UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RACHEL WELTY, et al.,	)	
	)	
***Plaintiffs*,**	)	
	)	
v.	)	**Case No. 3:24-cv-00768**
	)	**District Judge Aleta A. Trauger**
BRYANT C. DUNAWAY, et al.,	)	**Magistrate Judge Jeffrey S. Frensley**
	)	
***Defendants*.**	)	

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants provide notice of a decision by the Sixth Circuit in *Friends of George's, Inc. v. Mulroy*, No. 23-5611, -- F.4th --, 2024 WL 3451870 (6th Cir. July 18, 2024) (Attach. A), that supports both their opposition to Plaintiffs' motion for a preliminary injunction and their pending motion to dismiss. In *Friends*, the Sixth Circuit reversed a decision granting an injunction against enforcement of a criminal statute prohibiting the performance of "adult cabaret entertainment" in certain locations, finding that the plaintiff lacked standing to bring its pre-enforcement challenge. A plaintiff may seek pre-enforcement review, the court reiterated, "only when the plaintiff (1) alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) that the challenged statute proscribes, and (3) the plaintiff's intention generates a '*certainly impending*' threat of prosecution." *Id.* at *2 (internal citations omitted). The Sixth Circuit held that the plaintiff in *Friends*—like the Plaintiffs here—failed to make the required showing.

Intent to Engage in Proscribed Conduct Affected with Constitutional Interest. To determine whether a plaintiff "intends to engage in a course of conduct that the [challenged statute] arguably proscribes," courts "must first figure out what the [challenged statute] proscribes." *Id.* (citing *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 159, 162 (2014)). The Sixth Circuit in *Friends* found that the district court

had erred in declining to apply an appropriate narrowing construction of the Adult Entertainment Act ("AEA"). *Id.* at *3. And properly construed, the plaintiff failed to demonstrate that its "intended performances" were proscribed by the AEA. *Id.* at *4. So too here. The Underage Abortion Trafficking Act, properly construed using the canons of *noscitur a sociis* and constitutional avoidance, targets only conduct intended to entice and facilitate a minor's crossing state lines to obtain an elective abortion without parental consent—not pure speech or abortion advocacy. PI Opp., D.E. 22, PageID# 217-22. Plaintiffs' vague allegations regarding their hypothetical future activity only compound their inability to demonstrate the intent required for standing.

The Sixth Circuit further noted that even if a plaintiff could demonstrate her intention to engage in proscribed conduct, "it would also need to show that this alleged intention to breach the [Act] is 'arguably affected with a constitutional interest.'" *Friends*, 2024 WL 3451870 at *5 (citing *Susan B. Anthony List*, 573 U.S. at 159). And just as there is "no constitutional interest in exhibiting indecent material to minors," *id.*, there is no constitutional interest in "procuring an abortion"—much less enticing someone else's child to leave the state to obtain an abortion without parental consent, *cf. Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 300 (2022). As was the case in *Friends*, "[a]ny intention [Plaintiffs] might have to violate the [Act] is not arguably affected with a constitutional interest." *Friends*, 2024 WL 3451870 at *6. Plaintiffs thus lack pre-enforcement standing because "they have shown no injury." *Id.*

Certainly Impending Threat of Prosecution. The Sixth Circuit further made clear that even if Plaintiffs could demonstrate an intention to engage in a course of conduct arguably proscribed by the Act and affected with a constitutional interest, they still must establish a "*certainly impending* threat of prosecution." *Id.* (citing *Crawford v. U.S. Dep't of the Treasury*, 868 F.3d 438, 454 (6th Cir. 2017)). "[M]ere allegations of a 'subjective chill'"—which is all Plaintiffs present here—are insufficient. *Id.* (quoting *McKay v. Federspiel*, 823 F.3d 862, 868-69 (6th Cir. 2016)). Threats of prosecution instead are judged

using the four *McKay* factors: (1) history of past enforcement; (2) enforcement warning letters; (3) attributes of the statute that make enforcement easier or more likely; and (4) the defendant's refusal to disavow enforcement. *Id.* (citing *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 550 (6th Cir. 2021)).

But Plaintiffs have not come anywhere close to satisfying the *McKay* factors, all of which cut against them. *See* PI Opp'n, D.E. 22, PageID# 226-27. There is no history of past enforcement. Plaintiffs have presented no warning letters. The Act does not "allow any member of the public to initiate an enforcement action," as district attorneys general have the "sole duty, authority, and discretion to prosecute criminal matters in the State of Tennessee," *Friends*, 2024 WL 3451870, at *6. And the Act is a "standard criminal law with no attributes making enforcement easier or more likely." *Id.* at *7. Finally, Plaintiffs have not shown a refusal by any Defendant to disavow enforcement as to "[their] *specific* speech," *Id.* (citing *Davis v. Colerain Twp.*, 51 F.4th 164, 174 (6th Cir. 2022)). Without a certainly impending threat of prosecution, Plaintiffs lack standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2024, a copy of the foregoing document was filed using the Court's electronic court-filing system, which sent notice of filing to the following counsel of record:

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