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

VICTOR LEAL, PATRICK VON DOHLEN, KIM ARMSTRONG, *Plaintiffs*,	§	
v.	§	NO. 2:20-cv-00185-Z
ALEX M. AZAR II, et.al., *Defendants*.	§	

STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants, the Texas Department of Insurance ("TDI") and Kent Sullivan ("Commissioner Sullivan"), in his official capacity as Texas Commissioner of Insurance, (collectively "State Defendants"), file this Reply in Support of their Motion to Dismiss.

I. ARGUMENT AND AUTHORITIES

A. The Texas Religious Freedom Restoration Act does not waive the State Defendants' immunity in federal court.

Leal argues that the Texas Religious Freedom Restoration Act ("TRFRA") waives the State's immunity in federal court because its general waiver provision waives sovereign immunity "without regard to whether a lawsuit is brought in federal or state court." Pl.'s Br. (Dkt. 17) at 1. Because the general waiver provision contains no language specifically limiting its application to state court, Leal argues the

immunity waiver must be read to extend to federal court as well. Leal is mistaken.

"The Supreme Court has made clear that [courts] may find a waiver of a State's Eleventh Amendment immunity in only the most exacting circumstances." *Magnolia Venture Capitol Corp. v. Prudential Sec., Inc.*, 151 F.3d 439, 443 (5th Cir. 1998). A state's consent to suit in federal court must be "unequivocally expressed." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S 89, 99 (1984). Because a court must identify "[a] clear declaration of the state's intention to submit its fiscal problems to other courts," *Magnolia*, 151F.3d at 444, a statutory waiver of immunity in federal court "must specify the State's intention to subject itself to suit in *federal court*." *Port. Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (emphasis in original).

That is why general waiver provisions may waive immunity in state court but fail to waive immunity in federal court. *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n,* 450 U.S. 147, 150 (1981) ("the State's general waiver of sovereign immunity . . . does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court."); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 579-580 (1946) (finding general waiver provision lacked the "clear declaration by a State of its consent to be sued in the federal courts"); *Bonillas v. Harlandale Indep. Sch. Dist.*, 832 F. Supp. 2d 729, 735 (W.D. Tex. 2011) ("General consent to suit provisions are insufficient to waive

Eleventh Amendment immunity, rather, the state must unequivocally express its consent to be sued in *federal* court.") (emphasis in original).

Indeed, the Fifth Circuit has rejected the waiver argument Leal advances here. In *Martinez v. Tex. Dep't of Criminal Justice*, the Fifth Circuit examined the general waiver provision in the Texas Whistleblower Act ("TWA") and found no waiver of immunity in federal court. 300 F.3d 567, 575 (5th Cir. 2002). The TWA's waiver provision states:

> A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. *Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under the chapter for violation of this chapter.*

TEX. GOV'T CODE § 554.0035 (emphasis added). The Fifth Circuit rejected the argument that TWA's general waiver of sovereign immunity waives immunity in federal court because "for a statute to waive Eleventh Amendment immunity, it must specify the State's intent to subject itself to suit in *federal court*." *Martinez*, 300 F.3d at 575 (internal quotations omitted) (emphasis in original). The Court also examined the TWA's venue provision and found that "neither section evidences any intent by Texas to waive its Eleventh Amendment immunity and subject itself to suit in federal courts." *Id.* The TWA simply lacked the required "unequivocal expression or overwhelming implication leaving 'no room for any other reasonable construction" that the State waived its immunity in federal court." *Id.* (quoting *Feeney*, 495 U.S. at 305.

Leal's argument is plainly inconsistent with the Fifth Circuit's decision in *Martinez*. Leal argues that because TRFRA's waiver provision contains no language limiting the waiver to state court, "it waives sovereign immunity across the board." Pl.'s Br. (Dkt. 17) at 7. But the TWA's general waiver of "sovereign immunity" also contains no such language but the Fifth Circuit declined to equate the lack of language limiting the waiver to state court as a clear expression of a waiver in federal court.

Leal attempts to distinguish *Martinez* by arguing that the Fifth Circuit reached its conclusion based on the TWA's mandatory venue provision and that without that provision "there would be [no] basis for limiting section 554.0035's waiver of sovereign immunity to state-court litigation." *Id.* at 8. *Martinez* contained no such holding. Instead the Fifth Circuit emphasized that for a waiver of immunity in federal court to be effective, the statute "must specify the State's intent to subject itself to suit in *federal court*." *Martinez*, 300 F.3d at 575 (internal quotations omitted) (emphasis in original). Thus, contrary to Leal's claim (at 8), the venue provision was not "crucial to the Court's holding," because even without the venue provision the statute lacked the required "unequivocal expression or overwhelming implication" of waiver of immunity *in federal court*. *Martinez*, 300 F.3d at 575. Under Leal's reading of *Martinez*, the TWA's waiver provision showed an intent to waive immunity in federal court but the venue provision showed the opposite. That reading conflicts with the Fifth Circuit's clear holding that *"[n]either section* evidences any intent by Texas

to waive its Eleventh Amendment immunity and subject itself to suit in federal courts" *Martinez*, 300 F.3d at 575. TRFRA's identical waiver language thus also contains no "unequivocal expression or overwhelming implication" of Texas's intent to waive immunity *in federal court*. Leal's position cannot be squared with the Fifth Circuit's holding in *Martinez*.

Leal's emphasis on the shared historical bases for immunity in both state and federal courts is also misplaced. *See* Pl.'s Br. (Dkt. 17) at 1-3. Regardless of whether sovereign immunity in state court and sovereign immunity in federal court are conceptionally linked, courts have consistently required *waiver* of those immunities to be distinctly stated and unequivocally expressed. That requirement is in "recognition of the vital role of the doctrine of sovereign immunity in our federal system" *Pennhurst*, 465 U.S. at 99.; *id.* ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.") (emphasis in original). Because TRFRA does not "specify the State's intent to subject itself to suit in *federal court*" it does not waive State Defendants' immunity in federal court. *Martinez*, 300 F.3d at 575 (internal quotations omitted) (emphasis in original).

Further, TRFRA specifically disclaims any waiver of sovereign immunity under the Eleventh Amendment to the United State Constitution. TEX. CIV. PRAC. & REM. CODE 110.006(b). As the United State Supreme Court has recognized, "Eleventh Amendment Immunity" is "convenient shorthand" for a State's sovereign immunity in federal court. *Alden v. Maine*, 527 U.S. 706, 713 (1999); *see also Welch v. Texas*

Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 (1987) ("the Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State."). The Fifth Circuit[1] and courts in this district[2] have for decades repeatedly used "Eleventh Amendment" immunity as short hand for immunity in federal court. The Court should interpret TRFRA's reservation of "Eleventh Amendment" immunity in light with that common understanding. *In re Foust*, 310 F.3d 849, 864 (5th Cir. 2002)("The waiver of a state's sovereign immunity, like waiver of any constitutional right, is strictly construed in favor of the holder of the right" and "exemptions to [a state's] waiver should be liberally construed in favor

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[1] *See, e.g., Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 182 (5th Cir. 2020); *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019); *Nelson v. Univ. of Texas at Dallas*, 535 F.3d 318, 321 (5th Cir. 2008); *Martinez*, 300 F.3d at 573; C*hampagne v. Jefferson Par. Sheriff's Office*, 188 F.3d 312, 313 (5th Cir. 1999) *Magnolia*, 151 F.3d at 443; *Sherwinski v. Peterson*, 98 F.3d 849, 852 (5th Cir. 1996); *Warnock v. Pecos Cty., Tex.*, 88 F.3d 341, 343 (5th Cir. 1996); *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 186 (5th Cir. 1986); *Dagnall v. Gegenheimer*, 645 F.2d 2, 3 (5th Cir. 1981).

[2] *See, e.g., Patrick v. Martin*, No.2:16-CV-216-D-BR, 2020 WL 4040969 (N.D. Tex. July 16, 2020) (Kacsmaryk, J.); *Shah v. Univ. of Texas Sw. Med. Sch.*, 54 F. Supp. 3d 681, 690 (N.D. Tex. 2014); *Sosebee v. Texas Alcoholic Beverage Comm'n*, 906 F. Supp. 2d 596, 604 (N.D. Tex. 2012); *Florance v. Buchmeyer*, 500 F. Supp. 2d 618, 637 (N.D. Tex. 2007); *Shabazz v. Texas Youth Comm'n*, 300 F. Supp. 2d 467, 472 (N.D. Tex. 2003); *In re Greenwood*, 237 B.R. 128, 130 (N.D. Tex. 1999); *Gaines v. Texas Tech Univ.*, 965 F. Supp. 886, 889 (N.D. Tex. 1997); *Student Servs. for Lesbians/Gays & Friends v. Texas Tech Univ.*, 635 F. Supp. 776, 782 (N.D. Tex. 1986); *Lary v. Kavanaugh*, 611 F. Supp. 562, 563 (N.D. Tex. 1985).

of limiting liability."); *Cazales v. Lecon, Inc.*, 994 F. Supp. 765, 769 (S.D. Tex. 1997) ("when a court is confronted with a purported waiver of immunity, the court must construe any ambiguities in favor of immunity."). Leal has failed to demonstrate a waiver of State Defendants' immunity in federal court.

B. Leal lacks standing because Leal's injury cannot be redressed by the relief sought.

Leal argues that he has sufficiently pled Article III standing for a TRFRA violation because he has alleged a plausible basis for redressability. Pl.'s Br. (Dkt. 17) at 9–12; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (Article III standing requires an injury-in-fact, traceability to the defendant, and redressability by the court). Leal's arguments, however, fail to obviate the fact that Leal seeks relief that is speculative in nature to redress his injury. Leal requests both prohibitory and mandatory injunctive relief against the State Defendants to essentially create a new healthcare market that supports his sincerely held religious beliefs in a manner that suits his preferences, without any factual statements that such a market can and would exist but for the contraceptive-equity laws. He states that he has pled a valid reason that the market does not offer the type of insurance coverage he wants, that he is not required to allege or prove that insurance companies will actually offer contraceptive-free health insurance, and that the mandatory injunctive relief sought would guarantee his injury would be redressed. Pl.'s Br. (Dkt. 17) at 9–12. But none of these arguments demonstrate the relief sought is anything but speculative to redress Leal's injury.

First, Leal is not entitled to the mandatory injunction he seeks as a matter of law.[3] Because this particular relief is unavailable, he cannot "guarantee" his injury will be redressed by a favorable decision. The sufficiency of Leal's pleadings can only be measured against the prohibitive relief sought, that is, his request for an injunction to "enjoin [State Defendants] from enforcing the Texas contraceptive-equity laws[.]" Pl.'s Complaint (Dkt. 1) ¶ 58(f).

Second, Leal claims he is opposed to all forms of birth control and he wants "to purchase health insurance that excludes coverage of contraception to avoid subsidizing other people's contraception and becoming complicit in its use." *Id.* ¶ 31. He thus seeks a remedy that allows for both the purchase of health insurance coverage for prescription drugs that excludes contraception *and* a guarantee that his payments will not indirectly support coverage for contraception. Although the first remedy may be plausible, *see Lujan*, 504 U.S. at 560–61, nothing in Leal's amended complaint evidences a likelihood that private insurers would offer plans that would ensure his payments do not subsidize another person's use of contraception. The existence or non-existence of a particular healthcare market is undoubtedly in the realm of speculation, which is not enough to satisfy Article III standing. *See id.*

[3] This argument is explained in Part D, *infra*.

C. Leal has failed to state a claim for a violation of TRFRA.

Leal incorrectly suggests that the Supreme Court has "establish[ed] a rule of absolute deference to complicity-based objections under RFRA." Pl.'s Br. (Dkt. 17) at 17. (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) While the Court cannot question "whether the religious belief asserted in a RFRA case is reasonable," the Court must determine whether the challenged law imposes a "substantial" burden on Leal's religious exercise. *Hobby Lobby*, 573 U.S. at 724. The Supreme Court's analysis in *Hobby Lobby*, for example, addressed the "severe" financial consequences for employers' non-compliance with the contraception mandate as meeting the "substantial" burden requirement. *Id.* at 720. The question of "substantial burden" was not directly before the Supreme Court in *Little Sisters*. Thus, neither *Hobby Lobby* nor *Little Sisters* set forth a "rule of absolute deference" to a plaintiff's claim of substantial burden and neither involved a challenge from an individual complaining of a religious burden arising from the law's regulation of a third-party.

As set forth in Defendants' Motion (Dkt. 8 at 8-11), Leal fails to plead facts showing that the law imposes a substantial burden on his exercise of religion. His Response identifies as an alleged substantial burden that "the contraception-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." Pl.'s Br. (Dkt. 17) at 14. That conclusory assertion fails to articulate *how* that might be the case and he pleads no facts in his Complaint in support of that assertion. Leal's TRFRA claim should be dismissed.

D. It is not premature to strike or dismiss a remedy sought when it is precluded as a matter of law

Leal argues that the adequacy of the injunctive relief sought cannot be resolved in a pre-trial motion to dismiss or motion to strike because the scope of relief is not an issue that turns on the sufficiency of the pleadings. Pl.'s Br. (Dkt. 17) at 21–22. Leal is correct, in so far as the issue concerns the scope of the allowable relief sought. But Leal is incorrect when, as here, the specific relief sought is precluded as a matter of law.

Leal seeks two types of injunctive relief: (1) prohibitive relief to enjoin the State Defendants from enforcing the contraceptive-equity laws, and (2) mandatory relief to order the State Defendants to ensure "that religious objectors can obtain health insurance that excludes contraceptive coverage, and to use their regulatory authority to require insurers to offer such plans if necessary." Pl.'s Complaint (Dkt. 1) ¶ 58(f). TRFRA only permits injunctive relief "to prevent the threatened or continued violation" caused by an "exercise of government authority." TEX. CIV. PRAC. & REM. CODE §§ 110.005(a)(2), 110.002. TRFRA does not authorize injunctive relief requiring state agencies or officials to take affirmative and prospective action against third parties. *Cf. East Tex. Baptist Univ. v. Burwell* 793 F.3d 449, 459 (5th Cir. 2015); *Real*

Alternatives, Inc. v. Sec. of Dep't of Health & Human Servs., 867 F.3d 338, 364 (3d Cir. 2017).[4] Nor is such injunctive relief available under the *Ex parte Young* exception. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Put simply, Leal's second request for injunctive relief is not available as a matter of law.

When a remedy is unavailable as a matter of law, courts have permitted the relief to be struck at the pleading stage, either under Rule 12(b)(6), *see Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010); *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 391 (5th Cir. 2014); *Ozon v. Bank of America*, No. DR-15-CV-057-AM-VRG, 2015 WL 11545020, at *5–6 (W.D. Tex. Nov. 9, 2015), or under Rule 12(f) of the Federal Rules of Civil Procedure. *See Wells v. Bd. of Trustees of Cal. State Univ.*, 393 F.Supp.2d 990, 994–95 (9th Cir. 2005). Because the State Defendants are contesting the availability of the particular remedy sought, and not the scope of an allowable remedy, this Court may properly dispose of the issue now on the pleadings. Indeed, resolving the allowable remedy available to Leal based on the pleadings is the point of pretrial motions; Leal should not be allowed to bring requests for specific relief to trial when the question has already been resolved by law.

[4] If Leal's is correct, and TRFRA authorizes a plaintiff to harness the regulatory authority of a government agency to promulgate rules that force third-parties to offer products a plaintiff prefers, then there would be no need for the plaintiff to identify an exercise of government authority that violates religious practice in the first instance. Such relief would be available, under Leal's construction, even absent the existence of the contraception equity laws he challenges here. There is no plausible reading of TRFRA that supports the availability of the relief he seeks.

II. CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that the Court grant their motion and dismiss Leal's claims against them with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which automatically provided notice to all counsel of record

/s/ Matthew Bohuslav
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