UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

John J. Dierlam	§	
Plaintiff	§	
	§	
versus	§	
	§	CIVIL ACTION NO. 4:16-cv-00307
	§	
Joseph R. Biden, in his official capacity	§	
as President of the United States et. al.	§	
	§	
Defendants	§	

Response to the Government's Partial Motion To Dismiss Plaintiff's Second Amended Complaint

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Issues Presented

1)Does the defendant's bad faith and harm of the public interest result in at least some culpability for their violation of §1502(c) of the ACA regardless of whether or not a private right of action exists in §1502(c)?

2)Does each claim in the Complaint "allege facts," as presented in the Complaint and not as characterized by the defendant's straw man arguments, "that raise a right to relief above the speculative level?"

Background

About the year 2010, Congress passed Pub. L. No. 111-148 (PPACA) and Pub. L. No. 111-152 (HCERA), collectively known as the ACA. Provisions of the ACA require every individual, or their guardian, with a sufficient income as calculated in the ACA, to maintain a government approved and mandated health insurance policy or qualify for an exemption. Various exemptions may avoid the penalties. The ACA specifies little in what should be included in "minimum essential coverage," instead it gives fairly broad authority to HHS to define these specifics, 42 § 300gg-13(a)(4) is but one example of this delegation. It is here where the requirement that "minimum essential coverage" include contraceptive, sterilization, certain abortion services, and related counseling.

The Original complaint was filed Feb. 4, 2016 in US District Court for the Southern District of Texas. Since that time the Tax Cut and Jobs Act of 2017 (TCJA) was passed which set the Individual Mandate Penalty (IMP) to $0. The government issued amended religious exemptions to the HHS Mandate in 2018. This case was dismissed by this court on June 14, 2018. The appeals court on Oct. 15, 2020 reversed and remanded for lack of an analysis of mootness and standing.

Standard of Review

> To survive a motion to dismiss, a civil plaintiff must allege facts that raise a right to relief above the speculative level…However, a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. Rule 8 does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element.(internal quotation marks and citations deleted throughout this document)[1]

"At the pleading stage, general factual allegations of injury . . . may suffice,"[2] "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 130 S.Ct. 2743, 2752, 177 L.Ed.2d 461 (2010).* The plaintiff bears the burden to establish these elements.

In *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* mootness is characterized as "the doctrine of standing set in a time frame." In other words, all three elements of standing must be maintained at all times during the lawsuit. An exception exists when,

> ...a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. By contrast, in a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury [is] certainly impending. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).*

From *Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013),* "A case becomes moot—and therefore no longer a Case or Controversy for purposes of Article III—when the issues presented

1 *REAL ALTERNATIVES, INC. v. Burwell, Dist. Court, MD Pennsylvania 2015, quoting Twombly, 550 U.S. at 555*
2 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

are no longer live or the parties lack a legally cognizable interest in the outcome."

Summary of the Argument

The defendants bring a Partial Motion To Dismiss plaintiff's second amended complaint (PMTD) based upon FRCP 12(b)(1) indicating some claims lack standing and/or moot and FRCP 12(b)(6) "failure to state a claim upon which relief can be granted" on p.8 of their motion. This Response produces abundant facts to refute all these allegations. First, the currently known past, present and future injuries are summarized. The §1502(c) violation is shown to have at least three independent legal sources to support standing. In the government's PMTD, the government sets up a number of straw man arguments which have the intention to misdirect from the actual facts and law in this case. The government has a legal burden to demonstrate the IMP "could not reasonably be expected to recur" which they neglect to mention and can not demonstrate. The TCJA does not impact the standing or mootness of this case. The government's amended Religious Exemptions likewise do not affect standing and mootness due to the defendant's damage to the market. In fact, the expected continuing difficulty to find insurance coverage is a separate violation of RFRA and the 1st amendment. In addition, the government violates the "dirty hands doctrine," "unjust enrichment," and benefits from judicial estoppel. In ¶43 of the Second Amended Complaint (2AC), I incorporated the further refinements of all arguments from other court submissions pertaining to this case. The defendant's appear to ignore this statement in ¶43 of the 2AC when convenient. For instance, this Court initially dismissed this case primarily because it found the burden upon my religious beliefs not to be substantial. Please refer to pp.9-21 of the Appeal Brief in *Dierlam v. Trump, 977 F.3d 471 (5th Cir. 2020)* (ABDvT) for arguments against that decision. I will not repeat the arguments here.

It is rather ironic the government cites *Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24*

(1916) on p.27 of the PMTD, "the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation." The ACA in general was never crafted to be taxation thus the repeated use of the term "penalty" in reference to the IMP in the original bill. The act was arbitrary in the sense it was an unrestrained, autocratic abuse and usurpation of power. The actual intention of the act was one of tyranny. It had the effect and intention to create and control a health insurance marketplace not for any purpose of regulation but to rule over the participants and confiscate and direct property from political and religious enemies to constituencies of its choice. This claim in the Complaint is the central font from which all the many other violations flow. At its heart, as suggested by the *Brushaber* decision, the ACA is unconstitutional based upon the 4th and 5th amendments. As the facts to support this and other claims in the complaint form a tangled web with the violations interrelated, overlapping, and cumulative my burden is to show only one set of facts to support all the claims. The Complaint and this Response present more than sufficient facts to state a claim for relief.

Argument

I – Standing

A – First Element - Summary of Injuries Retrospective, Current, and Prospective

The first element of standing requires an actual or eminent, concrete and particular injury. Despite the government's insistence that current exemptions provide all the relief I requested, these exemptions actually provide little if any of the relief I requested. Considerable harm has been and will be done by the defendants and the ACA. In summary, the following injuries were or will be sustained and traceable to the defendants: RETROSPECTIVE - a)The payment of the IMP for a current total of $5626.22. b)The defendant's regulation forced me to drop my employer's health insurance in 2013. CURRENT - a)The inability or difficulty to find health insurance which conforms to my beliefs and is affordable which was caused by the defendants

hijacking of the market, b)I currently have no health insurance therefore I am hesitant to seek medical attention due to the possible crippling cost. I face increased danger to health, which the government has caused by the loss of a "generally available, non-trivial benefit" as recognized by previous courts.[3] c)The unconstitutional restrictions and limitations on so called "religious health care," prevents it from being an alternative I can choose. PROSPECTIVE - a)The eminent raising of the IMP above $0. b)The illegitimate expansion by the defendants of other provisions of the ACA similar to the HHS Mandate in the name of health care "if unchecked by [] litigation."[4] c)The continuing difficulty and pressure from the defendant's regulations to violate my beliefs in any effort to maintain health insurance. These latter injuries are eminent. As there are multiple claims more details on the elements of standing will be provided in the following.

B – The government is culpable for violation of §1502(c) as a private right of action and wavier of sovereign immunity preexisted the ACA. Common sense suggests notice must proceed injury to have any value.

Pages 7-9 of my Response to the Government's MTD the first Amended Complaint Dkt#39 (RMTD1AC) is still applicable. In short, a wavier of sovereign immunity, a private right of action, and remedy preexisted the ACA in 5 USC §702, 28 USC §§ 1346, 1340, and 1331, and 2674. These statutes are applicable for IRS taxes and penalties. Congress placed the IMP within the IRS code therefore these statutes apply. The injury was the payment of the IMP covered by these statutes to which at least in part the defendants exposed me. Also, the agencies commanded by Congress in §1502(c) to provide notice to applicable individuals are the same agencies who created the HHS Mandate[5], which placed individuals like myself between a rock and a hard

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

4 *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). p.190*

5 I did not invent the term "HHS Mandate" as implied in footnote 8 of the government's PMTD. It has appeared in numerous other cases for example, *LITTLE SISTERS POOR SAINTS PETER PAUL HOME v. PA, 140 S. Ct. 2367.* It does NOT refer to any provision of the ACA. It refers solely to the defendant agencies regulations which were above and beyond the requirements and scope of the preventative services provision of the ACA, more specifically the abortion, contraceptive, sterilization services and related counseling.

place, i.e. my religious beliefs and the requirements of their regulations, constituting another injury. However, I am not trying to enforce §1502(c), rather it is my contention that the agencies' bad faith in their failure to provide proper notice and their creation of the HHS Mandate contributed to the injury. See pp.30-32 of ABDvT for more detail on the waiver of sovereign immunity and how 28 USC § 2680(c) does not provide a shield to the defendants.

The Supreme Court in *Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)* indicated the proper method to initiate a determination of Congressional intention is in the text of the statute. "We therefore begin (and find that we can end) our search for Congress's intent with the text and structure." The stated goals of the ACA were to extend health insurance coverage and reduce costs. §1502(c) despite the contention of the government was clearly intended to help applicable individuals avoid the penalties and obtain coverage. §1502(c) of the ACA does not contain the word "after" or any functional equivalent to indicate a previous return without minimum essential coverage triggers the notice from the IRS in contradiction to the government's contention on p.13 of their PMTD. §1502(c) only requires two conditions a)the individual file a tax return and b)the individual not have minimum essential coverage to be triggered. The agencies should have had access to this information prior to the 2014 tax year.

I received my first and only letter from the IRS which could be described as compliant with §1502(c) as well as hearing of others receiving a similar letter near the end of 2016, well after I filed this lawsuit giving the government much advance warning. By that time, applicable Individuals would have been required to pay the IMP for nearly two years when the IRS sent these letters. It is not sensible to create a new penalty and demand upon citizens and not provide warning and assistance BEFORE the event. The letter I received was not the one in footnote 5 of the PMTD, which does not appear intended for individuals but rather insurance dealers and

similar institutions. The defendants state on p.17 of the government's MTD Plaintiff's First Amended Complaint Dkt#37 (MTD1AC) that the HHS Mandate was not required for minimum essential coverage thereby implying insurance compatible with my beliefs existed at the time the IMP came into effect. The letter I received contained more than a web address, it also contained a phone number for additional help. I remember thinking at the time, if I had received this information before the lawsuit I possibly could have avoided the exposure to the IMP if compatible insurance did exist. This lawsuit was well under way and I knew the Law contained the HHS Mandate for all Applicable Individuals with NO exceptions for which I qualify; I did not pursue. The defendants still have not come up with a single example of health insurance compatible with my beliefs existing at that time because they can not, even their inadequate individual religious exemptions did not exist until 2018. Texas never set up a "health care exchange" therefore healthcare.gov could not direct me to such. In addition, healthcare.gov was a complete failure on its October 2013 launch. I only remember checking the website when directed by IRS tax forms to check for a religious exemption, which occurred in 2015 for the 2014 tax year. It did not direct me to any assistance in finding health insurance when it indicated I did not qualify for a religious exemption to the IMP.

C – The defendants are responsible for harming the public interest, a fact which should bolster standing.

In *Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003)*, which involves the interpretation of a statute by the appellee in that case as forbidding an agency from acting beyond a deadline set by statute so that it could avoid payments to its retirees and transfer that responsibility to the public purse. The Supreme Court in that case indicated that the deadline specified by Congress did not suddenly lift the agency's authority to act, but was merely a spur to act in a timely manner. In the present case, the issue is NOT the authority of the agencies to act. Affirmation of

authority to act after the deadline could protect the public interest in *Barnhart*. The instant case is the opposite of *Barnhart*, here agency action to send notice years after the Individual Mandate penalties were assessed accomplished nothing except the waste of taxpayer money as the penalties had been paid. A failure to act timely on the part of the agencies, CAUSED harm to the public interest in the present case.

In *Brock v. Pierce County, 476 U.S. 253, 106 S. Ct. 1834, 90 L. Ed. 2d 248 (1986)*, the Supreme Court stated,

> This Court has frequently articulated the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided."

The agencies failure to act has prejudiced the public interests. It had the effect of exposing the taxpayer to the harm of the IMP when proper and timely compliance may have avoided such in violation of the principle articulated by the Supreme Court. A favorable decision should lead to a refund of all the monies paid for the IMP.

D – The IRS honored the 2018 claim, which at least tacitly acknowledged some entitlement.

Further evidence of the applicability to this case of the statutes cited above can be obtained from the fact the IRS honored my claim form for the 2018 tax year, which was similar to the previous years. The IRS either acted without proper authority or tacitly acknowledged the entitlement and waivers mentioned above which are now denied by the government for the previous years.

E – The doctrine of "Unclean Hands" provides an independent means to secure standing.

Another independent source of standing based upon equity springs from the doctrine of "unclean hands." This doctrine indicates the parties must not have been unethical or act in bad faith in their prior actions regarding the subject of the complaint. Clearly, the defendants have

not properly carried out their duties as directed by §1502(c), and further in their PMTD on p.12 they make the argument there is no duty since there is no penalty for violation. Under this doctrine, my standing does not stem from the statute but the defendant's bad faith. Are the defendants to be allowed to profit from their bad behavior and harm of the public interest? Based upon the sections above, the three elements of standing have been well established for this claim.

F – The Supreme Court determined the Individual Plaintiffs in the *California* Case do not have standing. The defendant's assertion these plaintiffs are similarly situated is incorrect. The injuries I claim are much different.

On p. 3 of the PMTD the government asserts the individual plaintiffs in *California v. Texas, 141 S. Ct. 2104 (2021)* are similarly situated to myself. Nothing can be further from the truth. The Supreme decided the individuals had no current injuries since they indicated solely because of the Individual Mandate they continued to buy unwanted health insurance even though the IMP is $0. For obvious reasons, I have never made such a claim. My injuries are very different and include current injuries as described above. The Court declined to rule on whether the reduction to $0 by the TCJA of the IMP leaves the ACA unconstitutional. I would be happy to make this argument, which is also more evidence for an arbitrary, capricious, and unreasonable construction, but it is practically inevitable Democrats especially through reconciliation will raise the IMP bolstered by this Supreme Court decision to close the window of opportunity for any other suit if for no other reason. Eminent harm on this basis is also justified. The defendants are very likely to repeat their past behavior of collecting the IMP.

II – The government mischaracterizes the claims and facts in the Complaint to form an easier target to attack all the prospective claims for lack of Mootness or standing.

Section II of the PMTD sets up several straw man arguments. The government misstates the claims and facts in this case so as to have a much easier path to vitiate and declare them moot or without standing. A proper analysis will show this conclusion is far from the truth and a

controversy remains between the parties despite the insistence of the government the alterations in the regulations and statutes have removed any legally recognizable violation of rights or claims against the government.

A – The TCJA did not affect the standing or mootness of this case. The government can not show the Individual Mandate Penalty, which was never removed from the ACA, will not be raised as required by the mootness doctrine. The Biden administration has promised to raise the penalty.

The defendants simply do not address the central issue of the law here as expressed in the Standard of Review section. The exception or refinement to the "standing set in a time frame" doctrine is first "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." The government insists the TCJA of 2017 zeros out the penalty however they make no effort to show the "allegedly wrongful behavior" will not recur, because they can not. Here the "allegedly wrongful behavior," the IMP, is not considered wrongful by current law, *Nat. Fedn. of Indep. Business v. Sebelius, 132 S. Ct. 2566, 567 U.S. 1, 183 L. Ed. 2d 450 (2012)* (NFIB). It is the absence of this behavior, more specifically the lack of any revenue, which was considered wrongful by the *California, 141 S. Ct.* state government plaintiffs who initiated the lawsuit for just that reason.

One could make the argument, although the government did not in the PMTD, that upon passage of the TCJA the instant lawsuit transformed into one "brought to force compliance." In which case it becomes MY BURDEN to show "if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury [is] certainly impending." However, this burden is so light it is almost nonexistent. First, "tax and spend" is a normal inclination of Democrats, who are currently in power in Congress. The Biden Administration has already indicated they will raise taxes including the IMP. See

https://www.foxnews.com/opinion/georgia-senate-runoffs-democrats-tax-increases-grover-norquist and https://www.breitbart.com/politics/2020/12/17/carney-bidens-massive-tax-hikes-inevitable-if-democrats-win-georgia-senate-races/ Second, the IMP, the "allegedly wrongful behavior," was never removed from the Law only reduced to $0, which is to say the most offensive part of the law which here is in contention was NEVER modified by the TCJA. Therefore, the challenge to my standing is not valid since no substantive change has occurred from the day this lawsuit was filed. Therefore, even the injury of additional Individual Mandate Penalties "[is] certainly impending."

B – The Religious Exemptions to the HHS Mandate are inadequate and do not moot this case or reduce my standing. The defendant's regulations have harmed the market and prevent it from recovering as it is much less a FREE market. I remain an "Applicable Individual" without a willing insurer and the continuing pressure from the defendant's regulation will be a large obstacle to maintain coverage. The government uses the insurers as a false proxy to do what it can not.

The permanent injunction issued in *DeOtte v. Azar, 393 F. Supp. 3d 490 (N.D. Tex. 2019)* mentioned by the defendants on p.16 of their PMTD is very similar to the existing Individual Exemption at 83 Fed. Reg. 57,536 (Nov. 15, 2018), therefore a separate argument is not necessary. I maintain the Individual Religious exemption is inadequate for several reasons: 1)The defendant's regulations without any Individual exemption were in effect from about 2012 to 2018. Insurers during that time were forced to include the HHS Mandate in all health insurance contracts. These contracts tend to be adhesion contracts. Take it or, leave it. The HHS Mandate continues to be the default requirement for all health insurance contracts. The exemption merely allows a WILLING insurer to change this default and offer a contract which does not include the HHS Mandate. The Minimum Essential Service provision of the ACA, of which the HHS Mandate is but one element, mandates what must be in a health insurance contract such that free market forces can not properly operate or act to correct any damage. The insurers are restricted in

what they can offer and therefore individuals are restricted in what can be purchased. Many insurers no longer offer products in the government owned and operated Individual marketplaces because it was not profitable. For these reasons the defendant's have so skewed the market that the playing field is not level. The largest party and beneficiary of the health insurance contract is the government. Current insurers have little incentive to change the default contract if they are currently able to make a profit. 2)Due to the numerous lies from the government and its affiliated third parties, I no longer have any trust in their words. At a minimum, I would expect any health insurer in some way to certify their product is free of the HHS Mandate and related services. One would expect few if any insurers would offer such an HHS Mandate free policy or it may be more costly. 3)Even if a health insurance policy can be identified there is no assurance the insurer will remain in business or the policy can be maintained for other reasons. Thus, necessitating another long, taxing, and perhaps fruitless search without any assistance with which other citizens with belief systems which allow the HHS Mandate or which support it do NOT suffer. This burden even considered alone constitutes government pressure to abandon my beliefs in violation of RFRA and the first amendment. I am placed at a decided disadvantage compared to other citizens because the universe of products has been greatly reduced. 4)Currently, I do not have health insurance. If a willing insurer can not be located, I remain an "applicable individual" as defined in the ACA per 26 USC 5000A(d) and the exemption is useless. 5)As mentioned above the exemption requires a willing insurer to issue the policy, however "minimum essential coverage" and many other mandates upon the insurer indicate it is not a party acting upon its own free will. Yet the government has insisted the system set up by the ACA is the same as Medicare and Social Security and has been given the same exceptions as those programs. See p.19 of the MTD1AC. The government shifts its argument between the system is like Social

Security and Medicare and the system is formed of private third parties free to determine what is contained in a policy whenever it is convenient. Both can not be true. This argument should be barred by judicial estoppel. I submit neither party is free. The government could create a mandate to protect citizen rights and avoid disparate impact. The fact that it will not is evidence another agenda is at work, which aims to enslave not protect. From "Restricting the Freedom of Contract: A Fundamental Prohibition," Yale Human Rights and Development Journal: Vol. 16: Iss. 1, Article 2. p.92 in equal protection analysis, "When discussing impact, the courts are ultimately engaged in a searching examination that asks whether the allegedly unprotected classifications were used as false proxies for categories otherwise eligible for stricter scrutiny." Here it is possible to see the use of a private third party to do what the government can not do directly is just such a "false proxy." See below for more details. The reasons above among others indicate the government's analysis is totally incorrect. None of the prospective claims are moot, all the elements of standing remain in place, and there is certainly no lack of controversy.

III – Other Claims do not lack sufficient facts to support a plausible cause for relief under 12(b)(6). The facts in this case are interrelated, overlap, and accumulate, but only a subset of these facts is required to support all claims because of the tangled web.

The claims in the Complaint are interrelated and accumulate to support the general thesis the ACA is a sham with an actual goal of tyranny. The many violations of civil rights indicate the self-contradictions within the law and regulations can be better explained with this intention rather than a goal to expand health care and lower cost. Only one set of facts to support a plausible claim for relief need be provided by Rule 12(b)(6). In this case, the set of facts to support the claims must trace the violations which are a "tangled web"[6], which can be expected if the true goal of the legislation is not as stated. It should not be necessary to repeat the facts and

6 "What a Tangled Web We Weave/When First We Practice to Deceive!" from "the play Marmion by Sir Walter Scott

their interrelationships to support every claim. Other facts to support the claims do exist some of which are in this document. Because of the interrelationships and overlap, it is difficult to separate the violations in an efficient and coherent manner for presentation. The same act can violate multiple laws and principles. Many of the arguments presented here are copied from other documents especially from pp.6-30 of the Petition for Certiorari in Supreme Court Case No.20-946 (PCSC). Please refer to this document for more detail.

A – Facts in support of Claim III include the errors in the IOM report, errors in the "contraceptive coverage" provision, and the failure of all three prongs of the Lemon test.

First, to correct the factual errors in the PMTD. On p. 5 of the PMTD again the government uses the term "science-based" to describe the IOM[7] report. Aside from the evidence in the 2AC, on p.66 of the IOM report is the statement, "...evidence and expert judgment are inextricably linked,..." This statement alone is sufficient to SEPARATE THE PANEL AND THEIR RECOMMENDATIONS FROM ANY BASIS IN SCIENCE. Many introductory texts explain and define the Scientific Method. If "expert judgment" is the "evidence" the method is short-circuited. Experiment is at the heart of the method, as it is a test of the hypothesis against the real world. In contradiction to this so called "expert judgment," evidence exists the recommendations harm women.[8] This beliefs over science attitude of the Left has not stopped. In the following link, Dr. Robert Malone, who is a pioneer in mRNA vaccines, about half way through the interview talks about the "academic thought police" after he posted some information on social media which went against the Leftist political narrative on coronavirus

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

8 See Brief of the Association of American Physicians & Surgeons et. al. Amicus Curiae, Zubik v. Burwell, 2016 WL 2842449 (U.S. May 16, 2016), Brief for the Breast Cancer Prevention Institute as Amicus Curiae, Zubik v. Burwell, 2016 WL2842449 (U.S. May 16, 2016), Brief of Michael J. New, PH.D., Amicus Curiae, Zubik v. Burwell, 2016 WL 2842449 (U.S. May 16, 2016), and Helen M. Alvare, No Compelling Interest: The 'Birth Control' Mandate & Religious Freedom,58 VILLANOVA L. REV. 379 (2013)

vaccines. He was banned from the platform, but later reinstated. He stated in the interview, "We can't get to scientific truth if we can't discuss things." He also indicated that many people for good reason are mistrusting government information sources.
https://www.theepochtimes.com/dr-robert-malone-mrna-vaccine-inventor-on-the-bioethics-of-experimental-vaccines-and-the-ultimate-gaslighting_3889805.html

Second, the ACA contains no "contraceptive coverage requirement." This requirement is not as universal as the defendants suggest, not only are "grandfathered plans" exempt but so is Medicare which covers about 1 million women of child bearing age, which would be a major oversight if the defendant's interpretation of "preventative services" in the ACA were correct.[9] This requirement was obviously created by the defendants from thin air, which raises the question, what can they NOT create in the name of health care? This is yet another abuse in itself which "if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury [is] certainly impending." The HHS mandate currently exists and continues to have many victims as has been and will be shown. Furthermore, I see nothing to prevent the agencies from placing anything in "minimum essential coverage" thereby forcing the population to accept and pay for any benefit or injury to any group and call it health care. For instance drugs for executions or euthanasia, supplies for a death lottery if the government should determine the country contains too many white people, etc. With this new power, the defendant agencies could confiscate more property than the IRS brings into the treasury. Citizens would have little recourse or ability to protest as a so called private third party is charged with the confiscation.

The Lemon Test as cited on p. 16 of the PMTD fails in all three prongs. First prong – No

9 https://www.medicare.org/articles/does-your-medicare-plan-include-birth-control-coverage/

secular legislative purpose. The stated purpose of "increas[ing] women's access to recommended preventive services" is contradicted by facts. a)The IOM panel was highly flawed in their recommendations as pointed out by the dissenter. Their motivation was not "science-based" but instead came from the belief system of the Left. b)The services are not "preventive" as intended by the ACA provision as indicated in the previous paragraph and many women volunteer to pregnancy; it is not a disease. c)These services cause net harm to rather than protect women. See pp.23-25 of the First Amended Complaint (1AC). Also the defendant's willful violation of equal protection in denying the FDA approved sterilization method to men free of charge contradict a goal of improving women's health or equalizing costs. From *Edwards v. Aguillard, 482 US 578 (Supreme Court 1987)*, "...it is required that the statement of [the government's] purpose be sincere and not a sham." See pp.30-34 of the 1AC and the section below. Second Prong – advancement and inhibition of religion. The regulation creates four classes because it facially discriminates against gender and as applied against certain religions. The class who receives a free benefit contains those favored by the government and share its beliefs. Whereas, the class most harmed is disfavored by the government and oppose those beliefs on religious and political grounds. Therefore, in both sub-prongs, this prong also fails. Third Prong – Excessive government entanglement. "Excessive government entanglement" and "political divisiveness"[10] can be seen in the long history of suits against the HHS mandate as well as the multiple revisions of the mandate or its exemptions.[11] This prong fails. In addition, the fraud and deception on the part of the government has allowed the acquisition and use of private property tangible and intangible. The "Principle of Restitution" or "unjust enrichment" demands the government not be

10 *Lynch v. Donnelly, 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring)*

11 See https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/ for a partial list of cases against the HHS Mandate and https://www.becketlaw.org/research-central/hhs-info-central/ for a timeline of the rule changes.

allowed to keep ill gotten gains and the parties be restored to their original state.

B – Facts which support Claim IV include those provided in the previous section. Hostility to certain religions and favoritism of other beliefs will support a finding of discriminate intent and lack of neutrality. Statements from high ranking members of the Democrat party and the Obama administration as well as affiliations of the IOM panel reveal favoritism and hostility.

The previous section also provides evidence the free exercise clause is violated. See p.37 of the RMTD1AC. In support of equal protection and 1st amendment violations, which are related, a "discriminate intent" and "lack of neutrality" should be present.[12] Hostility to certain religions and favoritism to the Leftist belief system can be seen in the following: a)

> Michael O'Dea, executive director of Christus Medicus Foundation, wrote to Sebelius, "It is clear that the Institute of Medicine has an agenda. Virtually all of the Women's Preventive Services committee members are affiliated in some way with Planned Parenthood." Further research by HLI America has substantiated O'Dea's concern, revealing that many of the committee members have strong relationships with both Planned Parenthood and NARAL Pro-Choice, and have actively supported pro-abortion candidates for public office.[13]

b)Although President Obama provided assurances to Bishop Dolan around November of 2011, religious freedom would be protected in the implementation of the ACA, two months later Obama rather abruptly told him he had until August to figure out how he was going to comply with the birth control mandate.[14] c)A very likely reason for Obama's change to a confrontational and hostile stance in the previous point was later revealed in a wikileak email from John Podesta, the Clinton Presidential Campaign Chairman, dated 2/11/2012. In the email he admits to complicity in the creation of groups whose purpose was to subvert the Catholic Church specifically in the area of contraceptive coverage. Hostility toward the orthodox Catholic faith is evident in this email among the higher ranks of the Democrat Party.[15] d)In October of 2011,

12 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993)*
13 https://www.thepublicdiscourse.com/2011/09/4031/
14 https://freerepublic.com/focus/f-religion/2866637/posts
15 https://wikileaks.org/podesta-emails/emailid/57579 and https://www.catholicvote.org/ongoing-updates-clinton-campaign-anti-catholic-wikileaks-scandal/

Kathleen Sebelius, Secretary of HHS at that time, gave a speech at a NARAL luncheon where she announced that the Obama administration favored health insurance coverage of birth control without copays. She said, "We are in a war," with reference to a few pro-life demonstrators at the entrance to the event.[16]

C – Facts which support Claim V include exemptions given to certain religions which are contradictory to the stated purpose of the ACA in violation of law and preventing religious health care. My choices are unfairly limited and I am treated like a citizen disfavored by the government.

pp.26-30 of the RMTD1AC is still applicable despite the adoption of the inadequate Individual Religious exemption to the HHS Mandate after that writing. Without health care insurance, I remain an "Applicable Individual," therefore I will be subject to the IMP when it is increased, which will act as additional incentive to violate my religious beliefs in violation of RFRA and the first amendment as well as due process and equal protection. The hostility of Democrats to the Catholic faith has been shown above. Certain religions are granted an exemption which is contradictory to the stated purpose of the ACA. See https://www.cnbc.com/id/100935430

The ACA limits my choices to a)the ghetto of a "health care sharing ministry" which does not meet all my moral objections and is an inferior product to insurance coverage since most if not all of these ministries are Protestant, which do not have the same requirements as the Catholic faith. Many if not all of these ministries also limit the total dollar amount of care allowed for each participant as well as the number of health incidents for a particular reason each year. The ACA does not require any standard of care of the Health Care Sharing Ministries. The instant case appears worse than *Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954),* which involved a violation of equal protection and due process although here the

16 https://www.creativeminorityreport.com/2011/10/sebelius-at-war-with-pro-lifers.html

discrimination concerns the protected class of religion rather than race. b)Not having health insurance exposes me to a potential for crippling costs even if the IMP remains at $0, or c)a probable hopeless, never ending search for affordable health insurance which complies with my moral objections and from a provider willing to certify such, is not a fair or reasonable choice. As formulated by the ACA so called "religious health care" and health insurance are decidedly NOT equal. Disparate impact here exists based upon religion rather than race or alienage.[17] The two requirements of health care sharing ministries function to block any future belief system from "religious health care" as well as any innovation of products with long established religions. Granting certain religions preference in contradiction to the purpose of the law which is also "not closely fitted" to the government's purpose should evoke strict scrutiny.[18]

D – Facts which support an Equal Protection Violation in the HHS Mandate include a large amount of evidence providing female contraception and not male contraception free of charge provides a perverse incentive to shift the burden and risks which are harmful and even deadly upon females while providing their male partners with the free FDA approved contraceptive would be cheaper, safer, and more efficacious in direct contradiction to the stated goals of the government. Other arguments presented by the government are either self-contradictory or not supported by fact or law.

Section B above provided evidence of a "discriminate intent." pp.30-34 of the RMTD1AC provides an introduction to this claim. The government in their PMTD presented many of the same defenses as in Appeals Court. See pp. 14-17 of the Reply Brief of the Appellant in *Dierlam v. Trump, 977 F.3d 471 (5th Cir. 2020)* (RBDvT) for the responses. On pp.19-21 of the PCSC I briefly summarize the legal analysis from the review, Gabriel Ascher "Good for the Gander, Good for the Goose: Extending the Affordable Care Act Under Equal Protection Law to Cover Male Sterilization" 90 N.Y.U. L. Rev. 2029 2015 p.2038. I do not agree with the conclusion of extending the HHS Mandate. It can be gathered from this article, like

17 *Arlington Heights v. Metropolitan Housing Corp., 280 429 U.S. 252 (1977).*
18 *Larson v. Valente, 456 US 228 (1982)*

practically every where in the ACA, the stated purpose of the defendants is contradicted by their words and actions. The instant case is closer to *Craig v. Boren, 429 U.S. 190, 197 (1976)* in which a classification based on sex did not advance the purpose of the law. However, the HHS Mandate is much more invidious. Not only is there no history of discrimination favoring male sterilization or against female sterilization, but 10 to 20 women die every year from tubal ligation surgery compared to not a single recorded death due to a male vasectomy. Id. at p.2058 Female sterilization is also more likely to fail than male sterilization. The cost of the procedure is many times more expensive for women than men and the cost of the complications which may develop are also much higher for women. Offering female sterilization free of charge and not male sterilization creates a perverse incentive which places the life and health of women at even greater risk. Id. at p.2034 The government may be giving some women a free service benefit, but they are sacrificing the lives of at least some these women to their belief system.

E – The defendants again misdirect from the actual charge in Claim VII. Facts which support a violation of Equal Protection and Due Process in the ACA are presented in other sections. One need only point out how these violations treat similarly situated individuals differently, and how the artifices of a "false proxy" and "compelled association" are used to block due process.

On p.21-22 and 26-27 of the PMTD the defendants again set up a straw man argument. It is NOT the "shared responsibility payment provision" or "minimum essential coverage" alone which is challenged, it is the entire Law, just as the title of the section indicates. As pointed out previously, multiple provisions are either self-contradictory or contradictory to the stated purposes. The very design of the Law is intended to be "oppressive and partial" with a better fit to the goal of tyranny rather than any expansion of health coverage or cost reduction. The first part of this Claim in the complaint is pointing out a more equitable way to address health care if the Democrats were sincere about their goals as well as the irrational, capricious, and arbitrary

nature of the law. By intention, similarly situated individuals are repeatedly not treated the same. 1)The religious exemptions do not treat similarly situated individuals alike, which is also a "fundamental right." In total the ACA violates the 1st, 4th, 5th, 9th, and 10th amendments. 2)Democrat constituencies are favored while others tend to be harmed, which is also reflected in the IMP exemptions. 3)The ACA allows abuses like the HHS Mandate incorporated into "minimum essential coverage", which also violate equal protection and due process. More such abuses are certain to follow. As indicated in section B and below the use of the artifice of a "false proxy" and a "compelled association" effectively blocks due process to protect fundamental rights. pp.34-36 and 41-42 of the RMTD1AC are still applicable. The court decisions in *Brushaber v. Union Pac. R.R. Co., 24-25, 240 U.S. 1 (1916)* and *Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934)* would suggest the reasons presented here are sufficient to overturn the ACA in its entirety. See also pp.23-26 of the PCSC.

F – The Congress which passed the ACA assumed several powers which the Constitution does not provide. These violations are outlined in Claims VI – VIII.

Claim VI - VIII deal with a lack of Congressional authority to impose provisions of the ACA, which should be viewed as a whole since its provisions interact, rather than are isolated and independent as the defendants constantly suggest. The Supreme Court in *NFIB* indicated most of the authority the Congress claimed to authorize its actions were fallacious. The majority isolated the IMP and indicated it could be supported if it were interpreted as a tax. However, they provided no justification for the isolation of this Penalty from the rest of the Law. The ACA assumes Congress to have the following powers which the Constitution does not grant, the invalidity of any one of can invalidate the entire law:

1 – Congressional power to tax is not plenary. Direct taxes must be applied in proportion to population. The Individual Mandate and the Individual Mandate Penalty together form a direct tax, which is not levied in proportion to population.

The power of Congress is limited by the Constitution, but it is also limited by legal principles which may not be explicitly defined but form part of the framework upon which the Constitution was created and are often rooted in tradition. The definition of direct and indirect taxes, which the Supreme Court has not yet determined, must be viewed in this context. On pp.26-30 of the PCSC, I briefly review direct and indirect taxation, "consent of the governed", and proper Constitutional interpretation as well as how here these topics interact. In *Janus v. American Federation of State, 138 S. Ct. 2448, 585 U.S., 201 L. Ed. 2d 924 (2018)* the court laid out principles to overturn stare decisis:

> ...stare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights...Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that stare decisis does not require us to retain *Abood*.

See also *Knick v. TP. OF SCOTT, PENNSYLVANIA, 139 S. Ct. 2162, 204 L. Ed. 2d 558, 588 U.S. (2019).*

Any reasonable and consistent interpretation of the Constitution would indicate the Supreme Court majority was incorrect in *NFIB.* The factors cited above are operational in the instant case as well. The mandates imposed by the ACA in section 1501 are direct and unconstitutional. Despite what the defendant's view as triggering the IMP on pp.25-26 of the PMTD, if Congress grants exemptions to a tax, it does not change the general character of that tax especially here as it is clear Congress intended an exaction of the purchase of a product or a like sized penalty be generally applied to the entire population including children.

2 – Congress lacks the power to create or destroy commerce. Taxes which fall outside of three purposes are unconstitutional.

Congress only has power to regulate commerce, NOT create or destroy it, which is the

intention and effect of the ACA. Also a tax levied by Congress must be for the purpose of the payment of Debts, provide for the common defense, or the General Welfare otherwise it is unconstitutional. Minimum essential coverage and the IMP are designed to exceed these limitations and are therefore unconstitutional. See pp.26 of the PCSC, and pp.39-41 of the RMTD1AC.

3 – Congress is not granted any Constitutional power to pressure anyone to enter a Contract. Freedom of Contract is rooted in tradition. As the value of the contract is reduced or eliminated by the terms of the government, a confiscation has occurred and the principle of "unjust enrichment" is applicable.

Congress has no power to pressure or require individuals to enter a contract or purchase any product. See pp.8-12 of the PCSC for a brief discussion on freedom of contract and how it is relevant to the instant case. The value of the contract has been decreased to the parties other than the government, the government has therefore made a confiscation of property in violation of the 5th amendment without due process. The principle of "unjust enrichment" also applies. See pp.20-22 of the RBDvT.

4 – Provisions of the ACA violate the implied 4th and 9th amendment right to privacy.

On p.27 of the PMTD the government misstates the claims to violations of privacy and association. I do not claim a violation of any intimate association with an insurance company in the instant case. I claim a violation of the right to be free from governmental intrusion and compulsion in a PRIVATE contract with a supposedly PRIVATE third party to direct PRIVATE, personal, and intimate health care decisions for myself and any potential family. See pp.41-43 of the ABDvT.

5 – The *Janus* severely limits government ability to form "compelled associations." The ACA creates a "compelled association" much more egregious than the one described in *Janus* as no due process to protect Constitutional rights is provided by the ACA.

Similarly, on p.27-28 of the PMTD, it is not "any expressive activity on the part of providers," which I see as a violation. The violation is the expressive activity on the part of the

defendants, which use the providers as a "false proxy." It is the defendants belief system to which I am pressured to agree by word and action in violation of Constitutional rights. See pp.18-20 of the RBDvT for a brief explanation of the close analogy between the laws forming the compelled association in *Janus* and the provisions of the ACA to coerce an association. The situation is much worse in the instant case as some due process was in place to hear and resolve violations of rights in the *Janus* case and the government employee could always quit their job.

Conclusion

As discussed above, the ACA and its regulations violate the 1st, 4th, 5th, 9th, and 10th amendments to the Constitution as well as legal principals such as "unclean hands," "unjust enrichment," and "judicial estoppel." Therefore, the government's PMTD should be denied in its entirety. In addition, the "wrongful behavior" mentioned in this Response was primarily caused by members of the Democrat Party for the goal of tyrannical rule. In pursuit of the same goal this behavior has not changed as seen by recent events such as the violation of Constitutional rights using a so called private third party as a false proxy. See https://nypost.com/2021/07/15/white-house-flagging-posts-for-facebook-to-censor-due-to-covid-19-misinformation/ "If unchecked by the litigation" such as this lawsuit, I am afraid we will only fall deeper into the abyss in which the Constitution becomes irrelevant and we are ruled by a totalitarian Fascist/Communist government.

If the court should find the fault with the Second amended complaint, despite a ¶43 incorporation of all subsequent documents, to be a lack of "sufficient factual matter, accepted as true" for one or more claims to avoid a 12(b)(6) dismissal, then I would ask leave of the court to amend the Complaint so as to incorporate the additional material presented here and from previous submissions into a consolidated Third Amended Complaint. I am unaware of any rule

which limits the size of a complaint but, this Third Amended Complaint will likely be of considerable length. The FRCP 8(a) prescription for a "short and plain statement" can not be reasonably met under the higher standard to which I will be subject. I would also ask the court to be as specific as possible to what it finds to be lacking in the Complaint.

Date: 7/26/2021
Respectfully Submitted,
John J. Dierlam
John J. Dierlam

Certificate of Service

I certify I have on July 26, 2021 mailed a copy of the above document to the clerk of the court at:

United States District Clerk
Southern District of Texas
515 Rusk, Room 5300
Houston, TX 77002

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

Emily S. Newton
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Room 7132
Washington, DC 20530

I have emailed a courtesy copy to the Defendant's counsel at Emily.S.Newton@usdoj.gov as well as the Case Manager for Judge Ellison at Arturo_Rivera@txs.uscourts.gov.

Date: 7/25/2021
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