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

VICTOR LEAL, *et al.*, Plaintiffs, v. ALEX M. AZAR II, *et al.*, Defendants.	Civil Action No. 2:20-CV-185-Z

FEDERAL DEFENDANTS' MOTION TO DISMISS
COMPLAINT PURSUANT TO RULES 12(B)(1) AND 12(B)(6)

ERIN NEALY COX
United States Attorney

Brian W. Stoltz
Assistant United States Attorney
Texas Bar No. 24060668
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8626
Facsimile: 214-659-8807
brian.stoltz@usdoj.gov

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

CHRISTOPHER M. LYNCH
(D.C. Bar # 1049152)
Trial Attorney
U.S. Department of Justice
Civil Division
1100 L Street, NW
Washington, D.C. 20005
Telephone: (202) 353-4537
Fax: (202) 616-8460
Email: Christopher.M.Lynch@usdoj.gov

Attorneys for Federal Defendants Alex M. Azar,
Steven T. Mnuchin, Eugene Scalia, and the United States

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

LEGAL STANDARD 4

ARGUMENT 5

I. THE COURT HAS NO JURISDICTION AND THIS CASE SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(1) 5

A. Plaintiffs Have No Standing to Sue 5

1. Plaintiffs Leal and Von Dohlen 5

2. Plaintiff Armstrong 9

B. Plaintiffs' Claims Are Time Barred 11

II. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM 13

A. Plaintiffs Leal and Von Dohlen's Claims Are Barred by *Res Judicata* 13

B. Plaintiffs Fail to State a Claim for Violation of the Appointments Clause 17

C. The Contraceptive Mandate Does Not Violate Nondelegation Precedents 21

D. Plaintiffs Leal and Von Dohlen Fail to Allege a Violation of the Religious Freedom Restoration Act 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Am. Power & Light Co. v. SEC,
329 U.S. 90 (1946) 22

Anderson v. Wells Fargo Bank, N.A.,
953 F.3d 311 (5th Cir. 2020) 13

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 4, 24

Barr v. American Association of Political Consultants,
140 S. Ct. 2335 (2020) 19

BCCA Appeal Grp. v. EPA,
355 F.3d 817 (5th Cir. 2003) 17

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 4

Bennett v. Spear,
520 U.S. 154 (1997) 7, 8

Big Time Vapes, Inc. v. FDA,
963 F.3d 436 (5th Cir. 2020) 21, 23

Bonelli v. Gov't of Virgin Islands,
No. 2015-0047, 2017 WL 3208971 (V.I. July 28, 2017) 12

Carr v. Comm'r, SSA,
961 F.3d 1267 (10th Cir. 2020) 17

Clapper v. Amnesty Int'l, USA,
568 U.S. 398 (2013) 7, 11

Colonial Oaks Assisted Living Lafeyette, LLC v. Hannie Dev., Inc.,
--- F.3d ----, 2020 WL 5015453 (5th Cir. Aug. 25, 2020) 15, 17

Consumer Fin. Prot. Bureau v. Gordon,
819 F.3d 1179 (9th Cir. 2016) 19

Croft v. Governor of Tex.,
562 F.3d 735 (5th Cir. 2009) 5

D.R. Horton, Inc. v. NLRB,
737 F.3d 344 (5th Cir. 2013) 18

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 4

Dall. S. Mill, Inc. v. Kaolin Mushroom Farms, Inc.,
No. 3:05-CV-1890-B, 2006 WL 8437487 (N.D. Tex. Aug. 10, 2006) 5

DeOtte v. Azar,
393 F. Supp. 3d 490 (N.D. Tex. 2019) 3, 6

Doe v. Tangipahoa Par. Sch. Bd.,
494 F.3d 494 (5th Cir. 2007) 9

Ellis v. Amex Life Ins. Co.,
211 F.3d 935 (5th Cir. 2000) 13, 14

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 8, 10

Grant ex rel. Family Eldercare v. Gilbert,
324 F.3d 383 (5th Cir. 2003) 5

Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives,
920 F.3d 1 (D.C. Cir. 2019) 19

Guidry v. Bank of LaPlace,
954 F.2d 278 (5th Cir. 1992) 24

In re DBC,
545 F.3d 1373 (Fed. Cir. 2008) 18

In re The Compl't of RLB Contracting, Inc., as Owner of the Dredge Jonathan King Boyd its Engine, Tackle, & Gear for Exoneration or Limitation of Liab. v. Butler,
773 F.3d 596 (5th Cir. 2014) 4

Inclusive Cmtys. Project, Inc. v. Dep't of Treasury,
946 F.3d 649 (5th Cir. 2019) 7, 8, 10

Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Board,
574 F.3d 748 (D.C. Cir. 2009) 17

Island Creek Coal Co. v. Bryan,
937 F.3d 738 (6th Cir. 2019) 18

KERM, Inc. v. FCC,
353 F.3d 57 (D.C. Cir. 2004)..... 6

Little Sisters of the Poor v. Pennsylvania,
140 S. Ct. 2367 (2020)..... 10, 22

Lucia v. SEC,
138 S. Ct. 2044 (2018)..... 17

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) ..... *passim*

Machete Prods., LLC v. Page,
809 F.3d 281 (5th Cir. 2015) 4

Murry v. Tangherlini,
No. 4:12-CV-744-A, 2013 WL 1408763 (N.D. Tex. Apr. 8, 2013)..... 13

Nat'l Wildlife Fed'n v. EPA,
286 F.3d 554 (D.C. Cir. 2002)..... 17

Nilsen v. City of Moss Point.,
701 F.2d 556 (5th Cir. 1983) 13

Norris v. Hearst Tr.,
500 F.3d 454 (5th Cir. 2007) 13

Prager v. El Paso Nat'l Bank,
417 F.2d 1111 (5th Cir. 1969) 14

Priests for Life v. U.S. Dep't of Health & Human Servs.,
808 F.3d 1 (D.C. Cir. 2015)..... 24

Procter & Gamble Co. v. Amway Corp.,
376 F.3d 496 (5th Cir. 2004) 13

Rodriguez de Quijas v. Shearson/Am.Express, Inc.,
490 U.S. 477 (1989) 22

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 7

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers,
239 F. Supp. 3d 77, 84 (D.D.C. 2017)……..…….... 12

Texas v. Rettig,
--- F.3d ---, 2020 WL 4376829 (5th Cir. Aug. 31, 2020) 11

United States v. Comrie,
842 F.3d 348 (5th Cir. 2016) 23

United States v. Huntsberry,
956 F.3d 270 (5th Cir. 2020) 13

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 21, 22

Whole Women's Health v. Hellerstedt,
136 S. Ct. 2292 (2016) 15, 16

Statutes

28 U.S.C. § 1658 12

28 U.S.C. § 2401 11

42 U.S.C. § 300gg-13 ..... *passim*

42 U.S.C. § 2000bb-1 ..... 23, 24

Public Health Services Act, § 202 n.1 18

Rules

Federal Rule of Civil Procedure 12(b)(1) 1, 3, 4, 5

Federal Rule of Civil Procedure 12(b)(6) 1, 3, 4, 13

Federal Rule of Evidence 201 13

Regulations

31 Fed. Reg. 8855, 80 Stat. 1610 18

47 Fed. Reg. 38409 (Aug. 31, 1982) 21

75 Fed. Reg. 41,726 (July 19, 2010) 9, 10

76 Fed. Reg. 46,621 (Aug 3, 2011) 9, 11, 21

77 Fed. Reg. 16,501 (Mar. 21, 2012) 20

78 Fed. Reg. 39,870 (July 2, 2013)..... 18, 20

82 Fed. Reg. 47,792 (Oct. 13, 2017)..... 9, 10

83 Fed. Reg. 57,536 (Nov. 15, 2018)..... 2, 18, 20

INTRODUCTION

In this action, Plaintiffs Victor Leal and Patrick Von Dohlen challenge regulations that do not apply to them because another court in this District has already enjoined the regulations' enforcement against them. Plaintiffs attempt to circumvent the preclusive effect of this prior judgment and their resultant lack of injury by claiming that private health insurers—third parties not before the Court—have chosen not to issue them the health insurance plan they would prefer. But no federal law or action of Defendants[1] requires the third parties to have made this choice. This fails to satisfy the requirements of Article III standing, and the doctrine of *res judicata* additionally bars Plaintiffs from bringing new theories to litigate a case they have already won.

In an attempt to escape this obvious defect, Plaintiffs Leal and Von Dohlen have been joined by Plaintiff Kim Armstrong, who claims a distinct injury from that claimed by Leal and Von Dohlen. But this does not help Plaintiffs, as Armstrong fails to establish any cognizable injury redressable by the Court.

Plaintiffs fare no better on the merits of their constitutional and RFRA claims. Even if Plaintiffs had satisfied the procedural requirements for each of these claims (and they have not), Congress delegated authority to HHS using an intelligible principle and the duly appointed Secretary of HHS repeatedly ratified the Health Resources and Services Administration's ("HRSA") exercise of that delegated authority, negating any possible concern regarding the appointment of HRSA's Administrator. Plaintiffs also cannot allege that the government—as opposed to private actors—has burdened their religious exercise. Plaintiffs' Complaint should be dismissed under either Rule 12(b)(1) or 12(b)(6).

[1] As used herein, "Defendants" refers to the United States of America, Secretary of Health and Human Services ("HHS") Alex M. Azar II, Secretary of the Treasury Steven T. Mnuchin, and Secretary of Labor Eugene Scalia.

BACKGROUND

The Affordable Care Act requires health insurers to provide coverage for certain preventive services without requiring the insured to share the cost of those services. 42 U.S.C. § 300gg-13. As the practice of medicine is continually advancing, Congress made the judgment to incorporate the evolving recommendations of medical experts as to what constitutes critical preventive services, rather than identifying a fixed list of services that insurers must cover. *See id*. Among the preventive care guidelines that Congress incorporated were "comprehensive guidelines" for women's preventive care and screenings supported by HRSA. *Id.* § 300gg-13(a)(4). Because such guidelines did not exist when the statute was enacted in 2010, the Institute of Medicine was asked to prepare a report with recommendations, which HRSA accepted and supported for this purpose in 2011. Since 2011, these guidelines have called for most insurance plans to cover all FDA-approved contraceptive methods for women. *See* Compl. ¶ 16, ECF No. 1. This requirement, sometimes referred to as the "Contraceptive Mandate," has been implemented through "notice-and-comment[] regulations" promulgated jointly by the Secretary of Health and Human Services, Secretary of the Treasury, and Secretary of Labor. *Id.* ¶ 17. The Secretaries have "solicited public comments on a number of occasions" regarding implementation of the Contraceptive Mandate, including in the course of "issuing and finalizing three interim final regulations prior to 2017." *Id.* Ex. 5, 83 Fed. Reg. 57,536, 57,539 (Nov. 15, 2018). These implementing regulations "defined the scope of permissible exemptions and accommodations for certain religious objectors" to the Contraceptive Mandate. *Id.*

In 2018, the Departments issued a final rule "giv[ing] individual religious objectors the option of purchasing health insurance that excludes contraception from any willing health insurance issuer." Compl. ¶ 20. Although enforcement of the 2018 final rule was enjoined on the

day it was to take effect,[2] *see id.* ¶ 21, litigation was filed in this District contending that the 2018 final rule's exemption for religious objectors was required by the Religious Freedom Restoration Act ("RFRA"). *Id.* ¶ 22; *see DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019). The court in *DeOtte* certified a class of individuals who "(1) object to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs; and (2) would be willing to purchase or obtain health insurance that excludes coverage or payments for some or all contraceptive services," Compl. Ex. 8 at 1, and "permanently enjoined federal officials from enforcing the Contraceptive Mandate against any religious objector protected by the [2018] final rule," Compl. ¶ 22.

Plaintiff Victor Leal initially brought an action in Texas state court, challenging the Contraceptive Mandate on various grounds, which Defendants removed to federal court, and moved to dismiss. *See, e.g.*, Federal Defendants' Motion to Dismiss First Amended Complaint Pursuant to Rules 12(b)(1) and 12(b)(6), *Leal v. Azar*, No. 2:20-cv-124-Z (N.D. Tex.) at 3. In response to Defendants' motion to dismiss, Plaintiffs filed a First Amended Complaint, withdrawing a number of claims, and adding two additional Plaintiffs, Patrick Von Dohlen and Kim Armstrong. *Id.* Defendants filed a motion to dismiss Plaintiffs' First Amended Complaint, which this Court granted on September 24, 2020. As in Defendants' initial motion to dismiss, Defendants argued, *inter alia*, that the doctrine of derivative jurisdiction precludes the Court from hearing that removed case. *See id.* at 11-12. Apparently in response to Defendants' derivative jurisdiction argument, Plaintiffs filed this substantively identical complaint directly in federal court on August 1, 2020, alleging that the statute under which the Contraceptive Mandate was

[2] On July 8, 2020, the Supreme Court reversed the injunction. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020).

promulgated violates the Appointments Clause and the nondelegation doctrine and that the Contraceptive Mandate violates RFRA.

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), a plaintiff bears the burden to establish a court's jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). It is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted).

Under both Rule 12(b)(1) and Rule 12(b)(6), to survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). While the Court accepts well-pleaded factual allegations as true, "mere conclusory statements" and "legal conclusion[s] couched as . . . factual allegation[s]" are "disentitle[d] . . . to th[is] presumption of truth." *Id*. at 678, 681 (citation omitted).

While courts apply the plausibility standard under both rules, "in examining a Rule 12(b)(1) motion, a district court is empowered to find facts as necessary to determine whether it has jurisdiction." *Machete Prods., LLC v. Page*, 809 F.3d 281, 287 (5th Cir. 2015). Accordingly, "the district court may consider evidence outside the pleadings and resolve factual disputes." *In re*

The Compl't of RLB Contracting, Inc., as Owner of the Dredge Jonathan King Boyd its Engine, Tackle, & Gear for Exoneration or Limitation of Liab. v. Butler, 773 F.3d 596, 601 (5th Cir. 2014).

ARGUMENT

I. THE COURT HAS NO JURISDICTION AND THIS CASE SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(1)

A. Plaintiffs Have No Standing to Sue

1. Plaintiffs Leal and Von Dohlen

"As held by the Supreme Court, standing is an essential and unchanging part of the case-or-controversy requirement of Article III of the United States Constitution. Indeed, standing determines a court's fundamental power to even hear a suit." *Dall. S. Mill, Inc. v. Kaolin Mushroom Farms, Inc.*, No. 3:05-CV-1890-B, 2006 WL 8437487, at *3 (N.D. Tex. Aug. 10, 2006) (citing *Lujan*, 504 U.S. at 560; *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 386 (5th Cir. 2003)). To meet this burden to establish standing, Plaintiffs must establish three elements: "(1) an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury." *Croft v. Governor of Tex.*, 562 F.3d 735, 745 (5th Cir. 2009). Because Plaintiffs Leal and Von Dohlen cannot show *any* of these three elements are present here, the Complaint must be dismissed.

First, Plaintiffs Leal and Von Dohlen have no legally cognizable injury. The injury they allege, based on "defendants' enforcement of the federal Contraceptive Mandate," Compl. ¶ 37, cannot satisfy the requirements of Article III, because as Plaintiffs admit, another court in this District has already "permanently enjoined federal officials from enforcing the Contraceptive Mandate against any religious objector," including Plaintiffs Leal and Von Dohlen. *Id.* ¶ 22; *see id.* Ex. 8. One would be hard-pressed to find a more textbook illustration of an action failing to

satisfy the case or controversy requirement of Article III than this one: Here, Plaintiffs Leal and Von Dohlen challenge a law that undisputedly does not apply to them because another court has already so held. *See* Compl. ¶¶ 20, 22 & Ex. 8; *see generally DeOtte*, 393 F. Supp. 3d 490. Plaintiffs Leal and Von Dohlen nowhere contend that Defendants are enforcing the Contraceptive Mandate against them in violation of *DeOtte*'s explicit injunction. In the absence of any allegation that the challenged regulation applies to or is being enforced against them *at all*, Plaintiffs Leal and Von Dohlen have no cognizable injury in fact. *See, e.g., KERM, Inc. v. FCC*, 353 F.3d 57, 59 (D.C. Cir. 2004) ("Where a petitioner is not subject to the administrative decision it challenges, courts are particularly disinclined to find that the requirements of standing are satisfied.").

Instead, Plaintiffs Leal and Von Dohlen merely allege that the existence of the Contraceptive Mandate "*restricts the available options* on the market to consumers who hold religious objections to contraceptive coverage." Compl. ¶ 34 (emphasis added); *see also id.* ("*[F]ew if any* insurance companies are offering health insurance of th[e] sort [that excludes contraception to religious objectors].") (emphasis added); *id.* ¶ 36 (alleging Texas Contraceptive Equity Law "drastically *limits* the scope of *acceptable* health insurance that Mr. Leal and Mr. Von Dohlen can purchase") (emphasis added). But Plaintiffs Leal and Von Dohlen's allegation that their options to choose health insurance coverage are narrower than they would prefer is insufficient to establish a cognizable injury, as there is no legally protected right to an unfettered choice in health insurance coverage. Indeed, they do not even allege that they are unable to purchase insurance for their families that excludes contraceptive coverage or that no such health insurance is available to them. In short, Plaintiffs Leal and Von Dohlen's mere wish that third parties were willing to offer their families more (and more preferable) options for contraception-free health insurance fails to establish the requisite injury-in-fact.

Article III standing also requires a plaintiff to show "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. Federal courts have jurisdiction only if the plaintiff's injury "fairly can be traced to the challenged [conduct] of the defendant, and [does] not . . . result[] from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). Courts are "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 (2013). Thus, when the plaintiff's asserted injury "depends on the unfettered choices made by independent actors not before the courts," standing ordinarily becomes "substantially more difficult to establish." *Lujan*, 504 U.S. at 562 (citations omitted); *see also Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655–56 (5th Cir. 2019) ("Those standards make it difficult for a plaintiff to establish standing to challenge a government action if he isn't its direct object."). In these circumstances, the plaintiff must show that the government's action will have a "determinative or coercive effect upon the action of" those third parties. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

Here, Plaintiffs Leal and Von Dohlen concede that the challenged federal Contraceptive Mandate does not apply to them, because another court in this District "permanently enjoined federal officials from enforcing [it] against any religious objector" and that "the protections conferred by the Trump Administration's final rule," which "give[s] individual religious objectors the option of purchasing health insurance that excludes contraception from any willing health insurer," "are in full force and effect" as a result of the *DeOtte* injunction. Compl. ¶¶ 20, 22. This concession is fatal to Plaintiffs Leal and Von Dohlen's contention that their putative injury is sufficiently traceable to Defendants to satisfy Article III.

Instead of challenging the actions of Defendants, Plaintiffs Leal and Von Dohlen allege that "few if any insurance companies are currently offering health insurance that excludes coverage for contraception" even though "the *DeOtte* injunction permits issuers of health insurance to issue group or individual health insurance that excludes contraception to religious objectors." *Id.* ¶¶ 23, 34. But this is simply admitting that their putative injury "depends on the unfettered choices made by independent actors not before the [Court]"—the insurance companies—and that those companies are freely "permit[ted] . . . to issue" the type of insurance Plaintiffs Leal and Von Dohlen want. *Lujan*, 504 U.S. at 562; Compl. ¶ 34. Although "few . . . are currently" choosing to do so, *id.* ¶ 23, Defendants' actions can necessarily have no "determinative or coercive effect" upon the actions of these third parties, given these parties are expressly permitted by law to do what Plaintiffs Leal and Von Dohlen wish. *Bennett*, 520 U.S. at 169.

For the same reasons, Plaintiffs Leal and Von Dohlen also cannot satisfy the third required element of standing. To do so, a plaintiff must show that "it is *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision." *Inclusive Cmtys. Project*, 946 F.3d at 655 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)) (emphasis added). Here, the Contraceptive Mandate already does not apply to Plaintiffs Leal and Von Dohlen by virtue of the *DeOtte* injunction, and insurers remain free to offer them health insurance without contraceptive coverage. Compl. ¶ 34. Invalidating the Contraceptive Mandate would leave Plaintiffs Leal and Von Dohlen in the same position: They would be, just as they are now, subject to the market-based choices of issuers of health insurance, and those insurers would be free to offer health insurance with or without contraceptive coverage as they see fit. Whether those insurers would choose to offer a different menu of health insurance products in that scenario can only be the subject of speculation, which is insufficient to establish

standing.

2. Plaintiff Armstrong

Like Plaintiffs Leal and Von Dohlen, Plaintiff Armstrong lacks standing to challenge the Contraceptive Mandate, because she has not shown that the mandate harms her. "Standing to sue must be proven, not merely asserted." *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 496–97 (5th Cir. 2007) (en banc). Here, Armstrong does not allege that the mere presence of contraceptive coverage in her insurance plan injures her, or that her purchase of a plan that includes contraceptive coverage enables conduct she finds religiously objectionable; she asserts only that "non-religious objectors such as" herself "are forced to pay higher premiums for health insurance that covers contraceptive services that they do not want or need." Compl. ¶ 35. But that allegation is no more than the mere speculation that, in the absence of the Contraceptive Mandate, Armstrong would have access to insurance plans that omit contraceptive coverage and that cost less as a result. She does not allege any facts showing that, but for the Contraceptive Mandate, she would have access to a plan with lower premiums.

With good reason. Armstrong's speculation runs against the agencies' determination over the course of years of rulemaking that insurers likely would not charge lower premiums even if they decided to offer a plan that omits contraceptive coverage. The agencies that administer § 300gg-13(a)(4) have concluded throughout their rulemakings that "compliance with the contraceptive Mandate is cost-neutral to issuers." 82 Fed. Reg. 47,792, 47,819 (Oct. 13, 2017); *see also* 76 Fed. Reg. 46,621 (Aug 3, 2011) (initial regulation implementing Contraceptive Mandate noting "[t]he Departments expect that this amendment will not result in any additional significant burden or costs to the affected entities"). Indeed, cost-savings, or at the very least cost-neutrality, are among the purposes of requiring coverage for preventive services: by preventing conditions

that require expensive medical care (like pregnancy), use of preventive services (like contraception) reduces the costs of insurance and can result in lower premiums. *See* 75 Fed. Reg. 41726, 41731, 41733 (July 19, 2010) (noting that "some of the benefits of preventive services accrue to society as a whole" and that "some of the recommended preventive services will result in savings due to lower healthcare costs"); *see also* 82 Fed. Reg. at 47,819. True, when the agencies issued their rules regarding the current conscience exemptions, upheld recently by the Supreme Court in *Little Sisters*, 140 S. Ct. 2367, the agencies acknowledged that it was possible "premiums may be expected to adjust to reflect changes in coverage" for plans that dropped contraceptive coverage under the exemption. 82 Fed. Reg. at 47,819. But the mere *possibility* that premiums might be different absent the Contraceptive Mandate is not sufficient to show that the Contraceptive Mandate has made Armstrong's premiums higher.

That deficiency also means that Armstrong cannot show this lawsuit will redress her alleged injury. She must show that, if she prevails in this case, insurers would likely offer her a plan that is lower in price because it excludes contraceptive coverage. *See, e.g.*, *Inclusive Cmtys. Project*, 946 F.3d at 655 (plaintiff must show that "it is *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision." (emphasis added) (quoting *Friends of the Earth*, 528 U.S. at 181)). She has provided no basis for that conclusion except for one sentence in the Complaint speculating that the Contraceptive Mandate causes higher premiums. *See* Compl. ¶ 35 ("The federal Contraceptive Mandate also inflicts injury in fact on non-religious objectors such as Ms. Armstrong, who are forced to pay higher premiums for health insurance that covers contraceptive services that they do not want or need."). That conclusion is too speculative to establish standing. But even if the conclusion that the Contraceptive Mandate has raised premiums were itself more than speculative, any theory about what insurers would do if it were invalidated

would still be "speculation about 'the unfettered choices made by independent actors not before the court.'" *Clapper*, 568 U.S. at 414 n.5 (citation omitted). She therefore has failed to establish standing in this case.

B. Plaintiffs' Claims Are Time Barred

All of Plaintiffs' claims against Defendants are barred by the applicable statutes of limitations. Plaintiffs claim (1) that the preventive services provision in the ACA under which the Contraceptive Mandate was promulgated, 42 U.S.C. § 300gg-13(a)(4), which was "signed into law" on March 23, 2010, violates the Appointments Clause and the Nondelegation Doctrine, and (2) that the Contraceptive Mandate violates RFRA. Compl. ¶ 44 n.1, *see generally id.* ¶¶ 38-50. Regardless of when these claims accrued, they are stale. This failure to bring timely claims deprives the Court of jurisdiction. *See Texas v. Rettig*, --- F.3d ---, 2020 WL 4376829 at *5 (5th Cir. Aug. 31, 2020) (noting "unlike the ordinary world of statutes of limitations, . . . the failure to sue the United States within the limitations period deprives [courts] of jurisdiction" because "[t]he United States enjoys sovereign immunity unless it consents to suit, and the terms of its consent circumscribe [a court's] jurisdiction" and "[t]he applicable statute of limitations is one such term of consent").

The preventive services provision of the ACA has now been in effect for more than 10 years. *See* Compl. ¶ 44 n.1. Likewise, the Contraceptive Mandate, promulgated in August 2011, has been law for 9 years and in effect for 8 years. *See id.* ¶¶ 16 & 17 (recognizing August 2011 promulgation of the Contraceptive Mandate); 76 Fed. Reg. 46,621, 46,624 (Aug. 3, 2011) (noting that "[u]nder the July 19, 2010 interim final rules, group health plans and insurance issuers do not have to begin covering preventive services supported in HRSA guidelines until the first plan or policy year that begins one year after the guidelines are issued" and explaining that interim final rules were issued because providing the opportunity for comment before issuing the guidelines as

final "would mean that many students could not benefit from the new prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013-14 school year, as opposed to the 2012-13 school year").

Plaintiffs' constitutional claims are barred under the six-year statute of limitations governing civil actions against the United States. 28 U.S.C. § 2401(a) ("Except as provided by chapter 71 of title 41 [relating to contracting disputes], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). The statute is unequivocal: Plaintiffs were required to file their claims within six years of the claims' accrual, which in turn could have been no later than when the Contraceptive Mandate took effect eight years ago. Plaintiffs cannot bring them at this late date.

Plaintiffs' RFRA claim fares no better. Indeed, it is governed by an even shorter limitations period than the constitutional claims. RFRA claims are subject to the four year statute of limitations set forth in 28 U.S.C. § 1658(a), which provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." *See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 84 (D.D.C. 2017); *Bonelli v. Gov't of Virgin Islands*, No. 2015-0047, 2017 WL 3208971, at *3 (V.I. July 28, 2017) ("Since the RFRA does not provide a statute of limitations and was enacted after 1990, any action under the RFRA must be brought within four years from the date that the cause of action accrues."). And here, too, Plaintiffs' challenge to the Contraceptive Mandate under RFRA can have accrued no later than the mandate took effect eight years ago. Like their constitutional claims, Plaintiffs' RFRA claim is barred.

II. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM

A. Plaintiffs Leal and Von Dohlen's Claims Are Barred by *Res Judicata*

As Plaintiffs concede in the Complaint, another court in this District "permanently enjoined federal officials from enforcing the Contraceptive Mandate against any religious objector" by giving "individual religious objectors [like Plaintiffs Leal and Von Dohlen] the option of purchasing health insurance that excludes contraception from any willing health insurer." Compl. ¶¶ 20, 22. The final judgment in that action, *DeOtte v. Azar*, 4:18-cv-825-O (N.D. Tex.), bars all of Plaintiffs Leal and Von Dohlen's claims in this case by *res judicata*, because the claims in both cases all arise from a "common nucleus of operative facts, and could have been brought in the first lawsuit." *Murry v. Tangherlini*, No. 4:12-CV-744-A, 2013 WL 1408763, at *4 (N.D. Tex. Apr. 8, 2013) (citing *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 (5th Cir. 2004); *Nilsen v. City of Moss Point.*, 701 F.2d 556, 561 (5th Cir. 1983)). Indeed, Plaintiffs Leal and Von Dohlen attack the identical decade-old regulations as in the prior suit for identical reasons. Pursuant to the judgment in that case, these regulations can no longer be applied to them; they cannot raise new legal theories to attack the regulations now.

In the Fifth Circuit,

> [r]es judicata is appropriate if: 1) the parties to both actions are identical (or at least in privity); 2) the judgment in the first action is rendered by a court of competent jurisdiction; 3) the first action concluded with a final judgment on the merits; and 4) the same claim or cause of action is involved in both suits.

Ellis v. Amex Life Ins. Co., 211 F.3d 935, 937 (5th Cir. 2000). Each of these elements is satisfied here.[3]

[3] "[D]ismissal under Rule 12(b)(6) is appropriate if the *res judicata* bar is apparent from the complaint and judicially noticed facts . . . ." *Anderson v. Wells Fargo Bank, N.A.*, 953 F.3d 311, 314 (5th Cir. 2020). Here, Plaintiffs plead the facts related to the *DeOtte* case in their Complaint and attach the judgment as an exhibit to their Complaint. Moreover, "[i]t is well-settled that courts

First, the parties here are—at a minimum—in privity with those in *DeOtte*. Plaintiffs Leal and Von Dohlen allege that they have no desire to purchase health insurance that includes contraceptive coverage because "[they] are devout Roman Catholics who oppose all forms of birth control, and they want to purchase health insurance that excludes coverage of contraception. . . ." Compl. ¶ 31. As such, Plaintiffs Leal and Von Dohlen are members of the plaintiff class certified in *DeOtte* that includes

> [a]ll current and future individuals in the United States who: (1) object to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs; and (2) would be willing to purchase or obtain health insurance that excludes coverage or payments for some or all contraceptive services . . . .

Id. Ex. 8 at 1.[4]

The second and third criteria for *res judicata* are also satisfied: The *DeOtte* court entered final judgment in favor of the plaintiffs (including Plaintiffs Leal and Von Dohlen), which involved a challenge to a federal regulation on the ground that the regulation violated a federal statute, on July 29, 2019.[5] *See id.* at 1-2.

Finally, this case arises from the same "transaction or occurrence" as *DeOtte*. The Fifth Circuit "appl[ies] a 'transactional' test in determining whether two suits involve the same claim, where the 'critical issue' is 'whether the plaintiff bases the two actions on the same nucleus of

---

may judicially notice court records as evidence of judicial actions," and Defendants request that the Court take judicial notice of the cited records in the *DeOtte* case pursuant to FRE 201. *United States v. Huntsberry*, 956 F.3d 270, 285 (5th Cir. 2020); *see also Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.").

[4] Plaintiffs here are also represented by the same counsel that represented the plaintiffs in *DeOtte*.

[5] Although the final judgment in *DeOtte* has been appealed, the District Court judgment continues to have preclusive effect pending the appeal. *See, e.g., Prager v. El Paso Nat'l Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969) ("The fact that the judgment is now on appeal to the New Mexico Supreme Court (where it remains undecided) has no effect on its absolute effect as a bar.").

operative facts.'" *Ellis*, 211 F.3d at 938. *DeOtte* was premised on the facts that "Federal regulations require health insurance to cover all FDA-approved contraceptive methods," which the plaintiffs claimed "substantially burdens the religious exercise of employers and individuals who object to contraception and abortifacients," leading the plaintiffs to "seek an injunction against [their] enforcement." Am. Compl., *DeOtte*, at 1-2. As the Complaint makes clear, the identical facts underlie this action. Here, Plaintiffs allege,

> In 2011, the Health Resources and Services Administration issued an edict that compels private insurance to cover all forms of FDA-approved contraceptive methods. . . . This makes it impossible for individuals to purchase health insurance unless they agree to subsidize other people's contraception, even though millions of Catholics . . . regard the use of contraception . . . as . . . contrary to the teachings of their religious faith. . . . Plaintiffs Victor Leal[and] Patrick Von Dohlen . . . are suffering injury from the defendants' enforcement of th[is] contraceptive coverage mandate[].

Compl. at 1-2. In short, the Contraceptive Mandate no longer applies to Plaintiffs Leal and Von Dohlen; they cannot raise new theories attacking it now based on the same alleged injury.

In their substantively identical case previously pending before this Court, Plaintiffs contended in opposition that the Supreme Court's decision in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2922 (2016) precludes the application of *res judicata* here. *See* Brief in Opposition to Federal Defs.' Mot to Dismiss, *Leal v. Azar* ("*Leal 1*"), 2:20-CV-124-Z (N.D. Tex.), ECF No. 22. Plaintiffs are wrong.

First, *Hellerstedt* did not abrogate the Fifth Circuit test for *res judicata*, which the court has applied on numerous occasions since *Hellerstedt* was issued. *See, e.g.*, *Colonial Oaks Assisted Living Lafeyette, LLC v. Hannie Dev., Inc.*, --- F.3d ----, 2020 WL 5015453 at *5 (5th Cir. Aug. 25, 2020).

Second, Plaintiffs cannot draw a material distinction between *DeOtte* and the instant case. Their claim that "factual developments" now permit a "facial challenge" as opposed to the previous

"as applied challenge" in *DeOtte* (*Leal 1* Opp'n at 14) gets *Hellerstedt* backwards. There, the Supreme Court found that an unsuccessful pre-enforcement facial challenge did not bar a subsequent post-enforcement as-applied challenge based on new facts and circumstances. *Hellerstedt*, 136 S. Ct. at 2306. This was because a second, "as applied" action premised on facts that did not exist at the time of the first "facial" litigation could not have been brought at the time of the initial challenge. Plaintiffs here propose the converse: that after an "as applied" challenge, plaintiffs can bring a new "facial" challenge that *does not* depend on particular facts. And no "factual development" has made any of Plaintiffs' causes of action asserted here newly viable since their counsel filed *DeOtte*.[6]

Plaintiffs also claimed that their current challenge is to the statute codified at 42 U.S.C § 300gg-13(a)(4), while *DeOtte* was a challenge to the "agency rules that codify the Contraceptive Mandate," *Leal 1* Opp'n at 18. This argument is premised on both a misreading of *Hellerstedt* and a misstatement of the Complaint. The language from *Hellerstedt* on which Plaintiffs rely notes the unremarkable proposition that "two different statutory provisions" "with two different, independent requirements" and "that serve two different functions" can be challenged in separate suits. *Hellerstedt*, 136 S. Ct at 2308; *Leal 1* Opp'n at 18 (quoting same). This language does *not* purport to authorize a second challenge to a single requirement—the Contraceptive Mandate—by bringing new legal arguments that were just as available to Plaintiffs at the time of the first challenge. Indeed, Plaintiffs' own allegations make clear that the subject of their complaint is the Contraceptive Mandate established pursuant to HRSA's guidelines, just as it was in *DeOtte*. *Compare* Compl. at 1 & ¶ 48 ("In 2011, [HRSA] issued an edict that compels private insurance to

[6] Indeed, the only relevant change since *DeOtte* is that it is now undisputable that the Contraceptive Mandate does *not* apply to religious objectors like Leal and Von Dohlen. *See* Compl. ¶¶ 20, 22 & Ex. 8.

cover all forms of FDA-approved contraceptive methods . . . .The federal Contraceptive Mandate violates [RFRA] . . . .") *with DeOtte* Am. Compl., at 1 ("Federal regulations require health insurance to cover all FDA-approved contraceptive methods. This 'Contraceptive Mandate' violates [RFRA] . . . .") (citations omitted).[7]

B. Plaintiffs Fail to State a Claim for Violation of the Appointments Clause

Plaintiffs fail to state a claim for a violation of the Appointments Clause for two reasons: (1) they have forfeited any such claim by failing to raise it before the agencies; and (2) any putative defect in the appointment of a relevant official has been cured by the Secretary of Health and Human Services' ratification of the Contraceptive Mandate through rulemaking.

First, there is no allegation that Plaintiffs contended before the agencies in any of the rulemakings related to the Contraceptive Mandate that the Contraceptive Mandate violates the Appointments Clause; they have therefore forfeited the claim. "It is well established that issues not raised in comments before the agency are waived and this Court will not consider them." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002); *see also BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 828 (5th Cir. 2003) ("[T]his court will not consider questions of law which were neither presented to nor passed on by the agency" and has "specifically held that challenges to [agency] action are waived by the failure to raise the objections during the notice and comment period.") (internal quotation marks and citations omitted). This applies with full force to Appointments Clause claims: Plaintiffs must make a "timely challenge" to the "validity of the

[7] Plaintiffs' putative distinction in *Leal 1* between *DeOtte*'s challenge to "the behavior of executive branch officials" and their current challenge to "the legislature's action" enacting the enabling statute fails for the same reason. *Leal 1* Opp'n 19-20. In each case, Plaintiffs challenge only the Contraceptive Mandate, promulgated under authority granted by statute. To the extent Plaintiffs did not challenge the statutory basis for the Contraceptive Mandate in *DeOtte*, they unquestionably "could have . . . raised" those claims there. *Colonial Oaks*, 2020 WL 5015453 at *5. Such claims are thus part of the same nucleus of operative facts.

appointment" to be "entitled to relief." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). If a party does not object before the agency to the validity of a decisionmaker's appointment, that objection is forfeited. *See, e.g.*, *Carr v. Comm'r, SSA*, 961 F.3d 1267, 1268 (10th Cir. 2020) (Appointments Clause challenge forfeited because plaintiffs "failed to raise [it] in their administrative proceedings"); *Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Board*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (per curiam) (Appointments Clause claim forfeited when never raised before the agency or in the opening appellate brief); *In re DBC*, 545 F.3d 1373, 1377 (Fed. Cir. 2008) (claim forfeited when never raised before agency); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 754 (6th Cir. 2019) (claim forfeited when not timely raised before the agency); *accord D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 351 (5th Cir. 2013) (noting "challenges under the Appointments Clause are 'nonjurisdictional structural constitutional objections' that are within a court's discretion to consider" and declining to hear challenge to appointment of decisionmaker "not . . . presented to us in the initial briefing").

Plaintiffs had numerous opportunities to raise their Appointments Clause challenge before the agencies. Defendants "solicited public comments on a number of occasions" with respect to the three Interim Final Rules related to the Contraceptive Mandate promulgated prior to 2017, including giving specific consideration during the course of rulemaking to comments addressing whether contraception should be included. Compl. Ex. 5, 83 Fed. Reg. at 57,537, 57,539; *see* 78 FR 39,870, 39,872 (July 2, 2013) ("Some commenters asserted that contraceptive services should not be considered preventive health services, arguing that they do not prevent disease and have been shown by some studies to be harmful to women's health."). It is too late for Plaintiffs to raise this issue for the first time now before a court, after nine years and numerous opportunities to do so before the agencies.

In *Leal 1*, Plaintiffs implausibly asserted in response that they are targeting a statute, not agency action, and thus need not have presented their claim to an agency. The Complaint refutes any such contention, making clear that Plaintiffs' challenge is to the Contraceptive Mandate established pursuant to HRSA's guidelines, not the enabling statute—which does not itself act on Plaintiffs. *See, e.g.*, Compl. at 1-2; *id.* ¶¶ 15-23 (section entitled "The Federal Contraceptive Mandate"); 42 U.S.C § 300gg-13(a)(4). Indeed, Plaintiffs themselves frame their Appointments Clause claim as a challenge to the way members of HRSA—the *agency*—are appointed in light of their authority, resulting in Plaintiffs' request that the Court "declare that the federal Contraceptive Mandate" is unconstitutional. *Id.* ¶ 44; *see id.* ¶¶ 38-43.

Plaintiffs cited just one case in *Leal 1*, *Barr v. American Association of Political Consultants*, 140 S. Ct. 2335 (2020), to support their attempt to refute the extensive authority cited above by Defendants. But that case has nothing to do with the Appointments Clause and is inapposite for that reason alone. It also has no bearing because plaintiffs in *Barr* challenged a statute that directly forbade them from taking certain actions while permitting others to do so. *See id*. at 2344 (addressing the validity of "the TCPA's prohibit[ion of] almost all robocalls to cell phones" which is "codified in . . . the U.S. Code" in light of the decision of "*Congress* [to] carve[] out a new . . . exception to [this] restriction") (emphasis added). Because *Barr* turned in no way on agency action, it does not speak to the claim at issue here, which challenges what an *agency* did and whether it had the authority to do it. In short, Plaintiffs could offer no case establishing they had not forfeited their Appointments Clause claim.

Even if not forfeited, any possible Appointments Clause problem with the Contraceptive Mandate has been cured by the Secretary of Health and Human Services' ratification of the Mandate through the rulemaking implementing it. "Regardless of whether" an initial

decisionmaker "was or was not validly appointed under . . . the . . . Appointments Clause," "a properly appointed official's ratification of an allegedly improper official's prior action, rather than mooting a claim, resolves the claim on the merits by remedy[ing] [the] defect (if any) from the initial appointment." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019); *accord Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016). Here, repeated actions by multiple Secretaries of Health and Human Services—who were unquestionably constitutionally appointed—to promulgate regulations for purposes of implementing the Contraceptive Mandate constitute ratification of the Mandate's substance, curing any taint to the Mandate from any conceivable Appointments Clause defect in the appointment of the HRSA Administrator. *See, e.g.*, 78 Fed. Reg. at 39,872, 39,899 (notice of final regulations "[a]pproved" by Kathleen Sebelius, "Secretary, Department of Health and Human Services" noting "[t]hese final regulations promote . . . [the] important policy goal[]" of "provid[ing] women with access to contraceptive coverage without cost sharing, thereby advancing the compelling government interests in safeguarding public health and ensuring that women have equal access to health care"); *see also* 83 Fed. Reg. at 57,539 (noting that "[s]ince 2011 . . . the Departments . . . have promulgated regulations to guide HRSA in exercising the discretion to allow exemption to [the Contraceptive Mandate], including issuing and finalizing three interim final regulations prior to 2017"); 77 Fed. Reg. 16,501, 16,503, 16,508 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking approved by HHS Secretary noting "the Departments committed to working with stakeholders to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate . . . religious organizations with religious objections to such coverage").

In *Leal 1*, Plaintiffs claimed in response that the statute does not give the Secretary authority to ratify the Contraceptive Mandate and that the statute would in any event "empower HRSA to dictate the preventive care that private insurers must cover *until* the Secretary acts to approve or revoke the decision." *Leal 1* Opp'n at 22. But Plaintiffs' argument fails for two fundamental problems. First, pursuant to Reorganization Plan No. 3 of 1966, the Secretary has been vested with "all functions of the Public Health Service, of the Surgeon General of the Public Health Service, and of all other officers and employees of the Public Health Service, and all functions of all agencies of or in the Public Health Service," including the functions of the Public Health Service now performed by HRSA. 31 Fed. Reg. 8855, 80 Stat. 1610; *see, e.g.*, Public Health Service Act, § 202 n.1 (noting HRSA is among the "agencies of the Service"); 47 Fed. Reg. 38409 (establishing HRSA as a Public Health Service agency in 1982). And having created HRSA, see *id.*, the Secretary of necessity has the authority to ratify its actions. Second, the Secretary *did* ratify the Contraceptive Mandate before it took effect, so the hypothetical question of whether some other guideline not discussed in the Complaint could take effect prior to the Secretary's approval is not at issue here. *See* 76 Fed. Reg. 46,621 (Aug. 3, 2011) (interim final regulations "[a]pproved" by the "Secretary" of HHS permitting Contraceptive Mandate to take effect but authorizing narrow religious exemption to the Contraceptive Mandate).

C. The Contraceptive Mandate Does Not Violate Nondelegation Precedents

Plaintiffs also fail to state a claim under Supreme Court and Fifth Circuit nondelegation precedents. To the extent that nondelegation principles apply to the HRSA guidelines, the statutory scheme provides a sufficient intelligible principle to guide decision-making and limit agency discretion. "[W]hen Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (emphasis and

citation omitted). The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 442-43 (5th Cir. 2020) (quoting *Whitman*, 531 U.S. at 474–75). Under nondelegation principles, "[t]he Court has found only two delegations to be unconstitutional. Ever." *Id.* at 446. Notably, the Court has even "blessed delegations that authorize regulation in the 'public interest' or to 'protect the public health.'" *Id.* at 442 n.18 (citing *Whitman*, 531 U.S. at 472).

The statutory provision at issue here falls within the intelligible-principle test announced by the Supreme Court. That provision incorporates only those "preventive care and screenings" that HRSA supported "with respect to women." By setting those criteria—that the agency identify care and screenings, that they be of a preventive nature, and that they be focused on women's preventive needs specifically—Congress gave sufficient guidance. That statutory guidance is sufficient to serve as an intelligible principle; it is not required to lay out the precise criteria that govern every part of the agencies' expert analysis. *See Whitman*, 531 U.S. at 474–75; *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (noting that in applying intelligible-principle test, statutory terms can "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear"). That guidance is certainly more exact than a recommendation to issue guidelines "in the 'public interest.'" *Whitman*, 531 U.S. at 474.

The Supreme Court's recent decision in *Little Sisters of the Poor* is not to the contrary. The Court noted expressly that it was not presented with a nondelegation challenge in that case and expressly disavowed making any conclusion on nondelegation. 140 S. Ct. at 2382. And although the Court stated that 42 U.S.C. § 300gg-13(a)(4) is "silent as to *what* those 'comprehensive guidelines' must contain, or how HRSA must go about creating them," *id.* at 2381, the Court did

not dispute that the statute instructed HRSA to create comprehensive guidelines for "preventive care and screenings," and not for some other kind of care (or something totally unrelated to care). That is still a sufficient intelligible principle to satisfy nondelegation precedents, even if it leaves HRSA with a great deal of discretion in executing its task.[8]

D. Plaintiffs Leal and Von Dohlen Fail to Allege a Violation of the Religious Freedom Restoration Act

Plaintiffs Leal and Von Dohlen[9] have failed to allege a violation of RFRA. RFRA provides that, with certain exceptions, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1. "To claim RFRA's protections, a person must show that (1) the relevant religious exercise is grounded in a sincerely held religious belief and (2) the government's action or policy substantially burdens that exercise by, for example, forcing the plaintiff to engage in conduct that seriously violates his or her religious beliefs." *United States v. Comrie*, 842 F.3d 348, 351 (5th Cir. 2016) (cleaned up).

Here, Plaintiffs Leal and Von Dohlen allege that the Contraceptive Mandate "imposes a substantial burden on the exercise of religion" because it "mak[es] it difficult or impossible for individuals and employers . . . to purchase health insurance that excludes contraceptive coverage." Compl. ¶ 48. But as the Complaint notes, the District Court in *DeOtte* "permanently enjoined

[8] To the extent Plaintiffs ask the Court to anticipate a change in nondelegation jurisprudence, such a ruling would be improper. Current Supreme Court and Fifth Circuit precedents permit the level of guidance offered in § 300gg-13(a)(4), and this Court should not act in anticipation of a change in binding precedents. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Big Time Vapes, Inc. v. Food & Drug Admin.*, 963 F.3d 436, 447 (5th Cir. 2020) ("The Court might well decide—perhaps soon—to reexamine or revive the nondelegation doctrine. But '[w]e are not supposed to . . . read tea leaves to predict where it might end up.'") (citation omitted).

[9] Plaintiff Armstrong "has no religious . . . objections to any of the FDA-approved contraception methods." Compl. ¶ 32. She therefore can assert no RFRA claim. *See* 42 U.S.C. § 2000bb-1 (preventing government from "substantially burden[ing] a person's exercise of religion").

federal officials from enforcing the Contraceptive Mandate against any religious objector," thus giving "full force and effect" to "the protections conferred by the Trump Administration's final rule," which "give[s] religious objectors the option of purchasing health insurance that excludes contraception from any willing health insurance issuer." *Id.* ¶¶ 20, 22.

Assuming *arguendo* that it is still "difficult or impossible" for Plaintiffs Leal and Von Dohlen "to purchase health insurance that excludes contraceptive coverage," *id.* ¶ 48, *but see id.* ¶¶ 23 (alleging only that "few" insurance companies are offering the type of health insurance Plaintiffs Leal and Von Dohlen would like), that does not constitute a violation of RFRA, which limits only the actions of "Government." 42 U.S.C. § 2000bb-1. Accordingly, the voluntary choice of private insurers not to offer Plaintiffs Leal and Von Dohlen a plan that excludes contraceptive coverage that they also deem "acceptable health insurance" does not implicate RFRA at all. Compl. ¶ 36.

Plaintiffs' only response in *Leal 1* was that conclusory, speculative allegations in two paragraphs in their complaint "*must* be assumed to be true." *Leal 1* Opp'n at 25 (emphasis in original). This is not the law; conclusory allegations are *not* sufficient to withstand a motion to dismiss. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Allegations "merely consistent with" liability are likewise insufficient. *Iqbal*, 556 U.S. at 678.

But even if Plaintiffs' allegations were sufficient to rise above the speculative level, they would remain insufficient to state a RFRA claim. Plaintiffs do not and cannot contend that the government is enforcing the Contraceptive Mandate upon them. *See* FAC ¶¶ 20, 22. Their contention is that non-government actors will not sell them desired insurance *despite* the fact that the government is not preventing such a sale and is enjoined from doing so. Plaintiffs cite no case

supporting the proposition that RFRA requires the government to do more to compel insurers to offer Plaintiffs' desired coverage. *See, e.g., Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of reh'g) ("RFRA does not authorize religious organizations to dictate the independent actions of third-parties, even if the organization sincerely disagrees with them."). Such action is not necessary to protect Plaintiffs' own "exercise of religion," nor can there possibly be a "l[ess] restrictive means" of furthering the government interest here than wholly exempting religious objectors from the Mandate. 42 U.S.C. § 2000bb-1.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be granted.

Respectfully submitted,

ERIN NEALY COX
United States Attorney

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney
Texas Bar No. 24060668
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8626
Facsimile: 214-659-8807
brian.stoltz@usdoj.gov

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ Christopher M. Lynch
CHRISTOPHER M. LYNCH (D.C. Bar # 1049152)
Trial Attorney
U.S. Department of Justice
Civil Division
1100 L Street, NW
Washington, D.C. 20005
Telephone: (202) 353-4537
Fax: (202) 616-8470
Email: Christopher.M.Lynch@usdoj.gov

Attorneys for Federal Defendants Alex M. Azar,
Steven T. Mnuchin, Eugene Scalia, and the United States

Certificate of Service

On October 7, 2020, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties who have appeared in the case electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Christopher M. Lynch
Christopher M. Lynch