UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J DIERLAM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:16-CV-00307**
	§	
BARACK HUSSEIN OBAMA, *et al.*,	§	
	§	
Defendants.	§	

CLARIFYING MEMORANDUM

Before the Court is plaintiff John Dierlam's Motion for Clarification and Leave to Submit a Third Amended Complaint (Doc. 111). At a hearing on January 28, 2022, the Court **GRANTED** Mr. Dierlam's Motion. The Court now offers this clarification of its rulings and reasoning concerning mootness and standing.

I. FACTUAL BACKGROUND

On February 4, 2016, Plaintiff John Dierlam filed his initial complaint, challenging the Affordable Care Act (ACA) and requesting prospective and retrospective relief for myriad alleged violations of the United States Constitution and the Religious Freedom Restoration Act. *See, generally* Compl., ECF No. 1. However, as Mr. Dierlam's case was progressing, the ACA was evolving.

The Tax Cut and Jobs Act (TCJA) went into effect a year after Mr. Dierlam filed his lawsuit, reducing the shared-responsibility payment (imposed on individuals who failed to purchase health insurance) to $0, but maintaining the individual mandate language. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (Dec. 22, 2017).

As well, in 2017, the Department of Health and Human Services and the Departments of Labor and the Treasury promulgated two Interim Final Rules (IFR) meant to protect religious objectors to the ACA's contraceptive mandate. "The first IFR significantly broadened the definition of an exempt religious employer." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2377 (2020). And "[t]he second IFR created a similar 'moral exemption' for employers." *Id*. at 2378. Part of the second IFR also included an "individual exemption," allowing "a willing plan sponsor" or "willing health insurance issuer" to offer a separate policy to individuals with objections to some or all contraceptive services. 82 Fed. Reg. at 47,812. The individual exemption is purely voluntary on the insurer's part, and therefore "cannot be used to force a plan (or its sponsor) or an issuer to provide coverage omitting contraception." *Id*. However, the two IFRs were enjoined until July 2020, when the Supreme Court's decision in *Little Sisters of the Poor* dissolved the nationwide injunction previously affirmed by the Third Circuit. 140 S. Ct. at 2373 (holding that the ACA authorized HHS to exempt or accommodate employers' religious or moral objections to providing no-cost contraceptive coverage).

And while all of this was happening, Mr. Dierlam was litigating his case. In November of 2017, Magistrate Judge Palermo found that the HHS exemption mooted all of Mr. Dierlam's claims for prospective relief, even though the exemption was still enjoined. R. &. R. 9, ECF 67. However, the Government apparently disagreed with her holding, as it (1) orally withdrew its HHS-exemption-based mootness argument during this Court's hearing on Judge Palermo's report, and (2) did not include HHS exemption mootness arguments in its briefing to the Fifth Circuit. Tr. 3:7-11, ECF 80.

As for the TCJA, it went unaddressed by Judge Palermo because it became law after she issued her report. However, this Court ruled from the bench that the TCJA mooted all of Mr.

Dierlam's claims for prospective relief, again conflicting with the Government's more limited understanding of the TCJA as mooting only those of Mr. Dierlam's prospective claims based on the individual mandate's shared responsibility payments. Tr. 38:13-16, ECF 80. Mr. Dierlam consistently held that neither the TCJA nor the HHS exemption mooted any of his claims.

The Fifth Circuit—noting the piecemeal mootness analyses resulting from the way the ACA changed in real time during the course of this litigation—remanded the matter, ordering this Court to conduct a comprehensive mootness analysis in the first instance. *Dierlam v. Trump*, 977 F.3d 471, 478 (5th Cir. 2020), *cert. denied sub nom. Dierlam v. Biden*, 141 S. Ct. 1392 (2021). Specifically, the Fifth Circuit first wanted clarity on what effect this Court thinks the TCJA as on the mootness of Mr. Dierlam's claims. *See id*. (noting that "the district court only said: 'I think, prospectively, it seems to be that most recent legislation does take care of the problem.'") Second, the Fifth Circuit wanted an HHS-mootness analysis that was not premised upon the supposed insufficiency of Mr. Dierlam's attempts to search for alternative health-insurance plans. *Id*.

After allowing Mr. Dierlam to amend his complaint, this Court held a hearing on the Government's second motion to dismiss, granting the motion after hearing oral argument on the mootness issue. *See* Min. entry 12.15.2021. Now, having granted Mr. Dierlam's motion for leave to file a third amended complaint, this Court elaborates upon its mootness and standing analyses per Mr. Dierlam's request.

II. DISCUSSION

A. Mootness

i. Legal Standard

The Court adopts in full the Fifth Circuit's articulation of the mootness doctrine[1]: The doctrine of mootness arises from Article III of the Constitution, which provides federal courts with jurisdiction over a matter only if there is a live "case" or "controversy." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "Accordingly, to invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013) (cleaned up). This case-or-controversy requirement persists "through all stages of federal judicial proceedings." *Id.* at 172, 133 S.Ct. 1017.

If an intervening event renders the court unable to grant the litigant "any effectual relief whatever," the case is moot. *Calderon v. Moore*, 518 U.S. 149, 150 (1996). But even when the "primary relief sought is no longer available," "being able to imagine an alternative form of relief is all that's required to keep a case alive." *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 553 (7th Cir. 2014), *judgment vacated sub nom. Univ. of Notre Dame v. Burwell*, 575 U.S. 901 (2015). So "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012).

Further, a case is not necessarily moot because it is uncertain whether the court's relief will have any practical impact on the plaintiff. "Courts often adjudicate disputes where the practical impact of any decision is not assured." *Chafin*, 568 U.S. at 175. For example, "the fact that a

[1] *Dierlam v. Trump*, 977 F.3d 471, 476–77 (5th Cir. 2020).

defendant is insolvent does not moot a claim for damages." *Id.* at 175–76. And "[c]ourts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed." *Id.* at 176.

When conducting a mootness analysis, a court must not "confuse[ ] mootness with the merits." *Id.* at 174. This means that a court analyzing mootness in the early stages of litigation need only ask whether the plaintiff's requested relief is "so implausible that it may be disregarded on the question of jurisdiction." *Id.* at 177. "[I]t is thus for lower courts at later stages of the litigation to decide whether [the plaintiff] is in fact entitled to the relief he seeks." *Id.*

ii. Analysis

The Court's legal research confirmed virtually all of the government's arguments regarding the mootness of Mr. Dierlam's prospective claims.

As the Fifth Circuit explained in remanding this case for a mootness analysis, in 2017, the HHS "created new exemptions to the contraceptive mandate" for religious objectors like Mr. Dierlam, and the TCJA was enacted, reducing the shared-responsibility payment to $0 beginning in tax year 2019. *Dierlam*, 977 F.3d at 473-74. And after the Supreme Court's ruling in July 2020, the HHS exemptions were no longer enjoined.

By law, the definition of exempt religious employers has been broadened, including any employer who "objects ... based on its sincerely held religious beliefs," "to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services." *Little Sisters of the Poor*, 140 S. Ct. at 2377 (2020) (citing 82 Fed. Reg. 47812 (2017)). This definition includes nonprofits, for-profits, publicly traded entities and non-publicly traded entities, and it exempts them from the contraceptive coverage accommodations of the ACA. *Id.* at 2377-78. As a result, it is not the case, as Mr. Dierlam alleges, that "[a] medical

insurer is compelled to … provide contraceptive coverage" to Mr. Dierlam or that Mr. Dierlam is "required to purchase medical insurance from [a] medical insurer[] [that] provides contraceptive coverage." Pl.'s Comp. ¶ 14, ECF 94.

And with the shared responsibility payment "zeroed out" by the TCJA, there is no enforcement mechanism to compel Mr. Dierlam to purchase health care coverage at all. *California v. Texas*, 141 S. Ct. 2104, 2114 (2021). Accordingly, the very action Mr. Dierlam demands—an exemption from having to participate in a health plan that covers contraceptive services that are inconsistent with his religious beliefs, *see* Pl.'s Comp. ¶¶ 43-45, ECF 94—has been issued, and any prospective injury Mr. Dierlam could allege based on the absence of such relief has thus been vitiated. *See Dierlam*, 977 F.3d at 473-74. Accordingly, Mr. Dierlam's requested relief has effectively been granted, and his claims for declaratory and injunctive relief are thus moot.

Mr. Dierlam first argues, citing a *Fox News* article from December 2020 and his personal predictions on the "normal inclination of Democrats", that his claims are not moot because Congress will simply reinstate the shared-responsibility payment. Pl.'s Resp. 10-11, ECF 105. 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—even more so when such speculation remains unsubstantiated two years into the Biden administration. *See Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 564 (5th Cir. 2006) (recognizing 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.'"); *see also Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996) (commenting that "[t]he 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.")

Second, Mr. Dierlam argues that, even though the TCJA reduced the shared-responsibility payment to $0, the language of the payment provision still remains and thus the reduction of the payment made "no substantive change." Pl.'s Resp. 11, ECF 105. However, the Supreme Court in *California v. Texas* held directly to the contrary when it found that the TCJA "effectively nullified the penalty by setting its amount at $0" such that the minimum essential coverage provision "has no means of enforcement." 141 S. Ct. at 2112, 2114. Mr. Dierlam tries to argue that he is injured by the mere existence of the mandatory language, but his "problem lies in the fact that the statutory provision, while it tells [him] to obtain that coverage, has no means of enforcement. With the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply." *Id.* Because of this, "there is no possible Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance. Or to put the matter conversely, that injury is not 'fairly traceable' to any 'allegedly unlawful conduct' of which the plaintiffs complain." *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Third, Mr. Dierlam argues that despite the Religious Exemption Rule, he is still injured 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, ECF 105. However, Mr. Dierlam 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). Here, where insurers are expressly permitted by law to give plaintiff a religious exemption, their decisions about whether to do so have very little to do with defendants. Similarly, Mr. Dierlam cannot establish redressability since he cannot 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 649, 655 (5th Cir. 2019).

For these reasons, the Court found that the TJCA and the HHS' exemptions moot all of Mr. Dierlam's prospective claims.

B. Standing

The party invoking federal jurisdiction bears the burden of establishing the three elements of standing by first sufficiently alleging "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual and imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Second, a plaintiff must allege "a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Id*. (citations omitted). And third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. (citations omitted).

The Court's analysis regarding standing tracks closely with its mootness analysis above because, 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 v. Arizona*, 520 U.S. 43, 68 & n.22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 387 (1980)). Therefore, this Court finds that Mr. Dierlam lacks standing for his prospective claims for the same reasons that this Court finds such claims moot.

Next is Mr. Dierlam's retrospective claim that the Government's failure to notify him of his non-enrollment (in violation of § 1502(c) of the ACA) "caused . . . harm" and prevented him

from having standing to file suit for retrospective claims sooner. Pl.'s Compl. at ¶ 11, ECF 94. However, Mr. Dierlam "c[an] not [] . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016), *as revised* (May 24, 2016). Here, where the purpose of § 1502(c) is to ensure that individuals who have not received minimum essential coverage are aware of coverage options, where any government notification would have simply directed Mr. Dierlam to HealthCare.gov, and where Mr. Dierlam admits that he was already aware of HealthCare.gov yet chose not to check it, no injury-in-fact exists. *See* § 1502(c); *see also* Pl.'s Compl. at ¶ 10, ECF 94. As such, Mr. Dierlam lacks standing to bring a claim based on the government's § 1502(c) failure to notify.

III. CONCLUSION

For the reasons detailed above, this Court found that Mr. Dierlam's prospective claims are moot as he lacks standing to bring them, and that his retrospective § 1502(c) claim is invalid for lack of standing. Mr. Dierlam should take care to ensure his third amended complaint does not suffer from the same mootness and standing insufficiencies.

SIGNED at Houston, Texas on this the 8th day of February, 2022.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE