IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JERI PEARSON et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 3:23-cv-387
	§	
SHRINERS HOSPITAL FOR	§	
CHILDREN, et al.,	§	
Defendants.	§	

DEFENDANT CECILE ERWIN YOUNG'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs have brought claims under 42 U.S.C. § 1983 and other state law claims related to Defendant Young's alleged inaction to prevent Plaintiffs termination of their employment; however, Plaintiffs' claims fail to survive a qualified immunity analysis as Defendant Young's conduct did not violate any clearly established statutory or constitutional rights of which a reasonable person would have known.

Plaintiffs are various employees of Shriners Hospital for Children who were allegedly terminated after they failed to get vaccinated for COVID-19. They now sue their former employer and various other parties over their termination, mainly under 42 U.S.C. § 1983. One of the Defendants is Cecile Erwin Young, the Executive Commissioner of Texas Health and Human Services ("HHS") despite the fact that Defendant Young was not meaningfully involved in Plaintiffs' termination. She neither ordered Plaintiffs to be fired nor did she force private employers like Shriners to vaccinate their employees. Accordingly, Plaintiffs lack standing to sue Defendant Young because their injuries are not fairly traceable to any conduct of Defendant Young. Additionally, Plaintiffs cannot establish that Defendant Young was "personally involved" in their unlawful termination, a long-standing requirement to sustain a § 1983 claim. Plaintiffs also assert a battery of common law claims against Defendant Young; however, these claims are barred by qualified immunity.

For these and other reasons discussed below, this Court should dismiss Plaintiffs' claims against Defendant Young.

BACKGROUND

Plaintiffs contend that, in September 2021, Shriners Hospital for Children issued a directive requiting nearly all Shriners employees to get vaccinated for COVID-19.[1] Plaintiffs did not comply with this policy, and Shriners terminated their employment.[2]

Plaintiffs did not allege that Defendant Young, HHS's Executive Commissioner, directed their termination, had hiring and firing authority at Shriners, or otherwise ordered Shriners to impose a vaccine mandate on its employees.[3] Rather, Plaintiffs contend that, by virtue of her position, Defendant Young "had a duty to intervene and correct Shriners' illegal conduct."[4] Plaintiffs contend they were fired, in part, because Defendant Young "took a 'see no evil, hear no evil' approach to [Shiners'] illegal conduct."[5]

Plaintiffs sued Defendant Young only in her individual capacity.[6] Plaintiffs assert the following claims against her and the other Defendants:

- *Count I: § 1983 — Option to Refuse:* Plaintiffs seemingly contend that the Fourteenth Amendment and 21 U.S.C. § 360bbb-3 (a.k.a. the "EUA") create a substantive due process right to refuse a COVID-19 vaccination.[7]
- *Count II: § 1983 — Equal Protection:* Plaintiffs contend they were denied their equal protection rights because Shriners "treated healthcare workers exercising their right to accept [a vaccination] differently than those exercising the right to refuse [a vaccination]."[8]

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[1] ECF 20 at ¶¶ 81–82.
[2] *Id.* at ¶¶ 72–100.
[3] *See id.* at ¶¶ 53–71.
[4] *Id.* at ¶ 62.
[5] *Id.* at ¶ 63.
[6] *Id.* at ¶ 20.8.
[7] *See id.* at ¶¶ 103–07.
[8] *Id.* at ¶ 110.

- *Count III: § 1983 — Procedural Due Process:* Plaintiffs allege they "were deprived of the right to refuse [a vaccination] without penalty and without the opportunity to be heard."[9]
- *Count IV: § 1983 — Option to Refuse (again):* Plaintiffs contend that 21 U.S.C. § 360bbb-3 creates a substantive due process right to refuse a COVID-19 vaccination.[10] This Count appears to mirror Count I.
- *Count V: § 1983 — PREP Act:* Plaintiffs state that 42 U.S.C. § 247d (a.k.a. the "PREP Act") creates a substantive due process right to not "participate in a PREP Act activity or use a PREP Act countermeasure."[11]
- *Count VI: § 1983 — Unconstitutional Conditions:* Plaintiffs allege that Defendant Young "violated the unconstitutional conditions doctrine because she required Plaintiffs, as a condition of being able to continue using their State-issued healthcare licenses, to relinquish their fundamental constitutional right to refuse being injected with an investigational drug, and to relinquish their right to equal protection and procedural due process."[12]
- *Count VII: § 1983 — Deprivation of Privacy Rights:* Plaintiffs contend that "[u]se of an investigational drug or participating in a federal program is a personal and private matter on which Shriners could not condition employment."[13]
- *Count VIII: Breach of Contract:*[14] Plaintiffs contend they have "third-party beneficiary rights under the CDC Provider Agreement" and that Shriners breached this agreement when it fired Plaintiffs.[15]
- *Count IX: Wrongful Termination:* Plaintiffs state the PREP Act and the EUA preempted Texas's at-will employment doctrine and that their termination was unlawful as it conflicted with the EUA and the PREP Act.[16]
- *Count X: Intentional Infliction of Emotional Distress:* Plaintiffs contend Defendants committed the tort of intentional infliction of emotional distress when they "pressure[d] Plaintiffs to use federally funded COVID-19 EUA/PREP Act drugs by using the tactics of depriving Plaintiffs of their chosen profession and use of their State-issued medical licenses."[17]

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[9] *Id.* at ¶ 119.
[10] *Id.* at ¶¶ 123–36.
[11] *Id.* at ¶ 140.
[12] *Id.* at ¶ 147.
[13] *Id.* at ¶ 157.
[14] Plaintiffs included two Count VIIs, thus the numbering of his Counts are off. We correct the error here.
[15] *Id.* at ¶¶ 159–66.
[16] *Id.* at ¶¶ 167–70.
[17] *Id.* at ¶ 174.

- *Count XI: 21 U.S.C. § 360bbb-3 — Implied Private Right of Action:* Plaintiffs allege the EUA contains a private right of action and assert a claim under this statute.[18]

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(1), a defendant may move for dismissal where a court lacks subject matter jurisdiction. The party invoking jurisdiction bears the burden of establishing standing.[19] Under Rule 12(b)(1), a defendant may challenge a court's subject matter jurisdiction through a "facial attack" or a "factual attack."[20] Where a defendant challenges subject matter jurisdiction on the face of a complaint and matters subject to judicial notice, the district court presumes the plaintiff's factual allegations to be true and determines whether those allegations are legally sufficient to establish jurisdiction.[21]

A Rule 12(b)(6) motion to dismiss turns on whether the plaintiff pled a "plausible" (as opposed to just a "possible") claim for relief.[22] On such a motion, the court can rely on: (1) the complaint; (2) the complaint's attachments; (3) a defendant's attachments that were referenced in the complaint and central to the plaintiff's claim; and (4) matters on which a court may take judicial notice.[23]

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[18] *Id.* at ¶¶ 176–78.
[19] *Lujan v. Defs. of Wildlife,* 504 U.W. 555, 560 (1992).
[20] *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).
[21] *See id.*; *Lester v. Lester*, No. 3:06-CV-1357-BH, 2009 WL 3573530, at *4 (N.D. Tex. Oct. 29, 2009) (*citing Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (other citation omitted)).
[22] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[23] *See, e.g.*, *Dorsey*, 540 F.3d 333, 338 (5th Cir. 2008); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000).

"A plaintiff seeking to overcome a motion to dismiss because of qualified immunity or for failing to state a claim must plead facts that allow the court to draw the reasonable inference that the defendant is liable for the harm alleged."[24] "The qualified immunity defense has two prongs: whether an official's conduct violated a constitutional right of the plaintiff; and whether the right was clearly established at the time of the violation."[25] "If the defendant's actions violated a clearly established constitutional right, the court then asks whether qualified immunity is still appropriate because the defendant's actions were objectively reasonable in light of the law which was clearly established at the time of the disputed action."[26] It is the plaintiff's burden to negate a properly raised qualified immunity defense.[27]

SUMMARY OF ARGUMENT

Plaintiffs' claims fail under two generally applicable reasons -- (1) Plaintiffs lack standing as they cannot fairly trace their injuries to Defendant Young and (2) Plaintiffs cannot show that Defendant Young was "personally involved" in the alleged unlawful conduct, as needed to establish a § 1983 claim. Additional flaws specific to each of Plaintiffs' claims are also addressed.

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[24] *Bevill v. Fletcher*, 26 F.4th 270, 274 (5th Cir. 2022).
[25] *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).
[26] *Id.* (quotations omitted).
[27] *Collier v. Montgomery*, 569 F.3d 214, 217–18 (5th Cir. 2009).

ARGUMENT

I. Arguments Generally Applicable to Plaintiffs' Claims.

A. Plaintiffs Lack Standing to Sue Defendant Young

To establish Article III standing, the plaintiff must show: (1) an injury in fact; (2) that is fairly traceable to the defendant's unlawful conduct; and (3) that is redressable by the Court.[28] Plaintiffs' claims fail on "traceability" grounds.

Plaintiffs do not contend that Defendant Young directly harmed them in any way. Rather, their main complaint is that she did not intervene to stop a third party's alleged unlawful acts—namely, Shriners' vaccine mandate for its employees, which led to Plaintiffs' employment being terminated.

Put simply, Plaintiffs' claims against Defendant Young trigger the stringent standing test applied to *indirect* injuries. It is well settled that standing is "substantially more difficult to establish" when "a causal relation between injury and challenged action depends upon the decision of an independent third party."[29] Where a third party's choice is "essential to a plaintiff's standing, the plaintiff must introduce facts showing that the third party's choices 'have been or will be made in such manner as to produce causation and permit redressability of injury.'"[30] More specifically, the plaintiffs must show the defendant's conduct had a "determinative or coercive effect" upon the third party. A third party's exercise of "'legitimate discretion' breaks the chain of . . . causation' for standing

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[28] *OCA-Greater Houston v. Tex.*, 867 F.3d 604, 610 (5th Cir. 2017).
[29] *Id.* at 2117 (quoting *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 562 (1992).
[30] *Three Expo Events, L.L.C. v. City of Dallas, Texas,* 907 F.3d 333, 341 (5th Cir. 2018)(quoting *Lujan,* 504 U.S. at 562).

purposes."[31] Merely "mak[ing] it *possible* for [a third party] to take the injury-causing action" is insufficient "to satisfy the fairly traceable element of [the] standing doctrine."[32]

Plaintiffs offer no allegations showing that Defendant Young's conduct had a "determinative or coercive effect" on Shriners. At most, by not intervening, Defendant Young merely made it *possible* for Shriners to terminate Plaintiffs. This is not enough to create a justiciable claim against Defendant Young, and Plaintiffs' claims should be dismissed.

B. Defendant Young was Not "Personally Involved" in Plaintiffs' Termination

"Personal involvement is an essential element of a civil rights cause of action."[33] This element is lacking here. Thus, Defendant Young is protected by qualified immunity.[34]

To be "personally involved," the official being sued generally must have "direct[ed]," "authoriz[ed]," or "participat[ed]" in the unlawful conduct.[35] Plaintiffs have not alleged any facts showing that Defendant Young directed, authorized, or otherwise participated in Shriners decision to impose a vaccine mandate or terminate Plaintiffs for their failure to comply with this internal company policy.

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[31] *Turaani v. Wray,* 988 F.3d 313, 317 (6th Cir. 2021)(quoting *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615 (1989); *See also, Causation,* 13A FED. PRAC. & PROC. JURIS. § 3531.5 (3d ed.)("Rather than a break in one causal chain, standing may be defeated by finding a different cause.")

[32] *TF-Harbor, LLC v. City of Rockwall, Tex.,* 18 F. Supp. 3d 810, 821-22 (N.D. Tex. 2014), *aff'd sub nom. TF-Harbor, LLC v. City of Rockwall, Tex.,* 592 F. App'x 323 (5th Cir. 2015).

[33] *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983).

[34] *See Banks v. Herbrich*, 90 F.4th 407, 417–18 (5th Cir. 2024) (finding that a government official was entitled to qualified immunity due to a lack of showing that she was "personally involved" in the alleged unconstitutional acts).

[35] *See Jackson v. Bayou Indus., Inc.*, No. CIV. A. 94-946, 1995 WL 133332, at *2 (E.D. La. Mar. 27, 1995).

Rather, Plaintiffs appear to rely on the "bystander liability" theory, as they contend that Defendant Young "took a 'see no evil, hear no evil' approach to [Shiners'] illegal conduct."[36] This does not negate Defendant Young's qualified immunity.[37] While the Fifth Circuit has applied this concept to overcome a law enforcement official's qualified immunity in excessive force cases,[38] the Court "has not specified which constitutional violations, beyond excessive force, may underlie a bystander liability claim."[39] Defendant Young is entitled to qualified immunity as it is not clearly established that bystander liability theory applies to employment discrimination cases brought under § 1983.[40]

C. There is Not Any Right of Continued Employment While Refusing Vaccination

A properly pled Section 1983 claim requires a plaintiff to "allege the violation of a right secured by the Constitution and laws of the United States . . . or demonstrate alleged deprivation caused by a person acting under color of state law."[41] Plaintiffs' Section 1983 claims are based solely on the proposition that Plaintiffs had a federally protected property interest in "their employment, employment-related benefits, and use of their State-issued

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[36] ECF 20, ¶ 63.
[37] *Hamilton v. Kindred*, 845 F.3d 659, 663 (5th Cir. 2017)(Under "bystander liability," an official can be personally liable under § 1983 when he: (1) knows that a fellow officer is violating an individual's constitutional rights; (2) had a reasonable opportunity to prevent the harm; and (3) chose not to act).
[38] *See, e.g.*, *Whitley v. Hanna*, 726 F.3d 631, 646 (5th Cir. 2013).
[39] *Cabler v. Red River Cnty., Tex.*, No. 5:21CV12-RWS-CMC, 2022 WL 950886, at *7 (E.D. Tex. Mar. 2, 2022).
[40] *See Morris v. Sorenson*, No. MO-16-CV-0071-KC-LS, 2016 WL 11554094, at *6 (W.D. Tex. Nov. 9, 2016)(finding that individual officers were entitled to qualified immunity as "the law was not clearly established in March of 2014 that the bystander theory of liability was recognized in a non-excessive force context"); *see also Wallace v. Miller*, No. 09-CV-342-JPG, 2014 WL 552885, at *9 (S.D. Ill. Feb. 12, 2014) ("The concept of bystander liability does not translate to Wallace's free exercise claim.").
[41] *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.,* 153 F.3d 211, 215 (5th Cir. 1998)(quoting *West. v. Atkins,* 487 U.S. 42, 48 (1988)).

healthcare licenses" and their "fundamental right to refuse [a vaccine]."[42] More than one hundred years of legal precedence indicate that no such right exists.

In 1905, the United States Supreme Court established there is not any fundamental right to refuse vaccines because the "liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and all circumstances, wholly freed from restraint" and because communities have "the right to protect [themselves] against an epidemic of disease which threatens the safety of [their] members."[43] The long-ago holding of *Jacobson* remains just as valid and pertinent today as courts across the country continue to reach the same conclusion holding that "as challenges to COVID-19 vaccine mandates have progressed, this Court, and others across the country, have held facially neutral and generally applicable state vaccination mandates are subject only to rational basis review."[44]

In a novel attempt to circumvent established legal precedent, Plaintiffs appear to be claiming a federally protected right to continued employment at Shriners.[45] Yet, Plaintiffs fail to provide any support for their claim. As the Eastern District of Washington explained when dismissing plaintiff's Section 1983 claims challenging Washington State's vaccine

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[42] ECF 20, ¶¶ 95-96.

[43] *Jacobson v. Massachusetts,* 197 U.S. 11, 26-27, 39 (1905)(upholding criminal conviction of appellant who refused to receive smallpox vaccine as required by state law).

[44] *Wise v. Inslee,* No. 2:21-CV-0288-TOR, 2022 WL 1243662 (E.D. Wash. Apr. 27, 2022)(holding that Washington State's vaccine requirement for state employees and healthcare workers "**easily** survives federal constitutional scrutiny")(emphasis added); *see also, We The Patriots USA, Inc. v. Hochul,* 17 F.4th 266, 293 (2nd Cir. 2021)("Both this Court and the Supreme Court have consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional)(citing *Jacobson,* 197 U.S. at 25-31)); *Williams v. Brown,* 567 F. Supp. 3d 1213, 1226 (D. Or. 2021)("In the context of COVID-19, courts across the country have concluded that *Jacobson* established that there is no fundamental right to refuse vaccination.")

[45] ECF 20, ¶¶ 95-96.

requirement, "[it] does not require that anyone receive the vaccine involuntarily as . . . the employees ha[d] a choice: they can choose to get vaccinated or apply for an exemption, or they can choose to no longer work for the state."[46] Furthermore, "vaccine requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps and rubella."[47] The "right" Plaintiffs allege Defendant Young violated simply does not exist anywhere in American jurisprudence.

Plaintiffs also attempt to create different standards through their mischaracterization of the COVID-19 vaccines and respective emergency authorizations by repeatedly referring to the vaccines as "investigational drugs."[48] Yet, while creative, Plaintiffs fail to explain the legal significance of such characterization or how that would cause it to fall outside the purview of *Jacobson.* Furthermore, Plaintiffs are simply wrong. While Plaintiffs allege the ability of the Secretary to issue Emergency Use Authorizations ("EUA"s) and the existence of same, Plaintiffs conveniently ignore the fact that the Pfizer-BioNTech COVID-19 vaccine received full FDA authorization on August 23, 2021 -- months before any of the Plaintiffs were required to be vaccinated.[49] Accordingly, Plaintiffs cannot credibly allege they were required to ever take any "investigational drug."

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[46] *Jensen v. Biden,* No. 4:21-CV-5119-TOR, 2022 U.S. Dist. LEXIS 3652, at *5 (E.D. Wash. Jan. 7, 2022).
[47] *Biden v. Missouri,* 595 U.S. 87, 95 (2022).
[48] ECF 20, ¶¶ 1-3, 6, 30-33, 36-38, 41, 43, 55, 59, 61, 64-65, 68, 71, 74-75, 78, 83, 85-87, 89-91, 97, 99, 106, 112, 121, 127-136, 147-48, 151, 156-57, 164, 168
[49] *See Legaretta v. Macias,* 603 F. Supp. 3d 1050, 1055-56 (D.N.M. 2022)("Pfizer's vaccine received . . . full FDA approval for individuals 16 and older."); FDA News Release, https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.

Plaintiffs' Section 1983 claims are simply without merit and lacking any factual or legal support.

Plaintiffs also attempt to rely on a variety of statutes and publications in support of their "right;" however, none confer the support Plaintiffs allege.

D. 45 C.F.R § 46 Does Not Create Any Rights

Plaintiffs mistakenly rely upon 45 C.F.R. § 41.116 and "Federal Wide Assurance" ("FWA") to support their claims of a constitutional right to employment without vaccination.[50] In fact, the Southern District of Texas has already rejected a similar attempt to apply 45 C.F.R. § 46.116 to vaccine requirements for continued employment at a healthcare facility when it explained, "Bridges has again misconstrued [45 C.F.R. 41.116] . . . [as] the hospital's employees are not participants in a human trial . . . [and] Bridges' claim that the injection requirement violates 45 C.F.R. § 41.116 also fails."[51] Plaintiffs' reliance upon 45 C.F.R. § 41.166 is simply inapplicable.

Similarly, the FWA is also inapplicable as it applies to institutions "engaged in research that is covered by this policy."[52] There is not any credible claim that Defendant Young, or any defendant herein, was engaged in research by implementing vaccine requirements.

Neither 45 C.F.R. 41.116 nor the FWA can support a Section 1983 claim as neither confers a private right of action. "Only Congress can create . . . rights enforceable under §

[50] ECF 20, ¶¶ 3, 4, 33, 65, 75,78, 83, 92, 97, 105-06, 129-30
[51] *Bridges v. Houston Methodist Hosp.,* 543 F. Supp. 3d 525, 527 (S.D. Tex. 2021).
[52] 45 C.F.R. § 46.103(a)

1983; agency regulations cannot give rise to a private cause of action where the authorizing statute does not confer such a right.[53] Additionally, if "Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms."[54] These regulations simply do not support Plaintiffs' Section 1983 claims.

E. 21 U.S.C. § 360bbb-3, *et seq.*, the Prep Act Does Not Create Any Rights

Plaintiffs' reliance upon 21 U.S.C. § 360bbb-3 is also inapplicable.[55] Section 360bbb-3 is part of the Food, Drug and Cosmetic Act and concerns "authorization for medical products for use in emergencies" and generally allows the Secretary of Health and Human Services to authorize drugs for use in emergencies and establish conditions of use. Similar to the arguments regarding 45 C.F.R. 41.116, *infra,* 21 U.S.C. § 360bbb-3 does not create any private right of action.

"Section 1983 does not provide a remedy for violations of federal statutes unless those statutes create a private right of action that is enforceable in a damages action, and 'anything short of an unambiguously conferred right' will not support such an action."[56] Other courts have also reached the conclusion that Section 360bbb-3 does not create private rights of action.[57] Furthermore, the Hon. Lynn Hughes has previously rejected a challenge

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[53] *Wright v. Fred Hutchinson Cancer Rsch. Ctr.,* 269 F. Supp. 2d 1286, 1289 (W.D. Wash. 2022).
[54] *Alexander v. Sandoval,* 532 U.S. 275, 286 (2001).
[55] ECF 20, ¶¶ 3, 36, 49, 65, 78, 106, 125, 130
[56] *Rodriguez v. Hemit,* No. C16-778 RAJ, 2018 WL 3618260, at *4 (W.D. Wash. July 30, 2018)(quoting *Gonzaga v. Doe,* 536 U.S. 273, 283 (2002)).
[57] *See, Navy Seal 1 v. Biden,* 574 F. Supp. 3d 1124, 1130 (M.D. Fla. 2021)(holding that the "informed consent" provisions" of 21 U.S.C. § 360bbb-3(e)(1)(A) "confer. . . no private right of action" through which plaintiffs could challenge requirement that employees of federal contractors be vaccinated against COVID-19); *Johnson v. Tyson Foods, Inc.,* 607 F. Supp. 3d 790, 806 (W.D. Tenn. 2022)(holding "Plaintiff has failed to state a claim for Defendant's alleged violation of . . . 21 U.S.C. § 360bbb-3 . . . because there is no private right of action under that statute.)

to a hospital's COVID-19 vaccination policy stating, "[Plaintiff] misconstrues [Section 360bbb-3] which does not apply **at all** to private employers like the hospital in this case."[58] "[Section 360bbb-3] does not confer a private opportunity to sue the government, employer or worker."[59]

As such, Plaintiffs cannot use Section 360bbb-3 to support any Section 1983 against Defendant Young.

F. The Belmont Report Does Not Create Any Rights

The Belmont Report does not even begin to create the rights alleged by Plaintiffs.[60] It is not a statute or regulation. The Belmont Report is a report that was drafted by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research regarding "informed consent" to agreements in which persons were participating in research.[61] The Belmont Report is a "statement of principles" that does not "create private rights of action."[62] In a separate case and prior to *Kriley,* the 7th Circuit referred to the Belmont Report as nothing more than a “guideline.”[63] The Belmont Report cannot form the basis for any Section 1983 complaint.

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[58] *Bridges,* 543 F. Supp. at 527 (emphasis added).
[59] *Id.*
[60] ECF 20, ¶¶ 3, 30 n. 17, 33 78, 106, 129, 130
[61] The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research -- Belmont Report. Washington, D.C.: U.S. Department of Health and Human Services 1979; ECF 20, ¶ 30, n. 17.
[62] *Kriley v. Nw. Mem'l Healthcare,* No. 22-1606, 2023 WL 371643, at *2 (7th Cir. 2023).
[63] *Ernst v. City of Chicago,* 837 F.3d 788, 807, n. 6 (7th Cir. 2016).

G. EUA Letters Do Not Create Any Rights

Plaintiffs also attempt to rely upon Emergency Use Authorization ("EUA") letters as a source of rights enforceable under Section 1983.[64] Following the same reasoning and arguments regarding Section 360bbb-3, *inter alia,* EUA letters are inapplicable. Plaintiffs were not "human subjects" in any research endeavor no matter how mightily Plaintiffs claim. They were employees of a private hospital that implemented a vaccination requirement for COVID-19 as a condition of employment. Requirements that have been upheld time and time again by courts all over this country. EUA letters simply do not provide any private rights of action through which Plaintiffs can support a Section 1983 claim.

Despite Plaintiffs' creative pleadings and best efforts to bootstrap various federal regulations and publications, Plaintiffs' legal theories are simply without merit and are baseless.[65] None of the statutes, agreements, regulations, or other cited materials in the Complaint create private rights of action or rights securable under 42 U.S.C § 1983 or create any legal duties and/or obligations of Defendant Young. As such, Plaintiffs fail to identify any federally protected or substantive rights that Defendant Young could have possibly violated, and, therefore, have failed to plead any federal causes of action for which

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[64] *See generally,* ECF 20.

[65] To the extent Plaintiffs seek damages from Defendant Young in her individual capacity, qualified immunity would bar such relief. *See Darden v. City of Fort Worth*, Texas, 880 F.3d 722, 727 (5th Cir. 2018)(listing elements of qualified immunity defense); *infra* §§ I, III (showing no clearly stablished rights violated).

relief could be granted. Plaintiffs' claims should be dismissed with prejudice under Rule 12(b)(6).

II. Arguments Specific to Each of Plaintiffs' Claims

All of Plaintiffs' Section 1983 claims should be dismissed for the reasons stated herein; however, even assuming Plaintiffs could possibly allege a federal right that had been infringed, additional grounds exist to dismiss each of the Section 1983 claims.

A. Option to Refuse

Count 1 of Plaintiff's Second Amended Complaint alleges that Defendant deprived Plaintiffs' of their "right to refuse an EUA products without penalty."[66] A similar argument was previously rejected by the Eastern District of New York when "[Plaintiff] argue[d] that Section 360bbb-3(e)(1)(A)(ii) requires that individuals be given the 'option to refuse' a product authorized on an emergency basis under that section."[67] "The key question is whether 'Congress intended to confer individual rights upon a class of beneficiaries,' and the answer must be rooted in the text and structure of the statute.[68] "Ultimately, anything short of an unambiguously conferred right will not support a cause of action under Section 1983."[69]

"Section 360bbb-3 does not provide an individual right."[70] Reasoning that no private right of action exists to enforce the FDCA as the statute explicitly restricts

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[66] ECF 20, ¶ 107; *see, generally,* ECF 20, ¶¶ 103-07.
[67] *Peralta v. N.Y. City of Dep't of Educ.,* No. 21-CV-6833(EK)(LB), 2023 U.S. Dist. LEXIS 169529, *13 (E.D.N.Y. Sept. 22, 2023).
[68] *Id.* (citing *Gonzaga,* 536 U.S. at 286-87).
[69] *Id.*
[70] *Id.*

enforcement to suits by the United States, the Court dismissed plaintiff's claim as plaintiff "failed to identify any right conferred by Section 360bbb-3."[71] As Plaintiffs herein are making identical arguments relying upon the exact same statute, Plaintiffs' cannot overcome qualified immunity as there was not any violation of a clearly established constitutional or statutory right.

B. Equal Protection

In Count 2, Plaintiffs allege their rights protected by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution were violated when Defendant "treated healthcare workers exercising their right to accept differently than those exercising the right to refuse."[72] "To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class."[73]

Plaintiffs have not even attempted to plead they were members of a "protected class." The only potential class to which Plaintiffs could possibly allege being part of would be a class of persons who declined a COVID-19 vaccination; however, as Plaintiffs are almost certainly aware, a litany of cases have held "unvaccinated individuals do not constitute a suspect class."[74] As Plaintiffs have not pled, nor can they plead, they are

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[71] *Id.*
[72] ECF 20, ¶ 110; *see generally,* ECF 20, ¶¶ 108-13.
[73] *Johnson v. Morel,* 876 F.2d 477, 479 (5th Cir. 1989), *abrogated on other grounds by Harper v. Harris County,* 21 F.3d 597 (5th Cir. 1994)(citing *Washington v. Davis,* 426 U.S. 229, 247-48 (1976).
[74] *George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors,* No. 22-cv-0424-BAS-DDL, 2022 WL 16722357, at *10 (S.D. Cal.Nov. 4, 2022); *Williams,* 567 F. Supp. 3d at 1228 ("The Court is fully

members of a suspect class, any challenge to the vaccine policy is subject to rational review.

Courts have "no trouble discerning a legitimate state interest in slowing the spread of COVID-19" and have consistently concluded that "vaccine mandates are rationally related to furthering that interest."[75] "After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the medical profession: first, do no harm."[76] Accordingly, Plaintiffs' equal protection claims fail to overcome the qualified immunity of Defendant Young and should be dismissed.

C. Due Process Clause

In Counts 3-5, Plaintiffs allege a deprivation of substantive and procedural due process rights under the Fourteenth Amendment to the U. S. Constitution.[77]

"The purpose of substantive due process is to 'protect . . . those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition,' which are not specifically enumerated by the Constitution."[78] Plaintiffs have not shown any fundamental right or liberty that could be the subject of a substantive due process

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in agreement with this growing consensus that no fundamental right or suspect classification is implicated by the Oregon vaccine mandates . . ."); *see also, McArthur v. Brabrand,* 610 F. Supp. 3d 822, 839-42 (E.D. Va. 2022)(dismissing plaintiff's equal protection claim because plaintiff failed to combat "several cases holding that unvaccinated people do not constitute a suspect class"); *Halgren v. City of Naperville,* 577 F. Supp. 3d 700, 753 (N.D. Ill. 2021)("Plaintiffs have not identified any legal support for the notion that vaccination status alone is a traditional suspect (or quasi-suspect) class within the meaning of the Equal Protection Clause.")

[75] *Williams,* 567 F. Supp. 3d at 1228; *Kheriaty v. Regents of the Univ. of Cal,* SACV 21-1367 JVS (KESx), 2021 U.S. Dist. LEXIS 249705, at *25 (C.D. Cal. Dec. 8, 2021).

[76] *Biden,* 595 U.S. at 93.

[77] ECF 20, ¶¶ 114-52.

[78] *Ralston Outdoor Adver. Ltd. V. City of Dallas,* No. 3:22-CV-01433-N, 2024 U.S. Dist. LEXIS 50173, at *10 (N.D. Tex. Mar. 20, 2024)(quoting *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997)).

analysis and any claims based thereon should be dismissed. As courts have routinely rejected these type of claims, Plaintiffs are unable to overcome qualified immunity of Defendant Young.

Plaintiff's procedural due process allegations fail for the same reasons. "Protected interests . . . are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits."[79] Plaintiffs have not sufficiently pled any.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[80] By Plaintiffs' own admission, they were given approximately one month to receive their first shot of the vaccination series or seek a medical or religious exemption.[81] Plaintiffs have done neither. To the extent Plaintiffs were entitled to a "procedural" process, the vaccine requirement at issue was one of general applicability – all Shriners' employees were to be vaccinated against COVID-19, subject to religious or medical exemptions. Such a requirement does not implicate procedural due process concerns.[82] Accordingly, Plaintiffs' procedural due process claims fail and should be

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[79] *Goss v. Lopez,* 419 U.S. 565, 572-73 (1975).
[80] *Mullane v. Cent. Hanover Bank & Tr. Co.,* 339 U.S. 306, 314 (1950).
[81] ECF 20, ¶¶ 81-2.
[82] *Pilz v. Inslee,* No. 3:21-cv-05735-BJR, 2022 WL 1719172, at *7 (W.D. Wash. May 27, 2022)("The Court joint other '[district] courts around the country [that] have rejected procedural due process challenges to 'employer-issued vaccine mandates during the COVID-19 pandemic, finding employees are not entitled to greater service than what is provided by enactment of the mandates themselves")(citation omitted).

dismissed.

D. Unconstitutional Conditions Doctrine

Count 6 asserts Defendant Young, acting in concert with Shriners while previously complaining of her lack of action, advised Plaintiffs "that in order to receive . . . public benefits, . . . they [had] to relinquish their fundamental right to refuse an investigational drug, they created an unconstitutional condition."[83] However, this allegation, even assuming a scintilla of validity, does not implicate the constitutional conditions doctrine which "vindicates the Constitution's **enumerated** rights by preventing the government from coercing people into giving them up."[84]

The "unconstitutional conditions doctrine" applies when a "condition is imposed" requiring a person "surrender "[a] constitutional right as a condition of [a government's]" such that something "has been taken."[85] Regardless of the creativity of Plaintiffs' pleadings, Plaintiffs have not shown the existence of any constitutional rights that could have been taken in this case. As such, Plaintiff's "unconstitutional conditions" should be dismissed.

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[83] ECF 20, ¶ 151.
[84] *Koontz v. St. Johns River Water Mgm't Dist.,* 570 U.S. 595, 604 (2013)(emphasis added).
[85] *Campo v. United States,* Nos. 20-44; 20-47; 20-55 (consolidated), 2024 U.S. Claims LEXIS 123, at *63 (U.S. Fed. Cl. Feb. 9, 2024).

E. Deprivation of Privacy Rights

In Count 7, Plaintiffs allege their privacy rights were violated due to the mandate requiring them to inform Defendants if and when the Plaintiffs participated in the federal COVID-19 program.[86]

The Constitution does not guarantee the right to privacy; however, the Supreme Court has recognized certain "zones of privacy" for "fundamental" rights that are implicit in the concept of ordered liberty."[87] The only "zones of privacy" for fundamental rights that have been recognized concern "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education."[88] Any such "zones" are clearly not implicated in the facts at issue. Without a fundamental right, Plaintiffs' Section 1983 claims should be dismissed.

F. Breach of Contract

In Count 7 [sic], Plaintiffs allege they were denied "enforceable third-party beneficiary rights under the CDC Provider Agreement.[89]

Parties that benefit from a government contract are generally assumed to be incidental beneficiaries and may not enforce the contract absent a clear intent to the contrary.[90] Government contracts often benefit the public, but individual members of the

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[86] ECF 20, ¶ 153-58.
[87] *Hollis v. Western Acad. Charter, Inc.,* 782 Fed. App'x 951, 956 (11th Cir. 2019)(quoting *Paul v. Davis,* 424 U.S. 693, 712-713 (1976).
[88] *Id.*
[89] ECF 20, ¶ 160.
[90] *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999), *op. amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000).

public are treated as incidental beneficiaries unless a different intention is manifested.[91]

Plaintiffs fail to allege or demonstrate how the CDC COVID Vaccination Program Provider Agreement, EUA Scope of Authorization letter, Federal Wide Assurance, or any other document, were drafted for their benefit, enabling them to sue as a third-party beneficiary.[92] Thus, Plaintiffs' breach of contract claims purportedly relying on the language in any state or federal agreement fail as a matter of law.[93]

In addition, a suit for breach of contract may not be maintained against a person who is not a party to the contract.[94] When a plaintiff argues they have a contract with an entity and bring suit against individuals who approved the contract on behalf of the entity "[s]uch allegations are insufficient to establish privity of contract between the parties and are therefore insufficient to support a breach of contract claim."[95] Thus, where Plaintiffs seek to enforce rights as a third-party beneficiary under a state or federal agreement, the claims must be dismissed.

Finally, Plaintiffs allege Defendant Young should be held personally liable under a breach of contract claim when her only involvement, if any, would have been based

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[91] *See* Restatement (Second) of Contracts § 302 (1979), cmt. a.
[92] *See, generally,* (ECF 20) at ¶¶ 159-166.
[93] *See, e.g., Boykins*, No. 1:11-cv-02923-SCJ, 2011 WL 13223810, at *1 (finding no federal question jurisdiction for third-party claim purportedly relying on breach of federal agreement); *Perea v. Wells Fargo Bank, N.A.*, No. EP-13-CA-00295-FM, 2014 WL 12973583, at *7 (W.D. Tex. Apr. 15, 2014) (finding no right of action or standing to enforce a federal agreement).
[94] *Note Inv. Grp., Inc. v. Assocs. First Cap. Corp.*, No. 1:12-CV-419, 2013 WL 11330534, at *2 (E.D. Tex. May 23, 2013) (mem. op.) (*citing Am. Realty Trust Inc. v. Matisse Capital Partners LLC*, 91 Fed. Appx. 904, 911-12 (5th Cir. 2003)).
[95] *Hoffman v. AmericaHomeKey, Inc.*, 23 F. Supp.3d 734, 740, (N.D. Tex. 2014); *see also, Norris v. Housing Auth. of Galveston*, 980 F. Supp. 885, 892, n.3 (S.D. Tex. 1997) (labeling breach of contract claims against commissioners in their individual capacity "pure nonsense").

upon her position as the Executive Commissioner of Texas Health and Human Services. Yet, Plaintiffs' only allegation related to Ms. Young's liability appears to be a deliberate indifference claim as they have not alleged any facts indicating her personal involvement. As Plaintiffs have failed to allege any facts or law sufficient to trigger § 1983 liability under a deliberate indifference theory, their claims are barred by qualified immunity.

G. Wrongful Termination

In Count 8, Plaintiffs allege they were wrongfully terminated for "exercising their right to refuse an EUA/PREP Act investigational drug."[96] Plaintiffs seemingly admit that they were at-will employees while trying to argue the at-will employment doctrine shouldn't apply.[97] Regardless, termination for failure to comply with a company vaccination policy does not give rise to any wrongful termination claim.

Texas law generally permits both employers and employees to terminate the employment relationship "at any time for any reason" unless a contract provides otherwise.[98] While there is a "narrow exception" to the at-will doctrine that prohibits employers for terminating employments "for the sole reason that the employee refused to perform an illegal act," Plaintiffs have not sought relief under this exception.[99] Further, Plaintiffs have not pled any facts whatsoever to indicate they were anything other than at-will employees.

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[96] ECF 20, ¶¶ 167-70.
[97] *Id.*
[98] *Hillman v. Nueces County,* 579 S.W.3d 354, 358-59 (Tex. 2019).
[99] *Sabine Pilot Serv., Inc. v. Hauck,* 687 S.W.2d 733, 735 (Tex. 1985).

Additionally, multiple courts have previously rejected wrongful termination claims regarding a plaintiff's failure to comply with company vaccine policies.[100] As such, Plaintiffs' wrongful termination claims are without merit on their face and should be dismissed with prejudice.

Plaintiffs also allege, without any support, that Texas "at-will employment" has been preempted by the various "authorities" discussed in Section I, *infra.* For the reasons previously explained, Plaintiffs are wrong. "To trigger preemption in the Fifth Circuit, Plaintiff must show that (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is a clear Congressional intent that claims brought under the federal law be removeable."[101] The PREP Act does not create a federal cause of action for any rights, duties or obligations.[102] "Various other courts have similarly held that the PREP Act fails to completely preempt state law.[103] Accordingly, Plaintiffs' preemption claim fails as well.

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[100] *See Antunes v. Rector & Visitors of the Univ. of Va.,* 627 F. Supp. 3d 553, 567 (W.D. Va. 2022); *Fallon v. Mercy Catholic Med. Crt. Of Se. Pa.,* 200 F. Supp. 3d 553 (E.D. Pa. 2016)(regarding refusal to receive influenza vaccine)

[101] *Chauvin v. Terminix Pest Control,* No. 22-3673 Section "H," 2023 U. S. Dist. LEXIS 204345, at *13-14 (E. D. La. Nov. 15, 2023).

[102] *Id.* at 14.

[103] *Id.* at 15 (citations omitted).

H. Intentional Infliction of Emotional Distress

While Plaintiffs allege Defendants seemingly engaged in extreme and outrageous conduct giving rise to a claim under the common law of the State of Texas in Count 9, Plaintiffs fail to clearly state the specific conduct of Defendants for which Plaintiffs complain; however, Plaintiffs' complaint appears to be related to Shriner's enforcement of its vaccination requirement.[104]

Texas courts have long recognized that sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue.[105] Under the Texas Tort Claims Act "TTCA," "[i]f a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only."[106] While the statute strongly favors dismissal of governmental employees, Section 101.106(f) "foreclose[s] suit against a government employee in h[er] individual capacity if [s]he was acting with the scope of employment.[107] In the case at bar, Plaintiffs have not alleged any facts showing Defendant Young had any involvement whatsoever outside of her course and scope of employment as the Executive Commissioner of Health and Human Services. In fact, Plaintiffs argue just the opposite in that she allegedly failed to take certain acts within the purview of her position as Executive

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[104] ECF 20, ¶¶ 171-75.
[105] *See Tooke v. City of Mexia,* 197 S.W.3d 325, 332 (Tex. 1997).
[106] TEX. CIV. PRAC. & REM. CODE § 101.106(f) (Vernon 1997).
[107] *Franka v. Velasquez,* 332 S.W.3d 367, 381 (Tex. 2011).

Commissioner. Because Plaintiffs' claims could have been brought under TTCA against Health and Human Services, a governmental unit, Plaintiffs' state law claims against Defendant Young in her individual capacity are barred by sovereign immunity.[108]

I. Implied Right of Action

Plaintiffs' final claim alleges an "implied right of action" under 21 U.S.C. 360bbb-3.[109] As previously discussed in Section I, D., herein, such right of action simply does not exist.[110] As Hon. Steven D. Merryday explained, "the 'informed consent' provisions of 21 U.S.C. § 360bbb-3(e)(1)(A) confer . . . no private right of action."[111]

III. Plaintiffs' Claims are Barred by Qualified Immunity

As noted, Plaintiffs have sued Defendant Young, in her individual capacity, alleging a violation of their due process rights pursuant to 42 U.S.C. § 1983. Plaintiffs' § 1983 claims against Defendant Young are barred by qualified immunity as the conduct for which Plaintiffs complain "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[112]

Qualified immunity bars suit against state officials in their individual capacity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[113] The Supreme Court has "repeatedly . .

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[108] *See Hundall v. Univ. of Tex. at El Paso (UTEP),* EP-13-CV-00365-DCG, 2014 U.S. Dist. LEXIS 201114, at *33 (W.D. Tex. Feb. 21, 2014).
[109] ECF 20, ¶¶ 176-78.
[110] *Johnson,* 607 F. Supp. 3d at 806.
[111] *Navy Seal 1 v. Biden,* 574 F. Supp. 3d 1124, 1130 (M.D. 2021).
[112] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).
[113] *Pearson*, 555 U.S. at 231.

. stressed the importance of resolving immunity questions at the earliest possible stage in litigation."[114] "Once a public official raises the defense of qualified immunity, the burden rests on the plaintiff to rebut it."[115]

A. Plaintiffs' Complaint Does Not Show a Constitutional Right was Clearly Established

A state official is entitled to qualified immunity unless the law is sufficiently clear to put a reasonable actor on notice that her conduct is unlawful.[116] There is not any clearly established law, and certainly none cited by Plaintiffs, that the Defendant Young could have violated, which means Plaintiffs' claims are barred by qualified immunity. The simple reality is that Plaintiffs have not been deprived of any liberty or property interest that would trigger any further due process analysis. Even simpler, there is certainly not any clearly established law showing that Plaintiffs' complaints rise to the level of a protected liberty or property interest. Because Plaintiffs cannot show the violation of a clearly established constitutional right, this should end the qualified immunity analysis in favor of Defendant Young.

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[114] *Id.* at 232.

[115] *Zarnow v. City of Wichita Falls, Tex.*, 500 F.3d 401, 407 (5th Cir. 2007).

[116] *See Wernecke v. Garcia*, 591 F.3d 386, 393 (5th Cir. 2009); *see also, White v. Pauly*, 580, U.S. 73, 79 (2017) (per curiam) ("clearly established law should not be defined at a high level of generality," but instead "must be particularized to the facts of the case" (internal quotation marks omitted)); *Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir. 2013) (to defeat qualified immunity, there must be "controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity"); *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 257 (5th Cir. 2005) ("the unlawfulness of [the] alleged conduct" must be "readily apparent from relevant precedent in sufficiently similar situations"); *McClendon v. City of Columbia*, 305 F.3d 314, 331 (5th Cir. 2002) (a court must "consider not only whether courts have recognized the *existence* of a particular constitutional right, but also . . . whether that right has been defined with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct").

B. Inaction is Not a Viable Theory to Hold a State Officer Liable for Acts of a Private Party

Further, the only action identified in the Complaint concerning Defendant Young is actually the failure of her **office** to properly supervise the Shriner defendants and/or intervene in the Shriner defendants' employment decisions.[117] Plaintiffs expressly attribute the termination of their employment or denial of employment opportunities to Defendant Young without any support for such position.[118] Plaintiffs allege that Young failed to direct HHSC to cross over into the field of employment law and prevent hospitals from setting terms and conditions of employment.[119] These allegations fail not only for the reasons discussed herein, but also because, generally, government entities and officers cannot be held liable for failure to protect the life, liberty, and property of its citizens against invasion by private parties, such as Shriners.[120] Accordingly, even *assuming* Shriners did violate any federal law or infringe upon any of Plaintiffs' fundamental interests, these allegations of "inaction" fail to state a colorable claim against Young—or any State officer, employee or individual.

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[117] ECF 20 at ¶ 71 (emphasis added).
[118] ECF86 at ¶¶ 53-71.
[119] *Id.*
[120] *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 859 (5th Cir. 2012)(There are two exceptions to this general rule, neither of which are applicable here. First, under the "special relationship" exception, a state actor may be found to have assumed the duty to provide for the needs of a helpless individual under its care); *Id.* at 64 (Second, under the "state-created danger exception," a state actor may be liable if the state actor created or knew of a dangerous situation and affirmatively placed the plaintiff in that situation); *Fisher v. Moore*, 73 F.4th 367, 369 (5th Cir. 2023)(The Fifth Circuit has not adopted the state-created danger exception to the "no duty to protect" rule); *See also, DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

Using the phrase "state-enforced custom" changes nothing.[121] A state actor normally can be held responsible for a private decision only when he has exercised coercive power or has provided such significant encouragement that the choice must in law be deemed to be that of the state.[122] In the case at bar, Plaintiffs have not alleged any coercive power nor significant encouragement. In fact, Plaintiffs have alleged the exact opposite – mere inaction. Further, neither licensing nor extensive regulation is sufficient to demonstrate state involvement.[123]

Plaintiffs seemingly allege that private entities are in some way regulated by HHSC.[124] However, they have not alleged any facts showing affirmative action by any state officer or employee including Defendant Young. Notably, they have not even alleged that any HHSC official was aware of Shriners conduct and consciously allowed it to proceed, much less coerced or compelled it.

A state's "mere acquiescence" does not convert private action into state action.[125] A plaintiff cannot, by clever pleading, frame inaction as "authorization" or "encouragement" so as to avoid dismissal under 12(b)(6).[126] Such a holding would "utterly

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[121] *Compare Becnel v. City Stores Co*., 675 F.2d 731, 732–33 (5th Cir. 1982) (holding plaintiff's bare allegation of state tolerance of a long-standing business custom fell far short of the requisite "significant involvement" of state) *with Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (finding state action when state did not merely fail to prevent private party's sale of plaintiff's property without a prior hearing; it authorized such action by statute).
[122] *Blum v. Yaretsky*, 457 U.S. 991, 992 (1982).
[123] *See id*. at 992–93; *Cornish v. Corr. Servs. Corp.,* 402 F.3d 545, 550 (5th Cir. 2005); *see also Rendell–Baker v. Kohn*, 457 U.S. 830, 840–42 (1982) (holding a private entity's contract with the government is insufficient to transform the conduct of that entity into state action).
[124] ECF 20 at ¶¶ 56-71.
[125] *Becnel*, 675 F.2d at 732.
[126] *See id*.

emasculate the distinction between private and state conduct."[127] In short, because Plaintiffs have failed to allege that Young coerced or significantly encouraged Shriners' conduct, they have failed to allege state action and therefore failed to state a claim against the Defendant Young.

CONCLUSION AND PRAYER

As a matter of law, Plaintiffs have not indicated any standing to bring the claims asserted herein against Defendant Young. Assuming, *arguendo,* Plaintiffs are able to impress upon the Court that they do, in fact, have standing, then Plaintiffs' claims remain barred due to the qualified immunity of Defendant Young. Finally, accepting Plaintiffs' factual pleadings as true, Plaintiffs simply have not presented any viable legal theory in which they are entitled to recover damages against Defendant Young and, therefore, fail to meet the federal pleading standards. For the foregoing reasons, Defendant Young respectfully requests this Court dismiss all claims against her and for such other and further relief to which she may show herself to be justly entitled.

[Signature Page Follows]

[127] *Id*. (*citing Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972)) (internal marks omitted).

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF CONFERENCE

I, the undersigned, do hereby certify that I conferred with Plaintiffs' counsel regarding Defendant's Motion to Dismiss via teleconference on March 27, 2024. Plaintiffs' counsel indicated both verbally and via email on March 27, 2024, that he was opposed to Defendant's Motion to Dismiss.

/s/ William H. Farrell
WILLIAM H. FARRELL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I, the undersigned, do hereby certify compliance with Local Rule of Practice 6 wherein Defendant's Motion to Dismiss was discussed via teleconference with counsel for Plaintiffs on March 27, 2024. I provided Plaintiffs' counsel with a letter indicating the basis of such Motion, and Plaintiffs' counsel indicated via email that he remained opposed to Defendant's Motion to Dismiss and that there would not be any additional amendments to Plaintiffs' Second Amended Complaint.

/s/ William H. Farrell
WILLIAM H. FARRELL
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that that on April 22, 2024, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ William H. Farrell
WILLIAM H. FARRELL
Assistant Attorney General