

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT
JUDGMENT

APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 11, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 19-11076 Mitchell Wagner v. TDCJ, et al
USDC No. 1:15-CV-177

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

By:

Charles B. Whitney, Deputy Clerk

Enclosure(s)

Mr. Benjamin Johnson Phillips

Mr. Mitchell Wagner

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 11, 2020

No. 19-11076

Lyle W. Cayce
Clerk

MITCHELL WAGNER,

Plaintiff—Appellant,

versus

ARCHIE D. SCARBOROUGH; KEITH F. MEEKS; STANLEY J.
BALDWIN; RICHARD BURGESS; JAMES FINLEY; CLAYTON
WHEEDEN; TEXAS KAIROS ORGANIZATION,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:15-CV-177

Before STEWART, GRAVES, and HIGGINSON, *Circuit Judges.*

PER CURIAM:*

Mitchell Wagner, Texas prisoner # 1543049, moves for leave to proceed in forma pauperis (IFP) in this appeal and moves for the appointment of counsel. By moving to appeal IFP, Wagner challenges the

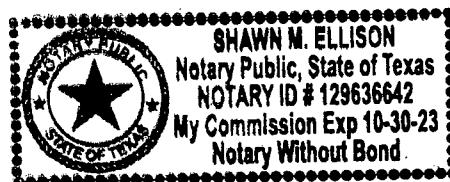
* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

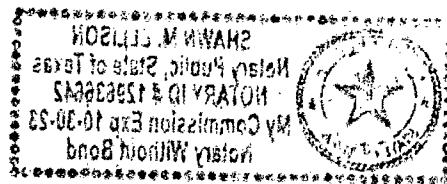
certification that his appeal is not in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

The notice of appeal failed to identify an existing judgment or order from which Wagner is appealing, and Wagner has not identified a nonfrivolous issue on appeal. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). Accordingly, the motion for leave to appeal IFP is DENIED, and the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2. Our dismissal of this appeal counts as one strike under 28 U.S.C. § 1915(g). *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015). Wagner is WARNED that if he accumulates three strikes, he will not be allowed to proceed IFP in any civil action or appeal filed while he is detained or incarcerated in any facility unless he is under imminent danger of serious physical injury. His motion for the appointment of counsel is DENIED.

C\$INIB02/CINIB02 TEXAS DEPARTMENT OF CRIMINAL JUSTICE 01/04/21
AIN5/ES00018 IN-FORMA-PAUPERIS DATA 16:00:51
TDCJ#: 01543049 SID#: 02396387 LOCATION: ROBERTSON INDIGENT DTE: 12/09/15
NAME: WAGNER, MITCHELL WINDELL BEGINNING PERIOD: 07/01/20
PREVIOUS TDCJ NUMBERS: 00875647 00995563
CURRENT BAL: 0.00 TOT HOLD AMT: 0.00 3MTH TOT DEP: 0.00
6MTH DEP: 0.00 6MTH AVG BAL: 0.00 6MTH AVG DEP: 0.00
MONTH HIGHEST BALANCE TOTAL DEPOSITS MONTH HIGHEST BALANCE TOTAL DEPOSITS
12/20 0.00 0.00 09/20 0.00 0.00
11/20 0.00 0.00 08/20 0.00 0.00
10/20 0.00 0.00 07/20 0.00 0.00

STATE OF TEXAS COUNTY OF *Jones*
ON THIS THE *4* DAY OF *January 2021*, I CERTIFY THAT THIS DOCUMENT IS A TRUE,
COMPLETE, AND UNALTERED COPY MADE BY ME OF INFORMATION CONTAINED IN THE
COMPUTER DATABASE REGARDING THE OFFENDER'S ACCOUNT. NP SIG: *[Signature]*
PF1-HELP PF3-END ENTER NEXT TDCJ NUMBER: _____ OR SID NUMBER: _____





B
Motion REQUESTING TRANSCRIPT GRANTED
ProceedING IN FORMA PAUPERIS

APPENDIX B

Docket
4/18/18

Mitchell Wagner #1543049
TDCJ Robertson Unit
12071 FM 3522
Abilene, TX 79601

Summary

CIVIL DOCKET

9/18/15 - 4/18/19

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION**

MITCHELL W. WAGNER, §
TDCJ ID No. 01543049, §
SID No. 02396387, §
Previous TDCJ ID Nos. 00875647, §
00995563, §
§
Appellant, §
§
v. § CIVIL ACTION NO. 1:15-CV-177-C
§
§
TEXAS DEPARTMENT OF CRIMINAL § USCA NO. 19-10298
JUSTICE, *et al.*, §
§
Appellee(s). §

ORDER

Before the Court is Appellant's Motion Requesting Transcript at Government Expense filed April 17, 2019. 28 U.S.C. § 753(f) provides that “[f]ees for transcripts furnished in other proceedings to persons permitted to appeal *in forma pauperis* shall also be paid by the United States if the trial judge or circuit judge certifies that the appeal is not frivolous (but presents a substantial question.)” *Id.* The Court previously granted Appellant leave to proceed *in forma pauperis* on appeal. Implicit in that decision was a finding that the appeal is taken in good faith. Consequently, Appellant is entitled to a free transcript in order to prosecute his appeal.

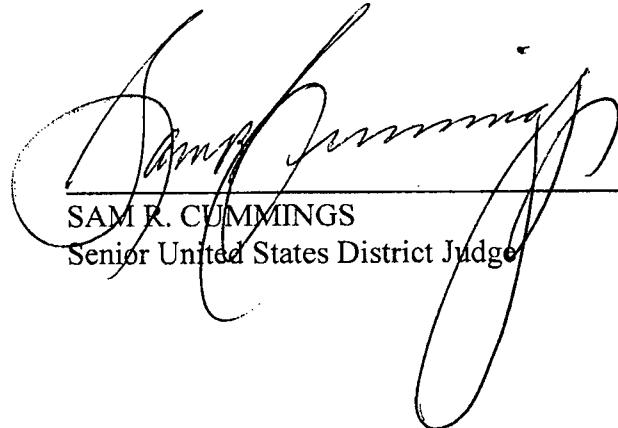
The Court finds that Appellant's Motion Requesting Transcript at Government Expense should be GRANTED, provided that Appellant returns the completed transcript request form

according to the instructions provided on the form and by the United States Court of Appeals for the Fifth Circuit.¹

The Clerk is directed to send another copy of the transcript order form and a courtesy copy of the docket sheet in this case for his use in complying with this Order.

SO ORDERED.

Dated April 18, 2019.



SAM R. CUMMINGS
Senior United States District Judge

¹The Court notes that the Clerk has sent the transcript order form to Appellant's attention on two separate occasions, but has yet to receive the completed form from Appellant. As of this date, no transcript has been prepared for any of the proceedings in this case.

B

MOTION REQUESTING TRANSCRIPT GRANTED
PROCEEDING IN FORMA PAUPERIS

APPENDIX B

MOTION TO PROCEED IN FORMA PAUPERIS
ON APPEAL

APPENDIX C

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

MITCHELL W. WAGNER,	§
TDCJ ID No. 01543049,	§
SID No. 02396387,	§
Previous TDCJ ID Nos. 00875647,	§
00995563,	§
	§
Appellant,	§
	§
v.	§ CIVIL ACTION NO. 1:15-CV-177-C
	§
TEXAS DEPARTMENT OF CRIMINAL	§ USCA NO. 19-10298
JUSTICE, <i>et al.</i> ,	§
	§
Appellee(s).	§

**ORDER REGARDING MOTION TO PROCEED
IN FORMA PAUPERIS ON APPEAL**

Appellant filed a Notice of Appeal dated February 26, 2019¹, appealing the Order adopting the Findings and Recommendations of the United States Magistrate Judge and dismissing certain claims and Defendants entered January 25, 2019. The Court has considered the Appellant's application for leave to proceed *in forma pauperis* on appeal, the certified trust fund account statement or institutional equivalent, and all consents and other documents required by the agency having custody of the Appellant to withdraw funds from the account.

The Court finds that:

The application for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915 is GRANTED.

Appellant is assessed an initial partial appeal fee of \$0.00. The agency having custody of the Appellant shall collect this amount from the trust fund account or institutional equivalent, when funds are available, and forward the initial fee to the Clerk of the District Court.

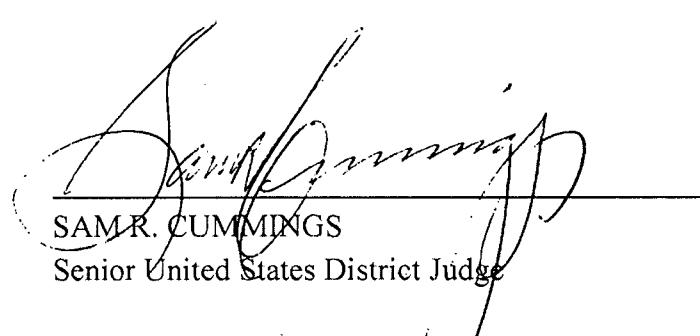
¹ Pursuant to the prison mailbox rule, a prisoner's pleading is deemed to have been filed on the date that the pro se prisoner submits the pleading to prison authorities for mailing. *Causey v. Cain*, 450 F.3d 601, 604 (5th Cir.2006) (citing *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)).

- (1) Plaintiff failed to properly exhaust all available administrative remedies pursuant to 42 U.S.C. § 1997e;
- (2) Plaintiff's claims are frivolous, barred by the collateral estoppel doctrine, and fail to state a claim upon which relief can be granted; and
- (3) Plaintiff's claims are barred by the applicable statute of limitations.

The Court is of the opinion that Defendant's Motion is unopposed in light of Plaintiff's failure to respond. The Court further finds that, whether or not Plaintiff's claims are barred by a failure to exhaust or the statute of limitations, he has failed to state a claim upon which relief can be granted. Based upon the facts and law stated in Defendant Baldwin's thorough Motion to Dismiss, the Court finds that the Motion should be GRANTED pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.² Plaintiff's complaint and the remaining claims alleged against Defendant Baldwin are DISMISSED with prejudice and final judgment will issue in favor of the Defendant.

SO ORDERED.

Dated March 26, 2019.



SAM R. CUMMINGS
Senior United States District Judge

²The Court expressly does not adopt Defendant Baldwin's assertion that Plaintiff's claims should be dismissed pursuant to 42 U.S.C. § 1997e, based primarily on Plaintiff's failure to include a copy of his Step 2 grievance with his complaint, as instructed on the form. "Failure to exhaust is an affirmative defense under the Prison Litigation Reform Act," so "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007). Moreover, district courts cannot "sidestep *Jones* by requiring prisoners to affirmatively plead exhaustion." *Carbe v. Lappin*, 492 F.3d 325, 327-28 (5th Cir. 2007). A district court "can dismiss a case prior to service on defendants for failure to state a claim, predicated on failure to exhaust, if the complaint itself makes clear that the prisoner failed to exhaust." *Id.* at 328 (citing *Jones*, 549 U.S. at 215). In this case, the Court cannot conclude that it was clear on the face of the complaint that Plaintiff had failed to exhaust prior to filing, and the record now before the Court does not establish failure to exhaust as an affirmative defense.

MOTION TO PROCEED IN FORMA PAUPERIS
ON APPEAL

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION**

MITCHELL W. WAGNER, §
TDCJ ID No. 01543049, §
SID No. 02396387, §
Previous TDCJ ID Nos. 00875647, §
00995563, §
Appellant, §
§
v. § CIVIL ACTION NO. 1:15-CV-177-C
§
TEXAS DEPARTMENT OF CRIMINAL § USCA NO. 19-10298
JUSTICE, *et al.*, §
Appellee(s). §

ORDER

Before the Court is Appellant's second Motion Requesting Transcript at Government Expense dated April 18, 2019 (Doc. 85). The Court finds that Appellant's prior Motion Requesting Transcript at Government Expense was granted by Order entered April 18, 2019, provided that Appellant returns the completed transcript request form according to the instructions provided on the form and by the United States Court of Appeals for the Fifth Circuit.¹

Appellant's second Motion Requesting Transcript at Government Expense dated April 18, 2019 (Doc. 85) is DENIED as moot.

SO ORDERED.

Dated April 26, 2019.

SAM R. CUMMINGS
Senior United States District Judge

¹The Court notes that Appellant's Transcript Order Form was received by the Clerk on April 25, 2019.

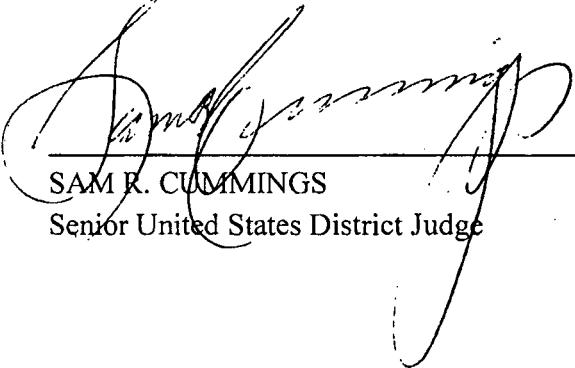
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

MITCHELL W. WAGNER, §
TDCJ ID No. 01543049, §
SID No. 02396387, §
Previous TDCJ ID Nos. 00875647, §
00995563, §
§
Appellant, §
§
v. § CIVIL ACTION NO. 1:15-CV-177-C
§
TEXAS DEPARTMENT OF CRIMINAL § USCA NO. 19-10298
JUSTICE, *et al.*, §
§
Appellee(s). §

JUDGMENT

For the reasons stated in the Court's Order of even date, it is ORDERED, ADJUDGED,
AND DECREED that Plaintiff's complaint and all remaining claims alleged therein against
Defendant Stanley J. Baldwin are **DISMISSED with prejudice.**

Dated March 26, 2019.


SAM R. CUMMINGS
Senior United States District Judge

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

MITCHELL W. WAGNER, §
TDCJ ID No. 01543049, §
SID No. 02396387, §
Previous TDCJ ID Nos. 00875647, §
00995563, §
§
Appellant, §
§
v. § CIVIL ACTION NO. 1:15-CV-177-C
§
TEXAS DEPARTMENT OF CRIMINAL § USCA NO. 19-10298
JUSTICE, *et al.*, §
§
§
Appellee(s). §

Order

On this day, the Court considered Defendant Baldwin's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) and 42 U.S.C. § 1997e (the "Motion"), filed on February 14, 2019. By his Motion, Defendant Stanley J. Baldwin, sued in his individual capacity¹, moves to dismiss Plaintiff's complaints that he violated Plaintiff's right to practice his religion pursuant to the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), and that he subjected Plaintiff to racial discrimination in violation of the Fourteenth Amendment. Plaintiff did not file any response to the Motion and the time to do so has expired.

Defendant Baldwin moves to dismiss Plaintiff's remaining claims against him on the following grounds:

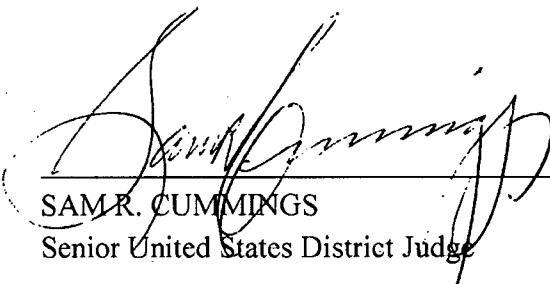
¹Plaintiff's official capacity claims against all original Defendants were dismissed with prejudice by Order entered March 8, 2017.

- (1) Plaintiff failed to properly exhaust all available administrative remedies pursuant to 42 U.S.C. § 1997e;
- (2) Plaintiff's claims are frivolous, barred by the collateral estoppel doctrine, and fail to state a claim upon which relief can be granted; and
- (3) Plaintiff's claims are barred by the applicable statute of limitations.

The Court is of the opinion that Defendant's Motion is unopposed in light of Plaintiff's failure to respond. The Court further finds that, whether or not Plaintiff's claims are barred by a failure to exhaust or the statute of limitations, he has failed to state a claim upon which relief can be granted. Based upon the facts and law stated in Defendant Baldwin's thorough Motion to Dismiss, the Court finds that the Motion should be GRANTED pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.² Plaintiff's complaint and the remaining claims alleged against Defendant Baldwin are DISMISSED with prejudice and final judgment will issue in favor of the Defendant.

SO ORDERED.

Dated March 26, 2019.



SAM R. CUMMINGS
Senior United States District Judge

²The Court expressly does not adopt Defendant Baldwin's assertion that Plaintiff's claims should be dismissed pursuant to 42 U.S.C. § 1997e, based primarily on Plaintiff's failure to include a copy of his Step 2 grievance with his complaint, as instructed on the form. "Failure to exhaust is an affirmative defense under the Prison Litigation Reform Act," so "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007). Moreover, district courts cannot "sidestep *Jones* by requiring prisoners to affirmatively plead exhaustion." *Carbe v. Lappin*, 492 F.3d 325, 327-28 (5th Cir. 2007). A district court "can dismiss a case prior to service on defendants for failure to state a claim, predicated on failure to exhaust, if the complaint itself makes clear that the prisoner failed to exhaust." *Id.* at 328 (citing *Jones*, 549 U.S. at 215). In this case, the Court cannot conclude that it was clear on the face of the complaint that Plaintiff had failed to exhaust prior to filing, and the record now before the Court does not establish failure to exhaust as an affirmative defense.

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

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

2018 OCT 16 AM 10:56

MITCHELL WAGNER,)	DEPUTY CLERK
TDCJ ID # 01543049,)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO.
)	1:15-CV-177-BL
TEXAS DEPARTMENT OF)	
CRIMINAL JUSTICE, <i>et al.</i> ,)	
Defendants.)	Assigned to U.S. Magistrate Judge

REPORT AND RECOMMENDATION

This case was reassigned to the United States Magistrate Judge under Second Amended Special Order No. 3-301. Although notified of the right to consent to the disposition of this case by a magistrate judge under 28 U.S.C. § 636(c), all parties have not consented, and therefore the undersigned magistrate judge enters this report and recommendation under the authority of 28 U.S.C. 636(b). Based on the relevant filings and applicable law, Defendant Stanley J. Baldwin's motion to partially dismiss should be granted such that Plaintiff's claims under the Texas Religious Freedom Restoration Act (TRFRA) should be dismissed for lack of subject matter jurisdiction, Plaintiff's Motions for the State to Produce Defendants' Addresses and Plaintiff's Motion for Summary Judgment should be denied, and Plaintiff's claims against the remaining defendants should be dismissed for lack of prosecution. After entry of this report and recommendation, the case should be reassigned to Senior United States District Judge Sam R. Cummings.

I. PROCEDURAL BACKGROUND

Plaintiff Mitchell Wagner, acting *pro se*, filed this lawsuit under 42 U.S.C. § 1983 seeking relief from over 25 defendants. Complaint (doc. 1). In response to a Court order, Wagner filed a more definite statement of his claims. More Definite Statement (MDS) (doc. 22). The Court also

conducted a hearing under *Spears v. McCotter*, 766 F.2d 179, 181-82 (5th Cir. 1985). Minute Entry (doc. 31). Through separate orders of partial dismissal and judgments issued under Federal Rule of Civil Procedure 54(b) the Court dismissed some of Plaintiff's claims against the majority of the defendants under authority of 28 U.S.C. §§ 1915A and 1915(e)(2)(B). Orders of Partial Dismissal (docs. 26, 34); Rule 54(b) Judgment's (docs. 27, 35). The Court then authorized issuance of service of process of Wagner's claims that his rights to practice his religion have been violated under the First Amendment, under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and under the TRFRA; and Wagner's claims that he has been the subject of racial discrimination in violation of the equal protection clause of the Fourteenth Amendment. *See Order Regarding Service Upon Remaining Defendants* (doc. 36) (citing Complaint (doc. 1) and More Definite Statement (doc. 22).) The remaining defendants upon which the Court allowed issuance of service of process are Archie D. Scarborough, Keith F. Meeks, Stanley J. Baldwin, Richard Burgess, James Finley, Clayton Wheeden, and the Texas Kairos Organization. *Id.* Defendant Stanley J. Baldwin has appeared through a motion for partial dismissal for lack of subject matter jurisdiction. Mot. Partial Dismiss (doc. 40). The remaining defendants have not yet been served.

II. BALDWIN'S MOTION FOR PARTIAL DISMISSAL

A. Standard for a Motion to Dismiss under Rule 12(b)(1)

Defendant Baldwin moves to dismiss Wagner's claims pursuant to the TRFRA for want of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Brief in Support (doc. 41). "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). A claim may not be dismissed

for lack of subject matter jurisdiction unless the claim is “so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy.” *ACS Recovery Services, Inc. v. Griffin*, 723 F.3d 518, 523 (5th Cir. 2013) (citations omitted). A court may find lack of subject matter jurisdiction based on any one of the following: (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). “The party asserting jurisdiction bears the burden of proof for a 12(b)(1) motion to dismiss.” *Wolcott*, 635 F.3d at 762.

B. The Court lacks subject-matter jurisdiction over Plaintiff’s TRFRA claim.

TRFRA provides a remedy for a person who successfully asserts a claim that his rights of free exercise of religion are violated. Tex. Civ. Prac. & Rem. Code Ann. § 110.005(a) (West 2011). TRFRA provides that a cause of action for damages or declaratory or injunctive relief must be brought against the defendant in the defendant’s official capacity and not in his individual capacity. Tex. Civ. Prac. & Rem. Code Ann. § 110.005(d) (West 2011). The Eleventh Amendment bars a suit against an individual for damages in federal court. The Eleventh Amendment bars suit in federal court against a state, or one of its agencies or departments, regardless of the nature of relief requested. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Neither Congress nor the State of Texas has waived Eleventh Amendment immunity with regard to § 1983 cases. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989) (“Congress, in passing § 1983, had no intention to disturb the States’ Eleventh Amendment immunity. . .”). Additionally, a suit for damages against a state official in his official capacity is not a suit against that individual, but a suit against the state. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

Because a suit seeking relief under the TRFRA must be brought against the individual in his official capacity, the State of Texas is the real party in interest. *See generally Pennhurst*, 465 U.S. at 101-02, 120-21 (noting that the general rule is that relief sought nominally against the officer is in fact against the sovereign if the decree would operate against the latter) (citations and footnote omitted). State law cannot be the basis on which a federal court either enters an injunction or an award of monetary relief against a state. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 322 n.5 (5th Cir. 2009), *aff'd*, *Sossamon v. Texas*, 563 U.S. 277 (2011) (citing *Pennhurst*, 465 U.S. at 117) (“The reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment.”). Accordingly, Wagner’s claims brought under the TRFRA should be dismissed for lack of subject matter jurisdiction. *See McKennie, v. Tex. Dep’t of Crim. Justice*, No. A-09-ca-906-LY, 2011 WL 13237553, at * 3, *9 (W.D. Tex. May 24, 2011)(dismissing TDCJ inmate’s claims under the TRFRA for want of jurisdiction). Baldwin’s motion for partial dismissal should be granted.¹

III. DISMISSAL OF UNSERVED DEFENDANTS

A. Status of Efforts by Attorney General and Court to Serve Defendants

As noted, Stanley Baldwin has appeared in this case. None of the other remaining Defendants has appeared, nor has the Court’s effort to have the United States Marshal attempt to serve process on two of the Defendants been successful. The Court began its efforts to obtain service by issuing

¹“The Fifth Circuit has recognized that when one defending party establishes that the plaintiff has no cause of action, the defense generally inures also to the benefit of other similarly situated defendants.” *Valencia v. Livingston, Et Al.*, No. 9:13-cv-043, 2016 WL 5339705, at *18 (E.D. Tex. Sep. 2, 2016) (noting that unserved defendant TDCJ employees were entitled to the benefit of the summary judgment motion of other defendants)(citing *Lewis v. Lynn*, 236 F.3d 766, 768 (5th Cir. 2001) (quoting *United States v. Peerless Ins. Co.*, 374 F.2d 942, 945 (4th Cir. 1967) (internal citations and other citations omitted), *rep. and rec. adopted*, 2016 WL 5118648 (E.D. Tex. Sep. 20, 2016)). Thus, Wagner’s claims under the TRFRA against any remaining defendant should be dismissed.

an order, on May 3, 2018, directing the Texas Attorney General (AG) to enter an appearance on behalf of those TDCJ defendants that were previously employed or still employed. (Doc. 36.)

(1). Defendants Finley, Wheeden, and the Kairos Organization

On June 11, 2018, the AG informed the Court that Defendants James Finley, Clayton Wheeden and the Kairos organization were never employees of TDCJ, and that the AG did not have an address for these Defendants. *Amicus* Mot. Seal at 1, n.1 (doc. 42) . The Court then, by order entered on June 13, 2018, directed Wagner to provide an address for service of process upon Defendants James Finley, Clayton Wheeden, and the Kairos organization. (Doc. 46.) On June 27, 2018, Wagner filed a document in which he proposed that the Kairos organization could be served at a Post Office Box address, and that individuals Finley and Wheeden be served through another individual named Dennis Berry. (Doc. 51). But in an order filed on August 6, 2018, the Court denied Mitchell's requests to effect service in such manner, and informed Wagner of the reasons that Dennis Berry could not be the agent for service of process on behalf of the Kairos organization or Finley and Wheeden. (Doc. 60.) The Court then extended the time for Mitchell to provide a proper agent and address for service upon the Kairos organization, and an address for service of process on Finley and Wheeden, until **August 27, 2018.** (Doc. 60.)

(2). Defendant Richard Burgess

On June 22, 2018, the AG informed the Court that Richard Burgess was never an employee of TDCJ and that TDCJ did not have an address for service of process upon him. (Doc. 48.) The Court then on June 25, 2018 directed Wagner to provide an address for service of process on Burgess by no later than July 25, 2018, and advised Wagner that failure to provide an address for service upon Burgess could result in the dismissal of Wagner's claims against Burgess. (Doc. 49.) The

Court then extended the time for Wagner to comply until **August 27, 2018.** (Doc. 60.)

(3). Defendants Archie D. Scarborough and Keith Meeks

The Court also previously ordered the AG to provide addresses for service of process upon defendants Archie D. Scarborough and Keith D. Meeks. (Doc. 45) The AG complied, by providing addresses under seal, but the deputy United States Marshal has filed returns of service, un-executed, showing that Meeks no longer resides at the address provided, and that though the officer attempted service upon Scarborough several different times, no one was ever home or returned contact to the Marshal's office. (Docs. 50, 52, and 55.) The Court subsequently ordered the AG to provide any additional address information for Scarborough or Meeks, but in response, the AG informed the Court on July 25, and August 1, respectively, that the AG's office had no address update or further information to assist in service upon these two individuals. (Docs. 58, 59.) Thus, as with the other unserved defendants, the Court again provided Wagner additional time to provide any additional addresses for service of process upon Defendants Scarborough and Meeks by no later than **August 27, 2018.** (Doc. 60.)

B. Plaintiff's Motions for the State to Produce Defendants' Addresses and for Summary Judgment for Failure to Appear.

Rather than comply with the Court's orders to provide any additional address information for these unserved defendants, Wagner filed two motions on August 28, 2018. First, Wagner filed a Motion for the State to Produce all Defendants [sic] Addresses. (Doc. 62.) By the motion, Plaintiff seeks Defendants' addresses pursuant to Texas Rule of Civil Procedure (TRCP) 538. Mot. State Produce Addresses, at 1-2 (doc. 62). Not only was TRCP 538 repealed by Order of April 15, 2013 (Tex. Sup. Ct. Order. Misc. Docket No. 13-9049), it is not applicable to federal court proceedings. Additionally, Defendants' address information is subject to an exception to the Texas Open Records

Act for “information that relates to the home address, home telephone number . . . [and other contact information of a] “current or former employee of the Texas Department of Criminal Justice . . . “ Tex. Gov’t Code Ann. § 552.117(a)(3) (West Supp. 2017). Under that Act, release of such information to a person not eligible to receive it is a criminal offense. Tex. Gov’t Code Ann. § 552.352(a) and (b) (West 2012).

Moreover, as recounted above, the AG’s Office has already diligently attempted to obtain current addresses for these defendants, pursuant to this Court’s prior orders, and was unable to do so. As provided in the Court’s last order for Wagner to provide addresses for service, it remains his obligation to provide addresses for service. For all of these reasons, Wagner’s Motion for the State to Produce All Defendants Addresses should be denied.

Plaintiff also filed a motion for summary judgment based upon the Defendants failure to appear in this case. (Doc. 63.) Summary judgment is a favored method for resolving cases in which no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See, e.g., Celotex v. Catrett*, 477 U.S. 317, 327 (1986) (“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole[.]”). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “[A dispute] is ‘genuine’ if it is real and substantial, as opposed to merely formal, pretended, or a sham.” *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001) (citation omitted). A fact is “material” if it “might affect the outcome of the suit under governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of

material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citation omitted).

Plaintiff's Motion for Summary Judgment for Failure to Appear is without merit. Plaintiff has an obligation per this Court's order to provide the listed Defendants' addresses. (Doc. 60.) Plaintiff does not explain in this motion his failure to adhere to his Court-ordered obligation. (Doc. 63.) Plaintiff cites no case law and provides no legal theory in his motion, nor does he suggest any valid legal basis through which he can obtain summary judgment. In this regard, as noted throughout this report and recommendation, other than Baldwin, no remaining Defendant has yet been served in this matter. Plaintiff cannot take a summary judgment against a defendant that has not even appeared in this case. Accordingly, Plaintiff's Motion for Summary Judgment for Failure to Appear should be denied.

C. Federal Rule of Civil Procedure 41(b).

Rule 41(b) of the Federal Rules of Civil Procedure permits a court to dismiss an action *sua sponte* for failure to prosecute or follow orders of the court. *McCullough v. Lynaugh*, 835 F.2d 1126, 1127 (5th Cir. 1988) (§ 1983 prisoner action). This authority flows from a court's inherent power to control its docket, prevent undue delays in the disposition of pending cases, and avoid congested court calendars. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-31 (1962). The Court repeatedly warned Wagner that it was his obligation to obtain and provide addresses for service of process on the remaining Defendants, and informed him that failure to do so could result in the dismissal of his claims against the remaining defendants for lack of prosecution under Rule 41(b). Because Wagner has failed to provide addresses in response to the Court's orders, his claims against the remaining unserved Defendants should be dismissed without prejudice for lack of prosecution.

IV. RECOMMENDATION

For the foregoing reasons, it is **RECOMMENDED** that Defendant Stanley Baldwin's motion for partial dismissal (doc. 40) be **GRANTED**, such that all Plaintiff Wagner's claims under the Texas Religious Freedom Restoration Act (TRFRA) be **DISMISSED** for lack of jurisdiction. It is further **RECOMMENDED** that Plaintiff Wagner's motions for the state to produce all Defendants' addresses (doc. 62), and for summary judgment (doc. 63), be **DENIED**. It is further **RECOMMENDED** that all Plaintiff's claims against the remaining unserved Defendants, that is Archie D. Scarborough, Keith F. Meeks, Richard Burgess, James Finley, Clayton Wheeden, and the Texas Kairos organization, be **DISMISSED** without prejudice under Federal Rule of Civil Procedure 41(b).

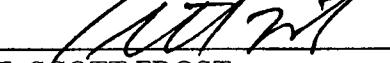
A copy of this Report and Recommendation shall be served on all parties in the manner provided by law.

Any party may object to this Report and Recommendation. A party who objects to any part of this Report and Recommendation must file specific written objections within fourteen (14) days after being served with a copy. *See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).* In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and identify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. The failure to file specific written objections will bar the aggrieved party from attacking on appeal the factual findings, legal conclusions, and recommendation set forth by the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superceded by statute on other grounds*, 28

U.S.C. § 631(b)(1) (extending the time to file objections from ten to fourteen days), *as recognized in ACS Recovery Servs., Inc. V. Griffin*, 676 F.3d 512, 521 n. 5 (5th Cir. 2012).

SO ORDERED.

Signed October 16, 2018.


E. SCOTT FROST
UNITED STATES MAGISTRATE JUDGE