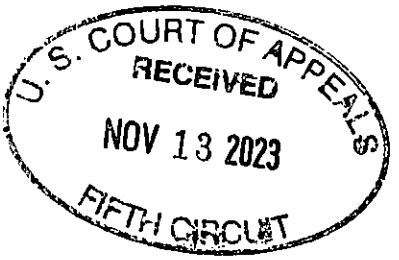
No. 23-20401

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



John J. Dierlam
Plaintiff-Appellant
v.
Joseph R. Biden, in his official capacity as President of the United States; United States Department of Health and Human Services; Xavier Becerra, Secretary, U.S. Department of Health and Human Services; United States Department of Treasury; Janet Yellen, Secretary, U.S. Department of Treasury; United States Department of Labor; Julie A. Su, Acting Secretary, U.S. Department of Labor,
Defendants-Appelees

From the United States District Court, Southern District of Texas
USDC No. 4:16-CV-307

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Entities which may have an interest:

Religious Organizations and Individuals especially Catholic interested in first Amendment Rights

Organizations Interested in Preserving or Reducing Constitutional Rights

Pro-abortion and contraceptive groups such as Planned Parenthood

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Statement Regarding Oral Arguments

As a pro-se litigant, I have little experience to guide me as to the usefulness of Oral arguments. However, oral arguments may help resolve any outstanding questions the Court may have which the briefs do not successfully detail.

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Jurisdiction

This court has jurisdiction based upon 28 USC § 1291 because on 8/8/2023 the District Court ruled on the final remaining claim in this case. The Defendants are agencies and officers of the US government therefore by Federal Rule of Appellate Procedure 4(a)(1)(B), 60 days are allowed to file an appeal. The appeal was filed on 8/18/2023.

Issues Presented

1) The lower court has an overwhelming bias against my case making a full and fair hearing impossible. Will not further remand and instructions to the lower court instead of a decision on the merits only further delay this nearly 8 year old lawsuit resulting in "piecemeal litigation" and many additional cycles of appeals to this court?[1]

2) The lower court now appears to acknowledge a past injury after the Appeals Court's Vacatur and Remand order but refuses to accept the existence of any injury present or future. The government admitted to a violation of RFRA prior to the last appeal, (ROA.555-556) however Judge Ellison dismissed all claims finding the religious burden imposed by the defendant's HHS Mandate not sufficient to trigger RFRA protection. (ROA.1292-1293) Even though many of the present and future injuries are almost identical, the court and the defendants again implicitly deny these injuries are substantial enough to trigger RFRA or any other

1 *Clark-Dietz & Associates-Engineers v. Basic Const., 702 F.2d 67 (5th Cir. 1983)*

violation. Should these actions evoke Judicial Estoppel on the part of the defendants and the admonishment of precedent indicating a court should not consider personal religious matters it is not equipped or authorized to rule upon? (ROA.894)

3)Has the appellant met the burden, especially at the pleading stage, for sufficient general factual allegations to establish standing? In addition, should not the Discovery plan in the Complaint further bolster standing as a reasonable method has been shown to establish additional facts to span any gap in standing if any should still exist? In other words, is the lower court setting the bar to meet standing requirements at a practically insurmountable level especially at the pleading stage?

4)(a)Can any case be considered moot by a District Court when similar continuing violations of the Constitution and Statutes of the US exist as predicted in Claim 1, but also relating to claims 12, 14, 16, and 17? As the new HHS rules, the announced enforcement of new definitions of sex (ROA.1219-1222), as well as the potential raising of the IMP above $0 constitute future and present injuries, do the defendants, "bear[] the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," which they can not possibly show?[2]

2 *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S.*

(b)Can a change in a Statute moot all claims even if the most egregious portions have not been altered? In the instant case only the amount of the Individual Mandate Penalty (IMP) is currently $0. Other provisions of the law such as the Individual Mandate (IM) and minimum essential coverage have a damaging effect whether the IMP is $0 or not. However, the existence of the IM and IMP remains an unconstitutional burden which can be used by a tyrannical majority (such as Democrats) as leverage to exert pressure on a disfavored minority (like orthodox Catholics). If the majority does not get what they want at some future date, they may threaten to raise the IMP, which will disproportionately harm the minority they are attempting to influence, which fulfills the very definition of a "false proxy." As the morals of the country are moved to the Left by this and similar future legislation, it becomes increasingly likely this weapon will be used. The original Constitution explicitly protected religion in the 1st amendment, while at the same time it definitely did not protect race. Yet, given today's environment if the protected group was based on race and not religion would this law be allowed to stand? (*Cf. Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944)* and *Dred Scott v. Sandford, 60 U.S. 393, 15 L. Ed. 691, 15 L. Ed. 2d 691 (1857).*)

5)Can an RFRA Claim be broken into retrospective and prospective

Ct. 693, 145 L. Ed. 2d 610 (2000).

elements as decided by the lower Court in opposition to the 7th Circuit in *Korte v. Sebelius, 735 F.3d 654, 672 (7th Cir. 2013)* and perhaps all circuit courts as this may be the only ruling by an Appeals Court on this matter?

6)The government indicates for a defense to all claims which request prospective relief, it is not responsible for the actions of an independent third party. The health insurance companies meet multiple criteria for a "State Actor." I would ask the court to resolve this contention between the parties? I believe the evidence in the Complaint and other documents is more than adequate to establish this fact but alternatively, the court could allow discovery to better determine the defendant's damage to the market and the degree of independence of the insurance companies, if the court has doubt.

7)Does the Appeals Court find the dismissal of the nearly 21 Claims based upon FRCP 12(b)(1) and 12(b)(6) valid, or does the Complaint provide sufficient grounds for the elements of standing and factual matter or at least the hope for more in Discovery to allow this case to proceed from the pleading stage? In light of the first issue listed above, I ask the court to rule on the merits and provide Summary Judgment on all claims. Below I will present the main issues of contention for several of the claims:

a)The heart of the disagreement for Claim 2 (ROA.914-925) of the

Complaint, which involves ACA § 1502(c), is a difference between the parties in what Congress intended in this section. As portions of this section are ambiguous especially in light of events after the passage of the law and the apparent intention of the agencies not to comply with this section, I would request the court to provide an interpretation of Congressional intent of § 1502(c) of the ACA to resolve this claim?

b)Claims 4 and 10 (ROA.928-934, 953-957) involve the establishment clause of the 1st amendment. Here the defendants do not appear to address the facts and law provided in the claims. The defendants rely on earlier court decisions which may not have considered all the facts and were later reversed and/or vacated.

c)For Claims 7 and 13 (ROA.941-948, 961-966), which are equal protection claims involving sex discrimination and discrimination involving the IM and IMP exemptions respectively, the disagreement seems to center on what it means to be "similarly situated" and what lines can be legitimately drawn by a legislature.

d)Claim 5 (ROA.934-937) is a free exercise claim against the original HHS Mandate. The government cites court decisions which declare the HHS Mandate to be neutral and generally applicable. However, these decisions appear to conflict with known facts. Statements and decisions with out a factual or rational basis

should carry little weight.

e)Claims 8 and 14 (ROA.948-949, 966-970) involve a violation of due process by the HHS Mandate and by provisions of the ACA respectively. Here the government compares the due process given as consistent with previous such taxes, however this can not be the case as this tax has never before existed.

f)Is the government responsible for a violation of the 5th amendment's taking clause as described in Claims 9 and 14? (ROA.949-951, 966-970) Unless the government now wishes to admit that the IM-IMP are "[t]axes and user fees,"[3] which would also be an admission this object comprises a capitation, has the value of a private contract been reduced for at least some parties? See *Omnia Commercial Co. v. United States, 261 U.S. 502, 43 S. Ct. 437, 67 L. Ed. 773 (1923).*

g)Claims 18, 19, and 20 (ROA.982-989) of the 3AC challenge the authority of Congress under the Constitution to impose the ACA on the population. Here the government denies my standing to bring these claims.

h)Claims 16 and 21 (ROA.978-979, 989-996) of the 3AC contain ongoing Constitutional violations. Claim 16 involves a violation using supposedly private parties as State Actors, which was first pioneered by the ACA at this scale, but continues to this day not only in the ACA but in other legislation and executive

3 *Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 615 (2013)*

abuse. A lack of precision in previous decisions have allowed the abuses of the for both claims. Without definitive judicial action these abuses will only expand. I would request the court to rule on the validity for the basis of these claims and resolve the issues presented in this case?

Statement of the Case

About the year 2010, Congress passed Pub. L. No. 111-148 (PPACA) and Pub. L. No. 111-152 (HCERA), collectively known as the ACA. Provisions of the ACA require every individual, or their guardian, with a sufficient income as calculated in the ACA, to maintain a government approved and regulated health insurance policy or qualify for an exemption. The ACA coerces every individual to maintain the policy or exemption because the consequence for not doing so is a monetary penalty, the "Shared Responsibility Payment" or Individual Mandate Penalty (IMP), of a sum calculated in 26 U.S.C. § 5000A created by the ACA to be equivalent to the cost of the lowest benefit plan in the so called marketplace; various exemptions may avoid this penalty.

The ACA specifies little in what should be included in "minimum essential coverage," instead it gives fairly broad authority to HHS to define these specifics, 42 § 300gg-13(a)(4) is but one example of this delegation. This provision does not specify or require the inclusion of any preventive services, but gives the authority to HRSA, a division of HHS, to include these services. In 2011 HRSA set up a 16

member panel at the Institutes of Medicine to make recommendations. This panel produced a report and HRSA accepted the recommendations of this panel and created a set of guidelines.[4] [5] It is here where the requirement that "minimum essential coverage" include contraceptive, sterilization and certain abortion services originates.

The Original complaint was filed Feb. 4, 2016 in US District Court for the Southern District of Texas. (ROA.26-57) The Complaint outlined various Constitutional and other violations associated with the ACA and the regulations enacted by the Defendants including 45 CFR §147.130 (HHS Mandate) among others. In the final claim, I request a Declaration of the term "direct taxes" so that the principle of the Consent of the Governed can be preserved. On 6/14/2018, Judge Ellison accepted the Magistrate's R&R and granted the defendant's Motion to Dismiss. (ROA.604) The decision was appealed. The Appeals court on 10/15/2020 vacated and remanded the Dismissal for an analysis of standing and mootness. (ROA.620-634) The 2nd Amended Complaint was filed on 5/10/2021 (ROA.638-677) and the defendant's filed a Partial Motion to Dismiss (PMTD2AC) on 7/08/2021 (ROA.708-748). It was granted on 12/15/2021. (ROA.805) I filed on

4 Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps 19-20, 109 (2011) ("IOM Rep."), http://iom.nationalacademies.org/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx

5 HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), http://www.hrsa.gov/womensguidelines/

12/27/2021 an Opposed Motion For Leave to File a Third Amended Complaint and Request for Clarification. (ROA.806-812) On 02/08/2022 the Court filed a Clarifying Memorandum. (ROA.846-854) I filed a Third Amended Complaint on 03/28/2022. (ROA.861-1011) The defendants filed a Partial Motion to Dismiss (PMTD3AC) on 05/09/2022 based on FRCP 12(b)(1) and 12(b)(6). (ROA.1016-1084) HHS proposed new rules on 8/4/2022.[6] I will refer to these rules as simply the new rules. They extend the original HHS Mandate and add "gender affirming care." The agency had previously released legal Memorandum indicating it may enforce these concepts under the old rule. (ROA.1219-1221) On 09/06/2022 I filed a Motion for an injunction of these rules and an expedited decision on the PMTD. (ROA.1131-1144) The Court did not grant the injunction. On 12/12/2022 the Court granted the PMTD without comment. (ROA.1164) Only the retrospective part of a RFRA claim was not dismissed in the Judge's order. On 8/8/2023, the judge ruled granting $5626.22 but denying any other relief. (ROA.1227-1228) I filed a Notice of Appeal on 8/18/2023. (ROA.1229) I am unaware of any legal reasoning, theory, or justification produced by the lower court other than in the Clarifying Memorandum and the court's tacit acceptance of what exists in the government's briefs. See transcripts of the hearings for the recent dismissals at (ROA.1295-1322,

6 United States, Department of Health and Human Services, "Nondiscrimination in Health Programs and Activities." Vol. 87 Fed. Reg. 47,824 (August 4, 2022)

1331-1334, 1347-1351) See the court orders on the these dismissals at (ROA.805, 1164, 1227-1228)

Summary Of the Argument

For all actions and decisions of the lower court, the Appeals Court precedent suggests the standard of review should be de novo. Several problems exist in the lower court's decision. These problems can be divided into the problems related to a particular claim and those pertaining to the case in general.

For the case in general, 1) the court showed a large bias in the choice of a Magistrate Judge. This Magistrate seemed to make judgments as if the Judge were a litigant for the government. The presiding judge choose to accept the R&R of the Magistrate despite both the plaintiff and the defendants pointing out multiple problems in the R&R. 2) The judge has decided I have no future or present injuries despite even more serious, blatant, and similar Constitutional violations by the government. 3)After the dismissal of the 2AC, I requested Clarification on standing and mootness. The judge responded with a memorandum to which I respond in the 3AC (ROA.997-1005) countering the three main reasons given by the court. a) The reduction of the IMP by the TCJA of 2017 to $0 did not eliminate all the sources of injury. b) The religious exemption provided by the government is inadequate as evidenced by the continued assault by the government on my religion. c) Precedent and the tests within that precedent indicate the health

insurers are "State Actors."

As the lower court never allowed a proper hearing on the claims and likely never will, I ask this court to render a judgment on the merits and provide Summary Judgment on all claims. I present the main controversies for each claim for this purpose. 1)In Claim 2 the defendants in a grossly negligent manner in disregard for the public interest ignore § 1502(c) of the ACA and indicate they have no responsibility to act. 2)The government does not really address the evidence in Claims 4 and 10, which are violations of the establishment clause. 3)Claims 7 and 13, are equal protection claims, which identify "false proxies" and show how they have a strong correlation to protected groups. 4)Claim 5, a violation of the free exercise clause, presents much evidence the government does not seem to be able to counter. 5)In the due process claims, 8 and 14, the government acts as a "mafiosi" under the ACA. In essence, if the citizen does not accept the government's very kind offer of protection, the government has multiple ways of harming the individual. 6)Claims 9 and 14 concern a violation of the takings clause of the 5th amendment. The government again does not properly address the allegations. When the government diminishes or eliminates the value of a contract a taking has occurred and it is guilty of "unjust enrichment." 7)Claims 18, 19, and 20 involve a lack of authority by Congress to enact the ACA. The

government indicates I lack standing to bring these claims, however my injuries are directly traceable to the actions of government. 8)Claims 16 and 21 ask for declarations to reign in abuses of government so as to prevent or lessen the continuing harm these claims identify in the ACA and a prior Supreme Court decision respectively. 9)Claim 15 draws from the *Brushaber* and *Nebbia* decisions to show the ACA is arbitrary and capricious. 10)Similarly, Claim 1 indicates arbitrary and capricious action in violation of the APA as defined by past precedent. Again, the government gives little response to these charges. 11)The government does not address the facts presented in Claims 6 and 17, which involve the implied Constitutional right to privacy. Here, the government is conditioning an important benefit on the acceptance and funding of its speech taking the form of a contract, which contains its political and religious ideas. 12)Claim 11 on the implied freedom of association in the Constitution, again gets very little attention from the government. The government attempts to misdirect the court away from the *Janus* decision to indicate only familial association is protected. However, this argument also fails as a familial association is implicated. 13)Claim 12 is a violation of the freedom of speech by the ACA. If the HHS Mandate unconstitutionally imposes on this freedom, which is just one provision by which HHS took advantage, simple inductive reasoning would suggest the very nature of

ACA leaves a large hole for similar future abuse in defining into minimum essential coverage other terms.

Finally, as the Democrat party as well as at least some Republicans move further Left from Socialism into Fascism, the very founding principles of the Constitution and Declaration of Independence are threatened and may be extinguished in the very near future. The ACA fits the mold of a syndicate as envisioned by Mussolini. This type of authoritarian, top down government structure is not compatible with the Constitution as evidenced by the many serious violations in this case. This Court has an opportunity to slow or stop this downward spiral into ruin.

Argument

I. Standard of Review

The Partial Motion To Dismiss the 3rd Amended Complaint (PMTD3AC) (ROA.1016-1084), which the judge granted, indicated all claims other than the retrospective RFRA claim were invalid based upon failure to state a claim upon which relief can be granted, 12(b)(6), and/or, a lack of standing or mootness of the claim, 12(b)(1). *Edionwe v. Bailey, 860 F.3d 287, 290 (5th Cir. 2017)* as well as many other decisions provides the 5th circuit standard of review for 12(b)(6) dismissals. Review is made de novo to determine if a claimant has met the burden to provide sufficient well plead facts accepted as true and viewed in a light most

favorable to the plaintiff. 12(b)(1) defenses are likewise reviewed de novo. "...a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief."[7]

The lower court split the RFRA claim into separate prospective and retrospective claims. (ROA.1292:10-12) Despite the government's admission to a violation of RFRA in 2017, the lower court dismissed the entire case on 6/14/2018 because in the court's opinion no substantial violation of religious freedom existed. (ROA.1292:13-1293:1) The Magistrate Judge and the court cited *Real Alternatives, Inc. v. Secretary Department of Health and Human Services, 867 F.3d 338, 344 (3d. Cir. 2017)* as more authoritative than *Wieland v. HHS, 196 F. Supp. 3d 1010 (E.D. Mo. 2016)* since it was an Appeals Court decision rather than a district court decision. (ROA.1271:18-22) The 5th circuit court vacated and remanded the lower court's decision in *Dierlam v. Trump, 977 F.3d 471 (5th Cir. 2020).* After the Remand, the lower court again split the RFRA claim. Now in agreement with the government, the court dismissed all claims except the retrospective RFRA claim on 12/12/2022. (ROA.1164) The court, despite my objections, on 8/8/2023 granted my Motion for Summary Judgment for $5626.22, but it granted none of the other relief requested. (ROA.1227-1228) From *McAllen*

7 *Ramming v. US, 281 F.3d 158 (5th Cir. 2001).*

Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014), "We review the court's grant of summary judgment de novo." I am not aware of any decision in the 5th circuit on the issue of a separation of an RFRA claim into prospective and retrospective, but the 7th circuit in *Korte v. Sebelius, 735 F.3d 654, 672 (7th Cir. 2013)* indicates "RFRA applies retrospectively and prospectively..."

II. Problems In the Lower Court's Decision not related to a specific claim

Several reasons exist as to why the lower court's decision is in error:

A. Several facts indicate bias likely prevented the Lower Court from "viewing the facts in a light most favorable to the plaintiff"

The lower court has an overwhelming bias as demonstrated by the many decisions which indicate the lower court did not view the facts "in a light most favorable to the plaintiff" or uphold current law and precedent. The District court appointed a Magistrate for a Report and Recommendation on 10/16/2017. (ROA.495) That report (ROA.508-532) was later criticized by the 5th Circuit Appeals Court decision in *Dierlam v. Trump, 977 F.3d 471 (5th Cir. 2020)* on p.478,

> Second, the magistrate judge's conclusion about the insufficiency of Dierlam's search for alternative health-insurance plans, including taking sua sponte judicial notice of a Catholic healthcare-sharing ministry, is irrelevant to the mootness determination. Dierlam says the sharing ministry is not a viable option for him. And he says that the magistrate judge's conclusion about his search for insurance "is factually incorrect." It is inappropriate to resolve these types of factual disputes at the pleadings stage to determine mootness. These are merits issues, not mootness issues.

Upon remand, Judge Ellison indicated he wanted to continue the Magistrate Judge's involvement in this case, I objected and filed a Motion to try to prevent further involvement by this Judge as the report was highly biased. (ROA.679-683) Judge Ellison has not ruled on this Motion nor has ever acknowledged any bias. As Judge Ellison appointed this Magistrate and fully accepted the R&R despite its deficiencies as indicated by myself in a Response and Reply (ROA.537-538, 568-587), and in the government's Response (ROA.549-566), it is highly likely he shares the same bias as the Magistrate. It is not an accident the lower court has not made its justifications or reasoning well known as mentioned supra. The lower court's bias can be best explained as some combination of political concern taking a greater importance over law and precedence and the lower court, like the Left in general, simply ignoring any inconvenient but correct facts and law. The Left lives in an alternative reality where such facts can not be comprehended. (ROA.887-889)[8]

B. The lower court fails to acknowledge any present or future injuries despite similar but more serious and obvious violations by the defendants.

The lower court ignores the injuries present and future. (ROA.898-899,

8 As the Left is very influenced by the Demonic and operates in ways very similar, another way to express the same idea I heard in this video by Fr. Nix https://www.youtube.com/watch?v=ouhQwzrWZ40 Fr. Nix says he was told by an Exorcist in at least one case the demons swore they did not attack God; God attacked them. Similarly, he suggests people with such deep Narcissism as this can not be reasoned with, only avoided.

1100-1102, 1133-1140, 1202-1204) See also (ROA.1095-1115) for weakness in the government's evidence and arguments. I am currently unaware of any health insurance plans free of the HHS Mandate.

I became aware after the writing of the 3AC, the defendants proposed new rules in August of 2022, which altered the definition of sex to include gender identity. (ROA.1133-1140) A district court judge decided due to a March 2, 2022 HHS guidance letter indicating the department may enforce the new definitions and provisions under the old 2020 rule, final agency action had been taken as the guidance had legally binding consequences. (ROA.1138-1139) The defendants also extended the HHS Mandate to Medicare. (ROA.1134-1135, 1219-1222) The defendants have forced this ultra vires change despite Congress having specifically defined Medicare as meeting minimum essential coverage. (ROA.1139) Additional evidence Congress never intended any rule such as the HHS Mandate can be seen in the fact that before the expansion by HHS of this Mandate into Medicare nearly 1,000,000 women of child bearing age under Medicare were not covered which also indicates the rule is not "generally applicable" in violation of free exercise. (ROA.936-937) These new rules have no religious exemption. (ROA.1220) Next year, I will face additional life long penalties if I can not sign up for Medicare around my 65th birthday, assuming I am able to sign up at a later date. I will face an

increase in the premium of 1% per month up to 10% per year for every year I do not sign up. This penalty has no maximum.[9] The extended Mandate has no religious exemption to this government benefit. Medicare parts B, C and, D require a copayment. My faith prevents me from supporting Abortion, Contraception, Sterilization, and related counseling. Therefore, I may not be able to obtain health coverage for the REST OF MY LIFE because of the actions of the government. I am fully aware my need for health care services will very likely increase as I age. I may well have to choose between affordable health care coverage or my religion. These injuries meet every relevant standard for past or future harm established by the courts. For example, from *Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717-18 (1981)* which found it unconstitutional when government "conditions receipt of an important benefit upon conduct proscribed by a religious faith."

It is clear and certain the government ...WILL...NOT...STOP... without intervention by litigation. Having thus far eluded judicial or legislative oversight, the government will continue its past behavior to violate religious freedom and speech by additional ultra vires mandates upon Insurance contracts such as Euthanasia, which also runs against the Catholic faith. Government sanctioned Euthanasia is now a leading cause of death in Canada. (ROA.1140) *Missouri v.*

9 Brief conversation with an Insurance agent specializing in Medicare.

BIDEN, No. 23-30445 (5th Cir. Oct. 3, 2023) presents injuries much less direct and blatant than the instant case.

C. The position of the Court on Mootness and Standing was discovered in the Clarifying Memorandum. The 3AC was an attempt in part to address the three major concerns identified therein.

After the Second Amended Complaint (2AC) was dismissed except for a retrospective RFRA claim, it became clear to me the lower court would not rule equitably under any circumstances. My read of FRCP 8, *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* and, *Baker v. Putnal, 75 F.3d 190 (5th Cir. 1996)* suggest that the Complaint is intended to merely initiate a lawsuit. The bar to withstand a 12(b)(1) and 12(b)(6) motion to dismiss is lower in the pleadings stage to allow additional evidence and argument to establish the claims. Other than the arguments in the defendant's motions and responses, the District Court after this dismissal did not directly address the issues of standing and mootness requested by the Appeals Court decision to Vacate and Remand in *Dierlam v. Trump, 977 F.3d 471 (5th Cir. 2020).* I therefore submitted the Motion for Clarification for the Court's position. The court responded with a Clarifying Memorandum filed by the Court on 2/8/2022, which states the Court's (and the defendants') view on standing and mootness. (ROA.846-854) This document contains practically the only explanation of the opinion of the court for this entire case. My plan was to attempt to address the objections raised by the

court in a 3AC and to consolidate the evidence with as much detail as possible as it would likely be my only opportunity to present my case. I believed such an updated and consolidated Complaint would be advantageous for appeal. The 3AC also contains a section responding specifically to the court's Clarifying Memorandum. (ROA.997-1005)

In this Clarifying Memorandum, the court and the defendants put forward three main points to indicate I lack standing and this case is moot. The TCJA of 2017, which reduced the IMP to $0, the HHS religious exemption which became effective in 2020, and their belief health insurance companies are independent third parties not before the court.

1. The TCJA of 2017 may have removed one source of injury, however it was never the only source of injury. The HHS guidance letter and the new rules have created a new and recent source of injury.

Even if the TCJA of 2017 reduced the IMP to $0 and the defendants state I have no "enforceable" requirement to purchase health insurance, I am forced to go without health insurance for my beliefs, which is a penalty in itself. As described in the Complaint, I was forced to drop my Employer's health insurance. I have not had health insurance since that time. No exemption was effective from 2013 to 2020. Further, no religious exemption currently exists for the new HHS Mandates which extend "minimum essential coverage" to include "gender affirming care"

and force at least some parts of Medicare to provide the same abortion, contraceptive, sterilization, and related counseling coverage as well as "gender affirming care" coverage. Medicare is a government program, which I will be denied due to my beliefs in violation of court precedent. (ROA.1219-1222)

The IM and minimum essential coverage still cause damage to the market and to myself whether the IMP is $0 or not. The 3AC contains a Discovery plan to quantify the damage to the market caused by the defendants. (ROA.996-997) If Discovery were allowed, the objection raised by the Court in the Memorandum, "it is likely, as opposed to merely speculative, that [his] injury will be redressed by a favorable decision" would have no basis as information quantifying the government's damage to the market as concerns violations of Constitutional rights could be obtained. Given the bias of the lower court, no injury, evidence, or smoking gun would ever be sufficient for the lower court to issue any "favorable decision."

Even without Discovery, it seems awful coincidental that HHS et. al. has no problem creating ultra vires regulation which forces every health insurer to incorporate the HHS mandate but when it comes to protecting the constitutional rights of individuals it can not think of any regulation which would help and only here it allows the health insurer a choice. The government's preference in this

alleged choice is clear. Of course, especially without Discovery, it is unknown what pressure the government has or is placing upon the health insurers to make this choice. The defendants in *Missouri v Biden*, many of whom are the same defendants in this case, were found to have illegally influenced the choices of supposedly independent third parties. I doubt social media companies were the first to experience such pressure.

My words quoted by the court on (ROA.850-851) of the Clarifying Memorandum (ROA.846-854),

> ...it is not the case, as Mr. Dierlam alleges, that "[a] medical insurer is compelled to ... provide contraceptive coverage" to Mr. Dierlam or that Mr. Dierlam is "required to purchase medical insurance from [a] medical insurer[] [that] provides contraceptive coverage." Pl.'s Comp. ¶ 14, ECF 94.

as well as by the government on (ROA.1047) in their PMTD3AC was the case prior to 2020, but was a fact denied by the government until 2017. The 3AC updated this language to reflect the inadequate individual religious exemption.

The court and/or the government often take words out of context or indicates I said something I did not say (see ROA.1155-1157 for an example), twists my argument to set up straw men easier to knock down, present only part of my argument, or simply fail to address my arguments for violations and injuries at all. (ROA.1094-1095) See also (ROA.1086-1116) for the large number of weaknesses

and contradictions in the government's arguments in their PMTD3AC. However, in my Response to the PMTD3AC I often mistakenly use the term "false proxy" instead of "State Actor." Except for claims 7 and 13 the only the term "State Actor" should be used. See infra.

2. The HHS religious exemption was always inadequate. My ability to find insurance coverage like other citizens is greatly impaired and the new gender and Medicare rules will again make it impossible to obtain health insurance coverage. The pressure to abandon my beliefs continues.

The religious exemption also does not cover all the injuries as the defendants and the court indicate. I am a second class citizen because I can not find or obtain health care insurance like every other citizen. The existence of the HHS Mandate creates a segregation based upon religion rather than race as in *Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).* I am at a disadvantage, because of my religious belief. I state my current choices on (ROA.1113) in regard to a freedom of speech violation but the available choices are similar for the other claims as well,

> I can take any position, make statements, and engage in protests FOR NOW, as long as I accept, attest by signature on a binding contract, and fund the speech and belief system of the government. I could alternatively accept second class citizen status and beg an insurer to consider creating and maintaining a policy free of the HHS Mandate as well as any future anti-Catholic mandates such as "gender affirming treatments." Who is also willing to certify such, and which can affordably meet my other requirements. Likewise, I could also compromise my beliefs and join the other ghetto meant for religious

> health care, a health care sharing ministry, or become Amish.[10] All these effects appear punitive for holding Catholic beliefs and are definitely NOT incidental or indirect.

In addition, without insurance coverage, a benefit found important by previous courts, I am exposed to the potentially crippling cost of health care.[11] The new HHS rules will make it impossible for me to enroll in at least some parts of Medicare and provides no religious exemption. Therefore, a choice to not have health insurance is a burden and a penalty in itself.

Additionally, the court or defendants pay little attention to the ongoing injury indicated in the Complaint of damage to the health insurance market caused by the defendants. The exemption covers only individuals who can find an insurer willing to accept the exemption. Otherwise, the insurer MUST include the HHS Mandate in all insurance policies. Insurers are less likely to offer such a policy due to the disfavor of the government and the additional requirements of granting an exemption. As mentioned in (ROA.978-979) Claim 16 of the 3AC and in the *Missouri v Biden* decision, the government has covertly exercised direct influence on businesses to have these entities infringe upon Constitutional rights of individuals for the political purposes of government officials. The revelations in the recent release of the Twitter files demonstrates this corrupt and unconstitutional

10 The Amish do not generally accept converts. See https://amishamerica.com/do-amish-accept-outsiders/

11 See *Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).*

practice as well as threats of more government regulation for noncompliance and direct payments for cooperation.[12] It is very likely, a similar practice has occurred or is occurring in regard to health insurance companies with the original and new HHS Mandates. As the universe of policies without the HHS Mandate has been diminished by the actions of the defendants if HHS Mandate free policies are available they may be more expensive. The defendants have caused harm to the market and therefore to myself. I am pressured to abandon my faith to obtain a benefit courts have found to be important.

3. The Health Care Insurers are not Independent Third Parties. They serve to cover unconstitutional acts of government. The terms "State Actor" and "False Proxy" are not interchangeable, which is a mistake in the 3AC. The tests in *Missouri v Biden* also suggest the Insurers are State Actors.

"Courts have characterized private parties as state actors where a state allows or is involved with conduct that would be unconstitutional should the state itself engage in that conduct."[13] Courts have recognized,

> ...a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function, ...(ii) when the government compels the private entity to take a particular action...; or (iii) when the government acts jointly with the private entity...(internal citations omitted) *Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405, 587 U.S. (2019).*

The Health Insurance Companies qualify as state actors in each of the above

12 https://www.westernjournal.com/can-read-twitter-files-right/ and https://twitter.com/mtaibbi/status/1598822959866683394

13 *United States v. Texas, No. 1: 21-CV-796-RP (W.D. Tex. Oct. 6, 2021) from p.662*

categories. (ROA.904-906) The ACA essentially destroyed the health insurance industry and created another in its place more to the liking of the government. The health insurance companies are in large part benefits administrators especially in regards to the HHS Mandate. Here they do not act in self interest, but are compelled to act in "a traditional, exclusive public function." The IM and IMP were designed to use the power of government to herd people to the approved businesses and by their joint action the political and religious purpose of the government is accomplished to the detriment of many individuals. The health insurance companies therefore qualify as state actors, and as such have absolutely no role in this lawsuit. Their master, the government, dictates the terms of the contract and unconstitutionally manipulates and controls both parties to the contract even though the insurer may be a willing participant. The court and the defendants refuse to fairly address or acknowledge the injuries or the role of the government in a supposedly PRIVATE contract with a supposedly PRIVATE third party. (ROA.979-981) Ironically, the government appears to accidentally admit the obvious on (ROA.1067) by indicating the regulation is directed to myself and not just an independent third party when they state, "Here, Mr. Dierlam cannot claim a First Amendment violation simply because [he] may be subject to . . . government regulation." (internal quotations omitted)

In support of the independent third party argument the court in the Clarifying Memorandum cites *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976), Inclusive Cmtys. Project, 946 F.3d 649, 655 (5th Cir. 2019),* and *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992),* (ROA.852-853) but none of these cases support the argument. All of these cases were well past the pleading stage. In all of these cases the party responsible for the complained action was several steps removed from the party which was the subject of the lawsuit. Considerable questions of redressability also existed. The instant case is very different. In fact *Lujan* supports the opposite conclusion,

> standing depends considerably upon whether the plaintiff is himself an object of the action...If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

See (ROA.997-1005) for more detail.

I make at least three mistakes in the 3AC as well as the Response to the PMTD3AC. These mistakes are more in the fashion of terminology and have little impact on the arguments. One of the mistakes, I use the term "false proxy" in most claims interchangeably with the term "State Actor." For example, (ROA.905,912,958,966,979,1004,1008) where the term "false proxy" is used when "State Actor" is the more proper term. The separate concepts are confounded in the equal protection claims. (ROA.941-948, 961-966) While these terms have a

relationship they are legally distinct and are appropriate for this case but in different claims. Aside from Claims 7 and 13 in the 3AC, all Claims which use the term "false proxy" should use the term "State Actor" only. "State Actor" was first employed in reference to States in the Union who violated the 14th amendment, which was intended to extend the Bill of Rights to all States. As the federal government is bound by the U.S. Constitution, the term applies to it as well. (ROA.1191-1193)

In *Missouri v. BIDEN, No. 23-30445 (5th Cir. Oct. 3, 2023)* the 5th circuit court mentions two tests which help to determine if an otherwise private company is a "State Actor." I believe a case can be made the Health Insurance providers are State Actors under either test. The "close nexus" test is applicable,

> ...when a private party is coerced or significantly encouraged by the government to such a degree that its 'choice'—which if made by the government would be unconstitutional...*Missouri v. BIDEN, No. 23-30445 (5th Cir. Oct. 3, 2023)*

Although the court is careful to limit the interpretation of "significant encouragement" and "coercion," in the instant case government coercion is obvious. A health insurance provider MUST include the HHS Mandate unless and only in the case of the original HHS Mandate, 45 CFR § 147.132(b), someone claims an exemption, only then does the provider have a choice to provide the exemption or not. From about 2013 until 2020, health care insurers had NO choice

as an individual exemption from the HHS Mandate did not exist during this period. The most "predictable way" the provider will act will be to deny the exemption. It should also be noted, the lower court never changed its analysis despite a change in rules by HHS which was brought to the attention of the court after the Clarifying Memorandum.

The same case mentions another test, the "joint action" test. A private party is a State Actor, "when it operates as a willful participant in joint activity with the State or its agents." Id. A "pervasive entwinement" is required between the parties. On (ROA.119, 912) in the MTD1AC the government compared the "health insurance system" to Social Security, which is a government run program. See also (ROA.904-906). The "marketplace" is a government OWNED and OPERATED website. The term "Marketplace" is used in the ACA and provides a good indication of the level of control and "entwinement" intended by this legislation with the health insurance industry. A health insurance provider in order to sell goods in this "marketplace," must comply with the government regulations and is charged a fee for entry. Failure to comply can result in penalties and removal from the government owned marketplace. Regulations include the HHS Mandates, which may have a net negative impact upon women, and "gender affirming care." The later is a more recent experimental treatment involving the use of drugs off

label. (ROA.1097-1098) Would any sane business take on the potential legal liability of providing experimental treatment, which has large questions of efficacy and effectiveness and can cause lifelong harm, unless it was coerced by or entwined with government? The entwinement does not end here. As mentioned supra and in the 3AC (ROA.950, 967-969), the insurance companies act as benefit administrators and confiscate monies from some participants at the government's direction to redistribute to other participants. A private company involved in such wealth redistribution would remain in business only until its net paying customers discovered its deceit.

III. Problems in the lower court decision related to specific claims

As mentioned in the Issues section above I ask the court to rule on the merits on all claims and where possible render Summary Judgment. I believe for most if not all claims sufficient evidence exists in the public domain, however if the court disagrees Discovery may help to uncover additional evidence although the length of time and the lack of cooperation of the government may be a problem. What follows is a list of what I see as the main controversy for each claim:

A. ACA § 1502(c) requires notice to taxpayers which the agencies do not comply. The Gross negligence of the defendants has damaged the public interest. Alternative relief can be imagined by the court.

I contend that the plain words of ACA § 1502(c) require more of the defendants than they are willing to admit and their interpretation and lack of action

put the public at jeopardy in a malicious and negligent manner. The defendants do not appear to believe the words of § 1502(c) should give rise to any action or responsibility on their part. (ROA.1038-1045) I present three different legal theories in claim 2 (ROA.914-925) with different relief requested for each theory. I did make a mistake for the FTCA theory in this claim. (ROA.923) Negligence Per Se was not allowed against the Federal government in FTCA claims by prior courts. However, Gross Negligence or Negligence can be substituted here and the claim can remain otherwise unchanged. (ROA.1095-1100) This lawsuit was initiated months before I heard or saw any compliance on the part of the agencies to provide the § 1502(c) notices, therefore but for this lawsuit the agencies may never have sent any such notices. The notices at that late date were useless to prevent the harm which befell many taxpayers as the penalties had been assessed for nearly two years and although the section indicated notices were to be sent every year the agencies have not complied. It appears the agencies never intended to send out these notices. As the statute indicates the agencies are to send a notice every year, certainly Congress envisioned a decreasing number of notices until everyone had a policy compliant with "minimum essential coverage." The agencies were to aid in this process. Here, the culpability was not only in the deficient notices but also in the ultra vires HHS Mandate set up by the agencies. This

Mandate made it impossible for Catholics to find a policy compliant with "minimum essential coverage." The religious exemption to this Mandate did not come into effect until 2020 and I argue it was still insufficient. The agencies provided no notice of this issue and instead blamed the victim for a less than diligent search. The New HHS Mandate with the rules of 8/4/2022 follows in the same pattern established by the original HHS Mandate. No individual religious exemption yet exists for this new Mandate. The agencies clearly intend to push their religious beliefs upon the populace and seek to supplant all other beliefs. As the agencies on their own authority went far beyond Congressional intent, the duties imposed by Congress in § 1502(c) must expand to satisfy the Congressional intent of this section. If the agencies wanted to vitiate this § 1502(c) claim they could send me notice around June 30, as the Statute requires, of a policy which is affordable, meets my religious requirements now and into the future, and which the insurer was willing to certify same. This injury occurs yearly. However, if they did so their actual goal, as clearly demonstrated by the pattern above, to grind down any resistance in the population and force compliance with their belief system would be much more difficult. The court could imagine alternative relief; for example, a declaration the agencies are very much in the wrong and MUST provide notices in the future with more specific help to those who lack their

requirements in "minimum essential coverage" or provide an exemption from the IM-IMP if no policy compliant with the individual's objection exists especially for any regulation not specifically authorized by Congress in the ACA. The agencies should take responsibility for the damage they caused and provide remedial action.

B. Claim 4 contains a violation of the Lemon test. Claim 10 indicates certain religions have an advantage which is also contrary to the stated goals of the ACA and therefore violates the establishment clause.

Claims 4 and 10 (ROA.928-934, 953-957) details establishment clause violations. Claim 4 provides evidence as to how the HHS Mandate fails each prong of the Lemon Test.[14] The defendant's PMTD3AC in (ROA.1052-1054) nor their Reply supporting the PMTD3AC (ROA.1127-1128) appears to provide more than a formulaic recitation of law regarding this claim. As described in Claim 5 infra, the goals of the HHS Mandate are many and so amorphous how can anyone determine what its "principle effect" is or how well it meets any of these goals?

For Claim 10, the government's PMTD3AC in (ROA.1052-1054) does not seem to address the contradictions between the § 1402(g) exemption and the stated purpose of the ACA and their statement indicating the purchase of insurance is not required. (ROA.1104-1105) Congress has provided an advantage to certain religions which have no relationship to the stated purpose. (ROA.953-954) I do not challenge the ability of Congress to provide religious exemptions, however when

14 *Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1973)*

the exemption appears to only favor certain religions in contradiction to the statements and facts presented by the legislature a violation of the establishment clause exists.

The Health Care Sharing Ministry exemption has a similar problem. The goals of the ACA and the statements of the defendants are in conflict with the facts presented. Again, this exemption appears to favor certain Protestant religions. The Supreme Court's analysis of the covert targeting of a religion in *Larson v. Valente, 456 US 228 (Supreme Court 1982)* appears to be the most appropriate as described in (ROA.854-857). Congress will certainly have known which religions would meet their requirements of a 501(c)(3) organization in existence before 1999. The history of the legislation was mostly secret. Here also the stated goals of the ACA are not furthered by the exemption. (ROA.954-957) The definition of a health care sharing ministry does appear to exclude Catholics (ROA.1104-1105) according to the government on (ROA.1126-1127), "...Congress defined 'health care sharing ministry' in non-denominational terms, 26 U.S.C. § 5000A(d)(2)(B)(ii)..." From the definition Congress requires, "...members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs..." which would exclude lay Catholics. I am unaware of any specific belief which REQUIRES a sharing of medical expenses, although

Catholic religious orders may have such rules. Although denominations are not mentioned, denominations would be segregated for reasons not consistent with the stated goals. The government provides one reason for the exemption is to "accommodate[] religious health care without opening the floodgates for any group to establish a new ministry to circumvent the Act" However, it appears a narrow definition such as Congress has drawn will exclude far more "religious health care" than it allows. A conclusion this exemption was not to allow "religious health care" but is rather a carve out for some Protestant sects is unavoidable and *Larson v. Valente* is appropriate.

C. At least two means exist to create a "False Proxy." Claim 7 and Claim 13 contain a false proxy of different types in violation of the equal protection clause.

The term "False Proxy" is appropriate for equal protection claims, here Claims 7 and 13. (ROA.941-948, 961-966) It comes into play when a government entity covertly intends to unconstitutionally discriminate against members of some protected group by using a classification in the statute which names a different group, the "false proxy," but actually targets the protected group because of some relationship between the groups. At least two means exist to achieve this purpose. 1)Members of the supposedly unprotected group harmed by the statute have a high correlation with the members of the protected group, thereby the unconstitutional purpose of the government entity is none the less achieved. 2)Another way to

achieve the same goal is to use a rather broad classification seemingly unrelated to the target group but provide exemptions in the statute which remove all groups from the deleterious effects of the statute except the target group(s). A high correlation with the protected group can again be achieved.

In claim 7 the discrimination against males is prima facie, but the discrimination against several Christian religions corresponds to the first type of false proxy. Claim 13 contains at least two instances where the latter type of false proxy is used. Exemptions to the IM are granted to religious groups which are less likely to oppose the political and religious purposes of the Democrats, which here is the expansion of abortion related services, even though these exemptions are antithetical to the stated purposes of the ACA. In the other instance, a large number of exemptions to the IMP are granted to groups more likely to be proponents of the religious and political ideas of the Democrats. Orthodox Christians especially Catholics, who are often also politically Conservative, will have a high correlation with the group who do not qualify for an exemption from the IMP. (ROA.961-966, 1101-1102, 1106-1109) The qualification to one of the exemptions to the IMP is also a prerequisite to qualification for government permission to purchase a high deductible plan, which will likely not include the HSS Mandate. Thereby, the trap is closed. (ROA.975-976)

A similar recent example can be seen in the mask and vaccine mandates regarding Covid. In this situation Democrats require participants to some activity, employment, or event to show proof of vaccine status and/or wear a mask. It is very much more likely that Conservatives and orthodox Catholics will be opposed to these mandates and requirements. Most orthodox Catholics can not receive the mRNA injections as aborted fetal tissue was used in testing. Data has shown the use of the vaccines and masks does not achieve the stated goals and may be very harmful. (ROA.886-887) In this case, Democrats use a false proxy of the first type to again discriminate against Constitutionally protected classes of religion and political affiliation without the need to overtly name these groups.

D. Claim 5 is a violation of the free exercise clause by the HHS Mandate. Considerable evidence is presented for this claim which has not been refuted.

Claim 5 (ROA.934-937), which is a free exercise claim against the HHS Mandate, lists evidence for four incidents of hostility to religion especially Catholic. (ROA.935-936) As mentioned in this claim the free exercise clause is designed to protect religion from overt and covert hostility. Recently, additional evidence has emerged of even more overt government hostility to Catholics. (ROA.1202-1204) I respond to the defendant's PMTD3AC in (ROA.1060-1063) on (ROA.1109). In this claim there exists several facts which the defendants can not overcome: 1)The clear words of Congress in creating a "preventive service"

provision as well as the quote on (ROA.929) of the purpose for the provision is to prevent disease, indicates the creation of a "contraceptive mandate" solely by the defendants is ultra vires. 2)(ROA.879-885) contains some of the very major mistakes of the IOM panel including a quote from a member of the panel which corroborates one of the items in the list of four provided above concerning bias by the panel. Evidence exists the mandate may harm the public and women's health. (ROA.882-883) 3)Congress defined Medicare as meeting minimum essential coverage therefore until the defendants made ultra vires changes to other regulations, nearly a million women were not covered by the contraceptive mandate again indicating this mandate was not intended by Congress. It left a large group of women not religiously motivated uncovered. 4)Contraceptives, abortion, etc. are only considered by women who have or are planing to engage in certain OPTIONAL activity. They understand the risks if they are seeking these services. 5)Strict scrutiny should be invoked. The defendants seem to believe their contraceptive mandate is a panacea to improve "public health", "gender equality", "women's access to health care", the "disparity between men's and women's health care costs", and "increase women's access to recommended preventive services." No regulation can be narrowly tailored to meet such broad goals.

E. The government does not provide sufficient due process as provided in claims 8 and 14. It instead acts like "mafiosi" using a "State Actor" to

confiscate property against my will to use for its purposes.

Claims 8 and 14 (ROA.948-949, 966-970) are due process claims. The government attempts to set up straw men which do not exist in the complaint. My argument is essentially a "State Actor" is used to confiscate property without my consent. The government unconstitutionally interferes with my ability to contract for health insurance coverage especially given the importance of these contracts. Rather than protecting constitutional rights, the government acts like "mafiosi" in a protection racket violating those rights. (ROA.1110-1111)

F. Claims 9 and 14 involve a violation of the takings clause of the 5th amendment due to a confiscation at the government's direction of property in a private contract. The *Omnia* decision is closely analogous.

Claims 9 and 14 (ROA.949-951, 966-970) contain violations of the takings clause in the 5th amendment involving the HHS Mandate and the ACA respectively. The government ridicules these claims in their PMTD3AC (ROA.1067-1068) and perhaps purposely misunderstands and dismisses these claims. My Response to the defendant's PMTD3AC (ROA.1113-1114) restates the claims and their basis in law. The HHS Mandate is only one provision in minimum essential coverage. These are terms in a PRIVATE contract coerced on both parties. The contract is theoretically owned by the parties not the government. The premium is another term specified in the contract. In exchange for the premium the insurer is to provide the coverage for the adverse events as specified in the terms of the

contract. If the terms coerced by the government cause a diminishment or elimination of the value of the contract to one of the parties a confiscation by the government has occurred. *Omnia Commercial Co. v. United States, 261 U.S. 502, 43 S. Ct. 437, 67 L. Ed. 773 (1923)* is a directly analogous case.

G. Claims 18 and 20 involve the authority of Congress to tax and Claim 19 concerns Congressional authority to regulate Commerce. The ACA exceeds the authority provided by the Constitution in these areas. As my injuries directly relate to the actions of the defendants in these areas, I have standing.

Claims 18, 19, and 20 of the 3AC (ROA.981-989) challenge the constitutionality of Congressional authority to enact the ACA. Claim 20 contains the argument that the TCJA of 2017 left the ACA without Constitutional support as it no longer brought in any revenue. This 5th Circuit Appeals Court has already ruled the ACA unconstitutional in *Texas v. United States, No. 19-10011 (5th Cir. Dec. 18, 2019)*. This case was appealed to the Supreme Court under *California v. Texas, 141 S. Ct. 2104, 593 U.S., 210 L. Ed. 2d 230 (2021).* The plaintiffs in the *Texas* case were found to lack standing by the Supreme Court. Unlike the plaintiffs in these cases, my standing is related to harm stemming from other parts of the ACA not just the IMP or IM. (ROA.897-901, 901-903) Although I disagree with the Supreme Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, p2587 (2012),* these claims raise several issues not fully addressed by that court, specifically regarding taxation and the regulation of commerce. The

government contends I lack standing to bring these claims as I have no current injury after the reduction of the IMP to $0. The individual plaintiffs in *California v. Texas, 141 S. Ct. 2104 (2021)* traced their current pocketbook injuries to the unenforceable IM, which was rejected by that court. My current and future injuries contain "financial" and "negative legal consequence" traceable to the government. The government has damaged my interest in commerce by imposition of unconstitutional exactions and regulations. (ROA.1114-1115)

H. Claim 16 involves the increasing proclivity of the government to pressure various businesses to unconstitutionally act as State Actors to serve government rather than their customers. Claim 21 relates to a violation of the Consent of the Governed which preceded and abetted the Constitutional abuses in the ACA.

Claim 16 (ROA.978-979) indicates the pressure applied to the medical profession and certain media outlets make these "State Actors" which harm the well being of the citizen. The examples given indicate harm to life and freedom of speech. Previous court decisions have addressed the topics in claims 16 and 21. (ROA.989-996) I do not seek an "advisory opinion" as alleged by the defendants but a definitive declaration to prevent the abuses which led to injuries stemming from the ACA and continue to cause injury as the abuses have not been checked by litigation. (ROA.1115)

I. Claim 15 argues the arbitrary and capricious nature of the ACA violates the 5th amendment, therefore *Brushaber* and *Nebbia* would suggest it is unconstitutional and unseverable.

Claim 15 (ROA.970-978) the government perhaps purposefully mischaracterizes in their PMTD documents. (ROA.1050-1052, 1127) This claim outlines a violation of the 5th amendment to the Constitution and provides considerable evidence for the arbitrary and capricious nature of the ACA. Based upon *Brushaber v. Union Pac. R.R. Co., 24-25, 240 U.S. 1 (1916)* and *Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934)* the ACA is unconstitutional and unseverable. (ROA.1102)

J. Claim 1 provides evidence of a violation of the APA by the HHS Mandate. All three elements mentioned in *MVMA v State Farm* indicate the HHS Mandate is capricious and arbitrary.

In Claim 1 (ROA.908-914), which describes a violation of the APA by the HHS Mandate, the government's PMTD documents (ROA.1050-1052, 1127) do not appear to address the facts given in this claim. As mentioned in my Response (ROA.1103) although only one element is necessary to show arbitrary and capricious action by an agency in violation of the APA according to *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.463 U.S. 29, 43 (1983),* evidence is provided in the complaint for a violation of all 3 elements.

K. Claims 6 and 17 concern the implied constitutional right to privacy which is violated by the government in the HHS Mandate and the ACA in a supposedly Private contract. The impact of the violation is neither incidental or indirect.

Claims 6 (ROA.937-941) and 17 (ROA.979-981) involve the implied Constitutional right to privacy. The government's PMTD on these claims is at

(ROA.1066-1067) and attempts to obfuscate the claims rather than address the facts presented. The quote supra concerning my choices regarding health coverage comes from my Response to the government. (ROA.1112-1113) The government is simply incorrect in classifying the impact on speech as incidental and indirect as here it is speech and conduct the government is mandating in order to enter into commerce for a product courts have found to be important.

L. The first amendment freedom of assembly implies a freedom of association. More than familial associations are protected as presented in Claim 11, but a familial association is also involved in contracting insurance coverage.

Claim 11 (ROA.957-959) contains a violation of the implied association clause of the 1st amendment to the Constitution by the ACA. The defendants say very little about this claim other than precedent only protects associations related to the "creation and sustenance of a family." (ROA.1065) The quote in Claim 11 from the 3AC claim suggests otherwise as it involves associations which concern "political, economic, religious or cultural matters." However, (ROA.979-980) indicates familial associations are also involved here. See also (ROA.1111).

M. A violation of the freedom of speech by the ACA is the concern of Claim 12. The HHS Mandate is only one provision of minimum essential coverage and it clearly demonstrates the government can force any provision. The public has no voice or due process to change it but must accept the government's terms if they want health coverage even if the IMP is $0.

Claim 12 (ROA.959-961) involves a violation by the ACA of freedom of speech in the 1st amendment to the Constitution. The defendants appear to

confound Claim 11 and 12 in their PMTD3AC. (ROA.1065-1066) The government cites *Priests For Life, 772 F.3d at 269-70* for support. My Response indicates there are major differences with the instant case and why that case is inappropriate. (ROA.1111-1112)

IV. The Unconstitutional Rise of Fascism in the US

Mussolini, who founded Fascism and was a Socialist/Communist as were his parents, witnessed the Bolshevik revolution in Russia. He realized that revolution essentially decapitated industry in Russia, setting it back tremendously. Mussolini modified Marxism to avoid this flaw. He envisioned a combination of the power of government, business, and labor. He created what he called syndicates. Each syndicate controlled and directed some particular industry. Private property was allowed, however if an individual did not cooperate with the government, which is now this combined entity, he at best may receive some government determined sum out of the profits of his business or he may face even greater sanctions and penalties. Private property did not necessarily have all the rights of ownership. On the other hand, if he cooperated he may rise up in the elite and be able to tell his suppliers what he was going to pay them. Here government controls everything, as Mussolini said, "Everything within the State. Nothing outside the State. Nothing against the State." Both Communism and Fascism disdain Capitalism. The ACA appears very similar to a health care insurance "syndicate." See

https://www.youtube.com/watch?v=rf8YpfTCXLs and https://www.youtube.com/watch?v=llRjvyrSSV4.

As discussed in the 3AC, Fascism has been falsely placed on the right of the political spectrum. Fascism is actually to the Left of socialism and to the Right of Communism. (ROA.871-873) Both Fascism and Communism devolve into very similar authoritarian, totalitarian, elitist oligarchies. The difference is mainly the group who composes the oligarchy. In Communism it is composed of the revolutionaries and their sycophants while in Fascism it is the conspiring leaders of business, labor, and government and their sycophants. Both Communism and Fascism are top down systems, which determine what rights are allowed the individual.

This system is completely incompatible with our Constitutional republic, which as provided in the Constitution and the Declaration of Independence is founded upon the principle that rights are God given to the people. The people by consent of the governed, cede some of this power to the government. The ACA simply was the first attempt to establish Fascism on a national level by a ruling elite in government and business. As this group has essentially succeeded, we see similar combinations today with ever increasing violations of the Constitution by a government increasingly directing or combining with business to achieve the aims

of an elite Leftist oligarchy, very much like that advocated by the World Economic Forum.

I have heard of a book book published very recently, The Death of Science: The Retreat from Reason in the Post-Modern World by Paul T. Goddard et. al., Clinical Press Ltd., Bristol UK, October 8, 2023. I saw one of the authors, who is a medical researcher in the UK, in this video on youtube https://www.youtube.com/watch?v=42uoERKuzo4 on the origins of Covid. The video has a blue tag under it directing potential viewers to the CDC website, which may well be an effort to misdirect and add editorial propaganda. From a description of the book,

> Science is on its death bed. Lies, specious argument and fraud abound in a variety of scientific endeavours including the treatment and vaccines for Covid-19. Managers and politicians have taken over where previously the scientists were in charge. They have been able to utilise the bizarre language and contradictory processes of political correctness, making themselves into the high priests of a new religion, one which spawns more politically correct managers and despises experts...

Dr. Dalgleish in the video suggested a dystopian future, or even present, is in store for all of us at the hands of Leftist dogmatic zealots. Although this paragraph describes a characteristic of the Left in general and not just Fascism, I add it here to illustrate a real consequence without intervention by the courts.

Constitutional violations by an elite combination of business and

government lead to the *Missouri v. Biden* decision. The violations in that case are a mere logical extension and a consequence of the Constitutional violations in the ACA and an attempt to establish yet another national "syndicate" over social media. Once established and without action by the court, these syndicates will exert an ever greater control over the participants much as HHS has expanded its ultra vires Mandates over its religious and political opponents. This court MUST clearly state the ACA is unconstitutional for ALL the reasons stated here and in the Complaint to provide some bulwark to prevent future violations by this elitist, Leftist, deep state, increasingly Fascist, government. "Separation of Church and State" has been a phrase often employed, but does not exist in the Constitution. Now, it appears we are more in need of a separation of Business and State. Please, reestablish the rule of law and the Constitution before it is too late, which may not be that far into the future.

Relief Requested

Despite the Appeals Court request for a proper and complete Standing and Mootness analysis upon remand after the last dismissal, little has changed since the last appeal. It appears to me a proper and complete Standing and Mootness analysis has still not been completed especially since new injuries and the evidence which supports them have been ignored by the lower court. Similar to Albert Einstein's definition of insanity, no reasonable person should expect

remanding this case again to the lower court will produce a different result.

This litigation will soon enter its eighth year. I am well aware my lifetime and resources are finite. Cycling through the Appeals Court for every new artifice created by the lower court and government will cause great delays, be inefficient, and amount to "piecemeal litigation."[15] This court has already declared the ACA unconstitutional in the *Texas* case. I have added their successful claim in my 3AC. Many of the claims in the instant case are much more substantial than a technical violation of the Constitution as in the *Texas* case, which stemmed from a lack of authority of the legislation due to the absence of any tax revenue. Much of the bill of rights has been eviscerated by the ACA, and so far the courts have failed to recognize it. The fundamental undeniable intent of the legislation is to confiscate private funds for government purposes, silence any opposition, and establish top down, authoritarian control over the citizen in complete contradiction to the fundamental principle of consent of the governed embodied in the Constitution.

Unlike Texas et. al., I have standing as my injuries are past, present, and future. The remedy I request, a declaration of the ACA as unconstitutional among others, unlike Texas et. al. will heal most of the injuries mentioned in the 3AC. This court's decision in *Missouri v. Biden* essentially acknowledged that social media companies were State Actors. Although Discovery was not allowed by the

15 *Clark-Dietz & Associates-Engineers v. Basic Const., 702 F.2d 67 (5th Cir. 1983)*

lower court and the passage of time may make it difficult to obtain some of the material, I believe sufficient publicly available information has emerged to draw conclusions. I submit the evidence for "State Actors" and the government's violation of the Constitutional rights of the American public is actually greater in the instant case than in the previously mentioned cases. I request this Court to rule to the maximum extent possible on all the issues posed by this Appeal and on the merits providing Summary Judgment of ALL the claims in this case and make any other ruling which could possibly hasten this case.

As I will turn 65 in 2024, I will not be able to sign up for Medicare as it now contains the expanded HHS Mandate and gender affirming care without compromising my faith. If I can not sign up in time, I face the eminent harm of lifetime penalties. It is likely I do not have time to cycle through the lower court again as this birthday is less than a year away. I therefore also ask the court to expedite this case and/or enjoin the executive branch (HHS etc.) to remove the ultra vires HHS Mandates, especially the new expanded Mandates on Medicare, as well as to enjoin the defendants from any contact with the Health Care Insurance providers which could coerce or encourage them to continue interfering with the Constitutional rights of the participants in a similar manner to the court order in *Missouri v Biden*.

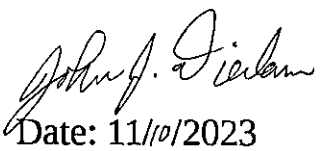
John J. Vielan

Certificate of Service

I certify I have on November 10, 2023 mailed a copy of the above document to the clerk of the court at:

FIFTH CIRCUIT CLERK'S OFFICE
600 South Maestri Place
New Orleans, LA 70130

I have emailed a copy to the Defendant's counsel at Sarah.N.Smith@usdoj.gov and Alisa.Klein@usdoj.gov



Date: 11/10/2023
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CERTIFICATE OF COMPLIANCE

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Date: 11/10/2023

John J. Durbin