**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF ALABAMA**
**NORTHERN DIVISION**

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| YELLOWHAMMER FUND, *et al.*,<br><br>*Plaintiffs*,<br><br>v.<br><br>STEVE MARSHALL, in his official capacity as Attorney General of the State of Alabama,<br><br>*Defendant*. | ) | No. 2:23-cv-00450-MHT-KFP |

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| WEST ALABAMA WOMEN'S CENTER, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>STEVE MARSHALL, in his official capacity as Attorney General of the State of Alabama,<br><br>*Defendant*. | ) | No. 2:23-cv-00450-MHT-KFP |

**REPLY IN SUPPORT OF MOTION TO DISMISS**

## REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs insist that Alabama's Criminal Code does not mean what it says, and that if it does, then it must somehow violate the Constitution. But the Due Process Clause does not compel the Attorney General to adopt Plaintiffs' strained interpretation of Alabama's conspiracy laws. Enforcement of those statutes' plain language is consistent with the Constitution and a sovereign's right to police conduct that occurs within its borders.

## I. Plaintiffs Lack Third-Party Standing.[1]

The standing inquiry here does not end merely because "Defendant does not contest that Dr. Robinson has standing to assert her own speech and due process rights[,]" doc. 34 at 20.[2] Rather, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) (cleaned up). Of course, Dr. Robinson's first-party standing as to two of the West Alabama Plaintiffs' three claims does nothing for the third claim or for the entirety of the non-overlapping claims and relief sought in Yellowhammer's Complaint (and vice versa for Yellowhammer's first-party standing). And any of the Plaintiffs' first-party standing does not allow Plaintiffs to obtain relief premised on third-party injuries that they

*Russo*, 140 S. Ct. 2103 (2020), and related cases, which Plaintiffs barely seem to acknowledge aren't good law after *Dobbs*. The Supreme Court in *Dobbs*—after citing *June Medical* and other abortion-related cases in the previous paragraph—articulated that "[t]he Court's abortion cases . . . . have ignored the Court's third-party standing doctrine." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 & n.61 (2022). *Dobbs* then cites *Warth v. Seldin*, 422 U.S. 490 (1975), and the dissents in *June Medical* as the "third-party standing doctrine" that abortion-related cases like *June Medical* ignored. *Id.* Plaintiffs thus cannot rely on the cases that *ignore* third-party standing doctrine to supply the standard for their third-party standing here. Sure, "*Dobbs* did not also rule that third-party standing cannot exist in the abortion context[,]" doc. 33 at 20 n.4, but it persuasively indicates that a warped variant of third-party standing that enabled abortion providers to assert women's right to abortion should not be *extended* to confer third-party standing on *former* abortion providers and abortion funders when the right to abortion no longer exists. *See*

vendor of 3.2% beer." *Id.* at 192. Craig's claim became moot sometime after the Supreme Court exercised jurisdiction when he turned twenty-one, so the question

facilitators. *See, e.g.*, https://action.yellowhammerfund.org/onlineactions/VJwyf79UF0yW0qhFnyakGw2 (last visited Oct. 12, 2023) (asking for donations "to support reproductive justice in Alabama" and explaining that "Yellowhammer Fund is an *abortion advocacy* and reproductive justice organization providing services in the Deep South." (emphasis added)).

*Next*, Plaintiffs lack a close relationship with women seeking abortions. Yellowhammer argues that "[i]t is difficult to imagine a situation in which the interests between the litigant and the third party could be more aligned" while distancing itself from such a situation: Justice Gorsuch's point in his dissent in *June Medical* that the types of implicated relationships are like those between parents and children. *See* doc. 33 at 21. The relationship Yellowhammer alleges is nothing close to that of a parent and child: it "receives approximately five to ten calls a week from people who need abortion funding" and then informs them that it cannot provide financial support or refer them, doc. 1 ¶ 47 (cited by doc. 33 at 23, 24); *id.* ¶ 68. That abstract series of one-off telephone connections, absent allegations of any pre- or post-existing relationship with these women, does not demonstrate that

The West Alabama Plaintiffs[5] appeal to the supposed closeness of the doctor–patient relationship, doc. 34 at 27, but "a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure[,]" *June Medical*, 140 S. Ct. at 2168 (Alito, J., dissenting); *see* ALA. CODE §§ 26-23A-2, 26-23E-2. The West Alabama Plaintiffs cite numerous paragraphs in their complaint in support of their argument that the relationship is close because the patients "rely on them to provide counseling and information[,]" doc. 34 at 27–28, but to the extent that these "patients" are just the "75-85 individuals per week" whom "Plaintiffs collectively receive calls or inquiries about out-of-state abortion options[,]" doc. 24 ¶ 102, these relationships are not any different than the one-off interactions that Yellowhammer alleges. Thus, no Plaintiffs have established the requisite close relationship.[6]

[5] Paradoxically, "only Plaintiffs AWC and Dr. Robinson"—*not* WAWC—bring a right-to-travel claim on behalf of their patients. Doc. 34 at 25 n.11. The West Alabama Plaintiffs provide no explanation as to why one materially similar former abortion provider in Alabama asserts third-party standing while the other does not. *See, e.g.*, doc. 23 ¶ 77 (referring to the "approximately 30 individuals per week" who call WAWC about out-of-state abortion options).

[6] Attorney General Marshall does not dispute that the Supreme Court's "third-party standing cases

*Lastly*, Plaintiffs' clients can vindicate their own rights. As to abortion,[7]

and dissenting in part). Plaintiffs have not suggested how "this suit differs from those cases [where women seeking abortions attempted to vindicate their own rights] in any meaningful way." *June Medical*, 140 S. Ct. at 2174 (Gorsuch, J., dissenting).

### B. The West Alabama Plaintiffs[8] Lack Third-Party Standing to Sue on Behalf of Their Staff.

As an initial matter, the West Alabama Plaintiffs do not contest Attorney General Marshall's argument that "they have not even alleged either a close relationship for purposes of third-party standing with their staff or that their staff is hindered from bringing suits[,]" doc. 28 at 15. Indeed, they cto5.2( )1.hoi(a)7(t)-4.2.5( )-280.ls

inside the State from helping women obtain abortions, even if abortion is legal elsewhere and even though women may independently obtain them without exposing themselves to criminal liability.

"It is perfectly possible and may even be rational to enact that a conspiracy to accomplish what an individual is free to do shall be a crime." *Drew*, 235 U.S. 432, 438 (1914) (emphasis added). Indeed, "it is well settled that Congress may make it a crime to conspire with others *to do* what an individual *may lawfully do on his own*." *Dennis v. United las1al .*"

conspiracy" to procure an out-of-state abortion "criminal whether the acts themselves are so or not." *Id.*

*Thompson v. State*, 17 So. 512 (Ala. 1895), does not change this conclusion. Plaintiffs are incorrect to assert that Attorney General Marshall needs *Thompson* to be a "panacea," doc. 33 at 38, for this Court to grant his Motion. His interpretation does not "hinge[] almost entirely," doc. 34 at 40, on any one line in *Thompson*. To the contrary, and as Attorney General Marshall clearly stated in his Motion, "*Thompson* does not undermine, much less override, § 13A-4-4's plain language." Doc. 28 at 20. Instead, it is Plaintiffs whose claims depend on *Thompson* meaning what they say it does and modifying § 13A-4-4 the way they argue it does. Attorney General Marshall will not fully retread his Motion's discussion explaining why Plaintiffs' appeals to the common-law rule announced in *Thompson*, § 13A-4-4's legislative history, and caselaw about other statutes (namely § 13A-4-3) do not alter the plain text of § 13A-4-4, which was enacted *after Thompson* and uses different language than either the common-law rule or those other statutes.

Plaintiffs do not directly engage with Attorney General Marshall's quotation of two successive sentences establishing that the place at which the substantive crime is to be committed "is not material" because "[i]t is the law of the place where the conspiracy is formed which is broken[,]" doc. 28 at 21. They instead emphasize *Thompson*'s language that, "if the combination is formed, and the agreement entered

into, to commit a *known felony, malum in se*, the offense is complete." *Thompson*, 17 So. at 516 (emphasis added) (cited by doc. 34 at 40; doc. 33 at 38). Known felony where? In "the place where the conspiracy is formed." Plaintiffs do not explain why that reading of *Thompson*—which agrees with a plain-text reading of § 13A-4-4—should be rejected.[9] And Plaintiffs have no evidence that the Legislature—despite acknowledging *Thompson*—intended to limit § 13A-4-4's plain text to disallow Attorney General Marshall's interpretation.

Indeed, Plaintiffs' attempts to impose a cribbed reading of § 13A-4-4 by means of a cribbed reading of *Thompson* proves too much. Plaintiffs, for example, appear to elevate *Thompson*'s "malum in se" language into an element of Alabama's conspiracy law, but doing so would create troubling results. Several courts, for example, have concluded that drug trafficking is merely malum prohibitum, not

dispensing . . . of narcotic drugs, except for medicinal use and under strict surveillance, does involve, as we think, moral turpitude, although malum prohibitum only."); *but see United States v. Pohlable*, No. SA CR07-0033 DOC, 2008 WL 11355441, at *4 (C.D. Cal. Apr. 28, 2008) (deeming drug trafficking malum in se). Thus, under Plaintiffs' reading of *Thompson* and § 13A-4-4, Alabama might be powerless to stop a drug ring from conspiring to sell drugs and even taking actions in Alabama to carry out their scheme, so long as the final transfer was to occur across State lines. That makes no sense and shows that Plaintiffs' reading of the *Thompson* proves too much.

On the other hand, a plain reading of § 13A-4-4 does not lead to the parade of horribles that the West Alabama Plaintiffs trot out. They claim that "people could be criminally prosecuted for 'conspiring' to engage in myriad *legal* behaviors, should those tasked with enforcement of the criminal laws disfavor or dislike such conduct[,]" doc. 34 at 32. No, § 13A-4-4 allows prosecution only of conspiracies to engage in behavior that would be illegal under Alabama law—that t d(u)-3(10,)4.5(e)- Tm

as selling heroin, which (at least in the United States) are, but Plaintiffs ignore the breadth of their own theory. As Attorney General Marshall noted in his Motion regarding an Alabama conspiracy to sell heroin in Georgia, Plaintiffs do not contest that "Alabama would lose its authority to punish this Alabama-based conduct if Georgia repealed its law or if the Alabama-based conspirators simply set their sights on another jurisdiction with lax laws"—i.e., those that would treat selling heroin as a misdemeanor or merely impose a civil fine. *See* doc. 28 at 17.

## III. Yellowhammer's[10] Extraterritorial Due Process Claim Fails.

Yellowhammer's claim hinges on its insistence that "the law plainly allows" it, *within Alabama's borders*, to *facilitate* elective abortions for Alabama's citizenry. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). On the contrary, Alabama law plainly *prohibits*

Yellowhammer thus fails to state a claim that Defendant's threatened application of these statutes violates the Due Process Clause.[11]

The central pillar to this claim is Yellowhammer's argument that Attorney General Marshall is "applying Alabama's Abortion Ban extraterritorially to out-of-state, lawful conduct." Doc. 33 at 33; *accord* at 36 (Plaintiffs are "not guilty of any crime unless Alabama unconstitutionally purports to apply its Abortion Ban outside its borders."). Yellowhammer provides no citation for the proposition that § 13A-4-4's liability mechanism—using out-of-state conduct (which Alabama is not prosecuting and which may not even come to fruition) as a predicate to punish conspiracies occurring *in Alabama* if that conduct would be illegal in Alabama—requires extraterritorial application. Alabama's conspiracy laws do not criminalize any out-of-state conduct, so there is no extraterritorial application. So even if there is "[a]n unbroken line of Supreme Court[12] precedent" prohibiting the extraterritorial

[11] Yellowhammer's claim here falls apart if it is incorrect about § 13A-4-3's impact on § 13A-4-4, which is why it spends four pages engaging in a wholly State-law-based argument before reaching its federal extraterritorial-based Due Process argument. The same is not true for Attorney General

application of State law, *see* doc. 33 at 34–37 (discussing *Nielsen*, *State Farm*, and *Bigelow*

Constitution permits a State to punish a non-citizen for "[a]cts done outside [its] jurisdiction" if they are intended to produce and produce "detrimental" effects within it. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (collecting cases); *cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572, 573 (1996) ("Alabama does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred *and that had no impact on Alabama or its residents*." (emphasis added)).

Relatedly, the Constitution does not categorically prohibit a State from regulating the extraterritorial conduct of its own citizens. *See Skiriotes v. Florida*, 313 U.S. 69, 77 (holding that Florida possessed authority to prosecute its citizen for sponge fishing beyond its territorial 3(9)-5.3sso]s-5.3( )-61256((23)-1.5([)3.8(n)-3.8( )-107(t)-

processing regulation that burdened out-of-state pork producers, the Court refused to recognize a per se rule restricting "the ability of a State to project its power extraterritorially." *Nat'l Pork Prods. Council*, 598 U.S. at 376. As the Court acknowledged, many laws (if not most laws) have some "practical effect" of influencing out-of-state behavior. *Id*. at 374–75 (noting States' "[e]nvironmental laws," "income tax laws," "libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws," "inspection laws, quarantine laws, and health laws of every description" have a "considerable influence on commerce outside their borders" (internal quotation marks omitted)).

The Court reiterated "the usual 'legislative power of a State to act upon

## IV. The West Alabama Plaintiffs'[14] Fair-Notice Due Process Claim Fails.

The West Alabama Plaintiffs' Response failure to engage with the text of the challenged laws proves fatal to their fair-notice due process claim. To succeed on this claim, they must show that the challenged interpretation is "unexpected and indefensible." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). But Plaintiffs still do not—again, because they cannot—dispute that § 13A-4-4's *text* prohibits the conduct they wish to engage in. Section 13A-4-4 provides that: "A conspiracy formed in this state to do an act beyond the state, which, if done in this state, would be a criminal offense, is indictable and punishable in this state in all respects as if such conspiracy d -4.1(a)4.y92 2( )-211.8(-5.2(ab(s)-4.4ct)4.3n )1.83(d)31 ept,ected 3.3(i)-4.2(h

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without running afoul of due process.[21]

In circular fashion, Yellowhammer asserts that—unlike speech incidental to

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that identical underlying speech or conduct would be constitutionally protected if aimed at California but not if aimed at Mississippi. These are the same agreements to engage in the same conduct. The language in Justice Jackson's concurrence in *Dennis*, 341 U.S. at 575 ("I do not suggest that Congress could punish conspiracy to advocate something, the doing of which it may not punish") (cited by doc. 33 at 43), might apply when the predicate activity is constitutionally protected, but Alabama certainly can and does prohibit "the doing" of elective abortion.

Alabama's interests in protecting unborn life and maternal health do not "evaporate[]," doc. 33 at 43, merely because Plaintiffs target a State where abortion is legal. Instead, Alabama "has decided to apply its law without exception to all persons who combine to" facilitate abortions that violate the Human Life Protection Act. *Giboney*, 336 U.S. at 497. Plaintiffs' attempt to argue for "special constitutional protection denied all other people[,]" *id.* at 496, for those who target a State where abortion is legal should be denied. *Id.* at 497 (Courts "are without constitutional authority to modify or upset [Alabama]'s determination that it is in the public interest

in *Williams*, Defendant has not construed § 13A-4-4 to prohibit "abstract advocacy" for abortion in Alabama or anywhere else. *See id*. (explaining that the statute did not criminalize statements such as "'I believe that child pornography should be legal' or even 'I encourage you to obtain child pornography'"). So the West Alabama Plaintiffs are incorrect to claim that Attorney General Marshall seeks to criminalize mere "[s]peech about lawful conduct in another state[,]" doc. 34 at 46. Under § 13A-4-4, abortion advocates may vigorously advocate for abortion.[23] Still, in Alabama, the formation of an agreement between particular persons with the intent of aborting a particular unborn child—followed by an act to further that objective—is unprotected criminal activity, not permissible abstract advocacy of illegality.

Plaintiffs heavily rely on *Bigelow v. Virginia*, insisting it should inform—maybe control—this Court's Extraterritorial Due Process and First Amendment analyses.[24] *E.g.* doc. 33 at 44–45; doc. 34 at 48–4

outdated legal landscape to support their purported constitutional right to facilitate a now-unprotected criminal activity.

Plaintiffs' discussion of heightened scrutiny for Alabama's conspiracy laws underscores why the First Amendment does not protect conspiracies formed in Alabama to procure elective abortions. True, viewpoint discrimination is almost per se disallowed under the First Amendment. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022). But this is because "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). By

## VI. Yellowhammer[27] Has Not Sufficiently Pleaded an Overbreadth Claim, But It Fails on the Merits Regardless.

Although Yellowhammer faults Attorney General Marshall's discussion of its purported overbreadth claim as "brief and passing," doc. 33 at 52, it fails to even address that discussion in full—betraying the weakness of its position. As an initial matter, Yellowhammer's Complaint does not contain a "short *and plain* statement of the claim[,]" FED. R. CIV. P. 8(a)(2) (emphasis added). Yellowhammer's Complaint literally contains no statement of an overbreadth claim at all. Its only arguable hook is its use of the word "overbroad" twice (buried within two Counts asserting only its own constitutional rights and not anyone else's, as in an overbreadth claim[28]), which is not sufficient to provide Attorney General Marshall fair notice that Yellowhammer even intended to assert such a claim.[29]

Regardless, Yellowhammer's failure to address Attorney General Marshall's discussion in full dooms its (purported) overbreadth claim on the merits.

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*Roberts*'s description of the right to associate as a "corresponding right"). Thus, Attorney General Marshall did not need to directly engage with this derivative claim to show that it fails. The same goes for Yellowhammer's expressive-conduct claim. If *speech* integral to a criminal conspiracy is unprotected, then so is expressive *conduct*.

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Overbreadth claimants "bear[] the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (cleaned up). "That is not easy to do." *Doe v. Valencia Coll.*, 903 F.3d 1220, 1232 (11th Cir. 2018). Because "invalidation for overbreadth is strong medicine that is not to be casually employed[,]" courts "vigorously enforce[] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292–93 (cleaned up) (citations omitted). And this potent medicine "should be administered only as a last resort." *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (quotation marks and citation omitted).

Yellowhammer failed to clear this high bar when it failed to address the "plainly legitimate sweep" of the laws it challenges. In his Motion, Attorney General Marshall pointed out the numerous "plainly legitimate" applications of the challenged laws—i.e., prohibiting conspiracies to engage in conduct that is uniformly criminalized. *See* doc. 28 at 27 n.13. Accordingly, "the ratio of unlawful-

moved to dismiss). But, of course, "facts contained in a motion or brief cannot substitute for

to-lawful applications is not lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth." *Hansen*, 599 U.S. at 784. So even if Yellowhammer experiences a significant chilling effect from the challenged laws, that does not "justify prohibiting all enforcement of [those] law[s]" because they "reflect[] 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Hicks*, 539 U.S. at 119 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

Indeed, declaring the challenged statutes here to be overbroad (and thus facially invalid) would threaten to leave Alabama without clear prohibitions on (for example) conspiring in Alabama to commit murder, creating "substantial social costs" that "swallow" the supposed "social benefits" Yellowhammer seeks. *Id.* "In other words, [Plaintiffs] ask[] [this Court] to throw out too much of the good based

(1966) (explaining that the right to travel protects "individuals" from restrictions on "free movement"). Yellowhammer emphasizes the fundamental nature of the individual right to travel but fails to cite a single case showing that this right extends to non-natural persons. *See* doc. 33 at 56–57. Instead, the "nature, history, and purpose of" the right to travel demonstrate that it is a "purely personal" guarantee of flesh and blood citizens to freely move between states. *See* doc. 28 at 31–33 (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (plurality opinion)); *see also Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (noting that "the

Amendment, which is unsurprising given—as the West Alabama Plaintiffs note—

at 64; doc. 34 at 54.[32] These assertions ignore that the relevant laws are general criminal statutes targeting conduct *other* than interstate travel—elective abortions and agreements to procure them.

The Human Life Protection Act recognizes and protects "[t]he dignity and value of life, especially the lives of children, born and unborn[.]" ALA. CODE § 26-23F-2(a)(4). Its primary objective is thus to advance Alabama's "legitimate interests" in respecting and preserving "prenatal life at all stages of development." *Dobbs*, 142 S. Ct. at 2284. Enforcing Alabama law also shields women from "[t]he medical, emotional, and psychological consequences of an abortion." ALA. CODE § 26-23A-2(a)(3). By the same token, Alabama's conspiracy laws aim to prohibit the "unlawful combination, the corrupt and corrupting agreement[,]" 17 So. at 516, formed by those who would help procure an elective abortion. These laws were not "enacted for the impermissible purpose of inhibiting migration[,]" *Saenz v. Roe*, 526 U.S. 489, 499 (1999), any more than other criminal laws of general applicability are. Likewise, the primary purpose of *enforcing* the relevant statutes is to prevent elective abortions and corrupt agreements to procure them.[33]

[32] West Alabama argues that a "reasonableness" test (if this Court finds the relevant statutes burden the right to travel) is inappropriate because the relevant statutes are "primarily aimed at impeding travel itself." Doc. 34 at 59. Yellowhammer similarly suggests that the reasonableness standard is applicable only if "the purpose of the law was not to prevent travel[.]" Doc. 33 at 61.

[33] The text of the generally applicable laws that Attorney General Marshall has a duty to enforce are the crux of this dispute. Attorney General Marshall's "threats" to enforce Alabama's

Plaintiffs' real argument is that the right to travel bars every State from imposing sanctions upon those who form unlawful agreements to commit a proscribed act if the act is permitted in another jurisdiction. *See, e.g.*, doc. 34 at 62 (arguing that an anti-gambling State must allow those operating within its borders to arrange travel for out-of-state gambling); *see also* doc. 28 at 34 ("At bottom then, Plaintiffs' theory must provide that the constitutional right to travel encompasses the right to travel *and* to do whatever is legal in other states."). Plaintiffs offer no authority to establish that the right to travel is so broad. Instead, they rely on traditional right-to-travel cases where the invalid law proscribed travel with a class of persons (the indigent) or categorically penalized travel for any purpose (taxing means of travel).

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conspiracy laws against abortion facilitators were not a "custom or usage" that violated constitutional rights through "a systematic maladministration of" the conspiracy laws. *Contra* doc. 33 at 62 n.23 (quoting *Adickes v. SH Kress & Co.*, 398 U.S. 144, 167 (1970)). For starters, Attorney General Marshall did not establish any "settled practices" through his brief remarks. *See Adickes*, 398 U.S. at 168 (explaining that "longstanding practice of state officials" may *differ* from the text of a statute). And his remarks were not a purposeful departure from a statute intended to impede interstate travel; rather, he explicitly stated that "nothing about that law restricts any individual from driving across state lines and seeking an abortion in another place[,]" doc. 34 at 13. His remarks signaled that he would enforce "provisions relating to conspiracy" when faced with efforts "to facilitate" elective abortions. *Id.*; doc. 23 at 11 n.4 (citing an article titled, "*The Good News Is, AG Marshall Will Enforce Abortion Ban*

*Edwards v. California* is distinguishable in almost every material aspect. 314 U.S. 160 (1941).[34] While the law at issue in *Edwards* categorically blocked "in-migration" of indigent non-residents, *id.* at 166, it should go without saying that no Alabama law forbids the transportation of pregnant women across State lines. More to the point, Alabama's conspiracy statutes criminalize travel aid only to the extent that it furthers a specific, unlawful agreement to procure an elective abortion. The law in *Edwards* criminalized crossing State lines with an entire class of persons (indigents) no matter the purpose. Here, participating in a specific, unlawful scheme to procure an elective abortion— regardless of movement across State lines— triggers criminal liability. And whereas the interstate transportation of indigent persons "if regulated at all . . . must be prescribed by a single authority[,]" *id.* at 176, "[t]he Constitution does not prohibit the citizens of each State from . . . prohibiting abortion[,]" *Dobbs*, 142 S. Ct. at 2284.

*Crandall* similarly does not support Plaintiffs' position. In *Crandall v. Nevada*, the Supreme Court held unconstitutional a Nevada statute that levied a one-dollar tax upon each person leaving the State of Nevada by any railroad, stage coach, or other vehicle. 73 U.S. at 39. The *Crandall* court reasoned that directly taxing

[34] *Edwards* was decided pursuant to the Commerce Clause and not "the right of persons to move freely from State to State[,]" which "the Court expresse[d] no view on." 314 U.S. at 169 (Douglas, J., concurring).

to serve" (natal life and maternal health). *Contra* doc. 34 at 59. Plaintiffs can only contend that the "immediate and primary purpose" of enforcing § 13A-4-4 is to impede the right to travel by arbitrarily declaring that the Human Life Protection Act "has already 'advance[d] those alleged interests" enough. *See* doc. 34 at 55.

discussed in his Motion, *see* doc. 28 at 30–31.[35] Indeed, "mere burdens on a person's ability to travel from state to state are not necessarily a violation of their right to travel." *Doe v. Moore*, 410 F.3d 1337, 1348 (11th Cir. 2005) (citing *Saenz v. Roe*, 526 U.S. 489, 499 (1999)). And even if enforcement of the relevant statutes imposed a cognizable burden on the right to travel, it is more than "[]reasonable by constitutional standards, especially in light of the reasoning behind such" prohibitions. *Id.* The State's legitimate objectives of prohibiting elective abortions and conspiracies to procure them cannot be achieved if conspirators may arrange abortions so long as they target out-of-state destinations. "The state has a strong interest in" preserving unborn human life and maternal health, and it is reasonable to not allow abortion providers to "legally subvert the purpose of the statute" by directing their conspiracies toward more permissive jurisdictions. *Id*.

Lastly, the Supreme Court's decision in *Jones v. Helms* demonstrates[36] that persons who commit a crime in a State do not have "an unqualified federal right to leave the jurisdiction prior to arrest or conviction." 452 U.S. 412, 420 (1981). "Prior to arrest" makes clear that Plaintiffs are incorrect that *Jones*'s reasoning hinged on

[35] Because Yellowhammer—the only Plaintiff asserting its own right to travel—nor women seeking abortions are subject to criminal prosecution, Plaintiffs cannot claim that criminal prosecution is the relevant burden on travel to assess.

[36] Despite Yellowhammer's assertion otherwise, Attorney General Marshall never suggested that *Jones v. Helms* prescribed a "rational basis" standard for assessing all laws that burden the right to travel. *Contra* doc. 33 at 63–65.

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**CERTIFICATE OF SERVICE**

I certify that I electronically filed this document using the Court's CM/ECF system on October 12, 2023, which will serve all counsel of record.

/s/ Benjamin M. Seiss