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' REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO RULES 12(B)(1) AND 12(B)(6)

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Plaintiffs challenge a regulation (the "Contraceptive Mandate") that does not apply to them, claiming injury from the choices of nonparty insurers. Plaintiffs do so despite their having already obtained an injunction exempting them from the Contraceptive Mandate and despite the Mandate's having been in effect for nearly a decade before they brought this challenge, during which time they never raised their Appointments Clause claim before the agencies. Plaintiffs' claims are also barred by *res judicata*: the claims arise not from new factual circumstances that had not arisen at the time of Plaintiffs' previous action; they simply raise new legal theories that should have been brought earlier. None of Plaintiffs' claims against the Federal Defendants (hereafter "Defendants") have merit, and the Court has no jurisdiction to hear them in any event. The case must be dismissed.

I. PLAINTIFFS FAIL TO ESTABLISH JURISDICTION

A. Plaintiffs Lack Standing to Sue

Plaintiffs Leal and Von Dohlen's own allegations establish that they lack Article III standing, because a court has already granted them all possible relief against Defendants. The injunction issued in *DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019), exempts them from the Contraceptive Mandate—meaning the government permits insurers to offer exactly what Leal and Von Dohlen want. *See* Compl. ¶¶ 20, 22, ECF No. 1. Their grievance is with either the State Defendants, who allegedly enforce a law prohibiting that type of plan, or with the business choices of insurers, who have declined to offer insurance on terms that Plaintiffs find acceptable. Either way, even if Plaintiffs had alleged an injury, it is not traceable to Defendants.

Plaintiffs claim they alleged that the Contraceptive Mandate makes it "impossible" for them to purchase their desired coverage. But Plaintiffs' Complaint alleges that federal and state mandates together are responsible. Compl. ¶ 33. When discussing only the federal mandate, Plaintiffs state only that "few if any insurance companies" offer plans excluding contraceptive coverage for religious objectors. Compl. ¶ 34. Leal and Von Dohlen therefore seem to concede that such plans may be available—either in Texas or in jurisdictions without Texas's law. *Id.* At most, they allege that, if Texas didn't prohibit such plans, they might be dissatisfied with the

number of such plans insurance companies might offer. This fails to establish any injury traceable to Defendants.

Nor have Plaintiffs established redressability for their claims, which here rely only on speculative predictions about the future actions of third parties, which need not be accepted as true, and in any event are insufficient to establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (refusing to "endorse standing theories that rest on speculation about the decisions of independent actors"). Because Leal and Von Dohlen's theory of redressability is that third-party insurers will offer additional plans that federal law already allows them to offer, they have not met their burden of pleading redressability. Likewise, Plaintiff Armstrong merely offers a conclusory assertion that third-party insurers will offer her plans that omit contraceptive coverage and that those plans will be more affordable than the plans currently available to her. Those predictions, without more, are too speculative to support standing.

B. Plaintiffs' Claims Are Time Barred

Plaintiffs do not dispute their failure to bring their claims within eight years of the time the Contraceptive Mandate took effect, nine years after it was established, and ten years after the enabling statute was passed—each of which is well beyond the relevant limitations period. They instead claim they can bring this litigation at any time on the theory that their claims "'accrue[ ]' each day" the Mandate is enforced because it imposes an "ongoing" violation of constitutional rights. Opp'n 9. But even assuming that the issuance of the Contraceptive Mandate was *procedurally* improper because of alleged noncompliance with the Appointments Clause and nondelegation precedents, the continued effects of those alleged past wrongs do not give rise to a continuing violation that tolls the limitations period. *See McGregor v. Louisiana State Univ. Bd. of Sup'rs*, 3 F.3d 850, 867 (5th Cir. 1993) (rejecting continuing-violation theory for a past wrong "even though its effects persist").

The courts readily apply the same six-year statute of limitations at issue here to facial claims that an agency violated its procedural obligations under the Administrative Procedure Act in issuing a rule. *Am. Stewards of Liberty v. Dep't of Interior*, 960 F.3d 223, 229 (5th Cir. 2020).

The courts have not treated the continued existence of a procedurally improper rule as itself sufficient to extend the period to challenge the promulgation of the rule. *Id.* at 230–31. The time to bring a facial challenge to the process used to promulgate the Contraceptive Mandate has long passed. And Plaintiffs Leal and Von Dohlen cannot bring an as-applied challenge because, as noted above, the Contraceptive Mandate no longer applies to them.[1]

II. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM

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

Plaintiffs spend a full 10 pages of their 25-page opposition arguing that Leal and Von Dohlen's claims are not barred by *res judicata*. Plaintiffs are wrong. In their motion, Defendants established that these claims are barred by *res judicata*, easily satisfying the Fifth Circuit test. Mot. 13-17, ECF No. 15. In the 10 pages of their opposition addressed to these arguments, Plaintiffs rely on only one case, *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2922 (2016), to support them. But it does not.

First, as noted in Defendants' motion, *Hellerstedt* did not abrogate the Fifth Circuit test for *res judicata*, which the court has applied on numerous occasions since, including on the date Plaintiffs' opposition was filed. *See, e.g., Matter of ABC Dentistry, P.A.*, 978 F.3d 323 (5th Cir. Oct. 28, 2020) ("Claim preclusion, or res judicata, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit.") (internal quotation marks omitted).

Plaintiffs' own complaint stands as an insurmountable barrier to their halfhearted contention that there is "no overlap at all" between the factual nuclei of this case and *DeOtte*. Opp'n at 16. In each case, Plaintiffs challenge the Contraceptive Mandate, established pursuant to HRSA's guidelines under authority granted by statute. *See* Mot. at 14-15 (establishing the identical factual basis of the two cases). Moreover, Plaintiffs' theory for distinguishing the two cases—that

[1] Plaintiffs are incorrect that 28 U.S.C. § 2401(a) applies only to claims against the United States and not cabinet secretaries; just one recent example of contrary authority is *Texas v. Rettig*, 968 F.3d 402, 413 (5th Cir. 2020) (dismissing claims against cabinet secretaries pursuant to section 2401(a)).

the earlier case challenged "*only* the behavior of *executive branch officials*" while the instant case represents a "challenge[] to the *legislature's* action in enacting a law that confers authority on individuals who are not appointed in conformity with Article II" does not suffice to avoid the *res judicata*. Opp'n at 15 (emphases in original). The distinction Plaintiffs draw between the two cases is merely that they rely on different *legal theories*, not different *facts*. But this is precisely what *res judicata* bars: bringing new legal claims that relate to the same "transaction[]" or "same nucleus of operative facts" as a prior case, *Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 938 (5th Cir. 2000), because those claims "could or should have been brought in the earlier litigation." *ABC Dentistry*, 978 F.3d 323 (internal quotation marks omitted). 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 Assisted Living Lafeyette, LLC v. Hannie Dev., Inc.*, 972 F.3d 684, 691 (5th Cir 2020) (emphasis in original). Such claims are thus part of the same nucleus of operative facts and barred by *res judicata*.

Second, Plaintiffs cannot draw a material distinction between *DeOtte* and the instant case. Indeed, their own attempts to use *Hellerstedt* as the basis to draw such distinctions demonstrate this failure. Plaintiffs' claim that "factual developments" now permit a "facial challenge" as opposed to the previous "as applied challenge" in *DeOtte* (Opp'n 10) 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 that time. 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*. 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. Far from supporting Plaintiffs' position, this change in circumstances is fatal to their claims.

Plaintiffs also claim that their current challenge is to the statute codified at 42 U.S.C § 300gg-13(a)(4)—pursuant to which the Contraceptive Mandate was established—while *DeOtte* was a challenge to the "agency rules that codify the Contraceptive Mandate," Opp'n 14. But *Hellerstedt* 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. Instead, *Hellerstedt* 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; Opp'n 14 (quoting same). Here, Plaintiffs' own allegations make clear that the subject of their complaint is the Contraceptive Mandate supported by HRSA and promulgated by regulation, just as it was in *DeOtte*. *Compare* Compl. at 1 & ¶ 48 ("In 2011, [HRSA] issued an edict that compels private insurance to 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).

In short, Plaintiffs treat *Hellerstedt* as if it radically altered the rules governing *res judicata* for an amorphous subset of cases "where important human values are at stake" Opp'n at 16 (quoting *Hellerstedt,* 136 S. Ct at 2305). But all *Hellerstedt* indicates is that in such "important" cases, "[f]actual developments [subsequent to the first action] may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable" and that "such changed circumstances will give rise to a new constitutional claim." *Hellerstedt*, 136 S. Ct. at 2305. This is neither a new rule nor incompatible with the standard Fifth Circuit test; claims based on materially changed factual circumstances from a prior claim of course could *not* have been brought at the time of the earlier claim, and thus are not barred. *Cf. ABC Dentistry*, 978 F.3d 323; *Colonial Oaks*, 972 F.3d at 691. But Plaintiffs present no such new factual circumstances, only new legal theories that they should have asserted in their prior suit. *Res judicata* bars Plaintiffs from bringing them now.

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

Plaintiffs' opposition likewise fails to save their Appointments Clause claim. As Defendants have explained, Plaintiffs forfeited this claim by failing to present it to the agency in the nine years since the Contraceptive Mandate was established. Mot. 17-19. In opposition, Plaintiffs wholly fail to address the extensive authority cited by Defendants. Instead, Plaintiffs implausibly assert that they are targeting a statute, not agency action, and thus need not have presented their claim to an agency. The Complaint refutes this contention, making clear that Plaintiffs' challenge is to the Contraceptive Mandate established by HRSA. *See, e.g.*, Compl. at 1-2; *id.* ¶¶ 15-23 (section entitled "The Federal Contraceptive Mandate"). Plaintiffs assert no injury from the statute—which does not operate directly on them in any event, *see* 42 U.S.C § 300gg-13(a)(4)—other than that the Contraceptive Mandate was promulgated pursuant to it. Indeed, Plaintiffs themselves frame their Appointments Clause claim as a challenge to the way members of HRSA—the *agency*—are appointed in light of the authority they exercised in adopting the Contraceptive Mandate, resulting in Plaintiffs' request that the Court "declare that the federal Contraceptive Mandate" is unconstitutional. *Id.* ¶ 44; *see id.* ¶¶ 38-43. For this reason, as explained in Defendants' motion, Mot. at 19, the only case Plaintiffs cite to support this argument, *Barr v. American Association of Political Consultants*, 140 S. Ct. 2335 (2020), provides them none. Indeed, that case has nothing whatsoever to do with the issues at hand. There, the plaintiffs challenged a statute that acted upon them directly by prohibiting them from taking certain actions. No agency action was at issue. Here, by contrast, the core of Plaintiffs' Complaint is their opposition to agency action. Unlike the statute at issue in *Barr*, the statute here does not force Plaintiffs to act or prohibit Plaintiffs from acting; it merely authorizes the agency action that is the true target of their complaint.

Plaintiffs also fail to refute the Secretary of Health and Human Services' ratification of the Contraceptive Mandate. Plaintiffs do not dispute that the Secretary was constitutionally appointed and that the Secretary's promulgation of regulations for purposes of implementing the Contraceptive Mandate constituted ratification of the Mandate's substance. *See* Mot. 20-21.

Instead, Plaintiffs claim the statute does not give the Secretary authority to do so and that the Contraceptive Mandate 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." Opp'n 22. But as Defendants demonstrated in their motion, the first argument is simply wrong. Reorganization Plan No. 3 of 1966—which is part of the United States Code, *see* 5 U.S.C. app. 1—vests the Secretary with "all functions of all agencies of or in the Public Health Service," including HRSA, which is the Secretary's creation. 5 U.S.C. app. 1 Reorg. Plan 3 1966 § 1(a); *see* Mot. at 21. Thus, HRSA is ultimately an arm of the Secretary that is exercising *his or her authority*. The Secretary thus has the power to ratify HRSA's actions. And because the Secretary's ratification cured any conceivable defect in the authority pursuant to which the Contraceptive Mandate was issued, it resolves Plaintiffs' Appointments Clause claims on the merits whether or not it was "necessary for the Contraceptive Mandate to take effect." Opp'n 22; *see Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019).

Plaintiffs' second argument fails because the Secretary *did* ratify the Contraceptive Mandate before it took effect, so it is of no moment whether or not the Mandate *could have* taken effect before ratification.[2] *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 religious exemption to the Contraceptive Mandate).

C. The Contraceptive Mandate Does Not Violate Nondelegation Precedents

Instead of arguing that the statute lacks an intelligible principle, Plaintiffs essentially argue that every intelligible principle should have additional subsidiary principles, which is not the law.

[2] Other than the Contraceptive Mandate, Plaintiffs do not identify in their Complaint or opposition any harm they allegedly suffered from a specific preventive medicine or service that insurers must cover without cost sharing pursuant to the HRSA guidelines promulgated pursuant to § 300gg-13(a)(4) (or even identify any other specific covered preventive medicine or service at all). In any event, § 300gg-13(b) provides for a delay before any preventive medicine or service identified by HRSA is subject to insurance coverage without cost sharing. During this delay, the Secretary could choose to ratify any decision of HRSA prior to the decision affecting any insurance plan, so no medicine or service must necessarily be covered for any period without the Secretary's ratification.

Plaintiffs cannot and do not dispute that the ACA instructs HRSA that its determinations must be comprehensive guidelines that relate specifically to women's preventive care and screenings, and that those instructions guide HRSA's exercise of its mission. Instead, Plaintiffs contend that the agencies should have further instructions about how to follow the broader instructions. But nondelegation precedents expressly permit even extremely broad statutory delegations within very general guidelines, such as the authority to recoup "excess profits" without defining what profits are "excess." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (citation omitted). And here Congress has not empowered HRSA to set standards that "affect the entire national economy," but instead has given HRSA the power to define a term in a cabined regulatory scheme. *See id.*

Plaintiffs essentially ask this Court to anticipate a change in Supreme Court nondelegation caselaw, citing *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*. But the *Little Sisters* Court expressly disavowed making any conclusion on nondelegation. 140 S. Ct. 2367, 2382 (2020). 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).

D. No RFRA Violation Is Alleged

Finally, Defendants established in their Motion that Leal and Von Dohlen fail to state a claim for violation of RFRA.[3] Mot. 23-25; *see* Compl. ¶¶ 20, 22. Just as in *Leal I*, Plaintiffs' only response is that conclusory, speculative allegations in two paragraphs in the Complaint "*must* be assumed to be true." Opp'n 25 (emphasis in original). This is not the law, for all of Plaintiffs' repeating it; 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

[3] Plaintiffs do not dispute that Armstrong has no RFRA claim.

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* Compl. ¶¶ 20, 22. The facts alleged in Plaintiffs' Complaint merely support the contention that non-government actors will not sell them the desired insurance *despite* the fact that the government is not preventing such a sale and is, in fact, enjoined from doing so. Plaintiffs offer no response to Defendants' demonstration in their motion that these allegations are inadequate to support a RFRA claim. Nor do Plaintiffs cite any 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) ("RFRA does not authorize religious organizations to dictate the independent actions of third-parties, even if the organization sincerely disagrees with them.") (Kavanaugh, J., dissenting from denial of reh'g). Nor do Plaintiffs argue that the government must take such affirmative action to protect Plaintiffs' "exercise of religion," or that there is no "l[ess] restrictive means" of furthering the government interest here. 42 U.S.C. § 2000bb-1.

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For all these reasons, Defendants' motion to dismiss (ECF No. 15) should be granted.

Respectfully submitted,

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Certificate of Service

On November 12, 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