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

In his Response to Defendants' partial motion to dismiss ("PMTD"), Plaintiff reiterates his numerous disagreements with Congress's policy choices reflected in the Affordable Care Act ("ACA") and its implementing regulations, namely the adoption of the minimum essential coverage provision and the contraceptive coverage regulations. But those policy disagreements, no matter how vehement, do not amount to plausible claims for relief, nor do they give this Court jurisdiction to hear them. Because Plaintiff largely reiterates the allegations made in his First Amended Complaint, most of the claims in his Second Amended Complaint should be dismissed for the same reasons this Court dismissed his first. In addition, because Plaintiff no longer faces a monetary penalty for failing to maintain minimum essential coverage and an exemption is in place that allows an insurer to provide Plaintiff with health coverage that omits the contraceptive services to which Plaintiff objects, his prospective challenges to the minimum essential coverage provision and contraceptive coverage regulations are also moot. The Court should dismiss with prejudice Counts I and III-VIII of Plaintiff's Second Amended Complaint and Count II to the extent it seeks prospective relief.[1]

I. Plaintiff Lacks Standing To Bring, And Fails To State, A Claim Under § 1502(c) Of The ACA.

Plaintiff's Response does not undermine Defendants' showing that this Court should dismiss Plaintiff's claim under § 1502(c) of the ACA for lack of subject matter jurisdiction and for failure to state a claim. In support of his standing, Plaintiff argues that Defendants' purported failure to provide him with a timely notification under § 1502(c) "contributed to" his alleged injury: imposition of past

[1] At numerous points throughout his Response, Plaintiff attempts to rely on allegations in his First Amended Complaint and to refer the Court to other filings without restating the arguments therein. *See, e.g.*, Pl.'s Resp. 3 (referring the Court to his brief on appeal), 16 (referring the Court to his First Amended Complaint). The Second Amended Complaint is the operative one here, *see Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 48 (1991), so Plaintiff cannot rely on allegations in his first. Plaintiff also cannot rely on arguments in other filings by attempting to incorporate them by reference. *See, e.g., Phoenix Licensing, L.L.C. v. Advance Am.*, 2016 WL 6217180, at *10 (E.D. Tex. Oct. 25, 2016) ("The Court finds that incorporating arguments by reference is improper and would circumvent the page limit requirements established by the Court's Local Rules."). Thus, Defendants' opening brief and this reply address the allegations in Plaintiff's Second Amended Complaint and the arguments in Plaintiff's Response; Defendants do not waive any arguments by not responding to content in other filings that Plaintiff improperly attempts to rely on by reference.

shared-responsibility payments. Pl.'s Resp. 5-6, ECF 105. As explained, however, any notification under § 1502(c) would have directed Plaintiff to HealthCare.gov, Defs.' PMTD 10, ECF 104, and Plaintiff's Response confirms that he had that website information when he made his first shared-responsibility payment in 2015, *see* Pl.'s Resp. 7 (Plaintiff checked HealthCare.gov "in 2015 for the 2014 tax year").[2] Indeed, Plaintiff's allegations show that even after he received the § 1502(c) notification in 2016, *see id.* at 6, he continued to lack health insurance and to make shared-responsibility payments, *see* 2AC ¶ 43. Any lack of notification under § 1502(c) thus did not cause Plaintiff's alleged injury, and "proper and timely compliance," as he would have it, Pl.'s Resp. 8, would not redress it.

Plaintiff otherwise attempts to establish standing to bring his § 1502(c) claim by arguing that Defendants have "unclean hands" due to "not properly carr[ying] out their duties as directed by §1502(c)." *Id.* at 8-9. The unclean hands doctrine has no place here. It "is an affirmative defense to equitable relief" and "requires that the party seeking equitable relief must come into court with clean hands." *Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co.*, 173 F. Supp. 3d 363, 407-08 (N.D. Tex. 2016) (internal citation omitted), *aff'd as modified and remanded,* 725 F. App'x 256 (5th Cir. 2018).[3] It thus cannot be used by a plaintiff to establish standing, and Plaintiff cites no authority to indicate otherwise.

In addition to lacking standing, Plaintiff also fails to state a claim under § 1502(c) for two reasons. First, as explained, there is no private right of action to enforce § 1502(c). *See* Defs.' PMTD 11-12. In support of his argument that "a private right of action … preexisted the ACA," Plaintiff cites the Administrative Procedure Act ("APA"), 5 USC § 702, various jurisdictional statutes (28 USC §§ 1331, 1340, and 1346), and the Federal Tort Claims Act ("FTCA"), 28 USC § 2674, which he says

[2] Plaintiff argues that "Texas never set up a 'health care exchange' therefore healthcare.gov could not direct me to such." Pl.'s Resp. 7. But a state, like Texas, that did not set up a state exchange was served by the federal exchange accessible at HealthCare.gov. *See* 42 U.S.C. §§ 18031, 18041(c)(1); *King v. Burwell*, 576 U.S. 473, 478, 482-83, 487, 489-90, 496 (2015). And irrespective of what Plaintiff may or may not have found on that website, he had access to the same website information that he would have received via the notification under § 1502(c).

[3] Hereinafter, all internal alterations, citations, quotations, and subsequent history are deleted unless otherwise indicated.

are "applicable to IRS taxes and penalties." Pl.'s Resp. 5. But Plaintiff's Second Amended Complaint does not invoke the APA or the FTCA, nor has Plaintiff pled facts that could support a claim under either statute.[4] Jurisdictional statutes do not provide Plaintiff with a cause of action. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004) (explaining the distinction between a jurisdictional statute and one creating a cause of action). And Plaintiff's argument that a cause of action under § 1502(c) "preexisted" the ACA, Pl.'s Resp. 5, underscores what he has repeatedly conceded: "that §1502(c) [itself] does not grant a private right of action," 2AC ¶ 11; *see also* Pl.'s Resp. 1 (suggesting that Defendants are liable under § 1502(c) "regardless of whether or not a private right of action exists in §1502(c)"), 6 ("I am not trying to enforce §1502(c).").

Second, Plaintiff cannot maintain a claim that, due to Defendants' alleged failure to provide the § 1502(c) notification prior to 2016, he is entitled to refunds of past shared-responsibility payments, because the notification is not a condition precedent to a taxpayer's prior responsibility to make shared-responsibility payments. *See* Defs.' PMTD 12-14. Plaintiff argues that "§1502(c) … 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." Pl.'s Resp. 6. But § 1502(c) plainly contemplates that the notification be sent after an individual "files an … income tax return" for the preceding taxable year and therein indicates that s/he "is not enrolled in minimum essential coverage." 42 U.S.C. § 18092; *see also id.* (indicating that the notification shall be sent "[n]ot later than June 30 of each year" after the statutorily set due date of income tax returns); https://perma.cc/PU7F-7GMX (explaining the § 1502(c) notification requirement and that "[i]nforming taxpayers, *at the time of filing*, about their

[4] In addition, any APA claim based on Plaintiff's allegations would not be reviewable because any failure to provide Plaintiff with the § 1502(c) notification prior to 2016 is not a "final agency action." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (explaining that review under the APA requires a "'final agency action.'" (quoting 5 U.S.C. § 704)). Moreover, Plaintiff is not seeking to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), as he seeks refunds of his shared-responsibility payments and received the § 1502(c) notice in 2016. *See* Pl.'s Resp. 6.

coverage options through the … Marketplaces may provide an opportunity for them to enroll in Marketplace coverage and avoid a shared responsibility payment *next year*") (emphasis added). Plaintiff otherwise fails to contend with Defendants' showing that any failure to comply with § 1502(c) would not inhibit the Government from collecting, much less require it to refund, any shared-responsibility payment. *See* Defs.' PMTD 12-13.[5] His § 1502(c) claim should be dismissed.

II. Plaintiff's Prospective Claims Are Moot, Or, In The Alternative, He Lacks Standing To Bring Them.

As explained, intervening events since Plaintiff filed his First Amended Complaint—namely the zeroing out of the shared-responsibility payment in the Tax Cuts and Jobs Act ("TCJA"), the injunction issued in *DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019), and the Religious Exemption Rule that allows a willing insurer to provide Plaintiff with health care coverage that omits the contraceptive coverage to which he objects—have rendered Plaintiff's prospective claims moot or, in the alternative, Plaintiff lacks standing to bring them. *See* Defs.' PMTD 14-16. In response, Plaintiff makes three primary arguments, none of which show that this Court has jurisdiction to hear Plaintiff's prospective claims.

First, Plaintiff argues that the nullification of the shared-responsibility payment does not moot his prospective claims because "defendants are very likely to repeat their past behavior of collecting the [shared-responsibility payment]." Pl.'s Resp. 9. But the Fifth Circuit, like others, has recognized that "statutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'" *Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 564 (5th Cir. 2006), *different portion of op. and*

[5] Even if Plaintiff could show that a lack of notification under § 1502(c) entitles him to a refund of any shared-responsibility payment (he cannot), he plainly would not be entitled to a refund "of all the monies paid for the [shared-responsibility payment]," as he contends, Pl.'s Resp. 8, given that he received the § 1502(c) notification in 2016, *see id.* at 6, before at least two of his alleged shared-responsibility payments were made, *see* 2AC ¶ 44 (seeking compensation for payments made for the 2016 and 2017 tax years). And contrary to Plaintiff's assertion, the Government has not "tacitly acknowledged," Pl.'s Resp. 8, that Plaintiff is entitled to a refund of any of the shared-responsibility payments he seeks.

analysis abrogated by Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 703 (5th Cir. 2020). "The exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted." *Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996). There is no such certainty here.

In support of his argument that Congress will reinstate the shared-responsibility payment, Plaintiff cites two news articles from December 2020, which predicted, based on campaign statements, that Congress would reinstate the shared-responsibility payment on "day one" of the Biden administration if Democrats won a majority of the Senate, *see* Pl.'s Resp. 11 (citing https://perma.cc/3P39-RTRN; https://perma.cc/HCT8-3D9A). Those articles cannot be used to show that Congress is "certain" to reinstate the shared-responsibility payment when their predictions for "day one" have not come to pass seven months later. Other than his personal predictions based on the purported "normal inclination of Democrats," Pl.'s Resp. 10, Plaintiff offers no other evidence to support his speculation that it is "practically inevitable" that Congress will reinstate the shared-responsibility payment, *id.* at 9. Such unsupported speculation is not sufficient to establish the certainty necessary to invoke the rare exception to the general rule that statutory changes discontinuing a challenged practice moot Plaintiff's prospective claims.[6]

Second, Plaintiff argues that the TCJA had no effect on his standing because the shared-responsibility payment provision remains and the reduction of the payment to $0 made "no substantive change." Pl.'s Resp. 11. The Supreme Court disagreed. As explained, it found that the TCJA "effectively nullified the penalty by setting its amount at $0," *California v. Texas*, 141 S. Ct. 2104, 2112 (2021), such that the minimum essential coverage provision "has no means of enforcement," *id.* at 2114.

[6] For similar reasons, if analyzed as a standing issue, Plaintiff has not shown that any injury flowing from reinstatement of the shared-responsibility payment is "certainly impending," as he must. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Plaintiff therefore cannot establish a legally cognizable injury based on "the additional penalties imposed by the ACA," 2AC ¶ 13(F), given the elimination of the penalty he challenges, *see* Defs.' PMTD 15-16. And without a means to enforce the minimum essential coverage provision, Plaintiff's requested relief—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 effectively been granted, rendering his claims for injunctive and declaratory relief moot, *see* Defs.' PMTD 14-15.

Third, Plaintiff argues that he is injured despite the Religious Exemption Rule because the previous requirement that all health plans include contraceptive coverage "so skewed the market" that "few if any insurers" will offer a policy without contraceptive coverage, and "[e]ven 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." Pl.'s Resp. 12. Notably, Plaintiff's purported injury is not based on an allegation that he has been unable to find a compatible policy; rather, his Response confirms, again, that he has not attempted to find one, even after the Religious Exemption Rule went into effect in 2018. *See* Pl.'s Resp. 7, 12. His speculation that he would not be able to find one if he looked, and that even if he found one, it might go out of business, is too conjectural and hypothetical to establish an Article III injury in light of the Religious Exemption Rule. *Hotze v. Burwell*, 784 F.3d 984, 995 (5th Cir. 2015).

In addition, Plaintiff cannot show causation where his putative injury "results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). Courts are "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 (2013). Thus, when a plaintiff's asserted injury "depends on the unfettered choices made by independent actors not before the courts," standing is "substantially more difficult to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992); *see also Inclusive Cmtys. Project v. Dep't of Treasury*, 946 F.3d 649, 655–56 (5th Cir. 2019).

In these circumstances, a plaintiff must show that the Government's action will have a "determinative or coercive effect upon the action of" those third parties. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

Here, the Religious Exemption Rule is in effect, and Plaintiff concedes that the injunction issued in *DeOtte*, 393 F. Supp. 3d 490, provides him similar protection, *see* Pl.'s Resp. 11. The existence of the Rule and the *DeOtte* injunction is fatal to Plaintiff's ability to show that his putative injury is sufficiently traceable to Defendants to establish standing. Instead of challenging the actions of Defendants, Plaintiff predicts that "few if any insurers w[ill] offer … [a] policy" free of contraceptive coverage, Pl.'s Resp. 12, even though he concedes that the Religious Exemption Rule (and *DeOtte* injunction) "allows a willing insurer to change this default and offer a contract which does not include [contraceptive coverage]," *id.* at 11. Plaintiff thus admits that his putative injury "depends on the unfettered choices made by independent actors not before the [Court]"—insurance companies—and that those companies are allowed to provide the type of coverage that he wants. *Lujan*, 504 U.S. at 562. Even if few choose to do so, as Plaintiff suggests, Pl.'s Resp. 12, Defendants' actions can necessarily have no "determinative or coercive effect" on the actions of those third parties, given that they are expressly permitted by law to do what Plaintiff wants. *Bennett*, 520 U.S. at 169.

For like reasons, Plaintiff also cannot establish redressability. To do so, he must show that "it is *likely,* as opposed to merely *speculative*, that [his] injury will be redressed by a favorable decision." *Inclusive Cmtys. Project*, 946 F.3d at 655. Insurers are currently free to offer Plaintiff health insurance without contraceptive coverage. Invalidating the contraceptive coverage regulations, as Plaintiff requests, would thus leave him in the same position: just as he is now, he would be subject to the market-based choices of insurers and those insurers would be free to offer health insurance to Plaintiff with or without contraceptive coverage as they see fit. Plaintiff's prospective claims must be dismissed.

III. Plaintiff Fails To State A Claim in Counts III-VIII.

Whether prospective or retrospective, Plaintiff also fails to state a claim in Counts III-VIII of his Second Amended Complaint, and those claims should be dismissed under Rule 12(b)(6) as well.

Establishment Clause Claims (Counts III and V): As explained in Defendants' opening brief, Plaintiff fails to state an Establishment Clause claim because both the contraceptive coverage regulations and the religious exemptions to the minimum essential coverage provision meet all three prongs of the *Lemon* test. Defs.' PMTD 16-19.

With respect to the contraceptive coverage regulations, Plaintiff argues first, that the stated secular purpose to increase women's access to recommended preventive services is a "sham" that "is contradicted by the facts." Pl.'s Resp. 16. To validly allege the lack of a secular purpose, however, Plaintiff must contend that Defendants acted with an improper *religious* purpose. *See, e.g.*, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005). Plaintiff does not do that; instead, at most, he alleges that Defendants acted with an improper political purpose. *See id.* (arguing that the motivation for the contraceptive coverage requirement "came from the belief system of the Left"). Second, Plaintiff argues that the contraceptive coverage regulations lack a permissible secular effect because they "discriminate[] … against certain religions" by purportedly benefiting those who share the Government's beliefs and harming those who oppose the Government's beliefs "on religious and political grounds." Pl.'s Resp. 16. But again, Plaintiff does not plausibly allege that the contraceptive coverage regulations favor certain *religious*, as opposed to governmental or political, beliefs over others. And the fact that secular government decisions happen to coincide with some religious beliefs but not others does not mean that the Government has enacted a religious preference. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988). Third, Plaintiff argues that the lawsuits challenging the contraceptive coverage regulations, as well as the exemptions from them, show excessive government entanglement with religion. Pl.'s Resp. 16. But Plaintiff does not explain how secular exemptions from

the contraceptive coverage regulations (like the exemption for grandfathered plans discussed in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698-99 (2014)) could possibly entangle the government with religion. And the Religious Exemption Rule is a permissible accommodation of religion. *See Little Sisters of the Poor Saints Peter & Paul Home v. Penn.*, 140 S. Ct. 2367 (2020).

With respect to the religious exemptions to the minimum essential coverage provision, Plaintiff argues that "[c]ertain religions are granted an exemption" and given "religio[us] preference." Pl.'s Resp. 18-19. Other than making these conclusory statements, and expressing his general dissatisfaction with the option of participating in a health care sharing ministry, Plaintiff does not engage with Defendants' showing that the exemptions do not distinguish between sects or contend with the unanimous case law finding that such exemptions satisfy the *Lemon* test. *See* Defs.' PMTD 17-19.

Free Exercise Claim (Count IV): To support his Free Exercise claim, Plaintiff relies on the same arguments he used to support his Establishment Clause claim. Those arguments should be rejected for the reasons just stated. In addition, he argues that the political affiliations of those who made recommendations for the preventive services guidelines and emails from select Obama administration officials show "[h]ostility to certain religions and favoritism to the Leftist belief system." Pl.'s Resp. 17. For reasons explained, government action—namely, the contraceptive coverage regulations—does not send a message of hostility toward religion (or any particular religion) merely because it conflicts with a particular religion's view on a secular policy issue. *See Bowen*, 487 U.S. at 612-13. And the alleged political affiliations and statements of select individuals do not undermine the pertinent evidence on this score, namely the laws in question and the legislative and regulatory history, including the Institute of Medicine Report, which show that the laws are neutral and generally applicable, as nearly every court to consider the issue has found. *See* Defs.' PMTD 23-24.[7]

[7] For the same reasons, Plaintiff's arguments do not support an equal protection claim that the contraceptive coverage requirement was enacted with "discriminat[ory] intent." Pl.'s Resp. 19.

Equal Protection Claims (Counts III and VII): As Defendants explained, the contraceptive coverage regulations satisfy equal protection because they have the permissible aim of remedying prior discrimination and equalizing access to healthcare outcomes by providing insurance coverage that is disproportionately needed by women, who are uniquely disadvantaged without it. *See* Defs.' PMTD 19-22. In his response, Plaintiff continues to argue that the contraceptive coverage regulations violate equal protection because "FDA approved sterilization" is not provided "to men free of charge," Pl.'s Resp. 16, and that "female sterilization [is] free of charge and not male sterilization," *id.* at 20. Of course, the ACA and its implementing regulations provide for coverage of female sterilization without cost sharing, not free of charge. In any event, Plaintiff's argument that male sterilization coverage should be required ignores the permissible governmental aim of the contraceptive coverage regulations and the fact that the differences between women and men with respect to pregnancy and childbirth support the gender-based distinction at issue under equal protection principles. *See* Defs.' PMTD 19-21.

Plaintiff also argues that the religious exemptions to the minimum essential coverage provision violate equal protection because they favor certain religions. *See* Pl.'s Resp. 18, 20. Multiple courts of appeals have recognized that the religious exemption in 26 U.S.C. § 1402(g)(1) from the social security tax is a permissible accommodation of religion, concluding that it is permissibly drawn "to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church." *Droz v. Commissioner*, 48 F.3d 1120, 1124 (9th Cir. 1995); *see also Hatcher v. Commissioner*, 688 F.2d 82, 83-84 (10th Cir. 1979); *Jaggard v. Commissioner*, 582 F.2d 1189, 1190 (8th Cir. 1978) (per curiam). For similar reasons, the religious exemptions under 26 U.S.C. § 5000A(d)(2)(A) and (B), available by reference to 26 U.S.C. § 1402(g)(1), are lawful and nondiscriminatory under both the Establishment Clause and equal protection principles, *see Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 100-02 (4th Cir. 2013); *Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173,

1183 (D.C. Cir. 2015); *Olson v. Social Sec. Admin.*, 243 F. Supp. 3d 1037, 1058 (D.N.D.), *aff'd*, 709 Fed. App'x 398 (8th Cir. 2017).

Tax and Spend Claims (Counts VI and VIII): As explained, Plaintiff's claim that the ACA exceeds Congress's constitutional authority to tax is foreclosed by the Supreme Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB"),* 567 U.S. 519 (2012). In his Response, Plaintiff simply reiterates the arguments he made in his Second Amended Complaint, *see* Pl.'s Resp. 21-22, but his view that "the Supreme Court majority was incorrect in *NFIB*," *id.* at 22, cannot overcome that binding Supreme Court precedent.

Due Process Claims (Counts VI and VII): In his Response, Plaintiff restates his argument that Defendants have "confiscate[ed] … property in violation of the 5th amendment without due process" by "require[ing] individuals to enter a contract." Pl.'s Resp. 23. As explained, however, such a claim is subject only to rational basis review. *See* Defs.' PMTD 26-27; *see also Residents Against Flooding v. Reinvestment Zone No. 17*, 734 F. App'x 916, 919 (5th Cir. 2018) (per curiam); *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 601 (6th Cir. 2013) (holding that the "freedom to refuse to pay for unwanted medical care . . . cannot be characterized as 'fundamental' so as to receive heightened protection under the Due Process Clause"). And the minimum essential coverage requirement and shared-responsibility payment provision are neither arbitrary, nor a confiscation of property, and instead (prior to the 2019 tax year), served the lawful purposes of "induc[ing] the purchase of health insurance" and "rais[ing] . . . revenue." *NFIB*, 132 S. Ct. at 2596-97. Similarly, to the extent Plaintiff challenges the ACA as a whole on due process grounds, *see* Pl.'s Resp. 20-21, his due process challenge fails (even

assuming he has standing to raise it) because the ACA is rationally related to the "legitimate government purposes of promoting public health and gender equality." *Priests for Life v. HHS*, 7 F. Supp. 3d 88, 110-11 (D.D.C. 2013).[8]

Privacy and Freedom of Association Claims (Count VI): Plaintiff also contends that the minimum essential coverage requirement violates his Fourth and Ninth Amendment rights to privacy and association by forcing him to enter into a private contract for "personal, and intimate health care decisions" and to agree to "defendants[']] belief system." Pl.'s Resp. 23-24. As explained, however, the minimum essential coverage requirement is far afield from the kinds of intimate associations protected under existing precedent by the right to privacy and the freedom of intimate association. *See* Defs.' PMTD 27. And contrary to Plaintiff's argument, *see* Pl.'s Resp. 23-24, *Janus v. America Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), provides no support for his freedom of association claim. *Janus* held that a state law that conditioned government employment on the payment of "agency fees" to public-sector unions violated an employee's right not to associate with a labor union. That holding was predicated on the plaintiff's refusal to join a union because he opposed many of the public policy positions the union advocated, including in collective bargaining. *See* 138 S. Ct. at 2461. By contrast, Plaintiff does not allege that he dropped his health-insurance coverage because of any expressive activity on his insurer's part, and any requirement that insurers cover contraceptive services concerns non-expressive conduct, not speech.

IV. Plaintiff Should Not Be Permitted To Amend His Complaint For The Third Time.

Plaintiff asks that "[i]f the court should find … fault with the Second amended complaint," he be given leave to file a third amended complaint. Pl.'s Resp. 24. He should not be given leave to do so. As Magistrate Judge Hanovice Palermo explained in holding that Plaintiff should not be granted

[8] Under rational basis review, the Government has "no obligation to produce evidence to sustain the rationality of a statutory classification," and courts may not "judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe*, 509 U.S. 312, 319, 320 (1993); *see also Plyler v. Doe*, 457 U.S. 202, 216 (1982).

leave to amend again, "a plaintiff should be denied leave to amend a complaint if the court determines that the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face." R&R 24, ECF 67. Plaintiff has already been granted leave to amend twice. His current complaint largely reiterates the same factual allegations that the Magistrate Judge and this Court previously found wanting, and the intervening events that led the Fifth Circuit to instruct this Court to permit Plaintiff to amend only provide additional reasons to dismiss his prospective claims for lack of jurisdiction. The one claim that Plaintiff indicates he would bring if allowed to amend his complaint again is that the zeroing out of the shared-responsibility payment makes the ACA unconstitutional. *See* Pl.'s Resp. 9. But such a claim would be futile because, like the plaintiffs who just appealed such a claim to the Supreme Court, Plaintiff would lack standing to bring that claim. *See generally California*, 141 S. Ct. 2104. And after filing three long and at times indecipherable complaints, Plaintiff indicates that his third amended complaint would "likely be of considerable length" and would not comply with Rule 8(a)'s requirements for "short and plain statement[s]." Pl.'s Resp. 25. Under these circumstances, Plaintiff should not be permitted to amend again, and if he is, Defendants respectfully request that the Court provide reasonable limitations on Plaintiff's ability to do so, such as limiting amendment to only certain claims.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should dismiss with prejudice Counts I and III-VIII of Plaintiff's Second Amended Complaint in their entirety and Count II to the extent it seeks prospective relief.

Dated: August 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 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, which he has confirmed suffices for effective service.

Executed on August 2, 2021, in Washington, D.C.

/s/ Emily Sue Newton
EMILY SUE NEWTON