IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
Northern Division

REPRODUCTIVE HEALTH SERVICES, on behalf of its patients, physicians, and staff; and JUNE AYERS, RN, *Plaintiffs,* v. LUTHER STRANGE, in his official capacity as Attorney General of the State of Alabama; and DARYL D. BAILEY, in his official capacity as District Attorney of Montgomery County, Alabama, *Defendants.*	)	Civil Action No. 2:14-cv-1014-SRW

DEFENDANTS' MOTION FOR MORE DEFINITE STATEMENT OR TO STRIKE

As explained below, the complaint suffers from pleading deficiencies that the plaintiffs should be required to correct before the defendants file an answer or otherwise respond. Accordingly, defendants Luther Strange and Daryl Bailey respectfully request an order requiring the plaintiffs to submit a new complaint that (1) is not a "shotgun pleading" and (2) clarifies whether they intend to proceed under 42 U.S.C. § 1983. *See* Fed. R. Civ. P. 12(e). In the alternative, the defendants request the Court to strike the language in the complaint that creates the ambiguity concerning § 1983—*i.e.*, the plaintiffs' request

for an "award of . . . attorneys' fees pursuant to 42 U.S.C. § 1988." Doc. 1 at 15; *see* Fed. R. Civ. P. 12(f).

1. Alabama law generally requires a minor girl seeking an abortion to first obtain the consent of one of her parents or a legal guardian. *See* Ala. Code § 26-21-3(a). If the girl does not want to do that, or cannot do that, then she may still proceed with the abortion if she gets approval from a state court through a process known as the "judicial bypass" procedure. *See id.* § 26-21-4. In this case, a Montgomery abortion clinic, Reproductive Health Services ("RHS"), and its administrator, June Ayers, challenge various amendments the Alabama Legislature recently made to the judicial bypass procedure. *See generally* doc. 1. Notably, they purport to vindicate not their own rights, but the rights of RHS's "patients" (in Counts I and II) and of "out-of-state minors" (in Counts III and IV). *E.g.*, doc. 1 ¶¶ 45, 47, 49, 51, at 13-14; *see also id.* ¶¶ 4, 8, at 3.

2. The complaint is ambiguous "in that it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996). This is because each of the complaint's four counts "incorporate[s] as though fully set out herein" all of the preceding paragraphs of the complaint. *E.g.*, *id.* ¶ 44, at 13. For example, in paragraph 50, the fourth count,

which asserts an equal protection violation, incorporates "[t]he allegations of paragraphs 1 through 49." *Id.* ¶ 50, at 14. Read fairly, that means count four reiterates *all* of the complaint's preceding factual allegations—whether or not they have anything to do with count four's equal protection claim. Indeed, read fairly, count four includes each of the *legal* conclusions from the previous three counts as well as all legal conclusions set forth in the body of the complaint. *Id.* ¶ 50, at 14. The Eleventh Circuit has called complaints like this "'shotgun' pleading[s]." *See Anderson*, 77 F.3d at 366; *see also Byrne v. Nezhat*, 261 F.3d 1075, 1129 (11th Cir. 2001); *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001).

3. The complaint is also ambiguous with respect to the plaintiffs' statutory cause of action. This is because it cites "42 U.S.C. § 1988" as its basis for requesting an award of attorney fees, but nowhere expressly invokes 42 U.S.C. § 1983 as authorization to bring the suit in the first place. Doc. 1 at 15. Under 42 U.S.C. § 1988, attorney fees are available *only* in suits brought pursuant to Section 1983 (or a few other statutes not conceivably relevant here). 42 U.S.C. § 1983(b); *see also, e.g.*, *Estes v. Tuscaloosa Cnty.*, 696 F.2d 898, 901 (11th Cir. 1983) ("Section 1988 authorizes attorney's fees as part of a remedy for violations of civil rights statutes; it does not create an independent right of action."). Thus, it is conceivable that the plaintiffs intend to proceed under

§ 1983, but it is not inevitably the case. That is, the complaint *might be* premised in part on § 1983—or it might not be. There is no way for the defendants to know for sure.

4. Rule 12(e) allows defendants to move for a more definite statement whenever they confront a complaint that is "so vague or ambiguous that [they] cannot reasonably prepare a response." Fed. R. Civ. P. 12(e). The present complaint fits that description based on the ambiguities described in the two preceding paragraphs.

5. The Eleventh Circuit and this Court frequently have suggested defendants facing a shotgun complaint should move for a more definite statement. For example, the Eleventh Circuit made this point in *Anderson*:

> Under the Federal Rules of Civil Procedure, a defendant faced with a complaint such as Anderson's is not expected to frame a responsive pleading. Rather, the defendant is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite statement. Where, as here, the plaintiff asserts multiple claims for relief, a more definite statement, if properly drawn, will present each claim for relief in a separate count, as required by Rule 10(b),4 and with such clarity and precision that the defendant will be able to discern what the plaintiff is claiming and to frame a responsive pleading.

77 F.3d at 366 (footnotes omitted). And indeed, this Court has previously admonished the Alabama Attorney General's Office for moving to dismiss a shotgun complaint rather than moving for a more definite statement under

Rule 12(e). *See McGuire v. City of Montgomery*, No. 2:11-CV-1027-WKW, 2013 WL 1336882 at *3 & n.2 (M.D. Ala. March 29, 2013).

6. The ambiguity concerning the plaintiffs' statutory cause of action similarly prevents the defendants from "reasonably prepar[ing] a response" to the complaint. Fed. R. Civ. P. 12(e). A pivotal issue in this case will be whether RHS and June Ayres may validly pursue the interests of other persons not before the Court—*e.g.*, their potential patients. Whether or not RHS and June Ayers may do this consistent with the Constitution, there is substantial authority that would prevent them from doing so under the banner of § 1983. *See, e.g.*, *Estate of Gilliam v. City of Prattville*, 639 F.3d 1041, 10476 (11th Cir. 2011) ("[B]y its own terms, § 1983 grants the cause of action 'to the party injured,' suggesting that the action is personal to the injured party." (quoting 42 U.S.C. § 1983)). In its current state, however, the complaint leaves the defendants in the dark about whether the plaintiffs mean to proceed under § 1983. As a result, the defendants do not know how to prepare a response regarding this important issue.[1]

[1] Although the complaint cites *other* authorities purporting to authorize this action, those citations are irrelevant to the current motion. *See* doc. 1 ¶ 6, at 3 (citing 28 U.S.C. §§ 2201, 2202; Fed. R. Civ. P. 57, 65). Citation to other arguable causes of action does not eliminate the fundamental ambiguity concerning the plaintiffs' potential § 1983 claim.

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7. If the plaintiffs want to proceed under § 1983 and seek attorney fees, they are entitled to do so as long as they amend their complaint to give the defendants (and the Court) clarity on the point. If, on the other hand, the Court concludes that the complaint *is* sufficiently clear—*i.e.*, that the plaintiffs are *not* seeking to proceed under § 1983—then the Court should strike the plaintiffs' request for an "award of . . . attorneys' fees pursuant to 42 U.S.C. § 1988." Doc. 1 at 15. As explained above, attorney fees are not available in this action unless the plaintiffs are bringing it pursuant to § 1983. The attorney-fee request thus constitutes "immaterial" or "impertinent" matter that the Court can and should strike from the complaint. Fed. R. Civ. P. 12(f).

In addition, granting this motion should ultimately help the plaintiffs. Relying on case law that would be binding in this circuit, the Fifth Circuit recently affirmed a grant of summary judgment based on the plaintiffs' failure to expressly invoke 42 U.S.C. § 1983 in their complaint. *See Johnson v. City of Shelby*, 743 F.3d 59, 62 (5th Cir. 2013) (citing, among other cases, *Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382-83 (5th Cir. 1980) (Tjoflat, J.)), *petition for cert. filed* U.S. Apr. 29, 2014 (No. 13-1318). The Supreme Court has taken some interest in *Johnson*, as evidenced by its decision to relist the case at least three times. *See Johnson v. City of Shelby*, No. 13-1318 (U.S. Nov. 3, 2014) (docket entry), available at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1318.htm.

Respectfully submitted this 3rd day of November, 2014.

Luther Strange (ASB-0036-G42L)
Attorney General

s/ William G. Parker, Jr.
William G. Parker, Jr. (ASB-5142-I72P)
Kyle A. Beckman (ASB-6046-E63B)
Assistant Attorneys General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
wparker@ago.state.al.us
kbekman@ago.state.al.us

Counsel for Defendants Luther Strange and Daryl D. Bailey

CERTIFICATE OF SERVICE

I certify that on November 3, 2014, I electronically filed the foregoing brief using the CM/ECF system, which will serve a copy on the following counsel:

Andrew Beck
abeck@aclu.org

Jennifer Dalven
jdalven@aclu.org

Randall C. Marshall
rmarshall@aclualabama.org

Renee Paradis
rparadis@aclu.org

s/ William G. Parker, Jr.
Attorney for the Defendants