IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20440

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 the Secretary of the U.S. Department of 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 of the Treasury; UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, DEPARTMENT OF LABOR, in his official capacity as the Secretary of the U.S. Department of Labor.

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Texas

BRIEF FOR APPELLEES

Joseph H. Hunt
Assistant Attorney General

Ryan Patrick
United States Attorney

Sharon Swingle
(202) 353-2689
Lowell V. Sturgill Jr.
(202) 514-3427
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

CERTIFICATE OF INTERESTED PERSONS

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Defendants-Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.1 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.

Plaintiff-Appellant:

John J. Dierlam

Defendants-Appellees:

Donald J. Trump, 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

United States Department of Treasury

Steven T. Mnuchin, Secretary, U.S. Department of Treasury

United States Department of Labor

R. Alexander Acosta, Secretary, Department of Labor

Counsel for Plaintiff-Appellant:

John J. Dierlam, pro se

Counsel for Defendants-Appellees

Lowell V. Sturgill Jr.
Sharon Swingle
Attorneys, Appellate Staff
Civil Division, U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Jennifer Ricketts
Emily S. Newton
Elizabeth L. Cade
Attorneys, Federal Programs Branch
Civil Division, U.S. Department of Justice
Ryan Patrick
Office of the United States Attorney
Southern District of Texas

s/Lowell V. Sturgill Jr.

STATEMENT REGARDING ORAL ARGUMENT

Although the federal defendants do not believe oral argument is necessary to resolve the straightforward issues presented in this appeal, they stand ready to present oral argument if that would assist the Court.

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INTRODUCTION

This litigation involves the so-called individual mandate and contraceptive-coverage mandate under the Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), as implemented by the Departments of Health and Human Services (HHS), Treasury, and Labor.

Until January 1, 2019, the ACA's individual mandate required an "applicable individual" to maintain "minimum essential coverage," be exempt from that requirement, or make a shared-responsibility payment. *See* 26 U.S.C. § 5000A; *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (*NFIB*) (holding that Congress "had the power to impose the exaction in § 5000A under the taxing power"). Beginning with the 2019 tax year, the shared-responsibility payment has been reduced to $0 by the Tax Cuts and Jobs Act (TCJA). *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

The ACA also requires most group health plans and health-insurance providers to provide coverage for certain preventive services without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a). The Act does not specify the preventive care for women that must be covered, but HHS's Health Resources and Services Administration (HRSA) issued guidelines requiring coverage for women of all FDA-approved contraceptive methods. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15,

2012). The agencies adopted an exemption for churches and their integrated auxiliaries, and later provided an accommodation for certain religious non-profits.

The agencies subsequently expanded the religious exemption by interim final rule, and finalized that expanded exemption in a new final rule. *See* 83 Fed. Reg. 57,536 (Nov. 15, 2018). The final rule was enjoined by a federal district court in Pennsylvania on a nationwide basis, however, one day before it was scheduled to become effective. *See Pennsylvania v. Trump*, Civ. No. 17-cv-4540, 2019 WL 190324 (E.D. Pa. Jan. 14, 2019), *appeals pending*, Nos. 19-1129, 19-1189 (3d Cir.).

Pro se plaintiff John J. Dierlam objects on religious grounds to obtaining health insurance that covers certain contraceptive methods. He claims that he has been unable to obtain a policy that does not provide for such coverage, and as a result was required to make shared-responsibility payments. He brings a host of claims under the ACA, the Religious Freedom Restoration Act (RFRA), and the U.S. Constitution, all of which the district court dismissed in their entirety.

The district court's judgment should largely be affirmed. First, plaintiff's prospective challenge to the individual mandate under RFRA is moot: as noted, the TCJA eliminates the shared-responsibility payment for any individual who does not have minimum essential coverage beginning with the 2019 tax year, thus ending plaintiff's alleged harm from the penalty going forward.

Second, this Court should also affirm the dismissal of plaintiff's claim under section 1502(c) of the ACA. Section 1502(c) requires the government to notify an individual who has filed an individual income tax return, but failed to obtain minimum essential coverage under the ACA, of the services that are available through the health insurance exchange in his state. The only relief plaintiff seeks on that claim, however, is a refund of shared-responsibility payments he made in 2015 and 2016, and his liability for those tax payments is not conditioned upon the government's subsequent compliance with section 1502(c).

Third, plaintiff's constitutional claims were also properly dismissed. Those claims challenge the contraceptive-coverage mandate, the statutory religious exemptions to the individual mandate (for which plaintiff alleges he does not qualify), and the ACA as a whole on various grounds, including the establishment, equal protection, free exercise, freedom of association, and due process clauses, as well as the Fourth and Ninth Amendments. Those contentions all fail to state a valid claim on the merits or are moot in light of the TCJA.

Fourth, plaintiff's RFRA challenge to the contraceptive-coverage mandate also fails to state a claim. Plaintiff is not himself subject to the mandate, nor does he seek an exemption that would allow willing issuers to offer him a policy free of contraceptive coverage. Instead, he seeks an injunction that would invalidate the mandate in all its applications, based on a theory that the mandate "skew[s] the

market" in a way that will discourage issuers (presumably for economic or administrative reasons) from offering him a contraceptive-coverage-free policy. This kind of claim, which alleges only incidental harm resulting from the government's regulation of third parties, has never been understood to implicate the free exercise of religion, and is unwarranted under both RFRA and traditional equitable principles.

The defendants-appellees agree, however, that the district court erred in dismissing plaintiff's remaining claim that the individual mandate violated RFRA insofar as it required him to make shared-responsibility payments in 2015 and 2016 because of his failure to purchase health insurance covering contraceptive services. The district court dismissed that claim on the ground that plaintiff cannot validly allege the existence of a substantial burden on his free exercise of religion. That ruling conflicts with *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), which held that the contraceptive-coverage mandate imposed a substantial burden on a closely held corporation that objected on religious grounds to providing health insurance that included contraceptive coverage, and was instead required to pay a per-employee penalty. This Court should remand for further proceedings to determine if plaintiff can prove this validly-pled claim.

Finally, the court should reject as forfeited plaintiff's argument that the TCJA's reduction of the shared-responsibility payment to $0 beginning in tax year

2019 leaves the individual mandate without a source of constitutional authority and requires invalidation of the ACA as a whole. Plaintiff never pled such a claim, nor did he seek to amend his complaint to do so, even though Congress enacted the TCJA months before the district court dismissed his complaint.

STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's federal statutory and constitutional claims under 28 U.S.C. § 1331. On June 14, 2018, the district court entered final judgment against plaintiff. *See* Dkt. No. 78. Plaintiff filed a timely notice of appeal on July 2, 2018. *See* Dkt. No. 82. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Court should affirm the dismissal of plaintiff's prospective challenge to the individual mandate under RFRA as moot in light of the TCJA, which eliminates the individual mandate shared-responsibility payment beginning with the 2019 tax year.

2. Whether the Court should affirm the dismissal of plaintiff's claim under section 1502(c) of the ACA because the notification that the statute requires is not a condition precedent on the government's authority to require shared-responsibility payments.

3. Whether the Court should affirm the dismissal of plaintiff's constitutional challenges—to the ACA, the contraceptive-coverage mandate, and the ACA's statutory religious exemptions to the individual mandate—for failure to state a claim or as moot.

4. Whether the Court should affirm the dismissal of plaintiff's prospective RFRA claim challenging the contraceptive-coverage mandate because plaintiff's demand for invalidation of that mandate in all its applications is unnecessary to alleviate a substantial burden on his free exercise of religion, and goes far beyond the relief authorized by RFRA and traditional principles of equity.

5. Whether the Court should remand plaintiff's claim seeking a refund of shared-responsibility payments in 2015 and 2016 because plaintiff has validly alleged that the individual mandate substantially burdened his religion.

6. Whether the Court should reject as forfeited plaintiff's argument that the TCJA leaves the individual mandate without a source of constitutional authority and requires invalidation of the ACA as a whole.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Affordable Care Act and Applicable Regulations

The ACA establishes a framework of economic regulations and incentives concerning the health-insurance and healthcare industries. This case concerns two

of those provisions—the ACA's so-called individual and contraceptive-coverage mandates.

a. Individual and Employer Mandates

As originally enacted, the ACA's minimum essential coverage provision, commonly referred to as the individual mandate, requires an "applicable individual" to maintain "minimum essential coverage," have an exemption from the coverage requirement, or make a shared responsibility payment. *See* 26 U.S.C. § 5000A; *NFIB*, 567 U.S.at 574. In *NFIB*, the Supreme Court held that the individual mandate exceeded the commerce power as a freestanding requirement, but that it was possible to adopt a savings construction of the mandate as a lawful exercise of Congress's taxing power, insofar as it functions as a condition for avoiding a tax. *See id.*

An "applicable individual" under section 5000A means any individual except those subject to certain exceptions, including, as relevant here, one who qualifies for a religious exemption. 26 U.S.C. § 5000A(d). Religious exemptions are available for individuals who are members of certain recognized religious sects that waive Social Security and Medicare benefits, and for individuals who are members of a religious or ethical health care sharing ministry. *Id.* § 5000A(d)(2)(A), (B).

"[M]inimum essential coverage" means health coverage under any of the following: government-sponsored programs (*e.g.*, Medicare); an eligible employer-sponsored plan; a health plan offered by the individual market within a State; a

grandfathered plan; and other coverage recognized by HHS, in conjunction with the Secretary of the Treasury. *See* 26 U.S.C § 5000A(f)(1). Individuals who file an individual income tax return and who are not enrolled in minimum essential coverage must be notified by the federal government of the services available through the health insurance exchanges operating in the State in which they reside. *See* Pub. L. No. 111-148, title I, § 1502(c), *codified at* 42 U.S.C. § 18092 (hereinafter "section 1502(c)").

The ACA requires an employer that provides a group health plan to its employees to include, among other things, coverage for certain preventive services without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a). An employer whose group plan fails to provide such coverage may be required to pay a tax. *See* 26 U.S.C. § 4980D(a)-(b). The ACA also generally requires applicable large employers, that is, employers with 50 or more full-time employees, to offer their full-time employees (and their dependents) "minimum essential coverage," under an eligible employer-sponsored plan. 26 U.S.C. § 5000A(f)(2); *id*. § 4980H(a), (c)(2). An employer who fails to do so may in certain circumstances be subject to a tax of varying amounts. *Id.* § 4980H.

b. Contraceptive-Coverage Mandate

The ACA also provides for coverage without cost sharing of certain "evidence-based" preventive-care items or services. 42 U.S.C. § 300gg-13(a)(1). In

addition, and as relevant here, the Act requires coverage without cost sharing, "with respect to women," of "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA]." *Id.* § 300gg-13(a)(4).

In August 2011, HRSA adopted the recommendation of the Institute of Medicine to issue guidelines requiring coverage for women of, among other things, all FDA-approved contraceptive methods. *See* 77 Fed. Reg. at 8725. Coverage for such contraceptive methods was thus required for plan years beginning on or after August 1, 2012. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

At the same time, the agencies, invoking their authority under 42 U.S.C. § 300gg-13(a)(4), promulgated rules authorizing HRSA to exempt churches and their integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. at 46,623. Those rules were finalized in February 2012. *See* 77 Fed. Reg. at 8725. The agencies later added an "accommodation" for religious not-for-profit organizations with religious objections to providing contraceptive coverage. *See* 78 Fed. Reg. 39,870, 39,874-82 (July 2, 2013). The accommodation allowed an objecting organization to opt out of any requirement to directly "contract, arrange, pay, or refer for contraceptive coverage." *Id.* at 39,874. The regulations then generally required the objecting organization's health insurer or third-party

administrator (in the case of self-insured plans) to provide or arrange contraceptive coverage for plan participants. *See id.* at 39,875-80.[1]

2. Challenges to the Contraceptive-Coverage Mandate and the Agencies' Religious Accommodation

a. Employer Challenges

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that RFRA prohibited applying the contraceptive-coverage mandate to closely held for-profit corporations with religious objections to providing insurance coverage for certain types of contraceptive methods. The Court held that the mandate imposed a substantial burden on those employers' exercise of religion because it subjected them to "substantial" economic penalties because of their failure to provide minimum essential coverage for their employees, *id.* at 720, and that application of the mandate to the particular employers there was not the least restrictive means of furthering the government's asserted interests, given that the

[1] In the case of self-insured church plans, coverage by the plan's third-party administrator under the accommodation was voluntary, as church plans are exempt from the Employee Retirement Income Security Act of 1974 (ERISA). *See* 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014). The ACA also exempts from the preventive-services requirement, including the contraceptive-coverage mandate, so-called grandfathered health plans (generally, those plans that have not made specified changes since the Act's enactment). *See* 42 U.S.C. § 18011. And employers with fewer than fifty employees are not subject to the tax imposed on employers that fail to offer health coverage, *see* 26 U.S.C. § 4980H(c)(2), although small employers that do provide non-grandfathered coverage must comply with the preventive-services requirement.

accommodation for not-for-profit religious employers could be extended to them. *See id.* at 730-31.

In response to *Hobby Lobby*, the agencies promulgated rules extending the accommodation to closely held for-profit entities with religious objections to providing contraceptive coverage. *See* 80 Fed. Reg. 41,318, 41,323-28 (July 14, 2015). Numerous entities, however, continued to challenge the mandate. They argued that the accommodation itself burdened their exercise of religion because they sincerely believed that the required notice and the fact that their health insurer or third-party administrator provided contraceptive coverage in connection with their health plans made them complicit in the provision of such coverage.

A split developed in the circuits, *see* 82 Fed. Reg. at 47,792, 47,798 (Oct. 13, 2017), and the Supreme Court granted certiorari in several of the cases. The Court subsequently vacated the judgments and remanded the cases to the respective courts of appeals. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1559-60 (2016) (per curiam). The Court directed that the parties "be afforded an opportunity to arrive at an approach going forward that accommodates [the plaintiffs'] religious exercise while at the same time ensuring that women covered by [the plaintiffs'] health plans receive full and equal health coverage, including contraceptive coverage." *Id.* at 1560 (quotation marks omitted).

b. Employee Challenges

Meanwhile, separate litigation was brought by employees who had religious objections to obtaining insurance coverage that included coverage for certain contraceptive methods. In two cases, the plaintiffs worked for non-profit organizations that agreed with the plaintiffs in opposing coverage of certain contraceptives (albeit on moral rather than religious grounds), and that were willing to offer the employees insurance that omitted such coverage. *See March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015); *Real Alternatives, Inc. v. Burwell*, 150 F. Supp. 3d 419 (M.D. Pa. 2015), *aff'd*, 867 F.3d 338 (3d Cir. 2017). In another case, the plaintiffs worked for a State government entity that was purportedly willing to provide a plan omitting contraceptive coverage consistent with the employees' religious beliefs. *See Wieland v. HHS*, 196 F. Supp. 3d 1010 (E.D. Mo. 2016). In all three cases, the plaintiffs argued that the contraceptive-coverage mandate violated RFRA by making it impossible for them to obtain health insurance consistent with their religious beliefs. The courts in *March for Life* and *Wieland* granted permanent injunctions on behalf of the plaintiffs, but the plaintiffs' RFRA claims in *Real Alternatives* were dismissed.

3. Administrative Responses to *Zubik*, et al.

a. 2016 Request for Information

In response to *Zubik*, the agencies sought public comments to determine whether further modifications to the accommodation could resolve the religious objections asserted by various organizations while providing a mechanism for contraceptive coverage for their employees. *See* 81 Fed. Reg. 47,741 (July 22, 2016). The agencies received over 54,000 comments, but could not find a way to amend the accommodation to both satisfy objecting organizations and also provide seamless coverage to their employees. *See* FAQs About Affordable Care Act Implementation Part 36, at 4 (Jan. 9, 2017), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

b. Interim and Final Rules and Legal Challenges

In an effort to resolve pending litigation and to prevent future litigation, the agencies issued rules that expand the religious exemption from the contraceptive-coverage mandate. The agencies initially issued an interim final rule, *see* 82 Fed. Reg. 47,792 (Oct. 13, 2007), and then, after notice and comment, issued a final rule. *See* 83 Fed. Reg. 57,536 (Nov. 15, 2018).

The rules extend the religious exemption to all nongovernmental plan sponsors, as well as institutions of higher education in their arrangement of student

health plans, to the extent those entities have sincere religious objections to providing contraceptive coverage. *See* 83 Fed. Reg. at 57,537; 82 Fed. Reg. at 47,806.

The rules also provide an exemption for individuals. *See* 83 Fed. Reg. at 57,546; 82 Fed. Reg. at 47,812. That exemption provides that nothing in the ACA's implementing regulations may be construed to prevent a willing plan sponsor of a group health plan, or a willing health insurance issuer offering group or individual health insurance coverage, from offering a separate benefit package option, or a separate policy, certificate, or contract of insurance, to any individual who objects to coverage or payments for some or all contraceptive services based on the individual's sincerely held religious beliefs. *See id.*

The interim final rule was preliminarily enjoined, *see Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017); *California v. Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017), *aff'd in part and vacated in part*, 911 F.3d 558 (9th Cir. 2018), and the final rule also has been preliminarily enjoined. *See Pennsylvania v. Trump*, No. 17-cv-4540, 2019 WL 190324 (E.D. Pa. Jan. 14, 2019); *California v. Health & Human Servs.*, No. 17-cv-5783, 2019 WL 178555 (N.D. Cal. Jan. 13, 2019). Appeals of the preliminary injunctions of the final rules are currently pending. *See Pennsylvania v. Trump*, Nos. 19-1129,19-1189 (3d Cir.); *California v. Health & Human Servs.*, Nos. 19-15072, 19-15118, 19-15150 (9th Cir.).

4. The Tax Cuts and Jobs Act

On December 22, 2017, Congress enacted the Tax Cuts and Jobs Act (TCJA). *See* Pub. L. No. 115-97, 131 Stat. 2054. The TCJA eliminates the penalty for failing to have minimum essential coverage starting with the 2019 tax year. *See id.* § 11081, 131 Stat. at 2092. The TCJA leaves untouched, however, the ACA's requirement that an "applicable individual" must "maintain minimum essential coverage," 26 U.S.C. § 5000A(a).

B. Procedural History

1. Complaint

Plaintiff John J. Dierlam filed suit pro se on February 4, 2016, *see* ROA.11. According to his operative complaint, plaintiff is a practicing Catholic who, in 2012, was enrolled in a health insurance plan through his employer. *See* First Am. Complaint, ROA.200. After Congress enacted the Affordable Care Act (ACA), plaintiff alleges that he was informed by his company's insurance representative that, because of the ACA, his medical insurance plan had expanded its coverage of contraceptive services. *See* ROA.201. Based on his sincere beliefs about the teachings of his faith, plaintiff dropped his medical coverage. *See id.*

Plaintiff alleges that he subsequently contacted "three or so" insurers to try to find alternative medical insurance that would be consistent with his faith. ROA.202. The companies advised him that they would follow the HHS preventive-services

mandate and provide contraceptive coverage. He alleges that he found one Christian bill-sharing organization that would have satisfied his obligation to obtain medical insurance under the ACA's individual mandate, but that this organization required the affirmation of a statement the wording of which he alleges was clearly Protestant. *Id.* He also allegedly contacted a Texas state agency, which informed him that it could not help him. *See id*. Unable to find religiously acceptable medical insurance, plaintiff alleges, he was compelled to pay shared-responsibility payments in 2015 and 2016. *See* ROA.207.

Plaintiff's complaint raises claims that essentially fall into five categories. First, plaintiff brings a prospective challenge to the individual mandate under RFRA. *See* ROA.206-08. He seeks injunctive relief. ROA.227.

Second, plaintiff asserts that the government violated section 1502(c) of the ACA by failing to notify him of the services that are available to him through the insurance exchanges operating in the state where he lives. *See* ROA.204-06. He seeks a refund of the shared-responsibility payments he made in 2015 and 2016. *See* ROA.227.

Third, plaintiff asserts that the ACA, the contraceptive-coverage mandate, and the system of exemptions under that mandate violate the establishment, equal protection, free exercise, freedom of association, and due process clauses, as well as the Fourth and Ninth Amendments. *See* ROA.212-17. He seeks a refund of his 2015

and 2016 shared-responsibility payments; an injunction barring the government from imposing any such payments on him in the future; a declaration that religious objectors to contraceptive coverage cannot be required to make the shared-responsibility payment or subjected to any other penalty; and a declaration that the contraceptive-coverage mandate and the ACA are unconstitutional. *See* ROA.227-28.

Fourth, plaintiff asserts that the contraceptive-coverage mandate violates RFRA prospectively, on the theory that the mandate has "so skewed and damaged the insurance market" that it is difficult or impossible for plaintiff to obtain medical insurance that does not provide contraceptive coverage to which plaintiff objects on religious grounds. *See* ROA.207-08. He seeks a declaration that the contraceptive-coverage mandate and the ACA are facially unconstitutional, in all their applications. *See* ROA.227-28.

Fifth, plaintiff asserts that the individual-mandate penalty violates RFRA with respect to his 2015 and 2016 shared-responsibility payments, for which he seeks a refund. *See* ROA.206-08, 227.

In addition, plaintiff makes a new argument for the first time in his brief on appeal, that the ACA and the individual mandate are unconstitutional because the TCJA's elimination of the individual-mandate tax penalty beginning with the 2019 tax year renders the individual mandate without a constitutional source of authority.

See Appellant Br. 46-47. He asks this Court to rule that the ACA is unconstitutional in its entirety. *See id.*

2. Magistrate Judge Report and Recommendation

The magistrate judge recommended granting the government's motion to dismiss plaintiff's complaint in its entirety. *See* ROA.493.

The magistrate judge recommended dismissal of plaintiff's claims for injunctive and declaratory relief on the ground that the claim is moot in light of the 2017 interim final rule because, under that rule, "individuals who object on religious grounds are exempt from purchasing health insurance plans that offer coverage for contraceptive services, and instead can purchase health insurance that does not cover contraceptive services." ROA.501.

The magistrate judge recommended dismissal of plaintiff's claim that the government violated section 1502(c) of the ACA by failing to notify him of services available through the Texas state health insurance exchange, reasoning that plaintiff had conceded that the statute does not create a private right of action. *See* ROA.497 n.7.

The magistrate judge also recommended dismissal of plaintiff's constitutional challenges to the contraceptive-coverage mandate, the statutory religious exemptions to the individual mandate, and the ACA as a whole under the establishment, equal protection, free exercise, freedom of association, and due

process clauses, as well as the Fourth and Ninth Amendments. The judge noted that the Supreme Court had already determined that the ACA's individual mandate is constitutional under Congress's power to tax. *See* ROA.496 n.5 (citing *NFIB*, 567 U.S. at 574). The judge also reasoned that the ACA does not force plaintiff to enter into a contract in violation of his rights to privacy and association because it allows him to pay a shared-responsibility payment rather than obtain health insurance. *See* ROA.496 n.6.

The magistrate judge recommended dismissal of plaintiff's claim that the individual mandate substantially burdened his religion under RFRA by requiring him to make shared-responsibility payments in 2015 and 2016, reasoning that the individual mandate does not impose a substantial burden on plaintiff's free exercise of religion. *See* ROA.502. "Had [Dierlam] maintained [insurance] coverage," the magistrate judge stated, "he would have been a passive recipient of benefits, not an active provider of contraceptive services." ROA.514. The magistrate judge considered any connection between plaintiff's membership in a health plan and the provision of contraceptives to another plan member "too attenuated to amount to a substantial burden." *Id.* (citing *Real Alternatives, Inc. v. Secretary Dep't of Health & Human Servs.*, 867 F.3d 338, 360 (3d Cir. 2017)).

The magistrate judge also recommended dismissal of plaintiff's RFRA claim challenging the contraceptive-coverage mandate. Although plaintiff asserted that the

contraceptive-coverage mandate had deterred health insurers from offering policies that comported with his sincere religious beliefs, the magistrate judge reasoned that, in light of the interim final rule, "the health care marketplace will adapt, if it has not done so to date, to provide insurance plans that do not cover contraceptive services." ROA.502. In addition, the magistrate judge took judicial notice of "a Catholic health care sharing ministry that offers—and has offered at least since October 2014—'a health care option . . . consistent with Catholic teaching.'" ROA.501-02, 502 n.9 (alteration omitted).

3. District Court Ruling

After considering plaintiff's objections to the magistrate judge's report and recommendation and holding a hearing, the district court entered judgment for the government on all claims. *See* ROA.568. The district court did not issue a written opinion, but explained some of the reasoning for its ruling from the bench.

With respect to plaintiff's prospective challenge to the individual mandate under RFRA, the court reasoned that the TCJA "take[s] care of it prospectively" by eliminating the shared-responsibility payment for failing to have minimum essential coverage beginning with the 2019 tax year. *See* ROA.625.

The court dismissed plaintiff's ACA section 1502(c) claim, which centers on the government's alleged failure "to notify [plaintiff] of non-enrollment" in minimum essential coverage, on the ground that "the ACA [does not] provide[] the

proper right of action." ROA.625-25. The court summarily dismissed plaintiff's constitutional challenges to the contraceptive-coverage mandate, the statutory religious exemptions to the individual mandate, and the ACA—under the establishment, equal protection, free exercise, due process, and freedom of association clauses as well as the Fourth and Ninth Amendments—for failure to state a claim, and concluded that the individual mandate is within Congress's power to tax. *See* ROA.626.

The district court dismissed plaintiff's retrospective challenge to the individual mandate under RFRA on the ground that plaintiff cannot demonstrate a substantial burden on his free exercise of religion, relying on *Real Alternatives, Inc. v. Secretary Dep't of Health & Human Servs.*, 867 F.3d 338, 364 (3d Cir. 2017). ROA.625-26. The court did not discuss the government's submission that requiring an individual to maintain a health insurance plan that includes contraceptive coverage in violation of sincerely held religious beliefs, or to forego health insurance and face a shared-responsibility payment, imposes a substantial burden on that individual's religious exercise. ROA.545-49. The court also did not address plaintiff's prospective RFRA challenge to the contraceptive-coverage mandate.

4. District Court Ruling in *Texas v. United States*

In separate litigation now pending before this Court, Texas and other States sued, arguing that the TCJA's reduction of the shared-responsibility payment to $0

means that *NFIB*'s saving construction of the individual mandate as a tax is no longer available, and that because the mandate is now unconstitutional, the rest of the ACA is invalid as non-severable. The district court entered a declaratory judgment to that effect, but stayed its decision pending appeal to this Court. *See Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *appeal docketed*, No. 19-10011 (5th Cir.).

SUMMARY OF ARGUMENT

1. The Court should affirm the dismissal of plaintiff's prospective RFRA challenge to the individual mandate as moot. As of January 1, 2019, the TCJA has eliminated the shared-responsibility payment required of an individual who fails to obtain minimum essential coverage. Plaintiff thus is no longer subject to any financial penalty for failing to purchase health insurance covering contraceptive services.

2. The Court also should affirm the dismissal of plaintiff's claim that the government violated section 1502(c) of the ACA by failing notify him of the services available to him through the health insurance exchange operating where he lives. The only relief plaintiff seeks on that claim is a return of his shared-responsibility payments in 2015 and 2016, but section 1502(c) is not a condition precedent to the government's authority to require those payments.

3. The Court should affirm the dismissal of plaintiff's constitutional claims.

a. Plaintiff's establishment clause challenge to the individual and contraceptive-coverage mandates fails because Congress enacted the individual mandate for permissible secular purposes (to induce the purchase of health insurance and raise revenue), and the contraceptive-coverage mandate serves the valid, secular goal of providing preventive health services for women. Moreover, neither mandate communicates a message of disapproval of Catholicism.

Plaintiff's establishment clause and equal protection challenges to the ACA's statutory religious exemptions to the individual mandate (for which he alleges he is not eligible) also do not state a claim. Those exemptions apply to religious groups that have been determined to provide adequately for their own members. Courts uniformly agree that such exemptions represent valid accommodations of religion.

b. Plaintiff's equal protection challenge to the contraceptive-coverage mandate, which is that the mandate unlawfully fails to require coverage for FDA-approved contraceptive services for males, fails to state a claim. The contraceptive-coverage mandate satisfies the intermediate scrutiny that applies to gender-based classifications because it seeks to remedy insurance companies' prior discrimination against women in the pricing of health coverage. Furthermore, it reflects the demonstrable fact that women are differently situated from men with respect to

pregnancy and childbirth, and that more-expansive contraceptive coverage is necessary to provide equal access to health-care outcomes.

c. Plaintiff's claim that the contraceptive-coverage mandate violates the free exercise clause fails because the mandate applies to all covered employers regardless of religion and its secular purpose is to promote women's health.

d. Plaintiff's freedom of expressive association claim fails to state a claim. Plaintiff does not assert that he wishes not to associate with health insurance providers, much less than any such wish is based on an objection to any expressive activity on the part of providers.

e. Plaintiff has not alleged a valid Fourth or Ninth Amendment or due process challenge to the individual mandate based on alleged property or privacy interests. Plaintiff's retrospective property claim is foreclosed by *NFIB*, which held that the individual mandate serves the lawful purposes of inducing the purchase of health insurance and raising revenue, and as already noted, the TCJA moots his prospective challenge to the individual mandate. Plaintiff's privacy claim fails because the requirement that he associate with an insurance company does not implicate any constitutionally protected rights of intimate association.

f. Plaintiff's substantive due process challenge to the ACA fails because the ACA is rationally related to the legitimate government purposes of promoting public health and gender equality.

4. The Court also should affirm the dismissal of plaintiff's prospective challenge to the contraceptive-coverage mandate under RFRA. Plaintiff's challenge is based on the assertion that the contraceptive coverage will discourage insurers from providing him with a policy that excludes contraceptive coverage. But the fact that the ACA regulates third parties in a way that makes them unwilling to do business with him on his preferred terms is not a "substantial burden" under RFRA. Furthermore, the relief he seeks is not merely an exemption that would allow a willing insurer to offer him a health insurance policy that does not include contraceptive coverage, but instead the invalidation of the contraceptive-coverage mandate in all its applications. That result would have a substantial impact on the public, and is unwarranted under both RFRA and traditional equitable principles.

5. The Court should vacate and remand the dismissal of plaintiff's RFRA claim for a refund of his shared-responsibility payments in 2015 and 2016. The district court erred in rejecting that claim on the basis that plaintiff has not validly alleged a substantial burden on his free exercise of religion. Plaintiff alleges that he made those payments because he was unable to find health insurance that, consistent with his religious faith, omitted coverage of contraceptive services. That is the same kind of economic burden on religious conscience the Supreme Court found substantial in *Hobby Lobby*.

6. The Court should reject as forfeited plaintiff's argument that the TCJA renders the individual mandate without a source of constitutional authority and requires invalidation of the ACA as a whole. Plaintiff never pled such a claim, nor did he seek to amend his complaint to do so, even though Congress enacted the TCJA months before the district court dismissed his complaint.

STANDARD OF REVIEW

This Court reviews de novo the dismissal of a complaint for failure to state a claim, *see Moon v. City of El Paso*, 906 F.3d 352, 357 (5th Cir. 2018), accepting all well-pleaded facts as true, and viewing them in the light most favorable to the non-movant, *see Turner v. Lieutenant Driver*, 848 F.3d 678, 684 (5th Cir. 2017).

ARGUMENT

I. The Court Should Affirm the Dismissal of Plaintiff's Prospective RFRA Claim Against the Individual Mandate as Moot.

The TCJA eliminated the shared-responsibility payment for failing to have minimum essential coverage starting with the 2019 tax year. *See* Pub. L. No. 115-97, § 11081, 131 Stat. at 2092. As a result, plaintiff's prospective RFRA challenge to the individual mandate is moot, as plaintiff is no longer subject to any financial penalty for failing to purchase health insurance covering contraceptive services.

"[A] statutory change is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996) (quotation marks

omitted); *see also Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166 (9th Cir. 2011) (per curiam) (holding that challenge to "Don't Ask, Don't Tell" statute became moot when the statute was repealed).

"The exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted." *Cammermeyer*, 97 F.3d at 1238 (cleaned up). There is no such certainty that Congress will reinstate the individual-mandate penalty.[2]

II. The Court Should Affirm the Dismissal of Plaintiff's Claim Under Section 1502(c) of the ACA.

This Court should also affirm the dismissal of plaintiff's claim under section 1502(c) of the ACA. Under section 1502(c), the Secretary of Treasury, acting through the Internal Revenue Service (IRS) and in consultation with HHS, is required to notify a person who files an individual income tax return and is not enrolled in minimum essential coverage of the services available through the health insurance exchanges operating in the State in which the individual resides. Plaintiff argues that because he was allegedly never provided with this notification, he is

[2] Unlike in *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), plaintiff does not and cannot allege that he has standing to challenge the mandate on the ground that he will purchase insurance because of the mandate even after the penalty has been eliminated. To the contrary, plaintiff did not buy insurance because of the mandate even when the penalty existed, and so it is clear that the mandate no longer injures him now that the penalty has been eliminated.

entitled to a refund of his 2015 and 2016 shared-responsibility payments. *See* ROA.204, 227.

Plaintiff's allegations fail to state a valid claim because compliance with section 1502(c) is not a condition precedent to a taxpayer's responsibility to make shared-responsibility payments. Section 1502(c) requires the IRS, no later than June 30 of each year, to send specified information "to each individual who files an individual income tax return and who is not enrolled in minimum essential coverage." The provision contains no consequence for any failure to comply with this requirement, much less a prohibition on collecting the shared responsibility payment. *Cf. Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."). *See also State Farm Fire & Cas. Co. v. United States*, 137 S. Ct. 436, 442 (2016) (holding that in the absence of statutory language providing a remedy for the violation of the False Claims Act's requirement to keep a complaint under seal, the sanction for a breach of that duty "is not [a] loss of all later powers to act"); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (government's failure to comply with a requirement to hold a bail hearing at the prisoner's first appearance in court or within a specified period thereafter did not require the prisoner's release

because nothing in the statute indicated that compliance was a precondition to detention following a belated hearing).

When Congress intends to impose administrative or procedural requirements to protect taxpayer rights, Congress knows how do to so, and does so expressly. For example, under 26 U.S.C. §§ 6330 and 6331, the IRS must notify taxpayers in writing of their right to a hearing before a levy is made on their property. Congress's decision not to use similar language in section 1502(c) confirms that it does not impose a condition precedent on the collection of a shared-responsibility payment. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Moreover, under section 1502(c), the IRS is required to send an individual the notification that section identifies only *after* that individual has filed a tax return indicating that he or she failed to obtain minimum essential coverage in the previous tax year. It would make little sense to conclude that the IRS's failure to provide notification under section 1502(c) constitutes a condition precedent on a taxpayer's liability for the *previous* tax year.

Plaintiff's theory of liability is also inconsistent with the terms of 26 U.S.C. § 5000A, which governs shared-responsibility payments. That statute requires an

applicable individual who fails to obtain minimum essential coverage for himself and any dependent to make the shared-responsibility payment, and also defines "applicable individual" in a manner that exempts certain categories of individuals. *Id.* § 5000A(b), (d). The statute also contains a separate subsection listing additional "exemptions" from the shared-responsibility payment. *Id.* § 5000A(e). None of the statutory exemptions applies to an individual who has not received notice under § 1502(c). "When Congress provides exceptions in a statute . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).

For all the above reasons, an individual's liability for the shared-responsibility payment under 26 U.S.C. § 5000A is not dependent on the IRS's provision of notice under section 1502(c), and plaintiff's section 1502(c) claim was thus properly dismissed.

III. This Court Should Affirm the Dismissal of Plaintiff's Establishment Clause, Equal Protection, Free Exercise, Freedom of Association, Due Process, and Fourth and Ninth Amendment Claims.

The district court also correctly dismissed the constitutional claims in plaintiff's operative complaint for failure to state a claim. *See* ROA.626.

A. Plaintiff Fails to Allege a Valid Establishment Clause Claim.

This Court has held that the "general framework for analyzing Establishment Clause challenges" is the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Croft v. Governor of Texas*, 562 F.3d 735, 742 (5th Cir. 2009). Under that test, government action is permissible if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. *See Lemon*, 403 U.S. at 612–13.

1. The Individual and Contraceptive-Coverage Mandates Satisfy the Establishment Clause.

Congress enacted the individual mandate to serve the secular purposes of "induc[ing] the purchase of health insurance" and raising revenue. *NFIB*, 132 S. Ct. at 2596-97. And the contraceptive-coverage mandate was enacted to serve the secular goal of "improving women's health." HRSA, Women's Preventive Services Guidelines, https://hrsa.gov/womens-guidelines/index.html.

Plaintiff argues that the government's contention that freely available contraceptives improve the health of women "has not been established and evidence exists contrary to this conclusion." Appellant's Br. 33. To validly allege the lack of a secular purpose, however, plaintiff must contend that the government acted with an improper *religious* purpose. *See, e.g.*, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005). Plaintiff does not allege that, nor could any such well-pleaded allegation be made.

Plaintiff argues that the individual and contraceptive-coverage mandates lack a permissible secular effect because they "confer[] 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." Appellant's Br. 33. But plaintiff cannot validly maintain that the individual and contraceptive-coverage mandates favor one *religious* view over another. This case is therefore distinguishable from *Larson v. Valente*, 456 U.S. 228 (1982), where the Supreme Court held that a state charitable solicitation law constituted impermissible religious favoritism by discriminating against religious organizations that solicit more than 50% of their funds from nonmembers, in favor of religious organizations whose solicitations did not exceed that level. *See id.* at 255. The fact that secular government decisions happen to coincide with some religious views but not others does not mean the government has enacted a religious preference. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988).

Plaintiff argues that the numerous exemptions to the contraceptive-coverage mandate, such as the exemption for grandfathered insurance plans, *see supra* p. 10, excessively entangle government with religion. *See* Appellant's Br. 33-34. Plaintiff's brief does not explain this argument, and the secular exemptions from the contraceptive-coverage mandate (which are discussed in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698-99 (2014)) in no way entangle the government with

religion. Likewise, the contraceptive-coverage exemption for churches and their integrated auxiliaries, as well as the accommodation for some religious employers, are permissible voluntary accommodations of religion. *See Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1181-83 (D.C. Cir. 2015).

Plaintiff's argument that the contraceptive-coverage mandate sends a "message of hostility to certain religions, especially Catholic," Appellant's Br. 34, fails for reasons already explained. Government action does not send a message of hostility toward religion (or any particular religion) merely because it conflicts with a religious or particular religion's view on secular policy issues. *See Bowen*, 487 U.S. at 612-13.

2. The Religious Exemptions to the Individual Mandate Satisfy the Establishment and Equal Protection Clauses.

Plaintiff's constitutional challenges to the religious exemptions to the individual mandate, which he asserts impermissibly favor certain religions, also fail to state a valid claim. The ACA provides two religious exemptions to the individual mandate. A "religious conscience exemption" applies to any individual who is "a member of a recognized religious sect or division thereof which is described in [26 U.S.C. §1402(g)(1),]" and is "an adherent of established tenets or teachings of such sect or division as described in such section." 26 U.S.C. § 5000A(d)(2)(A) (i) and (ii). The referenced statutory provision, 26 U.S.C. § 1402(g)(1), provides an exemption to the social security tax for an individual who is a member of, and

adheres to the tenets of, a religious sect the practice of which is to make provision for its own dependent members. The other ACA statutory religious exemption applies to a member of a "health care sharing ministry . . . . the members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed." *Id.* § 5000A(d)(2)(B).

As multiple courts of appeals have recognized, the religious exemption in 26 U.S.C. § 1402(g)(1) from the social security tax is a permissible accommodation of religion. *See, e.g.*, *Droz v. Commissioner*, 48 F.3d 1120, 1124 (9th Cir. 1995); *Hatcher v. Commissioner*, 688 F.2d 82, 83-84 (10th Cir. 1979); *Jaggard v. Commissioner*, 582 F.2d 1189, 1190 (8th Cir. 1978) (per curiam). The plaintiffs in those cases had religious objections to paying social security taxes, but failed to qualify for the statutory exemption. The courts rejected their claim that the exemption unlawfully discriminates on the basis of religion, concluding that it is permissibly drawn "to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church." *Droz*, 48 F.3d at 1124. *See also Hatcher*, 688 F.2d at 83-84; *Jaggard*, 582 F.2d at 1190. For similar reasons, the religious exemptions set out in 26 U.S.C. § 5000A(d)(2)(A) and (B) are lawful and nondiscriminatory under the Establishment Clause and equal protection principles. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72,

100-02 (4th Cir. 2013); *Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1183 (D.C. Cir. 2015); *Olson v. Social Sec. Admin.*, 243 F. Supp. 3d 1037, 1058 (D.N.D.), *aff'd*, 709 Fed. App'x 398 (8th Cir. 2017).

B. Plaintiff Fails to Allege a Valid Equal Protection Challenge to the Contraceptive-Coverage Mandate.

Plaintiff's claim that the contraceptive-coverage mandate violates equal protection because it does not require coverage without cost-sharing of FDA-approved contraceptive services for males, *see* Appellant's Br. 34-35, was also properly dismissed for failure to state a claim.

To withstand equal protection scrutiny, classifications by gender "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam). Although "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme," gender distinctions are permissible when the statutory structure and history show that a classification was enacted to compensate for past discrimination. *Id.* (quotation marks and citation omitted) (collecting cases). *See also Kahn v. Shevin*, 416 U.S. 351 (1974).

In enacting the ACA, including the requirement that preventive services for women be covered without cost-sharing, Congress intended to end the "practices of the private insurance companies in their gender discrimination" against women, who "paid more for the same health insurance coverage available to men." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 263 (D.C. Cir. 2014) (citing 155 Cong. Rec. 28,842 (2009) (statement of Sen. Mikulski)) (cleaned up), *vacated on other grounds sub nom.*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Remedying this past discrimination, rather than penalizing men or validating stereotypical assumptions about women, is the purpose of the statute, as implemented through the contraceptive-coverage requirement. Under the Supreme Court's cases, the requirement of coverage of contraceptive care without cost-sharing for women is a constitutional means of achieving that governmental interest.

Furthermore, gender classifications are permissible when they are not invidious, but instead reflect the "demonstrable fact" that men and women "are not similarly situated" in some circumstances. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). In *Schlesinger*, the Supreme Court upheld a statutory distinction between male and female naval officers that gave female officers a longer period of commissioned service before mandatory discharge for want of promotion, reasoning that, given restrictions on women officers' participation in combat and sea duty, Congress could have "believed that women line officers had less opportunity for

promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with 'fair and equitable career advancement programs.'" *Id.* at 508.

Indeed, the Supreme Court has specifically recognized that women and men are differently situated with respect to pregnancy and childbirth and that these differences can support a gender-based distinction under equal protection principles. In *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Court upheld an immigration statute that makes it more difficult for a child born abroad and out of wedlock to one United States parent to claim citizenship if the citizen parent was a father. As the Court recognized, "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. "[G]iven the unique relationship of the mother to the event of birth," as well as the greater "opportunity for a meaningful relationship" with the child that "inheres in the very event of birth, . . . as a matter of biological inevitability," the more favorable treatment afforded to children of a U.S. citizen mother complies with equal protection. *Id.* at 61-65, 70-71.

Here, as in *Tuan Anh Nguyen*, the different circumstances of men and women with respect to contraception, pregnancy, and childbirth likewise justifies a gender-based distinction in contraceptive coverage. Prior to enactment of the ACA and the preventive-services mandate, "'women of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men,'" "in part because services more

important or specific to women have not been adequately covered by health insurance." *Priests for Life*, 772 F.3d at 263 (quoting 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand)). "[W]omen have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein). "An unintended pregnancy is virtually certain to impose substantial, unplanned-for expenses and time demands," which "fall disproportionately on women." *Priests for Life*, 772 F.3d at 263. The contraceptive-coverage mandate aims to equalize access to health-care outcomes by providing insurance coverage that is disproportionately needed by women, who are uniquely disadvantaged if it is not provided.

C. Plaintiff Cannot State a Valid Free Exercise Clause Challenge to the Contraceptive-Coverage Mandate.

Under governing Supreme Court precedent, a law that is neutral and generally applicable does not violate the Free Exercise Clause where, as here, the government is regulating "outward physical acts" rather than an "internal . . . decision that affects the faith and mission" of the regulated entity. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). "Neutrality and general applicability are interrelated." *Church of the Lukumi Babalu Aye v. City of Hialeah, Inc.*, 508 U.S. 520, 521-32 (1993). A law is neutral if it does not target religiously motivated conduct, either facially or as applied, *see id.* at 533, and if its purpose is something other than the disapproval of a particular religion or religion in general.

See id. at 545. A law is generally applicable as long as it does not selectively impose burdens on conduct motivated by religious belief. *See id.*

Plaintiff contends that the contraceptive-coverage mandate "targets and selectively burdens behavior of religious motivation," while "favoring atheists/agnostics/pagans." Appellant's Br. 35-36. Not so. Apart from its exemption for churches and their integrated auxiliaries, and its accommodation for religious employers—which are permissible voluntary accommodations of religion, *see supra* pp. 33-35—the contraceptive-coverage mandate applies to all covered employers regardless of religion. Moreover, opposition to contraceptive services is not limited to religious groups, *see supra* p. 12, and the mandate's manifest purpose is to protect the health and well-being of women, not to favor "atheists/agnostics/pagans." The contraceptive-coverage is neutral toward religion, in purpose and effect.

D. Plaintiff's Freedom of Association Challenge to the Individual Mandate Fails to Allege a Valid First Amendment Claim.

The First Amendment right of expressive association protects "the right of all persons to associate together in groups to advance beliefs and ideas." *Mote v. Walthall*, 902 F.3d 500, 507 (5th Cir. 2018) (cleaned up). The freedom of association also includes "[t]he right to eschew association for expressive purposes." *Janus v. America Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

Plaintiff contends that the individual mandate violates the freedom of association because it forces parties to enter a contract not of their choosing. *See* ROA.214; Appellant's Br. 39. But plaintiff does not assert that he wishes not to associate with health-insurance providers, much less that any such wish is based on an objection to any expressive activity on the part of providers. To the contrary, plaintiff alleges that he had health insurance in the past; that he dropped it only because the contraceptive-coverage mandate required insurers generally to cover contraceptive services, *see* ROA.200-01; and that he wishes to obtain a policy that satisfies his religious beliefs. *See supra* pp. 15-16.

Contrary to plaintiff's argument, *see* Appellant's Br. 41, *Janus* provides no support for his freedom of association claim. *Janus* held that a state law that conditioned government employment on the payment of "agency fees" to public-sector unions violated an employee's right not to associate with a labor union. That holding was predicated on the plaintiff's refusal to join a union because he opposed many of the public policy positions the union advocated, including in collective bargaining. *See* 138 S. Ct. at 2461. By contrast, plaintiff does not allege that he dropped in his health-insurance coverage because of any expressive activity on his insurer's part, and the contraceptive-coverage mandate's requirement that insurers cover contraceptive services concerns non-expressive conduct, not speech.

E. Plaintiff Has Not Alleged a Valid Claim Against the Individual Mandate Under the Fourth or Ninth Amendments or the Due Process Clause Based on Alleged Property or Privacy Interests.

Plaintiff contends that the individual mandate is a "confiscation of property without due process" and violates Fourth and Ninth amendment private property rights because "a portion of a private transaction for health insurance is taken over my objection and used at the direction and coercion of the government not for taxation and revenue but for purposes with which I disagree." Appellant's Br. 41-42.

A substantive due-process property claim is subject only to rational basis review. *See Simi Inv. Co. v. Harris County*, 236 F.3d 240, 250-51 (5th Cir. 2000); *Residents Against Flooding v. Reinvestment Zone No. 17*, 734 F. App'x 916, 919 (5th Cir. 2018) (per curiam); *see also U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 601 (6th Cir. 2013) (holding that the "freedom to refuse to pay for unwanted medical care . . . cannot be characterized as 'fundamental' so as to receive heightened protection under the Due Process Clause"). Plaintiff's retrospective due-process challenge to the individual mandate fails to state a claim because, prior to the 2019 tax year (when the TCJA reduces the individual mandate's shared-responsibility payment to $0), the individual mandate and its shared-responsibility payment served the lawful purposes of "induc[ing] the purchase of health insurance" and "rais[ing] . . . revenue." *NFIB*, 132 S. Ct. at 2596-97. And the TCJA renders plaintiff's

prospective challenge to the individual mandate moot, since plaintiff no longer has any obligation to pay a shared-responsibility payment due to his refusal to purchase insurance. *See supra* pp. 26-27.

Plaintiff's privacy objections to the individual mandate are no stronger. The kinds of intimate associations that are protected under existing precedent by the constitutional right to privacy (and the freedom of intimate association) concern "the kinds of relationships that attend the creation and sustenance of a family, such as marital or parental relationships." *Mote*, 902 F.3d at 506 (quotation marks omitted). Plaintiff contends that the individual mandate infringes on his right "not to choose contraceptives," Appellant Br. 42 (emphasis omitted), but that claim is far afield from cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* did not involve a tax, but a criminal prohibition. And just as a general sales tax applied to contraceptives would not violate *Griswold*, so too a general tax on the refusal to purchase a health insurance policy does not violate *Griswold* simply because the policy would have included contraceptive coverage. Moreover, having to "associate[e] with a large business enterprise" (*i.e.*, an insurance company) "lacks the[] qualities necessary for constitutional protection" under case law addressing the right of intimate association. *U.S. Citizens*, 705 F.3d at 598.

F. Plaintiff's Due Process Challenge to the ACA Fails to State a Valid Claim

Plaintiff also challenges the ACA as a whole on substantive due process grounds. *See* Appellant's Br. 43. Plaintiff contends that the ACA is unnecessary; that no evidence exists to show the ACA will result in better health in the population or lower cost; that the exemptions to the individual mandate penalty are over- and under-inclusive and generally benefit Democratic constituencies; and that less restrictive means exist to lower health-care costs and provide health care for the less fortunate. *See* Appellant's Br. 44-46.

"The Supreme Court long ago abandoned the protection of economic rights through substantive due process," *U.S. Citizens*, 705 F.3d at 601, and plaintiff has not identified any other fundamental right that would support subjecting the ACA to due process strict scrutiny. Plaintiff's due process challenge thus fails because the ACA is rationally related to the "legitimate government purposes of promoting public health and gender equality." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 7 F. Supp. 3d 88, 110-11 (D.D.C. 2013), *aff'd*, 772 F.3d 229 (D.C. Cir. 2014), *vacated sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

Moreover, it is well established that under rational basis review, the government has "no obligation to produce evidence to sustain the rationality of a statutory classification," and that courts may not "judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe*, 509 U.S. 312, 319, 320 (1993); *see also*

Plyler v. Doe, 457 U.S. 202, 216 (1982) (A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived.").

IV. The Court Should Affirm the Dismissal of Plaintiff's Prospective RFRA Challenge to the Contraceptive-Coverage Mandate.

This Court should affirm the dismissal of plaintiff's prospective challenge to the contraceptive-coverage mandate under RFRA, which prevents the government from "substantially burden[ing] a person's exercise of religion" unless the "application of the burden to the person . . . is the least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Plaintiff's claim is that the contraceptive-coverage mandate "skews the market" for health insurance by discouraging health insurance companies from offering policies that omit contraceptive coverage to which he objects. *See* First Am. Complaint, ROA.201-04, 206-08. Notably, however, plaintiff is not himself subject to that mandate, and his claim in that regard is not for an exemption that would allow a willing insurer to provide him with a policy that does not include contraceptive coverage. Instead, as to this claim he seeks an injunction that would invalidate the mandate in all its applications, *see supra* p. 17, based apparently on the theory that because employers and insurers generally have to include contraceptive coverage within their policies for everyone else, they will be unwilling (presumably for

economic or administrative reasons) to offer him a policy that does not include contraceptive coverage.

That kind of theory, however, has never been held to validly allege a substantial burden on the free exercise of religion. To the contrary, it has long been understood that a substantial burden cannot rest on the indirect effects of the government's regulation of third parties.

Under the Supreme Court's case law that predated *Employment Division v. Smith*, 494 U.S. 872 (1990), which Congress expected courts to "look to . . . for guidance in determining whether the exercise of religion has been substantially burdened," S. Rep. No. 103-111, at 8; *see* H.R. Rep. No. 103-88, at 6-7 (1993), it was clear that government action having only the incidental effect of harming religious exercise does not constitute a substantial burden. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-49 (1988), the Supreme Court held that government-proposed road-building and logging projects near American Indian religious sites did not implicate the Free Exercise Clause because the right of free exercise concerns "'what the government cannot do to the individual, not . . . what the individual can exact from the government.'" *Id.* at 451 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). In *Lyng*, the government was regulating the use of its own land, and the incidental effects of that regulation on the plaintiffs there did not implicate the Free Exercise Clause because

the government was neither coercing individuals into violating their religious beliefs nor penalizing religious activity by denying any person equal rights, benefits, or privileges. *Id.* at 449. *See also Bowen v. Roy,* 476 U.S. 693, 699 (1986) (holding that the Free Exercise Clause does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development").

Plaintiff cites no case to the contrary, or any case even remotely suggesting that his assertion that third parties would be unwilling to do business with him because of how the government has regulated their contracts with other third parties validly alleges a RFRA substantial burden. As then-Judge Kavanaugh explained in *Priests for Life*, *supra*, "RFRA does not authorize religious organizations to dictate the independent actions of third-parties." 808 F.3d at 26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

Plaintiff's attempt to assert a valid, prospective RFRA claim against the contraceptive-coverage mandate based on the anticipated unwillingness of insurers to write him a policy that complies with his religion also fails for another reason: the relief that he seeks—facial invalidation of that mandate, in all its potential applications—would deny women across the country (or at least in his State) the cost-free contraceptive coverage the ACA provides. Even at the permanent injunction phase, the plaintiff must show that the balance of equities and the public interest support equitable relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555

U.S. 7, 32 (2008). Given the impact that the injunctive relief plaintiff seeks would have on the women who would lose the coverage that the contraceptive-coverage mandate provides, plaintiff's prospective challenge to the contraceptive-coverage mandate fails.[3]

V. The Court Should Vacate the Dismissal of Plaintiff's Claim Seeking a Refund of Shared-Responsibility Payments.

The district court dismissed plaintiff's claim for a refund of his 2015 and 2016 shared-responsibility payments on the ground that he failed to show a substantial burden on the free exercise of religion under RFRA. *See* ROA.625-26. The government acknowledges that the court's conclusion was erroneous and conflicts with the Supreme Court's reasoning in *Hobby Lobby*. Nor are there any alternative grounds to affirm the dismissal. Accordingly, the government agrees that the dismissal of this claim should be vacated and the claim remanded for further consideration regarding whether plaintiff can prove the elements of a valid RFRA claim.

[3] Even if plaintiff's complaint could fairly be read to seek only an exemption from the contraceptive-coverage mandate that would allow a willing insurer to write him a health insurance policy that excludes contraceptive coverage, the final rule would provide exactly that kind of exemption, *see* 83 Fed. Reg. at 57,590, if the government's appeal of the Pennsylvania district court's preliminary injunction of the final rule is successful. Moreover, even though that exemption is not currently available to plaintiff because of that injunction, he lacks standing to seek that relief given his failure to identify any willing insurer that would write him a policy free of contraceptive coverage but for the contraceptive-coverage mandate.

A. Plaintiff Has Validly Alleged the Existence of a Substantial Burden on His Free Exercise of Religion Under RFRA.

In *Hobby Lobby*, the Supreme Court held that the contraceptive-coverage mandate "imposes a substantial burden" on employers with a sincere religious objection to providing contraceptive coverage because the mandate would subject them to "substantial" penalties for adhering to their faith. 573 U.S. at 691, 726. The same conclusion should apply here with respect to plaintiff and the individual mandate, as plaintiff alleges that he has been required to pay thousands of dollars in penalties because his sincere religious beliefs preclude him from obtaining minimum essential health coverage. *See* Appellant's Br. 24. Under *Hobby Lobby*, this harm clearly qualifies as a substantial burden for purposes of RFRA.

The district court's contrary holding was based on the Third Circuit's reasoning in *Real Alternatives*, *supra*. *See* ROA.625-26. The employee plaintiffs in *Real Alternatives* argued that their religious beliefs precluded them from participating in an insurance plan that covers contraceptive services. *See* 867 F.3d at 359. The Third Circuit held that the contraceptive-coverage mandate did not substantially burden that belief because "[t]he employees' actions under the ACA are mediated by the insurance company, and any link between the decision to sign up for insurance on the one hand and the provision of contraceptives to a particular individual on the other is 'far too attenuated to rank as substantial.'" *Id.* at 360, *quoting Hobby Lobby*, 573 U.S. at 760 (Ginsburg, J., dissenting)).

The Third Circuit's holding in *Real Alternatives* conflicts with *Hobby Lobby*, as confirmed by the fact that the Third Circuit cited Justice Ginsburg's *dissenting* opinion in support of its reasoning. In *Hobby Lobby*, the government argued that "the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated" to show a RFRA substantial burden. 573 U.S. at 723. The Supreme Court rejected this argument, holding that it "dodges the question that RFRA presents (whether the contraceptive-coverage mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at 2778.

The Third Circuit viewed *Hobby Lobby* as distinguishable because "[u]nlike in *Hobby Lobby*, which literally required the objecting employers to 'arrange for' contraceptive coverage in a way that effectively amounted to sponsorship, 134 S. Ct. at 2775, the Contraceptive Mandate requires nothing of the employees that implicates their religious beliefs as stated." *Real Alternatives*, 867 F.3d at 361-62. But regardless of whether that reasoning was correct with respect to *employees* challenging the *contraceptive-coverage* mandate applicable to employers, that

reasoning by its own terms does not apply to plaintiff's challenge to the *individual* mandate: it did indeed impose a financial penalty on him for adhering to his sincere religious objection to purchasing a policy that covers contraception, just as the contraceptive-coverage mandate did to the employer in *Hobby Lobby*. Accordingly, the district court clearly erred in applying the Third Circuit's inapposite decision in *Real Alternatives* rather than the Supreme Court's controlling precedent in *Hobby Lobby*.

B. The Alternative Grounds for Dismissal Suggested Below Cannot Support Affirmance.

1. The magistrate judge also reasoned that plaintiff cannot show a substantial burden on his free exercise of religion because he "overlooked a Catholic health care sharing ministry that offers—and has offered since at least October 2014—a 'health care option . . . [c]onsistent with Catholic teaching.'" ROA.501. That ministry, of which the magistrate judge took judicial notice, is Christus Medical Foundation (CMF) Curo. *See* ROA.501 n.9.

The magistrate judge's sua sponte reliance on the existence of CMF Curo does not provide an alternate ground for affirmance of plaintiff's RFRA refund claims. In his response to the magistrate judge's report and recommendation, and at the district court's hearing on the government's motion to dismiss, plaintiff explained that using CMF Curo would require him to "compromise [his] beliefs," ROA.651, because CMF Curo requires membership in Samaritan Ministries, see *id.*, which is not

Catholic, and "which requires an affirmation which is of protestant origin," *see id.*[4] *See also* ROA.594. Assuming these beliefs to be sincere, this Court is obliged to accept them as true with respect to plaintiff's RFRA claims.[5] *See Hobby Lobby*, 573 U.S. at 724; *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981).

2. As the government pointed out below, plaintiff's operative complaint is jurisdictionally flawed in two respects: it does not recite that plaintiff paid the shared responsibility payments he seeks to be refunded, as 28 U.S.C. § 1346(a)(1) requires, *see Humphreys v. United States*, 62 F.3d 667, 672 (5th Cir. 1995) (per curiam), and as to the claim for a refund of his 2016 shared responsibility payment, he filed the operative complaint prematurely, by failing to wait at least six months after submitting an administrative claim for a refund, as required by 26 U.S.C. §§ 6532(a)(1) and 7422.

These grounds do not provide an alternative basis for affirming the dismissal of plaintiff's refund claims under RFRA because plaintiff would have been entitled to amend the complaint to cure the deficiencies if the district court had actually tried to rely on those grounds below. *See Hinton v. AMAZON.COM.DEDC, LLC*, 72 F.

[4] The statement is set out at CMF Curo's website, https://cmfcuro.com/statement-of-faith/.

[5] The government acknowledges that it argued the contrary in responding to the Magistrate Judge's Report and Recommendation and at the district court hearing.

Supp. 3d 685, 692 (S.D. Miss. 2014) (noting that a court should "ordinarily provide a claimant with an opportunity to amend his complaint prior to granting a motion to dismiss with prejudice," unless any amendment "would be futile or the plaintiff has presented his best case") (citing, *e.g.*, *Hart v. Bayer Corp.*, 199 F.3d 239, 248 n.6 (5th Cir. 2000)). *See also Mires v. United States*, 466 F.3d 1208, 1211-12 (10th Cir. 2006). At the time the district court dismissed his complaint, plaintiff did not have any balance due and owing on his federal income taxes with respect to the tax years for which he seeks a refund of shared-responsibility payments, and six months would had elapsed since April of 2016, when he alleges he filed his administrative claim for a refund of his 2016 shared-responsibility payment. *See* ROA.229.

VI. This Court Should Reject Plaintiff's Forfeited Argument That the Elimination of the Shared-Responsibility Payment Renders the Individual Mandate Unconstitutional and Requires Invalidation of the ACA as a Whole.

Finally, this Court should reject as forfeited plaintiff's argument that the TCJA's elimination of the shared-responsibility payment leaves the individual mandate without a source of constitutional authority, and that the mandate is not severable, thus requiring invalidation of the ACA as a whole.

Plaintiff never pled such a claim, nor did he seek leave to amend his complaint to do so, even though Congress enacted the TCJA on December 22, 2017, well before the dismissal of his complaint. This Court will not consider on appeal a claim that was never properly before the district court, *see Heileman v. Microsoft Corp.*,

2000 WL 310124, at *4, 211 F.3d 126 (5th Cir. 2000), even where the plaintiff proceeds pro se, *see Walker v. Webco Indus., Inc.*, 562 F. App'x 215, 217 (5th Cir. 2014), and application of that rule is particularly appropriate here, where the argument, which could have sweeping ramifications in practice, is properly raised in other litigation before this Court. At most, if this Court does not reject the argument as forfeited, it should remand and instruct the district court to consider whether to allow plaintiff to amend his complaint to include this claim, given that the case must already be remanded for the shared-responsibility refund claim.

CONCLUSION

For the foregoing reasons, the Court should (1) affirm the dismissal of plaintiff's prospective RFRA claim against the individual mandate; (2) affirm the dismissal of plaintiff's claim that the government failed to provide him the notice required by section 1502(c) of the ACA; (3) affirm the dismissal of plaintiff's constitutional claims; (4) affirm the dismissal of plaintiff's prospective RFRA claim challenging the contraceptive-coverage mandate, and (5) vacate and remand the dismissal of plaintiff's claim seeking a refund of shared-responsibility payments in 2015 and 2016.

Respectfully submitted,

Joseph H. Hunt
Assistant Attorney General

Ryan Patrick
United States Attorney

Sharon Swingle
(202) 353-2689
s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.
(202) 514-3427
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Certificate of Service

I hereby certify that on this 25th day of February, 2019, I filed the foregoing Brief for Appellees by use of the Fifth Circuit's CM/ECF system. Service of the brief will be made on plaintiff, who is proceeding pro se, by e-mail and Federal Express next-day delivery.

s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,059 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.