No. 18-20440

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN J. DIERLAM
Plaintiff-Appellant
v.
DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, in his official capacity as Secretary of the U.S, Department Health and Human Services; UNITED STATES DEPARTMENT OF TREASURY; STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY, in his official capacity as the Secretary of the U.S. Department the Treasury; UNITED SATATES DEPARTMENT OF LABOR; R. ALEXANDER COSTA, SECRETARY, DEPARTMENT OF LABOR, in his official capacity as the Secretary of the U.S. Department of Labor
Defendant-Appelee

On Appeal from the United States District, Court Southern District of Texas
USDC No. 4:16-CV-307

BRIEF OF APPELLANT

John J. Dierlam, pro se
5802 Redell Road
Baytown, Texas 77521
Phone: 281-424-2266
email: jdierlam@outlook.com

United States Court of Appeals for the Fifth Circuit

John J. Dierlam	§	
Plaintiff-Appellant	§	
v.	§	No. 18-20440
Donald Trump, President, et. al.	§	
Defendant-Appelee	§	

CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Entities which may have an interest:

Religious Organizations and Individuals especially Catholic interested in first Amendment Rights

Organizations Interested in Preserving or Reducing Constitutional Rights

Pro-abortion and contraceptive groups such as Planned Parenthood

Counsel for Appellee:
Lowell Sturgill
Emily S. Newton
United States Department of Justice
950 Pennsylvania Ave NW, Room 7241
Washington, DC 20530

Appellant:
John J. Dierlam
5802 Redell Road
Baytown, TX 77521
Pro Se
John J. Dierlam

Statement Regarding Oral Arguments

As a non-Lawer pro-se litigant, I have little experience to guide me as to the usefulness of Oral arguments. However, oral arguments may help resolve any outstanding questions the Court may have which the breifs do not successfully detail.

Fifth Circuit Court of Appeals

John J. Dierlam	§	
	§	
	§	
versus	§	NO. 18-20440
	§	
Donald Trump, President, et. al.	§	
USDC No. 4:16-CV-307	§	
	§	
	§	

Table of Contents

Table of Citations

Cases

Statutes

Regulations

Rules

Other

Jurisdiction

As this case principally involves the Affordable Care Act and Constitution of the United States, the District court had authority based upon 5 U.S.C. §702, 28 U.S.C. § 1331, § 1340, § 1343, § 1346, § 1367, and § 1391(e)(1)(C). 5 U.S.C. §706, 28 U.S.C. § 1361, § 2201, § 2202, § 2465, § 2674, 42 U.S.C. § 2000bb-1 provides for the relief sought.

This court has jurisdiction based upon 28 USC § 1291 because on 6/14/2018 the District Court completely and finally dismissed this case. The Defendants are agencies and officers of the US government therefore by Federal Rule of Appellate Procedure 4(a)(1)(B), 60 days are allowed to file an appeal. The appeal was filed on 7/3/2018.

Issues Presented

1)Did the Judge err in this case by ruling on the merits, whether the burden on my religious expression was "substantial," rather than on the more narrow question before the District Court regarding the Federal Rule of Civil Procedure 12(b)6 Motion to Dismiss?

2)In so doing, did he rely on "material outside of the pleadings," which requires by FRCP 12(d) a conversion to a Motion for Summary Judgment governed by FRCP 56?

3)Did the District Court Judge err in disregarding an essential fact in this case, the admission by the government, it interfered with religious exercise thus violating RFRA and providing an obvious claim for relief, which should be sufficient to survive a FRCP 12(b)6 challenge?

4)Should the Motion to Dismiss be denied for all claims? This question may require the court to deliberate on the Law concerning each claim which may introduce additional issues.

Background

About the year 2010, Congress passed Pub. L. No. 111-148 (PPACA) and Pub. L. No. 111-152 (HCERA), collectively known as the ACA. Provisions of the ACA require every individual, or their guardian, with a sufficient income as calculated in the ACA, to maintain a government approved and regulated health insurance policy or qualify for an exemption. The ACA coerces every individual to maintain the policy or exemption because the consequence for not doing so is a monetary penalty, the "Shared Responsibility Payment" or Individual Mandate Penalty, of a sum calculated in 26 U.S.C. § 5000A created by the ACA to be equivalent to the cost of the lowest benefit plan in the so called marketplace; various exemptions may avoid this penalty.

The ACA specifies little in what should be included in "minimum essential

coverage," instead it gives fairly broad authority to HHS to define these specifics, 42 § 300gg-13(a)(4) is but one example of this delegation. This provision does not specify or require the inclusion of any preventive services, but gives the authority to HRSA, a division of HHS, to include these services. In 2011 HRSA set up a 16 member panel at the Institutes of Medicine to make recommendations. This panel produced a report and HRSA accepted the recommendations of this panel and created a set of guidelines.[1] [2] It is here where the requirement that "minimum essential coverage" include contraceptive, sterilization and certain abortion services.

The Original complaint was filed Feb. 4, 2016 in US District Court for the Southern District of Texas. (See ROA.11-42) The Complaint outlined various Constitutional and other violations associated with the ACA and the regulations enacted by the Defendants including 45 CFR §147.130 (HHS Mandate) among others. In the final claim, I request a Declaration of the term "direct taxes" so that the principle of the Consent of the Governed can be preserved. The Defendants filed a Motion to Dismiss the amended Complaint on August 4, 2016. (See ROA.241-289) The Motion to Dismiss was referred to a Magistrate judge for a

1 Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps 19-20, 109 (2011) ("IOM Rep."), http://iom.nationalacademies.org/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx

2 HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), http://www.hrsa.gov/womensguidelines/

recommendation. On 6/14/2018, Judge Ellison accepted the Magistrate's R&R and granted the Motion to Dismiss. (ROA.568)

Standard of Review

The following quote from *Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285 (5th Cir. 2004),* succinctly lays out the appropriate standard of review for both a case dismissed under FRCP 12(b)(6) or for summary judgment under FRCP 56(c).

> We review de novo dismissals under Rule 12(b)(6)... In doing so, we accept as true the well-pleaded factual allegations in the complaint... The complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff...The dismissal will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief...If a court considers materials outside of the pleadings, the motion to dismiss must be treated as a motion for summary judgment under Rule 56(c)...We review the grant of summary judgment de novo...A summary judgment motion is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the record indicates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.(internal quotations and citations will be omitted throughout this document)

The requirements for proper dismissal is similar for either Rule, but a dismissal under FRCP 56(c) provides less flexibility since it requires a more rigorous notice to the parties and a particular statement as to where in Law the entitlement of the defendants to summary judgment lies. From *Galvan v. Calhoun County, No. 16-*

41504 (5th Cir. Feb. 12, 2018), "In addition to showing there are no factual issues warranting trial, the party moving for summary judgment must establish that it is entitled to judgment as a matter of law...The movant must make this requisite showing before the burden shifts to the nonmovant to produce evidence to oppose the motion." However, if a district court fails to convert a motion to dismiss under 12(b)(6) into a summary judgment motion under 56, "...this error is reversible only if [the non-movant] had no notice or opportunity to refute [the movant's] allegations in the motion to dismiss." *Hunter v. TRANSAMERICA LIFE INSURANCE COMPANY, No. 11-20735 (5th Cir. Nov. 28, 2012).* (See also *Carter v. Stanton, 405 U.S. 669, 671, 92 S. Ct. 1232, 31 L. Ed. 2d 569 (1972).*)

Summary of the Argument

Despite the Defendant's statements, the numerous and egregious constitutional violations and actions by the government can be better explained by just a couple of motivations. 1)The Democrat Party and the Obama Administration have a hostility toward Christian religions, especially Catholic. 2)As detailed more fully in Claim III (ROA.208-212) and Claim VII (ROA.217-221), these entities also have an agenda to "transform America," to force compliance with their beliefs, and aid their constituencies through the exercise of greater control by legislation, regulations, and penalties which are in the words of Hamilton from

Federalist No.35 "oppressive and partial." The government has admitted that at least some of their previous findings were incorrect. (ROA.540-541)

Section I provides highlights of the changing determination of a "substantial burden" in RFRA related cases by the courts. A considerable change occurred in the *Priests for Life v. DEPT. OF HEALTH & HUMAN SERV'S, p247, 772 F. 3d 229 (D.C. Circuit 2014)* decision to the advantage of the government. The logic of the *Priests for Life* and *Real Alternatives, Inc. v. Burwell, 150 F. Supp. 3d 419 (M.D. Pa. 2015)* court decisions set up an abusive Catch22 test, which few if any prior successful RFRA plaintiffs could pass. Likewise, the instant case does not pass the "substantial burden test," even though the burden on religious exercise is greater than most if not all the previously successful RFRA plaintiffs.

Citing *Real Alternatives,* which was of key importance to the Judge for this case, Judge Ellison chose to ignore the evidence and rule on the merits determining a "substantial" burden does not exist in the present case. In so doing, the judge committed several errors as described in Section II. At this stage my only burden is to show a "possible set of facts" to entitle relief. Many exist. My burden is substantial using the *Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004)* criteria. The government has admitted a substantial burden exists. To arrive at the determination my burden was insubstantial, "material outside of the proceedings" must have been

utilized. The Judge did not follow the procedures of FRCP 56, and I did not receive proper notice so as to provide adequate defense such as provided in Section I.

Section III counters the government's defenses for the first RFRA claim. The government indicates the RFRA claim is moot since it has put forward a new exemption to the HHS Mandate. It is also the Magistrate Judge's and the government's contention that CMF Curo is a Catholic bill sharing organization which can provide an exemption to the Individual Mandate Penalty and health coverage which meets my religious objections. This contention is false for several reasons. CMF Curo was not in existence as a bill sharing entity until well after the ACA imposed 1999 cut off. I have firmly held beliefs against bill sharing which are similar to my opposition to health insurance which incorporates the HHS Mandate. The government has created two new defenses to replace the vast majority of the Magistrate's R&R, which it rejects. To my knowledge, I paid the Individual Mandate Penalty each year in full. I am willing to submit whatever proof the Court requires to counter the assertion otherwise by the government. This lawsuit was initiated well after the required six months after a claim was delivered to the IRS. As only the amount in contention has changed, but the issues remain the same the timing of presentations of additional amounts is of no real consequence.

The government appears to indicate all my claims are moot. Section IV

presents a short summary of the reasons this is not the case. Inter alia, the Individual Mandate Penalty, which will be reduced to $0 in 2019, and the Individual Mandate to maintain minimum essential coverage are not repealed, the government's regulations and Laws continue to harm the market making it difficult if at all possible to find health coverage which meets my needs causing me to face the potentially crippling cost of health care or violate firmly held beliefs.

The government's Motion To Dismiss involves all claims in the Complaint. Section V contains evidence which briefly summarizes a possible set of facts which entitle me to relief for these claims. As mentioned in the first paragraph, it is not surprising the government would violate multiple constitutional rights in an effort to force their belief system and "transform America." The Obama administration's HHS Mandate as implemented violated the establishment and free exercise clauses as well as equal protection. The Lemon test and strict scrutiny are applicable. The ACA was secretively, incompetently, and negligently crafted. It is not surprising many provisions conflict with the Constitution, its stated purpose, and other provisions of Law.

The religious exemptions in the ACA contradict the stated purpose of the Law, facially discriminate among religions for purposes which conflict with other provisions, and do not adequately cover religious health care. The 1st amendment

freedom not to associate is violated as well as the 4th amendment freedom from seizure without due process as the federal government requires the purchase of a product from its selected providers. At least a portion of the purchase is not used for my benefit, but for the purpose of the government over my religious and political views. As the power to require a purchase is not expressly provided in the Constitution, it violates the 9th and 10th amendments. These reasons among others and the many exemptions render the ACA capricious, unreasonable, and often at odds with its own stated purpose, which suggests the stated purpose is a SHAM.

Argument

I – The Preponderance of Case Precedent and the Evidence indicate a "Substantial Burden" does exist

A – *Adkins* and *Wieland* are consistent with Congressional intent in RFRA while *Real Alternatives* and similar decisions are Aberrant and Abusive

RFRA was passed by congress in 1993. Codified in 42 U.S.C. § 2000bb is the intention of that body,

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner, 374 U.S. 398 (1963)* and *Wisconsin v. Yoder, 406 U.S. 205 (1972)* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

The word "substantial" used in RFRA was not defined by that act but it implies a sufficient degree beyond the trivial. The determination whether a "substantial" burden on religion existed in this case was of key importance for Judge Ellison's

decision, therefore the following contains a brief legal genesis of this concept.

Adkins is a RLUIPA case. RFRA and RLUIPA use a common definition of "religious exercise." Other similarities also exist between these acts of Congress. The court indicated that the plaintiff must demonstrate that the government regulation imposes a substantial burden on religious exercise. Then, based upon this evidence the court needs, "...to answer two questions: (1) Is the burdened activity "religious exercise," and if so (2) is the burden substantial?" This influential case has been cited to contain the definition of "substantial burden" for the 5th circuit.[3] The *Adkins* court citing *Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)* and *Thomas v. Review Bd. of Indiana Employment Security Div., 450 U. S. 707 (1981)* as well as influence from the legislative history and other circuit court decisions provided the following definition for a "substantial burden:"

> ...a government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.

3 See *MOUSSAZADEH v. TEXAS DEPARTMENT OF CRIMINAL JUSTICE, No. 09-40400 (5th Cir. Dec. 21, 2012).*

Adkins v. Kaspar appears to introduce the phrase "religious behavior," but does not explicitly define it. A change in "religious" behavior was not a requirement for a substantial burden in the *Thomas* or *Sherbert* decisions. To "significantly modify his religious behavior" taken in isolation presents a new requirement for a "substantial burden." The *Adkins* court paid little attention to the question of "religious behavior" only noting that RLUIPA's broad definition of "religious exercise" easily included the religious services in the complaint.

After this pronouncement on substantial burden, the *Adkins* court focused on the government regulations which may violate RLUIPA. A regulation becomes significant in regard to a violation of RLUIPA when either of two conditions are met. The first condition requires that the regulation "influence the adherent to act in a way that violates his religious beliefs." This condition does not require a change in "religious" behavior on the part of the adherent. In its determination the court found, the uniform rule imposed by the prison on all religious denominations did not impose a substantial burden because it did not entirely prevent the religious services. The issue was a lack of properly trained volunteers to oversee a service on all holy days of the religion at issue. The court did express concern over this issue, which could be considered to violate the first condition. Prison officials assured the Court and the Court accepted, this problem would be remedied in the

near future, otherwise the decision may have been different. The new requirements concerning "religious behavior" played little or no role in this decision, therefore this phrase can be considered obiter dicta.

United States v. Ali, 682 F.3d 705 (8th Cir. 2012) is an RFRA case which succeeded on appeal although Ali later lost on remand. This case involved the plaintiff's failure to stand when the judge entered the courtroom. Ali failed to object to a pretrial order to stand, displayed inconsistency in standing, and stood after three clerics of her religion said it was permitted to stand if she felt she was in a difficult situation. The District Court found that Ali's interpretation of Islam was not consistent with other practitioners. The Appeals Court determined the District "...court erred by evaluating the orthodoxy and sophistication of Ali's belief, instead of simply evaluating whether her practice was rooted in her sincerely held religious beliefs." In this case, it is unclear what if any "religious behavior" was significantly modified or what "religious beliefs" were significantly violated. The court was guided solely by the language of the RFRA and the "sincerely held beliefs" as expressed by the plaintiff.

The court in the case *Priests for Life v. DEPT. OF HEALTH & HUMAN SERV'S, p247, 772 F. 3d 229 (Dist. of Columbia Circuit 2014)* in contrast to the previous cases considerably raises the bar and displays increased resistance to

allowing the claimant to interpret his own belief and how the law coerces him to violate that belief. "Whether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact." Id. This conclusion places a court in a position to decide what is reasonable, central, or even other matters within a particular religion. The court ruled against the appellant and indicated it was not a substantial burden to sign a paper to trigger a third party to provide coverage for sterilization, contraception, and abortion services. This case was joined to *Zubik v. Burwell, 136 S. Ct. 1557, 578 U.S. 3, 194 L. Ed. 2d 696 (2016)* appeal to the Supreme Court and later modified by a compromise in that case.

Real Alternatives, Inc. v. Burwell, 150 F. Supp. 3d 419 (M.D. Pa. 2015), which Judge Ellison cited, is in step with *Priests for Life. F*rom section IV(B)(3)(b) of the *Real Alternatives* decision, "In order to prevail under the substantial burden test, plaintiffs must show more than a governmental action that violates their sincerely held religious beliefs; they must show that the governmental action forces [plaintiffs] to modify [their] own behavior in violation of those beliefs." This test appears to have been first formulated by the *Priests for Life* court. Although *Kaemmerling v. Lappin, 553 F.3d 669 (D.C. Cir. 2008)* is cited as authority, it does not appear the page cited contains any text consistent with the previous quote. The

Kaemmerling court indicated it could not find any religious exercise on the part of the appellant related to his objection to the government action. The court then indicated the case was analogous to *Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986)*. The "substantial burden test" is more restrictive than the definition of "substantial burden" from the *Adkins* court. This test does not contain the obiter dicta requirement for a modification in "religious" behavior, but it requires the plaintiff to identify government action which "forces" the plaintiff to violate belief rather than simply pressures the violation of belief. A significant difference of degree. It is also stripped of the accompanying conditions which were used to indicate a regulation in violation of RFRA. The hurdle to demonstrate such a burden is greatly increased without these conditions, which modify the parameters of what is a "substantial burden" by defining laws which pose a substantial burden. The *Real Alternatives* court found, "...the Contraceptive Mandate simply does not cause Plaintiffs to modify their behavior in violation of their beliefs — arguably they have not modified any behavior at all..."

In *East Texas Baptist University v. Burwell, 793 F.3d 449,456 (5th Cir. 2015) on Petition for Rehearing En Banc*, which was a case similar to *Priests for Life* and also joined in *Zubik*, the complaint lay in signing a paper to trigger a third party to provide the abortion and related insurance coverage. In this decision, the dissenting

Justices elegantly point out the inconsistencies of the courts in deciding the law in RFRA cases. As pointed out by the dissenting Justices, Thomas Moore was executed because he would not sign a paper. As the government action did not "force" a change in his behavior or religious exercise he also would not have passed the "substantial burden test."

The District court in *Wieland v. U.S. Dep't of Health & Human Servs., No. 4:13-cv-1577, 2016 WL 3924118, (E.D. Mo. July 21, 2016)* addresses the government's previous claim that it is not a "substantial burden" to subscribe to a health plan which may contain services that will not be utilized by the plaintiffs because of religious prohibition but other individuals may elect to utilize,

> Plaintiffs contend that Defendants' argument is, in essence, an attack on the sincerity of their religious beliefs, which the Supreme Court most recently in *Hobby Lobby* cautioned against. This Court agrees. Defendants' argument is, in effect, an argument that Plaintiffs religious beliefs are unreasonable. However, the sincerity of Plaintiffs' religious beliefs has not been disputed, and it is not for the Court "to say that [Plaintiffs'] religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S. Ct. at 2779 (explaining that Court's "narrow function . . . in this context is to determine whether the line drawn reflects an honest conviction . . .") Id.

The *Wieland* court, in agreement with the 8th circuit decision in *Ali,* held that a court may question whether a belief is firmly held, it is prohibited from questioning whether a belief is reasonable or sufficiently sophisticated under RFRA.

B – The current case meets the "substantial burden" definition of *Adkins*

Turning now to the instant case, the HHS Mandate violates both conditions given in *Adkins,* which indicates this Mandate places a "substantial burden" on religious adherents. As described in ROA.203-204, Cannon Law forbids even indirect participation or support of abortion upon penalty of excommunication not to mention the very real possibility of eternal damnation. Three of the FDA approved contraceptive methods can be used as abortifacients or have that effect, ROA.206-207. The HHS Mandate introduced by the Obama administration requires that minimum essential coverage include and encourages use of these services. Therefore, participation in health insurance and the payment of premiums causes me to violate a central tenant of my religion. My faith requires martyrdom rather than violation. The Individual Mandate Penalty adds additional financial pressure to purchase the insurance. Therefore, the regulations "influence[]" me "to act in a way that violates [] religious beliefs." The HHS Mandate requirement in minimum essential coverage also violates the second condition in *Adkins* as I am forced "to choose between" health insurance, which has been considered a "generally available, non-trivial benefit," or follow my "religious beliefs" and face the possibility of crippling costs of health care. Even considering the expanded exemption provided by HHS et. al. in 45 CFR 147.133(b) due to the harm to the market by the defendants few if any insurers may be willing to provide acceptable

health insurance and the effect is the same. A "substantial burden" remains.

However, the *Adkins* court would ask a question as a prerequisite which has not yet been addressed, "Is the burdened activity religious exercise?" The *Adkins* court described the definition of "religious exercise" as broad. My religion requires respect for innocent life. By forcing my participation in a system which DESTROYS innocent life, the regulations "substantially burden" demonstrating the required respect, which is "religious exercise" similar to the plaintiffs in *Sherbert* and *Yoder.* A change in "religious behavior" has occurred as the requirement to silently accept and pay premiums for abortion, contraception, and sterilization coverage did not previously exist. In addition, as the government points out on ROA.548, "...the shared responsibility payment is itself significant. Indeed, it could be viewed as more significant than the $5 fine imposed in *Wisconsin v. Yoder, 406 U.S. 205, 208 (1972)*, or the small license tax imposed on Jehovah's Witnesses who sought to solicit as part of the exercise of their religion in *Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 108 (1943).*"

C – The "Substantial Burden Test" in *Priests for Life* and *Real Alternatives* creates an Abusive insurmountable barrier in violation of Congressional intent

I was compelled by my religious beliefs and "force[d] to modify" my behavior by dropping my employer's health coverage in 2012 as opposed to the plaintiffs in *Real Alternatives.* I modified my behavior to stay within the confines

of my faith and to attempt to mitigate the damage caused by the government, NOT to violate firmly held belief. However, I was and continued to be pressured to violate my religious beliefs. I believe Judge Ellison has properly interpreted the court's ruling in *Real Alternatives* and similar decisions. Upon information and belief, these decisions were intended to set up a practically insurmountable barrier in the determination of "substantial." Advocates of *Real Alternatives* and similar decisions support the ACA and the HHS mandate as these decisions allow the denial of an entitlement granted by Congress under practically all circumstances given: 1)the question of "substantial burden" is one solely of law and, 2)the use of the "substantial burden test." If one modifies their behavior to violate firmly held beliefs as required by the test, one can question whether those beliefs were firmly held, another requirement of RFRA. Clearly, Congress did not intend to set up such an abusive Catch22.

I can not think of any prior successful RFRA plaintiff who could pass the "substantial burden test." For example, in *Sherbert,* the plaintiff had the option to keep searching for a job which did not require work on Saturday and/or forego a claim for unemployment compensation. In *Yoder*, the plaintiff had the option to pay a penalty rather than send their children to public school. The Law "pressured" the plaintiffs to violate religious beliefs. It did not "force" the plaintiffs to violate

religious beliefs.

II – The Judge erred in dismissing this case.

My only requirements to avoid a 12(b)(6) dismissal is to present some possible set of facts to demonstrate relief is possible and to comply with *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)* in the presentation of those facts in the Complaint. The Defendants have not indicated any deficiency in the Complaint contrary to *Ashcroft* after the 1st Amended Complaint.

A – The Judge erred by ignoring the facts presented which were sufficient to suggest a possible set of facts to entitle relief

As in *Real Alternatives,* the court treated the determination of "substantial burden" as a question of Law, ruled on the merits, and in effect provided Summary judgment to the defendants by declaring my burden not "substantial." ROA.625-626 Judge Ellison's decision illustrates the insurmountable barrier imposed by the *Real Alternatives* Court's reasoning. The judge erred by ignoring the facts presented in the pleadings which are more than sufficient to survive the Motion to Dismiss.

B – The Judge erred by not following the procedures of FRCP 56 for Summary Judgment after the use of material outside of the pleadings

The question of substantial is one of degree, therefore it raises the question of a burden being insubstantial compared to what? Neither the RFRA nor the Judge provide an answer to this question. Yet, it must be answered to come to any decision. The *Adkins* court warns,

> Declining to inquire into whether a practice is central to an adherent's religion avoids the greater harm, identified in *Lyng* and in the text of the *Smith* opinion, of having courts presume to determine the place of a particular belief in a religion. These precedents instruct that, like determinations regarding the importance of ideas in the free speech field, judges are ill-suited to resolve issues of theology in myriad faiths. *Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004)*

The prohibition of even indirect support for abortion by the Catholic Church is a central tenant, ROA.203. Yet the judge does not find this fact significant, which appears to question the reasonableness of my belief and implies the Judge has a more authoritative source other than the pleadings. The government reversed course on this issue after the Magistrate's R&R. If material to answer the question requiring a comparison of burdens or the question of what is reasonable in the Catholic faith does not exist in the pleadings, the Judge must have used "material outside the pleadings." When such material is introduced in a 12(b)(6) motion, FRCP 12(d) requires that the procedures of FRCP 56 for Summary Judgment be followed. The notice requirements of FRCP 56 were not followed. I did not expect a judgment on the merits determining whether my burden was "substantial." I was not able to provide adequate defense as provided in Section I of this document.

C – The Judge erred by ignoring an important fact which alone should be sufficient to survive the MTD, an admission by the government a "substantial burden" does exist.

Unlike previously cited cases, the government on ROA.540-541 admits a "substantial burden" is present,

> Upon reexamination, the Agencies determined that requiring certain objecting entities or individuals to choose between the [Contraceptive] Mandate, the accommodation, or penalties for noncompliance imposes a substantial burden on religious exercise under RFRA … Similarly, their reexamination led the Agencies to conclude, consistent with the rulings in favor of religious employee plaintiffs in *Wieland* and *March for Life* . . . , that the [Contraceptive] Mandate imposes a substantial burden on the religious beliefs of individual employees who oppose contraceptive coverage and would be able to obtain a plan that omits contraception from a willing employer or issuer (as applicable), but cannot obtain one solely because of the Mandate's prohibition on that employer and/or issuer providing them with such a plan. (82 Fed. Reg. 47,800)

The government also indicates the HHS Mandate has not changed, "The Rules keep the Contraceptive Mandate in place..." (ROA.541) See Section IIIA for more on the October 2017 religious exemption modification by HHS et. al. Although these admissions by the government occured after the Magistrate's R&R, the judge should have been aware. The Judge's agreement with the Magistrate's analysis and the determination my burden is not "substantial" is contrary to these facts.

III – The RFRA Defenses of the Government after the Magistrate's R&R including the two new defenses are invalid

The District Court Judge appears to embrace the Magistrate Judge's R&R in full. However, the Defendants reject the Magistrate's analysis my burden is not substantial under RFRA as a reason why I should not be refunded the Individual Mandate Penalties. (ROA.545-546) On ROA.547 they reject the Magistrate's analysis indicating a distinction between an employer and an employee in their

potential objections to insurance contraceptive coverage. The Defendants correctly indicate this argument is an attack upon the reasonableness of a belief. The Defendants also reject as irrelevant the Magistrate's argument concerning the granting of an exemption in this case may encourage others to seek an exemption on ROA.549. In short, the Defendants reject the vast majority of the Magistrate's reasoning in the R&R, but accept her conclusion.

A – The new HHS religious exemption from their Mandate which gave rise to the first RFRA Claim for many reasons is insufficient to cause this case to be Moot

One of the two areas in which the Defendants agree with the Magistrate Judge's R&R is the Magistrate's claim that the case is now moot due to an additional exemption granted by the Defendant agencies. (ROA.543-545) Many facts exist which do not support this conclusion: a) As noted elsewhere, the continued existence of the HHS Mandate in essential minimum coverage advance a set of beliefs without sufficient scientific evidence and violate multiple constitutional rights. b) The government's previous defense of the HHS Mandate and its bad faith has required extensive litigation. As mentioned in the *Wieland* case 4:13-cv-01577-JCH Dkt.79-1 p.11, MCHCP although initially providing insurance without the HHS mandated coverage was hesitating to reinstate it due to previous action from HHS and the need to recreate a policy for a single family. c) No assurance is provided the government has ceased the pressure on insurers or

will not apply it again in the future, thus making the exemption worthless. The ACA did not require the services in the HHS mandate. The Obama administration imposed them. HHS et. al. may again impose the same in a different guise. d) As given in ROA.214, 342-343 minimum essential coverage which incorporates the HHS Mandate represents a confiscation of property without due process. e) Although the Government initially claimed exemptions to the ACA Individual Mandate and the HHS Mandate (ROA.272-273) would irreparably harm these laws as well as the insurers who could not be expected to keep track of a myriad of exemptions, now indicate the market will "adapt." (ROA.545) It is the government which has placed a heavy hand on the contents of a transaction between private parties for narrow, self serving, political reasons and unproven non-science based beliefs. The government sought to compel the association by the imposition of the Individual Mandate Penalty and by Law. The Individual Mandate Penalty is scheduled to be reduced to $0 beginning in 2019 by the Tax Cut and Jobs Act of 2017. The Individual Mandate to purchase "minimum essential coverage" remains. There is no assurance a future Congress will not raise this penalty or allow it to be reduced on schedule. As the legislation has NOT eliminated the Individual Mandate Penalty completely and maintains the Individual Mandate, it is a continuing threat. Although some attempt was made, see ROA.501-502, the

government has not presented any evidence health care coverage which meets my needs and religious requirements exists. A heavy burden should be on the government to repair the harm and remove all threats. f)"[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." from *Sossamon v. Lone Star State of Texas, 560 F.3d 316 (5th Cir. 2009)* quoting the Supreme court in *528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)*. The court in *Sossamon* indicates a "heavy burden" exists on the party asserting mootness that the behavior will not repeat. Unlike *Sossamon,* in the present case, the Defendants have displayed bad faith in the formulation and implementation of the regulations as evidenced in the volume of litigation required because the defendants repeatedly would not modify their regulations sufficiently to avoid entanglement with religion. Therefore, the burden should not be lightened because the Defendants are government entities. g)It is unlikely, due to past enforcement behavior and continued existence of the Mandate, any insurer will be willing to offer a plan without the HHS Mandate coverage. I will continue to be denied the benefit and protection of health insurance. I will also continue to face the Individual Mandate Penalty at least until 2020. I have suffered this penalty in full according to my calculations each year it was required. The total as of now is $5626.22, and will

increase. For this reason and the ample reasons listed above, harm has been and continues to be visited upon me. The three elements required for standing from *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)*, remain in place. This case is definitely NOT moot.

B – The government's claim my Search for Insurance was not sufficiently thorough and a bill sharing ministry consistent with my beliefs exists is factually incorrect.

The only other area of agreement by the government with the Magistrate's R&R was my search allegedly overlooked a Catholic organization, CMF Curo which could provide an exemption to the Individual Mandate Penalty as a bill sharing ministry. (ROA.545) As pointed out in ROA.559-561, this assertion is FALSE. In 2015 CMF Curo partnered with Samaritan Ministries, which is NOT a Catholic organiation. Samaritan Ministries controls and administers the medical bill sharing and exemptions, not CMF Curo. In addition, as indicated on ROA.202 and on ROA.559-561, I have firmly held beliefs opposed to bill sharing. 1)I am not at all comfortable with other individuals writing checks for my personal medical bills and even if well meaning knowing about my medical condition. 2)Bill sharing is inferior to insurance. The ACA requires no standard of care of a bill sharing ministry nor it appears do the bill sharing organizations enforce any standard of care. Samaritan Ministries has limits on the amount of medical bills which members will cover and the frequency of those bills. 3)For several reasons, I

believe the practice of medicine in large part has become corrupt. It has too great a focus on treating symptoms and making profit rather than finding the root cause of a patient's problem. I describe one such personal incident on ROA.201-202. If during bill sharing, I am required to pay for treatment which I believe to be ineffective or harmful, I will be placed in a very similar situation as caused by the HHS Mandate. The only difference is INNOCENT life may not be threatened. It would still cause me extreme stress and moral dilemma. In other words, I avoid the fire by jumping into the frying pan. For these reasons, membership in a medical bill sharing organization is NOT an acceptable alternative. See ROA.651-652.

Health Care Sharing Ministries and Health Insurance providers are private parties and the government may not be responsible for their decisions, however these are not independent entities. It is the government which sets the environment which influences these decisions. It is the government which seeks to force acceptance of a narrow choice which meets its needs but not mine. Yet again, this situation is a violation of RFRA, a confiscation of property without due process, and possibly other constitutional rights. If one substitutes "bill sharing ministry" for "health insurer" the argument of the government is identical to that which it supposedly rejected in their Response to the Magistrate's R&R. The government initially argued that health insurance existed which did not include the HHS

Mandate (ROA.254-255, 267-268) and previously implied my search was not sufficiently thorough, ROA.263-264. The government again appears to indicate a "substantial burden" does not exist and attacks the reasonableness of my beliefs.

With this defense, the Defendants are also blaming the victim for their actions, and lack of action as described in Claim I of the Complaint. As the government has admitted to the violation of RFRA, this defense should be barred by Judicial Estoppel. From *In re Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999)*, "a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position." (See also *New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)*) All the required "elements of injury, causation, and redressability"[4] remain in place. I have standing and the Court has jurisdiction.

C – The government's defense, indicating I did not state I paid the Individual Mandate Penalty in full, has no basis in actual events. To my knowledge, I paid the Penalty in full each year.

Initially the Defendants, for all claims in the Complaint put forward a 12(b)(6) defense of failure to state a claim. Only for Claim I on ROA.262, did they also claim I lacked standing and the district Court lacked Jurisdiction, FRCP 12(b)(1). The government now seeks to substitute a couple of completely new, rather weak, and highly flawed reasons for lack of standing and court jurisdiction to replace the

4 *Serv. Employees Int'l Union, Local 5 v. City of Houston, 595 F.3d 588, 597 (5th Cir. 2010)*

majority of the Magistrate's analysis, which they reject.

On ROA.550 the defendants state that the complaint does not contain the word "full" in connection with the word "payment." ¶44 on ROA.227 does imply full payment as was interpreted by the Magistrate on ROA.503. As described on ROA.531, while a mistake in calculation is possible, I fully complied with the instructions in the calculation of the Individual Mandate Penalty and the IRS has yet to inform me of any shortfall for any tax year. This issue has no basis in fact.

D – The first IRS Claim Form 843 was filed in compliance with 26 U.S.C. § 6532. As the controversy has not changed the timing of additional claims has little importance. It is more efficient for all participants to present them whenever convenient.

On ROA.550 the Defendants indicate that I included in an Exhibit the IRS Claim Form 843 for 2015 before the prerequisite six month time period of notification to the IRS before suit. This suit was filed over nine months after no response to the submission of the first 2014 IRS claim form in full compliance with 26 U.S.C. § 6532. I have included the case number on all subsequent claim forms. This controversy and the issues involved are the same for each year. 26 CFR 301.6402-2(b)(2) forbids the IRS from granting equitable relief, therefore no reasonable expectation exists the IRS will take any further action. The time a subsequent IRS claim form is presented to the court after the first form is of no practical importance and is only a waste of time and money, for myself and the

Court, to require a petition to modify the Complaint or file a new lawsuit as the controversy has not changed but only the amount in contention has increased.

IV – On ROA.494, 544 the government appears to indicate all my claims are Moot. Multiple reasons indicate this conclusion is in error.

On ROA.554-558, I list each claim and what I see may be moot due to later developments. In summary, since 1)the Individual Mandate Penalty was not repealed but only reduced to $0, 2)the Individual Mandate to maintain "minimum essential coverage" remains in place (42 U.S. Code § 18091 and 26 U.S. Code § 5000A(a)), 3)the monies unconstitutionally and improperly extracted from me by the Individual Mandate Penalty have not been returned and will increase, 4)the defendant's regulations harm the market, reduce the value of the contract, and constitute a confiscation of property for the benefit of the government without due process, 5)the violation of other constitutional guarantees such as equal protection and establishment of religion have not been adequately addressed by the government nor has any development changed the violations, 6) the ACA is capricious, highly flawed, and violates multiple constitutional rights which have not been addressed by any developments to date, the three elements required for standing from *Lujan* remain in place and NONE of the claims are moot.

V – A Possible Set of Facts exists or can be inferred for the Claims other than RFRA, which was previously addressed, to Defeat a 12(b)6 Motion To Dismiss

My only burden at this stage is to show some possible, "set of facts...which

would entitle [me] to relief." No Discovery has occurred, yet sufficient facts are available which establish injury and entitlement to relief for most of the claims. For the other claims, reasonable inference of the available facts can lead one to a possible set of facts justifying relief.

A – The Defendant's negligent Violation of Section 1502 of the ACA in Claim I does not qualify for any exception. A wavier of sovereign immunity preexisted the ACA in 5 USC §702, 28 USC §§ 1346, 1340, and 1331, and 2674.

Claim I involves the violation of Section 1502 of the ACA by the defendant agencies. (See ROA.306-308) Section 1502(c) was intended by Congress to aid the taxpayer to avoid the penalties invoked by the Individual Mandate Penalty and locate suitable health coverage. It directs Treasury and HHS to send notification to individuals filing tax returns who are not enrolled in insurance meeting "minimum essential coverage." The language in this Section appears to command these agencies to provide this notice.

It is the position of the Defendants that Congress provides no wavier of sovereign immunity here. (See ROA.265) However, 5 USC §702, 28 USC §§ 1346, 1340, 1331 and 2674 provide the Court jurisdiction and wavier of sovereign immunity. In *Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953)* the court explains some of the limits of the wavier of sovereign immunity, "It was not intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested

through the medium of a damage suit for tort." Id at 27. In Claim I, I do not challenge the tax or any of these areas. The act of the defendant agencies to NOT follow the Law as required in 1502(c), was not a "discretionary administrative act," "an authorized activity," or represents "the exercise of due care" as covered by exceptions in 28 USC § 2680. I have complied with 28 USC § 7422 as to full payment and 26 CFR 301.6402-2 as to filing a claim with the IRS.

28 USC § 2680(c) provides a government employee an exception from liability in 28 USC § 1346(b) for, "...Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer..." although other provisions of 28 USC § 1346 apply which can provide a wavier of sovereign immunity. 28 USC § 1346(b) is still applicable since, 1)Congress in the ACA did not intend the Individual Mandate Penalty to be a tax. It often refers to this provision as a penalty in the act, which will be reduced to $0 in 2019. 2)In this claim, it is not so much "the assessment or collection of any tax" as prohibited in 28 USC § 2680 which is at issue as it is the negligent behavior of the defendants which exposed me to the tax, especially if as the government has indicated, insurance products which meet the requirements of minimum essential coverage and my religious objections are readily available. 3) From the case

Johnson v. Sawyer, 980 F.2d 1490 (5th Cir. 1992)

> It is axiomatic that not every employee of the IRS is engaged in assessing or collecting taxes even though those are the primary functions and missions of the Service. It is equally true that not every official act of those agents who are thus engaged is sufficiently related to assessing or collecting taxes to have the nexus required to enjoy the protection of § 2680(c). We refuse to expand this exemption as far beyond its already broad range as the government suggests.

In the present case, as multiple agencies were involved, it is very likely the decision to ignore the Law and not send the notifications was not made by any employee of the IRS. Therefore, the exception in § 2680(c) does not apply.

B – Claim III demonstrates the HHS Mandate violates the establishment clause and equal protection

1 – The failure of all three prongs of the Lemon test abundantly indicate a Violation of the Establishment Clause

As no obvious facial discrimination exists in the HHS Mandate, which remains in place, the Lemon Test first developed by the Supreme Court in *Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1973)* is appropriate to determine a violation of the Establishment Clause. See ROA.322-324 for more details.

The government's stated compelling interests for the regulations constituting the HHS Mandate can be summarized from ROA.255, 256, 270, 280 as improving women's access to health care, women's health, and promoting public health. As well as the somewhat related purposes of gender equality and to lessen the

disparity between men's and women's health care costs.

As the government's contention that freely available contraceptives, abortion, and sterilization services improve the health of women has not been established and evidence exists contrary to this conclusion, it is no more than belief. (See ROA.210-212, 305-306) In addition, a statement from the author of the preventive services provision of the ACA indicates a much different purpose for the authorizing section of this Law.[5] From *Edwards v. Aguillard, 482 US 578 (Supreme Court 1987)*, "...it is required that the statement of [the government's] purpose be sincere and not a sham." Therefore the government does not have a valid "secular legislative purpose"[6] and the first prong fails.

The second prong fails as it confers benefits on the adherents of the government's belief system while simultaneously in effect punishing those of other religious motivation with additional financial burden to pay for this benefit. It simultaneously "advance[s]" one set of beliefs and "inhibits" others.[7] See *Larson v. Valente, 456 US 228 (Supreme Court 1982)* The third prong fails as "excessive entanglement with religion" is demonstrated by the numerous exemptions to the HHS mandate, many of which were awarded by Court action after litigation. See the website:https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-

5 Congressional Record-Senate, Dec. 3, 2009, p.S12274
6 *Littlefield v. Forney Independent School Dist., 268 F.3d 275 (5th Cir. 2001).*
7 Id.

database/ for a list of cases.

"Political divisiveness" has also been cited by the Courts as an indication of a violation of the third prong of the Lemon test. In *Lynch v. Donnelly, 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring)* Justice O'Conner indicated that the first amendment "...mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." The government is sending a message of hostility to certain religions, especially Catholic.[8] The effect is to reward a Democrat constituency while forcing all others to pay for this benefit. Evidence exists the intention of the Democrats and Obama Administration was hostility and to force all to accept their belief system. *Lynch* would suggest sufficient grounds exist to support a violation of the third prong of the Lemon test.

2 – The facial violation of Equal Protection by the HHS Mandate as also described in Claim III adds evidence to the previous violation as it indicates a strong desire on the part of the Defendants to force a belief on the public. Contrary to the stated purpose of gender equality and women's health, the Defendants do not allow the FDA approved contraceptive method for males free of charge.

In order to show a violation of the equal protection clause I, "must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated."[9] As detailed in ROA.329-333 the government facially violated

8 See http://www.freerepublic.com/focus/f-religion/2866637/posts for parts of Obama's encounter with Catholic Cardinal Timothy Dolan on the subject of the HHS Mandate.

9 Adkins v. Kaspar, 393 F.3d 559, 566 (5th Cir. 2004).

equal protection based on gender and "in effect" religion. Four classes are created. The class receiving full benefit is very much under-inclusive as admitted by the Defendants on ROA.548 footnote 5. If contraception is the object for what the defendants term the "contraceptive mandate" the remaining classes are similarly situated and are NOT responsible for the alleged harm. Heightened Scrutiny should be applied. However, under either heightened or rational scrutiny equal protection is violated as the government's regulation can not be justified as protecting women's health or public health when no evidence is provided the means employed provide a net benefit and contradictory evidence exists. The "gender equality" argument likewise has no merit. See ROA.330-333 for more detail. Therefore, the regulation fails even the rational scrutiny test as the regulation "must rationally relate to a legitimate governmental purpose."[10]

C-As described in Claim IV, the HHS Mandate violates Free Exercise of Religion because as applied it is not a "neutral regulation of general applicability." None of the requirements of strict scrutiny can be satisfied, and statements by people in authority suggest coercion of at least certain religions.

As established in ROA.335-337 the HHS Mandate is not a "neutral regulation of general applicability," since as applied it targets and selectively burdens behavior of religious motivation. Respect for innocent life is a central tenant of the Catholic Church. See ROA.203-204 ¶8. The HHS Mandate is also non-neutral because it disfavors Christians especially Catholics while favoring

10 *MARCH FOR LIFE v. Burwell, No. 14-cv-1149 (RJL) (Dist. Court Aug. 31, 2015).*

atheists/agnostics/pagans resulting in a religious gerrymander. It is not "generally applicable" because it leaves considerable harm to "women's health" unprotected. If the science based methodology of the dissenter on the IOM panel were utilized, more effective and proven means to advance women's health can be found. For these reasons, strict scrutiny must be applied. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, pp.533, 545 (1993)*. To satisfy strict scrutiny: "(1) the government must have a compelling interest; (2) the conduct must further that interest, i.e., it must be a substantially effective means for advancing that interest; and (3) the conduct must be necessary, i.e., the least onerous alternative for furthering that interest."[11] The HHS Mandate fails each requirement of strict scrutiny. As pointed out by several Courts, the means employed are not the least restrictive, which is a failure of the third prong of the test. "Contemporaneous statements made by members of the decisionmaking body" (Id.) presented in ROA.209, 210-211, 305-306, 322 suggest a more sinister intention. The Podesta emails revealed by Wikileaks suggest an attempt to subvert and coerce the Catholic Church on the subject of Contraceptives.[12] This point of view in the Democrat Party can explain Obama's behavior in Supra 8 further

11 Russell W. Galloway, Basic Establishment Clause Analysis, Santa Clara Law Review, Art.1, Vol. 29, No.4, p.853

12 https://wikileaks.org/podesta-emails/emailid/57579 or https://www.catholicvote.org/ongoing-updates-clinton-campaign-anti-catholic-wikileaks-scandal/

substantiating a basis for non-neutrality and the imposition of a belief system on the American people. The government has not shown how the HHS Mandate advances its stated compelling interest. The means employed are not required to advance the very broad stated purpose. See p.881-882 of *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)* regarding hybrid cases. Here the Court prophetically observed, "...it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." In the instant case not only is freedom of association impacted but multiple other rights as well making this a hybrid case.

D-The religious exemptions in the ACA facially violate the Establishment clause as described in Claim V. The implementation of these exemptions also violate RFRA, due process, and free exercise.

> *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from Lemon. *Hernandez v. Commissioner, 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989).*

Similar to *Larson* these two exemptions facially "in effect" favor religions which have an aversion to insurance benefits or, have (1) 503(c) Health Care Sharing Ministry which (2) is in continuous operation since 1999. These exemptions are codified at 26 U.S.C. § 5000A(d)(2)(A) Religious Conscience Exemption and (B)

Health Care Sharing Ministry. Strict scrutiny is therefore appropriate. Id. Both also fail the Lemon test and seriously violate the stated purposes as demonstrated in ROA.325-329.

Briefly, the ACA does not require of either exemption any standard of care or require any assurance the participants will not be a burden on the public health care system. The §1402(g) exemption is contrary to the stated purpose of the ACA for two independent reasons, 1) the Defendants state on ROA.253-254, 286 the purchase of insurance is NOT a requirement of the ACA, and 2) Congress defined the choice to purchase or not health insurance as Commercial activity, Public Law 111-148 §1501(a)(2). Commercial activity other than self-employment is not covered by a §1402(g) exemption. Under the ACA, employment status is not a consideration as practically everyone is held responsible for coverage. This exemption is not applicable despite the government's attempt to draw a parallel between the tax system established by the ACA and Social Security and Medicare.[13] This exemption fails all three prongs of strict scrutiny.

Neither of the health care sharing ministry requirements, a 503(c) structure or existence since 1999, has any relationship to the stated purpose of the ACA nor is the exemption for health care sharing ministries the least onerous or even an effective means to accommodate religious health care. The second stated

13 *United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982)*

government reason for the health care sharing ministry exemption is to "accommodate[] religious health care without opening the floodgates for any group to establish a new ministry to circumvent the Act" does not further the stated purposes of the ACA. A new health care sharing ministry will not circumvent the act any more than the existing ministries as no standard exists unless the exemption was conceived as a sham intended to favor certain existing ministries and in effect bar any other attempt at religious health care. This exemption also fails all three prongs of strict scrutiny. These exemptions and their implementation also violate RFRA, due process, and free exercise for similar reasons.

E-The freedom of association as implied in the 1st Amendment is violated by the ACA as given in Claim VI. This Law compels an association between a citizen and a private enterprise for the purpose of the federal government. By not securing the rights of the citizen as required by Court decisions in this area of Law, the government has also violated due process.

A violation of the freedom of association is given in ROA.319-321, 341-342. No evidence of a compelling interest or the use of the least restrictive means has been presented to justify the compelled association between a citizen and a private insurance company. However, even if we assume such exists, Court decisions such as *Abood v. Detroit Bd. of Ed., 431 US 209 (Supreme Court 1977)* require an adjudication process to protect the rights of non-union individuals in a compelled association with a union.

The Supreme Court in *Chicago Teachers Union v. Hudson 475 U.S. 292*

(Supreme Court 1986) indicated unions were to, provide adequate information as to expenditures before fees are charged, a reasonably prompt opportunity to challenge any portion of the fee used for activity other than collective bargaining opposed by any individual before an impartial decision maker, and to escrow the funds in dispute until a resolution occurs. Previous Court decisions determined a union was to reduce the fees charged non-union individuals by the amount of expenditures not associated with collective bargaining, the government's stated compelling interest. In the present case, the compelled association is between private parties in a private transaction, and not public employees and a union. An insurance company can be larger, more powerful and influential than a Union. In normal contracts, each party is free to set or reject terms, but the heavy hand of the government makes these something other than "ordinary commercial transactions."[14] The public employee has the option to quit and find another job, which is not the case here. For these reasons, the protection of Constitutional rights is even more paramount. Drawing a parallel with other compelled associations would suggest any expenditure which falls outside the two stated objectives of the ACA can be challenged. The HHS Mandate and other elements of the regulations neither facilitates covering additional individuals or lowering cost. The government nor the ACA make any provision to secure citizen rights under this compelled

14 *Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012).*

association which is itself a violation of due process. See Section G below.

1– A recent Supreme Court decision even further enhances the case against Compelled Association.

In the recent Supreme Court case *Janus v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, No. 16-1466 (U.S. June 27, 2018)* the court overturned *Abood.* The extraction of any state mandated fees from non-consenting employees even with a system in place allowing employees to object, can no longer override employee's constitutional rights in favor of the government's compelling interest. This decision adds further support to my case for a violation of the freedom of association, especially for the expression of religious and political ideas as are involved in this and the instant case.

F-Claim VI also contains a Violation of 4th and 9th Amendment Private Property Rights by the ACA. The government directs at least a portion of a private transaction for its purpose in opposition to my religious and political views without any due process. This power is not enumerated to the federal government.

This violation is detailed in ROA.342-343. The minimum essential coverage provision is a confiscation of property without due process. "A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property."[15] At least a portion of a private transaction for health insurance is taken over my objection and used at the direction and coercion of the

15 *United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).*

government not for taxation and revenue but for purposes with which I disagree, violating private property rights guaranteed by the fourth amendment. See footnote 24 in *Whalen v. Roe, 429 US 589, pp598-600 (Supreme Court 1977)*, in which Professor Kirkland describes two of the three facets of the right to privacy as "...the right of the individual to be free in his private affairs from governmental surveillance and intrusion...," and "...the right of an individual to be free in action, thought, experience, and belief from governmental compulsion..." It is these elements of the right to privacy which have been violated by the ACA. Slavery is the confiscation of the labor of an individual, which is the supply side of a person's wealth. However, if government has the power to direct and control the demand side of a person's wealth it in effect has similar power over the individual as provided by slavery. At this level of control ALL human rights are diminished or eliminated. In *Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)*, the court found a right to privacy in the 9th amendment among others to choose contraceptives in marriage. The government lacks the power to force me to maintain contraceptive or any other health coverage as part of a private contract. I have a right to direct my health care, which may involve intimate and familial decisions such as NOT to choose contraceptives, as I see fit and to be "let alone" by government.[16] As indicated in the 9th and 10th amendments, any power not

16 *Olmstead v. United States, 277 US 438, 478 - Supreme Court 1928 (Brandeis dissenting)*

expressly given to the federal government is reserved to the people or the states.

G-Claim VII contains an equal protection and due process violation by the ACA. Much evidence indicates this Law is arbitrary, capricious, unreasonable, and the means selected does not relate to the stated purpose but has a better relationship to a goal of tyranny.

ROA.333-335 illustrates the violation of multiple Constitutional rights including freedom of association, privacy, due process, and equal protection. The Supreme Court stated in *Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934)*, "...the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." The ACA and its regulations are often unreasonable, capricious, and have no relation to the expansion of health care coverage or lowering cost, which are the stated "object sought to be obtained." The implication of the former purpose is to ostensibly address a problem of less fortunate people without adequate health care.

Congress has created two classes of people, those with and without health insurance plans meeting "minimum essential coverage." Those without minimum essential coverage unless they qualify for an exemption are subject to an additional penalty, the Individual Mandate Penalty. Several facts indicate the stated purpose is not the actual purpose of the ACA:

1) Although the government refers to a National "Health Insurance System," (ROA.271) no such entity actually exists. This structure is neither national, viable, a government program, or much of a health insurance system. See ROA.315-316

2)The government explains the reason for the passage of the ACA as a reaction, "to address a crisis in the national health care market, namely, the absence of affordable, universally available health coverage." ROA.257 The adult non-elderly uninsured rate averaged a fairly steady 16.7%, std. dev. of 0.5 between 1995 to 2013, including a 1.4% increase in 2010 due to the recession. No crisis is evident. In 2015 only a 6% drop from this average occurred, which suggests a very significant number of people remain uninsured after the implementation of the ACA.[17] (See ROA.316) No evidence is presented by the government that extending health coverage will result in better health in the population or lower cost. Evidence exists it may actually harm the less fortunate. (See ROA.220)

3)The monies from the Individual Mandate Penalty or "shared responsibility payment," contrary to this latter label, are not used in the so called national "health insurance system." Neither are these proceeds used to provide the payers any sort of health care or insurance contrary to the stated purpose of the ACA. (ROA.316)

4)The government claims that there is an analogy between the payment of

17 See http://kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/. As of Q1 2015, 13% did not have health coverage with half of these indicating cost was a factor.

Social Security and medicare taxes to the mythical national health system and Individual Mandate Penalty. ROA.270 This parallel is not appropriate for several reasons see ROA.317-318, 325-326.

5)A large number of exemptions can apply to the Individual Mandate Penalty. See ROA.334-335. The classifications created by the requirement for "minimum essential coverage" and the exceptions are both under-inclusive and over-inclusive as to burdens, benefits, and harm and which group receives each. Democrat constituencies appear to generally benefit, other groups tend to be burdened or harmed. Similarly situated individuals are NOT treated alike.

For these reasons, the ACA involves both a "classification" which in effect impacts "fundamental rights" and proceeds "along suspect lines."[18] Because the stated purpose often runs contradictory with its design and implementation, evidence exists of an "unreasonable" and "capricious" nature. Strict scrutiny should apply. Based on the same evidence, all three requirements of strict scrutiny fail. The stated compelling interest is invalid and likely something other than the one stated. The means, including minimum essential coverage and the Individual Mandate Penalty, do not extend health coverage or lower cost and may cause net harm. Many less restrictive means exist to lower health care costs and provide health care for the less fortunate. These include tax reductions and incentives for

18 *Heller v. Doe, 509 U. S. 312, 319–320 (1993)*

improved lifestyle choices for those earning below a certain sum, and the use of Health Care Savings accounts with catastrophic coverage, which give individuals incentives to save on expenses. Health insurance is a poor model, a system of low cost national government owned clinics may be another better, cheaper alternative. Many in the Democrat party favor a single payer health care system. A better explanation for the purpose and provisions of the ACA is to force acceptance of such a system as the ACA unconstitutionally increases the control of the government over all the people and their health care.

1 – A suit recently filed by 20 State officials concerning the unconstitutionality of the ACA on similar grounds but using different evidence lends support that some set of facts exists which can provide entitlement to relief.

Twenty state officials in February of 2018 filed a lawsuit in the Northern District of Texas, case 4:18-cv-00167-O. They declare the ACA is unconstitutional because it is irrational. The suit provides different evidence from that which I provide. One important fact among the evidence they present is, on Dec. 22, 2017 the Tax Cuts and Jobs Act of 2017 was signed into Law, which reduces the Individual Mandate Penalty to $0 but the mandate to maintain insurance remains. The ACA will no longer produce any revenue. Congress' ability to tax was the basis the Supreme Court used to save the ACA. In multiple locations in the ACA, Congress indicated the Individual Mandate Penalty and Individual Mandate were essential to the entire Law. Therefore, the entire Law must be declared

unconstitutional. Obviously, these 20 States believe there exists some "...set of facts in support of [their] claim which would entitle [them] to relief." The same should apply in the present case.

Conclusion

The lower Court Judge erred as the many egregious violations and the abundant evidence for those violations should allow this case to easily survive the 12(b)6 and 12(b)1 Motion to Dismiss. Even though the Government urged the Court to Dismiss the RFRA claim on grounds other than lack of a "substantial burden," the Judge erroneously chose to dismiss this claim primarily on those grounds.

Many years ago, my Grandmother visited her cousins behind the iron curtain in a Soviet Bloc controlled Communist country. Upon her return, she told me about some of the methods used by the Communist government to separate the people from their religion. With the protection of the Constitution, I never thought anything similar could occur in this country. The US government and its Courts have proven me wrong. My trust in these institutions has been greatly eroded. Based upon my experience thus far, it appears nearly impossible to get a fair hearing in this case. The Motion to Dismiss should be denied for all claims, and the Lower Court decision should be reversed.

John J. Dialam

Certificate of Service

I certify I have on Oct. 4 , 2018 mailed a copy of the above document to the clerk of the court at:

FIFTH CIRCUIT CLERK'S OFFICE
600 South Maestri Place
New Orleans, LA 70130

as I do not have access to the Court's electronic filing system. I have also mailed a copy to Defendant's Counsel at:

Lowell Sturgill
U.S. Department of Justice, Room 7241
950 Pennsylvania Ave NW
Washington, DC 20530

I have emailed courtesy copies to the Defendant's counsel at Lowell.Sturgill@usdoj.gov and Emily.S.Newton@usdoj.gov

Date: 10/4 /2018
John J. Dierlam
5802 Redell Road
Baytown, TX 77521
Phone: 281-424-2266
John J. Dierlam

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1.This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by FED. R. APP. P. 32(f), this brief contains 11694 words (according to the wordprocessor's word count tool.)

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Apache OpenOffice 4.1.1 in Times New Roman 14 point typeface, footnotes are in 12 point.

Date: 10/3/2018.
John J. Sferlazza