IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

VICTOR LEAL, PATRICK VON DOHLEN, KIM ARMSTRONG, *Plaintiffs*,	§	
v.	§	NO. 2:20-cv-00185-Z
ALEX M. AZAR II, et.al., *Defendants*.	§	

BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

VICTOR LEAL, PATRICK VON DOHLEN, KIM ARMSTRONG, *Plaintiff*,	§	
v.	§	NO. 2:20-cv-00124-Z
ALEX M. AZAR II, et.al., *Defendants*.	§	

BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS

Defendants, the Texas Department of Insurance ("TDI") and Kent Sullivan ("Commissioner Sullivan"), in his official capacity as Texas Commissioner of Insurance, (collectively "State Defendants"), file this Brief in Support of their Motion to Dismiss. This lawsuit is substantively identical to Plaintiffs' lawsuit pending before this court (Cause No. 2:20-CV-124-Z) except this lawsuit was originally filed here while Cause No. 2:20-CV-124-Z was filed in state court and substantively removed to this court. State Defendants now move for dismissal in this case for the same reasons it previously moved for dismissal in that case.[1]

[1] State Defendants motion to dismiss in Cause No. 2:20-CV-124-Z is currently pending before the Court.

I. INTRODUCTION

In Texas, a health insurance provider offering a health benefit plan that covers prescription drugs must also provide in its health benefit plan coverage for prescription contraception drugs at no additional cost to an insured. TEX. INS. CODE §§ 1369.104–.105. If the plan provides for a co-payment, deductible, or co-insurance by the insured for prescription drugs, the plan must provide for a co-payment, deductible, or co-insurance for prescription contraception drugs at the same or lower cost to the insured. *Id.* § 1369.105. There is an exception to this requirement if the health insurance plan is issued by a religious organization. *Id.* § 1369.108. But overall, Texas prohibits insurance providers from excluding prescription contraception drugs unless the health benefit plan excludes coverage for all prescription drugs. *See id.* §§ 1369.101–.109; 28 TEX. ADMIN. CODE § 21.404 (collectively "contraception equity laws").

Plaintiff Victor Leal[2] claims to oppose all forms of contraception drugs on account of his sincerely held religious beliefs and wishes to purchase insurance that excludes coverage for prescription drugs. (Dkt. 1, ¶31.) He objects to Texas's contraception equity laws because they deny them the ability to purchase suitable health coverage for prescription drugs without "subsidizing other people's

[2] Plaintiff Patrick Von Dohlen "is not asserting a claim against the state defendants at this time" but will likely seek leave to assert a claim once the 60-day pre-suit notice requirement under TRFRA expires. (Dkt. 1, ¶ 54). Plaintiff Kim Armstrong asserts no claims against the State Defendants. (*Id.* at ¶ 55). Thus, Leal is the only plaintiff currently asserting claims against State Defendants.

contraception and becoming complicit in its use." (*Id.*). Leal's claim against State Defendants is that Texas's contraception equity laws violate his sincerely held religious beliefs under the Texas Religious Freedom Restoration Act ("TRFRA").

The Court lacks jurisdiction over Leal's claims against State Defendants. Eleventh Amendment immunity bars Leal's claims against them because Texas's immunity has not been waived. Leal has also not suffered a cognizable injury that is redressable by this Court and thus lacks standing to bring his claims. Accordingly, Leal's claims must be dismissed for lack of subject-matter jurisdiction.

Additionally, Leal's claims against the State Defendants must be dismissed for failing to state a claim upon which relief can be granted. Under TRFRA, Leal must establish that a law substantially burdens a sincerely held religious belief. However, the law imposes no such burden on Leal's religious beliefs because he is merely consumers of health insurance, not a provider, and the contraception equity laws apply only to health insurance providers who offer health insurance plans covering prescription drugs. Incidental impact to Leal as consumers is not enough to establish a substantial burden to a sincerely held religious belief under TRFRA. Because He does not plead a plausible claim for relief under TRFRA, his claims against State Defendants must also be dismissed for failing to state a claim upon which relief can be granted.

II. STANDARD OF REVIEW

Federal Rule of Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). When the court lacks the statutory or constitutional power to adjudicate a case, the case is properly dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). A motion to dismiss pursuant to Rule 12(b)(1) is analyzed under the same plausibility standard as a motion to dismiss under Rule 12(b)(6). *See Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). To avoid dismissal under Rule 12(b)(6), a plaintiff must plead sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While the Court must accept all factual allegations as true, the Court "do[es] not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005).

III. ARGUMENT AND AUTHORITIES

A. Eleventh Amendment immunity bars Leal's TRFRA claim.

For more than a century, courts have held that the U.S. Constitution does not provide jurisdiction over suits against nonconsenting states. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *Alden v. Maine*, 527 U.S. 706, 754 (1999). Eleventh Amendment immunity bars suits in federal court against a state, a state agency, or a state official in his official capacity. *Bryant v. Tex. Dep't of Aging & Disability Servs.*, 781 F.3d 764, 769 (5th Cir. 2015). The State's immunity from suit extends to claims for both money damages and equitable relief. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (noting the "State cannot be sued directly in its own name regardless of the relief sought"). And State officials cannot be sued for violations of state law in federal court, even under the *Ex Parte Young* exception. *Pennhurst State Sch. & Hosp. v. Halderman*, 456 U.S. 89, 106 (1984). While states can waive this immunity and consent to suit in federal court, any such consent must be unequivocal. *Id.* at 99–100.

As a state agency, TDI enjoys immunity from suit in federal court under the Eleventh Amendment to the U. S. Constitution. *See Allbritain v. Tex. Dep't of Ins.*, No. A-12-CA-431-SS, 2014 WL 272223, at *3 (W.D. Tex. Jan. 23, 2014) (recognizing that TDI is protected from suit in federal court under the Eleventh Amendment). Moreover, although *Ex Parte Young* permits some federal claims against state officials sued in their official capacities, *Pennhurst* does not permit state claims

against these officials in federal court. Therefore, TDI and Commissioner Sullivan in his official capacity cannot be sued as defendants in a federal-court action. *See Pennhurst*, 465 U.S. at 100; *Bryant*, 781 F.3d at 769.

TRFRA waives the State's immunity in state court, but expressly "does not waive or abolish sovereign immunity to suit and from liability under the Eleventh Amendment to the United States Constitution." TEX. CIV. PRAC. & REM. CODE. § 110.008. Leal argues that the term "Eleventh Amendment immunity" in that statutory provision should be read narrowly to bar only suits brought by a plaintiff who is not a citizen of the defendant state (Dkt. 1, ¶¶ 2–4). Leal is incorrect.

Leal's argument ignores the reality that "the term 'Eleventh Amendment immunity' has been used loosely and interchangeably with 'state sovereign immunity' to refer to a state's immunity from suit without its consent." *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 240–41 (5th Cir. 2005). The clear intent of that statute comports with the common usage of the phrase "Eleventh Amendment immunity" to bar suit in federal court regardless of the citizenship of the plaintiff. In any event, Leal points to no "clear declaration" that Texas intended to submit itself to federal court jurisdiction, *id.* at 241, and a "state's waiver of sovereign immunity in state court does not mean the state has waived Eleventh Amendment immunity in federal court." *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 (5th Cir. 2002) (using the term "Eleventh Amendment immunity" to refer broadly to immunity from suit in federal court).

B. Leal lacks standing to assert his TRFRA claim.

To obtain relief in federal court, a plaintiff must have standing to bring the case, because Article III of the U.S. Constitution limits a federal court's jurisdiction to only cases and controversies. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). To establish Article III standing, a plaintiff must show (1) that he suffered an injury in fact—that is, "an invasion of a *legally protected interest* which is concrete and particularized[,]" and not merely hypothetical; (2) that the injury is fairly traceable to the defendant's conduct, and; (3) that the injury will likely be redressed with a favorable decision by the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (emphasis added) (citations omitted). Leal fail to satisfy all of these factors.

Leal lack standing to assert his TRFRA claim because his alleged injury is not redressable by the declaration he seeks in this lawsuit. He does not allege that the challenged laws directly regulate his conduct. Instead, he alleges that the laws prohibit private insurers from offering certain plans, and thus "drastically limit[] the scope of acceptable health insurance." (Dkt. 1, ¶36.) But Leal does not plead facts showing insurers would be willing to issue policies that would meet their criteria. He plead facts that, instead, suggest just the opposite. (Dkt. 1, ¶23) ("Despite the *DeOtte* injunction, few *if any* insurance companies are currently offering health insurance that excludes coverage for contraception.") (emphasis added). Nor does Leal plead facts to show that private insurers are willing (or even able) to offer plans that exclude

coverage for contraception *and also* guarantee that Leal's payments will not indirectly support coverage for contraception. They thus lack a concrete injury that is fairly traceable to the Texas laws they challenge and that will be redressed by a favorable ruling from this Court.

C. Leal fails to state a claim for a violation of TRFRA.

Leal fails to plead facts to support a claim that the Texas contraceptive equity laws substantially burdens his exercise of religion. Leal's lack of access to private insurance that meets his religious criteria is not a TRFRA violation. Instructive here are two recent decisions from federal district courts in Texas that addressed the application of the federal Religious Freedom Restoration Act ("RFRA") to claims by individuals related to the Affordable Care Act's ("ACA") Contraception Mandate. *See DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019); *Dierlam v. Trump*, No. 4:16-CV-307, 2017 WL 7049573, at *1 (S.D. Tex. Nov. 21, 2017).

In *DeOtte*, Judge O'Connor in the Court's Fort Worth Division found that the ACA's Contraception Mandate violated RFRA by substantially burdening the religious exercise of a class of individual plaintiffs who objected to insurance coverage of contraception, but the court's reasoning relied on a condition that no longer exists: the enforceability of the Contraception Mandate as to individual religious objectors. The Court reasoned that because "the Individual Plaintiffs *are required by law* to purchase ACA-compliant health insurance" they are "forced to choose between violating their beliefs or violating the law." *DeOtte*, 393 F. Supp. 3d at 510 (emphasis

in original). The court went on to describe the religious burden imposed by the interplay of the ACA's Individual Mandate and Contraceptive Mandate:

> for many in the Individual Class, it is likely the Individual Mandate and the Contraceptive Mandate, *acting in tandem*, "coerce [them] into acting contrary to their religious beliefs, requir[ing] government to bring forward a compelling justification for its otherwise lawful actions." Whichever route an Individual Class member chooses, the problem is the same: The class members cannot participate in the health-insurance market without violating their beliefs, which means they cannot comply with federal law without violating their beliefs. *That* is a substantial burden.

Id. (internal citations omitted) (emphasis added).

As Leal indicates in his Amended Complaint the *DeOtte* injunction precludes the enforcement of the ACA's Contraception Mandate as to religious objectors. (Dkt.1, ¶22). In doing so, the court's injunction removed the burden on which its RFRA analysis had relied. In other words, *DeOtte* does not advance Leal's claims with the *DeOtte* injunction in place.[3]

Instead, the district court decision in *Dierlam* provides a more appropriate analytical framework for addressing Leal's TRFRA claim. *Dierlam*, 2017 WL 7049573. In *Dierlam*, the court held that individual employees failed to state a claim for a RFRA violation based on the ACA's Contraception Mandate. *Id.* at *7–9. The

[3] The United States Supreme Court recently reversed the Third Circuit Court of Appeals decision in *Pennsylvania v. President of the United States*, 930 F.3d 543 (3d Cir. 2019), with instructions on remand to dissolve the nationwide preliminary injunction against the Trump Administration's rule giving religious objectors the option of purchasing health insurance that excludes contraception from any willing insurance issuer. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020).

court distinguished the nature of the religious burden on *employers*, like those in *Hobby Lobby*—who play an "active role" and "actually *provide* healthcare coverage to their employees"—with that of an *employee* who is "merely a consumer of healthcare coverage." *Id.* (citing *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014)) (emphasis in original). The court discussed the Third Circuit's reasoning in *Real Alternatives, Inc. v. Secretary of Department of Health and Human Services*—the only circuit court to consider whether the Contraception Mandate may impose a substantial burden on individuals—and agreed with the Third Circuit that any connection between an individual's membership in a health care plan and the provision of contraceptives to another plan member "is too attenuated to amount to a substantial burden." *Id.* at *9 (citing 867 F.3d 338, 360 (3d. Cir. 2017)). It thus held that the plaintiff had failed to state a claim for a RFRA violation. *Id.*

Similarly, this Court should hold that Leal has failed to state a claim for a violation of TRFRA. He has failed to plead facts to show that his purchase of an insurance plan that includes coverage for contraception would "somehow facilitate[] another person's decision to obtain contraception services." *Id.* at *9; *see also East Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 463 (5th Cir. 2015), *vacated on other grounds by Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) ("[T]he act at issue in this case is not one that authorizes or facilitates the use of contraceptives."). While Leal objects to the lack of control he has over what an insurance company may choose to do as an accounting matter with the revenue generated from his purchase of an

insurance plan, "RFRA confers no right to challenge the independent conduct of third parties." *East Tex. Baptist Univ.*, 793 F.3d at 459 (citing cases); *accord Real Alternatives*, 867 F.3d at 364 (citing cases).

Also unavailing is Leal's complaint that the effect of Texas's contraception equity laws is to limit the availability in the market of private insurance plans that conform to his religious beliefs to only those plans that exclude coverage of all prescription drugs. He pleads no facts regarding any burden associated with covering the costs of his prescription medications by other available means, such as through membership-based pharmacy savings programs or health care sharing ministries. *Dierlam*, 2017 WL 7049573, at *4 (noting that the plaintiff could join a "Catholic sharing ministry without violating his religious beliefs"). TRFRA has never been held to guarantee access to products or services in the market that conform to an individual's religious beliefs in the form he or she would prefer. More is required to plead a violation of TRFRA.[4]

[4] While Plaintiff Von Dohlen does not currently assert any claims against State Defendants, he intends to seek leave to add a TRFRA claim against State Defendants after the expiration of the required notice period. (Dkt. 1, ¶¶ 54–55). The Court should not delay the dismissal of this suit in its entirety in order to provide Von Dohlen leave to amend. Nowhere in the Amended Petition does Von Dohlen distinguish his prospective claims or the factual basis for those claims from Leal's claims. Because Von Dohlen's prospective claims are identical to Leal's current claims, and because there are no factual allegations different between both Plaintiffs, the same legal basis for dismissing Leal's claims—Rules 12(b)(1) and 12(b)(6)— would apply equally to Von Dohlen's prospective claims.

D. Leal cannot obtain the injunctive relief he seeks.

Leal makes two requests for injunctive relief, asking this Court to: (1) "enjoin [State Defendants] from enforcing the Texas contraceptive-equity laws," and (2) "*order* [State Defendants] *to ensure that religious objectors in Texas can obtain health insurance that excludes contraceptive coverage, and to use their regulatory authority to require insurers to offer such plans if needed*[.]" (Dkt. 1, ¶ 58(f)) (emphasis added). As previously discussed, the declaratory and injunctive relief Leal seeks is barred by the State Defendant's immunity from suit and liability in federal Court. *Supra*, Part III.A. And the *Ex Parte Young* exception to immunity for prospective injunctive relief does not apply in suits seeking to enforce state law. *Pennhurst*, 465 U.S. at 106.

Even if State Defendants were not immune to Leal's RFRA claim in federal court, Leal's second request for injunctive relief—asking this Court to order State Defendants to mandate actions by third-party insurance providers—is improper. That request for injunctive relief fails as a matter of law because the State and its officials cannot be compelled to take affirmative or proactive action under RFRA. As with the federal RFRA, TRFRA "confers no right to challenge the independent conduct of third parties." *East Tex. Baptist Univ.*, 793 F.3d at 459 (citing cases); *accord Real Alternatives*, 867 F.3d at 364 (citing cases). The statute merely authorizes injunctive relief to "prevent" a government agency from substantially burdening a person's free exercise of religions. TEX. CIV. PRAC. & REM. CODE. § 110.005 (2); *see also United States* v. *Macon Cty.*, 99 U.S. 582, 591 (1878) ("We have no power by

mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation.").

Because Leal's claim for affirmative injunctive relief is foreclosed as a matter of law, it may be disposed under a Rule 12(b)(6) motion to dismiss for "fail[ing] to state *a claim upon which relief can be granted*." FED. R. CIV. P. 12(b)(6) (emphasis added). *See also Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) (comparing Rules 12(b)(6) and 12(f) and concluding that a motion to strike under Rule 12(f) is not the proper vehicle to strike claims for damages that are precluded as a matter of law); *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 391 (5th Cir. 2014) (judgment on the pleadings affirmed because punitive damages were unrecoverable as a matter of law); *Ozon v. Bank of America*, No. DR-15-CV-057-AM-VRG, 2015 WL11545020, at *5–6 (W.D. Tex. Nov. 9, 2015) (reviewing *Whittlestone* and *McBride* and concluding that a motion to dismiss is the appropriate procedural mechanism to dispose of claims for damages that are barred as a matter of law).

However, should Leal's TRFRA claim not be dismissed the State Defendants request in the alternative that this Court strike under Rule 12(f) Leal's request for injunctive relief to compel affirmative action because the *remedy* is barred as a matter of law. FED. R. CIV. P. 12(f). *See Wells v. Bd. of Trustees of Cal. State Univ.*, 393 F.Supp.2d 990, 994–95 (9th Cir. 2005) (citing *Tapley v. Lockwood Green Eng'rs, Inc.*, 502 F.2d 559, 560 (8th Cir. 1974)) ("A Rule 12(f) motion may be used to strike a prayer

for relief when the damages sought are not recoverable as a matter of law.").

IV. CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that the Court grant their motion and dismiss Leal's claims against them with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which automatically provided notice to all counsel of record

/s/ Matthew Bohuslav
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