual conduct with the minor; reduced by 6 levels, to level 26, pursuant to USSG 2X3.1].

Notwithstanding subparagraph A, the defendant may file one habeas petition (motion under 28 U.S.C. § 2255) for ineffective assistance of counsel only if: (1) the motion is based solely on information not known to the defendant at the time the District Court imposed

sentence; and (2) in the exercise of reasonable diligence, the information could not have been known by the defendant at that time.

VIII. PROVIDING INFORMATION FOR THE PRESENTENCE REPORT

The defendant agrees to provide material financial and other information requested by a representative of the United States Probation Office for use in preparing a presentence report. Failure to execute releases and provide such information violates this Agreement. Such failure will subject the defendant to additional penalties, including an enhancement under USSG § 3C1.1, or an upward departure under § 5K2.0, and relieve the Government of the obligations in this Agreement. Such failure will not, however, constitute grounds for withdrawing the plea of guilty unless the Government so requests.

IX. NO RIGHT TO WITHDRAW PLEA

The defendant understands that the Court may not follow the recommendations or requests made by the parties at the time of sentencing. The defendant cannot withdraw from this Plea Agreement or the guilty plea, regardless of the Court's actions.

X. CONSEQUENCES OF VIOLATING AGREEMENT

A. **Government's Options.** If the defendant fails to keep any promise in this Agreement or commits a new crime, the Government is relieved of any obligation not to prosecute the defendant on other charges, including charges not pursued due to this Plea Agreement. Such charges may be brought without prior notice. In addition, if the Government determines after sentence is imposed that the defendant's breach of the Agreement warrants further prosecution, the Government may choose between letting the conviction(s) under this Plea Agreement stand or vacating such conviction(s) so that such charge(s) may be re-

prosecuted. If the Government determines that a breach warrants prosecution before sentencing, it may withdraw from the Plea Agreement in its entirety.

B. Defendant's Waiver of Rights. If the defendant fails to keep any promise made in this Agreement, the defendant gives up the right not to be placed twice in jeopardy for the offense(s) to which the defendant entered a plea of guilty or which were dismissed under this Agreement. In addition, for any charge that is brought as a result of the defendant's failure to keep this Agreement, the defendant gives up: (1) any right under the Constitution and laws of the United States to be charged or tried in a more speedy manner; and (2) the right to be charged within the applicable statute of limitations period if the statute of limitations expired after the defendant entered into this Agreement.

XI. MISCELLANEOUS

A. No Other Terms. This Agreement is the complete understanding between the parties, and no other promises have been made by the Government to the defendant or to the attorney for the defendant. This Agreement does not prevent any governmental agency from pursuing civil or administrative actions against the defendant or any property. Unless an exception to this paragraph is explicitly set forth elsewhere in this document, this Agreement does not bind or obligate governmental entities other than the United States Attorney's Office for the District of Idaho. The Government will bring the defendant's cooperation and pleas to the attention of other prosecuting authorities at the defendant's or defendant's counsel's request.

B. Plea Agreement Acceptance Deadline. This plea offer is explicitly conditioned on the defendant's notification of acceptance of this Plea Agreement no later than **5:00 p.m. on October 26, 2012**.

XII. UNITED STATES' APPROVAL

I have reviewed this matter and the Plea Agreement. I agree on behalf of the United States that the terms and conditions set forth above are appropriate and are in the best interests of justice.

WENDY J. OLSON
UNITED STATES ATTORNEY
By:

James M. Peters
Assistant United States Attorney

10-26-12
Date

XIII. ACCEPTANCE BY DEFENDANT AND COUNSEL

I have read and carefully reviewed every part of this Plea Agreement with my attorney. I understand the Agreement and its effect upon my potential sentence. Furthermore, I have discussed all of my rights with my attorney and I understand those rights. No other promises or inducements have been made to me, directly or indirectly, by any agent of the Government, including any Assistant United States Attorney, concerning the plea to be entered in this case. In addition, no one has threatened or coerced me to do, or to refrain from doing, anything in connection with this case, including to enter a guilty plea. I am satisfied with my attorney's advice and representation in this case.

D. Swinson — 10/19/2012

DYRELL ROBERT SWINSON
Defendant

Date

I have read this Plea Agreement and have discussed the contents of the Agreement with my client. The Plea Agreement accurately sets forth the entirety of the Agreement. I concur in my client's decision to plead guilty as set forth above.

THOMAS MONAGHAN
Attorney for the Defendant

10/19/12

Date

PRESS RELEASE

Washington Man Sentenced In Idaho Sex Trafficking Case

Monday, March 25, 2013

For Immediate Release

U.S. Attorney's Office, District of Idaho

BOISE – Dyrell Robert Swinson, 20, of Tacoma, Washington, was sentenced this morning in United States District Court to 57 months in federal prison for his role in a child sex trafficking case, U.S. Attorney Wendy J. Olson announced. U.S. District Judge Edward J. Lodge also ordered Swinson to be supervised by a probation officer for five years after he is released from custody. He will also be required to register as a sex offender. Swinson pleaded guilty in November 2012 to obstructing a sex trafficking of children investigation.

According to the plea agreement, on March 8, 2012, law enforcement observed suspicious behavior by the occupants of a vehicle eastbound on Interstate 84 in Payette County, Idaho. The vehicle was intercepted at a rest area and the two occupants of the vehicle were questioned by an Idaho State Police trooper. The officer determined that Swinson, the driver of the vehicle, had a suspended Washington driver's license. The passenger, a young female who Swin was his cousin, was unable to provide identification. The trooper, believing the female's age to be false, conducted a consensual search of the vehicle and discovered items

TOP

inconsistent with statements made by the vehicle's occupants. Swinson was arrested for driving without privileges and both individuals were taken to the Payette County Jail. During an interview at the jail, the passenger admitted her true age – 15 – and identity. A check with Idaho State Police dispatch revealed the juvenile was a ward of the state of Washington and a runaway who had disappeared on November 22, 2011.

According to the plea agreement, Swinson, after being advised that telephone calls from the jail were being recorded, made several calls requesting other parties to alter or delete electronic records. During the investigation, law enforcement discovered that Swinson had posted provocative photographs of the 15-year-old on Internet advertisement web sites with telephone numbers for customers to call. Swinson admitted that his solicitations of other persons to alter, eliminate, or destroy evidence stored online was an attempt to obstruct the enforcement of federal law involving sex trafficking of a minor.

“Sex trafficking victimizes vulnerable teens, often forcing them into a desperate lifestyle so that others may profit,” said Olson. “Law enforcement agencies and prosecutors in Idaho are working together to identify and rescue these victims and to ensure that the traffickers are punished.”

The case was investigated by the Federal Bureau of Investigation, the Idaho State Police, and the Payette County Sheriff's Office.

This case was brought as part of Project Safe Childhood, a nationwide initiative launched in May 2006 by the Department of Justice to combat the growing epidemic of child sexual exploitation and abuse. Led by the United States Attorneys' Offices and the Criminal Division's Child Exploitation and Obscenity Section, Project Safe Childhood marshals federal, state, and local resources to locate, apprehend, and prosecute individuals who sexually exploit children, and to identify and rescue victims. For more information about Project Safe Childhood, please visit www.usdoj.gov/psc. For more information about internet safety education, please visit www.usdoj.gov/psc and click on the tab "resources."

Updated December 15, 2014

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