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

Alexander R. Deanda, on behalf of himself and others similarly situated,

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.

Case No. 2:20-cv-00092-Z

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College Avenue, Suite 207
Tyler, Texas 75702-7221
(903) 581-1776 (phone)
bryan@hughesfirm.com

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
1200 Summit Avenue, Suite 860
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Jonathan F. Mitchell
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Alex Yarbrough
Texas Bar No. 24079615
Riney & Mayfield LLP
320 South Polk Street, Suite 600
Amarillo, Texas 79101
(806) 468-3202 (phone)
(806) 376-4509 (fax)
ayarbrough@rineymayfield.com

Counsel for Plaintiff and the Proposed Classes

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I. The Defendants' Jurisdictional Objections Are Without Merit

The defendants continue to assert that Mr. Deanda's claims are untimely and that he lacks standing. Neither contention has merit.

A. Mr. Deanda's Claims Are Timely

The statute of limitations is inapplicable to Mr. Deanda's claims because he is seeking to prevent and enjoin *ongoing* conduct that he alleges to be unlawful. *See, e.g.*, *Leal v. Azar*, No. 2:20-CV-185-Z, 2020 WL 7672177, at *6–*7 (N.D. Tex. Dec. 23, 2020) (holding that "[s]tatutes of limitations are simply inapplicable" to lawsuits "seeking *prospective* relief for *ongoing* injuries." (emphasis in original)). The defendants try to get around *Leal* by asserting that Mr. Deanda is not challenging "direct or immediate action to enforce any aspect of the Title X program against him." Defs.' Br., ECF No. 35 at 4. But that observation has no bearing on the limitations question, which concerns whether Mr. Deanda is challenging conduct that occurred more than six years ago. He is clearly not doing so, because he is seeking only prospective relief that will stop the defendants from administering the Title X program in manner that violates Texas law and that violates his right to direct the upbringing on his children.

The defendants' remaining observations are likewise irrelevant to the limitations issue. Their assertions that Mr. Deanda "fails to show any violation of his legal rights at all" goes to the merits rather than the timeliness of Mr. Deanda's claims. *See* Defs.' Br., ECF No. 35 at 4. The same goes for their complaint that Mr. Deanda has failed to "identify any specific act or acts allegedly causing [a] violation" of his rights. *See id.* And Mr. Deanda is not challenging the "ongoing effects"[1] of a past government action; he is suing to stop the defendants from continuing to administer the Title X program in a manner that violates his rights under Texas law and the Constitution.

1. Defs.' Br., ECF No. 35 at 4.

That these actions began many years ago does nothing to change the fact that Mr. Mr. Deanda is seeking relief against the defendants' present and future actions.

B. Mr. Deanda Has Standing

The defendants deny that Mr. Deanda's theories of standing rest on a "concrete" injury,[2] but they are mistaken. Each of Mr. Deanda's four theories of standing easily surmounts the "concreteness" requirement, especially in light of the Supreme Court's recent pronouncement in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

1. Mr. Deanda's Loss Of Statutory Rights Under Section 151.001(6) of the Texas Family Code Is A Concrete Injury

The law of Texas gives Mr. Deanda and each of the putative class members a statutory right to consent to their child's medical and dental care, and psychiatric, psychological, and surgical treatment. *See* Tex. Family Code § 151.001(6). It is undisputed that the defendants have taken away this statutory right by insisting that Title X "preempts" section 151.001(6), and by administering a federal program that refuses to honor the state-law rights that Texas confers on parents.

The defendants deny that the loss of this state-law right qualifies as a "concrete" injury. *See* Defs.' Br., ECF No. 35 at 9. But they never even recite the test for "concreteness," let alone apply that test to the facts of this case. The Supreme Court has made clear that an injury qualifies as "concrete" if it bears a "close relationship" to harms "traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2200; *see also id.* ("Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm."). The Court explained in *TransUnion*:

2. *See* Defs.' Br., ECF No. 35 at 7.

> Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. And those traditional harms may also include harms specified by the Constitution itself.

TransUnion, 141 S. Ct. at 2204. The loss of a right to consent to a child's medical treatment is litigated all the time in divorce or child-custody proceedings, and a physician can be sued in tort for providing treatment to an unemancipated minor without securing informed consent. This surely qualifies as a harm "traditionally recognized as providing a basis for lawsuits in American courts." In addition, the right to direct the upbringing of one's children is an interest of constitutional magnitude, and *TransUnion* recognizes that "harms specified by the Constitution" will satisfy the "concreteness" requirement. *Id.*

2. Mr. Deanda And The Putative Class Members Are Suffering Injury From The Subversion Of Their Authority As Parents And The Loss Of Assurance That Their Children Will Be Unable To Access Family-Planning Services

The defendants criticize our reliance on *Parents United For Better Schools, Inc. v. School District of Philadelphia Board of Education*, 148 F.3d 260 (3d Cir. 1998), by observing that the Third Circuit did not actually analyze whether the parents had standing, but merely citied a state appellate-court opinion that had conferred standing on those parents. *See* Defs.' Br., ECF No. 35 at 11. True enough, but the Third Circuit *still* allowed the parents' claims to proceed in federal court—even though the Third Circuit had was duty-bound to dismiss the case on its own initiative if it thought that the parents' standing was problematic. And while the Supreme Court has cautioned us not to place undue weight on tacit jurisdictional holdings of this sort,[3] the

3. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings . . . have no precedential effect").

defendants present no argument that the Third Circuit erred in allowing those claims to proceed.

The defendants also try to distinguish *Parents United* by observing that the state appellate court had relied on a theory organizational standing, in which at least one of the association's members had alleged a "direct, immediate, and substantial injury." Defs.' Br., ECF No. 35 at 12 (quoting *Parents United For Better Schools, Inc. v. School District of Philadelphia Board of Education*, 646 A.2d 689, 692 (Pa. Cmwlth. 1994)). But the "direct, immediate, and substantial injury" that the state court recognized came from the school district's decision to distribute condoms to children—even though the program allowed parents to opt their children out of the program by mailing in a "veto form"—because parents suffered injury from the loss of their prerogative to "consent . . . before medical treatment [is] provided." *Id.* at 691. The injury asserted by Mr. Deanda and the putative class members is no different. The defendants point out that the plaintiffs' children in *Parents United* were students at the public schools where condoms were distributed, but the Title X program offers contraception to *any* person in the state of Texas—and Mr. Deanda's children (and the children of the putative class members) are as eligible to receive those services as anyone else. And the Title X program (unlike the Philadelphia public schools' condom-distribution program) does not even offer a "veto form" to objecting parents.

3. Mr. Deanda And The Putative Class Members Are Injured By Increased Risk That Their Children Might Access Birth Control Without Their Knowledge Or Consent

The defendants try to distinguish *Massachusetts v. EPA*, 549 U.S. 497 (2007), by insisting that a plaintiff may establish Article III injury from "increased risk" only when asserting a "procedural" right rather than a "substantive" right. *See* Defs.' Br., ECF No. 35 at 14. This claim has no basis in law. Courts have often endorsed "increased risk" theories of Article III injury when litigants assert substantive rights. *See*

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 74 (1978) (conferring standing to challenge to constitutionality of the Price-Anderson Act, which limits the liability of nuclear power plants, because of the plaintiffs' "concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions."); *Babbitt v. Farm Workers National Union*, 442 U.S. 289, 298 (1979) (holding that Article III injury exists when a plaintiff "demonstrate[s] a realistic danger of sustaining a direct injury as a result of [a] statute's operation or enforcement."). And *Massachusetts* did not in any way hold or insinuate that "increased risk" injuries can confer standing only when a procedural right is asserted; on the contrary, it indicated that an increased risk will *always* suffice to establish Article III injury. *See Massachusetts*, 549 U.S. at 525 n.23 ("[E]ven a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability" (citation and internal quotation marks omitted)).

II. Mr. Deanda Is Entitled To Judgment As A Matter Of Law

The defendants' efforts to defeat Mr. Deanda's substantive arguments are likewise unavailaing.

A. The Title X Statute Does Not Preempt Section 151.001(6)

There is simply no language in the Title X statute that preempts state parental-consent laws. The defendants quote language from non-binding court opinions that talk about the importance of "confidentiality,"[4] but none of that shows how the statutory language displaces the requirements of section 151.001(6). And the statutory requirement to "encourage" family participation "[t]o the extent practical" establishes a federally mandated *minimum* for parental involvement. 42 U.S.C. § 300(a). It does

4. *See* Defs.' Br., ECF No. 35 at 16 (quoting *Planned Parenthood v. Heckler*, 712 F.2d 650, 660 (D.C. Cir. 1983)).

not purport to forbid Title X programs from obtaining parental consent, and it certainly does not preempt or displace state laws that require more extensive parental involvement.

The defendants also have no answer to the statutory canons that disfavor preemption[5] and that require Congress to speak clearly when imposing conditions on the receipt of federal funds.[6] The defendants rely on non-binding court decisions that have held that Title X preempts state parental-consent laws. See Defs.' Br., ECF No. 35 at 18 (citing authorities). But none of those cases even acknowledges the presumption against preemption or the clear-statement rule of *Pennhurst*, let alone explains how those presumptions have been overcome.

The defendants' reliance on the Title XX statute, which contains an explicit and federally mandated parental-consent requirement, does nothing to undermine Mr. Deanda's argument because Mr. Deanda is not contending (and has never contended) that the Title X compels parental consent as a federal requirement. He is claiming only that 42 U.S.C. § 300(a) does not preempt state laws that require more extensive parental involvement than the minimum floor established by the Title X statute. And the defendants' reliance on *Planned Parenthood of Houston & Southeast Texas v.*

5. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993) ("We are reluctant to infer pre-emption.").
6. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (same); *Will v. Michigan Dep't of Police*, 491 U.S. 58, 65 (1989) ("Congress should make its intention 'clear and manifest' . . . if it intends to impose a condition on the grant of federal moneys" (citation omitted); *see also NFIB v. Sebelius*, 567 U.S. 519, 576–77 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.); *id.* at 676 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

Sanchez, 403 F.3d 324 (5th Cir. 2005), is no help because because Texas is not purporting to impose conditions on the receipt of federal funds; it is simply insisting that Title X participants comply with the state's generally applicable laws.

B. The Defendants' Administration Of The Title X Program Violates The Constitutional Right Of Parents To Direct The Upbringing Of Their Children

The defendants continue to insist that the constitutional right of parents to direct the upbringing of their children is implicated only by coercive government policies, rather than by voluntary programs that offer birth control and prescription contraception to minors without parental consent. *See* Defs.' Br., ECF No. 35, at 20–21 (citing *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980); *Anspach v. Philadelphia*, 503 F.3d 256, 262 (3d Cir. 2007)). But the Supreme Court has never imposed such a limit on the constitutional right of parents to direct their children's upbringing, and there is no reason for this Court to do so either for the reasons explained in Mr. Deanda's previous brief. *See* Pls.' Cross-MSJ, ECF No. 30, at 19–21.

And the defendants are wrong to say that rational-basis review should apply. *See* Defs.' Br., ECF No. 35, at 22–24 (citing *Littlefield v. Forney Independent School District*, 268 F.3d 275, 291 (5th Cir. 2001)). *Littlefield* makes clear that rational-basis review applies only when parental rights are asserted in the context of public education. *See Littlefield*, 268 F.3d at 289 ("We . . . follow almost eighty years of precedent analyzing parental rights *in the context of public education* under a rational-basis standard." (emphasis added)); *id.* at 291 ("*Troxel* does not change the above reasoning in the context of parental rights *concerning public education*." (emphasis added)); *id.* ("[A] rational-basis test is the appropriate level of scrutiny for parental rights *in the public school context*." (emphasis added)).

CONCLUSION

The plaintiff's motion for summary judgment should be granted, and the defendants' motion for summary judgment should be denied.

Respectfully submitted.

/s/ Jonathan F. Mitchell

JONATHAN F. MITCHELL
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

D. BRYAN HUGHES
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College Avenue, Suite 207
Tyler, Texas 75702-7221
(903) 581-1776 (phone)
bryan@hughesfirm.com

H. DUSTIN FILLMORE III
Texas Bar No. 06996010
CHARLES W. FILLMORE
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
1200 Summit Avenue, Suite 860
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

ALEX YARBROUGH
Texas Bar No. 24079615
Riney & Mayfield LLP
320 South Polk Street, Suite 600
Amarillo, Texas 79101
(806) 468-3202 (phone)
(806) 376-4509 (fax)
ayarbrough@rineymayfield.com

Counsel for Plaintiff and the Proposed Classes

Dated: September 10, 2021

CERTIFICATE OF SERVICE

I certify that on September 10, 2021, I served this document through CM/ECF upon:

AMBER RICHER
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, D.C. 20530
(202) 514-3489
amber.richer@usdoj.gov

Counsel for the Defendants

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiff and the Proposed Classes