No. 17-60805

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

COUNTY OF LAUDERDALE; JUDGE LISA HOWELL, In her official capacity; JUDGE VELDORE YOUNG, In her official capacity,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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INTRODUCTION

Section 12601 of Title 34 authorizes the Attorney General to bring a civil action for "appropriate equitable and declaratory relief" to "eliminate" systemic constitutional violations in "the administration of juvenile justice or the incarceration of juveniles." 34 U.S.C. 12601. Lauderdale County and its Youth Court judges ask this Court to construe that statute to exclude the governmental

entities principally responsible for administering juvenile justice in our country: state juvenile courts.[1]

The judges offer no sound basis for doing so. They rely largely on a single statutory term—agency—reading it in isolation while ignoring the surrounding language and the statute's purpose. And they do so entirely based on a Supreme Court case that was decided *after* Congress enacted Section 12601, and which overruled longstanding Supreme Court precedent that had interpreted the phrase "department or agency" broadly to include all three branches of government, including courts. That legal backdrop in place when Congress enacted Section 12601 is a far better indicator of what Congress intended the word "agency" to mean than a Supreme Court case overturning that precedent a year later.

The judges' remaining arguments for excluding juvenile courts from Section 12601's purview fare no better. The judges emphasize that the juvenile-justice provision encompasses entities other than courts but offer no reason to believe Congress intended to *limit* its reach to those other players while excluding the principal institution administering juvenile justice. The judges also urge this Court to construe the juvenile-justice provision to encompass only "law enforcement agencies," a reading that not only would conflict with the statutory text but would

[1] Because Lauderdale County has adopted the judges' arguments on appeal wholesale, this brief refers to appellees as "the judges" for simplicity.

contradict the judges' own recognition that the statute applies to "non-law enforcement 'agencies'" such as the Mississippi Division of Youth Services. Judges' Br. 15-16.

The judges do not defend the district court's alternative ruling that they are absolutely immune from this suit for equitable and declaratory relief, nor can they, as *Pulliam* v. *Allen*, 466 U.S. 522 (1984), forecloses that argument. Instead, the judges isolate two allegations in the United States' complaint and contend that, as to those allegations, they are "immune" from suit.

As explained below, these newfound "immunity" arguments have no merit. But even if the judges were correct that they cannot be held liable for the two allegations they highlight, that would not warrant dismissal of the entire lawsuit. The United States' complaint alleged a pattern or practice of constitutional violations in Lauderdale County Youth Courts for which the judges are directly responsible, including routinely ordering children detained without a finding of probable cause, failing to appoint juveniles an attorney for adjudication or disposition hearings, and reincarcerating them for violating probation without a hearing on the alleged violation. The judges offer no argument for immunizing them from the United States' entire pattern-or-practice suit, which is the only question at this stage of the proceedings.

ARGUMENT

I

SECTION 12601 OF TITLE 34 APPLIES TO OFFICIALS AND EMPLOYEES OF STATE JUVENILE COURTS

Section 12601 applies to officials or employees of "any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles." 34 U.S.C. 12601(a). The United States argued in its opening brief that this language is best read to encompass state juvenile court systems, the governmental bodies that actually administer juvenile justice and determine whether juveniles will be incarcerated. U.S. Br. 12-22.

Contrary to the judges' characterization, the United States does not ask this Court to "depart from plain meaning." Judges' Br. 18. Rather, the United States' position is that the statute's plain meaning cannot be discerned from a single word construed in a vacuum but must account for all of the statutory language, viewed in light of the statute's purpose. See, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1081 (2015) (plurality op.); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 345 (1997); *United States* v. *Kaluza*, 780 F.3d 647, 658 (5th Cir. 2015). Thus, while the term "agency" in the abstract does not typically refer to courts, the statutory language as a whole indicates that Congress intended to eliminate systemic constitutional violations throughout the juvenile justice system. Given the outsize role that juvenile courts play in administering juvenile justice and ordering juveniles

incarcerated, it would frustrate the statute's purpose to exclude from its reach the most powerful and central institution in the juvenile justice system.

1. The judges do not address the full statutory language. Nor do they explain how a statute designed to eradicate systemic constitutional infirmities in the administration of juvenile justice could, consistent with congressional intent, be read to exclude the principal governmental entities responsible for administering juvenile justice. Instead, the judges focus on the word "agency" in isolation, arguing that the Supreme Court's decision in *Hubbard* v. *United States*, 514 U.S. 695, 700 (1995), precludes a conclusion that the term "agency" in Section 12601 includes juvenile courts. Judges' Br. 15-19. The judges' reliance on *Hubbard* is misplaced, for several reasons.

First, contrary to the judges' repeated assertion (at 2-3, 15, 17, 26), *Hubbard* did not hold that it is "incontrovertible" that the term "agency" can never encompass courts. Rather, *Hubbard* stated that "*[u]nder [18 U.S.C.] § 6*, it seems incontrovertible that 'agency' does not refer to a court." 514 U.S. at 700 (emphasis added). Section 6 of Title 18 is a criminal statute defining the term "agency" as used throughout the federal criminal code, including in 18 U.S.C. 1001, the federal false-statements statute at issue in *Hubbard*. The *Hubbard* Court did not address the meaning of "agency" in 34 U.S.C. 12601, a remedial civil-rights statute enacted to "eliminate" systemic constitutional violations in the juvenile justice

system. 34 U.S.C. 12601. And while *Hubbard* recognized that "[i]n ordinary parlance," courts are not typically described as agencies, 514 U.S. at 699, it did not say that Congress could never use the term "agency" to mean a court. Indeed, Congress has used the word "agency" to mean courts and even the entire judicial branch in various statutes. See, *e.g.*, 5 U.S.C. 7905(a)(2)(C); 42 U.S.C. 2014(a); U.S. Br. 20 n.9 (citing statutes).

Second, *Hubbard* was decided the year *after* Congress enacted Section 12601, and overturned longstanding precedent that had interpreted the phrase "department or agency" to include courts. *Hubbard* is thus less relevant to determining what Congress intended when it enacted Section 12601 in 1994 than is the legal landscape *before Hubbard*. See *McQuiggin* v. *Perkins*, 569 U.S. 383, 398 n.3 (2013) ("Congress legislates against the backdrop of existing law."). Examination of that history suggests that, when Congress enacted Section 12601 in 1994, it would likely have expected courts to accord the term "agency" a broader meaning in the context of a remedial civil-rights statute designed to eliminate patterns of constitutional violations in the administration of juvenile justice.

Hubbard concerned 18 U.S.C. 1001, which at that time criminalized false statements occurring "in any matter within the jurisdiction of any department or agency of the United States." 514 U.S. at 699. In 1955, the Supreme Court held that that language encompassed false statements made to any branch of the

government—executive, legislative, or judicial—concluding that it "would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments." *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955). Although Congress did not "amend[]" or even "consider[] amending [Section] 1001 in the 40 years since *Bramblett* was decided," *Hubbard*, 514 U.S. at 721 (Rehnquist, J., dissenting), in 1995, the Supreme Court in *Hubbard* determined that Congress intended the phrase "department or agency" in Section 1001 to apply only to the executive branch, overruling *Bramblett*, *id.* at 699-708, 715.

Congress acted swiftly, overturning *Hubbard* the next congressional session via the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459. Enacted for the express purpose of "restoring" the pre-*Hubbard* scope of Section 1001, the 1996 Act amended 18 U.S.C. 1001 to make clear that it applies to false statements made "in any matter within the jurisdiction of the executive, legislative, or judicial branch" of the federal government, unless the matter falls within an enumerated exception. *Ibid.*; see also 142 Cong. Rec. S8939 (daily ed. July 25, 1996) (statement of Sen. Specter) (stating that the bill was "intended to restore section 1001 to its pre-Hubbard status").

Thus, when Congress enacted Section 12601 in 1994, the Supreme Court had interpreted the phrase "department or agency" to encompass all three branches of government where a more limited interpretation "would do violence" to

congressional purpose. *Bramblett*, 348 U.S. at 509. As Chief Justice Rehnquist observed in his *Hubbard* dissent, Congress's failure to amend Section 1001 in the four decades after *Bramblett* implies that it agreed with *Bramblett*'s expansive interpretation of "department or agency" in that context. 514 U.S. at 721-722 (Rehnquist, J., dissenting); see also *Monessen Sw. Ry. Co.* v. *Morgan*, 486 U.S. 330, 338 (1988). Indeed, Congress confirmed that it approved of *Bramblett*'s reading of "department or agency" in Section 1001 when it expeditiously overturned *Hubbard*. This history suggests that the Congress that enacted Section 12601 would have understood that the term "agency" can take on a broader meaning where that interpretation is necessary to accomplish congressional purpose, particularly in a remedial civil-rights statute designed to eliminate systemic constitutional violations in the administration of juvenile justice.

2. The judges urge that interpreting Section 12601 to exclude juvenile courts would not render the juvenile-justice language "superfluous" because it would still apply to other agencies within the juvenile justice system. Judges' Br. 23-24. The United States, however, has never contended that excluding juvenile courts would render Section 12601's juvenile-justice clause "superfluous." To the contrary, the United States recognizes that the statutory language encompasses other actors in the juvenile justice system, such as prosecutors, indigent defense counsel, and probation officers. See U.S. Br. 16.

The question is whether Congress intended to *limit* the statute's reach to those non-judicial actors. The United States contends that it is unlikely that Congress intended Section 12601, a statute designed to eliminate constitutional violations in the juvenile justice system, to reach solely the other actors in that system while leaving officials and employees of "the most powerful institution" in the administration of juvenile justice free to violate juveniles' rights with impunity. Preston Elrod & R. Scott Ryder, *Juvenile Justice: A Social, Historical, and Legal Perspective* 246 (4th ed. 2014).

The judges argue that the settlement agreements with the "other defendants in this case" demonstrate that interpreting Section 12601 to exclude juvenile courts would not frustrate the statute's purpose. Judges' Br. 23. In fact, this case exemplifies precisely why such a narrow construction makes little sense. The United States' complaint, brought after a comprehensive investigation, alleged systemic constitutional violations at every stage of juvenile justice in Lauderdale County, from initial arrest, through every proceeding in Youth Court, to probation and probation revocation. See ROA.30-65; U.S. Br. 4-6 (summarizing investigation findings and complaint).

The settlements with the City of Meridian and Mississippi Department of Youth Services (DYS), while significant, touched only the outer edges of the problems the United States' investigation uncovered. The settlement with the City

addressed problems with the way the Meridian Police Department conducted school arrests and interviewed detained youths. See ROA.615-619. And the settlement with the State addressed the policies and practices of the DYS, which provides probation services to juveniles in Lauderdale County. See ROA.632-637.

These settlements leave untouched and unremedied a wide swath of alleged constitutional deficiencies in Lauderdale County's juvenile justice system: namely, the entire judicial process between arrest and disposition, including probation. They do not address the problems with pretrial detention, including the Youth Court judges' alleged failure to make probable cause determinations before ordering youth detained; the judges' alleged failure to appoint juveniles counsel for critical hearings; or the judges' alleged failure to permit juveniles to present witnesses on their behalf in adjudication hearings. See ROA.48-50. And while the settlement with the State required DYS to revise its standard probation contracts used in Lauderdale County (see ROA.636), DYS counselors only recommend the terms of probation. It is the Youth Court judges who actually determine what the terms of probation will be, whether a child's probation should be revoked, and the penalty for violating probation. See ROA.50, 1357-1358; Miss. Code Ann. §§ 43-21-605(c) (2015) and 43-21-613(1) (2015). The settlement agreements with the City and State do not and cannot remedy any systemic constitutional violations in the Youth Court's process for issuing and revoking probation. See ROA.53-56

(alleging, among other things, that the Youth Court does not regularly afford juveniles a hearing before revoking their probation).

In short, far from proving the judges' point, the settlements in this case illustrate the gaping hole that construing Section 12601 to exclude juvenile courts would leave in the United States' ability to "eliminate" patterns of constitutional violations in the administration of juvenile justice. 34 U.S.C. 12601(b).

3. Mirroring the district court's reasoning, the judges urge this Court to go beyond excluding juvenile courts and construe Section 12601's juvenile-justice provision even more narrowly, to include only law-enforcement agencies that operate within the juvenile justice system. See Judges' Br. 20-22.

The judges offer no reasoned justification for such a narrow interpretation. Indeed, the judges' crabbed reading would squarely contradict the statute's broad language: Section 12601 covers "*any* governmental agency" responsible for the administration of justice or the incarceration of juveniles, not just those "similar to law enforcement agencies." Judges' Br. 21; see *Tula-Rubio* v. *Lynch*, 787 F.3d 288, 293 (5th Cir. 2015) (the word "any" indicates a "broad meaning"). The judges' narrow construction would also exclude entities that the judges expressly concede Section 12601 encompasses, such as the Mississippi Division of Youth Services (DYS). See Judges' Br. 23 (acknowledging that the DYS is covered by Section 12601 although "certainly not a 'law enforcement agency'").

The judges nevertheless argue that Section 12601's title, "Police Pattern or Practice," indicates a congressional intent to limit its application to law-enforcement agencies. Judges' Br. 20-21. The United States explained in its opening brief (at 21) why this argument fails. The title of a statute cannot "take the place of the detailed provisions of the text." *Trainmen* v. *Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947). The text of Section 12601 extends the statute's reach to *both* "law enforcement officers" *and* "officials or employees of any governmental agency with responsibility for the administration of juvenile justice." 34 U.S.C. 12601(a).

The judges claim that Congress added the "Police Pattern or Practice" heading after the juvenile-justice clause, suggesting that the heading was an intentional limitation on the scope of the statutory text. Judges' Br. 20-21. That is incorrect. The provision of the 1994 bill that became Section 12601 was first introduced in the Senate on November 1, 1993, as part of Senate Bill 1607. That version was titled "Police Pattern or Practice" and, like the unenacted 1991 House bill, would have applied only to law enforcement officers. S. 1607, 103d Cong. § 1111 (1993); accord Police Accountability Act of 1991, H.R. 3371, 102d Cong. § 1202(a)(1). The Senate did not add the clause extending the pattern-or-practice provision to officials and employees in the juvenile justice system until November 18, 1993. See 139 Cong. Rec. 30,357 (1993). Congress's failure to broaden the

section's title to encompass the late-added juvenile-justice provision simply "reflect[s] careless, or mistaken, drafting." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1994). It cannot be read to "undo or limit" the statute's plain text. *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1169 (2014).

Nor can Section 12601's current placement in Title 34, the title of the Code captioned "Crime Control and Law Enforcement," justify reading out the juvenile-justice provision. See Judges' Br. 21. For starters, Congress did *not* place this provision into Title 34. Upon enactment, the provision was placed into Title 42, a broader title captioned "The Public Health and Welfare" that contains the majority of the federal civil-rights statutes. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 2071. The provision formerly known as 42 U.S.C. 14141 was moved into a new title, Title 34, and recodified as 34 U.S.C. 12601 by the Office of the Law Revision Counsel in September 2017. See Office of the Law Revision Counsel, Editorial Reclassification: Title 34, United States Code, http://uscode.house.gov/editorialreclassification/t34/index.html (last visited May 17, 2018).

In any event, Section 12601 is a unique statute granting the Attorney General enforcement authority over two independent areas of concern: law enforcement and the juvenile justice system. The judges do not identify a title or chapter in the Code that would have encapsulated both prongs. The Office of Law

Revision Counsel's decision to locate the provision in a law-enforcement chapter "was not meant to render the statute more restricted than its terms," which plainly extend to both law enforcement officers and juvenile-justice entities. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 546 (2004) (Souter, J., concurring in the judgment). Had the provision instead been placed in a chapter dealing with juvenile justice, such placement would not warrant reading out the law-enforcement officers clause.

Recognizing that the juvenile-justice provision cannot be read out of the statute entirely, as the district court did, the judges argue that the phrase "any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles" should be construed narrowly to encompass only "entities similar to law enforcement agencies" under the maxim of *noscitur a sociis*. Judges' Br. 21. That interpretive canon has no application here.

Noscitur a sociis "is invoked when a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning.'" *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (quoting *Dole* v. *Steelworkers*, 494 U.S. 26, 36 (1990)). Section 12601 does not contain "a list" or "a string of statutory terms." *Ibid.* It contains two independent noun clauses separated by a disjunctive—the statute prohibits a pattern or practice of rights deprivations "by law enforcement officers *or* by officials or employees of any governmental agency" responsible for administering juvenile justice or

incarcerating juveniles. 34 U.S.C. 12601(a). The Supreme Court has found *noscitur a sociis* "out of place" in a similar context, rejecting the notion that "pairing a broad statutory term with a narrow one shrinks the broad one." *S.D. Warren*, 547 U.S. at 378-379. Indeed, it is not clear why, applying the judges' reasoning, the juvenile-justice clause would not limit the law-enforcement clause rather than vice-versa. Simply put, absent "some sort of gathering with a common feature to extrapolate," *noscitur a sociis* has no bearing. *Id.* at 379-380; see also *Graham Cty. Soil & Water Conserv. Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 289 (2010) (holding that a series of three adjectives was "too few and too disparate to qualify as 'a string of statutory terms' or 'items in a list'" triggering application of *noscitur a sociis* (citations omitted)).

The judges suggest that the Department of Justice (DOJ or the Department) itself "has placed a 'law enforcement' gloss on the statute," cherrypicking some language from the Department's website. Judges' Br. 22. That claim is both wrong and beside the point. Information a federal agency provides on its public website is not relevant to discerning the meaning of statutory terms. Nor can an agency's website negate or alter the official position of the United States set forth in the Department's briefs.[2] Regardless, the Department's website accurately

[2] Despite the judges' repeated reference to "the Division," the United States' brief represents the position of the United States as authorized by the

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reflects the United States' position that Section 12601 encompasses juvenile courts, stating explicitly that, "[u]nder [Section 12601], we can determine whether youths' civil rights are being complied with in juvenile arrests, *juvenile courts*[,] and juvenile probation systems, as well as in detention facilities." Department of Justice, Rights of Juveniles, https://www.justice.gov/crt/rights-juveniles (last visited May 17, 2018) (emphasis added); see also Judges' Br. 24 n.33 (acknowledging that the Department has enforced Section 12601 against entities that are "not law enforcement agencies").

4. The judges also make the unusual argument that this Court can discern Section 12601's meaning from DOJ's subsequent enforcement decisions. Specifically, the judges argue that, because DOJ's enforcement of Section 12601 has focused more on policing and juvenile confinement, excluding juvenile courts from the statute's reach will "not frustrate Congressional purpose." Judges' Br. 24.

How a federal agency has chosen to "marshal its limited resources and personnel" to enforce a statute, however, has no bearing on the question of what *Congress* intended by the statutory terms it chose. *Massachusetts* v. *EPA*, 549 U.S. 497, 527 (2007). A federal agency's enforcement decisions "involve[] a complicated balancing of a number of factors," including "whether agency

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United States Solicitor General, not solely that of the DOJ Civil Rights Division. See 28 U.S.C. 516; 28 C.F.R. 0.20(b).

resources are best spent on this violation," whether the particular action is "likely to succeed," whether the enforcement action "best fits the agency's overall policies," and "whether the agency has enough resources to undertake the action at all." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985).

In any event, the judges' characterization of DOJ's Section 12601 enforcement is inaccurate. While DOJ's early enforcement efforts under Section 12601 focused on police misconduct—which is not surprising given that it was enacted in the aftermath of the Rodney King beating and riots, see H.R. Rep. No. 102-242, at 135-139 (1991); 139 Cong. Rec. 27,518 (1993) (statement of Sen. Moseley Braun)—the Department has consistently enforced the juvenile-justice prong for the last 15 years. Moreover, the judges' emphasis on "lawsuits" (at 2, 24-25) misunderstands the nature of the Department's enforcement work. Although this is the only case involving juvenile courts that has reached contested litigation (see U.S. Br. 21 n.10; ROA.1236 n.3, 1494-1495), the Department has been investigating complaints of systemic constitutional violations in the operation of state juvenile courts since at least 2003, and has reached reform agreements with juvenile court systems under this authority.[3] And, indeed, the Department has an

[3] See Memorandum of Agreement Between the United States Department of Justice and the St. Louis County Family Court (Dec. 14, 2016), available at https://www.justice.gov/crt/case-document/file/918581/download; Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County (Dec.

(continued…)

open investigation into the practices of the Dallas County, Texas, truancy courts and juvenile district court.[4]

5. Finally, as the United States noted in its opening brief (at 22), although this Court need not address it, Section 12601's limited legislative history—namely, Senator Carol Moseley Braun's explanation for adding the juvenile-justice language—supports the United States' interpretation. The judges attempt to discount Senator Moseley Braun's explanation, arguing that she "was not the author of" the juvenile-justice provision and that, in any event, her explanation for it implicitly refers only to "police," "prosecutors," and "jailers," not to judges. Judges' Br. 25-26 & n.36. The judges are wrong on both counts.

First, Senator Moseley Braun stated expressly that she "sponsored [the] provision" giving the Attorney General pattern-or-practice authority in the juvenile justice arena. 139 Cong. Rec. 30,589 (1993). Indeed, she previewed her intent to introduce the juvenile-justice provision in an earlier hearing on the bill, stating: "[B]ecause of the strong evidence that minority youth receive disparate treatment

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17, 2012), available at https://www.justice.gov/iso/opa/resources/877201212181059489251 57.pdf.

[4] See Press Release, Department of Justice, *Department of Justice Announces Investigation of the Dallas County Truancy Court and Juvenile District Courts* (Mar. 31, 2015), https://www.justice.gov/opa/pr/department-justice-announces-investigation-dallas-county-truancy-court-and-juvenile-district.

in many Juvenile Justice Systems across the country, I will introduce a measure to allow the Attorney General to intervene where a pattern and practice of such conduct can be demonstrated." 139 Cong. Rec. 27,519 (1993). That the juvenile-justice language was ultimately added to the larger bill via a "manager's amendment" by then-Senator Biden (see Judges' Br. 25 n.36) does not mean that Senator Moseley Braun did not author it. A manager's amendment is a common procedural mechanism for introducing many small amendments at once to "expedite the legislative process on the Senate floor." Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History By The Rules*, 122 Yale L.J. 70, 146 n.333 (2012) (citation omitted). Senator Biden, as Judiciary Chair and manager of the 1994 bill, see 139 Cong. Rec. 27,517 (1993) (statement of Sen. Mosely Braun) (referring to Senate Bill 1607 as "the Biden crime bill"), was simply the messenger for Senator Moseley Braun's amendment.

Second, the judges' suggestion (at 26) that Senator Moseley Braun's remarks evince concern only for constitutional violations committed by "police," "prosecutors," and "jailers," and not those committed by juvenile-court judges, does not hold water. The Senator explained that she "sponsored" the juvenile-justice provision to "ensure" that "juvenile justice systems across the country" be administered in a nondiscriminatory manner. 139 Cong. Rec. 30,589 (1993); see also 139 Cong. Rec. 27,519 (1993). In doing so, she cited stark racial disparities in

juvenile incarceration rates, noting that black youth were "much more likely than whites" to be "institutionalized in the juvenile justice system" despite accounting for only 25% of juvenile arrests. 139 Cong. Rec. 30,589 (1993). It is juvenile-court judges, of course, who determine which juveniles will be "institutionalized in the juvenile justice system." *Ibid.* This passage thus suggests that the sponsor of Section 12601's juvenile-justice language envisioned that it would encompass juvenile-court judges.

II

THE JUDGES OFFER NO ARGUMENT FOR DISMISSING THIS PATTERN-OR-PRACTICE ACTION ON IMMUNITY GROUNDS

The district court also erred in concluding that the Youth Court judges are absolutely immune from this lawsuit. As explained in the United States' opening brief, *Pulliam* v. *Allen*, 466 U.S. 522 (1984), held that absolute judicial immunity applies only to actions seeking damages, not to actions seeking declaratory or injunctive relief, which is all the United States sought here—and, indeed, all that 34 U.S.C 12601 authorizes the United States to pursue. U.S. Br. 23-24.

The judges do not dispute that, under *Pulliam*, they are not absolutely immune from this action. And though they make passing reference to "federalism," the judges expressly disavow—and therefore have waived—any argument that the district court should have dismissed this case on abstention grounds. Judges' Br. 27-28; see *Procter & Gamble Co.* v. *Amway Corp.*, 376 F.3d

496, 499 n.1 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument."); Fed. R. App. P. 28(a)(8) and 28(b).

1. Instead, the judges isolate two of the myriad allegations in the United States' complaint—that Youth Court public defenders regularly provide inadequate representation, and that juveniles arrested in Lauderdale County can be detained up to five days before receiving a probable cause hearing before a Youth Court judge—and argue that, as to *those* allegations, this Court's case law provides the judges "immunity." See Judges' Br. 26-31 (citing *Chrissy F.* v. *Mississippi Dep't of Pub. Welfare*, 995 F.2d 595, 599-600 (5th Cir. 1993), and *Bauer* v. *Texas*, 341 F.3d 352, 359 (5th Cir. 2003)).

As explained below, the judges' assertions of "immunity" as to these isolated allegations are meritless. But even if the judges' arguments had merit, they would not warrant dismissing the entire action. The United States' complaint alleged a pattern or practice of constitutional violations at every stage of Youth Court proceedings, from initial intake, through adjudication and disposition, to probation revocation. ROA.61-64 (Claims 2-4). Beyond the two allegations that the judges highlight here, the complaint alleged, among other things, that: the Youth Court judges routinely order juveniles detained pre-trial without making a probable cause determination, and sometimes do so without the child present (ROA.48-49); the judges do not consistently appoint accused juveniles a public

defender for adjudication and disposition hearings (ROA.48-50); when the judges do appoint an attorney, they frequently do so just before the hearing, preventing any opportunity for meaningful attorney-client consultation before adjudication or disposition (ROA.48-50); the judges do not afford juveniles a meaningful opportunity to call witnesses on their behalf in adjudication hearings (ROA.50); the judges enforce probation contracts that fail to give juveniles adequate notice of probation conditions (ROA.51-54); juveniles suspended for probation violations are often detained for days before receiving a hearing before a Youth Court judge (ROA.51-54); and the judges routinely revoke juveniles' probation without determining that they actually violated their probation conditions (ROA.51-54). The judges' "immunity" arguments on appeal are targeted at two isolated allegations and do not purport to affect the bulk of the allegations comprising the United States' pattern-or-practice claims.

2. Regardless, the judges' limited "immunity" arguments are meritless. The judges first contend that, under this Court's decision in *Chrissy F.*, they are immune from suit "for the actions or inactions of the public defenders" whom they appoint. Judges' Br. 28. *Chrissy F.*, however, is not a judicial immunity case. In *Chrissy F.*, a guardian ad litem, on behalf of a six-year-old girl, brought suit under 42 U.S.C. 1983 seeking to set aside a Mississippi Youth Court judge's rulings granting custody to the child's father. 995 F.2d at 597. This Court held that the

suit was an impermissible attempt to seek federal review of a state-court final judgment and therefore should have been dismissed under *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983). *Chrissy F.*, 995 F.2d at 598-599. In so holding, this Court rejected the plaintiff's claim that state-court appellate review was unavailable, observing that the child's guardians ad litem could have appealed the custody ruling in state court, and that it was their role as the child's advocates, not the judge's role as arbiter, to object to any alleged violations of the child's procedural rights. *Id.* at 599-600. *Chrissy F.* has no bearing here, as the United States' complaint did not ask the federal court to review any state-court final judgments (see U.S. Br. 26-28), and the judges do not challenge the district court's denial of their motion to dismiss on *Rooker-Feldman* grounds (see Judges' Br. 28).

In any event, the United States does not seek to hold the judges accountable for the Youth Court public defenders' "actions or inactions." Judges' Br. 28. The United States' complaint alleged that Youth Court judges regularly fail even to appoint accused juveniles an attorney for critical hearings (ROA.49)—a constitutional infirmity for which the judges are directly responsible (see Miss. Code Ann. § 43-21-201 (2015)). To the extent the complaint alleged that Youth Court public defenders systematically fail to provide constitutionally adequate representation (see, *e.g.*, ROA.49-50), such allegations were directed at Lauderdale

County, which contracts with and pays the public defenders and thus bears the obligation of "ensur[ing] that the youth court defenders have the adequate resources that they need to provide" constitutionally effective representation. ROA.144; see ROA.1367, 1374-1375, 1389-1392, 1443-1452; Miss. Code Ann. § 19-9-96 (2015); see generally *Wilbur* v. *City of Mount Vernon*, 989 F. Supp. 2d 1122, 1130-1133 (W.D. Wash. 2013).

3. The judges also argue that they are "immune" from suit for the allegation that arrested juveniles are routinely detained longer than 48 hours before receiving a probable cause hearing, in violation of their Fourth Amendment rights under *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991). Judges' Br. 26, 29-31. Specifically, the judges contend that, because Mississippi law excludes weekends and holidays from the 48-hour period, Miss. Code Ann. § 43-21-307 (2015), the United States is effectively challenging the facial constitutionality of the state statute, making the judges improper defendants under *Bauer*, 341 F.3d at 359-361 (holding that a state probate judge was not a proper defendant to a Section 1983 suit challenging the facial constitutionality of a state statute governing the appointment of temporary guardians).

This argument likewise fails. The United States' allegation regarding the Lauderdale County Youth Court's delay in holding probable cause hearings falls squarely within the Supreme Court's rulings in *Riverside* and *Gerstein* v. *Pugh*,

420 U.S. 103 (1975). In *Gerstein*, a class-action suit brought against state-court judges, among other officials, the Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to pretrial detention. *Id.* at 125-126. And in *Riverside*, a class-action suit brought against a county, the Court clarified that "prompt" under *Gerstein* means "as soon as is reasonably feasible, but in no event later than 48 hours after arrest." 500 U.S. at 57. Of particular relevance here, the *Riverside* Court further held that Riverside County's practice of excluding holidays and weekends from the 48-hour period—which, like here, state law expressly permitted, see *id.* at 47 (citing Cal. Penal Code Ann. § 825 (West 1985))—did "not comport fully" with the constitutional principles the Court had outlined. *Id.* at 58; see also *id.* at 57.

The United States' allegation here is identical to the claim in *Riverside*: the claim is that, given the Youth Court's limited hearing days, juveniles arrested in Lauderdale County are routinely held longer than 48 hours before receiving a probable cause hearing without a "bona fide emergency or other extraordinary circumstance." *Riverside*, 500 U.S. at 57. And as in *Riverside*, the United States' allegation runs primarily against the County—as all parties recognized, it is Lauderdale County who funds Youth Court operations and thus it would be the County's obligation to provide personnel and resources for additional hearing days. See ROA.1366-1367, 1444. To the extent this allegation also implicates the

judges, it is wholly consistent with *Gerstein*, which was itself a lawsuit against judges challenging pretrial procedures that were consistent with state law. See *Gerstein*, 420 U.S. at 105-110.[5]

Bauer does not dictate otherwise. *Bauer* involved a Section 1983 suit against a state probate judge seeking a declaratory judgment that a state statute governing the appointment of temporary guardians for incapacitated persons was unconstitutional. 341 F.3d at 355. This Court concluded that the probate judge was not a proper party because he was not plaintiff's adversary with respect to the statute, his role being merely to adjudicate claims under it. *Id.* at 359-361.

Bauer is inapposite, as the United States did not challenge the facial constitutionality of any state law here. Rather, the United States challenged the

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[5] In a footnote to their Statement of the Case, the judges suggest that *Riverside*'s 48-hour requirement does not apply to juvenile proceedings. Judges' Br. 15 n.26 (citing *Alfredo A.* v. *Superior Court*, 865 P.2d 56 (Cal. 1994)). The United States disagrees, see, *e.g.*, *S.L. ex rel. K.L.* v. *Pierce Twp. Bd. of Trs.*, 771 F.3d 956, 962 (6th Cir. 2014) (recognizing that *Riverside*'s 48-hour requirement applies to juvenile arrestees), and *In re K.W.*, 137 So.3d 798, 801 (La. Ct. App. 2014) (same), but in any event, that substantive issue is not before this Court. The district court dismissed the entire action on judicial immunity grounds. It was not asked to, and did not, address the parameters of *Gerstein*'s prompt judicial hearing requirement in juvenile proceedings, an issue relevant to only one of the complaint's numerous allegations. See *Martco Ltd. P'ship* v. *Wellons, Inc.*, 588 F.3d 864, 877 (5th Cir. 2009) ("[A]rguments not raised before the district court are waived and cannot be raised for the first time on appeal."). And even had the issue been raised below, alluding to an issue in a footnote in the facts section of an appellee brief is insufficient to preserve it for appeal. See *Procter & Gamble*, 376 F.3d at 499 n.1.

County's *practice* of only holding Youth Court hearings on Tuesdays and Thursdays, which, the complaint alleged, results in children regularly being detained longer than 48 hours before receiving a probable cause hearing, in violation of *Riverside*. See ROA.48. That Mississippi Code § 43-21-307 permits such a practice does not transform the United States' claim into a facial attack on that statute, nor would a ruling that the County systematically violates *Riverside* require striking down the state law. See *Riverside*, 500 U.S. at 47, 57-58 (holding that County's practice of excluding weekends and holidays from the 48-hour period violated the Fourth Amendment, without striking down the California statute permitting such a practice); ROA.1239-1243, 1387-1388.

CONCLUSION

For the foregoing reasons and those presented in the United States' opening brief, this Court should reverse the district court's order dismissing the United States' claims against Lauderdale County and its Youth Court judges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 17, 2018, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES AS APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Christine A. Monta
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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF FOR THE UNITED STATES AS APPELLANT:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6047 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2010, in 14-point Times New Roman font.

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Date: May 17, 2018