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November 19, 2018

VIA CM/ECF

Lyle W. Cayce
Clerk of the Court
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: *United States* v. *County of Lauderdale; Judge Veldore Young*, In her official capacity; *Judge Lisa Howell*, In her official capacity, No. 17-60805 (argued Nov. 6, 2018)

Dear Mr. Cayce:

The United States respectfully submits this letter brief to respond to appellees' letter brief, filed with this Court on November 12, 2018, and to follow up on questions that members of the panel asked at oral argument.

A. Appellees Conflate The Question Of Whose Conduct May Comprise A Pattern Or Practice Under 34 U.S.C. 12601 With Who May Be Sued For That Pattern Or Practice

At oral argument and in their post-argument letter brief, appellees argued that this Court need not address whether Youth Court employees other than the named judges might fall within the scope of the statute because the United States "has not sued any person who is a Youth Court employee." Appellees' Letter Br. 1; Oral Argument at 27:52 ("They haven't sued those people."). That argument conflates the question of *whose conduct the statute covers* with the question of *who may be sued (i.e., liable) for that conduct*.

Section 12601 makes "any governmental authority," "any agent thereof," or "any person acting on behalf of a governmental authority" liable for a pattern or practice of constitutional violations committed by "officials or employees of any governmental agency with responsibility for the administration of juvenile justice." 34 U.S.C. 12601(a). The first clause defines who may be sued, whereas the latter clause defines which actors' conduct can comprise a pattern or practice that the "governmental authority" and its officials may be liable for.

On its face, then, Section 12601 makes governmental entities (*e.g.*, municipalities) and their relevant officials who oversee juvenile-justice agencies liable for unconstitutional patterns or practices committed by their subordinate officials or employees. The statute does not require the United States to name separately as defendants those individual actors alleged to be committing the acts that make up the pattern or practice. Indeed, Section 12601 is a statute designed to achieve systemic relief. Accordingly, the United States does not typically sue the

individual actors committing the pattern or practice of alleged violations; we sue the "governmental authority" and the government officials who oversee the relevant agency and who, in their official capacities, have the power to reform the unconstitutional practices alleged.

B. The Judges Are Being Sued In Their Official Capacities As The Officials Responsible For Administering The Lauderdale County Youth Court, Not In Their Adjudicative Roles

Here, the United States' complaint alleged a pattern or practice of constitutional violations committed by several officials and employees of the Lauderdale County Youth Court, including the Youth Court judges themselves (see generally ROA.48-49, 53-54), their designees serving as intake officers (see ROA.45-47), and the Youth Court public defenders (see ROA.49-50). Consistent with the statute's text, the complaint was filed against Lauderdale County, Mississippi, and its Youth Court judges in their capacities as the officials "responsible for overseeing administration of the Youth Court." ROA.36. The judges were named as defendants because they are representatives of the governmental authority (Lauderdale County) who exercise control over the relevant governmental agency (the Youth Court) and its employees. Although here the Youth Court judges were also alleged to be committing some of the violations that comprise the pattern or practice, they were named as defendants not because of their conduct but because they are in charge of the Youth Court and thus the officials in a position to reform its practices and policies. See *Touart* v. *Johnston*, 656 So. 2d 318, 325 (Miss. 1995).[1]

While the United States could have brought this action solely against Lauderdale County as the "governmental authority," 34 U.S.C. 12601(a), it chose to also name as defendants the officials who oversee the Youth Court (*i.e.*, the judges) because of questions whether the County itself has power to order Youth Court officials or employees to take any particular action. See *Touart*, 656 So. 2d at 325; ROA.471 (County averring that it is "unable under Mississippi law to exercise control and/or operation of the Youth Court"); ROA.541-542, 651 (same).[2] Suing the judges in their official capacity as administrators of the Youth Court is equivalent to suing the Youth Court itself. See *Castro Romero* v. *Becken*, 256 F.3d 349, 355 (5th Cir. 2001). Where a

[1] Confusion on this point might arise from the fact that Lauderdale County has only two juvenile judges, who serve as both judicial actors and administrators of the Youth Court. In a larger jurisdiction with many juvenile judges, we would likely name the Chief Judge of the juvenile court in his or her official capacity as the official responsible for administering the court rather than all of the individual judges whose policies and practices comprise the alleged unconstitutional pattern or practice. Or, if we believe effective relief may be achieved by only suing the County or municipality, we may not name the Chief Judge as a defendant at all.

[2] In some instances, suing the municipality alone is sufficient. See, *e.g.*, *United States* v. *City of New Orleans*, 731 F.3d 434 (5th Cir. 2013). In other instances, the municipal entity may not be able to assert the requisite control over agency actors to ensure effective relief. In such cases, the United States will also name as a defendant the relevant agency itself or, if state law deems the agency a non-jural entity, the government official who oversees the agency. Cf., *e.g.*, *Melendres* v. *Maricopa Cty.*, 815 F.3d 645, 647-648 & 650 n.1 (9th Cir. 2016) (allowing suit to proceed against County and sheriff in his official capacity after Sheriff's Office was found to be a non-jural entity, and recognizing that, in light of the County's claim "that it cannot exercise control over" its sheriff, the ability to achieve full relief required keeping sheriff as a party).

State has determined that its courts are not separate legal entities capable of being sued, however, we must name the officials responsible for administering the juvenile court rather than the court itself. See, *e.g.*, *Bryant* v. *Municipal Court of Gulfport, Miss.*, No. 1:12cv0002, 2012 WL 4434675, at *5 (S.D. Miss. Sept. 24, 2012) (holding that a Mississippi city's municipal court was "merely a department of" the city and not "an independent entity that may sue and be sued"); see also Fed. R. Civ. P. 17(b)(3) (the capacity to sue or be sued is determined by state law).[3]

To that end, the United States wishes to clarify its response to the Court's question at oral argument regarding whether a distinction can be drawn between court officials or employees acting in an "adjudicative" versus an "administrative" capacity. At oral argument, undersigned counsel understood the Court to be asking about the statute's *coverage*—that is, whether court officials or employees might fall within the statute's scope when performing certain functions but not others. That is why counsel answered that there would be no textual basis for doing so: the Youth Court is either a "governmental agency with responsibility for the administration of juvenile justice," 34 U.S.C. 12601(a), or it is not. If it is, then all of its "officials or employees" are covered; if it is not, then none of them are. To the extent the Court was asking not about *whose conduct the statute covers* but rather about *who can be sued under it*, however, then the United States agrees that state juvenile-court judges can be sued only in their official capacities as administrators of a juvenile court, not in their roles as adjudicators of individual cases.

We reiterate, moreover, that while many of the unconstitutional practices we alleged here occur during the judicial process, they are not "adjudicative" in the sense that they concern the substance of judges' decisionmaking in individual cases. We did not allege, in other words, that the Youth Court judges are getting any probable cause decisions, juvenile adjudications, or probation revocation decisions *wrong*. Rather, we alleged that the Lauderdale County Youth Court, on a *systemic* level, fails to accord juveniles the constitutional *procedural* protections to which they are entitled, such as providing timely probable cause hearings, appointing counsel for critical stages, and holding probation revocation hearings. ROA.48-53.[4]

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[3] In private damages cases under 42 U.S.C. 1983, a suit against a government official in his official capacity is generally considered equivalent to a suit against the governmental entity itself; accordingly, where both parties are named, courts will often dismiss the suit against the government official as duplicative. See *Castro Romero*, 256 F.3d at 355. In cases seeking equitable relief, however, courts have recognized that keeping the government official in the case may be necessary to achieve full and effective relief where the municipality asserts that it lacks the ability to control the official or his subordinates. See, *e.g.*, *Melendres*, 815 F.3d at 650 n.1. Even where a court deems a named defendant duplicative or determines that the plaintiff named the wrong party, however, "[m]isjoinder of parties is not a ground for dismissing an action," as the court may "at any time, on just terms, drop or add a party" as appropriate. Fed. R. Civ. P. 21.

[4] All of the procedural protections we seek to vindicate in this case are well-established constitutional rights that apply in juvenile proceedings as well as criminal proceedings. See generally *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles are entitled to basic due process protections that apply in adult criminal proceedings); *Moss* v. *Weaver*, 525 F.2d 1258 (5th Cir. 1976) (holding that *Gerstein* applies to juvenile proceedings); *S.L. ex rel. K.L.* v. *Pierce Twp. Bd. of Trs.*, 771 F.3d 956 (6th Cir. 2014) (recognizing that *Riverside*'s 48-hour rule applies to juvenile proceedings). Appellees' latest attempt (Letter Br. 2-3) to challenge the applicability of

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To the extent any particular Section 12601 action might raise concerns about potential intrusiveness into judges' substantive decisionmaking, such concerns are more appropriately addressed by the district court in crafting carefully tailored relief at the remedial stage. Here, the United States' complaint seeks equitable relief that will mandate that the Youth Court adopt the required constitutional procedures. See ROA.64-65. The complaint does not challenge any substantive decision. Concerns about potential intrusiveness into judges' substantive decisionmaking are not grounds for construing the statute to exclude entirely officials and employees of state juvenile courts, the principal governmental entities responsible for the "administration of juvenile justice." 34 U.S.C. 12601(a).

In an appropriate case, a district court may also address intrusiveness concerns by abstaining from exercising jurisdiction. Below, appellees moved to dismiss under two different abstention theories—*Younger* and *Rooker-Feldman*. See U.S. Br. 6-7 & nn.3-4. The district court denied both motions, and appellees did not reassert either theory on appeal as an alternative basis for affirming the district court's dismissal of this action. Appellees have thus waived any abstention argument on appeal. See *Gates* v. *Strain*, 885 F.3d 874, 880 n.2 (5th Cir. 2018). The United States relied on that waiver in drafting its reply brief. If this Court wishes to ignore appellees' waiver and consider abstention, it should provide the United States an opportunity to brief that issue before doing so.

C. Applying Title VII's Co-Employment Doctrine In Section 12601 Litigation Could Result In Unnecessary Complexity And Nationwide Inconsistency

Appellees are apparently no longer pressing the Title VII co-employment doctrine they raised for the first time at oral argument. See Appellees' Letter Br. 1-2. To the extent this Court nonetheless wishes to consider it, however, we note that application of the doctrine in Section 12601 cases could result in undue complexity and nationwide inconsistency.

As an example of the co-employment doctrine, appellees cite *Graves* v. *Lowery*, 117 F.3d 723 (3d Cir. 1997), a case involving employment discrimination claims under Title VII of the Civil Rights Act of 1964.[5] But, as *Graves* demonstrates, determining whether a County is a co-

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Riverside to juvenile cases is both unavailing—*Moss* predates *Riverside* by 15 years and did not opine on the issue *Riverside* decided—and not relevant to this appeal. Defendants did not move to dismiss below on the ground that any of the United States' allegations failed to establish constitutional violations. See U.S. Br. 26 n.5.

[5] In *Graves*, the Third Circuit held that a Pennsylvania County could be considered a co-employer of county court employees and thus potentially liable in a Title VII action brought by those employees alleging sex discrimination by a county judge. Although state law defined judicial personnel as court employees, the Court held that a jury could conclude that the courts had delegated control over their daily employment activities to the County, and thus that the County had "assumed *de facto* responsibility over their employment." 117 F.3d at 727. Among other facts, the Court noted that the employees in question "were covered by the County's personnel policies," were "subject to termination and/or reinstatement by the County," and had their Title VII complaints investigated by the County. *Id.* at 729.

employer of a court employee is a complicated, fact-specific question that turns not only on how state law defines the employee's position but also on *de facto* realities such as whether the court has delegated employment authority over court personnel to the County. See 117 F.3d at 729 ("[T]he precise contours of an employment relationship can only be established by a careful factual inquiry."). Accordingly, applying that doctrine to Section 12601 would mean that certain court personnel might come within the statute's scope in one State (because the County is found to be a co-employer), while court personnel performing the identical functions in a different State might not be covered (because the County is found to not be a co-employer). It is unlikely that Congress wanted the United States' enforcement authority under Section 12601 to vary from State to State depending on the random vagaries of how the State happens to structure the employment relationship between court personnel and the county in which the court sits.

If this Court determines that Lauderdale County is a "governmental agency" within the meaning of the statute but that the Youth Court is not, then the Court should remand for a determination whether the court personnel implicated in the United States' complaint are also "officials or employees" of Lauderdale County under co-employment principles. Indeed, one member of the panel suggested at oral argument that such a remand would be appropriate in those circumstances. The United States' pattern-or-practice complaint alleges unconstitutional practices committed not only by the Youth Court judges (see generally ROA.48-49, 53-54), but also by their designees serving as intake officers (see ROA.45-47) and by the Youth Court public defenders (see ROA.49-50). As *Graves* demonstrates, determining whether each of these court officials and employees may also be considered officials or employees of Lauderdale County would require not only an examination of how Mississippi law defines these court actors vis-à-vis the County but also factual development on how much control over court personnel matters the County exercises. See *Graves*, 117 F.3d at 727-730.

Sincerely,

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