UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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

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

MOTION TO DISMISS

Plaintiffs next argue that their First Amendment rights to speech, expression, and association are violated because they cannot conspire to procure out-of-state abortions. But

even if the

injunction after *Dobbs v. Jackson Womenǿs Health Organization*, 142 S. Ct. 2228 (2022), *Robinson v. Marshall*, No. 2:19-cv-365-MHT, 2022 WL 2314402 (M.D. Ala. June 24, 2022).

B.

By prohibiting and regulating abortions, the Alabama Legislature advances

Most women do not return to the [abortion] facility for post-surgical care *Id*. § 26-23A-2(a)(2).

C. Alabama Conspiracy Law

Under Alabama law:

> (a) A person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he or she agrees with one or more persons to engage in or cause the performance of the conduct, and any one or

rule [t]he place at which it is intended to commit the felony is not material. It is the law of the place where the conspiracy is formed which is broken. *Thompson v. State*, 17 So. 512, 516 (Ala. 1895).

D. Proceedings.

On July 31, 2023, , Yashica Robinson, and

and Yellowhammer Fund filed lawsuits in the Middle District of Alabama alleging that their constitutional rights to free speech, expression, association, travel, due process, and to be free from extraterritorial application of State law would be violated by the application of general Alabama criminal laws (namely Ala. Code §§ 13A-2-23, 13A-4-1, 13A-4-3, and 13A-4-4) to punish

whether the comp

Worthy v. City of Phenix City, 930 F.3d 1206, 1217 (11th Cir. 2019) (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (footnote omitted). Such a dispute always presents a purely legal question; there are not issues of fact because the allegations contained *Id.* (citing *Mitchell v. Duval Cnty. Sch. Bd.*, 107 F.3d 837, 838 n.1 (11th Cir. 1997) (per curiam)).

I. This Court lacks subject-matter jurisdiction to consider some of

First,

cases.[3] -party standing jurisprudence might have been in pre-*Dobbs* abortion-related cases, the normal articulation and application of third-party standing principles now controls. *See SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, 40 F.4th 1320, 1328 (11th Cir. 2022) (declining to treat abortion differently in the void-for-vagueness context because there is no longer a constitutional right to abortion).

a litigant may only assert his own constitutional rights or *United States v. Raines*, 362 U.S. 17, 22 (1960).]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining par

Warth, 422 U.S. at 499. However, the Court has crafted a narrow exception to the rule against third-party standing where (1)

in the

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[3] *See Dobbs*, 142 S. Ct. at 2275 n.61 (citing *Warth*, 422 U.S. at 499; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15, 17 18, (2004), *abrogated on others grounds by Lexmark Inter., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *June Med.*, 140 S. Ct., at 2167 68 (Alito, J., dissenting); *June Med.*, 140 S. Ct., at 2173 74 (Gorsuch, J., dissenting) (collecting cases); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 632 n.1 (2016) (Thomas, J., dissenting)); *see also All. for Hippocratic Med. v. FDA*, No. 23-10362, 2023 WL 2913725, at *4 (5th Cir. Apr. 12,

theories of third-
cases *Cameron v. EMW Womenꞌs Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 652 (Ky. 2023) (determining that *Dobbs* s of permitting abortion providers third-party standing in [abortion-related] and examining the dissents in *June Medical* and *Whole Womenꞌs Health* to hold that abortion providers did not have standing to sue on behalf of their patients).

[4]; (2) third

Powers v. Ohio, 499 U.S. 400, 411 (1991). [T]hird-party standing is

pregnant women who would financially struggle to travel out of state to procure an abortion. *Id*. WAWC and Dr. Robinson previously performed abortions and provided clients with Doc. 23 ¶ 65.[5] Close relationships for third-

Doc. 1 ¶ 69. But those women can sue under a pseudonym. *See, e.g.*, *Singleton*, 428 U.S. at

regularly contains cases in which women, using pseudonyms, challenge statutes that

. Plaintiffs have not

alleged that any client or potential client has been denied a request to litigate under a pseudonym, and these women face no threat of criminal prosecution in Alabama for having out-of-state abortions.

Neither is mootness an issue. Yellowhammer also alleges that a woman

obtain an abortion] also faces the imminent mootness of their

Doc. 1 ¶ 69

survive the end of her pregnancy under the capable-of-repetition-yet-evading-review

June Med., 140 S. Ct. at 2169 (Alito, J. dissenting); *see also*

Roe v. Wade

. And, of course, a woman seeking an abortion could pursue temporary or preliminary relief or bring a class action, which (once a class is certified) prevents

claims become moot, *see Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 75 (2013). Neither of Plaintiffs explanations for why their clients are unable to vindicate their own rights hold up under scrutiny. Because Plaintiffs have a potential conflict of interest with pregnant women and they cannot satisfy the relationship and

are claiming that this Court should command State officials to follow State law, such an order would violate the long- the Eleventh Amendment prohibit[s]

plainly illegal pursuant to Ala. Code § 13A-4-4 for Plaintiffs to conspire with others to procure abortions that would be illegal in Alabama. The criminal conduct is the agreement (the conspiracy) itself, which is conduct that occurs *in Alabama* that Alabama has every right to prosecute. Thus, the legality of abortion in other States is irrelevant to whether Alabama can prosecute a conspiracy formed in Alabama.

Plaintiffs do not contest that Alabama, for example, can criminalize conspiracy to sell heroin in Georgia. Nor, under their theory, would it appear to make a difference if Georgia penalized that conduct less harshly than Alabama does, for example, by treating the Alabama felony as a Georgia misdemeanor (or maybe even a civil fine).

facilitating procurement of an abortion in another state is unlawful. Doc. 23 ¶ 122.[7] This argument ignores the clear contours of Alabama law and fails to appreciate the high bar required to state such a due process claim: that the interpretation of the

see, e.g., *Bouie v. City of Columbia*,

378 U.S. 347, 354 (1964). Moreover, its inherent focus on State offi

compliance with State law runs afoul of basic federalism principles including sovereign immunity pursuant to *Pennhurst* and the nature of § 1983.

As an initial matter, argument fails because it relies on a clear misinterpretation of Alabama law. Alabama law

formed in this state to do an act beyond the state, which, *if done in this state*, would be a criminal offense ALA. CODE 13A-4-4 (emphasis added). Plaintiffs make no serious effort to dispute that the plain language encompasses the situation complained of here, nor could they. Instead, Plaintiffs contend that an 1895 Alabama Supreme Court decision recognizing then-operative common-law conspiracy rules

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[7] a similar due process claim. Even

law plainly allows him to do is a due p
as a separate claim, doc. 1 at 34 35, ¶ 101, it fa

somehow prevents this later-enacted statute from being given effect. *See* doc. 23 ¶¶ 36 55 (citing *Thompson*, 17 So. at 516).

Thompson does not undermine, much less override, § 13A-4- plain language. To begin,

For example, in *Rogers*, the Supreme Court found that a Tennessee decision

-and-a- [10] and retroactively applying it to

a criminal defendant was not

action against which the Due Process Clause aims to

common law decisionmaking

Id. And in *Metrish v. Lancaster*

found a due process violation

Rogers, 532 U.S. at 457. those in cases like

Bouie where [,]

347, 350 55 (1964); here, Plaintiffs undeniably would violate the statute as written.

Moreover, applying the other inchoate criminal statutes

funders,[12] doc. 1 ¶ 75, and their right to associate with their clients, staff, and other abortion groups, *id.* ¶ 85.

But the only criminalized activity is that which conspires to commit a *crime*. Such activity established criminal proscriptions such as laws against conspiracy, incitement, and solicitation criminalize speech (commercial or not) that is intended to induce or commence *United States v. Williams*, 553 U.S. 285, 298 (2008) ch -defined and narrowly limited classes of speech, the prevention and punishment of which have

spoken, writte *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (citations omitted).

Here, the only speech incidentally criminalized is speech that conspires as defined by Alabama law to perform an illegal act. To say this law s] on the basis of content and viewpoint[,] doc. 23 ¶ 127,

causes a crime that the speech is unprotected. *Fleury* -based restrictions are permitted when they are confined to [this] categor[y] of *Id.* at 1365; *see Virginia v. Black*, 538 U.S. 343, 361 basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint

¶¶ 128 31. But relevant Alabama law does not violate the right to travel for any of them.

would raise a constitutional issue. (footnote omitted)). Nor does

2. *Criminalizing Conspiracy Does Not Implicate Plaintiffsø and Their Stafføs Right To Travel Regardless.*

Nevertheless, even if the organizational Plaintiffs had a right to travel, Alabama law does not implicate their . And even if Plaintiffs had standing to sue on behalf of

As previously stated, traveled, and desires to once again travel, between states with passengers in its vehicles who need Doc. 1 ¶ 89. Because it no longer can do so, so the argument goes, their right to travel has been violated.

The theory ignores what Alabama law actually prohibits. For example, § 13A-4-

reach or even prohibit out-of-state .056n›a70W* nBT/F1 143a142(o)4(u)-3fonro

have so far not offered binding authority saying otherwise. In this context, the right to travel

Bray, 506 U.S. at 277.

Jones v. Helms . 452 U.S. 412 (1981). There, a prisoner challenged a Georgia law that charged parents with willful and voluntary abandonment of a dependent child generally as a misdemeanor but enhanced the crime to a felony if the parent left the state after abandonment. *See generally id.* The Court held that the statute did not violate the right to travel for two reasons relevant here.

an offense punishable by imprisonment has an unqualified federal right to leave the

Id

ALA. CODE § 13A-4-4, so once a person or group conspires in Alabama to procure an out-of-state abortion, they have committed the criminal conduct. *See also Thompson*, 17 So. at 516. In *Jones* . . . necessarily qualified his

452 U.S. at 421. Likewise, by facilitating an out-of-state abortion, Plaintiffs have qualified their right to freely travel interstate by engaging in criminal conduct (a conspiracy) within Alabama.

Assuming *arguendo* that such a right exists, Alabama conspiracy law does not implicate it because it does not apply extraterritorially. As a general matter, Alabama

al rule of statutory construction that, in order to have

Ex parte Old Republic, 733 So. 2d 881, 884 (Ala. 1999). Moreover, the law at issue only

in this state ALA. CODE § 13A-4-4 (emphasis added); *see also Thompson*, 17 S271(o)-34.06 tET555.06 [(6 0.06 Tc[(37)] TJETq0.00000912

does not prohibit territorial limits of [another state] an act which that state had specially authorized him to do it prohibits forming conspiracies in Alabama.[14] Lastly, *Bigelow v. Virginia*, 421 U.S. 809 (1975),[15] an abortion-related because Alabama enforcing its conspiracy law as to conduct occurring wholly in Alabama over the internal affairs of another State. [16] Th not violate the so-called right to be free from extraterritorial application of State law.

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[14] Additionally, the Supreme Court in *Heath v. Alabama* stated that *Nielsen* unusual facts and has continuing relevance, if it all, only to questions of jurisdiction between two

(1985).

[15] The *Bigelow* statement that Plaintiffs rely on, *see* doc. 1 ¶ 13, is dictum. The quoted statement was not under an outdated First Amendment balance-of-interests test, *Bigelow*, 421 U.S. at 812. And that holding is no longer -constitutionally protected status, *id.* at 822; *see also id.* at 830 (Rehnquist, CJ., dissenting). The State concerns unlawful activity[,] on in Alabama. *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623 24 (1995).

[16] Plaintiffs rely on *National Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023), a recent Dormant Commerce Clause case, for the proposition that . . . the *See* doc. 1 ¶ 99. Because their Complaint

Free From Extraterritorial Application of State Law *id.* at 34 ¶ 98, the State does not take Yellowhammer to be raising a Dormant Commerce Clause claim. Nonetheless, such claim would fail for three reasons. First, there is no extraterritoriality principle within the Dormant Com -of-state commerce. *Nat'l Pork Producers*, 143 S. Ct. at 1153 54. Second -of-state commerce. *See id.* at 1153. And third, Plaintiffs have not alleged a substantial burden to trigger *Pike* balancing, and even if they did, Alabama law would easily satisfy it. *See id.* at 1161. *See generally Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Respectfully submitted,

Steve Marshall
Attorney General

James W. Davis (ASB-4063-

I certify that

system on August 28, 2023, which will serve all counsel of record.

/s/ Benjamin M. Seiss