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 STATE DEFENDANTS' MOTION TO DISMISS

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The state defendants seek dismissal on sovereign-immunity and Article III standing grounds, and they also seek dismissal under Rule 12(b)(6). Because the sovereign-immunity and standing issues determine the Court's subject-matter jurisdiction over the claims against state defendants, we will address those arguments first before considering the merits.

I. The Texas Religious Freedom Restoration Act Waives The State Defendants' Sovereign Immunity In Federal Court

Section 110.008 of the Texas Civil Practice and Remedies Code provides:

> SOVEREIGN IMMUNITY WAIVED. (a) Subject to Section 110.006,[1] sovereign immunity to suit and from liability is waived and abolished to the extent of liability created by Section 110.005, and a claimant may sue a government agency for damages allowed by that section.
>
> (b) Notwithstanding Subsection (a), this chapter does not waive or abolish sovereign immunity to suit and from liability under the Eleventh Amendment to the United States Constitution.

Tex. Civ. Prac. & Rem. Code § 110.008. Section 110.008(a) explicitly waives the state defendants' "sovereign immunity to suit and from liability," without regard to whether a lawsuit is brought in federal or state court. Section 110.008(b), however, clarifies that the waiver of immunity in section 110.008(a) "does not waive or abolish sovereign immunity to suit and from liability *under the Eleventh Amendment to the United States Constitution*." Tex. Civ. Prac. & Rem. Code § 110.008(b) (emphasis added).

The state defendants think they can escape this statutory waiver by claiming to assert sovereign immunity "under the Eleventh Amendment to the United States Constitution." *Id.* But the Eleventh Amendment does not shield a state from lawsuits

1. Section 110.006 of the Civil Practice and Remedies Code requires plaintiffs to provide 60 days' written notice before bringing suit under the Texas Religious Freedom Restoration Act.

brought by its *own* citizens, and each of the plaintiffs is a citizen of Texas. *See* U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by Citizens of another State, or by Citizens or Subjects of any Foreign State*." (emphasis added)); *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) ("[T]he Eleventh Amendment . . . applies only if the plaintiff is not a citizen of the defendant State."); *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011) ("[T]he Eleventh Amendment only eliminates the basis for our judgment in the famous case of *Chisholm v. Georgia,* 2 U.S. 419 (1793), which involved a suit against a State by a noncitizen of the State." (footnote omitted)).

The defendants are *not* relying on the Eleventh Amendment, but on the constitutional sovereign immunity established in *Hans v. Louisiana*, 134 U.S. 1 (1890), which protects states from lawsuits brought by their own citizens. But *Hans* immunity rests entirely on the original meaning of Article III, and not the Eleventh Amendment. *See id.* at 12–17; David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* (Chicago 1990) at 7–8 ("[T]he eleventh amendment itself was inapplicable. . . . [T]he passages just quoted leave little doubt that the basis for the [*Hans*] decision was that article III's provisions extending the judicial power to 'Cases arising under this Constitution' was subject to an implied exception for suits by individuals against nonconsenting states."). The opinion in *Hans* and subsequent cases have repeatedly held that Article III does not authorize a federal court to hear lawsuits brought against non-consenting states—and they have made abundantly clear that it is the Constitution as originally ratified (and *not* the Eleventh Amendment) that allows states to assert sovereign immunity in lawsuits brought by their own

citizens,[2] by foreign states,[3] and by other states.[4] *See Alden v. Maine*, 527 U.S. 706, 712–13 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . .").

The state defendants do not contest the plaintiffs' claim that the Eleventh Amendment is inapplicable to this lawsuit. *See* State's Br. (ECF No. 8) at 6. That confesses that section 110.008 waives their sovereign immunity. Consider once again the text of section 110.008:

> SOVEREIGN IMMUNITY WAIVED. (a) Subject to Section 110.006, sovereign immunity to suit and from liability is waived and abolished to the extent of liability created by Section 110.005, and a claimant may sue a government agency for damages allowed by that section.
>
> (b) Notwithstanding Subsection (a), this chapter does not waive or abolish sovereign immunity to suit and from liability under the Eleventh Amendment to the United States Constitution.

Tex. Civ. Prac. & Rem. Code § 110.008. Subsection (a) waives *all* sovereign-immunity defenses, while subsection (b) carves out "sovereign immunity . . . under the Eleventh Amendment" for preservation. So the *only* way to assert a sovereign-immunity

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2. *See Hans*, 134 U.S. at 15–16 ("[T]he cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. . . . The suability of a state, without its consent, was a thing unknown to the law.").
3. *See Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) ("[W]e cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States.").
4. *See Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1494–95 (2019) ("[A]t the time of the founding, it was well settled that States were immune under both the common law and the law of nations. The Constitution's use of the term 'States' reflects both of these kinds of traditional immunity.").

defense under section 110.008 is to invoke "sovereign immunity . . . under the Eleventh Amendment to the United States Constitution"—and there is no way that a lawsuit brought by a citizen of Texas can be blocked by "sovereign immunity . . . *under the Eleventh Amendment*." Yet the state defendants ask the court to disregard the language of section 110.008 because they claim (without any evidence) that the "clear intent" of the legislature was to preserve sovereign immunity for *any lawsuit brought in federal court*, regardless of whether that immunity is asserted under the Eleventh Amendment. *See* State's Br. (ECF No. 8) at 6. The state defendants observe that some courts have mistakenly used the phrase "Eleventh Amendment immunity" to encompass *Hans* immunity and other sovereign-immunity defenses that a state might assert in federal court, and they insist that section 110.008(b) should therefore be interpreted in accordance with this misnomer rather than what the Eleventh Amendment says. *See id*. (quoting *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 240–41 (5th Cir. 2005)). There are many problems with this argument.

The first problem is that statutes must be interpreted according to what they say, rather than the actual or imagined "intent" of those who enacted them. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."); *id*. at 1754 ("Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."); *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."); *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."); *DeOtte v. Azar*, 393 F. Supp. 3d 490, 509 n.9 (N.D. Tex. 2019) ("The text is the law, and it is the text that must be observed." (citations and internal quotation

marks omitted)); *In re C.J.N.-S.*, 540 S.W.3d 589, 591 (Tex. 2018) ("When interpreting statutes, courts presume the Legislature's intent is reflected in the words of the statute and give those words their fair meaning."); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."). So it does not matter what the "intent" of the statute might have been; the Court must apply and enforce section 110.008 as written. Section 110.008(a) waives *all* sovereign-immunity defenses, while section 110.008(b) claws back and preserves *only* the state's "sovereign immunity . . . under the Eleventh Amendment." *Hans* immunity is not "sovereign immunity . . . under the Eleventh Amendment," and section 110.008(b) does *not* say that sovereign immunity is preserved "for any lawsuit filed in federal court."

Second, the Supreme Court has specifically held that it is a "misnomer" to use the phrase "Eleventh Amendment immunity" to include *Hans* immunity because the Eleventh Amendment applies only to lawsuits filed against a state by citizens of another state, or by citizens or subjects of a foreign state. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) (holding that the phrase "Eleventh Amendment immunity" is a "misnomer" when used to described *Hans* immunity, because *Hans* immunity "neither derives from, nor is limited by, the terms of the Eleventh Amendment."); *Northern Insurance Co. of New York v. Chatham County*, 547 U.S. 189, 193 (2006) (same); *id.* (recognizing that "preratification sovereignty," and not the Eleventh Amendment, provides the "source" of *Hans* immunity); *Mercado v. Dart*, 604 F.3d 360, 361 (7th Cir. 2010) (Easterbrook, J.) ("The parties call this 'eleventh amendment immunity,' which is triply inaccurate. . . . *Hans* did not interpret the eleventh amendment, whose text is limited to diversity suits"); *see also* notes 2–4, *supra*, and accompanying text. If this Court were to hold that the plaintiffs' lawsuit against the state defendants were barred by "sovereign immunity . . . under the Eleventh Amendment," it would be defying the Supreme Court, which has repeatedly and emphatically held that *Hans*

immunity is *not* derived from the Eleventh Amendment and cannot qualify as "sovereign immunity . . . under the Eleventh Amendment to the United States Constitution."

Third, the statute does not even use the phrase "Eleventh Amendment immunity," which is the phrase that courts have frequently but incorrectly used to encompass *Hans* immunity and other sovereign-immunity defenses that states may assert in federal court. *See* State's Br. (ECF No. 8) at 6 (incorrectly asserting that the phrase "Eleventh Amendment immunity" appears "in that statutory provision"); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 240–41 (5th Cir. 2005) (observing that "the term 'Eleventh Amendment immunity' has been used loosely and interchangeably with 'state sovereign immunity' to refer to a state's immunity from suit without its consent in federal courts."). Instead, section 110.008(b) says: "Notwithstanding Subsection (a), this chapter does not waive or abolish *sovereign immunity to suit and from liability under the Eleventh Amendment to the United States Constitution*." So the fact that some courts have used "Eleventh Amendment immunity" as a misnomer that encompasses *Hans* immunity does nothing to help the defendants when there is nothing in section 110.008 that uses that phrase.

Finally, even if one were accept the state defendants' invitation to subordinate the enacted language of the Eleventh Amendment and section 110.008 to ruminations about the statute's "intent," there is no evidence to support the defendants' assertion that the legislature intended to use "sovereign immunity . . . under the Eleventh Amendment" as a misnomer that encompasses *Hans* immunity. The mere observation that some courts have misused the phrase "Eleventh Amendment immunity" does nothing to prove that the state legislature was similarly misusing its reference to "the Eleventh Amendment," and the state defendants cite no legislative history to support this view. It would have been easy enough to draft a statutory provision that preserves sovereign immunity for any lawsuit brought in federal court. Section 110.008(b)

could have said: "Notwithstanding Subsection (a), this chapter does not waive or abolish sovereign immunity to suit and from liability *in federal court*." It is hard to understand why the legislature eschewed this formulation in favor of the language that it actually adopted, unless the legislature intended for section 110.008(b) to mean what it actually says: That sovereign immunity is preserved only for lawsuits brought in federal court by a non-citizen of Texas.

The state defendants deny that section 110.008 qualifies as a "clear declaration" that Texas intended to subject itself and state officials to federal-court jurisdiction. *See* State's Br. (ECF No. 8) at 6. But the waiver of sovereign immunity in section 110.008(a) is as clear as can be: "Subject to Section 110.006, *sovereign immunity to suit and from liability is waived and abolished to the extent of liability created by Section 110.005*, and a claimant may sue a government agency for damages allowed by that section." This waives *all* sovereign immunity for claims brought under Texas RFRA—regardless of whether the lawsuit is brought in state or federal court. Section 110.008(b) claws back and preserves a slice of this immunity, but only for claims blocked by "the Eleventh Amendment to the United States Constitution" rather than for every claim filed in federal court. The state defendants also observe that a "'state's waiver of sovereign immunity in state court does not mean the state has waived Eleventh Amendment immunity in federal court.'" State's Br. (ECF No. 8) at 6 (quoting *Perez v. Region 20 Education Service Center*, 307 F.3d 318, 332 (5th Cir. 2002)). True enough, but the waiver of sovereign immunity in section 110.008(a) is *not* limited to state court; it waives sovereign immunity across the board regardless of where the lawsuit is filed. Then section 110.008(b) provides that defendants may continue asserting "sovereign immunity . . . under the Eleventh Amendment"—but not sovereign immunity under *Hans*—notwithstanding the blanket waiver of immunity that appears in section 110.008(a).

In their reply brief in the previous *Leal v. Azar* case (No. 124), the state defendants tried to refute this argument by relying on *Martinez v. Texas Dep't of Criminal Justice*, 300 F.3d 567, 575–76 (5th Cir. 2002), which construed a statutory waiver of sovereign immunity in the Texas Whistleblower Act as applying only to lawsuits filed in state court.[5] But *Martinez* reached this conclusion only because the statutory waiver of immunity was accompanied by a mandatory venue provision that authorized lawsuits to be filed *only* in state district court. Immediately after quoting section 554.0035 of the Texas Government Code, which provides that "[s]overeign immunity is waived and abolished to the extent of liability for the relief allowed under the chapter for violation of this chapter," the *Martinez* Court wrote:

> Linked with this waiver is the Act's specifying that a public employee may sue "in a district court of the county in which the cause of action arises or in a district court of Travis County." Tex. Gov't Code Ann. § 554.007 (Vernon Supp. 2001). Neither section evidences any intent by Texas to waive its Eleventh Amendment immunity and subject itself to suit in federal courts. In other words, the Act waives state sovereign immunity only in Texas state courts. This is the only reasonable construction of the Act.

Martinez, 300 F.3d at 575. Crucial to the Court's holding was the fact that the mandatory venue rule in section 554.007 allowed lawsuits to be filed only in a *state* district court; without this venue provision, there would be basis for limiting section 554.0035's waiver of sovereign immunity to state-court litigation. The Texas Religious Freedom Restoration Act has no venue provision comparable to section 554.007, and no other provision of Texas RFRA indicates that litigation will proceed only in state court.

The Supreme Court has also instructed courts to interpret statutory waivers of sovereign immunity with an eye toward surrounding statutory provisions, which may indicate whether a statutory waiver of immunity to suit is limited to state court or

5. *See Leal v. Azar*, No. 2:20-cv-00124-Z (ECF No. 24) at 3.

extends to federal court as well. See *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306–07 (1990). Here, the state has clarified that its blanket waiver of sovereign immunity in section 110.008(a) will not extend to "sovereign immunity to suit and from liability *under the Eleventh Amendment to the United States Constitution*." Tex. Civ. Prac. & Rem. Code § 110.008(b) (emphasis added). By clarifying that sovereign immunity is preserved only when asserted "under the Eleventh Amendment," the statute makes clear that *Hans* immunity—which is *not* derived from the Eleventh Amendment—has been waived. Section 110.008(b) could have easily been written to say that "this chapter does not waive or abolish sovereign immunity to suit and from liability *in federal court*." The decision to eschew this formulation in favor of a statute that preserves sovereign immunity only under "the Eleventh Amendment" must be given effect. *See Bostock*, 140 S. Ct. at 1749 ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." (citation and internal quotation marks omitted)); *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 78 (Tex. 2017) ("[T]he foremost task of legal interpretation [is] divining what the law is, not what the interpreter wishes it to be."); *Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) ("[W]hen we stray from the plain language of a statute, we risk encroaching on the Legislature's function to decide what the law should be.").

II. Mr. Leal Has Alleged Article III Standing

At the pleading stage, a plaintiff needs only to allege 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; the 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 state defendants do not deny that Mr. Leal has alleged an injury in fact, which is traceable to the defendants' enforcement of the Texas contraceptive-equity law. But the defendants claim that Mr. Leal has failed to allege redressability, because he "does not plead facts showing insurers would be willing to issue" policies that exclude contraceptive coverage. *See* State's Br. (ECF No. 8) at 7. The state defendants also contend that the complaint *undercuts* the case for redressability, because it alleges that "few if any insurance companies" are currently offering coverage that excludes contraception in response to the *DeOtte* injunction. *See id.* (quoting Complaint (ECF No. 1 at ¶ 23). This argument is mistaken for many reasons.

First, the complaint explains that the *reason* that so few insurance companies are offering contraceptive-free health insurance in response to *DeOtte* is that the state defendants continue to enforce the Texas contraceptive-equity law, which prohibits insurers from offering contraceptive-free health insurance unless those policies also exclude *all* coverage of prescription drugs:

> In addition, the Texas Contraceptive Equity Law remains in effect, which prohibits health insurers in Texas from excluding contraceptive coverage unless they also exclude coverage for all prescription drugs. So no health insurer in Texas is even permitted to offer a policy that excludes contraceptive coverage unless it drops all coverage for prescription drugs, and even then a policy of that sort may *only* be sold to individuals who hold sincere religious objections to contraception.

See Complaint (ECF No. 1 at ¶ 23). So the complaint specifically blames the Texas contraceptive-equity laws for the paucity of acceptable health-insurance options in the

wake of the *DeOtte* injunction. The *DeOtte* injunction liberated insurance companies to offer contraceptive-free health insurance to individual religious objectors—but as long as the Texas contraceptive-equity laws remain in effect they cannot offer policies that exclude contraceptive coverage unless that policy simultaneously excludes *all* coverage of prescription drugs. The relief that Mr. Leal seeks will remove these remaining obstacles to the provision of contraceptive-free health insurance, by enjoining the enforcement of the federal Contraceptive Mandate in its entirety and by enjoining the enforcement of Texas contraceptive-equity laws.

Second, Mr. Leal is not required to allege (or prove) that insurance companies actually will offer contraceptive-free health insurance in response to his lawsuit. He needs only to show that it is "likely, as opposed to merely speculative," that they will do so. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (citation omitted)). And at the pleading stage, Mr. Leal needs only to allege facts that make it *plausible* to believe that his alleged injuries are "likely" to be redressed by the relief that he seeks. *See Iqbal*, 556 U.S. at 677–78; *Twombly*, 550 U.S. at 555–56.[6] It is certainly "plausible" to think that at least one insurance company will offer contraceptive-free health insurance policies in response to the relief that Mr. Leal requests, and the state defendants do not deny the plausibility of this belief. Nothing more is required at the pleading stage.

Third, Mr. Leal has specifically asked for relief that would:

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6. Women who challenge statutes outlawing abortion, for example, are not required to allege (or prove) that abortionists will begin offering services in their state after the enforcement of criminal penalties is enjoined. *See Roe v. Wade*, 410 U.S. 113, 124–25 (1973) (conferring standing on "Jane Roe" to challenge the constitutionality of Texas's abortion ban without requiring allegations or proof that abortionists would begin offering services in Texas in response to a favorable court ruling). If it is plausible to believe that this would occur, that is all a plaintiff needs to satisfy redressability at the pleading stage.

> order Commissioner Sullivan and the Texas Department of Insurance 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*

Complaint (ECF No. 1) at ¶ 58(f) (emphasis added). This requested relief *guarantees* that Mr. Leal's injury will be redressed. The state denies that this relief should be awarded,[7] but that goes to the merits and has nothing to do with whether Mr. Leal has alleged the elements of Article III standing. When determining whether a litigant has alleged the redressability component of standing, a court must *assume* that he will prevail on the merits and obtain the requested relief—and ask *only* whether the requested relief will remedy the alleged injury. A court cannot peak at the merits and deny standing based on its belief that the litigant will fail to obtain the requested relief.

III. If The Court Agrees With The State Defendants' Sovereign-Immunity Or Standing Arguments, Then It Must Remand The Claims To State Court Rather Than Dismissing Them Under Rule 12(b)(1)

The state defendants ask this Court to "dismiss" Mr. Leal's claims under Rule 12(b)(1) if it concludes that sovereign immunity or Article III standing doctrine deprives this Court of subject-matter jurisdiction. *See* State's Br. (ECF No. 8) at 3 ("Leal's claims must be dismissed for lack of subject-matter jurisdiction."). But the federal courts are forbidden to dismiss a removed case or claim for lack of subject-matter jurisdiction; they *must* remand those cases or claims to state court rather than dismissing them. 28 U.S.C. § 1441(c)(2) provides:

> (1) If a civil action includes—
>
> > (A) a claim arising under the Constitution, laws, or treaties of the United States(within the meaning of section 1331 of this title), and
> >
> > (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

7. *See* State's Br. (ECF No. 8) at 12–13.

> the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).
>
> (2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and *shall remand the severed claims to the State court from which the action was removed*.

28 U.S.C. § 1441(c)(2). 28 U.S.C. § 1447(c) establishes a similar rule when the district court lacks subject-matter jurisdiction over an entire case: The case *must* be remanded to state court rather than dismissed under Rule 12(b)(1). *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, *the case shall be remanded*." (emphasis added)); *International Primate Protection League v. Administrators of Tulane Education Fund*, 500 U.S. 72, 89 (1991) ("[T]he literal words of Section 1447(c) . . . give . . . no discretion to dismiss rather than remand an action. The statute declares that, where subject matter jurisdiction is lacking, the removed case 'shall be remanded.'" (citation and internal quotation marks omitted)). So the state defendants' jurisdictional objections are an argument for remand, not dismissal, and the Court may not dismiss Mr. Leal's claims under Rule 12(b)(1) even if it agrees with the state defendants' sovereign-immunity and standing arguments.

IV. Mr. Leal Has Alleged A Substantial Burden On His Exercise Of Religion

The state defendants deny that the contraceptive-equity law imposes a "substantial burden" on Mr. Leal. *See* State's Br. (ECF No. 8) at 8–11. But Mr. Leal alleges and sincerely believes that the contraceptive-equity law makes individual consumers of health insurance "complicit" in the use of contraception by causing them to subsidize its provision. *See* Complaint (ECF No. 1) at ¶ 29 ("[I]ndividual consumers of health insurance . . . are compelled to subsidize the use of contraception unless they

forgo health insurance entirely or purchase a plan that excludes all coverage of prescription drugs."); *id.* at ¶ 31 ("Plaintiffs Victor Leal and Patrick Von Dohlen are devout Roman Catholics who oppose all forms of birth control, and they want to purchase health insurance that excludes coverage of contraception to avoid subsidizing other people's contraception and becoming complicit in its use."). The complaint also alleges that the contraceptive-equity law makes it more expensive for Mr. Leal to avoid complicity in the use of contraception, as he cannot avoid this complicity unless he forgoes health insurance entirely or finds a policy that excludes all coverage of prescription drugs. *See id.* at ¶ 51 ("The Texas contraceptive-equality laws . . . mak[e] it impossible for individuals and employers with religious objections to purchase health insurance that excludes contraceptive coverage, unless they forgo all coverage of prescription drugs."). That is all that is needed to establish a "substantial burden" under *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

The Supreme Court has repeatedly held that courts *must* accept a religious objector's complicity-based objections to contraceptive coverage—no matter how attenuated the complicity may seem to an opposing party or a federal judge. The Court's only task is to determine whether a complicity-based objection is sincere; it may not dismiss a religious objector's sincere complicity objections as unreasonable or "too attenuated." As the Supreme Court explained in *Hobby Lobby*:

> [I]n these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and *it is not for us to say that their religious beliefs are mistaken or insubstantial.* Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.

Hobby Lobby, 573 U.S. at 725 (emphasis added) (citation omitted); *id.* at 724 ("[C]ourts have no business addressing . . . whether the religious belief asserted in a

RFRA case is reasonable." (parentheses omitted)).[8] The Court emphatically reaffirmed this stance in *Little Sisters of the Poor*, and declared that courts "*must* accept the sincerely held complicity-based objections of religious entities" no matter how "attenuated" the complicity may seem:

> [I]n *Hobby Lobby*, . . . we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities. That is, they could not "tell the plaintiffs that their beliefs are flawed" because, in the Departments' view, "the connection between what the objecting parties must do . . . and the end that they find to be morally wrong . . . is simply too attenuated."

Little Sisters, 140 S. Ct. at 2383 (quoting *Hobby Lobby*, 573 U.S. at 723–24); *see also id.* at 2390 (Alito, J., concurring) ("It is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives and that they also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct. As in *Hobby Lobby*, 'it is not for us to say that their religious beliefs are mistaken or insubstantial.'" (citation omitted)); *id.* at 2391 (Alito, J., concurring) ("Where to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question.").

The Supreme Court has also held that a law substantially burdens the exercise of religion whenever it makes one's exercise of religion more expensive. *See Hobby Lobby*, 573 U.S. at 710 ("[A] law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)). Even the withholding a government benefit imposes a "substantial burden" if that benefit

8. *See also* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. Chi. L. Rev. 1897, 1900 (2015) (acknowledging, in an article critical of *Hobby Lobby*, that "the mere fact that Hobby Lobby *believed* that it would be complicit, no matter how idiosyncratic its belief, sufficed to qualify it for an exemption." (emphasis in original)).

is conditioned upon a willingness to act in violation of a sincere religious belief. *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (finding it "clear" that a "disqualification for benefits . . . burden[s] the free exercise of appellant's religion."); *id.* at 406 ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").[9] Here, the complaint specifically alleges that the contraceptive-equity law makes it more expensive for Mr. Leal and devout Catholic believers to exercise their religion, because the law compels them to forgo health insurance or prescription-drug coverage if they want to avoid complicity in contraception. *See* Complaint (ECF No. 1) at ¶ 51.

The state defendants do not deny the sincerity of Mr. Leal's complicity objections, and they do not deny that the contraceptive-equity law makes it more expensive for Mr. Leal and devout Catholic believers to exercise their religion. Instead, the state defendants deny the reasonableness of Mr. Leal's complicity objections, and they argue that his theory of complicity "'is too attenuated to amount to a substantial burden.'" State's Br. (ECF No. 8) at 10 (quoting *Dierlam v. Trump*, 2017 WL 7049573, *9 (S.D. Tex.)). That is precisely what *Hobby Lobby* and *Little Sisters* forbid courts to do. And the cases on which the state defendants rely are flatly incompatible with the Supreme Court's instructions in those cases.

In *Real Alternatives, Inc. v. Secretary Department of Health and Human Services*, 867 F.3d 338 (3d Cir. 2017), for example, the Third Circuit dismissed an employee's complicity-based objections to contraceptive coverage as "'far too attenuated to rank

9. *See also Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

as [a] substantial'" burden on his exercise of religion. *Id.* at 360 (quoting Hobby Lobby, 573 U.S. at 760 (Ginsburg, J. dissenting)); *see also id.* ("This attenuation is fatal to the RFRA claim."). In *Dierlam v. Trump*, 2017 WL 7049573 (S.D. Tex.), a magistrate judge endorsed the Third Circuit's reasoning and rejected the RFRA claims of a devout Catholic who wished to purchase health insurance that excluded contraceptive coverage. *See id.* at *9 ("This Court agrees with the Third Circuit's reasoning. . . . Plaintiff's membership in an employer-provided health care plan and the provision of contraceptives to another plan member is too attenuated to amount to a substantial burden." (citing *Real Alternatives*, 867 F.3d at 360). And in *East Texas Baptist University v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated by Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam), the Fifth Circuit denied the factual premise of an employer's complicity objections, and held that an employer was simply wrong for believing that its execution and submission of EBSA Form 700 leads directly to the provision of abortifacient contraception. *See id.* at 459 ("Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives." (emphasis in original)).

All of these rulings defy the Supreme Court's pronouncements in *Hobby Lobby* and *Little Sisters*, which establish a rule of absolute deference to complicity-based objections under RFRA. *See Hobby Lobby*, 573 U.S. at 725; *Little Sisters*, 140 S. Ct. at 2383. It *does not matter* whether a court (or an opposing litigant) thinks a litigant's complicity concerns are "too attenuated" to warrant protection under RFRA. And it does not even matter whether the factual beliefs that undergird a litigant's complicity objection are correct. The Court's *only* task is to assess whether a complicity objection is sincere. Of course, a theory of complicity may be so fantastical or delusional as to call into question the sincerity of the objection, but the state defendants are not ques-

tioning the sincerity of Mr. Leal's complicity concerns—and none of the court decisions in *Real Alternatives*, *Dierlam*, and *East Texas Baptist* questioned the sincerity of the litigant's complicity objections either.

The Court should instead follow the approach of *DeOtte v. Azar*, 393 F. Supp. 3d 490, 508–11 (N.D. Tex. 2019), *Wieland v. United States Dep't of Health & Human Services*, 196 F. Supp. 3d 1010, 1017–19 (E.D. Mo. 2016), and *March for Life v. Burwell*, 128 F. Supp. 3d 116, 128–30 (D.D.C. 2015), which deferred to the asserted complicity objections and held that the federal Contraceptive Mandate substantially burdens the religious freedom of individual consumers of health insurance, by requiring them to choose between forgoing health insurance entirely or becoming complicit in the provision of objectionable contraception.[10] The state defendants try to distinguish *DeOtte* by observing that federal Contraceptive Mandate operated in conjunction with an "individual mandate" that compelled individuals to buy ACA-compliant health insurance, which forced individuals to choose between violating their religious beliefs and violating the law. *See DeOtte*, 393 F. Supp. 3d at 510 ("The class members cannot participate in the health-insurance market without violating their beliefs, which means they cannot comply with federal law without violating their

10. *See DeOtte*, 393 F. Supp. 3d at 509 (holding that the federal Contraceptive Mandate substantially burdens the religious freedom of individual consumers of health insurance who wish to avoid complicity in contraception, because these individuals "are forced out of either the health-insurance market or their religious exercise."); *Wieland*, 196 F. Supp. 3d at 1017 (holding that the federal contraceptive mandate substantially burdens the religious freedom of individual consumers of health insurance because "the ultimate impact is that Plaintiffs must either maintain a health insurance plan that includes contraceptive coverage, in violation of their sincerely-held religious beliefs, or they can forgo healthcare altogether"); *March for Life*, 128 F. Supp. 3d at 128–29 ("[T]he employee plaintiffs have demonstrated that the Mandate substantially burdens their sincere exercise of religion . . . [because] [t]he Mandate, in its current form, makes it impossible for employee plaintiffs to purchase a health insurance plan that does not include coverage of contraceptives to which they object.").

beliefs. That is a substantial burden."). But Mr. Leal is *still* subject to the ACA's individual mandate that requires him to buy health insurance,[11] and Texas law prevents him from purchasing health insurance that excludes contraception unless he forgoes *all* coverage of prescription drugs and finds a plan that excludes all forms of prescription-drug coverage.

More importantly, the Texas contraceptive equity law imposes a "substantial burden" on Mr. Leal regardless of whether federal law requires him to purchase health insurance. The "substantial burden" comes from the fact that Mr. Leal (and other devout Catholic believers) are denied the ability to purchase *any* type of health insurance that covers prescription drugs, as a consequence of their unwillingness to become complicit in the provision and use of contraception. It is no different from a law that requires health insurance to cover abortion on the same terms as other surgical procedures, which denies religious objectors the ability to purchase any type of insurance coverage for surgery unless they agree become complicit in abortion. The "substantial burden" test is satisfied whenever the government "make[s] the practice of . . . religious beliefs more expensive";[12] it does not require legal compulsion to act in violation of one's religious belief, as the state defendants appear to be suggesting.

Finally, the state defendants are wrong to say that Mr. Leal must "plead facts" showing how the purchase of health insurance will make him complicit in the use of contraception. *See* State's Br. (ECF No. 8) at 10. Under *Hobby Lobby* and *Little Sisters*, Mr. Leal needs only to plead a sincere belief that contraceptive coverage makes him complicit through the payment of premiums, and a court is not permitted to assess

11. The Fifth Circuit has declared the individual mandate unconstitutional, *see Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), but this ruling has been stayed pending the Supreme Court's review in *Texas v. California*, 140 S. Ct. 1262 (2020).
12. *Hobby Lobby*, 573 U.S. at 710 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

the reasonableness (or the factual accuracy) of that belief. *See Hobby Lobby*, 573 U.S. at 725; *Little Sisters*, 140 S. Ct. at 2383. And *even if* Mr. Leal were required to prove a factual basis for his complicity objections (and he isn't), he *still* would not be required to plead those facts in his complaint. *Twombly* and *Iqbal* do not require "detailed factual allegations,"[13] and they did not change the notice-pleading requirements of Rule 8 into a regime that requires complaints to allege every fact on which the plaintiff intends to rely. A complaint needs only enough factual detail to provide "fair notice" of the claims and the grounds on which they rest, as well as a "plausible" basis for believing the claims set forth in the complaint. *See Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (some internal quotation marks omitted)). Mr. Leal's complaint easily satisfies this standard.

The state defendants are equally wrong to say that Mr. Leal must plead details regarding the extent of the burden imposed by the Texas contraceptive-equity laws. *See* State's Br. (ECF No. 8) at 11. A complaint does not need this level of factual detail; it is enough to assert a "substantial burden" so long as the allegations make it "plausible" to believe that the Texas contraceptive-equity laws might impose a substantial burden on Mr. Leal. The state defendants do not argue that Mr. Leal has failed to satisfy the plausibility threshold of *Twombly* and *Iqbal*, and they do not contend that his allegations of "substantial burden" rely on rank speculation of the sort that characterized the *Twombly* and *Iqbal* pleadings. Nor is Mr. Leal is alleging fraud or

13. *See Iqbal*, 556 U.S. at 677–78; *Twombly*, 550 U.S. at 555–56.

mistake, which must be pleaded with particularity under Rule 9(b),[14] or anything else that triggers a heightened pleading requirement under federal law. *See, e.g.*, 15 U.S.C. § 78u-4(b) (imposing heightened pleading requirements for claims alleging securities fraud). Outside these situations, it is perfectly acceptable for a pleading to assert its claims generally and allow factual details to be learned in discovery. Mr. Leal has alleged that the Texas contraceptive-equity laws "mak[e] it impossible for individuals and employers with religious objections to purchase health insurance that excludes contraceptive coverage, unless they forgo all coverage of prescription drugs." Complaint (ECF No. 1) at ¶ 51. That is more than enough to set forth a "plausible" allegation of substantial burden under the requirements of Rule 8.

V. It Is Premature For The Court To Consider Whether Mr. Leal May Seek An Injunction Requiring The State Defendants To Ensure That Private Insurers Offer Contraceptive-Free Health Insurance To Religious Objectors

The Texas Religious Freedom Restoration Act provides that:

> (a) Any person, other than a government agency, who successfully asserts a claim or defense under this chapter is entitled to recover: . . .
>
> (2) injunctive relief to prevent the threatened violation or continued violation . . .

Tex. Civ. Prac. & Rem. Code § 110.005. Mr. Leal is asking for an injunction that would:

> [1] enjoin Commissioner Sullivan and the Texas Department of Insurance from enforcing the Texas contraceptive-equity laws, including Tex. Ins. Code §§ 1369.104–.109 and 28 Tex. Admin. Code § 21.404(c), and [2] order Commissioner Sullivan and the Texas Department of Insurance to ensure that religious objectors in Texas can obtain health insurance that excludes contraceptive coverage, and to

14. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

> use their regulatory authority to require insurers to offer such plans if needed;

Complaint (ECF No. 1) at ¶ 58(f). The state defendants deny that the Texas Religious Freedom Restoration Act authorizes the second half of this requested injunction, because they deny that this injunction "prevents" an actual or threatened violation of Texas RFRA. In the state defendants' view, Mr. Leal may seek only an injunction that prevents the continued enforcement of the Texas contraceptive-equity laws; an injunction that requires "affirmative or proactive action" would extend beyond the "prevention" of a statutory violation.

This is not something to be resolved on a motion to dismiss. Rule 12(b)(6) allows defendants to seek dismissal of a claim if there is *no* relief that can be granted,[15] but it does not authorize courts to determine the appropriate scope of an injunction before the plaintiff has prevailed on his claim. The state defendants do not deny the propriety of the first half of Mr. Leal's proposed injunction, nor do they deny that Mr. Leal can obtain *some* form of injunctive relief if he prevails on the merits of his Texas RFRA claim. They are simply arguing that the overall scope of Mr. Leal's proposed injunction is too broad. That is not an argument to dismiss his *claim* under Rule 12(b), and the appropriate time to debate the scope of an injunction is after this Court has found a violation of Texas RFRA that entitles to Mr. Leal to relief. Finally, the proposed "motion to strike" should be denied as pointless, because the scope of eventual relief does not in any way turn on what appears in a party's pleadings. *See* Fed. R. Civ. P. 54(c) ("Every . . . final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*." (emphasis added)).

15. *See* Fed. R. Civ. P. 12(b) (allowing parties to move to dismiss for "failure to state a claim upon which relief can be granted").

CONCLUSION

The state defendants' motion to dismiss should be denied.

Respectfully submitted.

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