IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DESSIE MARIA ANDREWS, *Plaintiff,*	§ § §	
v.	§	**Civil Action No. 1:20-CV-0608-LY**
GREG ABBOTT, SARAH ECKHARDT, and STEVE ADLER, *Defendants.*	§ § § §	

DEFENDANT GOVERNOR ABBOTT'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION & FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE JUDGE LEE YEAKEL:

Defendant Greg Abbott, named in his individual and official capacity as Governor of Texas, ("Governor Abbott") respectfully asks the Court to dismiss all claims brought against him by Plaintiff Dessie Maria Andrews ("Plaintiff"). Plaintiff sues Governor Abbott, Sarah Eckhardt ("Judge Eckhardt")[1], and Steve Adler ("Mayor Adler") (collectively "Defendants") for their alleged actions during the Public Health Emergency declared by U.S. Department of Health and Human Services ("HHS"). Plaintiff alleges that the Centers for Disease Control and Prevention ("CDC") and National Institute of Allergy and Infectious Diseases ("NIAID") promulgated social-distancing and face-mask-wearing recommendations that Defendants adopted without reviewing their underlying medical and scientific validity. Plaintiff characterizes Defendants' actions as a criminal enterprise and contends that the emergency orders they issued to combat the COVID-19 pandemic were based on misinformation from epidemiologists such as Neil Ferguson, who predicted 2.2 million deaths in the United States if no actions were taken to stop the virus from spreading.

[1] Sarah Eckhardt is no longer the Travis County Judge, but this motion shall respectfully refer to her as Judge Eckhardt because she is sued for actions allegedly taken while she held that position.

Plaintiff contends that Defendants' alleged actions were driven by a misguided intent to prevent millions of deaths based on a "hoax" and flawed epidemiological modeling. Plaintiff argues that Defendants' actions imposed significant costs on businesses and complains about the cancellation of SXSW, a popular film and musical festival. As it relates to Governor Abbott specifically, Plaintiff takes issue with the State of Disaster declared on March 13, 2020 and the Executive Orders issued pursuant to that declaration (authorized by Chapter 418 of the Texas Government Code). Based on Defendants' alleged actions, Plaintiff brings the following claims:

CLAIM #	DESCRIPTION	CITATION
Claim 1	Violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1961)	Doc. #1, 24–25 [¶¶ 168–78]
Claim 2	Aiding and Abetting Primary Contravention of RICO Section 1962(c) (18 U.S.C. § 1962)	Doc. #1, 25–26 [¶¶ 179–83]
Claim 3	Aiding and Abetting a RICO Section 1962(d) conspiracy in contravention of RICO Section 1962(c) (18 U.S.C. §§ 2(a)–(b) and §§ 1962(c)–(d)).	Doc. #1, 26–27 [¶¶ 184–86]
Claim 4	Deprivation of civil rights under 42 U.S.C. § 1983, § 1985, § 1986 • First Amendment (establishment clause and free exercise clause[2]) to United States Constitution • Fourth Amendment (unreasonable searches and seizures[3]) to the United States Constitution • Fifth Amendment (due process[4]) to the United States Constitution • Eighth Amendment (cruel and unusual punishment[5]) to the United States Constitution • Fourteenth Amendment (due process[6]) to the United States Constitution • Article I, Section 19 of the Texas Constitution[7] • International Covenant on Civil and Political Rights	Doc. #1, 27–28 [¶¶ 187–91]

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[2] *See* Doc. #1, 21 [¶ 144] (specifically mentioning the Establishment and Free Exercise Clauses in the First Amendment context).

[3] *See* Doc. #1, 21 [¶ 148] (specifically mentioning the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures in the context of the Fourth Amendment).

[4] *See* Doc. #1, 22 [¶ 150] (specifically mentioning due process in the context of the Fifth Amendment).

[5] *See* Doc. #1, 22 [¶ 151] (specifically mentioning cruel and unusual punishment in the context of the Eighth Amendment).

[6] Plaintiff does not elaborate on her Fourteenth Amendment claim but a fair reading suggests she brings identical claims under both the Fifth and Fourteenth Amendments.

[7] The only section of the Texas Constitution explicitly mentioned under Claim 4 is Article I, Section 19. *See* Doc. #1, 27–28 [¶¶ 187–91]. Elsewhere in the pleadings, Plaintiff also mentions purported violations of the Texas Constitution under Article I, Sections 6, 9, 13, 19, 27, and 29. *See* Doc. #1, 21 [¶¶ 145, 148–53]. While this chart only addresses the legal

CLAIM #	DESCRIPTION	CITATION
Claim 5	Fraud (state tort)	Doc. #1, 28 [¶¶ 192–94]
Claim 6	Intentional Infliction of Emotional Distress (state tort)	Doc. #1, 28–29 [¶¶ 195–200]
Claim 7	Deceptive Trade Practices (state law[8])	Doc. #1, 29–30 [¶¶ 201–05]

The Court lacks subject-matter jurisdiction over Plaintiff's claims against Governor Abbott for the following reasons:

1. Plaintiff lacks standing for her claims against Governor Abbott.
2. Plaintiff's claims against Governor Abbott in his official capacity are barred by Eleventh Amendment immunity.
3. Plaintiff's two tort claims against Governor Abbott in his individual capacity are barred based on his invocation of the Texas Tort Claims Act's Election of Remedies provision, TEX. CIV. PRAC. & REM. CODE § 101.106(f), because the claims are now considered to be against Governor Abbott in his official capacity only.

To the extent this Court determines it has subject-matter jurisdiction, Plaintiff fails to state a claim against Governor Abbott for the following reasons:

1. Plaintiff fails to state a claim for a violation of the RICO Act and, to the extent she sues Governor Abbott in his individual capacity, he is entitled to qualified immunity.
2. Plaintiff fails to a state a claim under 42 U.S.C. § 1983, § 1985, or § 1986 and, to the extent she sues Governor Abbott in his individual capacity, he is entitled to qualified immunity.
3. Plaintiff fails to state a claim under the Deceptive Trade Practices Act.

Governor Abbott respectfully asks the Court to grant this motion and dismiss Plaintiff's claims against him. In further support, Governor Abbott respectfully shows as follows:

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theories specifically raised in the numerated claims, the basis for dismissing the other claims premised on a purported violation of the Texas Constitution is the same. *See infra*. No violation of state law is actionable under 42 U.S.C. § 1983, 1985, or 1986. Thus, to the extent Plaintiff intends to bring claims for any purported violation of the Texas Constitution, Governor Abbott respectfully asks the Court to dismiss such claims.

[8] *See* Doc. #1, 3–4 [¶ 26] (specifically citing "Texas Business and Commerce Code Chapter 17, Deceptive Trade Practices" as a basis for this Court's jurisdiction).

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I. MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). When the court lacks the statutory or constitutional power to adjudicate a case, the case is properly dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.*

B. Arguments & Authorities

1. Plaintiff lacks standing to bring claims against Governor Abbott because she fails to articulate an actual and particularized injury-in-fact fairly traceable to his challenged actions (all claims).

Plaintiff lacks standing to bring her claims against Governor Abbott. To establish standing, a plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant (causation); and (3) that is likely to be redressed by a favorable decision (redressability). *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). All three elements are "an indispensable part of the plaintiff's case" and the party seeking to invoke federal jurisdiction bears the burden to establish them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Jurisdiction is "a threshold issue that must be resolved before any federal court reaches the merits of the case before it." *Perez v. U.S.*, 312 F.3d 191, 194 (5th Cir. 2002); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "'[S]tanding is not dispensed in gross'; a party must have standing to challenge each 'particular inadequacy in government administration.'" *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357–58 & n.6 (1996)).

For the purpose of standing, strong feelings about government action—even strong feelings not shared by the general public—are no better than weak ones at giving a plaintiff a direct and personal stake in litigation. *McMahon v. Fenves*, 946 F.3d 266, 271 (5th Cir. 2020). In *McMahon*, the plaintiffs were descendants of Confederate veterans and the Sons of Confederate Veterans, Inc., who challenged the relocation of Confederate statues, a monument, and two cannons. *Id.* at 268. The Fifth Circuit held the plaintiffs lacked standing to challenge these relocations. *Id.* at 268–72. While acknowledging that the plaintiffs had reasons to feel more attached to the monuments' viewpoint than the general public, these reasons did "not distinguish Plaintiffs from any other persons who might claim offense at the removal of these monuments" because "these ties affect[ed] only the magnitude of Plaintiffs' indignation, not the nature of their injury." *Id.* at 271–72. "That Plaintiffs are more offended than someone who is likeminded yet lacks these ties does not make that generalized injury particularized." *Id.* at 271.

Here, Plaintiff has not alleged that she suffered a particularized "injury-in-fact." While her pleadings discuss the alleged damage "caused to Texas," to "the citizens of the United States of America," to "small businesses," and to the "116,410 Texans who filed for unemployment in March and April," she fails to articulate an injury particularized to her—such as the closure of *her* business or the loss of *her* employment. *See e.g.* Doc. #1, 10–11, 17 [¶¶ 75–76, 81, 113]. While Plaintiff is clearly offended by Governor Abbott's orders, she has not alleged the particularized injury required to establish standing. It "is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Pub. Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). "For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." *Id.* (quoting *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940)). Lacking anything more than an abstract disagreement, Plaintiff has failed to establish the Court's subject-matter jurisdiction.

2. Plaintiff's claims against Governor Abbott in his official capacity are barred by Eleventh Amendment Immunity (all claims).

Absent a clearly stated waiver or consent to suit by the State of Texas or valid abrogation by Congress, Plaintiff's claims against Governor Abbott in his official capacity are jurisdictionally barred by Eleventh Amendment immunity.[9] *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (cited for its holding regarding waiver and abrogation); *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020) (cited for the proposition that Governor Abbott is entitled to Eleventh Amendment immunity). "A suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). "Suits against state officials in their official capacity [] should be treated as suits against the State." *Hafer v. Melo*, 502 U.S. 21, 25 (1991). The Eleventh Amendment continues to "bar a damages action against a State in federal court" and "[t]his bar remains in effect when State officials are sued for damages in their official capacity." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Here, Plaintiff lacks either State waiver or Congressional abrogation for her claims for damages against Governor Abbott, and her claims for injunctive relief do not fall within any exception.[10] *See* Doc. #1, 30.

a. Plaintiff's three RICO claims against Governor Abbott in his official capacity are barred by Eleventh Amendment immunity (Claims 1–3).

Plaintiff's three claims under RICO are barred by Eleventh Amendment immunity to the extent brought against Governor Abbott in his official capacity. RICO provides for criminal penalties

[9] Although often referred to as "Eleventh Amendment immunity" as a convenient shorthand, the phrase is "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). This motion uses the two terms interchangeably.

[10] Plaintiff's only non-monetary request is "[f]or the return of Plaintiff's liberties and freedoms and her Rights," which is simply too vague to avoid an Eleventh Amendment bar to suit, particularly in light of the standing problems mentioned *supra*. *See Verizon Md., Inc. v. Public Serv. Com'n of Md.*, 535 U.S. 635, 645 (2002); *Does 1–7 v. Round Rock Ind. Sch. Dist.*, 540 F. Supp. 2d 735, 745 (W.D. Tex. 2007) ("In the absence of some allegedly imminent violation of the law, . . . an injunction [to follow the law] is inappropriate. . . .") (citing *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Assuming this Court determines that Plaintiff's Original Complaint includes a viable request for prospective injunctive relief, Plaintiff's claims for violations of state law would not qualify under this exception and she fails to state a claim for violations of federal law for the reasons discussed *infra*. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Papasan v. Allain*, 478 U.S. 265, 277 (1986); *Williams on behalf of J.E. v. Reeves*, 954 F.3d 729, 739–40 (5th Cir. 2020).

and a civil cause of action for acts performed as part of an ongoing criminal organization. Nowhere in the RICO Act does Congress express a clear intent to abrogate the States' sovereign immunity. *See* 18 U.S.C. §§ 1961–68. Indeed, federal courts around the country have consistently held that States have Eleventh Amendment immunity to claims brought under RICO. *E.g., Gaines v. Tex. Tech Univ.*, 965 F. Supp. 886, 889 (N.D. Tex. 1997); *Dahmer v. Hamilton*, 238 F.3d 428 (9th Cir. 2000) (unpublished); *Chaz Constr., LLC v. Codell*, 137 F. App'x 735, 743 (6th Cir. 2005) (unpublished). Therefore, Plaintiff's RICO claims should be dismissed for lack of subject-matter jurisdiction.

b. Plaintiff's civil rights claims under 42 U.S.C. § 1983, § 1985, and § 1986 against Governor Abbott in his official capacity are barred by Eleventh Amendment immunity (Claim 4).

Plaintiff's civil rights claims under 42 U.S.C. § 1983, § 1985, and § 1986 are barred by Eleventh Amendment immunity to the extent brought against Governor Abbott in his official capacity. Section 1983 does not abrogate Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 345 (1979); *Aguilar v. TDCJ*, 160 F.3d 1052, 1054 (5th Cir. 1998) ("The Eleventh Amendment bars claims against a state brought pursuant to § 1983."). Section 1985 does not abrogate Eleventh Amendment immunity. *Early v. So. Univ. & Agr. & Mech. Coll. Bd. of Sup'rs,* 252 F. App'x 698, 700 (5th Cir. 2007) (unpublished). Section 1986 does not abrogate Eleventh Amendment immunity. *Unimex, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 594 F.2d 1060, 1061–62 n.1 (5th Cir. 1979); *Baxter v. La.*, No. Civ. A. 03-2014, 2003 WL 22175990, at *1 (E.D. La. 2003) (unpublished) ("Furthermore, the text of [Section] 1986 does not contain an unequivocal textual abrogation of the State's 11th Amendment immunity").

c. Plaintiff's fraud claim against Governor Abbott in his official capacity is barred by Eleventh Amendment immunity (Claim 5)

Plaintiff's fraud claim is barred by Eleventh Amendment immunity to the extent brought against Governor Abbott in his official capacity. The Texas Tort Claims Act ("TTCA") contains a waiver of sovereign immunity, but that waiver only applies in state court. *Sherwinski v. Peterson*, 98 F.3d 849, 851–52 (5th Cir. 1996) (holding the TTCA "waives sovereign immunity in state court only").

Here, the TTCA would not waive sovereign immunity even had Plaintiff filed her lawsuit in state court. *See LTTS Charter Sch., Inc. v. Palasota*, 362 S.W.3d 202, 209 (Tex. App.—Dallas 2012, no pet.) ("Fraud is an 'intentional tort' for which the TTCA provides no waiver of immunity."); *Tex. Dep't. of Public Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001) (holding that the TTCA does not waive sovereign immunity for *any* intentional torts).

d. Plaintiff's Intentional Infliction of Emotional Distress claim against Governor Abbott in his official capacity is barred by Eleventh Amendment immunity (Claim 6).

Plaintiff's intentional infliction of emotional distress claim is barred by Eleventh Amendment immunity to the extent brought against Governor Abbott in his official capacity. *See Sherwinski*, 98 F.3d at 851–52 (holding the TTCA does not waive immunity in federal court); *Jackson v. Sheriff of Ellis Cnty., Tex.*, 154 F. Supp.2d 917, 921 (N.D. Tex. 2001) (holding that Eleventh Amendment immunity barred the plaintiff's intentional infliction of emotional distress claim). Even in state court, Plaintiff's intentional tort claim would remain barred. *See, e.g.*, *Donohue v. Butts*, 516 S.W.3d 578, 581 (Tex. App.—San Antonio 2017, no pet.).

e. Plaintiff's claim under the Deceptive Trade Practices Act against Governor Abbott in his official capacity is barred by Eleventh Amendment immunity (Claim 7).

To the extent sued in his official capacity, Governor Abbott's Eleventh Amendment immunity bars Plaintiff's claim under the Deceptive Trade Practices Act ("DTPA"). *See* Doc. #1, 29–30 [¶¶ 201–05] (Claim 7). Texas appellate courts have repeatedly recognized that the DTPA lacks any waiver of the State's sovereign immunity from suit. *E.g. Prof'l Res. Plus v. Univ. of Texas, Austin*, No. 03-10-00524-CV, 2011 WL 749352, at *1 (Tex. App.—Austin 2011, no pet.); *Belton v. TDCJ*, No. 10-06-00142-CV, 2007 WL 475448, at *2 (Tex. App.—Waco 2007, pet. denied); *Univ. of Houston v. Simons*, No. 01-02-00368-CV, 2002 WL 31388906 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Concho v. Residential Servs., Inc. v. MHMR Servs. for Concho Valley*, No. 03-89-00022-CV, 1999 WL 644727, at *7 (Tex. App.—

Austin 1999, pet. denied); *Wije v. Texas Woman's Univ.*, No. 4:14-CV-571, 2016 WL 11472335, at *8 (E.D. Tex. 2016) (recommending that the court dismiss plaintiff's "TDTPA claims against TWU and the Individual Defendants in their official capacities . . . because such claims are barred by the Eleventh Amendment"), 2016 WL 1156514, at *9 (adopting the recommendation).

3. To the extent sued in his individual capacity for the torts of fraud and intentional infliction of emotional distress, Governor Abbott moves to dismiss under the TTCA's election-of-remedies statute (Claims 5 & 6).

Governor Abbott moves to dismiss the tort claims brought against him in his individual capacities, invoking the TTCA's Election of Remedies provision. *See* TEX. CIV. PRAC. & REM. CODE § 101.106. Under Section 101.106(f), "[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 been brought under [the Act] against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only." TEX. CIV. PRAC. & REM. CODE § 101.106(f). Section 101.106(f) essentially closes a loophole in which plaintiffs could circumvent the State's immunity by suing government employees for doing their jobs. *See Franka v. Velasquez*, 332 S.W.3d 367, 380 (Tex. 2011). "[F]or section 101.106(f), suit 'could have been brought' under the Act against the government regardless of whether the Act waives immunity from suit." *Id.* at 385. All torts are brought under the TTCA for purposes of Section 101.106. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008); *Gil Ramirez Group, LLC v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 415 (5th Cir. 2015).

Here, the alleged facts demonstrate that Governor Abbott acted within the scope of his employment as governor when he issued the Executive Orders at issue in this lawsuit. Conduct is within the general scope of employment under Section 101.106(f) unless the plaintiff has alleged some independent course of conduct by a state officer that was not intended to serve any purpose of the employer. *Alexander v. Walker*, 435 S.W.3d 789, 791 (Tex. 2014) (per curiam). Indeed, a governmental

employee can act within the scope of his employment even if his actions are in error. *See Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 425 (Tex. 2004) (concluding that board of adjusters' members were discharging duties assigned to them even though later judicial decision established that board action was incorrect). Even "intentional torts can fall within the scope of employment," including claims of fraud. *McFadden v. Olesky*, 517 S.W.3d 287, 297 (Tex. App.—Austin 2017, pet. denied); *see also Laverie v. Wetherbe*, 517 S.W.3d 748, 755–56 (Tex. 2017); *Fink v. Anderson*, 477 S.W. 3d 460, 466–67 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Anderson v. Bessman*, 365 S.W .3d 119, 123–24 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Here, even taking the allegations as true, Governor Abbott's alleged actions served the purpose of the Office of Governor, putting them well within scope of Section 101.106(f). Therefore, Governor Abbott is entitled to dismissal of the tort claims against him in his individual capacity under the Election of Remedies. Based on his invocation of Section 101.106(f), this lawsuit is considered against Governor Abbott in his official capacity as Governor of the State of Texas only. And, as noted *supra*, the tort claims against him in his official capacity are barred by Eleventh Amendment immunity.

II. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. Standard of Review

1. Generally

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). To avoid dismissal under Rule 12(b)(6), a plaintiff must plead sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While courts must accept all factual allegations as true, they "do not accept as true conclusory allegations, unwarranted

factual inferences, or legal conclusions." *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005); *see also Iqbal*, 556 U.S. at 679.

2. Qualified Immunity

Once a state official has asserted qualified immunity, the burden shifts to the plaintiff to show that qualified immunity does not bar her recovery. *Kovacic v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010). The qualified immunity analysis has two steps, which can be taken in either order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "First, [the Court should] assess whether a statutory or constitutional right would have been violated on the facts alleged." *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004). Second, the Court should "determine whether the defendant's actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

B. Arguments & Authorities

1. Plaintiff fails to state a claim upon which relief can be granted for a violation of any provision of the RICO Act (Claim 1–3).

a. Plaintiff fails to allege facts that create the reasonable inference that Governor Abbott violated RICO (individual and official capacity).

RICO provides a civil cause of action for "[a]ny person injured in his business or property by reason of a violation of" RICO's substantive provisions. 18 U.S.C. § 1964(c); *see id.* § 1962 (enumerating substantive violations). To recover under § 1964(c), a plaintiff must prove not only all elements of a substantive RICO violation but also that "he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). The plaintiff must also demonstrate that the substantive violation proximately caused his injury. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). Plaintiff's RICO claims fail first and foremost because she has not alleged that she has been injured in her business or property by the conduct constituting the violation of RICO. *See supra*, 5 (argument regarding standing). Thus, she fails to state a civil RICO

claim. *See Alexander v. Global Tel Link Corp.*, No. 19-60287, 2020 WL 3041323, at *4 (5th Cir. June 5, 2020) (affirming dismissal on the grounds that the plaintiffs failed to plead adequately that they suffered the injury required under § 1964(c)).

Additionally, Plaintiff fails to state a claim under 18 U.S.C. § 1962(c) because the alleged facts do not create the reasonable inference that Governor Abbott engaged in a "racketeering activity." To state a claim under 18 U.S.C. § 1962(c), Plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496 (footnote omitted); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998). "Racketeering activity" is defined under the RICO Act to mean "any act or threat involving" specified state-law crimes, any "act" indictable under various specified federal statutes, and certain federal "offenses." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 232 (1989). Plaintiff contends that "Defendants have used the mails and wires on behalf of themselves to communicate fraudulent propaganda in pursuit of their enterprise," that they "employed the federal mails and/or federal interstate wires, engaged in federal extortion." Doc. #1, 25–26 [¶¶ 176, 180]. But the factual allegations do not support these legal conclusions.[11] As such, Plaintiff fails to state a claim. *See Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989) (noting that the plaintiff must plead the elements of the criminal offenses that comprise the predicate acts to state a RICO claim).

Governor Abbott also lacked the requisite specific intent for a RICO violation. *See Allstate Ins. Co.*, 190 F. Supp.3d at 658 ("a culpable defendant acts knowingly with the specific intent to deceive for the purpose of causing pecuniary loss to another or bringing about some financial gain to himself"). According to Plaintiff, Governor Abbott "took the bait" dangled by the CDC, NIAID, and their

[11] Plaintiff has not even alleged interstate or intrastate use of the mail. *See Allstate Ins. Co. v. Benhamou*, 190 F. Supp. 3d 631, 657–58 (S.D. Tex. 2016) (Harmon, J.) ("The elements of RICO mail fraud are: (1) a scheme to defraud by means of false or fraudulent representation; (2) interstate or intrastate use of the mails to execute the scheme; (3) the use of the mails by the defendant connected with or incident to the scheme; and (4) actual injury to the plaintiff."). Nor has Plaintiff alleged that Governor Abbott obtained any money or thing of value in exchange for his issuance of these orders. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402–03 (2003) (discussing extortion).

affiliates—but is not the mastermind behind the COVID-19 "hoax." *See* Doc. #1, 6–8 [¶¶ 41–51]. Instead, "[w]hen Governor Abbott issued his declaration, his basi[c] premise was wrong," for his decision were based on the belief "that COVID-19 poses an imminent threat of disaster, and his issuance of a state of disaster on the modeling . . . which estimated more than 2.2 million deaths in the United States." Doc. #1, 8–9 [¶¶ 62, 66]. Governor Abbott thus took his actions based on a desire to protect the public from what he believed to be an imminent threat. *See* Doc. #1, 8–9 [¶¶ 49–69]; *id.* at 16 [¶ 110]. He lacks culpable intent.

Furthermore, Plaintiff fails to allege facts that meet the "enterprise" element claim of a claim under § 1962(c). "To avoid dismissal for failure to state a claim, a plaintiff must plead specific facts . . . which establish the existence of an enterprise." *Elliott v. Foufas,* 867 F.2d 877, 881 (5th Cir. 1989). To establish the enterprise element of a RICO claim, a plaintiff must "show evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440 (5th Cir. 1987). But here Plaintiff does not allege facts creating the reasonable inference that Governor Abbott acted as a continuing unit with Judge Eckhardt or Mayor Adler. *See generally* Doc. #1. While municipal and state actors may interact and even incidentally coordinate on occasion, "Plaintiff has failed to plead any facts which would establish the conduct of an enterprise, a meeting of the minds, an intent to conspire, or any pattern of racketeering activity" between Governor Abbott, Judge Eckhardt, or Mayor Adler. *See Bittakis v. City of El Paso*, 480 F. Supp.2d 895, 921 (W.D. Tex. 2007).

Lacking a violation under § 1962(c), Plaintiff's contention that Governor Abbott's disaster declaration and executive orders constituted "aiding and abetting a RICO §1962(d) conspiracy" fails. *See* Doc. #1, 26 [¶ 185]. "[T]o establish civil liability for RICO conspiracy, a claimant must allege injury from an act that is independently wrongful under RICO." *Allstate Ins. Co.*, 190 F. Supp. 3d at 663 (citing *Beck v. Prupis*, 529 U.S. 494, 507 (2000)). "Thus, when a plaintiff fails to properly allege a

violation of § 1962(c), [her] § 1962(d) claim is without basis." *Id.* Plaintiff fails to allege a violation of § 1962(c) and therefore her § 1962(d) claim is without basis.

Moreover, the facts as alleged fail to demonstrate an agreement to commit predicate acts between Governor Abbott, Judge Eckhardt, or Mayor Adler. "[B]ecause the core of a RICO civil conspiracy is an agreement to commit predicate acts, a RICO civil conspiracy complaint, at the very least, must specifically allege such an agreement." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1140 (5th Cir. 1992). Plaintiff has not alleged that Governor Abbott, Judge Eckhardt, or Mayor Adler reached the requisite agreement. If anything, Plaintiff's allegations suggest the opposite. *E.g.*, Doc. #1, 10 [¶ 72] ("Not content to rely on the governor's orders and instructions, on March 24, 2020, Mayor Steve Adler issued his 9 page Order. . . ."). This provides yet another basis to dismiss Plaintiff's civil RICO claim under § 1962(d).

b. In addition, Governor Abbott is entitled to qualified immunity from Plaintiff's RICO claims (individual capacity only).

In an abundance of caution, to the extent sued in his individual capacity under RICO, Governor Abbott respectfully asserts that qualified immunity bars such claim. *See Cockrell v. Cates*, 121 F.3d 705 (5th Cir. 1997) ("The Cockrells' argument that qualified immunity is not a defense to a civil RICO action is meritless."). To the extent this Court determines that Plaintiff's alleged facts create the reasonable inference that Governor Abbott violated the RICO Act, such violation was not clearly established at the time of the underlying events and therefore Governor Abbott in his individual capacity is entitled to qualified immunity. *See Flores,* 381 F.3d at 395.

2. Plaintiff fails to state a claim upon which relief can be granted for any violation of 42 U.S.C. § 1983, § 1985, or § 1986 (Claim 4).

a. Plaintiff's pleadings do not create the reasonable inference that Governor Abbott violated 42 U.S.C. 1983.

"To state a section 1983 claim, 'a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was

committed by a person acting under color of state law.'" *James v. Tex. Collin Cnty.*, 535 F.3d 365, 373 (5th Cir. 2008) (quoting *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000)). Violations of state law are not actionable under 42 U.S.C. § 1983. *Id.*; *Williams v. Treen*, 671 F.2d 892, 900 (5th Cir. 1982); *Giovanni v. Lynn*, 48 F.3d 908, 912 (5th Cir. 1995). Although Plaintiff mentions purported violations of the Texas Constitution, none of these claims are actionable under Section 1983 and therefore Plaintiff fails to state a claim. *See* Doc. #1, 27–28 [¶¶¶ 187–91]. Similarly, Plaintiff alleges a purported violation of the International Covenant on Civil and Political Right, but "[a]lthough the covenant does bind the United States as a matter of international law, the United States ratified the covenant on the express understanding that it was not self-executing, and so did not itself create obligations enforceable in the federal courts." *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004); Doc. #1, 27–28 [¶ 188]. Turning to the purported violations of rights secured by the Constitution or law of the United States, Plaintiff fails to allege facts creating the reasonable inference that Governor Abbott violated any right for which she seeks relief.[12]

i. Free Exercise Clause (First Amendment)

For over a century, the Supreme Court has recognized that the authority to respond to public health crises must be "lodged somewhere," and it is "not an unusual, nor an unreasonable or arbitrary, requirement," to vest it in officials "appointed, presumably, because of their fitness to determine such questions." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). On May 29, 2020, the Supreme Court denied injunctive relief in a First Amendment challenge to executive orders issued by the Governor of California that restricted places of worship as a result of the COVID-19 pandemic. As Chief Justice Roberts noted, the governor's restrictions "appear consistent with the Free Exercise Clause of the First Amendment." *S. Bay United Pentecostal Church v. Newsom,* No. 19A1044, ___ U.S. ___, 2020 WL 2813056, at *1 (May 29, 2020) (Roberts, C.J., concurring in denial for application of injunctive relief).

[12] *See supra*, 2–3 (the chart identifying the federal rights identified under Claim 4 with citations to the pleadings).

"When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). "Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.* (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)).

Here, Plaintiff disagrees with the epidemiological conclusions of the medical and scientific community—conclusions upon which Governor Abbott allegedly relied in issuing the orders she challenges. *See* Doc. #1, 8–9 [¶¶ 49–69]; *id.* at 16 [¶ 110]. But her factual allegations do not create the reasonable inference that Governor Abbott violated her right to free exercise under the First Amendment. The Free Exercise Clause protects individuals from state interference when exercising sincerely-held religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Laws and ordinances that "single[] out" a religious practice for discriminatory treatment "must undergo the most rigorous of scrutiny." *Id.* at 538. But Plaintiff does not allege that Governor Abbott's orders singled out a religious practice—to the contrary, she concedes that Governor Abbott "did not force churches to close or decree that they could not worship as usual." *See* Doc. #1, 9, 21 [¶¶ 69, 146]. And while neutral government actions are not *per se* compliant with the Free Exercise Clause, Plaintiff has not even alleged facts creating the reasonable inference that the incidental effect of Governor Abbott's alleged actions burdened her religious practices, much less that the burden violated her Free Exercise rights. Her allegations fail to state a claim.

ii. Establishment Clause (First Amendment)

Similarly, Plaintiff fails to state a claim for a violation of the Establishment Clause under any legal test. "The Supreme Court generally applies at least one of three tests under the Establishment Clause: the *Lemon* test, the endorsement test, and the coercion test." *American Humanist Ass'n v.*

McCarty, 851 F.3d 521, 525 (5th Cir. 2017). Governor Abbott's alleged actions had a secure purpose, had neither the primary effect of advancing nor inhibiting religion, and did not foster excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Governor Abbott's alleged actions did not unconstitutionally endorse a religion by taking a position on questions of religious belief or make adherence to a religion relevant to Plaintiff's standing in the political community. *See Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Governor Abbott's alleged actions did not direct a formal religious exercise in such a way as to oblige the participation of objectors. *See Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999). Plaintiff fails to state a claim for a violation of the Establishment Clause.

iii. Unreasonable Searches & Seizures (Fourth Amendment)

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects," to be free from "unreasonable searches and seizures," and requires that warrants must be based on probable cause. U.S. CONST. amend. IV. Here, Plaintiff alleges neither that she was subjected to a "search" nor a "seizure," even in the broader context in which those terms are applied under the Fourth Amendment. *See generally* Doc. #1; *e.g.*, *See v. City of Seattle*, 387 U.S. 541, 543 (1967) (extending the Fourth Amendment's protections to compulsory inspections of documents in a commercial establishment). Plaintiff asserts only conclusory allegations regarding "the people [being] denied the right to be secure in their persons, houses, papers and possession," which fail to demonstrate a violation of the Fourth Amendment generally, much less as it relates to her personally. Plaintiff fails to state a claim.

iv. Due Process (Fifth Amendment)

"The Fifth Amendment applies only to violations of constitutional rights by the United States or a federal actor." *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000); *see also e.g.*, *Mark v. Hickman*, No. CV H-17-2784, 2019 WL 5653631, at *5 (S.D. Tex. Oct. 29, 2019) ("Mark asserts due process

claims under both the Fifth and Fourteenth Amendments. . . . Because Mark does not allege that any of the defendants are federal actors, Mark's Fifth Amendment due process claims are DISMISSED."). Therefore, Governor Abbott respectfully asks the Court to dismiss Plaintiff's Fifth Amendment claim.

v. Cruel & Unusual Punishment (Eighth Amendment)

Plaintiff fails to state a claim under the Eighth Amendment because, *inter alia*, the Eighth Amendment does not apply to her. "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Ingraham v. Wright*, 430 U.S. 651, 671–672, n.40 (1977); *City of Revere v. Mass. General Hosp.*, 463 U.S. 239, 244 (1983). Moreover, Plaintiff alleges that Governor Abbott ordered "avoidance of social gatherings in groups of more than 10 people, restaurants, bars, gyms, massage parlors were to be avoided, visits to nursing homes were terminated and schools closed." Doc. #1, 9 [¶ 69]. Even if the Eighth Amendment did apply, this prohibition would not support the reasonable inference that these orders imposed a cruel and unusual punishment.

vi. Due Process (Fourteenth Amendment)

The threshold requirement of any due process claim is the government's deprivation of a liberty or property interest. *DePree v. Saunders*, 588 F.3d 282, 289 (5th Cir. 2009) (procedural); *see also Simi Inv. Co., Inc. v. Harris Cnty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000) (substantive). The first question is "whether there exists a liberty or property interest which has been interfered with by the State." *Id.* Here, it is unclear what specific liberty or property interest is at issue. And to the extent Governor Abbott's alleged actions touch upon some constitutionally protected interest, subjecting them to rational basis review by this Court, his disaster declaration and executive orders more than pass muster. *See Jacobson*, 197 U.S. at 31; *S. Bay United Pentecostal Church*, 2020 WL 2813056, at *1; *In re Abbott*, 854

F.3d 772, 783 (5th Cir. 2020) (discussing the framework governing emergency exercises of state authority during a public health crisis).

b. Plaintiff's pleadings do not create the reasonable inference that Governor Abbott violated 42 U.S.C. § 1985.

Plaintiff fails to state a claim under 42 U.S.C. § 1985 because her pleadings do not create the reasonable inference that Governor Abbott engaged in a conspiracy motivated by a racial animus. *See Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261, 270 n.12 (5th Cir. 2001) (for a claim under 42 U.S.C. § 1985, the plaintiff must show "(1) the defendants conspired (2) for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and (3) one or more of the conspirators committed some act in furtherance of the conspiracy; whereby (4) another person is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States; and (5) the action of the conspirators is motivated by a racial animus.").

c. Plaintiff's pleadings do not create the reasonable inference that Governor Abbott violated 42 U.S.C. § 1986.

Plaintiff fails to state a claim under 42 U.S.C. § 1986 because such claim "requires the existence of a valid claim under [Section] 1985." *Bradt v. Smith*, 634 F.2d 796, 801–02 (5th Cir. 1981). "Having failed to demonstrate a claim under § 1985, by definition [the plaintiff] cannot sustain a claim under § 1986." *Lockett v. New Orleans City*, 607 F.3d 992, 1002 (5th Cir. 2010) (citing *Galloway v. State of La.*, 817 F.2d 1154, 1159 n. 2 (5th Cir. 1987)). As Plaintiff fails to state a claim under § 1985, she similarly fails to state a claim under § 1986.

d. Alternatively, to the extent sued in his individual capacity for a claim under 42 U.S.C. § 1983, § 1985, or § 1986, Governor Abbott is entitled to qualified immunity from such claim.

To the extent this Court determines that Plaintiff's alleged facts create the reasonable inference that Governor Abbott violated Section § 1983, § 1985, or § 1986, such violation was not clearly

established at the time of the underlying events and therefore Governor Abbott in his individual capacity is entitled to qualified immunity. *See Flores,* 381 F.3d at 395.

3. The alleged facts do not create the reasonable inference that Governor Abbott violated the DTPA and therefore Plaintiff fails to state a claim (Claim 7).

Finally, Plaintiff fails to state a claim against Governor Abbott under the DTPA. The DTPA allows a "consumer" to bring a cause of action pursuant to section 17.50 of the Texas Business and Commerce Code. TEX. BUS. & COM. CODE § 17.50(a). "Consumer" is a defined term which means "an individual, partnership, corporation, this state, or a subdivision or agency of this state *who seeks or acquires by purchase or lease, any goods or services. . . .*" *Id.* § 17.45(4) (emphasis added). "Goods" and "services" are also defined terms in the statute. "'Goods' means tangible chattels or real property purchased or leased for use." *Id.* § 17.45(1). "'Services' means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." *Id.* § 17.45(2). Under the facts as pleaded, Plaintiff fails to identify any "good" or "service" she "[sought] or acquire[d] by purchase or lease" and has therefore failed to state a claim against Governor Abbott under the DTPA.

III. PRAYER

For all these reasons, Governor Abbott in his individual and official capacities respectfully asks the Court to grant his motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2020, a true and correct copy of the foregoing document was served via the Court's ECF system to all counsel of record.

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