UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

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

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Issues Presented

1)Has the government shown it has caused no current injury, actual or eminent, for which this court can provide relief other than a retrospective RFRA claim?

2)Have the defendant's demonstrated that no set of facts could possibly exist which upon further development through discovery would allow this court to construct any redress of the alleged injuries?

Background

About the year 2010, Congress passed Pub. L. No. 111-148 (PPACA) and Pub. L. No. 111-152 (HCERA), collectively known as the ACA. Provisions of the ACA require every individual, or their guardian, with a sufficient income as calculated in the ACA, to maintain a government approved and mandated health insurance policy or qualify for an exemption. Various exemptions may also avoid the penalties. The ACA specifies little in what should be included in "minimum essential coverage," instead it gives fairly broad authority to HHS to define these specifics, 42 § 300gg-13(a)(4) is but one example of this delegation. It is here where the requirement that "minimum essential coverage" include contraceptive, sterilization, certain abortion services, and related counseling without additional charge to women.

The Original complaint was filed Feb. 4, 2016 in US District Court for the Southern District of Texas. Since that time the Tax Cut and Jobs Act of 2017 (TCJA) was passed which set the Individual Mandate Penalty (IMP) to $0. The government issued amended religious exemptions to the HHS Mandate in 2018. This case was dismissed by this court on June 14, 2018. The appeals court on Oct. 15, 2020 reversed and remanded for lack of an analysis of mootness and standing. The Second Amended Complaint (2AC) was dismissed by this court on 12/15/2021. A third Amended Complaint (3AC) was filed on 3/28/2022. The defendants filed a Partial Motion to Dismiss the Third Amended Complaint (PMTD3AC) on 5/9/2022 indicating all

claims other than the RFRA claim lack standing and/or are moot FRCP 12(b)(1) and "failure to state a claim upon which relief can be granted" FRCP 12(b)(6).

Standard of Review

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

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

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

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

From *Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013)*, "A case becomes moot—and

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

therefore no longer a Case or Controversy for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome."

Summary of the Argument

The government's argument On pp.9-12 of the PMTD3AC regarding negligence per se appears to have merit. Federal courts generally subscribe to the theory federal law can not have an equivalent to any state law under which an individual can be sued. I would substitute gross negligence for negligence per se. The government is also correct on p.18 of the PMTD3AC. Litigation related expenses can not be used as an injury. Otherwise, for the most part, the defendant's arguments fail to accurately depict the facts and law mentioned in the Complaint. Statements or arguments are alleged as originating in the Complaint which simply do not exist in that document. These straw men are easier to knock over. The most likely reason for this behavior is the government can not mount a successful defense against the actual charges in the Complaint. Therefore, as a matter of law, the government's 12(b)(1) and 12(b)(6) Motion should be dismissed in its entirety as the evidence and law supporting these claims remain standing.

Argument

I – The Defendants Fail to Address the Evidence Provided in the Complaint

The defendants appear to make a very selective and cursory reading of the 3AC. Many of the facts in the 3AC are ignored. The defendants in large part do not refute the facts provided or provide additional facts in support of their position. Often formalaic recitations of law are given which do not fit the facts provided in the Complaint. "...Formulaic recitation of a cause of action's elements will not do,"[3] in a Complaint, but it appears to be acceptable in a government MTD. Further, "In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the district court must accept all well-pleaded facts as true and view them in the light most

3 *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).*

favorable to the plaintiff."[4] The failure of the defendants to address all facts and evidence presented do not make these items irrelevant nor should this Court ignore them. ¶89 of the 3AC specifically incorporates together all facts and evidence of all sections because of the interrelated nature of the charges. Several sections of the 3AC especially the first two claims present alternate legal theories to arrive at and support the same violation of law on the part of the defendants.

A - Claim 2 – The ACA § 1502(c) unambiguous mandates may not be altered. The agencies did not follow these mandates which causes even current injury. A new eminent injury is in the rule making phase as suggested by news accounts. Other ongoing injuries also exist. Three separate legal theories are put forward in this claim, any one can potentially provide some relief, however the relief depends upon which theory prevails. The defendants concede a third party not before the court is not necessarily involved.

As the defendants indicate on pp,10-11 of the PMTD3AC and I indicate in ¶104 of the 3AC, prior court decisions make it clear this court is not free to alter the unambiguous words of Congress. It is the defendants who are attempting to modify § 1502(c). Here "...services available through the Exchange operating in the State in which such individual resides" clearly refers to a health care marketplace set up in this case by Texas. However, Texas refused to set up such a marketplace. The government would have this court substitute healthcare.gov for this state operated marketplace. It should not be free to do so. Likewise, "Not later than June 30 of each year..." requires the agencies to send required notices. Again, this court is not free to alter this requirement. However, § 1502(c) does not forbid the agencies from sending additional information in the required notifications. Indeed, the notification I received in late 2016 did contain additional information other than a website address, which could have proven helpful. I started this lawsuit nearly a year prior to this notification. I was aware through my legal research the HHS Mandate created by the defendant agencies forced ALL insurers to include insurance coverages proscribed by the Catholic faith. No religious exemptions evenly remotely applicable

4 *Baker v. Putnal, 75 F.3d 190 (5th Cir. 1996).*

to me existed at that time. As described in the Complaint in ¶100, the HHS Mandate exceeded the Congressional authority granted the agencies. Congress did not anticipate States would refuse to set up a marketplace nor the agencies would create the HHS Mandate. It is the HHS Mandate, solely a product of the agencies, which caused injuries. If the agencies properly followed § 1502(c) and otherwise stayed within their Congressional authority, the damage could have been prevented. The injuries listed in ¶¶68-70 of the 3AC are traceable to the defendants.

What then can be legally inferred from § 1502(c) in the ACA? Congress intended the Individual Mandate (IM) to fall upon every citizen. It granted a couple of exemptions to the IM, supposedly based on religion, as well as excluded various government programs such as Medicare from many of the requirements of the ACA. It granted several exemptions to the IMP. Perhaps the largest exemption was granted to those who did not earn a sufficient level of income. The ACA's stated goals are to reduce cost and expand health care coverage. It appears Congress intended to reduce the number of uninsured yearly by continuing the required notices. It is reasonable to conclude the intention of Congress in § 1502(c) is to help people avoid the IMP and to aid in obtaining insurance meeting "minimum essential coverage," just as stated in ¶104 of the 3AC.

I can see only three possible reasons for the agency actions, a)a staggeringly high level of incompetence, b)gross negligence and callous disregard for the public interest, or most likely c)to advance an autocratic and unconstitutional control upon the population in violation of protected rights thereby forcing the population into the belief system held by these government agencies. All of these possibilities are bad, but the latter ones are malicious, egregious, and very much require judicial action. Also the court should note, for reason c it would be very much to the agencies advantage to not send the required notices now or in the future since if people are

ignorant of their choices they can be better herded to choices of preference to the agencies. In contradiction to the defendant's statement on p.10 of their PMTD3AC, future notices may help redress the injuries, **IF** they contain information on insurance providers with products consistent with my faith and other requirements. However, as just stated, such a notice would not aid in advancing the agenda of the defendants. In the current situation, the defendants can and have simply blamed the victim for a less than diligent search even though it is the defendant's regulations which have made it IMPOSSIBLE to find acceptable insurance.

Further evidence exists that (c) above is the reason the agencies created the HHS Mandate and the lack of the § 1502(c) notices. After filing the 3AC, I read HHS is moving to make good on President Biden's promise to roll back the Trump religious conscious exemptions. See https://news.yahoo.com/biden-admin-rescind-trump-conscience-132948000.html, which describes how medical professionals will no longer be allowed to refuse to perform abortions and transgender operations because of their religious beliefs. https://thefederalist.com/2022/01/31/under-biden-proposal-everyone-including-kids-could-more-easily-get-transgender-surgery/ indicates the administration is pushing to include transgender surgeries, hormone blockers, etc. into insurance coverage. See also 87 Fed. Reg. 584 (Jan 5, 2022). The agencies use many of the same arguments to justify this change as they used to justify the HHS Mandate. It appears the only document used to support their position refers to drugs for Off-Label uses, which suggests the experimental nature of the hormone therapies. Studies indicate approximately 80% of children with gender dysphoria grow out of it.[5] The proposed therapies can cause permanent damage to those treated, which causes this agency action to fall within the arbitrary and capricious definition given in ¶101 of the 3AC. Not only does the

5 See https://www.transgendertrend.com/children-change-minds/

Catholic faith find these so called therapies to be morally offensive, I expect many other religions would as well. Perhaps I did not foresee the defendants would include so called "gender health care" into "minimum essential coverage," otherwise I would have listed it with Euthanasia etc. in ¶96 of the 3AC. It is my understanding these new rules are not yet final agency action. However, as stated in ¶¶92-96 the ultra vires activity of the agencies in the creation of the HHS Mandate provides prospective relief. The agencies have made it clear, they are in the process of trying to force their Leftist religious belief system upon the public, a violation of the first amendment establishment of religion has been substantiated for the HHS Mandate (Claim 4) and this proposed new rule. This new rule constitutes a prospective injury listed in ¶70 of the 3AC. The defendant's proposed actions fall with in the *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* decision which states, "if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury [is] certainly impending."

As provided in the previous paragraph, the defendant's have condemned themselves even with out discovery by their recent actions to be in violation of at least Claim 1 and 4. Summary judgment for these Claims is appropriate. As seen in footnote 1 of their PMTD3AC, the defendants would have this court essentially invert FRCP 8, which only requires "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element."[6] Even without the recent activity, enough facts have been included here and in the Complaint to raise a reasonable expectation discovery as requested in ¶275 can plausibly uncover even more evidence for the culpability of the defendants.

On pp.9-12 of the PMTD3AC the defendants appear to make an argument that I lack

6 *REAL ALTERNATIVES, INC. v. Burwell, Dist. Court, MD Pennsylvania 2015, quoting Twombly, 550 U.S. at 555*

standing because the lack of notification caused no injury. However, multiple acts and omissions on the part of the defendants caused multiple injuries. See ¶¶68-70 of the 3AC. If a lack of notification caused no ADDITIONAL injury, it is because the defendants arranged it so. If it is NOW the defendant's contention that the individual religious exemption has produced currently existing insurance providers willing to provide a policy compliant with my faith and other requirements, then the lack of notification causes me current injury. June 30th is again rapidly approaching and the defendants can send me notice of these insurers. For my part, I do not plan to be their fool again and engage in wild goose chases for products which likely do not exist unless it is part of comprehensive discovery to determine the extent of the defendant's damage to the market as mentioned in ¶272.

It appears the defendants have completely misread my claims in ¶¶111-120 and 293 or are trying to mislead the court based upon their PMTD3AC pp.11-13. In these paragraphs I actually put forward two legal theories. The first is based upon a private right of action in the APA "if no other statue authorizes a cause of action." I do not claim the APA provides monetary relief, and in ¶293 I specifically state the relief sought should take different forms depending on which theory the court may find valid. After mentioning the APA, the remainder of the paragraphs evoke the Tucker Act, which finds a cause of action in "other sources of law" and can provide monetary relief. Here, I mention two possible sources of Law for a cause of action, "harm to the public interest" and "unclean hands." Both rely on the "inherent equity powers of the federal courts."[7] If the Court should provide a favorable ruling under the Tucker Act via either or both causes of action I would request the return of my IMPs and the purchase of health insurance by the defendants. The government's statements and footnote at the end of their Section I(B)1 do

7 *RHODE ISLAND ENVIRONMENTAL v. US, 304 F.3d 31, 41 (1st Cir. 2002).*

not appear to align with my corresponding claim.

A third legal theory is made in ¶¶121-127 of the 3AC and involves the FTCA, which can also provide monetary relief. On p.13 of the government's PMTD3AC, the defendants first argument indicates the claim is time barred. As Texas Law is controlling in the FTCA, in ¶99 the Continuing Tort Doctrine extends the time to file for a regularly occurring event, which should include a yearly notice among other sources of continuing injury.[8] As I have only become aware of this source of a private right of action within the past couple of months, I have not filed. Similar to filing the claim form with the IRS, it is almost certain the agencies will not provide the relief sought.

The government's second argument for failure to state a claim under FTCA may have some merit. It does appear the court's bar negligence per se under the theory a private citizen under state law has no corollary to any Federal Law. However negligence and gross negligence are allowed under FTCA. The difference between gross negligence and negligence is the state of mind of the perpetrator. In the former the perpetrator has awareness of the risk but proceeds with indifference to the rights of others. As described above, either of these causes of action may be appropriate. Multiple acts of the defendants are negligent.

On pp.15-17 of the defendants PMTD3AC in a rather formulaeic fashion dismisses all the prospective injuries without mentioning these injuries or providing any explanation on why each is invalid to establish standing. Six prospective injuries are summarized in ¶70 of the 3AC. As mentioned above the second of these injuries has recent developments which indicate injury is imminent. Perhaps the most important point here is the mind set of the defendants. It is clear the defendants have an agenda to advance their belief system and, they **WILL NOT STOP**. Here

8 *Achee v. Port Drum Co., 197 F. Supp. 2d 723 (E.D. Tex. 2002).*

"...it is absolutely clear the allegedly wrongful behavior..."[9] is recurring. If this hearing were actually fair, the law intends it to be the defendant's burden to show the wrongful behavior will not recur, not mine to show it has or will recur. This cursory treatment of this injury strongly indicates none of the prospective injuries have received serious consideration. Therefore, the vague criticisms on pp.15-17 should not be given any weight by this court. Controversy, jurisdiction, and standing remain in place.

On pp.17-19 of the PMTD3AC the defendants next attack what they refer to as lack of ongoing injuries. At least here, they do directly address some of the injuries. The previous paragraph demonstrates that the second paragraph on p.19 and the related first paragraph on p.18 of the PMTD3AC are in error as changes to the regulations of the ACA are in progress. The defendants maintain essentially that separate is equal in the last paragraph of p.17 of their PMTD3AC. After all, I have the choice of a "separate coverage option" (assuming I can find a willing insurer) or a separate health care sharing ministry (assuming any exist which share Catholic values as required by the ACA). However, the Supreme Court in *Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)* overturned a similar separate but equal segregation based upon race as a violation of equal protection. The government in this instance is creating a religious ghetto rather than one based upon race. The previous parenthetical comments as well as others which could be added should very much indicate these options are NOT EQUAL to the insurance policy choices allowed the remainder of the population. This type of segregation constitutes an "ongoing injury" and penalty in itself. The difficulties posed here are an inducement to abandon my faith, which is a violation of the 1st amendment to so condition

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

an important benefit as well as a violation of RFRA.

The paragraph spanning pp.18-19 of the PMTD3AC, remarks on damage to the market. This damage can be substantiated by the discovery mentioned in ¶272 of the 3AC without any speculation, which suggests the "injury will be redressed by a favorable decision" and does not require any "third party not before the court." Id. However, on p.37 of the PMTD3AC, the defendants appear to concede the obvious, a third party is not necessarily involved and I am at least one of the objects of the regulation concerning the health care contract, "Here, Mr. Dierlam cannot claim a First Amendment violation simply because [he] may be subject to . . . government regulation." (Internal quotations omitted.) The "third party not before the court" argument is a red herring and of no consequence in the instant case as this quote indicates I am the object of the "government regulation."

B - Claim 15 and 1 – The defendants comments regarding Claim 15 are invalid and should be disregarded. The defendants own words indicate the HHS Mandate is arbitrary and capricious.

Section III(A) on p.20 of the defendant's PMTD3AC combines arguments for Claims 1 and 15, which they claim concern the "contraceptive coverage requirement, which [Mr. Dierlam] refers to as the 'HHS Mandate,' violates the APA." As noted previously, the defendants very cursory read of the Complaint is evident. Claim 15 does not concern the HHS Mandate or the APA although they do pull some quotes from this claim. Claim 15 is a claim of arbitrary and capricious construction and intent for the ACA itself and uses the Supreme Court decisions *Brushaber v. Union Pac. R.R. Co., 24-25, 240 U.S. 1 (1916)* and *Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934)* for authority, not the APA. Therefore, any comments which concern Claim 15 are inappropriate and should be disregarded as the defendants have not provided an appropriate defense against this claim.

As noted in the 3AC, and as the defendant's own words on p.21 of the PMTD3AC indicate, "women's preventive healthcare and screenings" can not include abortion, contraceptives, sterilization, or related counseling as none of these activities are screenings nor have they ever been considered preventive. Pregnancy is not a disease. The term "contraceptive coverage requirement" is propaganda created by the defendants. It appears nowhere in the ACA.

¶101 of the 3AC provides possible elements for an agency decision to be considered arbitrary. Here, not just one but all the elements can be shown to have a basis in fact. 1)"the agency has relied on factors which Congress has not intended it to consider,"[10] has been established supra. 2)"entirely failed to consider an important aspect of the problem,"[11] see ¶33-43 of the 3AC. 3)"offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[12] See ¶¶133-141, 167-175, 180-181 of the 3AC. The evidence the HHS Mandate is arbitrary and capricious is enormous. It is clear a Leftist political belief system was the primary reason the defendants adopted the HHS Mandate. A 12(b)(6) Motion should be easily denied for claim 1.

C - Claim 4 and 10 – The defendants cite evidence inconsistent with the available facts to support their MTD the establishment clause violations in the HHS Mandate and the ACA. Evidence does indicate in contradiction to the statements of the defendants favoritism has been shown to certain sects.

The defendants cite the wrong paragraph numbers for the evidence on hostility toward religion of the classes created by the HHS Mandate, but that is the least of the problems with the defendant's analysis. Again, the defendant's provide only a formalaic recitation of law without any evidence. The statements made by the defendants are self contradictory, contradictory to the

10 *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.463 U.S. 29, 43 (1983)*
11 Id.
12 Id.

facts presented above, and in the 3AC. Of the cases cited in footnote 5, the defendants indicate many were reversed ("rev'd"). Also the number of cases cited contradicts their claim of no "excessive governmental entanglement with religion" from p.22 of the PMTD3AC. See ¶144 of the 3AC for more information and a link indicating a large number of cases which successfully objected to the HHS Mandate.

On p.23 of the PMTD3AC, the exemptions provided in U.S.C. § 5000A(d)(2)(A) and (B) are not just from the IMP as indicated by the defendants but these individuals are not considered "applicable individuals" in § 1501 of the ACA. Therefore they are also exempt from the IM. On p.23-24 of the PMTD3AC the defendants appear to make the case the "exemption makes no explicit and deliberate distinctions between sects." (internal quotations omitted) However this statement is not strictly true. The first religious exemption U.S.C. § 5000A(d)(2)(A) was created for certain religious sects with some sort of system in place instead of Social Security and Medicare such as the Amish. See 26 US Code § 1402(g). However, the Supreme Court in *United States v. Lee, 455 U.S. 252, p260 (1982)* indicated this exemption does not cover these individuals when they enter any commercial enterprise. Whether they or their employees utilize Social Security or Medicare, they are required to pay these taxes. Here the ACA is definitely self-contradictory as Congress defined in § 1501 the decision to purchase or not health care insurance as commercial. The sects which qualify for a § 1402(g) exemption are Protestant. Similarly, the very term used in the ACA "Health Care Sharing Ministry" appears to be a concept of Protestant origin. Catholics do not generally use terms such as this to identify organizations. I am aware of no Catholic organizations at the time the ACA was passed which existed as a 501(c)(3) for at least 10 years prior under any name let alone using any term such as "Health Care Sharing Ministry." Catholics have set up many hospitals and schools in this country over the last two

centuries, which is a much longer period than 10 years. The modern concept of hospital was originated centuries ago by the Catholic church, which was the original "Health Care" especially for the poor. These hospitals were often associated with monastic orders.[13] I am not aware of any reference to these as "ministries." These facts alone suggests a willful discrimination against the Catholic faith, especially since the ACA blocks the creation of any other "ministry" or allowed for any similar Catholic institutions in the definition. Neither exemption (A) or (B) require the members to not avail themselves of the public health care system outside of their "ministries." See ¶191-192 of the 3AC, for a very similar case, *Larson v. Valente, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)* which also set up an arbitrary limit to covertly target a particular religion.

The cases cited at the bottom of p.23 other then *Liberty Univ., 733 F.3d at 101* refer to the application of § 1402(g) in the context of the Social Security Act and were found to be consistent with that act.[14] As shown here and in claim 10, these exemptions are NOT consistent with the purpose of the ACA. Therefore, these exemptions also fail the *Lemon* test. I am not aware of any other court including the *Liberty* court to consider the information provided here and in Claim 10 in contradiction to the statements made by the defendants.

D - Claim 7 and 13 – The defendants cite inappropriate decisions and evidence to support their MTD the equal protection claims in the 3AC. The government mischaracterizes my equal protection argument in Claim 13. Even though fundamental freedoms are impacted sufficiently to evoke strict scrutiny, under either rational basis or strict scrutiny analysis a violation of equal protection is evident.

On p.25 of the PMTD3AC the defendants indicate that Claim 7 is an equal protection claim which purports favoritism on behalf of women over men. While this idea resembles the

13 See https://www.catholic.com/magazine/online-edition/the-christian-origins-of-the-hospital and https://biblemesh.com/blog/the-christian-origins-of-hospitals/

14 For example, The 1402(g) exemption "represents a congressional attempt to accommodate sincerely held religious beliefs against private and public insurance programs consistent with the overall welfare purpose of the Social Security Act." Jaggard v. CIR, 582 F.2d 1189, 1190 (8th Cir. 1978).

claim, it is not complete. Leftists often harm the group they claim to protect. Here, they may provide to some women a free contraceptive benefit, evidence suggests their policies will result in net harm to these women. Action which is contrary to a stated goal is often the basis for a violation of law, but it is also a sign a Leftist philosophy is being imposed. Much of the government's comments here have been refuted in Claim 7 and the government adds little new.

On p.27 of PMTD3AC is the statement, "As in Tuan Anh Nguyen, the different circumstances of men and women with respect to contraception, pregnancy, and childbirth likewise justify a gender-based distinction in contraceptive coverage." This statement is unsupported by the decision in *Tuan Anh Nguyen v. INS, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001).* The individual involved was trying to obtain US citizenship **LONG** after their birth in a foreign country. 8 U. S. C. § 1409 discriminates between the sex of which parent holds US citizenship. The individual made an equal protection argument which failed. The mother, a foreign citizen, was not involved in the case. Allegedly, the father was the US citizen. The case had nothing to do with conception or contraception, and little to do with pregnancy per se. Based upon biology alone, a much greater likelihood exists that a US citizen mother would give birth in the US or at least accompany the child back to the US. Proof of parentage would also be a more simple matter. Therefore, factors other than those stated by the defendants are at play in this case which do not exist in the instant case involving the HHS Mandate. Here, as discussed in the Claim 7, the discrimination between the sexes is invidious for multiple reasons.

On p.26 of the PMTD3AC is the statement:

> That Mr. Dierlam may not agree with the wisdom of this policy, see 3AC ¶ 169 (arguing that "10 to 20 women die every year from tubal ligation surgery" and thus that covering such care "creates a perverse incentive" for women), does not change its purpose of remedying discrimination.

I do not follow the logic of this statement. Are the defendants trying to remedy the fact that on average women live longer than men therefore they need to incentivize them with higher risk procedures at no cost in comparison to the corresponding male procedures in order to bring them in line with male lifespans? For what possible discrimination can death be considered a reasonable remedy for the party facing discrimination?

The government's arguments on pp.27-28 of the PMTD3AC actually involve resource parity which have been rejected by Supreme Court decisions. See ¶140 of the 3AC. Other than unsupported statements that insurance companies have discriminated against women and in favor of men regarding contraceptives, sterilization, abortion, and related counseling, the government provides no evidence. Without such evidence the definition provided in ¶101 of the 3AC indicates the agency action is arbitrary. It is not just my "policy belief" that insurance coverage should be determined by a cost-benefit analysis, this conclusion was proposed by probably the only member of the IOM panel with insurance industry experience. See ¶39 of the 3AC.

On p.28 of the PMTD3AC the government is correct in the first part of claim 13, I am raising a equal protection claim based upon the evidence and circumstances from claim 10. However, as pointed out in claim 10 above, the distinctions are NOT drawn on a secular basis and strict scrutiny should apply. Even if a rational basis is used, the exemptions should still fail as they are not reasonably related to the stated goals of expanding health care coverage and reducing cost. See ¶202 of the 3AC. The cap on any new Health Care Sharing Ministries can not be seen as expanding health care coverage, but is evidence of a carve out for certain religions as Congress required members to share the same beliefs. See ¶21 of the 3AC. If it was the intention of Congress to pressure individuals to affirm a belief system not their own, then it would be a reasonable method to expand health coverage. However, in this circumstance, both exemptions

would be a blatant violation of the 1st amendment and definitely demonstrate favoritism to certain religions.

On p.29 of the PMTD3AC the government completely mischaracterizes my argument for an equal protection claim based upon the exemptions to the IMP, a discriminate intent, and the violation of certain freedoms. As stated in ¶23 of the 3AC, the classification set up by Congress are those individuals with and with out "minimum essential coverage." A vast number of exemptions were created such that 90% of citizens may qualify for one. For the remaining 10% a less than honest citizen could arrange to qualify for one of these exemptions. For example, the receipt of a utility shut off notice could be arranged by simply not paying the utility bill regardless if the citizen had sufficient funds. Honest citizens, who will more likely have some religious affiliation, will not attempt this behavior, and therefore be more likely to face the IMP. Obviously, similar situated individuals are not treated the same due to the large number of exemptions which have nothing to do with health care insurance or the ability to pay for it and simply favor certain groups more likely affiliated with the Democrat Party. I make no claim honest, responsible citizens are a protected group. Even with rational basis analysis this evidence indicates NO "...rational relationship between the dis-parity of treatment and some legitimate governmental purpose" can be seen in these exemptions and how they are applied.[15] In addition, as stated in ¶204 of the 3AC, since the purchase of "minimum essential coverage" is not "ordinary commercial transactions" legislative judgment is not due any deference, which further lowers the bar for rational basis analysis.[16] The purchase of "minimum essential coverage" involves freedom of contract, false proxies, freedom of speech and religion, and due process. As

15 *Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012)*
16 Id.

fundamental rights and disparate impact are involved strict scrutiny should be invoked, but with either analysis the ACA violates equal protection.

E - Claim 5 – The defendants cite court decisions which state the HHS Mandate is neutral and generally applicable to demonstrate a violation of the free exercise clause does not exist in support of their MTD. However, these empty pronouncements without evidence are meaningless in the light of the overwhelming evidence presented here and in the 3AC.

The defendants on pp.30-33 repeatedly indicate how courts and others state the HHS Mandate is neutral and generally applicable. Evidence is presented in claim 5 of the 3AC that this law is not neutral and generally applicable. Pronouncements with out evidence have no value. Four separate facts are presented in ¶¶149-151 of the 3AC, which indicate a hostility to religion especially Catholic. When the Secretary of HHS declares, "We are in a war" in the context of this situation, what more evidence of hostility is required? War is perhaps the greatest hostility humanly possible. Whether the defendants want to characterize this information as unconfirmed or general statements is immaterial.

> In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff… *Baker v. Putnal, 75 F.3d 190 (5th Cir. 1996).*

This information is publicly available on the internet. See ¶¶37-39 of the 3AC, indicating a government employee was involved. The Democrat party has long been in favor of abortion and sexual license, which is witnessed by their reaction to a leak from the Supreme Court of a decision to possibly overturn *Roe v. Wade.* It is not difficult to understand what agenda is at work. The exception of over one million women of child bearing age receiving Medicare who are not covered by the HHS Mandate is alone sufficient to indicate this Mandate is not, nor can it be, generally applicable. See ¶¶152-153 of the 3AC.

F - Claim 8 and 14 – In claim 8, a violation of due process is seen not because of a lack of desirable products but in the confiscatory effects of the defendants regulations. The due

process violation in Claim 14 can not be compared to the due process of prior tax collection procedures as this tax/penalty is unique in our history.

On p.34 of the PMTD3AC the defendants state,

> He asserts that the lack of insurance products that he finds acceptable, which he attributes to the contraceptive coverage requirement, deprives him of "property, freedom of speech and religion," 3AC ¶ 177.

Not only is this argument not in Claim 8, 3AC ¶ 177, it is no where in the Complaint. Again, the government creates a straw man argument. All insurance contracts by default must contain the HHS Mandate. These contracts may contain other items of objectionable morality such as indicated above with the "transgender therapies." With the inclusion of these items the defendant agencies in effect coerce my speech, violate my religious freedom, freedom of contract, and represents a confiscation of property without due process as stated in claim 8. These violations are not a refusal to pay for unwanted medical care, since the government is confiscating the property not to pay for the care of the payer but for the corruption and harm of others. The rights mentioned here are "deeply rooted in this nation's history and tradition...such that neither liberty nor justice would exist if they were sacrificed."[17] No right is absolute, which is not to say these rights are not deeply rooted in the nation's history. We have experienced a great diminishment in "liberty" and "justice" in the past few years, which is not a coincidence but a result of Democrats being allowed by the courts to diminish the rights mentioned here especially after the ACA.

The government on p.33 of the PMTD3AC states, "At a procedural level, the assessment and collections procedures, such as those that were used to collect shared responsibility payments, have long been upheld by the Supreme Court as affording taxpayers all the process they are due." The IM, the IMP, and the combination of the IM-IMP even if considered a tax have never before existed in any form, therefore procedures used to collect previous taxes are

17 PMTD3AC p.34

irrelevant and do not necessarily relate to these taxes/penalties. The IM-IMP is an instrument not necessarily intended for taxation per se, but to control the resources of private parties for the purposes of government. This government interference diminishes the value of the property. The amount by which the value is diminished constitutes a confiscation by government. Whether the confiscation is implemented by a third party used as a false proxy for the government is of no relevance. Sales tax is also collected by a third party acting on behalf of the government. This confiscation of control and resources forms the very basis of the ACA and can not be removed. It is certainly arbitrary and capricious especially as this new power of government is weaponized to harm its enemies and others. As the government never compensates the individual or provides for the protection of any citizen rights over his own property, a violation of due process has occurred which is outlined in Claim 14. Section VIII(E)(1) of the 3AC merely indicates the same due process violation exists, **IF** the IMP is considered a penalty instead of a tax.

G - Claim 6, 11, 12, and 17 – Contrary to the frivolous assertions of the government, I make no claim of an intimate association with an insurance company or of coercion to divulge medical information in Claims 11 and 17. Similarly, in claims 6 and 12 the government does not regulate speech as long as one affirms the belief system of the agencies or accepts second class citizen status.

Claim 11 of the 3AC makes no argument of a "right to privacy" or "freedom of intimate association" with an insurance company or any one else for that matter as the defendants indicate on p.35 of the PMTD3AC. It appears the government is building another straw man argument. On p.36 of the PMTD3AC the defendants indicate referring to myself, "...he does not allege that he is being compelled to fund any speech." Perhaps the defendants missed it but in ¶95 of the 3AC I state, 'The violation is the expressive activity on the part of the defendants, which use the providers as a "false proxy" and "state actors."' The defendants also cite on p.35 of the same document *Priests For Life, 772 F.3d at 269-70* and indicate in that decision the court found their

"rights to expressive association" were not violated. Priests for Life is a religious organization not subject to the IM or IMP. They sued as an employer because they were forced to sign a paper which triggered their insurer to provide the HHS Mandate to their employees at no cost to them since as Catholics even indirect support of abortion is forbidden. The case was joined to *Zubik*, which was settled on a compromise. In the instant case, the involvement includes signing a piece of paper but also has much greater involvement which includes funding the forbidden activities and the government's speech. "Freedom of association ... plainly presupposes a freedom not to associate."[18] Similar to *Janus*, I do not want to be forced to fund, accept, or confirm the government's speech and belief system in the terms of the contract.

It appears the government prefers to create another straw man argument regarding Claim 17 on p.36 of their PMTD3AC rather than address the charges in the claim. No where in Claim 17 do I mention that a Health insurance contract forces me to divulge private medical information. The government's argument here is frivolous. Claim 17 provides a more fundamental violation of the right to privacy. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..."[19] is in jeopardy.

On p.37 of the PMTD3AC concerning the freedom of speech violation claims of 6 and 12 in the 3AC the defendants state,

> ...the ACA and the contraceptive coverage requirement do not regulate his speech at all—they do not prevent Mr. Dierlam from taking any position, making any statement, engaging in any protest, etc. Mr. Dierlam's claims relate only to the indirect effect that the ACA may have on his ability to find health insurers in the market that are offering plans that he wishes to purchase.

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18 *U.S. Citizens Ass'n v. Sebelius, 705 F.3d 588, 601 (6th Cir. 2013)* quoting *Roberts, 468 U.S. at 622, 104 S.Ct. 3244*

19 4th Amendment to the US Constitution.

I can take any position, make statements, and engage in protests FOR NOW, as long as I accept, attest by signature on a binding contract, and fund the speech and belief system of the government. I could alternatively accept second class citizen status and beg an insurer to consider creating and maintaining a policy free of the HHS Mandate as well as any future anti-Catholic mandates such as "gender affirming treatments." Who is also willing to certify such, and which can affordably meet my other requirements. Likewise, I could also compromise my beliefs and join the other ghetto meant for religious health care, a health care sharing ministry or become Amish.[20] All these effects appear punitive for holding Catholic beliefs and are definitely NOT incidental or indirect.

H - Claim 9 and 14 – A violation of the 5th amendment has occurred since a health insurance contract is PRIVATE PROPERTY and not a resource for the agencies or Congress to divide up to reward or punish groups of their choosing.

On p.38 of the PMTD3AC, the defendants quote *Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-39 (2005),* "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." Again perhaps the government missed it, but Claim 9 and 14 indicates that the HHS Mandate and minimum essential coverage respectively are "physical invasion[s] of private property." The health insurance contract is supposedly PRIVATE PROPERTY unless the government is now making an admission the HHS Mandate and minimum essential coverage comprise "[t]axes and user fees,"[21] which would also indicate the IM-IMP is a capitation. When private property is taken or equivalently its value is diminished due to the action of the government, a taking has occurred. The HHS Mandate which is but one provision of minimum essential coverage by default takes property, at least a part of the premium, and uses it to pay benefits for others. This concept is a

20 The Amish do not generally accept converts. See https://amishamerica.com/do-amish-accept-outsiders/
21 PMTD3AC p.38 quoting *Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 615 (2013).*

fundamental premise of the ACA. See ¶213 of the 3AC for a directly analogous case to the instant one.

I - Claim 18, 19 and 20 – The questions presented in the Complaint which the defendants claim were rejected by the Supreme Court in *NFIB* were not considered by that Court. The individual plaintiffs in the *California* case traced their injury from pocketbook injuries due to the IM. My current injuries stem from violations of the 1st, 4th, 5th, 9th, and 10th amendments not the unenforceable IM.

On p.38 the government states, "Mr. Dierlam cannot state a claim based on arguments the Supreme Court has already rejected." However, the question posed in ¶213 of the 3AC, whether the IM-IMP combination is a constitutional exercise of Congressional taxing authority, was not taken up by the court in *NFIB*. Likewise, the question of whether Congress has the power to create or destroy commerce was not decided by the court. If these questions were decided, the government does not provide a page number or any relevant quote. The Supreme Court generally only decides issues placed before it. Therefore, no evidence exists these arguments have been rejected by the court.

My injuries are provided in ¶¶68-70 of the 3AC, which includes past, present, and future injuries. The differences between these injuries and the injuries of the individual plaintiffs in the *California v. Texas, 141 S. Ct. 2104 (2021)* is provided in ¶72 of the 3AC. As opposed to the government's pronouncements on p.39 of the PMTD3AC, my current injuries do NOT stem from the currently unenforceable IM. My current and future injuries stem from violations of the 1st, 4th, 5th, 9th, and 10th amendments and not current pocketbook injuries as alleged by the individual plaintiffs in the *California* case. Indeed, a new eminent injury has been added with this Response. Redressability will likely be to enjoin the agencies from any enforcement of essential minimum coverage at a minimum. As this action would gut the ACA, it would be unseverable and the entire ACA would be unconstitutional. However with my standing

established, the fact that the ACA no longer brings in revenue, which was the only means by which the *NFIB* decision upheld it, is a valid question for the court as it also was not previously properly raised.

J - Claim 16 and 21 – Claim 16 is directed to any violation identified in the complaint which has not been checked by litigation but continues to the present. In Claim 21 no advisory opinion is requested. Previous Supreme Court decisions have considered the question of a definition of "direct" taxes which provides evidence for this fact. The lack of a proper definition has caused injury.

To address the defendant's on p.40 of the PMTD3AC, the violations of the Constitution involved in Claim 16 would include any Constitutional violation identified in the 3AC and for which the defendants have not been checked by judicial action. The violation in the link provided is a violation of the freedom of speech using a false proxy by the Biden administration.

As opposed to the defendant's statements on p.40 of the PMTD3AC, a specific declaration of direct and indirect taxes, which is the subject of Claim 21, is not an advisory opinion. Previous Supreme Court decisions have considered this question but refused to provide a definitive answer including *NFIB*. Much of the harm caused by Congress in the ACA originates from the absence of a proper definition of direct taxes in line with "deeply rooted tradition" in this country as demonstrated in claim 21. The statement at the bottom of the p.40 referring to 3AC ¶ 268, which the defendant's find objectionable, is NOT the relief requested. The defendant's objection is a product of only a cursory reading of the Complaint if not malicious intent. This statement along with many others in the 3AC were intended to provide a more complete picture of the history and inferences which can be reasonably made.

Conclusion

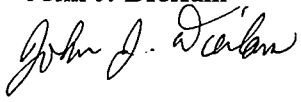
Based upon the information stated above and in the 3AC the defendants have failed to demonstrate some set of facts could not be discovered which would provide this court the ability to fashion a redress for the current and eminent injuries caused by the defendants. Therefore, the

defendants 12(b)(1) and 12(b)(6) defenses fail. On 12/15/2021 this court dismissed all claims in the Second Amended Complaint except a retrospective RFRA claim as the defendants requested in their PMTD2AC. The court in *Korte v. Sebelius, 735 F.3d 654, 672 (7th Cir. 2013)* stated,

> RFRA applies retrospectively and prospectively to "all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" its effective date.

The freedoms lost because of the ACA and its regulations are of paramount important to me and I believe to many people in this country. After some additional thought, I find my conscience will not allow me to settle the retrospective RFRA claim for any sum of money. Also, as implied by the quote above, retrospective RFRA relief alone is grossly insufficient with out prospective relief. Therefore, if this court dismisses all the other claims and does not feel it can follow the law as provided in the quote above, I would ask the court to simply note my refusal to settle the retrospective RFRA claim in its decision and finally dispose of this case so that I may file an appeal as soon as possible.

Date: 5/26/2022
Respectfully Submitted,
John J. Dierlam



Certificate of Service

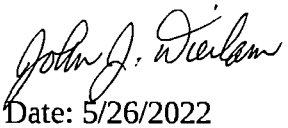
I certify I have on May 26, 2022 mailed a copy of the above document to the clerk of the court at:

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

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

Rebecca M. Kopplin
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005

I have emailed a courtesy copy to the defendant's counsel at Rebecca.M.Kopplin@usdoj.gov as well as the Case Manager for the Judge of the Court at Arturo_Rivera@txs.uscourts.gov.



Date: 5/26/2022
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

[Proposed] Order

After due consideration, the defendants Partial Motion To Dismiss the Third Amended Complaint is denied in its entirety.

The Honorable Keith P. Ellison
United States District Judge