

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

4 JOHN J. DIERLAM, )  
5 Plaintiff, ) NO. H-16-CV-307  
6 v. ) June 14, 2018  
7 BARACK HUSSEIN OBAMA, )  
8 et al., )  
9 Defendants. )

HEARING

15 For the Plaintiff: John J. Dierlam\*  
16 Pro Se  
17  
18 For the Defendant: Emily S. Newton\*  
U.S. Department of Justice  
20 Massachusetts Ave, NW  
Washington, DC 20530  
19 Court Reporter: Bruce Slavin, RPR, CMR

23 \*Appearing via teleconference.

24 Proceedings reported by mechanical stenography and produced  
25 by computer-aided transcription.

1                   THE COURT: Okay. Good afternoon and welcome.

2 We're here on Dierlam v. Trump.

3                   We'll take appearance of parties or counsel,  
4 as the case may be, beginning with Plaintiff.

14:31 5                   MR. DIERLAM: This is John Dierlam. I am the  
6 Plaintiff in this case.

7                   THE COURT: Thank you. Welcome.

8                   MS. NEWTON: And Emily Newton from the Department  
9 of Justice on behalf of the Defendants.

14:31 10                  THE COURT: Thank you very much. Welcome to you.

11                   Okay. First off, kudos to you, Mr. Dierlam.  
12 This is the best set of papers I have ever seen from a  
13 pro se litigant. Well done.

14                   MR. DIERLAM: Well, thanks. I appreciate that.

14:31 15                  THE COURT: I am going to give each side ample time  
16 to make argument, but, first, let me just see if we're  
17 singing from the same song sheet.

18                   Judge Palermo based her ruling in part on the  
19 interim final rules that were in place and my understanding,  
14:32 20 Ms. Newton, is that Judge Beetlestone of the Eastern  
21 District of Pennsylvania has enjoined those interim final  
22 rules.

23                   Is that your understanding?

24                   MS. NEWTON: Yes, Your Honor.

14:32 25                  THE COURT: Okay. Does that then vitiate the

1 mootness?

2 MS. NEWTON: No, Your Honor. We had made two  
3 arguments with regard to mootness, one being made on the  
4 IFRs and the other being based on the fact that Plaintiff  
14:32 5 can find a plan --

6 THE COURT: Yeah. Right.

7 MS. NEWTON: -- in accordance with his religious  
8 beliefs. So, we would no longer be making the argument with  
9 respect to the IFRs but would maintain our jurisdiction  
14:33 10 argument with regard to availability of plans in accordance  
11 with his beliefs.

12 THE COURT: Well, let me ask you about another  
13 intervening event.

14 The Tax Cuts and Jobs Act of 2017, Public Law  
14:33 15 115-97, was adopted ten days after your response to  
16 Judge Palermo and that eliminated the financial penalty for  
17 violating the mandate. Would that not also serve to moot  
18 the prospective aspects of Plaintiff's claim?

19 MS. NEWTON: Plaintiff's claim for, I think, a  
14:33 20 refund? It would not necessarily --

21 THE COURT: No. I said "prospective".

22 MS. NEWTON: Prospectively? It could. I believe  
23 it would still be that he maintains the position that he's  
24 either having to purchase a plan that contains contraceptive  
14:34 25 coverage or forego health insurance that could impose a

1 substantial burden on religious exercise in violation of  
2 RFRA. However, prospectively, to the extent his claim is  
3 based on the financial penalty, yes, Your Honor, I think  
4 that would vitiate the claim.

14:34 5 THE COURT: Why did the government change its  
6 position so completely on the substantial burden question in  
7 between Judge Palermo's opinion and your appearance here?

8 MS. NEWTON: I think the government set forth three  
9 explanation for that change in position in the IFRs and the  
14:34 10 rule makings -- well, in the IFRs and for the reasons stated  
11 in our brief, which, in accord with the statements made  
12 there, determined that in fact it is a substantial burden to  
13 have to comply with contraceptive coverage provisions, or  
14 face either a lack of coverage altogether or incur a  
14:35 15 financial penalty.

16 THE COURT: So, you just rethought it. There  
17 wasn't a change of personnel or anything else?

18 MS. NEWTON: Well, I mean, an agency can change  
19 position so long as it provides a reasoned explanation for  
14:35 20 that change in position.

21 I venture Your Honor is aware there was a  
22 change with regard to certain personnel between the time we  
23 filed our initial papers and the time we filed later, but  
24 the requirement is that the agency really provide a  
14:35 25 reasonable explanation for the change in position.

1                   THE COURT: Mr. Dierlam, this is your opportunity  
2 to argue your case. You can assume I've read all your  
3 papers. As I say, I found those very impressive. But  
4 anything you would like to say about your appeal from the --  
5 or your request for review from the report and  
6 recommendation?

7 MR. DIERLAM: Well, there's a couple of, somewhat,  
8 reasons I would like to mention that would help substantiate  
9 my case.

14:36 10 One is the -- when I looked up the *Wielend*  
11 case last night, that was dismissed by mutual agreement and  
12 the government has agreed to pay legal fees. So, I am  
13 taking it that the government is not going to pursue acting  
14 on that case so that, more importantly, *Wielend* stands.

14:36 15 THE COURT: This is *Wieland v. HHS*.

16 MR. DIERLAM: I believe so.

17 THE COURT: For the court reporter it's  
18 *W-i-e-l-e-n-d*, a decision of the District Court of the  
19 District of Columbia -- no -- I'm sorry -- excuse me --  
14:36 20 sorry -- Eastern District of Missouri.

21 MR. DIERLAM: Yes.

22 THE COURT: Okay. Go ahead, sir.

23 MR. DIERLAM: I think it was in February of this  
24 year 20 states have initiated a lawsuit against the federal  
14:37 25 government involving the ACA in general and it's somewhat

1 similar to some of the complaints I have. Of course, they  
2 are sovereign, they have more specific complaints and harm,  
3 et cetera, et cetera. But they are saying that because the  
4 2017 tax law came into effect in 2019, according to the law,  
14:37 5 the penalty would be reduced to zero and at that point it  
6 would be unconstitutional because it would no longer -- as  
7 the Supreme Court ruled in *NIFB* it provides some tax revenue  
8 to the government; therefore, it was allowed under taxing  
9 authority.

14:37 10 Now their position is no income for the  
11 government and, therefore, it is not constitutional anymore.  
12 Of course, that is ongoing, but...

13 THE COURT: Ms. Newton, let me get your response to  
14 that.

14:38 15 MS. NEWTON: My response to the latter point is  
16 that's simply not a claim, a claim for fraud, and it's not  
17 currently at issue or in front of the court.

18 MR. DIERLAM: Well, it is one of my claims. It is  
19 Claim 6 or 7.

14:38 20 MS. NEWTON: Respectfully, Your Honor, it is not  
21 and couldn't conceivably be -- That was not the grounds for  
22 any of the claims. And his objection is to being subjected  
23 to the shared responsibility payment because, otherwise, he  
24 would have to try to find a plan with the contraceptive  
14:38 25 coverage provisions; and, as the magistrate judge found and

1 as we have our argued, he does not have standing to bring  
2 that claim because he can, in fact, find such a plan.

3 MR. DIERLAM: Can I address that?

4 THE COURT: Yes, sir. Please go ahead.

14:39 5 MR. DIERLAM: The CMF CURO that was mentioned in  
6 the --

7 THE COURT: I'm not hearing. Start that over  
8 again. I didn't understand what you said.

9 MR. DIERLAM: CMF CURO was the categorization,  
10 supposedly, that was mentioned by the judge. As I wrote in  
11 my reply, they are not -- they do not have an exemption from  
12 the ACA. They were not even in existence before 1999 and,  
13 therefore, they are in partnership with a Protestant  
14 organization and that Protestant organization, actually, has  
15 the exemption and, therefore, there is just not enough  
16 veneer running on top of that other organization.  
17 Therefore, it does not -- it is not fully Catholic, is what  
18 I am saying.

19 And I have other objections, as I mention in  
14:40 20 the complaint, to Health Care Sharing Ministry. Therefore,  
21 to me, that is not a viable option. It also does not  
22 provide fully for insurance.

23 THE COURT: Are you saying that you have surveyed  
24 the entire insurance industry and there's nothing that is an  
14:40 25 adequate substitute or are you saying that particular

1 program was not?

2 MR. DIERLAM: Kind of both. My understanding is  
3 that maybe, from when I talked to the people at CMF CURO  
4 there may be one other organization that has some similar  
14:40 5 arrangement with a Protestant group. But in both cases, you  
6 know -- I also have -- There is more -- It's kind of  
7 complicated, but I have reservations toward the health  
8 sharing concept and...

9 I am trying to organize my thoughts here.

10 14:41 It is just not a viable alternative.

11 Also, the provision of the redemption that was  
12 mentioned that supposedly makes the case moot, the first  
13 provision -- the first prong is that I have religious  
14 objection, which I meet. I have religious objection to the  
14:41 15 contraceptive mandate, although "contraceptive mandate" is  
16 kind of a misnomer.

17 Also, on the second prong, though, I do not  
18 meet it in that I do not have an employer anymore. I quit  
19 my employment in 2015 with ZXP. I have not been employed  
20 since then. I've gotten -- I've started my own business to  
21 some extent.

22 THE COURT: Well, congratulations.

23 MR. DIERLAM: Thanks. Just a sole proprietorship.  
24 Very small.

25 14:42 THE COURT: Sorry. I didn't hear the last part.

1                   MR. DIERLAM: It's a sole proprietorship and it's  
2 very small.

3                   THE COURT: A small sole proprietorship. Okay.

4                   MR. DIERLAM: That's right.

14:42           5                   And I do not have -- as they call it, the  
6 contraceptive mandate, in general -- I mean, it applies to  
7 everybody. So, there are no -- outside these healthcare  
8 insuring ministries, there is no insurance available. And I  
9 can't see that anybody would write a policy for a single  
14:42 10           person to exclude the contraceptive mandate.

11                   So, I don't think there is any possibility I  
12 would be able to find anything that's -- and I prefer  
13 insurance. These healthcare insuring ministries are not  
14 insuring. I don't think they properly cover everything  
14:43 15           necessary.

16                   So, again, 1) I don't meet that second prong  
17 because I do not have a current insurance provider and I do  
18 not have an employer. So, that I do not meet; so, the  
19 exemption does not -- I do not qualify for the exemption.

14:43 20           So, all the -- nothing has changed.

21                   THE COURT: Okay. You say you don't have insurance  
22 and you don't think there exists insurance like that which  
23 you had.

24                   But you don't disagree, do you, that the  
14:43 25           financial penalty for violating the mandate is now gone?

1                   MR. DIERLAM: No. I do disagree with that.

2                   THE COURT: Why do you say that? It's been  
3 repealed by Congress.

4                   MR. DIERLAM: I paid this last year.

14:43 5                   THE COURT: I'm sorry?

6                   MR. DIERLAM: I paid \$3,000. In April I paid  
7 nearly \$3,000 for the penalty and I will pay it next year.  
8 It will not be gone until 2019.

9                   THE COURT: You're saying the fact it's not yet  
14:44 10 effective is --

11                   MR. DIERLAM: That's right. According to the  
12 law -- the Tax Reform Act of 2017, I think it was -- they do  
13 not reduce the penalty to zero until 2019.

14                   THE COURT: The one I am looking at is called the  
14:44 15 Tax Cuts and Jobs Act of 2017.

16                   MR. DIERLAM: Yeah. Yeah. Okay. I think it was  
17 past December 22nd, something like that --

18                   THE COURT: It was past --

19                   MR. DIERLAM: Last year?

14:44 20                   THE COURT: Yeah, it was.

21                   MR. DIERLAM: Okay. That's the one. It does  
22 not -- Not until 2019 does it reduce to zero.

23                   THE COURT: Do you want to speak to that,  
24 Ms. Newton?

14:44 25                   MS. NEWTON: Yeah. I would like to speak to a

1 couple of things, if I could.

2 He mentioned both in -- Mr. Dierlam mentioned  
3 in both his response and just now that he has various other  
4 objections to the healthcare sharing ministries and that he  
14:45 5 differs with the current practices of medicine, that he  
6 doesn't believe in making payments to individuals for  
7 specific needs.

8 To the extent that he has indicated that he is  
9 unwilling to participate in these plans because of those  
14:45 10 issues, those are caused by the government and he doesn't  
11 have standing to bring a claim against the government. His  
12 inability to find insurance that meets those moral  
13 objections is not the result of any action by the  
14 government.

14:45 15 And then with regard to the -- I'm sorry. So,  
16 thus far, his claim has been based on his payments in 2015  
17 and 2016, and for the reasons we stated this court doesn't  
18 have jurisdiction over those claims because he is still not  
19 satisfied with the jurisdictional prerequisites.

20 14:45 He has not amended his complaint to bring a  
21 claim based on any payments he made last year; so, that's  
22 not currently before the Court.

23 24 And, as the Court mentioned at the outset, any  
25 claim for injunctive or declaratory relief on the basis of a  
14:46 shared-responsibility payment that doesn't exist, obviously,

1 should be dismissed.

2 THE COURT: Mr. Dierlam, this is an issue that has  
3 fascinated me since I was a teenager.

4 MR. DIERLAM: Okay.

14:46 5 THE COURT: It came up for me because a lot of my  
6 friends, especially Catholic friends and Quaker friends,  
7 found that their parents should withhold a portion or all of  
8 their taxes to protest the government's involvement in the  
9 war in Vietnam, which is something I think had the same  
14:46 10 effect on their conscience that this has on your conscience.

11 MR. DIERLAM: Well, I think this is more serious  
12 than even that. But go ahead.

13 THE COURT: So, I have thought about it for a long  
14 time.

14:47 15 How do you feel about that? What would you  
16 say about the right of a taxpayer to withhold part of his  
17 taxes because he objects to a foreign policy of our  
18 government?

19 MR. DIERLAM: Well, in some of the decisions I have  
14:47 20 seen regarding that, that the government does have, you  
21 know, financial needs. I can understand that. However, the  
22 First Amendment is still there and, in this case, it does  
23 conflict with some basic tenets there.

24 THE COURT: But my friends thought that the war in  
14:47 25 Vietnam did, too. They thought the Quakers were, of course,

1 pacifists. The Catholics thought there was grotesquely  
2 unnecessary killings. They definitely grounded their  
3 opinions in the First Amendment.

4  
14:47 5 MR. DIERLAM: Well, you know, in that case, you  
6 know, were the enemy in that case -- were they totally  
7 innocent? I think the answer to that would be "no". In  
this case the unborn are totally innocent.

8 THE COURT: So, you're saying the difference is  
9 some of the Vietnamese children were not totally innocent?

10 14:48 MR. DIERLAM: I am saying the Vietnamese as a  
11 people and their government.

12 THE COURT: But a lot of children were killed in  
13 Vietnam. Surely they weren't guilty of anything.

14 14:48 MR. DIERLAM: Children weren't being targeted,  
15 though. Children were not being targeted. They were  
16 incidental. They were collateral damage, as they'd say.

17 THE COURT: So, there is a First Amendment  
18 difference between killing children as collateral damage and  
19 what you're talking about?

20 14:48 MR. DIERLAM: Well, in this case, the children are  
21 targeted. They are not collateral damage. They aren't  
22 targeted. It's not incidental to the action. It "is" the  
23 action. It is the main purpose of the action.

24 14:49 MR. DIERLAM: And, as I mentioned in my briefs there, two or  
25 three of the contraceptives have an abortive patient effect.

1 So, they will kill innocents.

2 THE COURT: Well, how about should Jehovah's  
3 Witnesses be able to withhold their payments because the  
4 plans cover blood transfusions?

14:49 5 MR. DIERLAM: Well, in the case of -- There's also  
6 another distinction here, as I mentioned in my brief.

7 In the case of the Catholic church,  
8 participating in such a -- in any type of a program or plan  
9 that has that effect I just mentioned is prohibited.

14:49 10 Now, in the case of Jehovah's Witnesses, that  
11 may just be a self -- you know, as long as you don't do it,  
12 whereas if other people do it is a different story.

13 In this case the Catholic church teaches that  
14 participating willingly in such a plan or such a program,  
14:50 15 you know, it helps to corrupt others; and, therefore, it  
16 taints you.

17 THE COURT: But Jehovah's Witnesses feel equally  
18 strongly about blood transfusions.

19 MR. DIERLAM: Well, as I mentioned, I don't know --  
14:50 20 I don't know if that was just for themselves or they feel  
21 that anybody getting a blood transfusion anywhere is a  
22 violation of their principles. If it's just for themselves,  
23 then that's a different category.

24 THE COURT: No. They're actively trying to --

14:50 25 MR. DIERLAM: Well --

## 1 (Simultaneous dialogue)

2 THE COURT: -- other people to their point of view.

3                   MR. DIERLAM: Yeah, I'm sure they are, but I'm  
4 saying -- but my point still exists, is that if they are  
5 feeling that as long as they don't participate that they are  
6 good. Whether other people participated in that activity is  
7 a different story, you know. Then them withdrawing or not  
8 using that service may be an alternative.

9                   In this case, in the Catholic church, whether  
10                  you use that service or not -- well, use it it's worse --  
11                  but still participating in that program, you know, is a  
12                  violation.

13 THE COURT: So, what about using Muslims who are  
14 offended by medications that are extracted from the poor?

19 THE COURT: So, you think that --

20 MR. DIERLAM: I'm not sure, but I am guessing that  
21 that's going to be the case.

22 THE COURT: So, you think that your religion ought  
23 to be accommodated but not other people's?

24 MR. DIERLAM: No. I am saying that there is a  
25 different philosophy there. There is two categories,

1 basically, that -- One is that like in a -- Let me give you  
2 a... Uh...

3 THE COURT: How about Christian Scientists who  
4 think that vaccinations ought to be prohibited?

14:52 5 MR. DIERLAM: Well, I'm not sure that Christian  
6 Science believes that vaccinations should be free for  
7 everybody or that they just themselves want --

8 THE COURT: For everybody.

9 MR. DIERLAM: Well, you know, I don't know.  
10 Assuming that they do, that they feel that, you know,  
11 participating in any program that encourages vaccinations,  
12 then they do fall in the same category and they -- you know,  
13 they should not be forced to participate, I would say.

14 THE COURT: So, they can withhold part of their tax  
15 money, too?

16 MR. DIERLAM: Well, you know, it's -- it's somewhat  
17 complicated, but there is a potential that that might be  
18 justified.

19 THE COURT: And then there are some religions that  
20 don't believe in any kind of medical treatment at all.  
21 Should they be allowed to withhold all their tax money?

22 MR. DIERLAM: If they're consistent. If they do  
23 believe -- I mean, they already exist now, as you know.  
24 There are exemptions from the Social Security tax, although  
25 I don't know the degree of that, of the exemptions, but they

1 do not have to pay it. They cannot pull from Social  
2 Security, from what I understand. But, to me, that's seems  
3 a just solution.

4 THE COURT: So, who makes the determination as to  
14:53 5 what the solution is? The individual taxpayer?

6 MR. DIERLAM: Well, that would be nice, but the  
7 government usually doesn't let us get away with that.

8 THE COURT: No. And I am curious as to why you  
9 think you should.

14:53 10 MR. DIERLAM: Well, you know, I think I should  
11 because of the laws that exist, RFRA, et cetera.

12 THE COURT: But --

13 MR. DIERLAM: I am basing -- most of my argument  
14 there is based on it and is fairly solid in that.

14:54 15 THE COURT: But there's only been one circuit court  
16 to consider this and that court came down decidedly against  
17 your position. So...

18 MR. DIERLAM: No. The *Wieland* case --

19 THE COURT: It wasn't a circuit court decision,  
14:54 20 sir. There has only been one circuit court decision on this  
21 and it definitely rejected that. It definitely rejected  
22 your position.

23 MR. DIERLAM: And I think that they were wrong on  
24 various grounds and for various reasons. I think their test  
14:54 25 was that -- something I mentioned in my brief, that their

1 test was -- if you really applied it and thought about how  
2 it worked, then it basically -- the RFRA is giving the  
3 individual an entitlement to an exemption. It gives the  
4 court the entitlement to the exemption. It's within the  
14:54 5 court's discretion whether they -- despite any evidence,  
6 that the individual gets an exemption or not.

7 THE COURT: So, I should disregard the circuit  
8 court's decision?

9 MR. DIERLAM: Well, to the extent I think they were  
14:55 10 wrong, yes.

11 THE COURT: Doesn't it sound a little bit  
12 unmanageable? Doesn't it sound a little bit Anarcho, that  
13 we're ignoring statutes and ignoring higher court decisions  
14 because you believe your religion is to the contrary?

14:55 15 MR. DIERLAM: No. It would be -- like I said, if  
16 we follow the Constitution. Yet, much of the Constitution  
17 does not fall under or -- And that goes for the laws as  
18 well. The laws are passed in violation of the Constitution,  
19 as the ACA was.

20 THE COURT: But who is going to decide this?  
21 You've decided they're in violation of the Constitution?

22 MR. DIERLAM: You know, it's obviously in the  
23 court's...whether or not it's -- and Congress and other  
24 parts of the government. I don't really get to decide. I  
14:56 25 just make a complaint and that's about it.

1                   THE COURT: But we have a system for correcting  
2 mistakes if the laws are unconstitutional. Judges are  
3 authorized to strike them down.

4                   MR. DIERLAM: Yes.

14:56           5                   THE COURT: But I don't know that individual  
6 taxpayers can decide that they're authorized to withhold  
7 money from causes they disagree with.

8                   MR. DIERLAM: Well, I haven't withheld money. I  
9 have paid in full, as far as I know, all the requirements  
14:56 10           that --

11                   THE COURT: But you're asking to withhold money.  
12 Right?

13                   MR. DIERLAM: Well, I am asking -- well, if the  
14 stay was lifted I would be asking for an injunction to stop  
14:56 15 them from forcing me to pay the money which I think is not  
16 constitutionally due.

17                   THE COURT: Okay. Let's talk about some of your  
18 other claims.

19                   You say that the Affordable Care Act violates  
14:56 20 the due process clause of the Fifth Amendment because the  
21 ACA was --

22                   MR. DIERLAM: I think the 20 states also --

23                   THE COURT: You say that the ACA, quote --

24                   MR. DIERLAM: -- in violation --

14:57 25                   THE COURT: -- let me finish -- the ACA, quote, was

1       created with a high degree of incompetence and negligence  
2       for the welfare of the general public and that the shared  
3       responsibility payments constitutes fallacious and insulting  
4       propaganda.

14:57   5                    MR. DIERLAM: Yes. I remember that.

6                    THE COURT: I think those are policy and political  
7       arguments. I don't think they're arguments for a court to  
8       do anything with. I can't ignore laws that I think were  
9       passed with incompetence and negligence.

14:57   10                  MR. DIERLAM: Well, I think the 20 states -- in  
11       their complaint I think they term it like the verbiage in  
12       *Brushaber*. They're using the words "irrational" and  
13       "capricious", which I do, too, I think, there, although I  
14       don't -- I think I vary the "irrational" a little bit. But,  
14:58   15       essentially, that there was great negligence in passing that  
16       law. And I do mention in my complaint and in some of the  
17       filings and the reply that I posted -- or sent in after  
18       that, examples of how the law is contradictory to itself,  
19       how it's contradictory to its own purpose, et cetera.

14:58   20                  THE COURT: And you say in another place that the  
21       Affordable Care Act discriminates in favor of those who  
22       engage in, quote, drug use, illicit sex and overeating at  
23       the expense of those who, quote, choose a healthier  
24       lifestyle.

14:58   25                  MR. DIERLAM: Yes.

1                   THE COURT: Do you really want me to strike down a  
2 law because it favors those who eat too much --

3                   MR. DIERLAM: That's an example of, again,  
4 irrational breaches of law.

14:58 5                   THE COURT: Okay. But do you think because the law  
6 favors overeating that I ought to strike it down?

7                   MR. DIERLAM: Well, it's just one example, just one  
8 example of many that I hopefully have there and there may be  
9 more that I rely on.

14:59 10                  THE COURT: How do I tell whether a law promotes  
11 overeating?

12                  MR. DIERLAM: Well -- well -- if it penalizes one  
13 group of people that are law-abiding and, otherwise, try to  
14 do the right things with their health, et cetera, and does  
14:59 15 not penalize a group that are doing things that harm their  
16 health, that they wind up in intensive care, needing more  
17 healthcare, a little more expensive healthcare, et cetera,  
18 et cetera -- does it do anything about that? I say, again,  
19 that's irrational and capricious.

14:59 20                  THE COURT: Do you know of any laws that have been  
21 struck down on the basis of the promotion of overeating?

22                  MR. DIERLAM: Well, I know some laws are  
23 established based on overeating. I think in New York they  
24 have some sort of a -- or I should say maybe it was -- the  
15:00 25 mayor there promoted a law that would tax soda usage and

1 prohibits the size of the container that it could be sold  
2 in.

3 THE COURT: And you say the ACA's, quote, real  
4 design and impact benefits certain Democratic constituencies  
15:00 5 and punishes primarily non-Democratic constituencies.

6 MR. DIERLAM: Uh-huh.

7 THE COURT: Do you know any laws that have been  
8 struck down on that basis?

9 MR. DIERLAM: Offhand -- you know, I'd have to  
15:00 10 really look at that, but, offhand, I am thinking there's  
11 certain voting jurisdictions, you know, the boundaries that  
12 have been -- higher courts and the courts have been involved  
13 in that said, you know, favored Republicans too much or, you  
14 know, Democrats too much or whatever -- it was gerrymandered  
15:01 15 basically -- and they would not allow those boundaries.

16 THE COURT: And you say the Establishment Clause is  
17 violated here because, quote, the committee only heard from  
18 pro-abortion, pro-contraception groups, which further places  
19 their objectivity in doubt.

15:01 20 MR. DIERLAM: Uh-huh.

21 THE COURT: Can I really strike down a law based on  
22 what I think about Congress members' objectivity?

23 MR. DIERLAM: Yes.

24 THE COURT: I can?

15:01 25 MR. DIERLAM: That's part of the law itself.

1                   THE COURT: I can?

2                   MR. DIERLAM: Say again.

3                   THE COURT: I can strike down a law because I think  
4 the congress members lack objectivity?

15:01           5                   MR. DIERLAM: Yes.

6                   THE COURT: Okay. Do you know of any laws that  
7 have been stricken on that basis?

8                   MR. DIERLAM: I believe so. What I am thinking of  
9 is the -- I think there is a -- I am trying to -- I haven't  
15:01 10           looked at it, but there is a ruling thing that -- it's the,  
11 you know, statements by the decision-making body or -- I  
12 think the Supreme Court looked at this -- but I'd have to  
13 really look at that -- but there's something saying that, if  
14 verbiage by the decision-making body shows a favoritism or  
15:02 15           lack of objectivity or something to that effect, then that  
16 is a basis for reversing a decision.

17                   THE COURT: Well, what if someone had a religious  
18 belief that all the races should not intermingle and,  
19 therefore, objected to integrated schools? Is that a  
15:02 20           religious belief that should be accommodated?

21                   MR. DIERLAM: I guess's it's possible. I'd have to  
22 really look at the particulars more on that. You know, they  
23 can -- on their own they can form their own school. I  
24 mean --

15:02 25           THE COURT: But still --

1                   MR. DIERLAM: School then will not be subsidized by  
2 the government --

3                   THE COURT: But when they pay their property taxes  
4 in Texas they are subsidizing public schools.

15:03 5                   MR. DIERLAM: That's right. They are.

6                   THE COURT: Do you think they ought to able to  
7 withhold some of their money because they don't think  
8 schools ought to involve interracial student bodies?

9                   MR. DIERLAM: Well, I don't think the current law  
15:03 10 will allow that, but I am thinking there is a case that they  
11 can make.

12                   THE COURT: Let me go back to you, Ms. Newton.

13 Anything you want to say? But, also, a particular question.

14                   You make an argument on taxpayer standing and  
15:03 15 you say that you didn't -- let's see -- that full payment of  
16 an assessment has to be made before a tax refund suit can be  
17 maintained and you cite the Supreme Court's decision in  
18 *Flora v. United States*.

19                   In fact, doesn't the Plaintiff need to pay all  
15:04 20 of his taxes for the years he's challenging, not all of his  
21 taxes forever?

22                   MS. NEWTON: All of the taxes for the years that he  
23 is challenging, but he has not even alleged, much less  
24 shown, that he did pay the taxes in 2015 and 2016.

15:04 25                   MR. DIERLAM: Can I comment on that?

1                   THE COURT: Yes, you can.

2                   MR. DIERLAM: In the reply to the response to the  
3 R&R by the Defendant, I do say there that I did pay, as far  
4 as I know, all the taxes.

15:04 5                   So, I mean, these are kind of minor  
6 technicalities that -- and, you know, I don't see how  
7 they're significant.

8                   There is only two that I know of they mention  
9 in their response.

15:04 10                  One was I did allege I paid all the taxes.

11                  And the second one was that, basically, the  
12 filing date on at least one of the exhibits there was before  
13 the six-month period, saying this is a continuing  
14 controversy. As long as I was on -- within -- after six  
15 months from the first one, to me, it doesn't matter because  
16 it's the same controversy continuing. And I mention that.  
17 In each of my claims I put that's the case number in that  
18 claim. So, it's not a new controversy. It's the same  
19 controversy.

15:05 20                  As far as the paying taxes, I used the  
21 worksheet that was in the instructions provided by the IRS,  
22 filled it out and I come up with a number. That's the  
23 number I paid and I put on the IRS form. It's possible I  
24 miscalculated. The IRS has not said anything to me. So, as  
15:05 25 far as I know, I have paid all the taxes in full.

1                   THE COURT: Does your complaint allege that? I  
2 don't think it does. Does it?

3                   MR. DIERLAM: Well, I don't think I mentioned it in  
4 the complaint, that I paid taxes in full. And I know in the  
15:06 5 Judge's R&R she says I paid the taxes in full in one of her  
6 statements. I guess she assumed it, because I didn't  
7 really -- I don't think I exactly mentioned that, but I did  
8 pay the taxes in full, as far as I know.

9                   THE COURT: Do you want to speak to that,  
15:06 10 Ms. Newton?

11                   MS. NEWTON: Yes, Your Honor.

12                   I mean, he just said that he didn't allege in  
13 the complaint that he paid his taxes in full, and the report  
14 and recommendation does not find that. I think to the  
15:06 15 extent that there may be some question about that, maybe  
16 he's referring to the shared responsibility payment, but he  
17 has not alleged, even in his response to our response to the  
18 R&R, that he has paid his taxes in full for 2017 --

19                   MR. DIERLAM: I state that categorically in my  
15:06 20 response, in my reply to your response.

21                   MS. NEWTON: I apologize if I have missed it, but  
22 there is no other evidence and it certainly wasn't claimed  
23 in the complaint.

24                   MR. DIERLAM: Well, I didn't think about mentioning  
15:07 25 that, you know. It's kind of a technicality. To me, it

1 seems like a minor technicality.

2 THE COURT: Well, the relevant statute is  
3 28 USC 1346 and it says: "The district courts have original  
4 jurisdiction over," quote, "any civil action against the  
15:07 5 United States for the recovery of any Internal Revenue tax  
6 alleged to have been erroneously or illegally assessed or  
7 collected" and that the statute is being construed in the  
8 *Flora* case as meaning "full payment of the assessment has to  
9 be paid before a tax refund suit can be maintained in the  
15:07 10 district court."

11 There is a lot that may be wrong with that  
12 law, but I do believe it is the law.

13 MR. DIERLAM: Well, you know, the only thing -- if  
14 there is anything that was left out is that I didn't say  
15:07 15 "full payment" in my complaint, although that is the case.  
16 I am saying that here. I said that in my reply to the  
17 Defendant's response to the R&R. I don't know how much --  
18 And if there's proof you need, I am willing to provide it,  
19 any additional proof, as I stated in my response as well or  
15:08 20 my reply as well. I think in my last sentence in my reply I  
21 state that. So, I mean, I don't see a big issue or a big  
22 problem here.

23 THE COURT: Anything else, Ms. Newton?

24 MS. NEWTON: No, Your Honor. We'll rest on the  
15:08 25 papers.

1                   THE COURT: Well, we're -- these are difficult  
2 issues. Anytime religion and government collide these are  
3 difficult issues.

4                   Do you want to say anything more about RFRA,  
15:09 5 Mr. Dierlam?

6                   MR. DIERLAM: About what?

7                   THE COURT: RFRA, Religious Freedom Restoration  
8 Act.

9                   MR. DIERLAM: Only that the *Wieland* case is, from  
15:09 10 what I can tell, the most similar, and it did -- the judge  
11 there seemed to have an appropriate ruling and ruled that  
12 the government did violate the RFRA. It is most similar to  
13 this case. They were Catholic. I am Catholic. So, to me,  
14 I think that's an appropriate ruling in this case as well.

15:09 15           THE COURT: In the *Hobby Lobby* case, where the  
16 court considered insurance that was required of employers,  
17 they found that the obligation to cover contraception  
18 required businesses and owners to engage in conduct that  
19 seriously violated their religious beliefs. Their theory  
15:10 20 was the business's insurance plans would have to cover birth  
21 control. "Some plan beneficiaries would use birth control,"  
22 and "birth control and the belief of the businessowners may  
23 result in the destruction of an embryo." So, they felt that  
24 was too great a burden on the employers and, therefore, it  
15:10 25 should not be required.

1                   It seems to me that that's much less true in  
2 your situation, Mr. Dierlam. You're not out shopping for  
3 contraception, insurance that covers contraception. You're  
4 not providing it for people who might use contraception  
15:11 5 contrary to your beliefs. It's not something you're  
6 providing to anybody else. You're just a passive recipient  
7 of insurance that you don't ever have to use for any  
8 purposes that offend you.

9                   Isn't that quite a difference?

10                  15:11    MR. DIERLAM: Not exactly. There's two things  
11 there that -- In my case, as I said, I am not employed, you  
12 know. I have no insurance right now. But, if I were  
13 looking for it, I couldn't find any. I tried to do that  
14 because of the HHS mandate. I couldn't find any.

15                  15:11    But if I were looking for it and if it didn't  
16 exist, then I would be in the same position as these  
17 employers you're talking about in the *Hobby Lobby* case. I  
18 would still be looking for coverage that did not violent my  
19 beliefs. And, so, I would be in the exact same position.

20                  15:11    I might not be as big as the other employers  
21 are, I don't have as much purchasing power, et cetera,  
22 et cetera, but, you know, me and any potential family, I  
23 would be looking for coverage and I would be in the exact  
24 same position.

25                  15:12    THE COURT: But you're looking for coverage that is

1 the converse of what was being looked for in *Hobby Lobby*.  
2 You're looking for coverage that excludes birth control  
3 rather than includes birth control. So, I don't know how  
4 your principles are being traduced.

15:12 5 MR. DIERLAM: Not exactly, in that they were  
6 looking for coverage that did not violate their beliefs,  
7 also. They did not want to pay for -- They were Protestant,  
8 as I remember, and they allowed some contraceptives, but  
9 some contraceptives they did not allow, like these  
15:12 10 abortifacients I mentioned. They had a moral objection to  
11 those.

12 THE COURT: The law required them to look for  
13 insurance that did cover contraception and --

14 MR. DIERLAM: Yes.

15:12 15 THE COURT: -- there is no law that requires you to  
16 look for insurance that covers contraception.

17 MR. DIERLAM: I understand.

18 THE COURT: There is no law that requires --

19 (Simultaneous dialogue)

15:13 20 MR. DIERLAM: The minimum coverage does require it  
21 now, not -- Again, as I mentioned before, that's kind of a  
22 misnomer from what the Defendants and the magistrate judge  
23 is mentioning there. The ACA does not require any  
24 contraceptive coverage. It doesn't require that at all.  
15:13 25 That was put in by the HHS under Obama.

1 THE COURT: Okay. I --

2 MR. DIERLAM: They put that in --

3 (Simultaneous dialogue)

4 THE COURT: I don't think that's quite the point.

15:13 5 You're not being forced to go look for insurance that covers  
6 contraception.

7 MR. DIERLAM: I am in that the essential minimum  
8 coverage which is required by the ACA and now contains that  
9 HHS mandate, which is still there, requires all insurers to  
15:13 10 provide that as part of essential minimum coverage.

11 THE COURT: And you think that gives you a private  
12 right of action under the Affordable Care Act?

13 MR. DIERLAM: Well, it's a violation of the  
14 Constitution. It gives me no choice but to -- any coverage  
15:14 15 that I can find will have that contraceptive coverage.

16 THE COURT: Well, are Jehovah's Witnesses'  
17 constitutional rights also violated by their inability to  
18 find an insurance coverage that excludes blood transfusions?

19 MR. DIERLAM: Well, as long as they don't have  
15:14 20 to -- I mean, in this case, when the penalty goes away, as  
21 long as I'm not in that system or I am forced to support the  
22 system, it's okay.

23 THE COURT: For you and Jehovah's Witnesses? For  
24 both you and Jehovah's Witnesses it's okay?

15:14 25 MR. DIERLAM: For what? For --

1                   THE COURT: For you to go look for insurance that  
2 does not cover that which offends your religious beliefs.

3                   MR. DIERLAM: Well, it's not only -- in this case  
4 it's also -- as I mentioned, in the other claim there, it's  
15:15 5 not just the religious beliefs here. It's also a  
6 confiscation of my property. It's a violation of, I think,  
7 the Fourth Amendment because the government is saying and  
8 dictating that a portion of the money that I must pay or the  
9 penalties I have paid, although eventually it will go to  
15:15 10 zero, the individual mandate is still in place until, you  
11 know, the ACA gets declared unconstitutional.

12                   But the -- Where was I at? As far as....

13                   Now, what was your question again?

14                   THE COURT: I am just worried how far this  
15 constitutional right that you believe you have identified --  
16 how broadly it cuts. I mean, do we have religious beliefs  
17 sufficient in Muslims and Jews to look for an insurance  
18 company that excludes medicine that's derived from pork? I  
19 mean, do they have a constitutional right to sue if they  
15:16 20 can't find it?

21                   MR. DIERLAM: Well, you know, if this was totally a  
22 private transaction -- which it should be -- then no. I  
23 would say no because, you know, if they can find it, that's  
24 fine. If they can't find it, that's up to them.

15:16 25                   THE COURT: And why are Jews and Muslims different

1 from Catholics in that regard?

2 MR. DIERLAM: They're not.

3 There are two aspects to this.

4 One is the religious aspect. If I'm not  
15:16 5 forced to participate in the system, we are penalized for  
6 not participating in the system and then, to me, it's fine.  
7 It doesn't matter. But in this case I am forced to  
8 participate and, therefore, that's a different -- that puts  
9 it in a different category.

15:17 10 The second thing is that, you know, it's  
11 violating my religious freedom.

12 THE COURT: That puts you in the same category as a  
13 Jehovah's Witness and the Muslims and the Jews. Right?

14 MR. DIERLAM: Not necessarily. I mentioned that  
15:17 15 point before. Not necessarily. However, if -- you know,  
16 they may have their own objections to various aspects of the  
17 law as forcing them to do or it might not be forcing,  
18 whatever provisions of the essential minimum coverage. They  
19 might have other objections. Other religions might have  
20 different objections. I can see that. And that all should  
21 be taken into account because everybody is being forced into  
22 the same plan.

23 Now, if there was no force, if the ACA,  
24 essentially, has no minimum essential coverage provision,  
15:18 25 then it would be fine.

1                   THE COURT: I am concerned about the boundaries of  
2 this right you're seeking and I am just wondering how it's  
3 going to apply if different individuals because of  
4 conscientious and religious exception want to opt out of  
15:18 5 whatever the government does.

6                   MR. DIERLAM: There is a solution that came up in  
7 the Supreme Court in the "compelled association" case. They  
8 set up with these unions that were established that were,  
9 you know, given bargaining rights with the government. They  
15:18 10 made a rule that if anything is outside of that -- that if  
11 you paid money or spent money on it that's outside of  
12 bargaining with the government, then the individuals in that  
13 union have -- or the individuals being represented by the  
14 union or all of them that are in the union -- have a right  
15:19 15 to take that complaint to the union and ask for a refund of  
16 that money.

17                   And there was a similar objection that you're  
18 raising raised by -- I can't remember case -- I mention it  
19 in one of my briefs -- that -- you know, saying that there  
15:19 20 would be so many that they can't, you know, handle it, it's  
21 just too overwhelming, et cetera, et cetera. And that was  
22 dismissed by one of the Supreme Court judges, saying that --  
23 it's in -- The *Abood* decision has been in place for a decade  
24 or so at the time it was written, and that there have been  
15:19 25 no problems, that they had figured it out and they had

1 properly adjudicated all the complaints. So, there is a  
2 solution.

3 THE COURT: I am still not understanding the  
4 contours of the solution. I don't understand what you think  
15:19 5 people ought to be authorized to do or not do.

6 MR. DIERLAM: In that case, whatever the objection  
7 was -- you know, religious, you know, whatever it was to  
8 money being spent that was outside of the government-stated  
9 purpose, you know, their compelling interests, then they had  
15:20 10 a right to a refund of that money regardless of what it was.

11 THE COURT: I am asking you to translate that into  
12 this context, where someone is offended on religious grounds  
13 by what the government is spending.

14 MR. DIERLAM: Uh-huh.

15:20 15 THE COURT: Tell me how it works. What does a  
16 Jehovah's Witness do?

17 MR. DIERLAM: Well, in this case what could be  
18 done -- this is a possibility -- some sort of board could be  
19 set up where the individual can appeal that they don't want  
15:20 20 to have this particular type of coverage and they don't want  
21 to pay for it for other people either; they don't want it in  
22 their policy at all. Okay? Whatever money that would go to  
23 that particular coverage, that you go to this board and that  
24 could be excised from their payments, just like in the *Abood*  
15:21 25 decision.

1 Do you follow what I am saying?

2 THE COURT: Yeah.

3 MR. DIERLAM: It would essentially be no -- very  
4 little difference other than, you know, I think that the  
5 government does not have a compelling interest there. I  
6 don't think that they can really set up such a system  
7 because they don't have a compelling interest or sufficient  
8 compelling interest but -- and they haven't made a case for  
9 that.

15:21 10 But that would a potential solution, and that  
11 would also avoid violating all the constitutional rights  
12 guaranteed by the Constitution, not just religion, because  
13 in some cases -- In *Abood* they were spending money on not so  
14 much religion but on supporting candidates that some of the  
15 people objected to, some of the members objected to, and  
16 they did not want their money spent on advancing, you know,  
17 that particular candidate.

18 I am sure there's others, too, there, but  
19 that's just one of the ones I can think of.

15:22 20 THE COURT: Ms. Newton, anything more?

21 MS. NEWTON: No, Your Honor.

22 THE COURT: Anything more, Mr. Dierlam?

23 MR. DIERLAM: Not that I can think of right now.

24 THE COURT: Well, let me just say, Mr. Dierlam, I  
15:22 25 really applaud the sincerity and the passion of your

1 convictions. This is an age where not many people are  
2 willing to adhere to a strict set of behavioral standards,  
3 and you clearly are and I applaud that. I really do.

4 MR. DIERLAM: Thanks. I appreciate it.

15:23 5 THE COURT: I am always impressed with people  
6 who -- and it's relative to this case -- are loyal to their  
7 principles.

11 THE COURT: I'm sorry. I didn't hear that.

12 MR. DIERLAM: I've been somewhat aware that my  
13 standards are higher than other people's, not just in  
14 religion but other things as well. But, you know, I try. I  
15 try.

16 THE COURT: I am not going to agree that they're  
17 higher than other people's, but you do adhere to a certain  
18 set of beliefs and I know it's not easy. I know it's not  
19 easy.

15:24 20 MR. DTEBTIAM: Yes.

24 The first one is the failure of the government  
15:24 25 to notify you of non-enrollment violated ACA. I just don't

1 think the ACA provides the proper right of action. I'm  
2 sorry.

3 MR. DIERLAM: Even though the previous act of  
4 Congress allowing you to protest the withholding or the  
15:24 5 income tax --

6 THE COURT: There are many wrongs in our society  
7 that do not -- that are not accompanied by legal claims for  
8 relief, and that may be one of them, but I don't think I see  
9 it in the ACA. The Fifth Circuit may see it differently.

10 15:24 The individual mandate. I think Judge Palermo  
11 is correct in dividing those arguments into "retrospective"  
12 and "prospective".

13 I think, prospectively, it seems to me that  
14 most recent legislation does take care of the problem  
15 15:25 prospectively. I think the Tax Cuts and Jobs Act of 2017  
16 does take care of it prospectively.

17 Retrospectively, I'm just unable to conclude  
18 that the individual mandate violates the Religious Freedom  
19 Restoration Act. I agree with what the Third Circuit said  
15:25 20 in that case that Judge Palermo relied on.

21 MR. DIERLAM: You said you didn't agree with what?

22 THE COURT: I agree with Judge Palermo's -- I agree  
23 with the Third Circuit in the case that Judge Palermo relied  
24 on so heavily; that the burden, although it's not  
15:25 25 nonexistent, is not so substantial that it's a violation of

1 RFRA.

2 MR. DIERLAM: Okay.

3 THE COURT: The Preventive Services Coverage  
4 Provision of the ACA I don't think violates the  
15:26 5 establishment clause.

6 I don't think the contraceptive coverage with  
7 the individual mandates violates the Equal Protection  
8 Clause.

9 I don't think the individual mandate exceeded  
15:26 10 Congress' power under the Taxing and Spending Clause.

11 I don't think the individual mandate violates  
12 the due process clause.

13 And I don't think the individual mandate  
14 violates your right to privacy or freedom of association.

15:26 15 I do congratulate you again on the force and  
16 the conviction you have put into your arguments. And other  
17 court some day may very well see things differently, but  
18 that's the best I can do today.

19 Thank you both.

20 MR. DIERLAM: Question real quick.

21 THE COURT: Yes, sir.

22 MR. DIERLAM: Does that mean you're dismissing the  
23 complaint in its entirety or --

24 THE COURT: Yes. Yes, it does.

15:27 25 MR. DIERLAM: Okay. I assume I will get something

1 in the mail to that effect?

2 THE COURT: We'll either enter it as a docket  
3 minute order or put something in the mail -- Oh. You're not  
4 on ECF, are you?

15:27 5 MR. DIERLAM: No.

6 THE COURT: Yeah, we'll send you something.

7 MR. DIERLAM: Okay.

8 THE COURT: Thank you very much.

9 MR. DIERLAM: Thank you.

10 15:27 MS. NEWTON: Thank you, Your Honor.

11

12 COURT REPORTER'S CERTIFICATE

13 I, BRUCE SLAVIN, certify that the foregoing is a  
14 correct transcript from the record of proceedings in the  
15 above entitled matter, to the best of my ability.

16

17 *s/Bruce Slavin*  
18 BRUCE SLAVIN, RPR, CMR

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