UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J. DIERLAM, *Plaintiff*, v. JOSEPH R. BIDEN JR., in his official capacity as President of the United States, *et al.*, *Defendants.*	Case No. 4:16-CV-00307

DEFENDANTS' PARTIAL MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED COMPLAINT

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants, Joseph R. Biden Jr., in his official capacity as the President of the United States, the United States Department of Health and Human Services ("HHS"), Xavier Becerra, in his official capacity as Secretary of HHS, the United States Department of the Treasury ("the Treasury"), Janet Yellen, in her official capacity as Secretary of the Treasury, the United States Department of Labor ("Labor"), and Marty Walsh, in his official capacity as the Secretary of Labor ("Defendants"), by and through their undersigned counsel, hereby move to dismiss Counts I and III-VIII of Plaintiff's Second Amended Complaint in their entirety and Count II to the extent it seeks prospective relief. For the reasons set forth in the accompanying Memorandum in Support of Defendants' Motion to Dismiss, this Court should dismiss those claims and deny Plaintiff's requested relief with respect to them.

Respectfully submitted,

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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NATURE AND STAGE OF THE PROCEEDING

On May 5, 2021, Plaintiff John J. Dierlam filed a Second Amended Complaint against Defendants, challenging their implementation of § 1502(c) of the Patient Protection and Affordable Care Act ("ACA" or "the Act"), as well as the legality of other provisions of the ACA, including the minimum essential coverage provision, its religious exemptions, the shared-responsibility payment provision, and the preventive services coverage provision to the extent it requires coverage of contraceptive services. Second Am. Compl. ("2AC"), ECF No. 94. On June 18, 2021, the Court granted Defendants' motion for an extension of time to file their response to Plaintiff's Second Amended Complaint until July 8, 2021. ECF No. 97. Defendants file this memorandum in support of their motion, requesting that the Court dismiss Counts I and III-VIII of Plaintiff's Second Amended Complaint in their entirety and Count II to the extent it seeks prospective relief under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[1]

ISSUES PRESENTED

Plaintiff claims that Defendants failed to provide him with the requisite notification of non-enrollment under § 1502(c) of the ACA. In addition, Plaintiff brings a claim under the Religious Freedom Restoration Act ("RFRA") and challenges the constitutionality of the ACA's minimum essential coverage provision and related religious exemptions, its shared-responsibility payment provision, and its preventive services coverage provision to the extent it requires coverage of contraceptive services. The issues presented by Plaintiff's Second Amended Complaint and responded to in this memorandum are:

[1] Defendants are not moving at this time to dismiss Plaintiff's retrospective RFRA claim in Count II and respectfully request that after ruling on this partial motion to dismiss, the Court permit Defendants to confer with Plaintiff and propose any next steps, as necessary, for addressing any remaining claims.

1. Does Plaintiff have standing to challenge Defendants' purported failure to provide him with a notification of non-enrollment under § 1502(c) of the Act?
2. Even if Plaintiff has standing, does § 1502(c) create a private right of action, and has Plaintiff plausibly alleged a violation of § 1502(c), when notification under § 1502(c) is not a condition precedent to the shared-responsibility payment requirement?
3. Does this Court have jurisdiction to consider Plaintiff's prospective claims where the relief he seeks has been provided by the Religious Exemption Rule and the Tax Cuts and Jobs Act ("TCJA") of 2017?
4. Has Plaintiff alleged a plausible claim that the contraceptive coverage requirement or the religious exemptions to the minimum essential coverage provision violate the Establishment Clause?
5. Has Plaintiff alleged a plausible claim that the contraceptive coverage requirement or the shared responsibility payment provision violate equal protection?
6. Has Plaintiff alleged a plausible claim that the contraceptive coverage requirement violates the Free Exercise Clause?
7. Has Plaintiff alleged a plausible claim that the minimum essential coverage provision violates Congress's power under the Taxing and Spending Clause?
8. Has Plaintiff alleged a plausible claim that the minimum essential coverage provision violates procedural due process or substantive due process?
9. Has Plaintiff alleged a plausible claim that the minimum essential coverage provision violates his right of privacy or freedom of association?

SUMMARY OF THE ARGUMENT

Like his prior two complaints, Plaintiff's Second Amended Complaint raises a host of statutory and constitutional claims, challenging the ACA's minimum essential coverage provision and the contraceptive coverage regulations based largely on Plaintiff's religious and ideological disagreements

with those laws. The allegations underlying Plaintiff's claims remain largely the same, as Plaintiff concedes, and thus many of his claims should be dismissed for precisely the same reasons that the Court previously dismissed them. Moreover, Plaintiff's latest complaint does not take into account that beginning in tax year 2019, Congress zeroed out the shared-responsibility payment, such that the Supreme Court recently recognized that the minimum essential coverage provision is not enforceable and plaintiffs situated similarly to Plaintiff lack standing to challenge it. *California v. Texas*, 141 S. Ct. 2104 (2021). Plaintiff's latest complaint also does not acknowledge a rule promulgated in 2017 (and finalized in 2018) that provides an exemption relating to the contraceptive coverage requirement for individuals, like Plaintiff, who object to contraceptive coverage on religious grounds. Those changes in the legal landscape provide additional grounds for dismissing Plaintiff's prospective claims.

BACKGROUND

I. THE AFFORDABLE CARE ACT

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), to address the absence of affordable, universally available health coverage. Plaintiff's Second Amended Complaint continues to focus on two provisions of the Act: (1) the minimum essential coverage provision, which requires most individuals to maintain qualifying health coverage; and (2) the preventive services coverage provision (and its implementing regulations), which, as relevant here, generally requires group health plans and health insurance issuers offering non-grandfathered plans to cover all FDA-approved contraceptive services without cost-sharing.

A. Minimum Essential Coverage Provision

As first enacted, the minimum essential coverage provision required an "applicable individual" to either maintain "minimum essential coverage," have an exemption from the coverage requirement, or make a shared responsibility payment. 26 U.S.C. § 5000A; *see Nat'l Fed'n of Indep. Bus. v. Sebelius,*

("NFIB"), 567 U.S. 519 (2012). In 2017, Congress amended the provision by setting the amount of the shared responsibility payment to "$0," effective beginning tax year 2019. *California,* 141 S. Ct. at 2212 (citing TCJA, Pub. L. 115–97, § 11081, 131 Stat. 2092 (codified in 26 U.S.C. § 5000A(c))). An "applicable individual" means any individual except one who qualifies for a religious exemption, is not lawfully present, or is incarcerated. 26 U.S.C. § 5000A(d). "[M]inimum essential coverage" means health coverage under any of the following: government-sponsored programs (*e.g.,* Medicare), an eligible employer-sponsored plan, a health plan offered in the individual market within a State, a grandfathered plan, and other coverage recognized by the Department of the Health and Human Services in coordination with the Department of the Treasury. *Id.* § 5000A(f)(1). Individuals who file individual income tax returns and are not enrolled in minimum essential coverage are to be notified of the services available through the health insurance exchanges operating in the State in which they reside. Pub. L. No. 111-148, title I, § 1502(c), codified at 42 U.S.C. § 18092 (hereinafter, "§ 1502(c)").

B. Contraceptive coverage requirement

The preventive services coverage provision, 42 U.S.C. § 300gg-13, seeks to make recommended preventive care affordable and accessible for more Americans. It requires non-grandfathered group health plans and health insurance issuers that offer non-grandfathered group or individual health plans to cover certain preventive services without requiring plan participants and beneficiaries to make co-payments or pay deductibles. 42 U.S.C. § 300gg-13. Thus, this provision applies to employment-based group health plans, as well as to health plans offered by health insurance issuers on the health insurance exchanges established by the ACA. *See* 29 U.S.C. § 1185d; 42 U.S.C. § 300gg-91(b). The provision does not require anything of individual plan participants or beneficiaries.

As relevant here, the preventive health services that must be covered include additional preventive services for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA), a component of HHS, *id.* § 300gg-13(a)(4). The

HRSA guidelines for preventive services for women were developed based on recommendations by the Institute of Medicine (IOM) after it conducted an extensive science-based review of the preventive services necessary for women's health and well-being.[2] IOM Rep. at 2. The HRSA guidelines require coverage for women of, among other things, all FDA-approved contraceptive methods.[3]

II. RELIGIOUS EXEMPTION RULE

In November 2018, the Defendant agencies (hereinafter, "the Agencies") issued a final rule that, as relevant here, created an exemption from the contraceptive coverage requirement that allows a willing health insurance issuer or plan sponsor to offer a separate coverage option to any individual who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs. 83 Fed. Reg. 57536, 57,537 (Nov. 15, 2018) ("Religious Exemption Rule").

III. PROCEDURAL HISTORY

Plaintiff originally brought this action in February 2016, to challenge on multiple statutory and constitutional grounds the minimum essential coverage provision and certain of its exemptions, as well as the contraceptive coverage requirement. After the Government moved in May 2016 to dismiss Plaintiff's complaint, Plaintiff filed an amended complaint in July 2016, which the Government again moved to dismiss. In November 2017, Magistrate Judge Dena Hanovice Palermo issued a Report and Recommendation (R&R), recommending that the Court dismiss Plaintiff's amended complaint with prejudice. ECF No. 67. Both parties filed responses to the R&R. ECF Nos. 73-75. The Court then

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[2] *See* Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps (2011) ("IOM Rep."), http://iom.nationalacademies.org/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited July 1, 2021). The IOM, now called the National Academy of Medicine, was established in 1970 by the National Academy of Sciences and is funded by Congress. IOM Rep. at iv. It secures the services of eminent members of appropriate professions to examine policy matters pertaining to the health of the public and provides expert advice to the federal government. *Id.*

[3] *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), http://www.hrsa.gov/womensguidelines/ (last visited July 1, 2021).

held a hearing on Defendants' motion to dismiss on June 14, 2018, at which time the Court dismissed all of Plaintiff's claims, stating its reasons on the record. ECF No. 78. Plaintiff appealed.

On appeal, the Government argued that the Court of Appeals should affirm dismissal of all of Plaintiff's claims, except his RFRA claim seeking retrospective relief. With regard to that claim, the Government stated that the jurisdictional deficiencies it had identified in this Court "do not provide an alternative basis for affirming the dismissal of plaintiff's refund claims under RFRA because [he] would have been entitled to amend the complaint to cure the deficiencies if the district court had actually tried to rely on those grounds below." Br. for Appellees 15, No. 18-20440 (Feb. 25, 2019).

On October 15, 2020, the Court of Appeals vacated the dismissal of Plaintiff's claims and remanded the case to this Court. *Dierlam v. Trump*, 977 F.3d 471, 474 (5th Cir. 2020), *cert. denied sub nom. Dierlam v. Biden*, 141 S. Ct. 1392 (2021).[4] The Court of Appeals "decline[d] to reach the merits of [Plaintiff's] claims." *Id.* at 473. Rather, with respect to Plaintiff's claims for retrospective relief, it noted that "the parties agree that the district court incorrectly dismissed Dierlam's claim for … a refund of his shared-responsibility payments[]." *Id.* And with respect to his prospective claims, the court noted that a year after Plaintiff filed his lawsuit, Congress reduced the shared responsibility payment to $0 and the Agencies "created new exemptions to the contraceptive mandate, including an exemption for individuals like [Plaintiff]." *Id.* at 473-74. "Given the altered legal landscape, and the potential effects on [Plaintiff]'s request for prospective relief," the court concluded that "a mootness analysis must precede the merits." *Id.* at 474. It thus "remand[ed] so that [this] court can conduct a mootness analysis in the first instance and allow [Plaintiff] to amend his complaint." *Id.*

[4] Hereinafter, all internal alterations, citations, quotations, omissions, and subsequent history are omitted unless otherwise indicated.

Plaintiff filed a Second Amended Complaint on May 5, 2021. Aside from minor revisions to the "Request for Relief," the allegations in Plaintiff's Second Amended Complaint largely mirror those in his first. *See generally* 2AC; Pl.'s Resp. to Gov's Mot. for Ext. of Time to Respond to Mr. Dierlam's 2AC ¶ c, ECF No. 98 (noting that Plaintiff "made only small changes to the [Second] Amended Complaint" and that it is "substantially the same as the 1st Amended Complaint"). Plaintiff alleges that in 2012, he was informed that his then-employer would include coverage for certain contraceptive services within its health plans as part of its compliance with the contraceptive coverage requirement. 2AC ¶ 3. Further, Plaintiff asserts that because his sincerely held religious beliefs prohibit him from supporting in any way the provision of such contraceptive services, he discontinued his medical coverage. *Id.* ¶¶ 3, 8. Shortly thereafter, Plaintiff alleges that he "made an attempt to find alternative individual medical insurance," *id.* ¶ 5, but after contacting "three or so companies," researching one plan online, and "contact[ing] a State of Texas agency," he concluded that he "was not going to find health insurance, which did not comply with the HHS mandate," and "ceased all efforts at th[at] point" to do so. *Id.* Without minimum essential coverage, he alleges that he was required to make shared responsibility payments between 2014 and 2017, for a total of $5,626.22. *Id.* ¶ 44.

Based on these allegations, Plaintiff brings multiple claims challenging various provisions of the ACA. First, Plaintiff claims that Defendants violated § 1502(c) of the ACA by failing to provide him a notification of non-enrollment. *Id.* ¶ 10. Second, he claims that the minimum essential coverage provision violates RFRA, *id.* ¶¶ 12-14, procedural due process, *id.* ¶ 28, substantive due process, *id.* ¶ 35, and his rights of privacy and association, *id.* ¶ 25, and that the religious exemptions from the minimum essential coverage provision violate the Establishment Clause, *id.* ¶¶ 21-22. Third, he claims that the contraceptive coverage requirement, insofar as it requires the provision of certain contraceptive services, violates equal protection, as well as the Establishment and Free Exercise Clauses. *See id.* ¶¶ 15-20. Fourth, and finally, Plaintiff claims that the shared responsibility payment

previously required under the minimum coverage provision violates equal protection, *id.* ¶¶ 29-35, and the Taxing and Spending Clause, *id.* ¶¶ 26-27, 36-42.

STANDARD OF REVIEW

Defendants move to dismiss some of Plaintiff's claims under Federal Rule of Civil Procedure 12(b)(1) because Plaintiff lacks standing to bring them and/or they are moot. The party invoking federal jurisdiction bears the burden of establishing it, *see, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), and the Court must determine whether it has jurisdiction before addressing the merits of a claim, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104 (1998).

Defendants also move to dismiss some of Plaintiff's claims for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

ARGUMENT

I. PLAINTIFF'S CLAIM BASED ON § 1502(c) OF THE ACA SHOULD BE DISMISSED BECAUSE PLAINTIFF LACKS STANDING TO BRING IT AND FAILS TO STATE A CLAIM.

Plaintiff first claims that Defendants violated the ACA by failing to provide him with the notification of non-enrollment under § 1502(c). 2AC ¶¶ 10-11. On that basis, Plaintiff asks the Court to order the IRS to refund "the sum of money requested on all IRS claims forms not previously refunded." *Id.* ¶ 44. This claim is identical to the claim based on § 1502(c) in Plaintiff's First Amended Complaint that this Court dismissed. It should be dismissed again for the same reasons, namely because Plaintiff lacks standing to bring it and, in any event, fails to state a claim under § 1502(c).

A. Plaintiff Was Not Injured By Any Failure To Notify Him Under § 1502(c), The Alleged Lack Of Notification Did Not Cause His Purported Injury, And Requiring Future Notification Would Not Redress It.

The party invoking federal jurisdiction bears the burden to establish the three elements of standing by sufficiently alleging "an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) 'actual or imminent, not conjectural or hypothetical.'" elements. *Lujan*, 504 U.S. at 560. "[A] bare procedural violation, divorced from any concrete harm" does not "satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016). In addition, a plaintiff must establish "a causal connection between the injury and the conduct complained of," and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61.

Plaintiff's allegation do not show that any violation of § 1502(c) caused him a legally cognizable injury, or that compliance with § 1502(c) would redress any such injury. Section 1502(c) provides:

> (c) NOTIFICATION OF NONENROLLMENT.—Not later than June 30 of each year, the Secretary of the Treasury, acting through the Internal Revenue Service and in consultation with the Secretary of Health and Human Services, shall send a notification to each individual who files an individual income tax return and who is not enrolled in minimum essential coverage (as defined in section 5000A of the Internal Revenue Code of 1986[, 26 U.S.C. § 5000A]). Such notification shall contain information on the services available through the Exchange operating in the State in which such individual resides.

Plaintiff baldly alleges that because he did not receive the notice under § 1502(c), "harm was … caused" and that receiving the notice would have given him standing in federal court sooner. 2AC ¶ 11. But Plaintiff's "conclusory, unsupported" allegation of harm is "inadequate to establish standing," *Brown v. Fifth La. Levee Dist.*, 2016 WL 3250105, at *6 (W.D. La. Apr. 26, 2016), and he does not otherwise allege any concrete harm aside from his bare procedural injury, which is likewise insufficient to establish standing, *see Spokeo*, 136 S. Ct. at 1549.

Plaintiff also cannot show that any failure by the Government to provide the notice of non-enrollment caused any alleged injury or that the Government's compliance with § 1502(c) would

redress it. The plain language of § 1502(c) shows that its purpose is to ensure that individuals who have filed individual income tax returns, and who have not obtained minimum essential coverage, are aware of the coverage options available to them through the health insurance exchange operating in their State. The best place for individuals to find such information is www.HealthCare.gov.[5] Once at the website, users need only input their zip code, and HealthCare.gov automatically links them to the appropriate website for their geographic region. Any notification under § 1502(c) would have directed Plaintiff to HealthCare.gov.

Plaintiff's allegations show that although Plaintiff was aware of HealthCare.gov, he chose not to check it for health coverage because he "was convinced no policy could be purchased compatible with [his] religious beliefs." 2AC ¶ 10; *see also id.* (alleging that the IRS directed him to check HealthCare.gov when he was completing his tax return). Plaintiff thus already had the information available to him that the notification would have provided and incurred a penalty, not because he was unaware of the options available to him, but, rather, because he chose not to check the website. *See id.* Plaintiff's knowing decision not to obtain health care coverage, rather than any lack of notification under § 1502(c), led to imposition of shared responsibility payments, and any future notification would not redress any alleged injury. The Court should thus dismiss Count I of Plaintiff's Second Amended Complaint because Plaintiff lacks standing to bring it. *See, e.g., Morrell v. Alfortish*, 2010 WL 4668429, at *7 (E.D. La. Nov. 9, 2010) (plaintiff lacked standing where his "choice to pursue a bid protest, however justified, was an independent cause which required the payment of legal fees and costs and was not proximately caused by the defendants' alleged illegal conduct").

[5] *See* https://www.irs.gov/pub/irs-utl/Notificationofnonenrollmentfor%20ACA.pdf.

B. Plaintiff Fails To State A Claim On The Basis Of § 1502(c) Because § 1502(c) Does Not Create A Private Cause Of Action, And, In Any Event, The Notification Under § 1502(c) Is Not A Condition Precedent To A Shared-Responsibility Payment.

Even if Plaintiff could establish standing to bring his first claim, he fails to state a claim for two independent reasons. First, § 1502(c) does not create a privately-enforceable cause of action. "[W]hether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction," *Transamerica Mortg. Advisors Inc. v. Lewis* ("*TAMA*"), 444 U.S. 11, 15 (1979), and "the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "'[T]o confer individual rights subject to private enforcement ... [a] statute must speak with a clear voice and unambiguous[ly] confer those rights." *Delancey v. City of Austin*, 570 F.3d 590, 593 (5th Cir. 2009); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387-88 (2015) (rejecting a private cause of action under the Medicaid Act and recognizing that "a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred'"). "[S]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander*, 532 U.S. at 289.

Here, Plaintiff concedes that § 1502(c) does not confer a private right of action. *See* 2AC ¶ 11 ("I do not contest that § 1502(c) does not grant a private right of action."). As Magistrate Judge Hanovice Palermo recognized, *see* R&R 5 n.7, and this Court confirmed, *see* Final J. (dismissing all claims), Plaintiff's claim under § 1502(c) should be dismissed for that reason alone. And even if Plaintiff had not conceded the point, the statutory text shows that Congress did not intend to create a private right of action. Section 1502(c) is directed at "the Secretary of the Treasury, acting through the Internal Revenue Service and in consultation with the Secretary of [HHS]"—not the individuals benefited by the provision—thus indicating that it was not meant to create a private right of action. *See Delancey*, 570 F.3d at 594. In addition, § 1502(c) does not contain rights-creating language, *see, e.g.,*

Gonzaga Univ. v. Doe, 536 U.S. 273, 284 n.3 (2002) (quoting Title VII provision, "No person in the United States *shall* ... be subjected to discrimination ...."), but instead sets forth the policy and practice for administering the notification, *Delancey*, 570 F.3d at 595. Such "policy and practice" language is insufficient to create a private right of action. *Id.* Furthermore, a taxpayer's receipt of notification under § 1502(c) is not a prerequisite to liability under § 5000A. If Congress had intended to protect from liability taxpayers who did not receive a § 1502(c) notification, it could have made notification a condition precedent to such liability. The fact that Congress did not do so is further evidence that § 1502(c) does not create a private right of action. *See TAMA*, 444 U.S. at 21 ("Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.").

Second, Plaintiff fails to state a claim based on any noncompliance with § 1502(c). Plaintiff argues that because he was allegedly never provided with the notification under § 1502(c), he is entitled to a refund of his past shared-responsibility payments. *See* 2AC ¶ 44. But compliance with § 1502(c) is not a condition precedent to a taxpayer's prior responsibility to make shared-responsibility payments. Section 1502(c) requires the IRS, no later than June 30 of each year, to send specified information "to each individual who files an individual income tax return and who is not enrolled in minimum essential coverage." The provision contains no consequence for any failure to comply with this requirement, much less a prohibition on collecting the prior shared-responsibility payment. *Cf. Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."); *see also State Farm Fire & Cas. Co. v. United States*, 137 S. Ct. 436, 442 (2016) (holding that in the absence of statutory language providing a remedy for the violation of the False Claims Act's requirement to keep a complaint under seal, the sanction for a breach of that duty "is not [a] loss of all later powers to act"); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (government's failure to comply with requirement to hold bail hearing at prisoner's first appearance

in court or within a specified period thereafter did not require the prisoner's release because nothing in the statute indicated compliance was a precondition to detention following a belated hearing).

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

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

Plaintiff's theory of liability is also inconsistent with the terms of 26 U.S.C. § 5000A, which governs shared-responsibility payments. That statute requires an applicable individual who fails to obtain minimum essential coverage for the individual and any dependent to make the shared-responsibility payment and also defines "applicable individual" in a manner that exempts certain categories of individuals. *Id.* § 5000A(b), (d). The statute also contains a separate subsection listing additional "exemptions" from the shared-responsibility payment. *Id.* § 5000A(e). The statute does not provide any specific exemption for individuals who have not received notice under § 1502(c). "When Congress provides exceptions in a statute . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United*

States v. Johnson, 529 U.S. 53, 58 (2000). For all the above reasons, an individual's liability for any shared-responsibility payment under 26 U.S.C. § 5000A is not dependent on the IRS's provision of notice under § 1502(c), and Plaintiff's claim under § 1502(c) should be dismissed.

II. PLAINTIFF'S REMAINING PROSPECTIVE CLAIMS SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The remainder of Plaintiff's prospective claims should be dismissed because they are moot. Article III of the Constitution defines the outer bounds of the constitutional jurisdiction of federal courts by restricting the exercise of judicial power only to "Cases" or "Controversies." U.S. Const. art. III, § 2. In part, this constitutional limitation defines "the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). Absent an ongoing case or controversy, a case is moot and a court lacks jurisdiction. *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). As the Supreme Court has observed, "[m]ootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Arizonans for Official English*, 520 U.S. at 68 & n.22 (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)).

Intervening events that occur while litigation is pending may, of course, render a formerly live, ongoing controversy moot. Those events might eliminate any ongoing injury-in-fact, *see, e.g., Spencer v. Kemna*, 523 U.S. 1, 14 (1998), or render relief unavailable because the relief sought has effectively been granted, *see Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992); *Mills v. Green*, 159 U.S. 651, 653, 657-58 (1895). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (citations omitted); *see also Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (where

a defendant has amended its regulations, "the issue of the validity of the old regulations is moot"). Thus, even if there is a live controversy when the case is filed, courts should refrain from deciding claims if "the requisite personal interest that must exist at the commencement of the litigation" is no longer present. *Arizonans for Official English*, 520 U.S. at 68 & n.22.

As the Fifth Circuit explained in remanding this case for a mootness analysis, in 2017, the Agencies "created new exemptions to the contraceptive mandate," including for "individuals like [Plaintiff]," and the TCJA was enacted, reducing the shared-responsibility payment to $0 beginning in tax year 2019. *Dierlam*, 977 F.3d at 473-74. As a result, it is not the case, as Plaintiff alleges, that "[a] medical insurer is compelled to … provide contraceptive coverage" to Plaintiff or that Plaintiff is "required to purchase medical insurance from [a] medical insurer[] [that] provides contraceptive coverage." 2AC ¶ 14. And with the shared responsibility payment "zeroed out," there is no enforcement mechanism to compel Plaintiff to purchase health care coverage at all. *California*, 141 S. Ct. at 2114. Accordingly, the very action Plaintiff demands—an exemption from having to participate in a health plan that covers contraceptive services that are inconsistent with his religious beliefs, *see* 2AC ¶¶ 43-45—has been issued, and any injury Plaintiff could allege based on the absence of such relief has thus been vitiated, *see Dierlam*, 977 F.3d at 473-74. Accordingly, Plaintiff's requested relief has effectively been granted, and his claims for declaratory and injunctive relief are thus moot.

Alternatively, if Plaintiff's Second Amended Complaint is considered to be the "operative pleading" here, *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 48 (1991), the deficiency identified above would be one of standing, rather than mootness. Either way, and for similar reasons, this Court lacks jurisdiction over Plaintiff's prospective claims. In light of the Religious Exemption Rule and the zeroing out of the shared-responsibility payment, any difficulty Plaintiff may have in finding health coverage that comports with his religious beliefs is not attributable to Defendants, and Plaintiff cannot establish a legally cognizable injury based on "the additional penalties imposed by the ACA," given

that there are no longer such penalties. *See California*, 141 S. Ct. at 2112 (explaining that "[i]n 2017, Congress effectively nullified the penalty by setting its amount at $0"). In addition, even without the Religious Exemption Rule, Plaintiff is a member of the class certified in *DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019), and thus, is protected by the permanent injunction issued in that case, which permits issuers of health insurance to provide health coverage to Plaintiff that excludes the contraceptive coverage to which he objects. *See id.* For this reason too, Plaintiff lacks standing to bring his prospective challenges to the contraceptive coverage requirement. *See, e.g., KERM, Inc. v. FCC*, 353 F.3d 57, 59 (D.C. Cir. 2004) ("Where a petitioner is not subject to the administrative decision it challenges, courts are particularly disinclined to find that the requirements of standing are satisfied.").

III. PLAINTIFF'S CLAIMS IN COUNTS III-VIII SHOULD ALSO BE DISMISSED FOR FAILURE TO STATE A CLAIM.

As set forth above, Plaintiff's prospective claims should be dismissed because they are moot and Plaintiff lacks standing to bring them. But his claims in Counts III-VIII, whether brought on a prospective or retrospective basis, should also be dismissed because Plaintiff fails to state plausible claims with respect to each one of them.

A. Plaintiff's Challenge To The Contraceptive Coverage Requirement Fails To State A Claim Under The Establishment Clause.

In Count III, Plaintiff claims that the contraceptive coverage requirement also violates the Establishment Clause because in implementing it, the government allegedly "bec[a]me entangled with and discriminate[d] among religions," in particular placing burdens on Catholics, who oppose abortion and contraception. 2AC ¶¶ 19; *see also id.* ¶ 15. "To withstand an Establishment Clause challenge, a statute must have a secular legislative purpose, the statute's primary purpose must neither advance nor inhibit religion, and the statute must not foster an excessive entanglement with religion." *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294-95 (5th Cir. 2001) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). Here, there is no indication that the contraceptive coverage requirement is anything

other than an effort to increase women's access to recommended preventive services.[6] Further, its principal effect neither advances nor inhibits religion, as its purpose is furthered irrespective of the religious faith of a particular beneficiary. *See Littlefield*, 268 F.3d at 294. And finally, the provision does not involve excessive governmental entanglement with religion.

B. Plaintiff's Challenge To The Minimum Essential Coverage Provision's Religious Exemptions Fails To State A Claim Under The Establishment Clause.

In Count V, Plaintiff argues that the religious exemptions to the minimum essential coverage requirement, 26 U.S.C. § 5000A(d)(2), also violate the Establishment Clause. *See* 2AC ¶¶ 21-22. Plaintiff contends that the religious conscience exemption, § 5000A(d)(2)(A), "discriminates among religions" because "[i]t currently only permits individuals of religions with an objection to receiving insurance benefits to apply." 2AC ¶ 21. Likewise, Plaintiff objects to the health care sharing ministry provision on the grounds that "it prevents ministries formed after 1999 ... from receiving the exemption." *Id.* Establishment Clause claims like Plaintiff's have been roundly rejected by the courts.

The Supreme Court has "long recognized that the government may ... accommodate religious practices ... without violating the Establishment Clause." *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 638 (W.D. Va. 2010) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005), *vacated*, 671 F.3d 391 (4th Cir. 2011), *cert. granted, judgment vacated sub nom. Liberty Univ. v. Geithner*, 568 U.S. 1022 (2012), and *aff'd sub nom. Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013). The two exemptions in 26 U.S.C. §

[6] *See, e.g., O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1161 (E.D. Mo. 2012) ("The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's health care costs.") (citing legislative history), *rev'd in part*, *vacated in part*, 766 F.3d 862 (8th Cir. 2014); *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 410 (E.D. Pa.) ("It is clear from the history of the regulations and the report published by the Institute of Medicine that the purpose of the Women's Preventive Health care regulations is not to target religion, but instead to promote public health and gender equality."), *aff'd sub nom. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and *rev'd on other grounds sub nom. Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2014 WL 4467879 (3d Cir. Aug. 5, 2014).

5000A make such accommodations. First, as explained above, the religious conscience exemption imports the familiar religious exemption found in the tax code (26 U.S.C. § 1402(g)), *see* 26 U.S.C. § 5000A(d)(2)(A), "which courts have consistently found constitutional under the Establishment Clause," *Liberty Univ.*, 733 F.3d at 101 (citing *Droz v. Comm'r*, 48 F.3d 1120, 1124-25 (9th Cir. 1995); *Hatcher v. Comm'r*, 688 F.2d 82, 84 (10th Cir. 1979) (per curiam); *Jaggard v. Comm'r*, 582 F.2d 1189, 1189-90 (8th Cir.1978) (per curiam); *Henson v. Comm'r*, 66 T.C. 835, 838-40 (1976); *Palmer v. Comm'r*, 52 T.C. 310, 314-15 (1969)). Further, as the Fourth Circuit explained in rejecting an identical challenge to the religious conscience exemption in the ACA, "th[e] exemption makes no 'explicit and deliberate distinctions' between sects" and passes the *Lemon* test that therefore applies to it. *Id.* at 101-02; *see also Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1183 (D.C. Cir. 2015) (rejecting Establishment Clause challenge to the exemption, which is not "drawn on sectarian lines"), *cert. denied*, 577 U.S. 1067 (2016). The exemption has a secular purpose—"to ensure that all persons are provided for, either by the [Act's insurance] system or by the church"; its "principal effects ... neither advance nor inhibit religion, but only assure that all individuals are covered"; and "there is no excessive entanglement with religion," as the inquiry required under the religious conscience exemption in the ACA is identical to that in § 1402(g), which has been upheld by every court to consider the issue. *Liberty Univ.*, 733 F.3d at 101-02.

Second, and similarly, neither the cutoff date of the health care sharing ministry provision nor its legislative history "suggest[] any deliberate attempt to distinguish between particular religious groups." *Id.* at 102. The cutoff date "serves at least two secular legislative purpose[s],": (1) to "ensure[] that the ministries provide care that possesses the reliability that comes with historical practice"; and (2) to "accommodate[] religious health care without opening the floodgates for any group to establish a new ministry to circumvent the Act." *Id.* Further, "[t]he primary effect of the cutoff accordingly neither advances nor inhibits religion," and "given that it applies only secular criteria

. . . [it] does not foster an excessive government entanglement with religion." *Id.*[7] As such, there is no basis for Plaintiff's Establishment Clause challenge to either religious exemption in § 5000A.

C. Plaintiff's Equal Protection Claims Should Be Dismissed For Failure To State A Claim.

In Counts III and VII, Plaintiff also appears to challenge the shared-responsibility payment provision and the contraceptive coverage requirement on equal protection grounds. "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Where a classification does not disadvantage a suspect class or impinge upon the exercise of a fundamental right, the classification at issue need only "bear[] some fair relationship to a legitimate public purpose." *Id.* at 216-17. To withstand equal protection scrutiny, gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam). Although "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme," gender distinctions are permissible when the statutory structure and history show that a classification was enacted to compensate for past discrimination. *Id.* (collecting cases); *see also Kahn v. Shevin*, 416 U.S. 351 (1974).

[7] Further, the inquiry required by the healthcare sharing ministries provision—whether members "share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs," 26 U.S.C. § 5000A(d)(2)(B)(ii)(II)—is no more intrusive than the inquiry mandated by § 1402(g) (described above).

In Count III, Plaintiff alleges that the contraceptive coverage regulations are "designed to burden males and benefit females." 2AC ¶ 17. In enacting the ACA, including the requirement that preventive services for women be covered without cost-sharing, Congress intended to end the "practices of the private insurance companies in their gender discrimination" against women, who "paid more for the same health insurance coverage available to men." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 263 (D.C. Cir. 2014) (citing 155 Cong. Rec. 28,842 (2009) (statement of Sen. Mikulski)) (cleaned up), *vacated on other grounds sub nom.*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Remedying this past discrimination, rather than penalizing men or validating stereotypical assumptions about women, is the purpose of the statute, as implemented through the contraceptive coverage requirement. Under Supreme Court jurisprudence, providing contraceptive coverage for women without cost-sharing is a constitutional means of achieving that governmental interest.

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

The Supreme Court has also specifically recognized that women and men are differently situated with respect to pregnancy and childbirth and that these differences can support gender-based distinctions. In *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Court upheld an immigration statute

that makes it more difficult for a child born abroad and to one unmarried United States parent to claim citizenship if the citizen parent was a father. As the Court recognized, "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. "[G]iven the unique relationship of the mother to the event of birth," as well as the greater "opportunity for a meaningful relationship" with the child that "inheres in the very event of birth, . . . as a matter of biological inevitability," the more favorable treatment afforded to children of a U.S. citizen mother complies with equal protection. *Id.* at 61-65, 70-71.

As in *Tuan Anh Nguyen*, the different circumstances of men and women with respect to contraception, pregnancy, and childbirth likewise justifies a gender-based distinction in contraceptive coverage. Prior to the enactment of the ACA and the preventive services coverage provision, "'women of childbearing age spen[t] 68 percent more in out-of-pocket health care costs than men,'" "in part because services more important or specific to women have not been adequately covered by health insurance." *Priests for Life*, 772 F.3d at 263 (quoting 155 Cong. Rec. 28,843 (2009) (statement of Sen. Gillibrand)). "[W]omen have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein). "An unintended pregnancy is virtually certain to impose substantial, unplanned-for expenses and time demands," which "fall disproportionately on women." *Priests for Life*, 772 F.3d at 263. The contraceptive coverage requirement aims to equalize access to health-care outcomes by providing insurance coverage that is disproportionately needed by women, who are uniquely disadvantaged if it is not provided. As such, it suffers from no constitutional infirmity.

In Count VII, Plaintiff also appears to bring an equal protection challenge to the ACA's shared responsibility payment provision. He asserts that the ACA establishes "perverse conditions," which place a "heavier burden" on individuals like Plaintiff who "choose a healthier lifestyle" and yet who "face the penalties of the ACA without any consideration of these and other mitigating factors." 2AC

¶¶ 29-30, 33. Plaintiff claims that this is unfair and "a violation of multiple constitutional rights, but especially equal protection of the law." *Id.* ¶ 34.

As noted, equal protection does not require that Congress treat everyone the same. *Plyler*, 457 U.S. at 216. Rather, it "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Where social or economic legislation is at issue, a classification need only be rationally related to a legitimate state interest to withstand an equal protection challenge. *Id.* at 440. Plaintiff has not shown that people who earn a certain level of income and choose not to purchase health insurance but choose a "healthier lifestyle" constitute a suspect class, the disadvantage of which would require more than a rational relationship to a legitimate public purpose. Congress regularly uses its taxing power to encourage certain purchases, including purchasing homes and professional educations. *NFIB*, 567 U.S. at 571-72. Congress also uses its taxing power as an "obviously regulatory measure[]" to discourage certain conduct, like purchasing cigarettes. *Id.* at 567. This use of the taxing power advantages those Congress chooses to qualify for certain tax incentives and necessarily disadvantages those falling outside Congress's definition of the encouraged behavior, but this does not inherently violate equal protection. Indeed, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012). The burden rests with plaintiffs to "negat[e] every conceivable basis which might support [the provisions]." *Id.* at 681. Here, Plaintiff has not shown that Congress's definition of those who qualified for the shared-responsibility payment was unrelated to a legitimate public purpose, and as shown above, *see supra* section II(B), the shared responsibility payment furthered the Government's interest in expanding health insurance coverage and reflected a legitimate balancing of individual and governmental interests. For all of these reasons, Plaintiff's equal protection claims fail.

D. Plaintiff's Free Exercise Claim Should Be Dismissed For Failure To State A Claim.

In Count IV, Plaintiff brings a Free Exercise claim, seemingly challenging the contraceptive coverage requirement based on his view that it "is not religiously neutral." 2AC ¶ 20.[8] Plaintiff's Free Exercise claim also fails.

The Supreme Court has made clear that a law that is neutral and generally applicable does not run afoul of the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or has the incidental effect of burdening a particular religious practice. *See Empt. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990); *Lukumi Babalu Aye, Inc. v. City of Hialeh*, 508 U.S. 520, 531-32 (1993). "Neutrality and general applicability are interrelated." *Id.* at 531. A law is neutral if it does not target religiously motivated conduct either on its face or as applied, *id.* at 533, and has as its purpose something other than the disapproval of a particular religion, or of religion in general, *id.* at 545. A law is generally applicable so long as it does not selectively impose burdens only on conduct motivated by religious belief. *Id.*

Unlike such selective laws, the contraceptive coverage requirement and its implementing regulations are neutral and generally applicable—as nearly every court to have considered a free exercise challenge to them and their predecessors has found.[9] "The regulations were passed, not with

[8] Although not entirely clear, based on Plaintiff's reference to the "HHS mandate" in Count IV, *see id.*, Defendants read Plaintiff's Free Exercise Claim as a challenge to the preventive services coverage provision of the ACA, as opposed to the minimum essential coverage provision, *see id.* ¶ 3 (seeming to label the preventive services coverage provision as the "HHS mandate").

[9] *See, e.g.*, *Mich. Cath. Conf. & Cath. Family Planning Servs. v. Burwell*, 755 F.3d 372, 393-94 (6th Cir. 2014), 755 F.3d at 393-94; *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 7 F. Supp. 3d 88, 104-08 (D.D.C. 2013); *Roman Cath. Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 85-91 (D.D.C. 2013), *aff'd in part, vacated in part sub nom. Priests for Life v. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *vacated sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Eternal World Television Network, Inc. v. Burwell*, 26 F. Supp. 3d 1228, 1235-37 (S.D. Ala. 2014); *Roman Cath. Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-3489, 2014 WL 1256373, at *23-26 (N.D. Ga. Mar. 26, 2014), *vacated in part sub nom. Eternal World Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122 (11th Cir. 2016); *Univ. of Notre Dame v. Sebelius ("Notre Dame I")*, 988 F. Supp. 2d 912, 927-30 (N.D. Ind. 2013), *aff'd*, 743 F.3d 547 (7th Cir. 2014), *vacated sub nom. Univ. of Notre Dame v. Burwell*, 136 S. Ct. 2007 (2016) (Mem.); *Cath. Diocese of Nashville v. Sebelius*, No. 3:13-cv-01303, 2013 WL 6834375, at *5-7 (M.D. Tenn. Dec. 26, 2013), and *Mich. Catholic Conf. v. Sebelius*, 989 F. Supp. 2d 577, 588-89 (W.D. Mich.

the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's health care costs." *O'Brien*, 894 F. Supp. 2d at 1161; *see, e.g., Notre Dame I*, 988 F. Supp. 2d at 929 ("The laws and regulations in question, as well as the legislative history, further show that the ACA and related regulations were enacted for reasons neutral to religion."). The regulations reflect expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations for or against such services. *See, e.g., Conestoga*, 917 F. Supp. 2d at 410 ("It is clear from the history of the regulations and the report published by the [IOM] that the purpose of the [regulations] is not to target religion, but instead to promote public health and gender equality."); *Notre Dame I*, 988 F. Supp. 2d at 930 (same; finding it "abundantly clear" that the regulations are neutral).[10]

The existence of express categorical exemptions or accommodations for certain entities, like grandfathered plans and religious objectors, "does not mean that [the regulations do] not apply generally." *Priests for Life*, 7 F. Supp. 3d at 106. "General applicability does not mean absolute universality." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008). "Instead, exemptions undermining 'general applicability' are those tending to suggest disfavor of religion." *O'Brien*, 894 F. Supp. 2d at 1162. The accommodation for grandfathered plans is available on equal terms to all employers, whether religious or secular. And the religious exemptions and accommodation promulgated by the

2013), *aff'd sub nom. Mich. Cath. Conf v. Burwell.*, 755 F.3d 372 (6th Cir. 2014), *vacated*, 575 U.S. 981 (2015). *But see Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 437 (W.D. Penn., Mar. 6, 2013); *Sharpe Holdings v. HHS*, No. 2:12-cv-92, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012).

[10] The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. The regulations apply to all non-grandfathered health plans that do not qualify for a religious or moral exemption. Thus, "it is just not true ... that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1162; *Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677, at *5 (W.D. Mich. Dec. 24, 2012), *aff'd*, 730 F.3d 618 (6th Cir. 2013), *cert. granted, judgment vacated sub nom. Autocam Corp. v. Burwell*, 573 U.S. 956 (2014); *Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 953 (S.D. Ind. 2012).

Agencies serve to accommodate religion, not to disfavor it. They therefore "present[] a strong argument in favor of neutrality" by "demonstrating that the 'object of the law' was not 'to infringe upon or restrict practices because of their religious motivation.'" *O'Brien*, 894 F. Supp. 2d at 1161 (quoting *Lukumi*, 508 U.S. at 533). Plaintiff fails to state a Free Exercise claim.

E. Plaintiff's Claims Based On The Taxing And Spending Clause Should Be Dismissed For Failure To State A Claim.

In Count VI, Plaintiff argues that the shared responsibility payment under the minimum coverage provision of the ACA "is not a constitutionally permitted tax, and is therefore outside of Congress' authority to impose." 2AC ¶ 26. In addition, in Counts VI and VIII, Plaintiff more broadly challenges the Supreme Court's interpretation of "direct" and "indirect" taxes and the Supreme Court's holding that the minimum essential coverage provision of the ACA is not a tax that requires apportionment. *Id.* ¶¶ 26-27, 36-42.[11] Plaintiff's position is foreclosed by the Supreme Court's decision in *NFIB*, as well as the text of both the Constitution and the statute.

In 2012, the Supreme Court directly addressed Plaintiff's taxing power argument:

> Our precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it. The "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

NFIB, 567 U.S. 570. And Plaintiff provides no reason to, and no basis upon which any lower court could, disturb the Supreme Court's determination that the shared responsibility payment under the minimum essential coverage provision of the ACA was not a direct tax requiring apportionment in order to be constitutional. *Id.* at 570-72. Although Plaintiff considers the taxed object to be "the existence of the individual," 2AC ¶ 26, the shared responsibility payment did not apply to individuals

[11] Plaintiff also requests a change in the apportionment of the House of Representatives in order to satisfy the apportionment requirements flowing from Plaintiff's interpretation of "direct" and "indirect" taxes. Compl. ¶¶ 36, 42. Plaintiff acknowledges, however, that this remedy is not within the power of the Court. *Id.* ¶ 42.

who do not pay federal income taxes because their income is less than the filing threshold in the Internal Revenue Code, *NFIB*, 567 U.S. at 563 (citing § 5000A(e)(2)). The payment was triggered only by specific circumstances, *i.e.*, "earning a certain amount of income but not obtaining health insurance," and thus was "not a direct tax that must be apportioned among the several States." *Id.* at 571.

Plaintiff also challenges the shared responsibility payment as a "punitive and confiscatory measure," which should be called a "penalty." 2AC ¶ 35. This argument, too, is foreclosed by the Supreme Court's determination in *NFIB* that analysis of the shared responsibility payment, using the Supreme Court's functional approach, leads to the determination that the provision was a tax instead of a penalty. 567 U.S. at 563-69. Congress's choice of label does not control that determination, *id.* at 565 (collecting cases), and although the payment was "plainly designed to expand health insurance coverage," "taxes that seek to influence conduct are nothing new," *id.* at 567. In light of this binding Supreme Court precedent, Plaintiff's claims based on the Taxing and Spending Clause must be dismissed.

F. Plaintiff's Procedural And Substantive Due Process Claims Should Be Dismissed For Failure To State A Claim.

To the extent Plaintiff's claims in Counts VI and VII can be read as challenging the minimum essential coverage provision of the ACA under the Due Process Clause of the Fifth Amendment, this argument also fails. 2AC ¶ 28 (challenging the minimum coverage provision as "a violation of the 5th amendment due process rights of the accused"); *id.* ¶ 35 (asserting that the ACA "as a whole" violates Plaintiff's substantive due process rights). The assessment and collections procedures, such as those that were used to collect payments under the minimum essential coverage provision of the ACA, have long been upheld by the Supreme Court as affording taxpayers all the process they are due. *Phillips v. Comm'r*, 283 U.S. 589, 595 (1931). In addition, "[t]he Supreme Court long ago abandoned the protection of economic rights through substantive due process," and accordingly the "freedom to

refuse to pay for unwanted medical care ... cannot be characterized as 'fundamental' so as to receive heightened protection under the Due Process Clause." *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 601 (6th Cir. 2013). In addition, the Supreme Court has held that the Due Process Clause should not be read to limit the taxing power, with the possible rare exception for cases where "the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916). The shared responsibility payment was a tax triggered by "earning a certain amount of income but not obtaining health insurance." *NFIB*, 132 S. Ct. at 2599. It was neither arbitrary, nor a confiscation of property. As such, it did not violate Plaintiff's due process rights and his retrospective due process claims must be dismissed for failure to state a claim.

G. Plaintiff's Claim Based On The Rights Of Privacy And Association Should Be Dismissed For Failure To State A Claim.

Plaintiff's claim in Count VI that the ACA "forces parties to [e]nter a contract not of their choosing, which is a violation of the right to privacy and association," also fails. 2AC ¶ 25. The kinds of intimate associations that are protected under existing precedent by the constitutional right to privacy (and the freedom of intimate association) concern "the kinds of relationships that attend the creation and sustenance of a family, such as marital or parental relationships." *Mote v. Walthall*, 902 F.3d 500, 507 (5th Cir. 2018). The requirement that Plaintiff associate with an insurance company does not implicate any such constitutionally protected rights of intimate association. *See U.S. Citizens*, 705 F.3d at 598 (explaining that having to associate with a large business enterprise "lacks the[] qualities necessary for constitutional protection" under case law addressing the right of intimate association).

To the extent Plaintiff's allegations are meant to support a First Amendment claim based on the right of expressive association, that claim too would fail because he does not allege that he wishes not to associate with health-insurance providers, much less that any such wish is based on an objection

to any expressive activity on the part of providers. *See Mote*, 902 F.3d at 507 (explaining that the First Amendment right of expressive association protects "the right of all persons to associate together in groups to advance beliefs and ideas"); *Janus v. America Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (explaining that the freedom of association also includes "[t]he right to eschew association for expressive purposes"). Like the others, Plaintiff's claim based on rights of privacy and association should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should dismiss Plaintiff's Second Amended Complaint.

Dated: July 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2021, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system. Because Plaintiff is not registered on the CM/ECF system, I also served Plaintiff with a copy of the foregoing document by electronic mail, and by mailing it to Plaintiff at the following address:

5802 Redell Rd
Baytown, TX 77521

Executed on July 8, 2021, in Washington, D.C.

/s/ Emily Sue Newton
EMILY SUE NEWTON