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

PARTIAL MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants, Joseph R. Biden Jr., in his official capacity as the President of the United States; the United States Department of Health and Human Services (HHS); Xavier Becerra, in his official capacity as Secretary of HHS; the United States Department of the Treasury (the Treasury); Janet Yellen, in her official capacity as Secretary of the Treasury; the United States Department of Labor (Labor); and Marty Walsh, in his official capacity as the Secretary of Labor, by and through their undersigned counsel, hereby move to dismiss Claims 1, 2, and 4 through 21 of the Third Amended Complaint in their entirety and Claim 3 to the extent it seeks prospective relief. For the reasons set forth in the accompanying memorandum in support, this Court should dismiss those claims and deny Plaintiff's requested relief with respect to them.

Dated: May 9, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, 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.

Executed on May 9, 2022, in Washington, D.C.

/s/ Rebecca Kopplin
REBECCA KOPPLIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J. DIERLAM,

Plaintiff,

v. Case No. 4:16-CV-00307

JOSEPH R. BIDEN JR., in his official capacity as President of the United States, *et al.*,

Defendants.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Rules

Federal Regulations

Other Authorities

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff John J. Dierlam most recently filed a Third Amended Complaint against Defendants, challenging their implementation of and the legality of the Patient Protection and Affordable Care Act (the ACA), particularly § 1502(c), the minimum essential coverage provision, the shared-responsibility payment provision, and the preventive services coverage provision to the extent it requires coverage of contraceptive services (the contraceptive coverage requirement). 3d Am. Compl. (3AC), ECF No. 124.

Defendants file this memorandum in support of their partial motion to dismiss the Third Amended Complaint. Defendants request that the Court dismiss Counts 1, 2, and 4 through 21 of the Third Amended Complaint in their entirety and Count 3 to the extent it seeks prospective relief. Defendants are not moving at this time to dismiss Mr. Dierlam's retrospective Religious Freedom Restoration Act (RFRA) claim in Count 3 and respectfully request that after ruling on this partial motion to dismiss, the Court permit Defendants to confer with Mr. Dierlam and propose any next steps, as necessary, for addressing any remaining claims.

ISSUES PRESENTED

This memorandum addresses the following issues:

1. Does Mr. Dierlam have standing to challenge Defendants' purported failure to provide him with a notification of non-enrollment under § 1502(c) of the ACA?
2. Even if Mr. Dierlam has standing, does any source of law create a right of action for Mr. Dierlam to sue based on a violation of § 1502(c), and has Mr. Dierlam plausibly alleged a violation of § 1502(c), when notification under § 1502(c) is not a condition precedent to the shared-responsibility payment requirement?
3. Does this Court have jurisdiction to consider Mr. Dierlam's prospective claims under the

Administrative Procedure Act (APA), RFRA, or the Constitution where the relief he seeks has been provided by the Religious Exemption Rule and the Tax Cuts and Jobs Act (TCJA) of 2017?

4. Has Mr. Dierlam alleged a plausible claim that the ACA, including the contraceptive coverage requirement, minimum essential coverage requirement, and shared responsibility payment provision, as modified by the Religious Exemption Rule and the TCJA, violate the APA, RFRA, or the Constitution?

For clarity, Defendants address each of Mr. Dierlam's 21 claims as follows:

	Lacks Standing	Fails to State a Claim
Claim 1	Part II	Part III.A
Claim 2	Part I.A	Part I.B
Claim 3 (prospective)	Part II	-
Claim 3 (retrospective)	-	-
Claim 4	Part II	Part III.B
Claim 5	Part II	Part III.D
Claim 6	Part II	Part III.F
Claim 7	Part II	Part III.C
Claim 8	Part II	Part III.E
Claim 9	Part II	Part III.G
Claim 10	Part II	Part III.B
Claim 11	Part II	Part III.F
Claim 12	Part II	Part III.F
Claim 13	Part II	Part III.C
Claim 14	Part II	Part III.E, Part III.G
Claim 15	Part II	Part III.A
Claim 16	Part II	Part III.I
Claim 17	Part II	Part III.F
Claim 18	Part II	Part III.H
Claim 19	Part II	Part III.H
Claim 20	Part II	Part III.H
Claim 21	Part II	Part III.I

SUMMARY OF THE ARGUMENT

The Court should once again dismiss Mr. Dierlam's claims, except his claim for retrospective relief under RFRA. This Court previously dismissed similar claims from the Second

Amended Complaint because the Religious Exemption Rule and TCJA mooted any prospective relief. Under the Religious Exemption Rule, health insurance issuers are free to offer separate health insurance coverage to individuals with religious objections to paying for the coverage of some or all contraceptives. And under the TCJA, even if Mr. Dierlam chooses to go without insurance altogether he will not face any enforcement action. Accordingly, Mr. Dierlam does not suffer any ongoing harm from the minimum essential coverage requirement, shared responsibility payment, or contraceptive coverage requirement. And there is no further prospective relief the Court can grant. While Mr. Dierlam argues that market forces have made it difficult for him to identify health insurance that he desires, that is a result of the independent choices of health insurance issuers, not Defendants, and thus cannot be redressed in this lawsuit. The Court also previously dismissed Mr. Dierlam's claim based on a past violation of § 1502(c) given that Mr. Dierlam had independently learned the same information, and thus lacked standing.

While Mr. Dierlam's Third Amended Complaint ranges broadly and raises a number of policy views held by Mr. Dierlam, it still does not overcome these jurisdictional hurdles, and these same arguments, as described *infra* at Parts I-II, warrant dismissal of all of Mr. Dierlam's claims other than his retrospective RFRA claim. Although the Court need not reach Defendant's Rule 12(b)(6) arguments to grant Defendants' motion to dismiss, Mr. Dierlam's claims also fail as a matter of law as described *infra* at Part III.[1]

BACKGROUND

I. The Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148,

[1] Because nearly all of Mr. Dierlam's claims can be dismissed at the motion-to-dismiss phase, discovery is unnecessary. *Contra* 3AC ¶¶ 271-75. If the Court grants this motion, Defendants propose that the parties confer regarding Mr. Dierlam's retrospective RFRA claim.

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

A. Minimum Essential Coverage Provision

As first enacted, the minimum essential coverage provision required an "applicable individual" to either maintain "minimum essential coverage," have an exemption from the coverage requirement, or make a shared responsibility payment. 26 U.S.C. § 5000A; *see Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519 (2012). In 2017, Congress amended the provision by setting the amount of the shared responsibility payment to "$0," effective beginning tax year 2019. *California v. Texas*, 141 S. Ct. 2104, 2112 (2021) (citing TCJA, Pub. L. 115–97, § 11081, 131 Stat. 2092 (codified in 26 U.S.C. § 5000A(c))), *remand*, 4 F. 4th 372 (5th Cir. 2021). An "applicable individual" means any individual except one who qualifies for a religious exemption, is not lawfully present, or is incarcerated. 26 U.S.C. § 5000A(d). "[M]inimum essential coverage" means health coverage under any of the following: government-sponsored programs (e.g., Medicare), an eligible employer-sponsored plan, a health plan offered in the individual market within a State, a grandfathered plan, and other coverage recognized by the Department of the Health and Human Services in coordination with the Department of the Treasury. *Id*. § 5000A(f)(1). Individuals who file individual income tax returns and are not

enrolled in minimum essential coverage are to be notified of the services available through the health insurance exchanges operating in the State in which they reside. Pub. L. No. 111-148, title I, § 1502(c), codified at 42 U.S.C. § 18092 (hereinafter § 1502(c)).

B. Contraceptive Coverage Requirement

The preventive services coverage provision, 42 U.S.C. § 300gg-13, seeks to make preventive care more accessible. It requires non-grandfathered group health plans and health insurance issuers that offer non-grandfathered group or individual health plans to cover certain preventive services without co-payments or deductibles. 42 U.S.C. § 300gg-13. Thus, this provision applies to employment-based group health plans, as well as to health plans offered by health insurance issuers on the health insurance exchanges established by the ACA. *See* 29 U.S.C. § 1185d; 42 U.S.C. § 300gg-91(b). The provision does not require anything of individual plan participants or beneficiaries. As relevant here, the preventive health services that must be covered include additional preventive services for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA), a component of HHS, *id*. § 300gg-13(a)(4). The HRSA guidelines for preventive services for women were developed based on recommendations by the Institute of Medicine (IOM) after it conducted an extensive science-based review of the preventive services necessary for women's health and well-being. Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps (2011) at 2, https://nap.nationalacademies.org/catalog/13181/clinical-preventive-services-for-women-closing-the-gaps. The HRSA guidelines require coverage for women of, among other things, all FDA-approved contraceptive methods. Mr. Dierlam refers to the contraceptive coverage requirement as the "HHS Mandate." *See* 3AC ¶ 3.

II. Religious Exemption Rule

Since November 2018, willing health insurance issuers or willing plan sponsors have had

the option of using the religious exemption promulgated by the Agencies. That religious exemption allows them to offer a separate coverage option to any individual who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57536, 57,537 (Nov. 15, 2018) (Religious Exemption Rule).

III. Procedural History

Mr. Dierlam first brought suit in 2016, challenging the minimum essential coverage provision and certain of its exemptions, as well as the contraceptive coverage requirement, and amended his complaint for the first time later that year. In keeping with Magistrate Judge Palermo's recommendation, the Court dismissed all of Mr. Dierlam's claims. Final Judgment, ECF No. 78. Mr. Dierlam appealed. On appeal, the Government argued that the Court of Appeals should affirm dismissal of all of Mr. Dierlam's claims, except his RFRA claim seeking retrospective relief. With regard to that claim, the Government stated that the jurisdictional deficiencies it had identified in this Court "do not provide an alternative basis for affirming the dismissal of plaintiff's refund claims under RFRA because [he] would have been entitled to amend the complaint to cure the deficiencies if the district court had actually tried to rely on those grounds below." Br. for Appellees 51, No. 18-20440 (5th Cir. Feb. 25, 2019).

The Court of Appeals vacated the dismissal of Mr. Dierlam's claims and remanded the case to this Court. *Dierlam v. Trump*, 977 F.3d 471, 474 (5th Cir. 2020), *cert. denied sub nom. Dierlam v. Biden*, 141 S. Ct. 1392 (2021). The Court of Appeals "decline[d] to reach the merits of [Plaintiff's] claims." *Id*. at 473. Rather, with respect to Mr. Dierlam's claims for retrospective relief, it noted that "the parties agree that the district court incorrectly dismissed Dierlam's claim for . . . a refund of his shared-responsibility payments[]." *Id*. at 474. And with

respect to his prospective claims, the court noted that a year after Mr. Dierlam filed his lawsuit, Congress reduced the shared responsibility payment to $0 and the Agencies "created new exemptions to the contraceptive mandate, including an exemption for individuals like [Plaintiff]." *Id.* at 473-74. "Given the altered legal landscape, and the potential effects on [Plaintiff]'s request for prospective relief," the court concluded that "a mootness analysis must precede the merits." *Id.* at 474. It thus "remand[ed] so that [this] court can conduct a mootness analysis in the first instance and allow [Plaintiff] to amend his complaint." *Id.*

Mr. Dierlam filed a Second Amended Complaint in 2021 that made minor changes to his "Request for Relief," and otherwise largely mirrored his first complaint. *See generally* 2AC. Defendants moved to dismiss all claims except the retrospective claim for relief under RFRA. This Court granted Defendants' motion, finding that the Religious Exemption Rule and the TCJA rendered Mr. Dierlam's prospective claims moot, and that Mr. Dierlam lacked standing to challenge past violations of § 1502(c). Order, ECF No. 110; Clarifying Mem., ECF No. 121.

Mr. Dierlam has now filed a Third Amended Complaint that seeks to raise twenty-one counts challenging the ACA, particularly the contraceptive coverage requirement, minimum essential coverage provision, shared responsibility payment provision, and the Defendants' compliance with § 1502(c).

LEGAL STANDARD

Defendants move to dismiss Mr. Dierlam's claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Lack of subject-matter jurisdiction may be found in any one of three instances: (1) "the complaint alone;" (2) "the complaint supplemented by undisputed facts evidenced in the record;" or (3) "the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera–Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.

1996). To survive a Rule 12(b)(1) motion, the burden of proof lies on the plaintiff to establish that subject-matter jurisdiction exists. *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995), *aff'd* 102 F.3d 551 (5th Cir. 1996); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.1980).

Rule 8(a)(2) requires a plaintiff's complaint to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Motions to dismiss for failure to state a claim are appropriate when a complaint fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). A claim has facial plausibility when the plaintiff pleads enough factual content that allows the court to draw a reasonable inference that the defendant is liable under the alleged claim. *Twombly*, 550 U.S. at 556. Courts "do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Vouchides v. Houston Cmty. Coll. Sys.*, Civ. A. No. H-10-cv-2559, 2011 WL 4592057, *5 (S.D. Tex. Sept. 30, 2011), quoting *Gentiello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010). If the allegations stated in the complaint do not provide relief on any possible theory, a motion to dismiss for failure to state a claim should be granted. *See Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994).

ARGUMENT

I. Mr. Dierlam's Claim Based on § 1502 of the ACA (Claim 2) Should Be Dismissed Because Mr. Dierlam Lacks Standing and Fails to State a Claim.

In Claim 2, Mr. Dierlam claims that Defendants violated the ACA by failing to provide him with the notification of non-enrollment under § 1502(c). 3AC ¶¶ 103-27. This Court has repeatedly dismissed similar claims in Mr. Dierlam's prior complaints. *See* Clarifying Mem. at 9

("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."). This claim should once again be dismissed for the same reasons: Mr. Dierlam lacks standing to bring it and, in any event, fails to identify any cause of action supporting a claim for the violation of § 1502(c).

A. Mr. Dierlam Lacks Standing Because He Was Not Injured By Any Failure To Notify Him Under § 1502(c), the Alleged Lack Of Notification Did Not Cause His Purported Injury, and Requiring Future Notification Would Not Redress It.

The party invoking federal jurisdiction bears the burden of establishing standing. This requires showing "an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "[A] bare procedural violation, divorced from any concrete harm" does not suffice. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016). In addition, a plaintiff must establish "a causal connection between the injury and the conduct complained of," and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61.

Like his Second Amended Complaint, Mr. Dierlam's Third Amended Complaint fails to allege that any violation of § 1502(c) caused him a legally cognizable injury, or that he currently has any redressable injury related to § 1502(c). Section 1502(c) provides:

> (c) NOTIFICATION OF NONENROLLMENT.—Not later than June 30 of each year, the Secretary of the Treasury, acting through the Internal Revenue Service and in consultation with the Secretary of Health and Human Services, shall send a notification to each individual who files an individual income tax return and who

> is not enrolled in minimum essential coverage (as defined in section 5000A of the Internal Revenue Code of 1986[, 26 U.S.C. § 5000A]). Such notification shall contain information on the services available through the Exchange operating in the State in which such individual resides.

§ 1502. The plain language of § 1502(c) shows that its purpose is to ensure that individuals who have filed individual income tax returns, and who have not obtained minimum essential coverage, are aware of the coverage options available to them through the health insurance exchange operating in their State. The best place for individuals to find such information is www.HealthCare.gov.[2] Once at the website, users need only input their zip code, and HealthCare.gov automatically links them to the appropriate website for their geographic region. Any notification under § 1502(c) would have directed Mr. Dierlam to HealthCare.gov.

It is unclear what injury Mr. Dierlam alleges as a result of his non-receipt of a § 1502 notice. In any event, he was aware of the HealthCare.gov website and in fact looked at it in 2015. *See* 3AC ¶ 105 ("I checked the healhcare.gov [sic] website when directed by IRS tax forms to check for a religious exemption, which occurred in 2015 for the 2014 tax year."). Because he was aware of the HealthCare.gov website—the same information that he would have received from any § 1502 notice, he was not injured by the lack of notice. Likewise, any future relief requiring notice of the HealthCare.gov website would not redress his alleged injury.

Mr. Dierlam appears to argue that a notice informing him of the HealthCare.gov website would have been inadequate because some people might not be able to locate health insurance on the website that satisfies their religious beliefs. 3AC ¶ 105. But the statutory text requires only that "[s]uch notification shall contain information on the services available through the Exchange operating in the State in which such individual resides," § 1502. Mr. Dierlam is attempting to

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

import requirements into § 1502 which do not exist in the statutory text. *See* 3AC ¶ 107. But it is not for the courts to insert additional statutory requirements beyond those which Congress has selected. "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citation omitted). And if no health insurer chooses to offer insurance that is acceptable to Mr. Dierlam, that is irrelevant to the question of whether he was injured by any lack of § 1502 notice, since the provision of § 1502 notice would not change the underlying availability of health insurance.

Accordingly, the Court should dismiss Count 2 of Mr. Dierlam's Third Amended Complaint for lack of standing. *See, e.g.*, *Morrell v. Alfortish*, Civ. A. No. 10-cv-924, 2010 WL 4668429, at *7 (E.D. La. Nov. 9, 2010) (plaintiff lacked standing where his "choice to pursue a bid protest, however justified, was an independent cause which required the payment of legal fees and costs and was not proximately caused by the defendants' alleged illegal conduct").

B. Mr. Dierlam Fails to Identify a Cause of Action to Support His Claim Based on a Past Violation of § 1502(c).

Even if Mr. Dierlam could establish standing for Count 2, he fails to state a claim because he identifies no applicable right of action with respect to a past violation of § 1502. Section 1502(c) itself does not create a privately enforceable cause of action. "[T]o confer individual rights subject to private enforcement . . . [a] statute must speak with a clear voice and unambiguous[ly] confer those rights." *Delancey v. City of Austin*, 570 F.3d 590, 593 (5th Cir. 2009); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387-88 (2015) (rejecting a private cause of action under the Medicaid provision requiring States to set reimbursement rates sufficient to enlist enough providers of health care services and recognizing

that "a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred'"). Here, (1) § 1502(c) is directed at the "Secretary of the Treasury," in consultation with the HHS Secretary, not the individuals intended to receive the notification, (2) § 1502(c) does not contain rights-creating language, and (3) a taxpayer's receipt of § 1502(c) notice is not a prerequisite to the IRS imposing a shared responsibility payment. All of the foregoing signify that § 1502(c) does not create a private right of action. *See, e.g.*, *Delancey*, 570 F.3d at 594; *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3 (2002); *Transamerica Mortg. Advisors, Inc v. Lewis*, 444 U.S. 11, 21 (1979).

Mr. Dierlam has previously conceded that § 1502(c) does not confer a private right of action, *see* 2AC ¶ 11, and in his Third Amended Complaint he does not rely on § 1502(c) itself, but instead points to the APA and Federal Tort Claims Act (FTCA), 3AC ¶¶ 110, 111-13, 121-27. Neither provides a cause of action here.

1. The APA Does Not Permit Retrospective, Monetary Relief.

Mr. Dierlam refers to the APA in his § 1502(c) claim. 3AC ¶¶ 111-13. But the APA does not provide a cause of action for this claim, which is based on a *past* violation of § 1502(c)—the APA provides a waiver of sovereign immunity only for claims "seeking relief other than money damages," 5 U.S.C. § 702, in other words, for claims seeking prospective, injunctive relief. *See King v. Dep't of Veterans Affs.*, 728 F.3d 410, 416 (5th Cir. 2013) ("[Plaintiff's] attempt to rely on the APA is unavailing: his complaint seeks exclusively money damages, and the APA waives sovereign immunity only for claims 'seeking relief *other than money damages*.'"). Indeed, Mr. Dierlam acknowledges that injunctive relief would not address the alleged past violation. *See* 3AC ¶ 119 ("It is not my purpose to enforce §1502(c), as the injury has occurred and can not be made right by sending out proper notices now or even at the

late date the defendants sent notices."). Instead, he requests several forms of monetary relief, which are clearly unavailable under the APA. *See* 3AC ¶ 293 (asking for "nominal damages," "the repayment of all the [shared responsibility payments] paid," and the government to "pay for [an insurance policy that meets his requirements] "for the same number of years for which I was denied health insurance if such a policy can be located." 3AC ¶ 293.[3]

2. Numerous Problems Bar Mr. Dierlam's Attempt to State an FTCA Claim Regarding § 1502.

Mr. Dierlam identifies the FTCA as a source of law that can "provide a wavier [sic] of sovereign immunity and a private right of action" regarding his claim based on violation of § 1502. 3AC ¶ 121. The FTCA is a limited waiver of sovereign immunity allowing the United States to be sued for the negligent or wrongful acts or omissions of its employees in their duties. 28 U.S.C. §§ 1346(b), 2671 *et seq*.; *McGuire v. Turnbo*, 137 F.3d 321 (5th Cir. 1998). In fashioning waivers of sovereign immunity, "Congress may impose such conditions as it chooses." *South Coast Corp. v. Comm'r*, 180 F.2d 878, 884 (5th Cir. 1950). The circumstances of the waiver must be scrupulously observed in favor of the sovereign and not expanded by the courts. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *McLaurin v. United States*, 392 F.3d 774, 781 n. 24 (5th Cir. 2004). There are at least three problems with Mr. Dierlam's FTCA theory.

First, Mr. Dierlam failed to meet the FTCA's jurisdictional requirement that claimants submit claims to agencies through the agencies' administrative processes prior to filing suit. As relevant here, the FTCA provides "that a tort claim against the United States 'shall be forever barred' unless the claimant meets two deadlines. First, a claim must be presented to the

[3] Mr. Dierlam's references to "harm of the public interest," 3AC ¶¶ 114-15, and unclean hands, 3AC ¶¶ 116-20, are also unavailing, as neither provides a cause of action.

appropriate federal agency for administrative review 'within two years after [the] claim accrues.'" 28 U.S.C. § 2401(b). Second, if the agency denies the claim, the claimant may file suit in federal court 'within six months' of the agency's denial." *United States v. Wong*, 575 U.S.402 (2015); *McNeil v. United States*, 508 U.S. 106 (1993) ("The FTCA bars claimants from bringing suits in federal court until they have exhausted their administrative remedies. Because [plaintiff has] failed to heed that clear statutory command, the District Court properly dismissed [the] suit."); *see also* 28 U.S.C. § 2675(a).

Here, each of the three defendant-agencies searched their records and found no administrative tort claim filed by Mr. Dierlam. Decl. of Michael B. Briskin, Ex. A; Decl. of Eirik Cheverud, Ex. B; Decl. of Marry-Ellan Krcha, Ex. C; Decl. of Meredith Torres, Ex. D. Because Mr. Dierlam failed to comply with the prerequisites to suit, he cannot avail himself of the FTCA's waiver of sovereign immunity and his claim must be dismissed. *McNeil*, 508 U.S. at 106; *McLaurin*, 392 F.3d at 777; *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir. Jan. 1981).

Second, "it is well-established that a federal agent's failure to fulfill duties imposed upon him solely by federal statute [or regulation] cannot stand alone as a basis for suit under the FTCA." *Coleman v. United States*, 912 F.3d 824, 835 (5th Cir. 2019), *appeal after remand*, 799 Fed. App'x 227 (5th Cir. 2020). This is because the FTCA "only imposes liability on the federal government in circumstances under which a private individual could be similarly sued," *U.S. ex rel. Delta Structural Tech., Inc. v. Ranger Ins. Co.*, No. CIVASA02CA0442FBNN, 2003 WL 22327089, at *4 (W.D. Tex. Sept. 18, 2003), *report and recommendation adopted*, No. CIV.A. SA-02-CA-442-, 2003 WL 22489817 (W.D. Tex. Oct. 28, 2003), and liability "simply cannot apply where the claimed negligence arises out of the failure of the United States to carry out a statutory duty in the conduct of its own affairs," *United States v. Smith*, 324 F.2d 622, 624-25

(5th Cir. 1963). Here, Mr. Dierlam does not allege that a government vehicle injured him in a tortious fashion, or any other typical FTCA claim. Instead, he argues only that the government violated a duty imposed on it by statute, but that cannot serve as the premise of an FTCA claim.

Mr. Dierlam suggests that, if the federal government violated a statute, that would constitute negligence *per se* actionable under the FTCA. 3AC ¶ 121. However, that theory has been rejected in this circuit. *See Bosco v. U.S. Army Corps of Engineers, Fort Worth Dist.*, 611 F. Supp. 449, 454 (N.D. Tex. 1985) (rejecting the argument that "[federal] Defendants' failure to follow [federal] regulations constitute[s] a cause of action under the FTCA" on a negligence *per se* theory); *see also Johnson v. Sawyer*, 47 F.3d 716, 729 (5th Cir. 1995).

Third, Mr. Dierlam fails to articulate any basis for tort-based damages under the FTCA, given his acknowledgement that, despite the alleged lack of § 1502(c) notification, he was aware of the HealthCare.gov website. 3AC ¶ 105. Therefore, he would have been no better off had he received a notification.

II. All of Mr. Dierlam's Prospective Claims Should be Dismissed for Lack of Jurisdiction.

This Court previously dismissed Mr. Dierlam's Second Amended Complaint (with the exception of Count II to the extent it sought retrospective relief) as moot. Order, ECF No. 110. Mr. Dierlam's Third Amended Complaint cannot overcome this hurdle because Mr. Dierlam still lacks any ongoing injury, and therefore all of Mr. Dierlam's claims, except for his retrospective RFRA claim, should again be dismissed as moot.[4]

[4] The analyses for standing and mootness are closely related. If the Court instead views the issue through the lens of standing at the time of Mr. Dierlam's filing of the Third Amended Complaint in 2022, then Mr. Dierlam would lack standing for his prospective claims for the

Article III of the Constitution defines the outer bounds of the constitutional jurisdiction of federal courts by restricting the exercise of judicial power only to "Cases" or "Controversies." U.S. Const. art. III, § 2. Absent an ongoing case or controversy, a case is moot and a court lacks jurisdiction. *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). "Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc*., 133 S. Ct. 721, 727 (2013) (citations omitted); *see also Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (where a defendant has amended its regulations, "the issue of the validity of the old regulations is moot"). Thus courts should refrain from deciding claims if "[t]he requisite personal interest that must exist at the commencement of the litigation" is no longer present. *Arizonans for Official English*, 520 U.S. at 68 & n.22.

A. As This Court and Others Have Recognized, the Religious Exemption Rule and Zeroing Out of the Shared Responsibility Payment Render Mr. Dierlam's Claims for Prospective Relief Moot.

After Mr. Dierlam initiated this lawsuit in 2016, two important developments transpired. First, the Agencies "created new exemptions to the contraceptive mandate," including for "individuals like [Mr. Dierlam]." *Dierlam*, 977 F.3d at 473-74. Second, the TCJA was enacted, reducing the shared-responsibility payment to $0 beginning in tax year 2019. *Id*. The ongoing

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same reasons. Clarifying Mem. at 8. *See Arizonans for Official English v. Arizona*, 520 U.S. 48, 68 & n.22 (1997) ("Mootness 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).'" (citation omitted).

injuries that Mr. Dierlam previously alleged in his Second Amended Complaint have thus been redressed. It is not the case that "[a] medical insurer is compelled to . . . provide contraceptive coverage" to him or that he is "required to purchase medical insurance from [a] medical insurer[] [that] provides contraceptive coverage." 2AC ¶ 14; *see also* Clarifying Mem. at 5-6. And with the shared responsibility payment "zeroed out," there is no enforcement mechanism to compel Plaintiff to purchase health care coverage at all. *California*, 141 S. Ct. at 2114; *see also* Clarifying Mem. at 6. This Court thus correctly dismissed Mr. Dierlam's prospective claims on these grounds. Order, ECF No. 110; Clarifying Mem., ECF No. 121.

B. The Third Amended Complaint Fails to Identify Any Ongoing Injury Attributable to Defendants.

In his Third Amended Complaint, Mr. Dierlam fails to identify any ongoing injuries that would overcome this Court's prior conclusion that his claims are moot.

He asserts that the ACA has imposed "unconstitutional restrictions and limitations [on] . . . 'religious health care,'" 3AC ¶ 69, but the Religious Exemption Rule permits willing health insurance issuers or willing plan sponsors to offer a separate coverage option to any individual, like Mr. Dierlam, who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs. Religious Exemption Rule. Mr. Dierlam argues that he "remain[s] an 'applicable individual' subject to the [minimum essential coverage requirement] and [shared responsibility payments]," 3AC ¶ 69, but acknowledges that the amount of the shared responsibility payment has been changed to zero, 3AC ¶ 69, and the requirement thus does not impose any injury. As this Court noted, the Supreme Court already rejected the argument that the $0 payment has some injurious effect. *See* Clarifying Mem. at 7 (rejecting the argument that Mr. Dierlam is "injured by the mere existence of the mandatory language," because "'there is no possible Government action that is causally connected to the plaintiffs'

injury—the costs of purchasing health insurance'" (citation omitted)).

Mr. Dierlam asserts that he exists in "a state of fear," 3AC ¶ 69, about potential changes to the ACA, but mere conjecture about hypothetical future events cannot establish an Article III injury. As this Court previously recognized, the injury must be "certainly impending"—"'[a]llegations of possible future injury' are not sufficient.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted); *see also Lujan*, 504 U.S. at 564 n.2 (holding that a plaintiff who "alleges only an injury at some indefinite future time" has not shown an injury in fact; "the injury [must] proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all"); *see also* Clarifying Mem. at 6 ("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 [Mr. Dierlam's] prospective claims—even more so when such speculation remains unsubstantiated two years into the Biden administration." (citation omitted)).

Mr. Dierlam also asserts that dismissing his claims will mean that "all [his] effort and expense in this lawsuit will have been completely wasted," 3AC ¶ 69, but that is not a cognizable Article III injury either. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 611 (5th Cir. 2017) ("It is fundamental that no plaintiff may claim as injury the expense of preparing for litigation, for then the injury-in-fact requirement would pose no barrier.").

Mr. Dierlam discusses at length his allegation that the Agencies caused "damage to the [health insurance] market in making the HHS Mandate the default." 3AC ¶ 69. Mr. Dierlam argues that the contraceptive coverage requirement, which he refers to as the "HHS Mandate," has become a "default requirement for all health insurance contracts," 3AC ¶ 80, and that as a result health insurers do not offer policies of the type that would meet his desires. *See also* 3AC ¶¶ 79-

89. But, as this Court has recognized:

> 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 [v. Dep't of Treasury]*, 946 F.3d 649, 655 (5th Cir. 2019)."

Clarifying Mem. at 7-8.

At several points, Mr. Dierlam argues that the effects of the portions of the ACA which he challenges have been so insidious that they have opened the door to what he views as myriad other constitutional violations, or that they may do so in the future. *See* 3AC ¶ 70 (expressing concern about speculative "prospective" injuries such as "[t]he illegitimate expansion by the defendants of other provisions of the ACA similar to the HHS Mandate in the name of health care 'if unchecked by [] litigation'" and "the lack of a firm definition of direct and indirect taxes in line with tradition, which can prevent future harm as was caused by the Congress in the ACA"). However, the Supreme Court has repeatedly held that a "generalized grievance," such as "every citizen's interest in proper application of the Constitution and laws," is insufficient to meet the requirements of Article III. *Lujan*, 504 U.S. at 573, 575 (citation omitted).

* * *

Accordingly, this Court lacks jurisdiction over Mr. Dierlam's prospective claims. In light of the Religious Exemption Rule and the zeroing out of the shared-responsibility payment, any difficulty Mr. Dierlam may have in finding health coverage that comports with his religious beliefs is not attributable to Defendants, and Mr. Dierlam cannot establish a legally cognizable injury based on "the additional penalties imposed by the ACA," given that there are no longer such penalties. *See California*, 141 S. Ct. at 2112 (explaining that "[i]n 2017, Congress

effectively nullified the penalty by setting its amount at $0"). Plaintiff's requested relief has effectively been granted, and his claims for prospective relief are thus moot.

III. All of Mr. Dierlam's Claims Other Than the Retrospective RFRA Claim Should Also Be Dismissed for Failure to State a Claim.

All of the relief that Defendants request in this motion could be granted on the already addressed bases of (1) the mootness of Mr. Dierlam's prospective claims and (2) the flaws in his retrospective § 1502 claim. However, if the Court wishes to dispose of Mr. Dierlam's claims on an alternative basis, Mr. Dierlam's claims also fail as a matter of law as explained below.

A. Mr. Dierlam Fails to State a Claim Under the APA. (Claims 1 and 15)

In Claims 1 and 15, Mr. Dierlam argues that the contraceptive coverage requirement, which he refers to as the "HHS Mandate," violates the APA. 3AC ¶¶ 90-102; 3AC ¶¶ 218-32. Specifically, he asserts that the contraceptive coverage requirement was promulgated in an arbitrary and capricious fashion. But his arguments rely solely on disagreement with the Agencies' policy views, which is insufficient to state a claim under the APA. *See, e.g.*, 3AC ¶ 218 ("If Congress actually intended to improve health outcomes in the population, it should seek to reward healthy behavior and punish unhealthy behavior . . . ."); 3AC ¶ 213 ("The implementation of the ACA achieves few if any of its stated goals[.]"); 3AC ¶ 220 (arguing that "[p]rojected spending reductions in health care costs have not materialized").

In evaluating an arbitrary-and-capricious claim, the scope of review is "narrow" and "a court is not to substitute its judgment for that of the agency." *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011) (citations omitted). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives," *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016), but only whether the agency's decision "was the product of reasoned decisionmaking," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*

Co., 463 U.S. 29, 52 (1983). The agency must only "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," a requirement that "is satisfied when the agency's explanation is clear enough that its path may reasonably be discerned." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quotation marks and citations omitted). The agencies satisfied each of these APA requirements, and Mr. Dierlam's *post hoc* policy criticisms also lack relevance because the question is whether the agencies' decision was reasonable *at the time it was made*. *See Ass'n of Flight Attendants-CWA, AFL-CIO v. Pension Ben. Guar. Corp.*, No. CIV.A. 05-1036ESH, 2006 WL 89829, at *11 (D.D.C. Jan. 13, 2006) ("[The agency's] assessment . . . was a reasonable conclusion based on the information available to the agency at the time it made its decision, and thus, it cannot be considered as arbitrary and capricious under the APA.").

Contrary to Mr. Dierlam's argument that "[t]he creation of the [contraceptive coverage requirement] was greatly in excess of what Congress authorized in the Preventive Services Provision of the ACA," 3AC ¶ 95, Congress gave the Agencies discretion to craft requirements for women's preventive healthcare and screenings which health plans must cover without cost sharing. The Public Health Service Act, as modified by the ACA, requires that covered group health plans "shall, at a minimum provide coverage for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." 42 U.S.C. § 300gg-13(a). HRSA issued such guidelines, defining preventive care as including all FDA-approved contraceptive methods. *See* HRSA, Women's Preventive Services Guidelines, https://www.hrsa.gov/womens-guidelines/index.html. Where, as here, "an agency has acted in an area in which it has 'special expertise,' the court must be particularly deferential to the agency's determinations." *Stringfellow Mem'l*

Hosp. v. Azar, 317 F. Supp. 3d 168, 18384 (D.D.C. 2018) (cleaned up and citation omitted).

B. Neither the Contraceptive Coverage Requirement Nor the Minimum Essential Coverage Provision Violate the Establishment Clause. (Claims 4 and 10)

In Claim 4, 3AC ¶¶ 132-46, Mr. Dierlam asserts that the contraceptive coverage requirement violates the Establishment Clause, 3AC ¶ 143, demonstrates "hostility toward certain religions," and creates "religion and gender classes," 3AC ¶ 142.

"To withstand an Establishment Clause challenge, a statute must have a secular legislative purpose, the statute's primary purpose must neither advance nor inhibit religion, and the statute must not foster an excessive entanglement with religion." *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 (5th Cir. 2001) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). Here, there is no indication that the contraceptive coverage requirement is anything other than an effort to increase women's access to recommended preventive services.[5] Further, its principal effect neither advances nor inhibits religion, as its purpose is furthered irrespective of the religious faith of a particular beneficiary. *See Littlefield*, 268 F.3d at 294. And finally, the provision does not involve excessive governmental entanglement with religion.

In Claim 10, 3AC ¶¶ 186-92, Mr. Dierlam argues that the religious exemptions to the

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

minimum essential coverage requirement also violate the Establishment Clause. Mr. Dierlam asserts that the religious exemption at 26 U.S.C. § 5000A(d)(2) violates the Establishment Clause because it "discriminate[s] between similarly situated religions." 3AC ¶ 187. Mr. Dierlam also appears to object to the provision addressing health care sharing ministries on Establishment Clause grounds. *Cf.* 3AC ¶ 189. Establishment Clause claims like these have been roundly rejected by the courts.

The Supreme Court has "long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause." *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 638 (W.D. Va. 2010) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005)), *vacated*, 671 F.3d 391 (4th Cir. 2011), *cert. granted, judgment vacated* 568 U.S. 1022 (2012), *and aff'd sub nom. Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013). The two exemptions in 26 U.S.C. § 5000A make just such accommodations. First, the religious conscience exemption imports the familiar religious exemption found in the tax code. *See* 26 U.S.C. § 5000A(d)(2)(A) (providing, among other exemptions, an exemption from shared responsibility payments for "member[s] of a recognized religious sect or division thereof which is described in section [26 U.S.C. §] 1402(g)(1), and is adherent of established tenets or teachings of such sect or division as described in such section"). These exemptions have "consistently [been] found constitutional under the Establishment Clause," *Liberty Univ.*, 733 F.3d at 101 (citing *Droz v. Comm'r*, 48 F.3d 1120, 1124-25 (9th Cir. 1995); *Hatcher v. Comm'r*, 688 F.2d 82, 84 (10th Cir. 1979) (*per curiam*); *Jaggard v. Comm'r*, 582 F.2d 1189, 1189-90 (8th Cir.1978) (per curiam); *Henson v. Comm'r*, 66 T.C. 835, 838-40 (1976); *Palmer v. Comm'r*, 52 T.C. 310, 314-15 (1969)). Further, as the Fourth Circuit explained in rejecting an identical challenge to the religious conscience exemption in the ACA, "th[e] exemption makes no 'explicit

and deliberate distinctions' between sects" and passes the *Lemon* test that therefore applies to it. *Id*. at 101-02; *see also Cutler v. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1183 (D.C. Cir. 2015) (rejecting Establishment Clause challenge to the exemption, which is not "drawn on sectarian lines"), *cert. denied*, 577 U.S. 1067 (2016). The exemption has a secular purpose—"to ensure that all persons are provided for, either by the [Act's insurance] system or by the church"; its "principal effects . . . neither advance nor inhibit religion, but only assure that all individuals are covered"; and "there is no excessive entanglement with religion," as the inquiry required under the religious conscience exemption in the ACA is identical to that in § 1402(g), which has been upheld by every court to consider the issue. *Liberty Univ.*, 733 F.3d at 101-02.

Mr. Dierlam's challenge to the health care sharing ministry provision, which provides an exemption from the shared responsibility payment for individuals participating in a qualifying health care sharing ministry, 26 U.S.C. § 5000A(d)(2)(B), likewise fails. Mr. Dierlam objects to the secular purposes of the provision, arguing that the metes and bounds of the provision are illogically drawn. 3AC ¶ 189. But courts have found that neither the cutoff date of the health care sharing ministry provision nor its legislative history "suggest[] any deliberate attempt to distinguish between particular religious groups," *Liberty Univ.*, 733 F.3d at 102; *see also id.* (concluding that the cutoff date serves a secular legislative purpose in that it (1) "ensures that the ministries provide care that possesses the reliability that comes with historical practice"; and (2) "accommodates religious health care without opening the floodgates for any group to establish a new ministry to circumvent the Act"); *see also id.* ("The primary effect of the cutoff accordingly neither advances nor inhibits religion," and "given that it applies only secular criteria . . . [it] does not foster an excessive government entanglement with religion.").

C. Neither the Contraceptive Coverage Requirement Nor the Minimum Essential Coverage Requirement Violate Equal Protection. (Claims 7 and 13)

In Claim 7, Mr. Dierlam argues that the contraceptive coverage requirement violates equal protection principles by improperly treating women more favorably than men. 3AC ¶¶ 162-75.

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

Here, in enacting the ACA requirement that preventive services for women be covered without cost-sharing, Congress intended to end the "practices of the private insurance companies in their gender discrimination" against women, who "paid more for the same health insurance

coverage available to men." *Priests for Life v. Dep't of Health & Human Servs.*, 772 F.3d 229, 263 (D.C. Cir. 2014) (citing 155 Cong. Rec. 28,842 (2009) (statement of Sen. Mikulski)) (cleaned up), *vacated on other grounds sub nom., Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Remedying this past discrimination, rather than penalizing men or validating stereotypical assumptions about women, is the purpose of the statute, as implemented through the contraceptive coverage requirement. 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. Under Supreme Court jurisprudence, providing contraceptive coverage for women without cost-sharing is a constitutional means of achieving that governmental interest.

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

The Supreme Court has also specifically recognized that women and men are differently situated with respect to pregnancy and childbirth and that these differences can support gender-

based distinctions. In *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Court upheld an immigration statute that makes it more difficult for a child born abroad to one unmarried United States parent to claim citizenship if the citizen parent was a father. As the Court recognized, "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id*. at 63. "[G]iven the unique relationship of the mother to the event of birth," as well as the greater "opportunity for a meaningful relationship" with the child that "inheres in the very event of birth, . . . as a matter of biological inevitability," the more favorable treatment afforded to children of a U.S. citizen mother complies with equal protection. *Id*. at 61-65, 70-71.

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

Mr. Dierlam argues that the reasons advanced by the government for adopting a gender-based distinction are "a sham," but his stated objections—that "[e]very contraceptive, except

abstinence, carries a risk of failure and serious complication," 3AC ¶ 170, and that activities that may result in conception "concern[] BOTH sexes BEFORE conception," 3AC ¶ 172—do not reduce the force of the government's concerns. Likewise, Mr. Dierlam's policy belief that "insurance coverage should be determined by a cost-benefit analysis, not the whim of an autocracy," 3AC ¶ 175, has no relevance to whether the government may permissibly act to regulate the insurance market to remedy gender-based discrimination and recognize ways in which men and women are not similarly situated, which it may.

In Claim 13, 3AC ¶¶ 201-08, Mr. Dierlam asserts that the minimum essential coverage requirement and the shared responsibility payment provision, and the exemptions thereto, violate equal protection principles.

Mr. Dierlam's first argument is a re-tread of his argument in Claim 10 that the limited exemptions provided violate the Establishment Clause because not all religions are included. *See* 3AC ¶ 201; *see also* 3AC ¶ 202 (asserting a "violation of the Establishment Clause" based on Congress's alleged "advance[ment of] religions with an aversion to insurance over those that do not have such an aversion" (emphasis added)). To the extent that he intends to raise a separate equal protection challenge to the exemptions, it would fail for the same reasons. Only rational basis review applies to distinctions drawn for secular reasons. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter–Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (applying rational-basis equal protection scrutiny to statutory religious exemption); *Liberty Univ., Inc.*, 733 F.3d at 102; *Wilkins v. Penns Grove-Carneys Point Reg'l Sch. Dist.*, 123 F. App'x 493, 495 (3d Cir. 2005). The Fourth Circuit considered an equal protection challenge to the ACA's religious conscience exemption and health care sharing ministry exemption and concluded that "the distinction made between sects that oppose insurance and provide for themselves in their own

welfare system and those that do not, and the distinction made between ministries formed before 1999 and those formed after, are secular and thus subject only to rational basis review. . . . Both distinctions are rationally related to the Government's legitimate interest in accommodating religious practice while limiting interference in the Act's overriding purposes." *Liberty Univ., Inc.*, 733 F.3d at 102 (citations omitted).

Mr. Dierlam's second argument is that the shared responsibility payment violates equal protection because it will fall more heavily on honest, responsible citizens." 3AC ¶ 203. As noted, equal protection does not require that Congress treat everyone the same. *Plyler*, 457 U.S. at 216. Rather, it "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985). Where social or economic legislation is at issue, a classification need only be rationally related to a legitimate state interest to withstand an equal protection challenge. *Id*. at 440. Mr. Dierlam does not establish that people who are not "honest, responsible citizens," 3AC ¶ 203, constitute a suspect class, and therefore only a rational relationship between the classification drawn and a legitimate public purpose is required. Indeed, Congress regularly uses its taxing power to encourage certain purchases, including purchasing homes and professional educations. *NFIB*, 567 U.S. at 571-72. Congress also uses its taxing power as an "obviously regulatory measure[]" to discourage certain conduct, like purchasing cigarettes. *Id*. at 567. This use of the taxing power advantages those Congress chooses to qualify for certain tax incentives and necessarily disadvantages those falling outside Congress's definition of the encouraged behavior, but this does not inherently violate equal protection. "[L]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012). The burden rests with plaintiffs to "negat[e] every conceivable basis which might support [the

provisions]." *Id*. at 681. Here, Mr. Dierlam has not shown that Congress's definition of those who must pay the shared responsibility payment was unrelated to a legitimate public purpose, and indeed, the shared responsibility payment furthered the Government's interest in expanding health insurance coverage and reflected a legitimate balancing of individual and governmental interests. *See NFIB*, 567 U.S. at 567 (the payment was "plainly designed to expand health insurance coverage"). For all of these reasons, Mr. Dierlam's equal protection claims fail.

D. The Contraceptive Coverage Requirement Does Not Violate the Free Exercise Clause. (Claim 5)

In Claim 5, 3AC ¶¶ 147-54, Mr. Dierlam challenges the contraceptive coverage requirement on Free Exercise grounds, arguing that it evinces "hostility . . . toward certain religions," 3AC ¶ 149, and "doubly burdens Christians," 3AC ¶ 148. This claim also fails.

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

Here, the contraceptive coverage requirement and its implementing regulations are neutral and generally applicable—as nearly every court to have considered a free exercise

challenge to them and their predecessors has found.[6] "The regulations were passed, not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's health care costs." *O'Brien*, 894 F. Supp. 2d at 1161; *see, e.g.*, *Notre Dame I*, 988 F. Supp. 2d at 929 ("The laws and regulations in question, as well as the legislative history, further show that the ACA and related regulations were enacted for reasons neutral to religion."). The regulations reflect expert medical recommendations about the medical necessity of contraceptive services, without regard to any religious motivations for or against such services. *See, e.g.*, *Conestoga*, 917 F. Supp. 2d at 410 ("It is clear from the history of the regulations and the report published by the [IOM] that the purpose of the [regulations] is not to target religion, but instead to promote public health and gender equality."); *Notre Dame I*, 988 F. Supp. 2d at 930 (same; finding it "abundantly clear" that the regulations are neutral).[7]

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[6] *See, e.g.*, *Mich. Cath. Conf. & Cath. Family Planning Servs. v. Burwell*, 755 F.3d 372, 393-94 (6th Cir. 2014), *vacated*, 575 U.S. 981 (2015); *Priests for Life v. Dep't of Health & Human Servs*., 7 F. Supp. 3d 88, 104-08 (D.D.C. 2013); *Roman Cath. Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 85-91 (D.D.C. 2013), *aff'd in part, vacated in part sub nom. Priests for Life*, 772 F.3d 229; *Eternal World Television Network, Inc. v. Burwell*, 26 F. Supp. 3d 1228, 1235-37 (S.D. Ala. 2014); *Roman Cath. Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-3489, 2014 WL 1256373, at *23-26 (N.D. Ga. Mar. 26, 2014), *vacated in part sub nom. Eternal World Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs*., 818 F.3d 1122 (11th Cir. 2016); *Notre Dame I*, 988 F. Supp. 2d at 927-30; *Cath. Diocese of Nashville v. Sebelius*, No. 3:13-cv-01303, 2013 WL 6834375, at *5-7 (M.D. Tenn. Dec. 26, 2013); *Mich. Catholic Conf. v. Sebelius*, 989 F. Supp. 2d 577, 588-89 (W.D. Mich. 2013), *aff'd sub nom. Mich. Cath. Conf v. Burwell*, 755 F.3d 372 (6th Cir. 2014), *vacated*, 575 U.S. 981 (2015). *But see Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 437 (W.D. Penn., Mar. 6, 2013); *Sharpe Holdings v. Dep't of Health & Human Servs.*, No. 2:12-cv-92, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012).

[7] The regulations, moreover, do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. The regulations apply to all non-grandfathered health plans that do not qualify for a religious or moral exemption. Thus, "it is just not true ... that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am.*

Indeed, Mr. Dierlam explicitly acknowledges that, "[a]s no mention of any particular religion or religious practice exists in the HHS Mandate, no facial violation [of the Free Exercise Clause] is evident." 3AC ¶ 148. To overcome this facial neutrality, Mr. Dierlam points only to an assortment of general statements, unconfirmed reported statements, and comments which do not even address religion. *See* 3AC ¶¶ 149 (claiming to identify a hostility to religion because a non-government employee wrote an email to the then-Secretary of HHS asserting that the Institute of Medicine "ha[d] strong relationships with both Planned Parenthood and NARAL Pro-Choice"). These vague statements do not suffice to establish hostility to religion.

Nor do exceptions mean that the contraceptive coverage requirement is not generally applicable. The existence of express categorical exemptions or accommodations for certain entities, like grandfathered plans and religious objectors, "does not mean that [the regulations do] not apply generally." *Priests for Life*, 7 F. Supp. 3d at 106. "General applicability does not mean absolute universality." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008). "Instead, exemptions undermining 'general applicability' are those tending to suggest disfavor of religion." *O'Brien*, 894 F. Supp. 2d at 1162. And indeed, the fact that the agencies promulgated religious exemptions and the accommodation demonstrates that the agencies' purpose was to accommodate religion, not to disfavor it. They therefore "present[] a strong argument in favor of neutrality" by "demonstrating that the 'object of the law' was not 'to infringe upon or restrict practices because of their religious motivation.'" *O'Brien*, 894 F. Supp. 2d at 1161 (quoting

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Family Ass'n v. FCC, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1162; *Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677, at *5 (W.D. Mich. Dec. 24, 2012), aff'd, 730 F.3d 618 (6th Cir. 2013), *cert. granted, judgment vacated sub nom. Autocam Corp. v. Burwell*, 573 U.S. 956 (2014); *Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943, 953 (S.D. Ind. 2012).

Lukumi, 508 U.S. at 533). Accordingly, Mr. Dierlam fails to state a Free Exercise claim.

E. Neither the Contraceptive Coverage Requirement Nor the Minimum Essential Coverage Requirement Violate Procedural or Substantive Due Process. (Claims 8 and 14)

In Claim 14, 3AC ¶¶ 209-17, Mr. Dierlam argues that the minimum essential coverage provision and the shared responsibility payment provision violate the Due Process Clause of the Fifth Amendment. He focuses on the alleged "unconstitutional[] extract[ion]" of "money," 3AC ¶ 215. 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. *Phillips v. Comm'r*, 283 U.S. 589, 595 (1931). At a substantive level, the Supreme Court has held that the Due Process Clause does not limit the taxing power, with a possible rare exception where "the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916). In other words, assessment of the shared responsibility payment, before the amount was zeroed out, was a constitutional implementation of the taxing power that does not violate due process. *See also Pledger v. Comm'r*, 641 F.2d 287, 292 (5th Cir. 1981) ("[U]nder either the Fifth Circuit or the Supreme Court standard, it is clear that the statutory scheme established by Congress for taxation is entitled to great deference by the courts and shall not be disturbed unless arbitrary and capricious and without a reasonable basis in fact."); *Walker v. United States*, 240 F.2d 601, 602-03 (5th Cir. 1957) ("The exhaustive opinion of the Supreme Court in [*Brushaber v. Union Pacific R. Co.*, 1915, 240 U.S. 1], establishes beyond doubt the all-embracing character of the taxing authority possessed by Congress along with a like latitude in selecting modes of exercising that power. . . . '[I]t is equally well settled that [the Fifth Amendment Due Process Clause] is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the

Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause . . . .'").

Mr. Dierlam appears to dispute that the shared responsibility payment is a tax, *see* 3AC ¶ 106 ("A . . . violation exists if the IMP is considered a penalty"), but, as further discussed *infra* Part III.H, the Supreme Court has already concluded that the shared responsibility payment *is* a tax, *NFIB*, 567 U.S. at 563-74. Nor do Mr. Dierlam's references to the freedom of contract, *e.g.* 3AC ¶¶ 212-13, compel a different outcome. The freedom of contract is not absolute and can be limited. *Nebbia v. New York*, 291 U.S. 502, 523 (1934) ("[N]either property rights nor contract rights are absolute . . . . Equally fundamental with the private right is that of the public to regulate it in the common interest."). Indeed, regulations governing contracts, like minimum wage requirements, are not unusual. *Cf. U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 601 (6th Cir. 2013) (noting that "[t]he Supreme Court long ago abandoned the protection of economic rights through substantive due process," because such rights are not fundamental).

In Claim 8, 3AC ¶¶ 176-78, Mr. Dierlam presents a variation on this theory, arguing that the contraceptive coverage requirement violates due process. 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. That the ideal product that Mr. Dierlam wishes to purchase is not available is not a violation of a fundamental right that would implicate due process protection. Such a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-22, 117 (1997). The "freedom to refuse to pay for unwanted medical care [through insurance] . . . cannot be characterized as

'fundamental' so as to receive heightened protection under the Due Process Clause." *U.S. Citizens Ass'n*, 705 F.3d at 601.

F. Mr. Dierlam Fails to State a Claim Based on the Freedom of Association, Right to Privacy, or Free Speech. (Claims 6, 11, 12, and 17)

Mr. Dierlam argues in Claim 11, 3AC ¶¶ 193-97, that the minimum essential coverage requirement and the shared responsibility payment provision violate the "implied Association Clause" of the First Amendment. The kinds of intimate associations that are protected under existing precedent by the constitutional right to privacy (and the freedom of intimate association) concern "the kinds of relationships that attend the creation and sustenance of a family, such as marital or parental relationships." *Mote v. Walthall*, 902 F.3d 500, 507 (5th Cir. 2018). Any requirement that Mr. Dierlam associate with an insurance company would not implicate any such constitutionally protected rights. *See U.S. Citizens*, 705 F.3d at 598 (explaining that having to associate with a large business enterprise "lacks the[] qualities necessary for constitutional protection" under case law addressing the right of intimate association).

And Mr. Dierlam remains perfectly free to engage in non-intimate associations as well—nothing in the minimum essential coverage requirement or shared responsibility payment provision interferes with his ability to join an expressive association or spread any message. *See Priests For Life*, 772 F.3d at 269-70 (finding that plaintiffs' rights to expressive association were not violated merely because they had to "interact[] with coverage providers that must make contraceptive coverage available" because "such interaction does not make those providers part of the organization's expressive association or otherwise impair its ability to express its message"). Mr. Dierlam's analogy to union fee cases, where plaintiffs were compelled to fund expressive activities including "lobbying, . . . advertising, . . . and litigation," *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2461 (2018), is also inapposite given

that he does not allege that he is being compelled to fund any speech.

In Claim 17, 3AC ¶¶ 235-38, Mr. Dierlam asserts that the minimum essential coverage requirement violates a right of privacy "implied in the 4th and 9th Amendments." Despite that summary, this claim primarily restates arguments relating to other claims, which Defendants address elsewhere. *E.g.* 3AC ¶ 236 (arguing that "[t]he minimum essential coverage provision is a confiscation of property without due process," which Defendants address *supra* Part III.E). In any event, Mr. Dierlam's privacy rights have not been infringed. He does not identify any private information that he must disclose. The minimum essential coverage requirement does not require him to give any personal medical information to anyone, and (even prior to the zeroing out of the shared responsibility payment) it permitted individuals to choose between acquiring suitable coverage and paying the shared responsibility payment, the latter of which has no privacy implications. Thus, Mr. Dierlam fails to state a claim based on any privacy right. *Cf. U.S. Citizens Ass'n*, 705 F.3d at 602-03 (rejecting a privacy claim based on the individual mandate because "[t]he individual mandate does not actually compel plaintiffs to disclose personal medical information to insurance companies. But even if it did, . . . Plaintiffs can avoid any privacy concern altogether by simply foregoing insurance and complying with the individual mandate by making the shared responsibility payment. . . . Finally, any injury plaintiffs may suffer by disclosing their private health information to insurance companies is highly speculative at this point, and plaintiffs did not allege any specific facts to support such injury. Plaintiffs' right to privacy claim is without merit and was properly dismissed" (citation omitted)).

Mr. Dierlam also argues in Claim 6 that his free speech rights are violated by the contraceptive coverage requirement because he views entering into a contract for health insurance as implicating his speech rights; 3AC ¶¶ 155-61; he also makes a similar argument that

the ACA writ large violates his speech rights through interference with his ability to enter into health insurance contracts of his choice in Claim 12, 3AC ¶¶ 198-200. Both of these claims fail because 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. These types of incidental effects of government regulation are unobjectionable under the First Amendment. As the Supreme Court has explained, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," and "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see also id.* (noting that for this reason "a ban on race-based hiring may require employers to remove 'White Applicants Only' signs, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, [547 U.S. 47, 62 (2006)]," "an ordinance against outdoor fires might forbid burning a flag, *R.A.V.* [*v. St. Paul*, 505 U.S. 377, 385 (1992)]" and "antitrust laws can prohibit 'agreements in restraint of trade,' *Giboney v. Empire Storage & Ice Co.*, [336 U.S. 490, 502 (1949)]"). Here, Mr. Dierlam "cannot claim a First Amendment violation simply because [he] may be subject to . . . government regulation." *Univ. of Penn. v. EEOC*, 493 U.S. 182, 200 (1990); *see also id*. (rejecting an "attenuated" First Amendment claim because "many laws make the exercise of First Amendment rights more difficult").

G. Mr. Dierlam Fails to State a Claim Under the Takings Clause. (Claims 9 and 14)

In Claim 9, Mr. Dierlam raises what he styles as a Takings Clause challenge to the contraceptive coverage requirement. 3AC ¶¶ 179-82. He again references the Takings Clause in

Claim 14. 3AC ¶¶ 209-17. His allegations, however, do not actually address the Takings Clause at all, but instead raise other scattered issues that are insufficient to state a claim. *See, e.g.*, 3AC ¶ 179 (alluding to the possible concern that in the future insurance will be "required . . . to cover drugs for executions or euthanasia, supplies for a death lottery if the government should determine the country contains too many white people, etc.").

In any event, Mr. Dierlam plainly cannot state a claim under the Takings Clause. This case does not present the standard model of a taking—"[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-39 (2005) (citing cases). Here, Mr. Dierlam does not allege any appropriation or invasion of his property. Moreover, it is clear that no unconstitutional taking has occurred because "[i]t is beyond dispute that '[t]axes and user fees . . . are not "takings."'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013) (citing cases). Since the Supreme Court has already held that the shared responsibility payment is a validly authorized tax, *NFIB*, 567 U.S. at 563-74, it cannot be an unconstitutional taking.

H. Mr. Dierlam's Claims Resisting *NFIB v. Sebelius* Fail to State a Claim. (Claims 18, 19, and 20)

In Claims 18 and 19, Mr. Dierlam appears to take issue with the Supreme Court's decision in *NFIB v. Sebelius*. *See, e.g.*, 3AC ¶ 241 ("[T]he Supreme Court majority was incorrect in *NFIB* as to the taxing authority of Congress to support the ACA[.]"); 3AC ¶ 242 ("The Individual Mandate and the Individual Mandate Penalty together form a direct tax, which is not levied in proportion to population."); 3AC ¶¶ 256-57 (asserting that the ACA is not authorized under the Commerce Clause because it "create[s] or destroy[s]" commerce); 3AC ¶ 258. Despite his disagreement with the decision in *NFIB*, Mr. Dierlam cannot state a claim based on arguments the Supreme Court has already rejected. Nor does it matter whether the

ACA is authorized under the Commerce Clause because the Supreme Court upheld it under the taxing power. These claims thus fail as a matter of law.

In Claim 20, Mr. Dierlam argues that the Supreme Court's conclusion in *NFIB* is cast into doubt by Congress's subsequent action to set the amount of the shared responsibility payment to zero. 3AC ¶ 258. Like the plaintiffs in *California v. Texas*, 141 S. Ct. 2104 (2021), who sought to raise this same claim, Mr. Dierlam lacks standing because there is no plausible mechanism of enforcement to cause him injury. *Compare id*. at 2113-16, *with supra* Part II. In any event, the amended Section 5000A is constitutional. In *NFIB*, the Supreme Court held that the payment provision in Section 5000A could be sustained as a valid exercise of Congress's constitutional power because it offered a choice between maintaining health insurance and making a tax payment. 567 U.S. at 570, 574 & n.11. In so ruling, the Supreme Court noted that no negative legal consequences attached to not buying health insurance beyond requiring a payment to the IRS, and that the government's position in the case confirmed that if someone chooses to pay rather than obtain health insurance, that person has fully complied with the law. *Id.* at 568. Congress in 2017 amended Section 5000A(c) by reducing to zero (effective in 2019) the shared responsibility payment assessed under Section 5000A(b) as a lawful alternative to purchasing insurance under Section 5000A(a), *see* TCJA, but it did not amend Section 5000A(a) or (b). Congress's decision to reduce the payment amount to zero therefore did not convert Section 5000A from a provision affording a constitutional choice into an unconstitutional mandate to maintain insurance. Rather than imposing a new burden on covered individuals, the 2017 amendment preserved the choice between lawful options and simply eliminated any financial or negative legal consequence from choosing not to enroll in health coverage.

I. Mr. Dierlam's Other Claims Likewise Fail to State a Claim. (Claims 16 and 21)

In Claim 16, Mr. Dierlam argues that the ACA "accelerated a growing corruption in the medical field" and "served as a blueprint" for "similar violations of Constitutional rights." 3AC ¶¶ 233-34. These paragraphs do not allege the violation of any particular law, and to the extent that they vaguely reference the Constitution, Defendants have previously addressed Mr. Dierlam's allegations of constitutional violations.

In Claim 21, 3AC ¶¶ 259-70, Mr. Dierlam makes a broad argument about what he asserts to be the proper definition of direct and indirect taxes. His arguments are in no way specific to the ACA or any particular provisions thereof, although if they were, *NFIB* would control, *see NFIB*, 567 U.S. at 571 (concluding that the shared responsibility payment is not a direct tax). This freestanding question of law is precisely the type of "hypothetical or abstract dispute[]" that is barred from the federal courts by Article III. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions." *Id.* Indeed, the relief sought demonstrates that Mr. Dierlam's objections go far beyond any particular provision of the ACA. *See* 3AC ¶ 268 (proposing, among other things, that "all federal taxes are brought back into line with a proper definition of direct and indirect taxes as the founders intended"). Accordingly, Claim 21 should be dismissed.

CONCLUSION

For the above-stated reasons, Mr. Dierlam's Third Amended Complaint should be dismissed, except for the retrospective RFRA claim in Claim 3.

Dated: May 9, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
Civil Division

MICHELLE BENNETT
Assistant Branch Director

/s/ Rebecca Kopplin
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, 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.

Executed on May 9, 2022, in Washington, D.C.

/s/ Rebecca Kopplin
REBECCA KOPPLIN

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

[PROPOSED] ORDER

Upon careful consideration of Defendants' Partial Motion to Dismiss Plaintiff's Third Amended Complaint, and for good cause shown, it is hereby **ORDERED** that Defendants' motion is **GRANTED**. Plaintiff's Claims 1, 2, and 4 through 21 are **DISMISSED** in their entirety, and Plaintiff's Claim 3 is **DISMISSED** to the extent it seeks prospective relief.

Keith P. Ellison
United States District Judge

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS – HOUSTON DIVISION

John J. Dierlam, Plaintiff, vs. Joseph P. Biden, President of the United States, et al. Defendants.	Case No. 4:16-cv-00307

DECLARATION OF MICHAEL B. BRISKIN

I, MICHAEL B. BRISKIN, make the following declaration in lieu of affidavit, pursuant to 28 U.S.C. §1746, to the best of my knowledge and belief:

1. I am employed as Deputy Assistant General Counsel for General Law & Regulation within Departmental Offices (headquarters) at the Department of the Treasury. I have worked in the Treasury Office of General Counsel since August 2006.

2. Among the duties of my office is the processing of all administrative claims under the Federal Tort Claims Act (FTCA) 28 U.S.C. §§1346(b), 2671-2680 for damages allegedly arising out of the tortious conduct of Departmental Offices employees acting within the course and scope of their employment.

3. Any such administrative claim received by Departmental Offices is required to be forwarded to my legal team. There we process the claim and administratively determine its merit, as provided by law and regulations in accordance with the Act.

4. My office has no record of any FTCA claim submitted by or on behalf of Plaintiff, John J. Dierlam, at any time. However, due to the disruption of normal working conditions in Departmental Offices caused by the COVID-19 outbreak since March 2020, the regular receipt and delivery of mail within the Office of General Counsel has been impacted. I therefore cannot state with absolute certainty that Plaintiff has not filed an FTCA administrative claim after February 2020.

I certify under penalty of perjury that the above Declaration is true and correct to the best of my knowledge and belief.

Executed this 21st day of April, 2022.

Michael B. Briskin
Deputy Assistant General Counsel for
General Law & Regulation
U.S. Department of the Treasury

EXHIBIT C

In the United States District Court
for the Southern District of Texas, Houston Division

John J. Dierlam, *Plaintiff*, v. Joseph P. Biden, President of the United States, et al., *Defendants*.	Case No. 4:16-cv-0037

Declaration of Eirik Cheverud

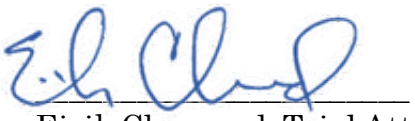
I, Eirik Cheverud, make the following declaration in lieu of affidavit, pursuant to 28 U.S.C. § 1746, to the best of my knowledge and belief:

1. I am employed as a Trial Attorney for the United States Department of Labor (Department), Office of the Solicitor, Plan Benefits Security Division. I have worked for the Office of the Solicitor since September 2013.

2. I contacted the Office of the Solicitor's Counsel for Claims and Compensation, the person who administers our records of administrative tort claims filed with the Department.

3. I have caused a search of our records of administrative tort claims filed with the Department, and I found no record of an administrative tort claim filed by or on behalf of Plaintiff, John J. Dierlam, and/or an authorized representative.

Dated April 29, 2022.



Eirik Cheverud, Trial Attorney
Plan Benefits Security Division
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave. NW, N4611
Washington, DC 20210

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS – HOUSTON DIVISION

John J. Dierlam, Plaintiff, vs. Joseph P. Biden, President of the United States, et al. Defendants.	Case No. 4:16-cv-00307

DECLARATION OF
MARY-ELLAN KRCHA

I, MARY-ELLAN KRCHA, make the following declaration in lieu of affidavit, pursuant to 28 U.S.C. §1746, to the best of my knowledge and belief:

1. I am employed as the Internal Revenue Service (I.R.S.) Claims Manager. I have held this position since April 2004.

2. Among the duties of my office is the processing of all administrative claims under the Federal Tort Claims Act (FTCA) 28 U.S.C. §§1346(b), 2671-2680 for damages allegedly arising out of the tortious conduct of Internal Revenue Service employees acting within the course and scope of their employment.

3. Any such administrative claim received by any I.R.S. office, wherever located, is required to be forwarded to my office, in Washington, DC. There we process the claim and administratively determine its merit, as provided by law and regulations in accordance with the Act.

4. In my capacity as I.R.S. Claims Manager, I also maintain a database which lists all administrative claims presented to the Internal Revenue Service under the FTCA. The database chronicles FTCA claim records received from October 1, 1995 forward.

5. However, due to the COVID-19 outbreak I can only attest that from October 1995 through January 31, 2020, the FTCA database shows that no FTCA administrative claim was received that was filed by or on behalf of Plaintiff John J. Dierlam.

6. Due to the disruption of normal working conditions in the I.R.S. caused by the COVID-19 outbreak since January 2020, not all Service mail facilities and Service offices are functioning at full capacity to date; consequently, the regular receipt and delivery of mail within the Service has been impacted. I therefore cannot state with any certainty that Plaintiff has not filed an FTCA administrative claim elsewhere within the Service that has not yet been forwarded to my office. While I have received several (122) FTCA claims since January 2020, I have not received any filed by or on behalf of Plaintiff, John J. Dierlam.

I certify under penalty of perjury that the above Declaration is true and correct to the best of my knowledge and belief.

Executed this 19th day of April, 2022.

Mary-Ellan Krcha

Mary-Ellan Krcha, Claims Manager
IRS Office of Chief Counsel
General Legal Services

EXHIBIT D

IN THE 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

DECLARATION OF
MEREDITH TORRES

1. I am a Senior Attorney in the General Law Division, Office of the General Counsel, Department of Health and Human Services (the "Department"). I am familiar with the official records of administrative tort claims maintained by the Department as well as with the system by which those records are maintained.

2. The Department has a Claims Office that maintains in a computerized database a record of administrative tort claims filed with the Department. As a consequence, if an administrative tort claim had been filed with the Department by Plaintiff, John J. Dierlam, a record of that filing would be maintained in the Claims Office's database.

3. I have caused a search of the Claims Office's database to be conducted and found no record of an administrative tort claim filed by or on behalf of Plaintiff, John J. Dierlam, and/or an authorized representative.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Dated at Washington, D.C., the 20th day of April, 2022.

MEREDITH TORRES
Senior Attorney, Claims and Employment Law
General Law Division
Office of the General Counsel
Department of Health and Human Services