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.

Case No. 2:20-cv-00185-Z

BRIEF IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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The federal defendants raise both jurisdictional and merits-based objections to the complaint. We will first address the jurisdictional issues and then proceed to the merits.

I. The Plaintiffs Have Alleged Article III Standing

At the pleading stage, a plaintiff needs only to allege and not prove the elements of Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of the Article III standing inquiry] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). Detailed factual allegations are not required; a complaint needs only to provide a plausible basis for believing that Article III standing can be established. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). The complaint does more than enough to plausibly allege the components of Article III standing.

A. Each Of The Plaintiffs Has Alleged Injury In Fact

Plaintiffs Leal and Von Dohlen allege that the continued enforcement of the federal Contraceptive Mandate inflicts Article III injury—even though the *DeOtte* injunction allows insurers to offer contraceptive-free policies to individual religious objectors—because it remains "impossible" for them to obtain health insurance that excludes contraceptive coverage:

> The federal defendants' enforcement of the Contraceptive Mandate, along with the state defendants' enforcement of Tex. Ins. Code §§ 1369.104–.109 and 28 Tex. Admin. Code § 21.404(c), *make it impossible for the plaintiffs to purchase health insurance that excludes this unwanted and unneeded coverage for contraception*, thereby inflicting injury in fact.

Complaint (ECF No. 1) at ¶ 33. How does this fail to allege injury in fact? Plaintiffs Leal and Von Dohlen want to purchase health insurance that excludes contraceptive coverage, and they have specifically alleged that it is "impossible" for them to do so in the current regulatory climate. *See id.* It is not merely that the continued enforcement of the Mandate "restricts the available options" and "drastically limits the scope of acceptable health insurance." *Id.* at ¶¶ 34, 36. It is that the plaintiffs are *unable* to obtain contraceptive-free health insurance

under the current regulatory regime.[1] If a woman alleged that she could not obtain an abortion because federal and state regulations had chased out willing providers and made it "impossible" for her to access the procedure, that would surely qualify as Article III injury. *See Roe v. Wade*, 410 U.S. 113, 124–25 (1973). It is hard to understand how a different result can obtain here. The inability to purchase a desired product or service constitutes injury in fact. *See Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) ("[T]he inability of consumers to buy a desired product may constitute injury-in-fact 'even if they could ameliorate the injury by purchasing some alternative product.'" (citation omitted)).

The federal defendants are equally wrong to deny that injury in fact can arise from regulations that reduce the number of contraceptive-free health-insurance policies that are available on the market. Even if the plaintiffs had not gone so far as to allege that it had become "impossible" to purchase such a plan, the enforcement of regulations that merely restrict the scope of acceptable health-insurance policies would *still* be enough to confer injury in fact on each of the plaintiffs. *See Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322, 1332–34 (D.C. Cir. 1986) (holding that a reduced opportunity to purchase fuel-efficient vehicles established injury in fact); *id.* at 1332 ("NHTSA's low CAFE standards will diminish the types of fuel-efficient vehicles and options available. Without the threat of civil penalties, manufacturers will not be prodded to install as many fuel-saving devices, nor to install them as promptly. As a result, petitioners' members will have less opportunity to purchase fuel-efficient light trucks than would otherwise be available to them."); *Orangeburg, South Carolina v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017) ("The lost opportunity to purchase a desired product is a cognizable injury, even though Orangeburg *can* purchase, and *has* purchased, wholesale power from another source. . . .

1. The federal defendants say that plaintiffs Leal and Von Dohlen "do not even allege that they are unable to purchase health insurance for their families that excludes contraceptive coverage or that no such health insurance is available to them." Fed. Defs.' Br. (ECF No. 15) at 6. We do not understand how they can make such a statement given paragraph 33 of the complaint.

[E]ven though Orangeburg can and does purchase wholesale power from another source, the city cannot purchase wholesale power from the provider of its choice *nor* on its preferred terms"). The federal defendants cite no authority that denies that an injury of this sort can confer standing. And their argument flies in the face of *Center for Auto Safety* and *Orangeburg*, which specifically hold that Article III injury arises when regulations reduce the available options from which to purchase a desired product.

Finally, the defendants assert that "there is no legally protected right to an unfettered choice in health insurance coverage." Fed. Defs.' Br. (ECF No. 15) at 6. But the injury-in-fact test does not turn on whether one is alleging the invasion of a "legally protected right." *See Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (specifically rejecting the notion that a plaintiff must allege the invasion of a "legally protected right" to establish standing); *id.* ("The 'legal interest' test goes to the merits. The question of standing is different."). A plaintiff needs only to allege an injury *in fact*. *See id.* at 152 ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."). And an "identifiable trifle" is all that is needed—not the identification of a "legally protected right." *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973); *see also American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067 (2019) (unwanted contact with a religious display sufficient to confer standing); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"); *New York Republican State Committee v. SEC*, 927 F.3d 499, 504 (D.C. Cir. 2019) ("As we have long held, even a slight injury is sufficient to confer standing; the size of the harm therefore poses no jurisdictional barrier to the NYGOP's claim.").

Plaintiff Armstrong has likewise alleged injury in fact by asserting that she is unable to purchase or obtain less expensive health insurance that excludes contraceptive coverage. *See* Complaint (ECF No. 1) at ¶¶ 32–33; *see also id.* at ¶ 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."). The federal defendants question whether compulsory contraceptive coverage actually leads to higher premiums. *See* Fed. Defs.' Br. (ECF No. 15) at 9–10. But Ms. Armstrong has specifically alleged that she is being "forced to pay higher premiums for health insurance that covers contraceptive services" that she does not want or need—and those allegations *must* be accepted as true at the motion-to-dismiss stage. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) ("We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint."). Whether Ms. Armstrong is actually paying higher premiums for this unnecessary and unwanted coverage is a disputed factual question that cannot be resolved on a motion to dismiss. *See id.*[2]

B. Each Of The Plaintiffs Has Alleged Traceability

The plaintiffs have specifically alleged that their inability to purchase health insurance that excludes contraceptive coverage is traceable to the federal defendants' enforcement of the Contraceptive Mandate. *See* Complaint (ECF No. 1) at ¶ 33 ("The federal defendants' enforcement of the Contraceptive Mandate, along with the state defendants' enforcement of

2. In addition, each of the defendants has previously asserted that the preventive-care mandates *will* cause premiums for health insurance to increase. *See* Department of the Treasury, Department of Labor, and Department of Health and Human Services, *Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 75 Fed. Reg. 41726, 41738 (July 19, 2010) ("The Departments estimate that premiums will increase by approximately 1.5 percent on average for enrollees in non-grandfathered plans."), available at https://bit.ly/2G5mPRX (last visited on October 28, 2020); *see also* Background: The Affordable Care Act's New Rules on Preventive Care (acknowledging that "the estimated effect on premiums" of the preventive-care mandates "is roughly 1.5% on average"), available at https://go.cms.gov/3oBpBja (last visited at October 28, 2020). It is hard to understand how the defendants can insist that the Contraceptive Mandate is cost-neutral given their past representations that preventive-care coverage mandates increase premiums.

Tex. Ins. Code §§ 1369.104–.109 and 28 Tex. Admin. Code § 21.404(c), make it impossible for the plaintiffs to purchase health insurance that excludes this unwanted and unneeded coverage for contraception, thereby inflicting injury in fact."); *id.* at ¶ 37 ("The plaintiffs' injuries are fairly traceable to the defendants' enforcement of the federal Contraceptive Mandate and the Texas contraceptive equity law"). And it is hard to fathom how the federal defendants can deny that this injury is "fairly traceable" to the Contraceptive Mandate.[3] The entire reason for the Contraceptive Mandate's existence was that some private insurers were *not* providing contraceptive coverage on their own initiative or in response to market forces; that is why the Obama Administration issued regulations to *force* every insurer to provide this coverage regardless of whether the beneficiary wanted or needed it. The present-day absence of contraceptive-free health-insurance policies is a direct result of the federal Contraceptive Mandate and the defendants' continued enforcement of it.

The defendants appear to be arguing that the failure of insurance companies to suddenly provide contraceptive-free health-insurance policies in response to the *DeOtte* injunction proves that the absence of these policies is attributable to market forces rather than government regulation. *See* Fed. Defs.' Br. (ECF No. 15) at 7–8. Hardly. The *DeOtte* injunction allows insurance companies to offer contraceptive-free health insurance *only* to individual religious objectors and not to the public at large. *See DeOtte v. Azar*, 393 F. Supp. 3d 490, 513–15 (N.D. Tex. 2019). So it is not at all surprising that insurers are slow to create new policies that can only be offered or sold to a narrow slice of the population.

But more importantly, the complaint *specifically alleges* that the continued enforcement of the Contraceptive Mandate makes it untenable for insurers to offer contraceptive-free health-insurance policies to the general public. *See* Complaint (ECF No. 1) at ¶ 34 ("[F]ew if any insurance companies are offering health insurance of this sort because only a small

3. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct.").

number of individuals hold sincere religious objections to all forms of contraception. . . . Without the federal Contraceptive Mandate, insurers will have the freedom to offer policies that exclude contraceptive coverage to the general public, just as they did before the Contraceptive Mandate, which will expand the health-insurance options available to consumers who oppose contraceptive coverage for sincere religious reasons."). This allegation *must* be assumed true at the motion-to-dismiss stage, even if the federal defendants dispute it, and that is all that is needed to *allege* traceability at this stage of the litigation. *See Leatherman*, 507 U.S. at 164 ("We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.").

For the same reason, plaintiff Armstrong has alleged traceability by asserting that the Mandate leads to higher premiums for contraceptive coverage. *See* Complaint (ECF No. 1) at ¶ 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."). The federal defendants dispute this factual allegation, *see* Fed. Defs.' Br. (ECF No. 15) at 9–10, but that is not grounds for *dismissal* of a complaint.

C. Each Of The Plaintiffs Has Alleged Redressability

The plaintiffs have alleged redressability by specifically asserting that an injunction against the continued enforcement of the Contraceptive Mandate "will expand" the availability of contraceptive-free health insurance:

> Without the federal Contraceptive Mandate, insurers will have the freedom to offer policies that exclude contraceptive coverage to the general public, just as they did before the Contraceptive Mandate, *which will expand the health-insurance options available to consumers who oppose contraceptive coverage for sincere religious reasons.*

Complaint (ECF No. 1) at ¶ 34 (emphasis added). They have also alleged that consumers *will* pay lower premiums for health insurance in the absence of the Contraceptive Mandate.

See id. at ¶ 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."). These statements go beyond merely alleging that the plaintiffs' injuries will "likely" be redressed by relief that invalidates the Contraceptive Mandate across the board.[4] These statements allege that the plaintiffs' injuries *will in fact* be redressed by the requested relief—and these factual assertions must be accepted as true on a motion to dismiss. *See Leatherman*, 507 U.S. at 164.

The federal defendants argue that the willingness of private insurers to offer contraceptive-free health insurance is speculative rather than certain,[5] and they express doubts that the elimination of the Contraceptive Mandate will lower health-insurance premiums.[6] But these are factual questions that cannot be resolved on a motion to dismiss. The plaintiffs are not required to *prove* that insurance companies actually will offer contraceptive-free health insurance in response to their lawsuit at this stage of the litigation, nor are they required to prove that their requested relief will reduce premiums for health insurance. And if the defendants want to dispute the plaintiffs' claim that insurers "will expand" the availability of contraceptive-free health insurance in response to the requested injunction, they can do so at summary judgment. The plaintiffs have asserted that this will occur, and that is all that is needed to *allege* redressability under the rules of notice pleading.

For good measure, the plaintiffs are also seeking an injunction that would require state insurance regulators

> to ensure that religious objectors in Texas can obtain health insurance that excludes contraceptive coverage, *and to use their regulatory authority to require insurers to offer such plans if needed*

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4. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (holding that a plaintiff needs only to allege that it is "likely" that his injury will be redressed by the requested relief).
5. *See* Fed. Defs.' Br. (ECF No. 15) at 8.
6. *See* Fed. Defs.' Br. (ECF No. 15) at 9–10.

Complaint (ECF No. 1) at ¶ 58(f) (emphasis added). This requested relief *guarantees* that Mr. Leal and Mr. Von Dohlen's injuries will be redressed, and it eliminates any possibility that market forces will prevent the emergence of health insurance that excludes contraceptive coverage. To be sure, Mr. Leal and Mr. Von Dohlen are not seeking this relief against the *federal* defendants, but they can still establish redressability by pointing to relief sought against other defendants in the lawsuit.

II. The Plaintiffs' Claims Are Not Time-Barred

The plaintiffs have sued to enjoin an *ongoing* violation of the Constitution and the Religious Freedom Restoration Act. They are asking only for declaratory and injunctive relief to stop these unlawful acts from continuing; they are not seeking any backward-looking relief to remedy or undo an action that occurred in the past. The statute of limitations is simply inapplicable to claims that seek only prospective relief against the continued enforcement of an unconstitutional statute—or against the continued enforcement of an agency rule that violates a plaintiff's federal statutory rights. *See, e.g.*, *Virginia Hospital Ass'n v. Baliles,* 868 F.2d 653, 663 (4th Cir. 1989) ("[T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations."), *aff'd in part on other grounds Wilder v. Virginia Hospital Ass'n,* 496 U.S. 498 (1990); *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) ("A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment.").

The government cites no case that holds that a plaintiff loses his right to seek prospective relief against the continued enforcement of an unconstitutional statute or agency rule unless he files suit within a specified time after its enactment. And we have been unable to locate any case that enforces a statute-of-limitations defense in these situations. It is common for litigants to challenge the continued enforcement of old statutes, including statutes that criminalize abortion or define marriage as an opposite-sex union, and the courts have never held

that the statute of limitations prevents litigants from seeking prospective relief against these statutes' enforcement. That is because the plaintiff's "claims" accrue continually as the defendants persist in enforcing unconstitutional statutes (or agency rules) in a manner that affects the plaintiff. *See Flynt v. Shimazu*, 940 F.3d 457, 462 (9th Cir. 2019) ("When the continued enforcement of a statute inflicts a continuing or repeated harm, a new claim arises (and a new limitations period commences) with each new injury."). The same is true here: The defendants, by continuing to enforce 42 U.S.C. § 300gg-13(a)(4) and the Contraceptive Mandate, are engaged in an ongoing violation of the Constitution and the plaintiffs' rights under RFRA, and their intent to continue in this unconstitutional and unlawful conduct is what allows the plaintiffs to seek declaratory and injunctive relief. A new cause of action "accrues" each day the defendants continue to enforce the disputed statute and agency rules.[7]

The government's statute-of-limitations argument has many other problems. The government invokes the six-year limitations period established in 28 U.S.C. § 2401(a), but that statute applies only to civil actions "commenced against the United States"; it does not apply to the *Ex parte Young* claims that have been brought against the cabinet secretaries. And the government's attempt to link its limitations argument with sovereign immunity (and jurisdiction)[8] runs headlong into the fact that sovereign immunity has no application to the *Ex parte Young* claims in this case. So any limitations argument with respect to the claims against the cabinet secretaries would be a defense on the merits rather than a jurisdictional objection.

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7. In their reply brief in the previous *Leal v. Azar* case (No. 124), the federal defendants tried to refute this argument by claiming that "the mandate is not being enforced against Leal and Von Dohlen." *Leal v. Azar*, No. 2:20-cv-00124-Z (ECF No. 25) at 5. It does not matter whether the mandate is being "enforced" against Leal or Von Dohlen; what matters is whether the continued enforcement of the mandate inflicts Article III injury by limiting the available options of contraceptive-free health insurance on the market.
8. *See* Fed. Defs. Br. (ECF No. 15) at 11–12.

III. Res Judicata Does Not Bar The Claims Asserted By Mr. Leal And Mr. Von Dohlen

The government insists that Leal and Von Dohlen's claims are barred by res judicata, but its arguments are incompatible with *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *Hellerstedt* allows Leal and Von Dohlen to bring a facial challenge to the Contraceptive Mandate because it is a different claim from the as-applied challenge that was litigated in *DeOtte*, and the plaintiffs' facial challenge is based on new material facts that post-date the *DeOtte* litigation. *See id.* at 2305. *Hellerstedt* also allows Leal and Von Dohlen to challenge the constitutionality of 42 U.S.C. § 300gg-13(a)(4) because it is a separate and distinct provision from the agency rules that were challenged in *DeOtte*, *see id.* at 2308, and even apart from *Hellerstedt* the enactment of section 300gg-13(a)(4) is a separate and distinct transaction from the issuance of the agency rules that established the Contraceptive Mandate. When a case involves "important human values"—such as religious freedom—a court must apply the approach to res judicata used in *Hellerstedt* rather than the "same transaction" test that courts apply in other contexts.

A. *Hellerstedt* Allows Leal And Von Dohlen To Bring A Facial Challenge To The Contraceptive Mandate

Hellerstedt holds that res judicata applies *only* when the same parties seek to relitigate "the very same claim." *See id.* at 2305 ("The doctrine of claim preclusion . . . prohibits 'successive litigation of the very same claim' by the same parties. Petitioners' postenforcement as-applied challenge is not 'the very same claim' as their preenforcement facial challenge." (quoting *New Hampshire v. Maine,* 532 U.S. 742, 748 (2001)); *id.* at 2307 ("The challenge brought in this case and the one in *Abbott* are not the 'very same claim,' and the doctrine of claim preclusion consequently does not bar a new challenge to the constitutionality of the admitting-privileges requirement." (citation omitted)). *Hellerstedt* also holds that a facial and as-applied challenge to the same statutory provision will *not* be "the very same claim" if the later challenge rests on later "factual developments" that postdate the earlier lawsuit. *Id.* at 2306; *see also id.* ("Changed circumstances of this kind are why the claim presented in *Abbott*

is not the same claim as petitioners' claim here."); *id.* at 2305 ("'[R]es judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint'" (quoting *Morgan v. Covington*, 648 F.3d 172, 178 (3rd Cir. 2011)).

Leal and Von Dohlen's facial challenge to the Contraceptive Mandate is not "the very same claim" as the as-applied challenge in *DeOtte* because it rests on factual developments that emerged after *DeOtte*. The *DeOtte* lawsuit challenged the Mandate only as applied to religious objectors, and it sought classwide relief that would allow insurers to offer contraceptive-free health insurance to individuals who hold religious objections to some or all contraceptive methods. *See DeOtte v. Azar*, 393 F. Supp. 3d 490, 513–15 (N.D. Tex. 2019).[9] After the *DeOtte* litigants obtained this relief, plaintiffs Leal and Von Dohlen sought to purchase contraceptive-free health insurance but found that it was "impossible" to obtain, despite the relief provided by the *DeOtte* injunction. *See* Complaint (ECF No. 1) at ¶ 33. These post-*DeOtte* discoveries of their continued inability to obtain contraceptive-free health insurance provides "new material facts," which suffices to overcome a res judicata defense under *Hellerstedt*. *See Hellerstedt*, 136 S. Ct. at 2305 ("[The] development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim." (citing Restatement (Second) of Judgments § 24, cmt. *f* (1980)). And these post-*DeOtte* factual developments revealed that Leal and Von Dohlen could not adequately protect their religious freedom unless they sued to enjoin section 300gg-13(a)(4) and the Contraceptive Mandate across the board, and not merely as applied to religious objectors.

The situation in this case is indistinguishable from *Hellerstedt*. The plaintiffs in *Hellerstedt* (like the plaintiffs in *DeOtte*), brought their initial lawsuit against the Texas admitting-

9. The requested relief tracked the protections conferred in the Trump Administration's agency rule, which had been subject to a nationwide injunction until the Supreme Court allowed the rule to take effect last June. *See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57,536, 57,586–90 (November 15, 2018); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

privileges law before they could know for certain what effects the law would have. *See Hellerstedt*, 136 S. Ct. at 2306 ("The *Abbott* plaintiffs brought their facial challenge to the admitting-privileges requirement *prior to its enforcement*—before many abortion clinics had closed and while it was still unclear how many clinics would be affected. . . . The postenforcement consequences of H.B. 2 were unknowable before it went into effect."). The plaintiffs in *DeOtte* likewise brought their initial lawsuit against the Contraceptive Mandate before they could know for certain whether the as-applied relief that they sought would ensure the availability of contraceptive-free health insurance to each member of the class—and they certainly could not have proven in that initial lawsuit that a total, across-the-board invalidation of the Contraceptive Mandate was necessary to attain that result. The second lawsuit in *Hellerstedt* was filed after the admitting-privileges law took effect, and after its effects became known for sure. *See id.* ("Here, petitioners bring an as-applied challenge to the requirement *after its enforcement*—and after a large number of clinics have in fact closed." (emphasis in original)). And in this case, the second lawsuit against the Contraceptive Mandate was filed after the *DeOtte* injunction had taken effect, and after it became known that the as-applied relief in *DeOtte* was insufficient to fully protect the religious freedom of individual consumers of health insurance. This second lawsuit—like the second lawsuit in *Hellerstedt*—rests on "new material facts,"[10] "later, concrete factual developments,"[11] and "events the postdate the filing of the initial complaint,"[12] which is all that is needed to show that Leal and Von Dohlen are *not* asserting "the very same claim" as the *DeOtte* litigants. *See id.* at 2307.

Finally, both this case and *DeOtte* involve "important human values," which appears to be a necessary condition for triggering *Hellerstedt*'s lenient approach to res judicata. *See Hel-*

10. *Hellerstedt*, 136 S. Ct. at 2305.
11. *Hellerstedt*, 136 S. Ct. at 2306.
12. *Hellerstedt*, 136 S. Ct. at 2305 (citation and internal quotation marks omitted).

lerstedt, 136 S. Ct. at 2306 ("The claims in both *Abbott* and the present case involve 'important human values.'").[13] It is hard to imagine a "human value" more important than the right of religious freedom, and the political branches have recognized the importance of this right by enshrining the Religious Freedom Restoration Act into law. It is also hard to imagine how any court can deny that the right of religious freedom qualifies as an "important human value" while simultaneously conferring that status on the right to abortion, which is unmentioned in the Constitution and is (to put it mildly) a controversial practice among large segments of American society. The res judicata rules that apply when "important human values" are at stake are fully applicable to the claims presented in this lawsuit.

B. *Hellerstedt* Allows Leal And Von Dohlen To Challenge The Constitutionality Of 42 U.S.C. § 300gg-13(a)(4)

Hellerstedt also allows Leal and Von Dohlen to challenge the constitutionality of 42 U.S.C. § 300gg-13(a)(4), because this statute is a "separate, distinct provision" from the agency rules that were challenged in the *DeOtte* litigation.

Hellerstedt makes clear that litigants may bring separate challenges to discrete provisions of the same statute—even when those separate provisions govern the same subject matter and are "part of one overarching government regulatory scheme." The statute in *Hellerstedt* required abortions to be performed by doctors with hospital admitting privileges, and it also required abortions to be performed in ambulatory surgical centers. Yet the Court allowed abortion providers to challenge the admitting-privileges provision and the surgical-center provision in separate lawsuits—even though the provisions appeared in the same statute, and even though the claims arose out of the same nucleus of operative facts. The Court explained:

13. *See The Supreme Court, 2015 Term—Leading Cases*, 130 Harv. L. Rev. 397, 406 (2016) ("The [*Hellerstedt*] majority first rejected the Fifth Circuit's res judicata holding, noting that material facts had developed since the first round of litigation and that 'important human values' were at stake." (footnotes omitted)); Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 Notre Dame L. Rev. 637, 646 (2016) ("Just last term, the Supreme Court indicated that res judicata rules operated differently in challenges to anti-abortion laws because of their impact on 'important human values.'").

> The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H.B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "[g]overnment regulatory scheme."
>
> That approach makes sense. The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.

Hellerstedt, 136 S. Ct. at 2308. All of this applies with equal or greater force to the challenges brought to 42 U.S.C. § 300gg-13(a)(4) and the agency rules that codify the Contraceptive Mandate.

First, section 300gg-13(a)(4) and the agency rules challenged in *DeOtte* are far more "separate" and "distinct" from each other than the abortion-related statutory provisions in *Hellerstedt*. Section 300gg-13(a)(4) is a statutory provision enacted in 2010 as part of the Affordable Care Act. The Contraceptive Mandate is a series of agency rules that long postdate the enactment of section 300gg-13(a)(4). Second, the statute and the agency rules set forth "different, independent requirements." Section 300gg-13(a)(4) is a delegation of authority to the Health Resources and Services Administration to impose preventive-care mandates on private insurers, while the Contraceptive Mandate specifically compels private insurers to cover FDA-approved contraceptive methods. Third, section 300gg-13(a)(4) and the Contraceptive Mandate have different effective dates. Section 300gg-13(a)(4) took effect immediately upon the ACA's enactment, while the Contraceptive Mandate's requirements did not take effect until 2013. When all of this is combined with *Hellerstedt*'s explicit encouragement of separate lawsuits for separate provisions, it becomes impossible to see how a res

judicata defense can be sustained against the plaintiffs' constitutional challenges to section 300gg-13(a)(4).

C. Leal And Von Dohlen Can Challenge The Constitutionality Of 42 U.S.C. § 300gg-13(a)(4) Under The "Same Nucleus Of Operative Facts" Test

In all events, Leal and Von Dohlen do not even need to rely on *Hellerstedt* to challenge the constitutionality of section 300gg-13(a)(4). Even if one applies the "same nucleus of operative fact" test that the government proposes (but that *Hellerstedt* eschewed),[14] the constitutional challenges to section 300gg-13(a)(4) are a different "claim" from the RFRA challenge to the Contraceptive Mandate.

The constitutional challenges to section 300gg-13(a)(4) allege that *Congress* violated the Constitution by enacting this statute.[15] They are challenges to the *legislature's* action in enacting a law that confers authority on individuals who are not appointed in conformity with Article II, and that fails to provide an intelligible principle to guide the discretion of the Health Resources Services Administration. The "nucleus" of relevant facts concerns the text of this statute and the meaning of the Constitution—nothing more. The alleged constitutional violation occurred at the moment of the statute's enactment,[16] and the "nucleus" of relevant facts is centered around that event and nothing else. There is no concern with how HRSA decides to use its powers under the statute; that is irrelevant to the Appointments Clause and nondelegation challenges alleged in the complaint. *See* Complaint (ECF No. 1) at ¶¶ 38–47.

The claims in *DeOtte*, by contrast, were challenging *only* the behavior of *executive-branch officials* who enforced the Contraceptive Mandate in a manner that violated the Religious

14. See Fed. Defs.' Br. (ECF No. 15) at 13.

15. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1214 (2010) ("[E]very constitutional holding should start by saying *who* has violated the Constitution.").

16. *See* Rosenkranz, *supra* at 1224 ("Every constitutional violation must be located in time." (emphasis removed)).

Freedom Restoration Act. The relevant facts concerned the meaning of RFRA and the conduct of the executive branch, which have nothing to do with *any* of facts surrounding the plaintiffs' constitutional challenges to section 300gg-13(a)(4). There is no overlap at all with these factual nuclei, and the government does not present an argument for how the constitutional challenges to section 300gg-13(a)(4) rest on the same "nucleus" of operative facts that undergird the RFRA claims in *DeOtte*.

D. The Federal Defendants' Efforts To Avoid *Hellerstedt* Are Unavailing

The federal defendants deny that *Hellerstedt* allows Leal and Von Dohlen to challenge section 300gg-13(a)(4) and the Mandate, but none of their arguments hold water.

First, the defendants assert that *Hellerstedt* "did not abrogate the Fifth Circuit's test for res judicata, which the court has applied on numerous occasions since *Hellerstedt* was issued." Fed. Defs.' Br. (ECF No. 15) at 15. But *Hellerstedt* is incompatible with the conventional test for res judicata that the Fifth Circuit (and every other court) had applied before *Hellerstedt*. *See Hellerstedt*, 136 S. Ct. at 2331–35 (Alito, J., dissenting). *Hellerstedt* holds that res judicata applies *only* when a litigant asserts "the very same claim" that he had brought in a previous lawsuit—rather than asking whether those claims arise out of the same "common nucleus of operative fact," or asking whether a claim "could have been raised" in the previous action. *Compare Hellerstedt*, 136 S. Ct. at 2305 ("The doctrine of claim preclusion (the here-relevant aspect of res judicata) prohibits 'successive litigation of the very same claim' by the same parties. *New Hampshire v. Maine,* 532 U.S. 742, 748 (2001). Petitioners' postenforcement as-applied challenge is not 'the very same claim' as their preenforcement facial challenge."), *with Currier v. Virginia*, 138 S. Ct. 2144, 2154 (2018) ("In civil cases, a claim generally may not be tried if it arises out of the same transaction or common nucleus of operative facts as another already tried."); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). *Hellerstedt* never

denied that the plaintiffs' as-applied challenge to Texas's admitting-privileges law, or that the plaintiffs' facial challenge to Texas's ambulatory-surgical-center requirement, *could* have been brought in the previous lawsuit that brought a facial challenge against the state's admitting-privileges law. And *Hellerstedt* never denied—and it could not have denied—that these claims arose from the same transaction or the same "nucleus of operative facts." *See* Riley T. Keenan, *Identity Crisis: Claim Preclusion in Constitutional Challenges to Statutes*, 20 U. Pa. J. Const. L. 371, 385–86 (2017) ("[T]he Court conspicuously avoided using the word 'transaction' throughout its opinion—the word appears outside of quotation marks only once, in a passage that criticizes the Fifth Circuit's own application of the transactional approach. Given that both the Fifth Circuit and the dissent explicitly applied the transactional approach to the plaintiffs' claims, the Court's care to avoid endorsing that approach cannot be dismissed as an oversight.").

Instead, *Hellerstedt* holds that the courts need not apply the same-transaction test for res judicata when "important human values" are at stake—and that even the slightest change of circumstances allows abortion litigants to avoid res judicata and litigate claims that they undoubtedly could have brought in a previous lawsuit. *See Hellerstedt*, 136 S. Ct. at 2305 ("[W]here 'important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.'" (quoting Restatement (Second) of Judgments § 24, Comment *f* (1980)); id. at 2306 ("The claims in both *Abbott* and the present case involve 'important human values.'" (quoting Restatement (Second) of Judgments § 24, Comment *f*)). This approach to res judicata is *different* from the "same transaction" or "common nucleus of operative fact" test that normally applies in civil litigation, and the *Hellerstedt* Court justified its departure from the same-transaction test by asserting that "important human values" were at stake. *See* Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 Notre Dame L. Rev. 637, 646 (2016) ("Just last term, the Supreme Court indicated that res judicata rules operated differently in challenges to anti-abortion laws because

of their impact on 'important human values.'"); Keenan, *supra* at 399 ("*Hellerstedt* sets forth a special rule for constitutional challenges to statutes that is significantly narrower than the rule prescribed by the transactional approach for ordinary civil litigation."); *id.*at 402 "*Hellerstedt* requires a rejection of the transactional approach to claim preclusion for challenges to statutes").[17]

The federal defendants are correct to observe that *Hellerstedt* did not overrule the same-transaction test for res judicata—and that test remains applicable in mine run of cases, *i.e.*, cases in which "important human values" are *not* at stake. And the Fifth Circuit is correct to continue applying the same-transaction test in post-*Hellerstedt* cases that do not implicate "important human values." But the right of religious freedom is as at least as "important" a "human value" as the right to abortion—and the federal defendants do not deny this. So Leal and Von Dohlen have the same latitude as abortion litigants to bring subsequent challenges to the Contraceptive Mandate, as long as their claims rely on "factual developments" that postdate the *DeOtte* litigation. *See Hellerstedt*, 136 S. Ct. at 2306.

Second, the federal defendants try to distinguish *Hellerstedt* by observing that the plaintiffs in that case had brought a facial challenge to the admitting-privileges law in their initial

17. *See also* Elizabeth Price Foley, *Whole Woman's Health and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2016 Cato Sup. Ct. Rev. 153, 171 ("[*Hellerstedt*] engaged in remarkable contortions of procedural law, including distortion of the principle of *res judicata*. Specifically, the majority concluded that the second lawsuit was not the same claim as the first lawsuit, invoking an obscure and controversial comment found in the Restatement (Second) of Judgments that suggested that cases involving 'important human values' should generally not be dismissed if a 'slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.' But as Justice Samuel Alito's dissent points out, this conclusion is 'plainly wrong' because both the first and second lawsuits arose out of the same transaction or occurrence--namely, the passage of H.B. 2." (footnotes omitted)); id. ("Contrary to the majority's claim, the Restatement comment relied on by the majority was designed only to illustrate the unremarkable proposition that a new legal claim based on *postjudgment acts* should generally be permitted in cases such as child custody or similar status adjudications, not cases seeking to relitigate the *same transaction* challenged in the prior lawsuit with 'better evidence.'" (footnote omitted)).

lawsuit, and followed that up with a subsequent as-applied challenge to the same statutory requirement. Fed. Defs.' Br. (ECF No. 15) at 15–16. In this case, by contrast, the *DeOtte* class led with an as-applied challenge to the Contraceptive Mandate that sought only an exemption for religious objectors, and now Leal and Von Dohlen are bringing a facial challenge to the Mandate and section 300gg-13(a)(4) in a subsequent lawsuit. But it does not matter under *Hellerstedt* whether the facial or as-applied challenge goes first. If "important human values" are at stake, then a plaintiff needs only to show that his subsequent claim is based on *some* event, material fact, or change of circumstances that postdates the filing of the initial lawsuit. *See Hellerstedt*, 136 S. Ct. at 2305 ("'[R]es judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint'" (citation omitted)); *id.* ("[W]here 'important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.'" (citation omitted)); *id.* at 2306 ("Changed circumstances of this kind are why the claim presented in *Abbott* is not the same claim as petitioners' claim here. The claims in both *Abbott* and the present case involve 'important human values.'" (citation omitted)). The new "factual development" is that Leal and Von Dohlen remain unable to obtain contraceptive-free health insurance despite the *DeOtte* injunction—a fact that could not have been known when *DeOtte* was litigated. That is all that is needed for Leal and Von Dohlen to overcome the defendants' res judiciata objections.

Finally, the federal defendants deny that the plaintiffs are "challenging" section 300gg-13(a)(4) in this lawsuit,[18] but that is simply untrue. The complaint asks the Court to:

> declare that 42 U.S.C. § 300gg-13(a)(4) violates the Appointments Clause by empowering individuals who have not been appointed in conformity with the Appointments Clause to unilaterally determine the preventive care that health insurance must cover

Complaint (ECF No. 1) at ¶ 58(a). It also asks the Court to:

18. Fed. Defs.' Br. (ECF No. 15) at 16.

> declare that 42 U.S.C. § 300gg-13(a)(4) violates Article I of the Constitution by delegating legislative power to the Health Resources and Services Administration without providing an "intelligible principle" to guide its discretion

Id. at ¶ 58(b). How can federal defendants deny that the plaintiffs are "challenging" section 300gg-13(a)(4), along with the congressional decision to enact this statutory language? The congressional *enactment* of this statutory provision is a separate and distinct transaction from the agency's decision to impose and enforce the Contraceptive Mandate,[19] and the *DeOtte* litigation never challenged the constitutionality of section 300gg-13(a)(4). So the constitutional challenge to the *statute* is fair game under *Hellerstedt*,[20] and it is even permissible under "same transaction" test that applies to cases that do not implicate "important human values."

IV. The Plaintiffs Have Alleged A Violation Of The Appointments Clause

The federal defendants contend that the plaintiffs forfeited their Appointments Clause claim by failing to raise it before the agencies, and they say that any constitutional problems with the appointment of HRSA's members have been "cured" because HRSA's decisions have been "ratified" by the Secretary of Health and Human Services. Each of these arguments is meritless.

The plaintiffs are challenging the constitutionality of an Act of Congress and seeking to enjoin its continued enforcement. *See* Complaint (ECF No. 1) at ¶¶ 58(a)–(b).[21] They are not petitioning for review of an agency rulemaking or adjudication, nor are they taking any type of appeal from an agency to a court. A litigant need not present his claims to an agency unless he is asking a court to directly review an agency's work, in the same way that a litigant must preserve arguments in the district court when seeking appellate review. Each of the cases that the government cites involves litigants who had petitioned for review of an agency

19. *See* Rosenkranz, *supra* at 1214, 1224; *see also* notes 15–16 and accompanying test.
20. *See Hellerstedt*, 136 S. Ct. at 2308.
21. The federal defendants again deny that we are "challenging" the constitutionality of section 300gg-13(a)(4), *see* Fed. Defs.' Br. (ECF No. 15) at 16, but that cannot squared with the relief requested in paragraphs 58(a) and 58(b) of the complaint.

action or had appealed an agency action under a statute that authorized judicial review. None of those cases have any relevance to this situation, where the plaintiffs have sued to stop the enforcement of an unconstitutional statute without regard to how the agencies have used their statutory authority.

A litigant who is merely suing federal officers to stop them from enforcing an unconstitutional statute is not required to present his claims to agencies that might be affected by the constitutional pronouncement. In *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), for example, the plaintiffs who challenged the constitutionality of statutes regulating robocalls were not required to present their constitutional claims to the FCC. They simply filed a declaratory judgment action directly against the Attorney General and the FCC, without any need to present their constitutional arguments in agency proceedings. *Id.* at 2345. The government does not cite a single case that enforces an agency-exhaustion requirement when a plaintiff sues to enjoin the continued enforcement of an allegedly unconstitutional statute, and we have not been able to find any.

The government's "ratification" argument is even more off-base. The statute *does not allow* the Secretary of Health and Human Services (or anyone else) to countermand HRSA's guidelines, and the Secretary is given no discretion to accept or reject the guidelines that HRSA produces. When HRSA announces the "preventive care and screenings" that private insurers must cover, the Secretary is *legally obligated* to issue rules and enforce preventive-care mandates in accordance with HRSA's guidelines. Yet the government is trying to pass off the Secretary's compulsory implementation of HRSA's decisions as a voluntary act of "ratification"—even though the text of section 300gg-13(a)(4) makes clear that HRSA holds the whip hand. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) ("On its face, then, [section 300gg-13(a)(4)] grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover."); *id.* ("HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings."); *id.* at 2381 ("By its terms, the ACA leaves the

Guidelines' content *to the exclusive discretion of HRSA*." (emphasis added)). The federal defendants try to rebut this by pointing to a regulation that purports to empower the Secretary to exercise "the functions of the Public Health Service now performed by HRSA,"[22] but a regulation cannot confer authority on the Secretary that a *statute* vests exclusively in HRSA. The President, for example, could not by executive order empower himself (or the Treasury Secretary) to countermand or ratify decisions on interest rates that Congress has by statute vested in the Federal Reserve. And the fact that the Secretary *did* "ratify" HRSA's decision does nothing to alleviate the Appointments Clause violation,[23] because the Secretary's ratification was not necessary for the Contraceptive Mandate to take effect.

Second, even if the Secretary had the authority to veto or "ratify" HRSA's guidelines, section 300gg-13(a)(4) would *still* violate the Appointments Clause because it would empower HRSA to dictate the preventive care that private insurers must cover *until* the Secretary acts to approve or revoke that decision. That constitutes "significant authority pursuant to the laws of the United States," even if it remains subject to reversal by a cabinet secretary, because the power to establish the default rule on matters of compulsory health-insurance coverage amounts to "significant authority" in and of itself. *See Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (holding that the SEC's administrative law judges qualify as "officers of the United States," even though their decisions are subject to review by the Commission).

V. The Plaintiffs Have Alleged A Violation Of The Nondelegation Doctrine

Statutes that delegate authority to agencies must supply an "intelligible principle" to guide the agency's discretion. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001). Yet there is *nothing* in the text of section 300gg-13(a)(4) that purports to guide HRSA's discretion when choosing the "preventive care" and "screenings" for women that

22. Fed. Defs.' Br. (ECF No. 15) at 21.
23. *See* Fed. Defs.' Br. (ECF No. 15) at 21.

private insurance must cover. The statute does not even require HRSA to make these decisions based on the "public interest" or the "public health," and it does not provide *any* factors or considerations that might influence the agency's decisionmaking. Even the statutes that fall along the outermost boundary of constitutionally permissible delegations have at least *something* to guide the agency; this statute has *nothing at all*. Consider once again what the statute says:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— . . .
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4). When it comes to deciding the "preventive care" and "screenings" for women that all private insurance will be forced to cover, HRSA can do whatever it wants.

The federal defendants suggest that the statute provides an "intelligible principle" by allowing HRSA to compel coverage only of "preventive care and screenings," and then only of preventive care and screenings "for women." *See* Feds' Br. (ECF No. 15) at 22. This argument confuses a statutory boundary on an agency's authority with the "intelligible principle" needed to guide the agency's discretion within those boundaries. Limiting the scope of HRSA's powers to "preventive care and screenings" does nothing provide to provide guidance when HRSA is deciding *which* "preventive care" and *which* "screenings" will be covered. That is where the absence of an intelligible principle is felt, and the government cannot point to anything in the statute that alleviates this problem.

Finally, the Supreme Court's recent opinion in *Little Sisters* indicates that the justices have at least some discomfort with the delegation in section 300gg-13(a)(4). Consider this

passage, which seems to go out of its way to call out the statute as a unique (and uniquely troublesome) delegation:

> On its face, then, [section 300gg-13(a)(4)] grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover. But the statute is completely silent as to *what* those "comprehensive guidelines" must contain, or how HRSA must go about creating them. The statute does not, as Congress has done in other statutes, provide an exhaustive or illustrative list of the preventive care and screenings that must be included. See, *e.g.*, 18 U.S.C. § 1961(1); 28 U.S.C. § 1603(a). It does not, as Congress did elsewhere in the same section of the ACA, set forth any criteria or standards to guide HRSA's selections. See, *e.g.*, 42 U.S.C. § 300gg–13(a)(3) (requiring "*evidence-informed* preventive care and screenings" (emphasis added)); § 300gg–13(a)(1) ("evidence-based items or services"). It does not, as Congress has done in other contexts, require that HRSA consult with or refrain from consulting with any party in the formulation of the Guidelines. See, *e.g.*, 16 U.S.C. § 1536(a)(1); 23 U.S.C. § 138. This means that HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings. But the same capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines.
>
> Congress could have limited HRSA's discretion in any number of ways, but it chose not to do so. Instead, it enacted "'expansive language offer[ing] no indication whatever'" that the statute limits what HRSA can designate as preventive care and screenings or who must provide that coverage.

Little Sisters, 140 S. Ct. at 2380 (some citations omitted). Of course, the Supreme Court did not go so far as to say that section 300gg-13(a)(4) actually violates the nondelegation doctrine. But the Court *did* make clear that the doctrine continues to exist—and that they will continue policing the boundary between permissible and impermissible delegations of lawmaking power. *See Gundy v. United States*, 139 S. Ct. 2116 (2019). If a statute such as section 300gg-13(a)(4) is held to pass muster under the "intelligible principle" standard, one must wonder how any statute could possibly fail this court-imposed test.

VI. Leal And Von Dohlen Have Alleged A Violation Of RFRA

The government argues that Leal and Von Dohlen's inability to obtain contraceptive-free health insurance is attributable to market forces rather than the Contraceptive Mandate,[24] but the complaint specifically alleges otherwise. *See* Complaint (ECF No. 1) at ¶ 33 ("The federal defendants' enforcement of the Contraceptive Mandate, along with the state defendants' enforcement of Tex. Ins. Code §§ 1369.104–.109 and 28 Tex. Admin. Code § 21.404(c), make it impossible for the plaintiffs to purchase health insurance that excludes this unwanted and unneeded coverage for contraception, thereby inflicting injury in fact."); *id.* at ¶ 34 ("[F]ew if any insurance companies are offering health insurance of this sort because only a small number of individuals hold sincere religious objections to all forms of contraception. . . . Without the federal Contraceptive Mandate, insurers will have the freedom to offer policies that exclude contraceptive coverage to the general public, just as they did before the Contraceptive Mandate, which will expand the health-insurance options available to consumers who oppose contraceptive coverage for sincere religious reasons."). These allegations *must* be assumed true at the motion-to-dismiss stage, even if the government disputes them. *See Leatherman*, 507 U.S. at 164. The government will have ample opportunity to contest the facts alleged in the complaint, but it cannot do so at this stage of the litigation. And the government does not need to be "enforcing" the Contraceptive Mandate against Leal and Von Dohlen;[25] the plaintiffs need only to allege that the federal defendants' current enforcement of the Mandate results in a substantial burden on Leal and Von Dohlen's exercise of religion.

CONCLUSION

The federal defendants' motion to dismiss should be denied.

24. *See* Feds' Br. (ECF No. 15) at 24.
25. *See* Feds' Br. (ECF No. 15) at 24.

Respectfully submitted.

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