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

ALEXANDER R. DEANDA, Plaintiff, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; JESSICA SWAFFORD MARCELLA, in her official capacity as Deputy Assistant Secretary for Population Affairs; UNITED STATES OF AMERICA, Defendants.	Civil Action No. 2:20-cv-92-Z

DEFENDANTS' COMBINED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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SUMMARY

For decades, the U.S. Department of Health and Human Services ("HHS") has exercised its authority under Title X of the Public Health Service Act to make grants for the provision of voluntary and confidential family planning methods and services to individuals of all ages. Pursuant to the plain terms of Title X, entities receiving these grants encourage but do not require family participation, to the extent practical. The program thus balances myriad interests to achieve the statutory goal of making comprehensive and voluntary family planning services available to all persons desiring such services. And courts nationwide have consistently upheld this statutory system.

Nonetheless, Plaintiff Alexander Deanda now challenges Defendants' longstanding administration of the Title X program. Plaintiff argues that he has demonstrated standing without setting forth any evidence showing the likelihood of any action that would directly and immediately implicate his parental consent with respect to his minor children. Plaintiff maintains that the provision of family planning services under Title X to people who desire such services violates his rights under section 151.001(6) of the Texas Family Code. Plaintiff therefore seeks to enjoin Defendants from funding any family planning project in Texas that does not impose a parental consent requirement for the provision of family planning services to minors. Plaintiff also argues that the administration of this voluntary program violates his substantive due process right to direct the upbringing of his children and seeks to enjoin Defendants from funding any family planning project in the United States that does not impose a parental consent requirement for services to minors.

In his Cross-Motion for Summary Judgment and Response to Defendants' Motion for Summary Judgment ("Pl. Mot."), ECF No. 30, Plaintiff thus fails to sustain his burden to

establish subject matter jurisdiction, much less to show that he is entitled to relief as a matter of law on either of his two remaining claims. Because Plaintiff's claims accrued more than six years prior to his filing of the complaint, the statute of limitations bars his current challenge to the longstanding administration of Title X. Moreover, Plaintiff has failed to establish that he has standing because he does not adduce evidence demonstrating an actual, concrete injury in fact that is fairly traceable to Defendants' actions or redressable by the present suit. And on the merits, Plaintiff's claims fail to show why a state law should be construed to impede the implementation of a voluntary federal program, or that the administration of Title X violates section 151.001(6) of the Texas Family Code. Finally, Plaintiff fails to show that the provision of voluntary family planning services under Title X to persons desiring those services violates his right to direct the upbringing of his children. As other courts have held when addressing similar claims, the voluntary provision of Title X-funded services to people who desire such services does not impose any requirement or prohibition on Plaintiff and therefore does not interfere with his interest in his relationship with his children. Moreover, the provision of confidential family planning services through the Title X program serves the government's interest in promoting adolescent health and reducing unplanned pregnancies.

Accordingly, Defendants are entitled to summary judgment on all claims, and Plaintiff's cross-motion for summary judgment should be denied.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF CANNOT ESTABLISH SUBJECT MATTER JURISDICTION

Plaintiff has failed to sustain his burden to establish subject matter jurisdiction. *See* Defendants' Brief in Support of Motion for Summary Judgment ("Def. Mot."), ECF No. 27 at 11-20. Plaintiff's response fails to refute the application of the statute of limitations or to set

forth necessary evidence to demonstrate standing. Accordingly, Defendants are entitled to summary judgment for lack of subject matter jurisdiction.

A. The Statute of Limitations Bars Plaintiff's Claims

Defendants showed in their opening brief that the six-year statute of limitations for claims against the United States bars Plaintiff's present action. 28 U.S.C. § 2401(a); Def. Mot. at 11-13. "[F]ailure to sue the United States within the limitations period . . . deprive[s] federal courts of jurisdiction." *Dunn-McCampbell Royalty Int. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997); *Texas v. Rettig*, 987 F.3d 518, 529 (5th Cir. 2021). Accordingly, Plaintiff must bear the burden of showing that his claim is timely, even when pursuing a constitutional claim. *Daniels v. United States*, 532 U.S. 374, 381 (2001); *United States v. Flores-Martinez*, 677 F.3d 699, 709-10 (5th Cir. 2012). And "Section 2401(a) generally 'applies to all civil actions whether legal, equitable, or mixed.'" *Felter v. Kempthorne*, 473 F.3d 1255, 1259 (D.C. Cir. 2007) (quoting *Kendall v. Army Bd. for Corr. of Military Records*, 996 F.2d 362, 365 (D.C. Cir. 1993)).

Plaintiff argues in response that this action is timely because his claim accrues continuously. Pl. Mot. at 2. Plaintiff argues that "defendants, by continuing to administer the Title X program . . . are engaged in an ongoing violation of the plaintiff's legal rights" such that "[a] new cause of action 'accrues' each day." Pl. Mot. at 2. To support this argument, Plaintiff relies upon this Court's decision in *Leal v. Azar*, No. 2:20-cv-185-Z, 2020 WL 7672177, at *6-7 (N.D. Tex. Dec. 23, 2020). In *Leal*, this Court held that the six-year statute of limitations did not bar the plaintiffs' claims "for injunctive relief under the *Larson* framework." *Id.* at *6 (citing *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949)). But whereas the Court found in *Leal* that the "*continued enforcement*" of the challenged law is "what impedes or prohibits Plaintiffs from acquiring health insurance *today*[,]" *id.* at 7, in this case Plaintiff by

contrast does not challenge any such direct or immediate action to enforce any aspect of the Title X program against him.[1]

Indeed, Plaintiff does not challenge any "acts committed by the defendants within the statute of limitations that could constitute a continuing violation." *Felter v. Kempthorne*, at 1260. Plaintiff fails to show any violation of his legal rights at all, nor does he identify any specific act or acts allegedly causing such violation. To the contrary, Plaintiff vaguely challenges "[D]efendants' administration of the Title X program[,]" in general. Compl. ¶ 25. Plaintiff's failure to identify any specific act or acts by Defendants within the six-year timeframe highlights the fact that at best he challenges merely the ongoing effects of actions occurring outside the limitations period.

But a challenge to the ongoing effects of an action outside the six-year timeframe is not a valid application of the continuing violation doctrine, as a "lingering effect of an unlawful act is not itself an unlawful act." *Felter*, 473 F.3d at 1260 (quoting *Guerra v. Cuomo*, 176 F.3d 547, 551 (D.C. Cir. 1999)). Since 1981, Title X has required that, "[t]o the extent practical," entities receiving Title X funds "shall encourage familiy [sic] participation." 42 U.S.C. § 300(a); Pub. L. No. 97-35, § 931(b)(1), 95 Stat. 357 (1981). Since 1984, Title X's implementing regulations have reflected the decisions in the D.C. Circuit and the Second Circuit that held the agency had exceeded its statutory authority by promulgating regulations requiring parental notification as well as deference to state parental notification and consent laws. Grants for Family Planning Projects; Parental Notification Requirement, 49 Fed. Reg. 38,117, 38,117-18 (Sept. 27, 1984)

[1] In *Leal*, the Court also "acknowledge[d] it is an open question whether the 1976 amendments to the APA abrogated the *Larson* doctrine in suits against federal agency officials." *Id.* at *6 n.7 (citing *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011); *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985)).

(removing from 42 C.F.R. part 59 the parental notification regulations, which "never went into effect" due to the decisions of the D.C. Circuit and Second Circuit Courts of Appeals); *Planned Parenthood v. Heckler*, 712 F.2d 650, 656, 663-64 (D.C. Cir. 1983); *New York v. Heckler*, 719 F.2d 1191, 1196 (2d Cir. 1983); *see also* Def. Mot. at 12-13. At best, Plaintiff challenges the continuing effects of these actions that occurred decades ago. *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 867 (5th Cir. 1993) ("We must be careful not to confuse continuous violations with a single violation followed by continuing consequences; only continuous unlawful acts can form the basis of a continuous violation."). Similar to his standing problem, Plaintiff fails to show a specific violation occurring within the limitations period, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982), and therefore he "cannot use the continuing violation theory 'to resurrect claims'" that accrued decades ago. *McGregor*, 3 F.3d at 867.

Similarly, Plaintiff's argument that the statute of limitations does not apply because he is raising an as-applied claim also fails. Pl. Mot. at 2-3. Plaintiff does not challenge any *new* direct and final *act* by Defendants within the limitations period from which new "rights, obligations, or legal consequences" might arguably flow. *Dunn-McCampbell*, 112 F.3d at 1287 ("To sustain such a challenge, however, the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit."); *Rettig*, 987 F.3d at 529 (citing *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 756 (5th Cir. 2011)). Far from challenging an action by Defendants applying any aspect of Title X services to him, Plaintiff brings this general challenge to the administration of Title X, seeks certification of two broad classes of parents, and requests nationwide injunctive relief. *See, e.g.,* Compl. ¶¶ 36, 43 (requesting a nationwide injunction that would impose a parental consent requirement as a condition of eligibility for Title X funding).

Nor does "asking for a declaration of his rights under 28 U.S.C. § 2201, along with an injunction to ensure those rights are observed," Pl. Mot. at 3, by itself, establish that his claims are timely. As courts of limited jurisdiction, federal courts cannot declare the rights of parties in the absence of a timely actual case or controversy. *Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 397 (5th Cir. 2000) ("[T]he request for a declaratory judgment to define the obligations of the Corps in evaluating applications for permits for construction amounts to a request for an advisory opinion from this court[,]" and "federal courts may not render advisory opinions."); *Felter*, 473 F.3d at 1259 (statute of limitations applies regardless of type of relief requested).

Accordingly, the statute of limitations bars this challenge to the agency's longstanding and settled administration of the Title X program. *Rettig*, 987 F.3d at 529.

B. Plaintiff Lacks Standing

In addition, Plaintiff fails to demonstrate a concrete injury in fact that is fairly traceable to the challenged actions of Defendants and redressable by the present action. *Henderson v. Stalder*, 287 F.3d 374, 378 (5th Cir. 2002); Def. Mot. at 13-20. Although this Court previously held that Plaintiff had met his burden at the pleading stage, Order, ECF No. 23 at 12-21, Plaintiff fails to sustain his heightened burden at the summary judgment stage. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); Def. Mot. at 13-20; *cf.* Pl. Mot. at 3. At this juncture Plaintiff is no longer entitled to favorable inferences but instead must set forth evidence to prove his standing. *Lujan*, 504 U.S. at 560-61; *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 496-97 (5th Cir. 2007) (en banc); Def. Mot. at 14. Plaintiff's only evidence in response is his own declaration, Declaration of Alexander R. Deanda ("Deanda Decl."), ECF No. 31, which merely attests to various allegations in the complaint, including that he has three daughters under the age of 18, *id.* at ¶ 3, and that he does not want his children to access family planning services without his prior

knowledge and consent, ¶¶ 4-5. The remainder of the declaration, ¶¶ 6-9, does not provide factual evidence of standing but instead restates Plaintiff's legal conclusions and arguments. Plaintiff's declaration falls short of providing evidence demonstrating that any of his daughters has sought or is imminently likely to seek Title X-funded family planning services without his consent. Plaintiff therefore lacks standing because he has not shown a concrete and actual injury in fact. Def. Mot. at 13-20; *see also, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

While he fails to set forth evidence showing specific facts necessary to demonstrate an actual case or controversy, Plaintiff presents four legal arguments in an attempt to satisfy his burden to show standing. Pl. Mot. at 3-12; Deanda Decl. at ¶ 9. First, Plaintiff argues that he has standing based on section 151.001(6) of the Texas Family Code. Pl. Mot. at 3; Deanda Decl. at ¶ 9(a). Second, Plaintiff argues that Defendants' administration of the Title X program undermines his parental authority. Pl. Mot. at 8; Deanda Decl. at ¶ 9(b). Third, Plaintiff argues that Defendants' administration of Title X deprives him of assurance that his minor children will abide his parental authority. Pl. Mot. at 9; Deanda Decl. at ¶ 9(c). Finally, Plaintiff argues that he has standing because Defendants' administration of the Title X program increases the risk that his minor children might access family planning services without his knowledge or consent. Pl. Mot. at 10; Deanda Decl. at ¶ 9(d). Plaintiff's arguments each fail because they do not establish a concrete injury in fact to a legally cognizable right that is fairly traceable to Defendants' administration of the Title X program and likely to be redressed by the present action.

Because Plaintiff lacks standing, Defendants are entitled to summary judgment. *Lujan*, 504 U.S. at 578 (Because "respondents lack standing to bring this action . . . the Court of

Appeals erred in denying the summary judgment motion filed by the United States."); *cf.* Pl. Mot. at 12 n.2.

1. Plaintiff's Reliance Upon the Texas Family Code Does Not Establish an Injury in Fact

Plaintiff argues that the administration of Title X in Texas without a parental consent requirement deprives him of "state-law rights and protections" under Texas Family Code § 151.001(6). Pl. Mot. at 3. Plaintiff argues that this "– standing alone – is sufficient to establish injury in fact for Mr. Deanda or any parent in Texas who would otherwise be entitled to consent to their child's medical treatment under section 151.001(6)." Pl. Mot. at 3. Plaintiff thus argues that he need not demonstrate his daughters have obtained or likely will obtain family planning services funded under Title X without his consent. Pl. Mot. at 3-4. But Plaintiff's argument based upon the Texas Family Code fails to satisfy the requirements for Article III standing.

Plaintiff cannot show Article III standing to challenge the administration of a federal program like Title X solely by invoking a provision of a statute, particularly a state statute. *See* Def. Mot. 17-18; *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016)) (rejecting a similar "proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'"). Plaintiff acknowledges that "Congress cannot create Article III standing merely by creating a cause of action that authorizes plaintiffs to sue." Pl. Mot. at 4. But he argues that "*TransUnion, Spokeo,* and *Lujan* have nothing to say about standing to sue over the loss of a state-law legal entitlement" and instead "merely limit the power of Congress." *Id.* at 5. Contrary to Plaintiff's suggestion, however, federal law determines the circumstances in which the United States and its agencies may be subject to suit and must provide the source of right for an action challenging the

administration of a federal program such as Title X. *Rettig*, 987 F.3d at 529; *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009); Def. Mot. at 16. Moreover, the Supreme Court's decisions in *TransUnion*, *Spokeo*, and *Lujan* reiterate the longstanding and well-established principle that to demonstrate standing, a plaintiff must show that he has suffered a *concrete* harm, even when relying upon a statutory cause of action. Def. Mot. at 17-19; *TransUnion*, 141 S. Ct. at 2210 ("The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."); *Lujan*, 504 U.S. at 578 ("[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972))).

Havens similarly requires that a party invoking a statutory cause of action show that he has suffered an actual, concrete injury to that statutory right. *Havens*, 455 U.S. at 373-74; Def. Mot. at 18-19. Plaintiff argues that under *Havens*, a tester would have had standing as the result of a mere "threat[] to revoke his legal entitlement to a truthful response." Pl. Mot. at 6. But if the mere *threat* of misinformation had been sufficient to demonstrate injury under the Fair Housing Act, both testers would have had standing without the need to show the results of their actual inquiries into the availability of housing. To the contrary, in *Havens* only the tester who showed that in fact she had received misrepresentations in response to her inquiries about the availability of housing thus sustained her burden to show that she had "suffered injury in precisely the form the statute was intended to guard against, and *therefore* ha[d] standing to maintain a claim." *Havens*, 455 U.S. at 373-75 (emphasis added).

Plaintiff similarly misplaces reliance upon cases holding that, in circumstances not applicable here, state law sometimes can supply a party's legal source of right. Pl Mot. at 4-7. For example, *FMC Corp. v. Boesky*, 852 F.2d 981, 992 (7th Cir. 1988), involved a question of pendent jurisdiction in a suit by one private party against another "alleg[ing] breaches of state-law contractual and fiduciary duties which some of the defendants owed to the company." As the Seventh Circuit explained in *FMC*, such litigation between private parties does not raise the same separation of powers concerns at issue in a suit challenging the executive branch's administration of a federal program, and therefore "implies limited constitutional standing concerns." *Id.* at 989. Nevertheless, "[t]here can be no diversity jurisdiction in the absence of an Article III case or controversy," *id.* at 993 n. 23, even when "the actual or threatened injury required by Article III exists solely by virtue of the recognized state-law right, the invasion of which creates standing[,]" *id.* at 993. *See also Utah ex rel. Div. of Forestry, Fire, & State Lands v. United States*, 528 F.3d 712, 721 (10th Cir. 2008) (In an action originally against the United States and private landowners under the federal Quiet Title Act, 28 U.S.C. § 2409a, but where the only remaining dispute was between Utah and one of the private landowners, the Court's observation that "[a]lthough Article III standing is a question of federal law, state law may create the asserted legal interest," meant only that "[h]ere, Utah's quiet title claim against the [private landowner] arises under Utah law.").

Thus, Plaintiff's theory of standing under Texas law fails. Plaintiff does not point to a single case demonstrating that a state law could provide the source of right to challenge Defendants' administration of Title X. *Cf.* Def. Mot. at 16. And furthermore, Plaintiff's theory of standing based upon a statutory cause of action fails to satisfy Article III by demonstrating an actual, concrete injury in fact. Plaintiff maintains that he has standing under the Texas statute

based upon nothing more than a subjective apprehension that his daughters possibly could obtain family planning services under Title X without his consent. Pl. Mot. at 6-7. Plaintiff's argument that he has been deprived of a statutory right therefore fails to sustain his burden to demonstrate a concrete injury in fact. Def. Mot. at 16-19; *Lujan*, 504 U.S. at 578 ("[I]t is clear that in suits against the Government, at least, the concrete injury requirement must remain.").

2. Plaintiff's Theory of Subversion of Parental Authority Does Not Establish an Injury in Fact

Plaintiff's argument that the Title X program "inflicts immediate present-day injury" by "subverting" his "authority" as a parent similarly fails. Pl. Mot. at 8. Although Plaintiff remains free to instruct his children that he wishes they not obtain family planning services without his consent, Plaintiff argues that he has suffered injury in fact from the availability of voluntary Title X services because he is therefore "unable to prevent [his] children from accessing contraception or other family-planning services." Pl. Mot. at 8.

Plaintiff misplaces reliance upon his sole authority on this point, *Parents United for Better Schools, Inc. ("PUBS") v. School District of Philadelphia Board of Education*, 148 F.3d 260 (3d Cir. 1998). The Third Circuit did not separately analyze whether the parents had standing, but rather recognized that the Pennsylvania Commonwealth Court had, in an earlier stage of the litigation, held that the parents had standing. *Id.* at 265 (citing *PUBS v. Sch. Dist. of Phila. Bd. of Educ.*, 646 A.2d 693 (Pa. Commw. Ct. 1994)). On review of the district court's decision granting the defendants' motion for summary judgment, the Third Circuit held that the voluntary distribution of condoms in Philadelphia public schools did *not* violate parents' interest in directing the upbringing of their children. *PUBS*, 148 F.3d at 275 ("We recognize the strong parental interest in deciding what is proper for the preservation of their childrens' [sic] health.

But we do not believe the Board's policy intrudes on this right. Participation in the program is voluntary.").

Moreover, even the state appellate court deciding the issue of standing did not base its determination upon an abstract theory of subversion of parental authority, but rather required the plaintiff organization to show "at least one member who has or will suffer a direct, immediate, and substantial injury to an interest as a result of a challenged action." *PUBS*, 646 A.2d at 692. To satisfy this burden, "PUBS asserts, and the Board does not challenge the fact, that many of its members are parents of children who attend Philadelphia public schools where Policy 123 has been implemented." *Id.* Accordingly, "PUBS has (1) identified a substantial interest, *i.e.* prior express parental consent to medical treatment; (2) which interest is directly affected by the action of the Board; and (3) the consequences of the Board's action affecting that interest are immediate." *Id.* at 693; *see also PUBS*, 148 F.3d at 265 (discussing this analysis). This requisite showing of a "direct, immediate, and substantial injury" is precisely the burden which Plaintiff here argues he need not demonstrate. Pl. Mot. at 8. Unlike the children in *PUBS*, who "attend[ed] Philadelphia public schools where [the condom distribution policy] has been implemented," 646 A.2d at 692, Plaintiff sets forth no evidence showing any analogous immediacy. Instead he argues that it is irrelevant whether any of his daughters is likely ever to come near a Title X project. Pl. Mot. at 8 (arguing that "this injury does not in any way depend on whether one's children are actually obtaining (or trying to obtain) birth control from Title X participants."). *PUBS* therefore does not support Plaintiff's theory of injury in the form of subversion of parental authority resulting from the mere existence of a voluntary program. *See PUBS*, 148 F.3d at 273 n.7 ("[P]arents may decline their children's participation. Parental authority has not been supplanted.").

3. Plaintiff's Theory of Deprivation of Assurance That His Children Will Obey His Parental Authority Does Not Establish an Injury in Fact

Plaintiff's theory of standing based upon deprivation of assurance of filial obedience is essentially identical to the prior theory of subversion of parental authority. Pl. Mot. at 9-10. Plaintiff argues that he suffers an injury in fact because Defendants' administration of the voluntary Title X program leaves him "wonder[ing] whether [his] children are obtaining prescription contraception and other birth control behind [his] back." Pl. Mot. at 9. Plaintiff again misplaces his reliance on *PUBS*, arguing in conclusory fashion that "[n]o different result should obtain when the condoms and birth control are distributed by the federal government" rather than a school. Pl. Mot. at 10 (citing *PUBS*, 646 A.2d at 689).

Plaintiff's argument again stretches *PUBS* beyond its actual holding. Neither the Pennsylvania Commonwealth Court nor the Third Circuit recognized as an injury in fact the purported loss of assurance that a child would obey parental instruction. *PUBS*, 646 A.2d at 692-93; *PUBS*, 148 F.3d at 275. As noted above, in *PUBS* the parents satisfied their burden to demonstrate standing by showing that their children were compelled to attend the school where the program for distributing condoms would be implemented. 646 A.2d at 692. Plaintiff maintains here that he is not required to make a similar showing of direct, immediate, and substantial injury. Pl. Mot. at 9-10. His theory that the administration of the Title X program harms him by depriving him of the assurance that his children will obey his instruction not to obtain family planning services without his consent therefore fails to show a concrete injury in fact.

4. Plaintiff's Theory of Increased Risk Fails to Establish an Injury in Fact

Finally, Plaintiff argues that he suffers an injury in fact because Title X increases the risk that his children might obtain family planning services without his consent. Pl. Mot. at 12.

Plaintiff premises this theory on precedent suggesting somewhat relaxed standards of causation and redressability when a litigant asserts a procedural right. *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007). Because "'procedural rights' are special[,]" *Lujan*, 504 U.S. at 572 n.7, the Supreme Court has held that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' . . . 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Massachusetts*, 549 U.S. at 517-18 (quoting *Lujan*, 504 U.S. at 572 n.7). Thus, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518. In such cases, the Supreme Court has suggested an inverse relationship between the severity of the harm and the required showing of likelihood of redress through the present action. *Id.* at 525 & n.23 ("The more drastic the injury that government action makes more likely, the lesser the increment in probability to establish standing.") (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234 (D.C. Cir. 1996)). In *Massachusetts v. EPA*, the Court found standing to challenge EPA's denial of the petition for rulemaking based upon evidence that "the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts." *Id.* at 526. Because Congress had expressly "authorized this type of challenge to EPA action," *id.* at 516, evidence that the "risk of catastrophic harm" from rising sea levels associated with global climate change is "real" and "would be reduced to some extent" if the EPA were required to respond to the petition for rulemaking sufficed to demonstrate standing. *Id.* at 526.

By contrast, Plaintiff's challenge to the administration of Title X does not assert that Congress has accorded him a procedural right which has been violated. *Cf. Massachusetts*, 549 U.S. at 516-18. To the contrary, he asserts a substantive due process claim. And even if he were

asserting such a procedural right, he would still bear the burden of demonstrating a concrete injury in fact. *See, e.g., Glickman*, 92 F.3d at 1234 (in a challenge to a timber harvesting Environmental Impact Statement, the plaintiffs' members submitted affidavits showing that they actually use the forest in "ways that would be severely impaired if government error led to a devastating wildfire"). Unlike the plaintiffs in cases such as *Massachusetts* and *Glickman* upon which Plaintiff relies, Pl. Mot. at 12, Plaintiff neither asserts a procedural right nor sets forth evidence showing any such concrete and particularized harm resulting from Defendants' administration of the Title X program.

For similar reasons, Plaintiff therefore also falls far short of showing the necessary material risk of substantial and imminent harm necessary to sustain a claim for prospective relief. *See TransUnion*, 141 S. Ct. at 2210 ("[A] person exposed to a risk of future harm may pursue forward-looking injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.") (citing *Clapper*, 568 U.S. at 414 n.5); Def. Mot. at 15, 20.

Thus, Plaintiff lacks Article III standing because he fails to show an actual, concrete harm. And because Plaintiff fails to sustain his burden to establish subject matter jurisdiction, Defendants are entitled to summary judgment on all claims.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON BOTH CLAIMS

Even if Plaintiff could establish subject matter jurisdiction, Plaintiff's remaining two claims fail on the merits. Defendants therefore are entitled to summary judgment on both claims. Def. Mot. at 21-34.

A. Defendants Are Entitled to Summary Judgment on Claim No. 1 Because Title X Precludes Mandatory Parental Notification or Consent

Defendants are entitled to summary judgment on Claim No. 1 because federal supremacy precludes any state law from imposing a parental consent requirement as a condition of eligibility for Title X funding. Def. Mot. at 21. As courts have consistently held for decades, the statutory text plainly precludes requiring parental consent. Def. Mot. at 22-25. Instead, "Congress made clear that confidentiality was essential to attract adolescents to the Title X clinics; without such assurances, one of the primary purposes of Title X – to make family planning services readily available to teenagers – would be severely undermined." *Planned Parenthood v. Heckler*, 712 F.2d at 660; Def. Mot. at 21-25, 32-34. Accordingly, state law cannot impose a parental consent requirement, which would impede the delivery of confidential family planning services under Title X. *See Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 341 & n.84 (5th Cir. 2005).

Against this consistent line of authority, Plaintiff nonetheless argues that federal law should be read to permit the imposition of parental consent requirements. Pl. Mot. at 14. Plaintiff seeks to impose a "requirement to provide parental consent [that] comes entirely from the law of Texas[.]" *Id.* at 13. Plaintiff argues that "nothing in federal law" prohibits imposing such parental consent requirements. *Id.* at 14. Plaintiff asserts that "defendants' brief does not analyze the *text* of the Title X statute, and it presents no argument for how that statutory language can be read to forbid states to require parental consent in Title X programs." *Id.* at 16.

To the contrary, imposing a parental consent requirement as Plaintiff suggests would contradict the plain meaning of the statute. Def. Mot. at 21-25, 32-34; *see also Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1738 (2020). "The text of the Title X statute plainly leaves no room for states to impose parental notification requirements[,]" Def. Mot. at 22, as the use of the

word "encourage" and the phrase "[t]o the extent practical" in 42 U.S.C. § 300(a) plainly indicates that family participation cannot be a requirement. Def. Mot. at 22-23. Imposing a parental consent requirement would render these statutory terms mere surplusage. *See, e.g., Planned Parenthood v. Heckler*, 712 F.2d at 654; *New York v. Heckler*, 719 F.2d at 1196.

Moreover, as Defendants have explained, Congress has determined that confidentiality is essential to ensure minors' access to family planning services, and confidentiality logically requires that grantees not be obligated to obtain parental consent. Def. Mot. at 24, 32-34. Imposing a parental consent requirement would be inconsistent with "one of the primary purposes of Title X – to make family planning services readily available to teenagers" – because "Congress made clear that confidentiality was essential to attract adolescents to the Title X clinics[.]" *Planned Parenthood v. Heckler*, 712 F.2d at 660. And a state's "attempt to require parental consent as a condition to the provision of family planning services constitute[s] the imposition of an additional eligibility requirement that clearly thwart[s] the goals of Title X." *Id.* at 664; *Planned Parenthood Ass'n v. Matheson*, 582 F. Supp. 1001, 1006 (D. Utah 1983) (Because state law "would do major damage to the federal interests created by Title X by preventing Title X grantees from providing confidential services to eligible minors on request[,]" "the Supremacy Clause dictates that the federal law prevail over" that state law.).

Despite the clear line of authority finding that Title X plainly does not allow the imposition of parental consent requirements, Plaintiff argues that under the clear-statement rule set forth in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), the Title X statute's requirement to "encourage" family participation "[t]o the extent practical" is not a sufficiently clear condition on federal grants. Pl. Mot. at 15-16. But for decades courts consistently have had no trouble interpreting this clear statutory language as foreclosing parental

notification or consent requirements. *See, e.g.,* Def. Mot. at 22-25; *Planned Parenthood v. Heckler*, 712 F.2d at 654; *New York v. Heckler*, 719 F.2d at 1196; *Cnty. of St. Charles v. Mo. Fam. Health Council*, 107 F.3d 682, 684-85 (8th Cir. 1997); *Jane Does 1 through 4 v. Utah Dep't of Health*, 776 F.2d 253, 255 (10th Cir. 1985); *Ware v. S. Tex. Fam. Planning & Health Corp.,* 2010 U.S. Dist. LEXIS 155133, at *3 (S.D. Tex. Jan. 26, 2010); *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. 1001, 1006 (D. Utah 1983); *Doe v. Pickett*, 480 F. Supp. 1218, 1220 (S.D. W.Va. 1979). Plaintiff argues in response that "none of those cases are binding authority[.]" Pl. Mot. 17. But this longstanding and widespread judicial consensus demonstrates that Title X unambiguously precludes imposing parental consent requirements. Def. Mot. at 22-23; *see also Patterson v. Planned Parenthood of Houston & Se. Tex.*, 971 S.W.2d 439, 440 (Tex. 1998) (recognizing that Title X has "been interpreted to proscribe the imposition of a parental notification or consent requirement."). Plaintiff's argument that the statutory language is ambiguous cannot be reconciled with the statutory text, purpose, and legislative history, as explained in consistent judicial authority over decades.

Moreover, the inclusion of a parental notification and consent requirement in Title XX, a separate statute enacted at the same time as Title X's requirement to encourage family participation to the extent practical, plainly evidences Congressional intent that Title X *not* include a parental consent requirement. Def. Mot. at 23. Plaintiff's argument that Title X should nonetheless be interpreted to allow the imposition of a parental consent requirement would essentially read out of the text this critical distinction in the language of these two statutory provisions. 42 U.S.C. § 300(a); 42 U.S.C. § 300z-5(a)(22)(A)(i); *Planned Parenthood v. Heckler*, 712 F.2d at 661; *New York v. Heckler*, 719 F.2d at 1197.

Finally, Plaintiff's attempt to distinguish *Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 341 (5th Cir. 2005), fails. Defendants showed that the Fifth Circuit has already held that state law may not impose "eligibility requirements [that] would seriously undermine and obstruct Congress's intent in distributing funds under Title X." *Id.* at 341 & n. 84; Def. Mot. at 24-25. In response, Plaintiff argues that his request to enjoin Title X funding for any project in Texas that does not require parental consent would not be "imposing conditions on the receipt of federal funds" but "simply insisting that Title X participants comply" with the state parental consent requirement. Pl. Mot. at 18-19. Logically, enjoining federal funding for failure to require parental consent pursuant to state law would be tantamount to imposing the parental consent requirement as a condition of eligibility for receipt of federal funds. *See* Def. Mot. at 24-25; *see also, e.g., Camacho v. Tex. Workforce Comm'n*, 326 F. Supp. 2d 803, 810 (W.D. Tex. 2004) ("[A] state cannot withhold assistance from individuals who met the federal eligibility requirements, simply because the individuals do not meet the state's additional requirements."). Plaintiff's argument that "Title X recipients must obey and remain subject to" state criminal law, Pl. Mot. at 19, is likewise inapposite for similar reasons.

Additionally, Plaintiff has not established that section 151.001(6) of the Texas Family Code should be construed to impose a parental consent requirement upon the provision of any and all family planning services under Title X. Subject to certain exceptions elsewhere in the Texas Family Code, section 151.001 generally provides that "(a) [a] parent of a child has the following rights and duties: . . . (6) the right to consent to the child's . . . medical and dental care." Plaintiff makes no attempt to prove, for example, that family planning services, or which family planning services, constitute "medical treatment" within the meaning of section

151.001(6). *See, e.g.,* 42 U.S.C. § 300(a) (authorizing grants for "family planning projects which shall offer a broad range of . . . methods and services").

As Defendants have demonstrated, Plaintiff's requested relief that would enjoin Defendants from providing funding to any project in Texas that does not require parental consent would impede the implementation of Title X and thus would violate federal supremacy. Accordingly, Defendants are entitled to summary judgment on Plaintiff's Claim No. 1 that Defendants' administration of the Title X program violates Texas state law.

B. Defendants Are Entitled to Summary Judgment on Claim No. 2 Because the Administration of Voluntary Family Planning Services Under Title X Does Not Interfere with Plaintiff's Upbringing of His Children

As a voluntary program, Title X does not violate parental rights. Def. Mot. at 25-34. Courts have recognized claims for interference with parental liberty only where the challenged government action requires or prohibits some action by parents. *See, e.g., Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980) (state's operation of a voluntary birth control clinic did not deprive parents of their liberty interest in the upbringing of their children); *Anspach v. Philadelphia*, 503 F.3d 256, 262 (3d Cir. 2007) ("Courts have recognized the parental liberty interest only where the behavior of the state actor compelled interference in the parent-child relationship.").

Plaintiff argues that Title X interferes with his parental rights even though the program is voluntary. Pl. Mot. at 19-20. But courts have consistently found that a challenged government program or policy that does not require or prohibit some action by parents does not interfere with parental rights under the Constitution. Def. Mot. at 26-31. Plaintiff cites no authority for his argument that even voluntary programs violate parents' right to direct the upbringing of their children. Pl. Mot. at 19. To the contrary, even cases involving access to birth control and prophylactics have found no interference with parental rights to direct the upbringing of one's children where the programs are entirely voluntary. *See, e.g., Irwin*, 615 F.2d at 1168; *Anspach*,

503 F.3d at 262; *PUBS*, 148 F.3d at 275. And his argument that the parental right to direct the upbringing of one's children is premised upon children's being "legally incapable of consenting to medical treatment or other major life decisions," Pl. Mot. at 19, is belied by, for example, cases recognizing minors' legal rights such as privacy, which "includes the right to obtain contraceptives." *Irwin*, 615 F.2d at 1166; *Anspach*, 503 F.3d at 263.[2]

Even assuming for the sake of argument that Title X did interfere with parental rights (which, in fact, it does not), Plaintiff fails to show that strict scrutiny rather than rational basis review should apply. Pl. Mot. at 20-21; *cf.* Def. Mot. at 31-32. As Defendants noted in their opening brief, Def. Mot. at 31-32, the Fifth Circuit has applied rational basis review to alleged violations of parental rights to direct the upbringing of their children. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001). *Littlefield* involved a claim that a mandatory school uniform policy interfered with parental rights to direct the upbringing of their children. *Id.* at 288. Relying on *Troxel* and arguing that the school policy violated their "fundamental" right to direct the upbringing of their children, the parents in that case similarly argued that the court should apply strict scrutiny in its review of the school policy. *Id.* In reaching the conclusion that the rational-basis standard should apply, the Fifth Circuit observed that, "[w]hile the Supreme

[2] Indeed, a small sample suggests that state laws vary with respect to the legal competence of minors to provide their own consent in particular contexts. *See, e.g.,* ALA. CODE § 22-8-4 (In general, "[a]ny minor who is 14 years of age or older, or has graduated from high school, or is married, or . . . divorced or is pregnant may give effective consent to any legally authorized medical, dental, health or mental health services for himself or herself."); TENN. CODE ANN. § 68-34-107 ("Contraceptive supplies and information may be furnished by physicians to any minor who is pregnant, a parent, or married, or who has the consent of the minor's parent or legal guardian, or who has been referred for such service . . . , or who requests and is in need of birth control procedures, supplies or information."); VA. CODE ANN. § 54.1-2969(E)(2) ("A minor shall be deemed an adult for the purpose of consenting to . . . [m]edical or health services required in case of birth control, pregnancy, or family planning except for the purposes of sexual sterilization").

Court in *Troxel* recognized that there exists a fundamental right of parents to direct their children's upbringing, it failed to articulate a standard of judicial scrutiny." *Id.* at 289 & n.20 ("The Court also failed to reach agreement on the parameters of the right at issue."). The Fifth Circuit thus held that "the sweeping statements of the plurality opinion in *Troxel* regarding the 'fundamental' 'interests of parents in the care, custody, and control of their children,'" did not "mandate a strict standard of scrutiny." *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). Instead, the Fifth Circuit relied upon "almost eighty years of precedent analyzing parental rights in the context of public education under a rational-basis standard." *Id.* (discussing *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972)).

The Fifth Circuit's application of the rational-basis standard of review to the challenge to school uniforms as a violation of parental rights is analogous to this case. The Fifth Circuit's decision in *Littlefield* recognizes that parental rights under the Constitution are not absolute and that it is not a given that strict scrutiny should apply to any claim of parental rights, as Plaintiff suggests it should. *Littlefield*, 268 F.3d at 289 & n.20; *cf.* Pl. Mot. at 20-21 (arguing that "[a]ny infringement on this right must therefore be subjected to strict scrutiny"); *Anspach*, 503 F.3d at 269 ("[There is no constitutional right to parental notification of a minor child's exercise of reproductive privacy rights."). Other courts have similarly held that parental rights to direct the upbringing of one's children are "not absolute[,]" even in the context of programs making contraceptives available to minors, and that "parental interests must be balanced with the child's right to privacy, which is also protected." *Anspach*, 503 F.3d at 261. Accordingly, rational basis review similarly should apply here as it did in *Littlefield*.

Regardless, the government has demonstrated its interests in the health of adolescents and in reducing unplanned pregnancies. Def. Mot. at 31-34; *see also, e.g., Anspach*, 503 F.3d at 269 (recognizing "the state's legitimate interest in the reproductive health of minors"); *id.* at 271 n.10 (noting that Title X supports holding that "the state's substantial interest in the reproductive health of minors counsels against recognition of a constitutional right to parental notification when a minor child seeks confidential health care services"). As Defendants previously explained, Congress explicitly found that "special emphasis" should be "placed on providing comprehensive family planning services to sexually active adolescents who desire such services in order to avoid unwanted pregnancies." S. Rep. No. 95-822, at 12 (1978); Def. Mot. at 32. In addition, Congress expressly sought to address "the serious health implications" and "the future adverse social impact on the adolescent mother imposed by the responsibilities of parenthood." S. Rep. No. 95-822, at 12; Def. Mot. at 32. Congress found that teen pregnancies in particular "are often unwanted and frequently result in adverse health, social, and economic consequences for the individuals and families involved." S. Rep. No. 95-822, at 27; Def. Mot. at 32. As a result of the serious health implications, Congress found it "imperative" to help adolescents avoid unplanned pregnancies. S. Rep. No. 95-822, at 30; Def. Mot. at 32-33. And, as also explained in Defendants' opening brief, Congress found that confidentiality is essential to ensure that adolescents have access to family planning services. Def. Mot. at 32-33.

Accordingly, Defendants are entitled to summary judgment on Claim No. 2.

III. EVEN IF THE COURT WERE TO AWARD RELIEF, ANY INJUNCTION SHOULD BE LIMITED TO THE PLAINTIFF

In their opening brief, Defendants showed that any relief should be tailored to provide the necessary relief to Plaintiff. Def. Mot. at 34-36. Plaintiff argues in response that his motion for class certification would "obviate" this issue. Pl. Mot. at 23. But as Defendants will demonstrate

in their response to the motion for class certification, Plaintiff's argument fails because the putative classes do not meet the requirements for certification under Rule 23 of the Federal Rules of Civil Procedure. Plaintiff further requests that, in the event "the Court denies class certification but grants Mr. Deanda's motion for summary judgment," the parties at that time file supplemental briefing on the scope of the remedy. *Id.* at 23.

Defendants maintain that Plaintiff has failed to establish that he is entitled to any relief, and that Defendants therefore are entitled to summary judgment on all claims. Def. Mot. at 34-36. Nonetheless, any relief in this case should be narrowly limited to provide relief to the Plaintiff as the Court may deem necessary. *Id.* at 34-36.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion for Summary Judgment on all claims and deny Plaintiff's Cross-Motion for Summary Judgment.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, I electronically transmitted the foregoing to the parties and the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court.

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