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.

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

INTRODUCTION

Because Mr. Dierlam lacks any ongoing or future injury, due to the Religious Exemption Rule and the reduction of the shared responsibility payment to zero, his prospective claims must be dismissed for lack of jurisdiction. In his opposition, Mr. Dierlam does not dispute that no government prohibition bars health insurance issuers from offering him insurance products that conform to his religious requirements; and Mr. Dierlam does not dispute that, should he elect not to obtain minimum essential coverage, whether due to his religious beliefs or for any reason, he will experience no enforcement consequences. Mr. Dierlam's main focus remains on his theory that the government is to blame for any lack of health insurance products on the market that meet his requirements. But where, as here, any such absence would be attributable to the independent choices of health insurance issuers, rather than governmental regulations, it cannot provide the necessary Article III injury.

Mr. Dierlam's claims (except his retrospective Religious Freedom Restoration Act (RFRA) claim in Count 3) should be dismissed for other reasons as well, as explained in Defendants' opening brief. Given the number of claims and repetition between Mr. Dierlam's opposition and the Third Amended Complaint, Defendants respond briefly to the main points raised in Mr. Dierlam's opposition and refer to the Court to their opening brief for a fuller discussion of all of the claims.

ARGUMENT

I. Mr. Dierlam's Retrospective § 1502(c) Claim (Claim 2) Should Be Dismissed.

As Defendants have previously explained, Mem. Supp. Defs.' P. MTD 3AC (P. MTD 3AC) at 8-15, ECF No. 126, Claim 2 must be dismissed both because Mr. Dierlam lacks any

injury caused by the alleged lack of § 1502(c) notification, and because Mr. Dierlam has identified no cause of action which would support such a claim.

A. Mr. Dierlam Fails to Carry his Burden to Identify an Injury Caused by the Alleged Lack of § 1502(c) Notification.

First, and fatally for his § 1502(c) claim, Mr. Dierlam's opposition still does not identify any injury-in-fact stemming from the alleged lack of notification. As this Court has previously concluded, without such an injury-in-fact, this claim must be dismissed, Clarifying Mem. at 9, ECF No. 121, 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).

Mr. Dierlam does not dispute that he was independently aware of the www.HealthCare.gov website. 3d Am. Compl. ¶ 105 (3AC), ECF No. 124. Therefore, he was no worse off than he would have been had the government notified him about the existence of that website. Indeed, Mr. Dierlam's opposition tacitly acknowledges that he was not injured by any lack of § 1502(c) notification by pointing only to alleged injuries caused by *other* purported actions of Defendants. *See* Resp. Gov.'s P. MTD 3AC at 8 (Pl.'s Opp'n), ECF No. 128 (arguing that "multiple acts and omissions on the part of the defendants caused multiple injuries. . . . If a lack of notification caused no ADDITIONAL injury, it is because the defendants arranged it so"). Because "a plaintiff must demonstrate standing for each claim he seeks to press," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006), Mr. Dierlam must identify an injury attributable to the lack of § 1502(c) notification, not other purported actions of Defendants. *See also Fontenot v. McCraw*, 777 F.3d 741, 746 (5th Cir. 2015) ("The court must evaluate each plaintiff's Article III standing for each claim; 'standing is not dispensed in gross.'" (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n. 6 (1996))).

Mr. Dierlam appears to argue that § 1502(c) should be interpreted to require that the government do more than notify individuals of www.HealthCare.gov—for example, either compel Texas to restructure its health insurance marketplace, *see* Pl.'s Opp'n at 4, or possibly compel the federal government to further facilitate individuals finding health care insurance in some amorphous way, *see* Pl.'s Opp'n at 5. But Mr. Dierlam's reading is contrary to the plain text of § 1502(c), which requires a notification "contain[ing] information on the services available through the Exchange operating in the State in which such individual resides." § 1502(c). And the statutory text is the cornerstone of statutory construction. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("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.'" (citation omitted)). The best place for individuals to find such information about available services is www.HealthCare.gov. The provision does not require any state to organize its health insurance marketplace in a particular way, or require the government to take more active steps to "matchmake" individuals with insurance. Accordingly, any inability by Mr. Dierlam to locate insurance that meets his preferences once he knew about www.HealthCare.gov—either in the past or now—cannot be attributed to any violation of § 1502(c). Or, to put it another way, Mr. Dierlam's concerns about Texas's marketplace or the availability of insurance plans are not redressable by any relief available on his § 1502(c) claim, since such relief would be limited to notification of www.HealthCare.gov.

B. <u>Mr. Dierlam Also Cannot Identify a Cause of Action Supporting Claim 2.</u>

In addition to the lack of standing, Claim 2 also fails because Mr. Dierlam identifies no applicable right of action. Mr. Dierlam does not seek to rely on § 1502(c) itself, which does not create a privately enforceable cause of action. Mr. Dierlam's opposition refers to the Tucker

Act, the Administrative Procedure Act (APA) and the Federal Tort Claims Act (FTCA), Pl.'s Opp'n at 8-9, but none of these provides a cause of action.

As an initial matter, while the Tucker Act waives sovereign immunity under some circumstances, it does not "create 'substantive rights.'" *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). In other words, the Tucker Act does not provide a source of substantive law entitling a plaintiff to relief. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1327-28 (2020) ("Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." (quoting *United States v. Mitchell*, 463 U.S. 206, 216 (1983))). Because Mr. Dierlam has not identified any such cause of action, it is unnecessary to analyze whether the Tucker Act would provide a waiver of sovereign immunity. Mr. Dierlam refers to "harm to the public interest" and "unclean hands," in conjunction with the Tucker Act, Pl.'s Opp'n at 8, but neither provides a cause of action. P. MTD 3AC at 13 n.3.

As to the APA, Mr. Dierlam now acknowledges that the APA does not permit retrospective, monetary relief. *Compare* P. MTD 3AC at 12-13, *with* Pl.'s Opp'n at 8 ("I do not claim the APA provides monetary relief . . . ."). Thus, Mr. Dierlam cannot seek monetary relief for any violation of § 1502(c) through the APA. *Contra* 3AC ¶ 293 (requesting "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 [he] was denied health insurance if such a policy can be located"). Nor can Mr. Dierlam obtain *non-monetary* relief regarding any violation of § 1502(c) through the APA. Given that Mr. Dierlam argues only that he did not receive notice in the past, not a continuing lack of notice, prospective relief would serve no purpose. And Mr. Dierlam himself has noted that providing notice now would not redress any past lack of notice: "[i]t is not my purpose to

enforce §1502(c), as the injury has occurred and can not [sic] be made right by sending out proper notices now or even at the late date the defendants sent notices." 3AC ¶ 119. Mr. Dierlam points to paragraph 293 of his Third Amended Complaint as identifying the relief he requests for Claim 2, Pl.'s Opp'n at 8, but the only form of nonmonetary relief mentioned there is declaratory relief. 3AC ¶ 293. To obtain declaratory relief, Mr. Dierlam must also identify an injury that can be redressed by declaratory relief, which he has not done. *See Waller v. Hanlon*, 922 F.3d 590, 603 (5th Cir. 2019) ("[T]he Declaratory Judgment Act does not vest the federal courts with jurisdiction broader than Article III's 'case or controversy' limitation.").

As to the FTCA, Mr. Dierlam admits that he has not filed an administrative claim with the defendant-agencies. *See* Pl.'s Opp'n at 9. In the absence of this jurisdictional prerequisite, the FTCA's waiver of sovereign immunity cannot apply and Mr. Dierlam's claim must be dismissed.[1] *McNeil v. United States*, 508 U.S. 106, 106 (1993). Furthermore, Mr. Dierlam has not fully grappled with the fact that FTCA 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). Mr. Dierlam appears to acknowledge this conclusion as to negligence *per se*, but continues to refer to "negligence" and "gross negligence." Pl.'s Opp'n at 9. But the point of the cited cases is that the government's mere failure to follow its own statutes and regulations does not constitute negligence, gross or otherwise, that is actionable under the FTCA. P. MTD 3AC at 14-15.

[1] Defendants are skeptical that any future administrative filing by Mr. Dierlam would be timely given the FTCA's requirement that claims be presented to an agency within two years of accrual, 28 U.S.C. § 2401(b), but the Court need not resolve this hypothetical question.

II. The Court Lacks Jurisdiction Over Mr. Dierlam's Prospective Claims—He Has No Ongoing or Future Injury Due to the Religious Exemption Rule and the Zeroing Out of the Shared Responsibility Payment.

Mr. Dierlam still fails to identify any ongoing injury which could save his prospective claims from dismissal. P. MTD 3AC at 15-20. As this Court previously recognized, Clarifying Mem. at 5-6, the Religious Exemption Rule[2] and the zeroing out of the shared responsibility payment rendered Mr. Dierlam's claims for prospective relief moot by ensuring that he would face no government sanction for declining any health insurance that does not comply with his religious beliefs.

Mr. Dierlam cannot rely on any present or future difficulty in finding insurance to provide the necessary injury. *Contra* 3AC ¶¶ 69(a)-(d), 70(c). If he chooses not to obtain insurance, he will not be required to make any shared responsibility payment. And, under the Religious Exemption Rule, willing insurers are free to offer Mr. Dierlam a health plan that excludes contraceptive coverage consistent with his religious beliefs. Mr. Dierlam analogizes his situation to that of "separate but equal segregation based on race" in public schools, Pl.'s Opp'n at 10, arguing that, in the current health insurance market, it is more difficult for him to find a health plan than for other people. But the government is in no way treating him unequally. Mr. Dierlam is free to contract with health insurers on the same terms as others. Whether health insurers choose to offer products that fit Mr. Dierlam's particular requirements is not a matter of governmental fiat, but is the independent choice of insurers. As this Court has recognized, this case against the defendant-agencies cannot be sustained if Mr. Dierlam's claimed injury "results from the independent action of some third party not before the court." Clarifying Mem. at 7-8

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[2] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57536, 57,537 (Nov. 15, 2018).

(quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Indeed, redressability problems also abound, given that the Religious Exemption Rule *already* permits insurers to offer health plans that exclude contraceptive coverage to religious objectors like Mr. Dierlam.

Nor can Mr. Dierlam defeat mootness through speculation about possible future policy changes. *See* Pl.'s Opp'n at 10 (expressing concern that "changes to the regulations of the ACA are in progress"); *accord* Pl.'s Opp'n at 6 (citing news articles about possible future regulatory actions separate from the Religious Exemption Rule or the amount of the shared responsibility payment); 3AC ¶ 70(a)-(b). This Court previously rejected such speculation as a basis for Article III injury because it lacks "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." Clarifying Mem. at 6; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)) (an injury must be "certainly impending"). Mr. Dierlam continues to fail to offer any evidence that changes to the amount of the shared responsibility payment or the Religious Exemption Rule are certain or even likely—much less that any such hypothetical changes would result in injury to him. In the absence of such evidence, his claims are moot. The Fifth Circuit recently reiterated that a dispute is moot even though "the current rules *might* be changed by the executive branch," because any resulting injury is "'conjectural or hypothetical'" not "'actual or imminent.'" *DeOtte v. State of Nevada*, 20 F.4th 1055, 1064 (5th Cir. 2021) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001) (finding case moot where plaintiff offered only speculation about future government actions that could result in harm).

Finally, Mr. Dierlam also refers to several philosophical disagreements with government policy that are untethered to any injury to him. *See* 3AC ¶ 70(d), (f) (objecting to the lack of a

"firm definition of direct and indirect taxes" and "continuing abuse of authority"). These are nothing more than generalized grievances that are insufficient to meet the requirements of Article III. *Cf. Lujan*, 504 U.S. at 573, 575.

III. For the Reasons Provided in Defendants' Opening Brief, All of Mr. Dierlam's Claims Other Than the Retrospective RFRA Claim Also Fail to State a Claim.

Given the number of claims and repetition between Mr. Dierlam's opposition and Third Amended Complaint, Defendants largely rest upon their previous explanation of why Mr. Dierlam's various theories fail to state a claim, P. MTD 3AC at 20-40, but offer the following clarifications:

APA (Claims 1 and 5) - As previously stated, the contraceptive coverage requirement is in accord with the requirements of the APA. P. MTD 3AC at 20-22. Mr. Dierlam now disclaims an APA claim, *see* Pl.'s Opp'n at 11 ("Claim 15 does not concern the HHS Mandate or the APA . . . ."), but it is unclear what other cause of action Mr. Dierlam would rely on, and this Court need not attempt to identify one on his behalf.

Establishment Clause (Claims 4 and 10) - The religious conscience exemption of 26 U.S.C. § 5000A imports a prior religious exemption from 26 U.S.C. § 1402(g)(1), and Mr. Dierlam acknowledges that the latter has been roundly upheld by courts against Establishment Clause challenges, Pl.'s Opp'n at 14. Mr. Dierlam's argument appears to be that a lawful exemption from the Social Security Act becomes unlawful when it is incorporated into the ACA, Pl.'s Opp'n at 14, but he does not explain why that would be. And in any event, this exemption has been upheld in the context of the ACA particularly. *E.g.*, *Liberty Univ. Inc., v. Lew*, 733 F.3d 72, 101-02 (4th Cir. 2013). Mr. Dierlam also argues that use of the term "ministries," which he asserts is a Protestant term, evinces "willful discrimination" against the Catholic faith. Pl.'s Opp'n at 13-14. But Congress defined "health care sharing ministry" in

non-denominational terms, 26 U.S.C. § 5000A(d)(2)(B)(ii), and this exemption has likewise been upheld. *Liberty Univ.*, 733 F.3d at 102.

Due Process (Claims 8 and 14) - In his opposition, Mr. Dierlam attempts to support his due process claims by arguing that "[a]ll insurance contracts by default must contain the HHS Mandate." Pl.'s Opp'n at 19. But he is incorrect to assert that he is required to obtain a health plan that covers contraceptives in violation of his religious beliefs. Under the Religious Exemption Rule, health insurance issuers can offer Mr. Dierlam a plan that excludes this coverage. And because the amount of the shared responsibility payment is zero, even if he opts not to carry any insurance, he will experience no enforcement action. Accordingly, the only deprivation he is suffering is, at most, an asserted "lack of insurance products that he finds acceptable," which is not a fundamental right that would implicate due process protection. P. MTD 3AC at 34.

Claims Similar to *NFIB* (Claims 18, 19, and 20) - While Mr. Dierlam steers away from his prior statement that the Supreme Court's decision in *NFIB* was "incorrect," 3AC ¶ 241, that is still the gravamen of his argument. *Compare* Pl.'s Opp'n at 23 ("[W]hether the IM-IMP combination is a constitutional exercise of Congressional taxing authority, was not taken up by the court in *NFIB*."), *with NFIB v. Sebelius*, 567 U.S. 519, 563-74 (2012), *also id.* at 574 ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax."). And while Mr. Dierlam argues that he, unlike the *California v. Texas* individual plaintiffs, has standing, Pl.'s Opp'n at 23-24, the two sets of plaintiffs are equivalently positioned in relevant respect—they will not face enforcement action if they do not obtain health coverage. *California v. Texas*, 141 S. Ct. 2104, 2113-16 (2021). In any event, Mr. Dierlam offers no response to the argument that the

amended Section 5000A is constitutional because it simply eliminated any financial or negative legal consequence from choosing not to enroll in health coverage.

CONCLUSION

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

Dated: June 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 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 June 2, 2022, in Washington, D.C.

/s/ Rebecca Kopplin
REBECCA KOPPLIN