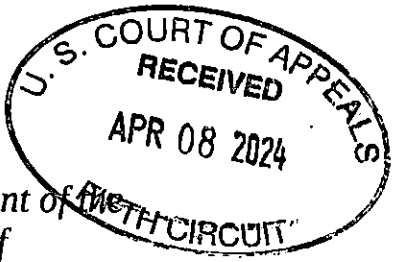
No. 23-20401

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

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

APPELLANT'S PETITION FOR REHEARING EN BANC

John J. Dierlam, pro se
5802 Redell Road
Baytown, Texas 77521
Phone: 281-424-2266
email: jdierlam@outlook.com

CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following listed persons and entities as describedin 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

Counsel for Appellee:
Sarah Nicole Smith
Alisa Beth Klein
United States Department of Justice
950 Pennsylvania Ave NW, Room 7241
Washington, DC 20530

Appellant:
John J. Dierlam
5802 Redell Road
Baytown, TX 77521
Pro Se

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Issues Presented

The requirements of Rule 35(a) and (b) are met as the decision by the panel conflicts with both Supreme Court precedent as well as the precedent of this and other circuit courts. Several questions of exceptional public importance are raised.

1) Conflicts exist with several court decisions relating to the conduct of a court in the pleading phase such as the instant case.

2) The panel decision is in conflict with *Janus v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, No. 16-1466 (U.S. June 27, 2018)* as the ACA forms a compelled association.

3) As evidence indicates the health insurance providers are State Actors, the panel decision is in conflict with *Missouri v. Biden, 83 F.4th 350 (5th Cir. 2023)*.

4) The panel is in conflict with several Supreme Court decisions concerning equal protection in interstate commerce.

5) The panel decision is in conflict with the 7th circuit decision *Korte v. Sebelius, 735 F.3d 654, 672 (7th Cir. 2013)* as the panel decision dismisses prospective relief.

Background

On February 4, 2016, I, John J. Dierlam, a citizen of Texas, the United States, and a life long Catholic, filed a complaint in SDTX Court against the

President of the U.S. and departments of Treasury, Labor, HHS, and their Secretaries. The third amended complaint (3AC) contains 21 claims against the government. I challenge the constitutionality of the ACA including inter alia minimum essential coverage, the Individual Mandate (IM), the Individual Mandate Penalty (IMP), and the HHS Mandate. In the final claim, I request a Declaration of the term direct taxes so that the principle of the Consent of the Governed is preserved. The ACA is a result of the destruction of this principle.

On 6/14/2018 the District Court dismissed the entire case for the first time despite the government admitting fault in violation of RFRA in their response to the Magistrate's R&R in 2017 (ROA.555-556). At the hearing of the same day the Judge stated,

> ...I agree with the Third Circuit in the case that Judge Palermo relied on so heavily; that the burden, although it's not nonexistent, is not so substantial that it's a violation of RFRA... (ROA.1292:22-25 - 1293:1)

I appealed the decision which resulted in the case *Dierlam v. Trump, 977 F.3d 471 (5th Cir. 2020)*, which vacated and remanded the case back to the district court for a mootness and standing analysis. The court granted the government's Partial Motion to Dismiss the 2nd amended complaint (PMTD2AC) on 12/15/2021.

As the court had not provided any mootness or standing analysis other than tacitly agreeing with the defendants on 12/27/2021, I filed an Opposed Motion For

Leave to File a Third Amended Complaint and Request for Clarification. The court granted the request and filed a Clarifying Memorandum on 02/08/2022. In the Clarifying Memorandum, the Judge's recollection differed from his pronouncement at trial mentioned above. (ROA.847-848) The Judge dismissed the retrospective RFRA claim due to lack of standing NOT mootness as indicated in his Memorandum.

I filed a Third Amended Complaint on 03/28/2022. Unbeknownst to me at the time, on March 2, 2022, HHS published a guidance letter, which indicated HHS would enforce gender identity and pregnancy discrimination under the old 2020 rule. On 8/4/2022 HHS proposed a new rule which will incorporate gender affirming care, gender identity, and pregnancy discrimination into all health insurance including medicare. Pregnancy discrimination is essentially the HHS Mandate. Several authorities indicate no positive benefit exists for hormone blockers and other such treatments.[1] Based upon these actions I filed for a temporary injunction against the government on 9/6/2022. On 10/1/2022 the court in *Texas v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, No. 2: 21-CV-194-Z (N.D. Tex. Oct. 1, 2022)* set aside the HHS guidance of 3/2/2022. The

1 See https://www.cnn.com/2024/03/13/uk/england-nhs-puberty-blockers-trans-children-intl-gbr/index.html , https://acpeds.org/transgender-interventions-harm-children and https://www2.cbn.com/news/health/pediatrician-group-points-60-studies-showing-gender-transition-has-no-long-term-benefit

court found it arbitrary, capricious, and unlawful, but did not issue an injunction. On 10/27/2022 at a hearing of the district court on my Motion for a temporary injunction as well as the government's PMTD3AC, the judge denied my Motion for an injunction but gave no reason. The judge granted the government's PMTD3AC on 12/12/2022. The judge dismissed all claims aside from the retrospective RFRA claim. I filed a Motion for Summary Judgment and on 8/11/2023 the judge issued an order granting retrospective relief of $5,626.22 for my past payments of the Individual Mandate Penalty (IMP), but denying any other relief. I filed for Appeal on 8/18/2023.

Argument

I – Conflicts with prior Court Decisions

The 5th circuit panel accepted and affirmed the lower court's analysis in the Clarifying Memorandum. This Motion will attempt to address the conflicts and legal contradictions warranting en banc hearing. However, the threshold issue of standing and mootness needs be addressed as these form a part of the conflicts and could prevent the court from addressing others.

A – The lower court's actions which kept this case in the pleading stage conflict with FRCP 8, *Lormand v. US Unwired, Inc., 565 F.3d 228 (5th Cir. 2009), Tuchman v. DSC Communications Corp., 14 F.3d 1061 (5th Cir. 1994), Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 562 (1992),* and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007),* as well as other decisions.

FRCP 8 suggests the Complaint is only necessary to start the litigation with

discovery and the adversarial process refining and sharpening the arguments of both parties. According to *Lormand v. US Unwired, Inc., 565 F.3d 228 (5th Cir. 2009),* Rule 8 requires only "enough factual matter (taken as true)" to raise a "reasonable hope" discovery will "reveal relevant evidence of each element of a claim" without imposing "a probability requirement." The defendants moved for dismissal on grounds of FRCP 12(b)(6) and 12(b)(1). "To prevail on a motion to dismiss an ordinary claim under Fed.R.Civ.P. 12(b)(6), a defendant must show that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Tuchman v. DSC Communications Corp., 14 F.3d 1061 (5th Cir. 1994).*

1 – The memorandum gives little attention to the damage to the market claim and indicates the existence of a religious exemption is sufficient to moot the claim. Evidence indicates the supposed independent third party is a State Actor.

On p.7 of the Clarifying Memorandum the court asserts in regard to the damage to the market claims, I "cannot show causation where [my] putative injury results from the independent action of some third party not before the court." As insurers are permitted to provide a religious exemption, their decision is not traceable to the government. For the same reason, I can not "establish redressability" as it is speculative a favorable decision can resolve the claimed injury. The statements here have a number of false assumptions. The quote from

the *Tuchman* decision above places a high burden on the defendants or the court to "prove no set of facts" can support the claim. From the 3AC (ROA.904) in *Wieland v. U.S. Dep't of Health & Human Servs. case 4:13-cv-01577-JCH Dkt.79-1 p.11,* the Wieland's insurer, after previously providing HHS Mandate free coverage, expressed reluctance to reinstate a policy due to actions by HHS and for a single family. In contradiction to the court's statements, health insurers are under pressure from HHS. As mentioned below, Health insurance providers are not independent third parties and the exemption is insufficient to cover all the injuries.

2 – The court argues setting the IMP to $0 by the TCJA moots this case. However, the IMP is not the only injury. Other injuries exist such as the expansion of the HHS Mandate into at least Part D of Medicare and other elements of minimum essential coverage like PrEP drug coverage. A court can still review the the legality of a law.

On p. 6 of the memorandum the court indicates my demand for "...an exemption from having to participate in a health plan that covers contraceptive services that are inconsistent with [my] religious beliefs," has been granted by the zeroing of the IMP by the TCJA of 2017. My claims for "declaratory and injunctive relief" are moot as no prospective injury I can possibly allege can exist given this relief.

The court and the defendants often mischaracterize the claims and arguments in the Complaint. I never asked for just an exemption to participate in health insurance. In contradiction to the court's position in *Lormand v. US Unwired, Inc.,*

565 F.3d 228 (5th Cir. 2009), the facts presented in the complaint never seem to be taken as true. I am keenly aware as I age the chance of needing costly health care will increase and may exceed my resources. The inability to obtain insurance which meets my religious beliefs is an injury in itself traceable to government action. Courts have ruled that Health Insurance is an important benefit, which the denial of can violate constitutional rights.[2]

The memorandum continued on the same page citing *Fantasy Ranch Inc. v. City of Arlington, Tex., 459 F.3d 546, 564 (5th Cir. 2006)* indicating a "statutory change" which "discontinue a challenged practice" is sufficient to render a case moot and the "exceptions to this general line of holdings are rare" occurring where it is virtually certain "the repealed law will be reenacted." The lower court insists my only injury is from the IM, which the TCJA zeroed out, other than "the costs of purchasing health insurance" no assertion in the complaint can be connected to the government.

However, the court's citations are inapposite. The ACA nor the provisions at issue were repealed. "The costs of purchasing health insurance" was connected with injury in the Complaint only where a willing insurer if one exists may require additional cost to maintain a policy which does not include the HHS Mandate. A

2 See for example *Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717-18 (1981), Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004)* and *Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).*

willing insurer is not permitted by Law to provide an exemption for any other anti-Catholic coverage mandate such as PrEP drugs, gender affirming care, etc. The exemption is of little value. This cost argument appears to be another Straw Man on the part of the court. Although I still maintain the potential raising of the Individual Mandate Penalty (IMP) is a source of injury. The court and panel refuse to accept as true any other source of injury. *Hobby Lobby* contains warnings for any court which strays into deciding issues of religious belief. These provisions are traceable to the government and cause difficulty or prevent me from obtaining health insurance. Besides, "...a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Opulent Life Church v. City of Holly Springs, 697 F.3d 279 (5th Cir. 2012)* quoting *City of Mesquite, 455 U.S. at 289, 102 S.Ct. 1070.* Therefore, the instant case can not be considered moot for the same reasons mentioned in the *Opulent Life* decision.

Although at the time of writing the 3AC, the website https://www.medicare.org/articles/does-your-medicare-plan-include-birth-control-coverage/ indicated Medicare DID NOT provide nearly one million women of child bearing age contraceptive coverage, it now indicates these women are covered by Medicare Part D. The website does not cite any statutory authority for

this change in position. I will be 65 in a few months. Part D of Medicare requires a premium. I will be unable to sign up for this part and perhaps parts A, B , and C if the proposed HHS rule 87 FR 47824, "Nondiscrimination in Health Programs and Activities" becomes a final rule. I will also face steep and increasing penalties. If the proposed rule is finalized after I sign up, I will then be forced to stop paying the premiums or not sign up for Social Security at least until I am disenrolled from Medicare.

According to the *Braidwood Management Inc. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022)* decision, in 2020 a group under HHS included "PrEP" drugs as part of preventive coverage without copay. Like the prevailing plaintiffs in that case, I object to health insurance coverage of these drugs and the other complained of coverage on much the same grounds. The religious exemption, 45 CFR § 147.133, only applies to contraceptives. The "purchaser standing doctrine" originating from the DC circuit court as laid out by the court in *BRAIDWOOD MANAGEMENT INC. v. Becerra, Civil Action No. 4: 20-cv-00283-O (N.D. Tex. Mar. 30, 2023)* provides standing for many of the claims. It is essentially what I called damage to the market. Clearly, the government has established a pattern and has no intention to ever STOP pushing its belief system upon the population.

3 – Considerable evidence indicates I have standing, this case is not moot, and the decision to not allow discovery was arbitrary and unreasonable,

contradictory to 5th circuit precedent.

Many of the cases cited in the memorandum allowed discovery and were past the pleading stage unlike the instant case. Several of the cases cited had plaintiffs who requested relief which the defendants were not authorized to provide or were several steps removed from the complained of action. It is for these reasons the courts considered them not redressable. In the instant case, the injuries were caused directly by government mandated language and action concerning a private health insurance contract. It is these government mandated terms which are at issue not any action by the Health insurers. Therefore, as given in *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 562 (1992)* since I am the "object of the action" which has caused the injury, a favorable decision preventing the action will redress it. Market forces can be restored and Health Insurance providers will have an incentive to serve customers again, NOT the government. I had health insurance before the passage of the ACA forced me to drop my employer's health insurance in 2013. No speculation is required here.

Although the evidence already presented may be sufficient, to further bolster the plausibility requirement a discovery plan was contained in the 3AC. (ROA.996-997) Interrogatories could be sent to past and present health insurance providers and others to quantify the damage to the market as well as help determine what unconstitutional secret pressure they may be currently or were

subjected to during the formulation of the ACA. Clearly a "set of facts" can be seen in the evidence presented here to avoid dismissal and warrant discovery. Injury exists from the actions of the government which damage the market to make affordable policies LESS available to myself, which is in line with the "purchaser standing doctrine." According to *Williamson v. US Dept. of Agriculture, 815 F.2d 368 (5th Cir. 1987)* a court's ruling on discovery will be "reversed only where they are arbitrary or clearly unreasonable." Bias in the lower court makes this decision clearly arbitrary and unreasonable.

B – The ACA forms a Compelled Association just as in *Janus*. The panel decision is in conflict with this Supreme Court decision, which ruled such a compelled association could not protect Constitutional Rights.

The Supreme Court in *Janus v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, No. 16-1466 (U.S. June 27, 2018)* held that a State mandated compelled association between nonunion government employees and a private organization, an employee union, was unconstitutional. The ACA creates a completely analogous compelled association even more injurious of Constitutional rights. The IMP nor the IM have ever been repealed. Harm is also caused by the forced acceptance of minimum essential coverage required by the government in a supposedly private contract. Placing such terms into a health insurance contract forces the individual to accept and affirm the belief system and political speech of the government. This weapon

can be used against any disfavored group, such as orthodox Catholics, or reward a favored group, such as young, single, secular, women. Any citizen who objects to the government's terms based upon a wide range of differences such as political, religious, or their secular understanding of science are forced to support the dogma of the government and fund its speech and contrary goals or forego an important benefit. Therefore, the very structure of the ACA provides all citizens standing who do not share the government's belief system as they are directly injured.

C – The panel decision is in conflict with *Missouri v. Biden*. The ACA passes the tests from this case indicating the health insurance providers are State Actors. The ACA creates a tyrannical Fascist Syndicate in violation of the Constitution.

The panel ruling is in conflict with the decision *Missouri v. Biden, 83 F.4th 350 (5th Cir. 2023)*. In this decision, the Court ruled various social media companies were State Actors after they were pressured and coerced by the Biden Administration to censure content in violation of free speech rights of the public. This decision mentions tests for unconstitutional direction of business by government.

The close nexus test is satisfied if the government "coerces" or "significantly encourages" the private business to do its will. In the instant case the government's choice is clear. Every insurer MUST provide the HHS Mandate coverage free of charge. Statements by the White house and the Secretary of HHS as well as

guidances on this matter strongly emphasize this coercion as well as threaten penalties for noncompliance despite the existence of an exemption. HHS has repeatedly arranged meetings and sent out letters to insurance providers.[3] Both compulsion and strong encouragement are involved.

The joint action test requires an entwinement between government and the private party, who may be a willing participant. A symbiotic relationship should be evident. The ACA contains the IM to ensure the health insurer customers. The health insurer in the individual market is dependent upon the government for access to the market. On (ROA.119, 912) in the MTD1AC the government compared the "health insurance system" to Social Security, which is a government run program. The health insurance companies act as benefit administrators and confiscate monies from some participants at the government's direction to redistribute to other participants.

The social media companies own and operate the servers and software their service runs upon. The health insurances companies must pay a fee to join the marketplace, which is a system of government owned and operated servers. If any

3 https://www.hhs.gov/about/news/2022/06/27/readout-secretaries-becerra-walsh-meet-with-health-insurers-employee-benefit-plan-stakeholders-to-discuss-birth-control-coverage.html , https://www.hhs.gov/about/news/2024/01/22/hhs-secretary-xavier-becerra-announces-new-actions-increase-contraceptive-care-coverage-51st-anniversary-roe-v-wade.html and https://www.hhs.gov/about/news/2022/07/28/hhs-dol-treasury-issue-guidance-regarding-birth-control-coverage.html

company falls out of favor with HHS they can find themselves kicked out of the marketplace. The Constitution permits Congress to regulate commerce, it does not grant Congress any authority to create, destroy, operate, or control a market.

The Biden Administration's pressure on the social media companies pales in comparison to the overt pressure applied by the ACA upon heath insurance companies. Much of the negotiations of the ACA occurred in secret. See "A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History" John Cannan, LAW LIBRARY JOURNAL Vol. 105:2 [2013-7]. The ACA served as a prototype for later unconstitutional actions such as those mentioned in *Missouri v. Biden*.

In short, the structure of the ACA is a Fascist system, which is incompatible with the US Constitution. I do not use the term Fascism solely as a pejorative. Fascism has a socioeconomic theory created by Mussolini who modified Marxist ideas. Mussolini had the idea to combine business, labor, and government. Mussolini created syndicates headed by party officials which direct and control a particular industry. For a historic prospective see https://www.youtube.com/watch?v=rf8YpfTCXLs . The ACA created a health insurance syndicate. The ACA's stated goals are the expansion of health insurance coverage and the reduction of cost. Data indicate it has not come close to achieving either goal. The design of the ACA

is better suited to a goal of tyranny. Therefore, it can not be "held that there was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object."[4] Every US citizen, especially those like myself who would like to purchase health insurance without unconstitutional government interference and control, is harmed by the ACA and has standing. As long as the ACA exists, mootness is not possible.

D – The ACA in effect creates a ghetto for religious health care in violation of Supreme Court precedent.

The ACA allows two exemptions from the IM. For no reason consistent with the goals of the ACA, religions with an aversion to insurance are permitted less government intrusion than other religions in violation of equal protection and the establishment clause in contradiction to *Larson v. Valente, 456 US 228 (Supreme Court 1982)* and *Estate of Thornton v. Caldor, Inc., 472 US 703 (Supreme Court 1985).*

The other exemption requires an organization to exist as a 501(3)c and be in existence since 1999. Neither requirement has any connection with the goals of the ACA. The ACA in 26 U.S.C. § 5000A(d)(2)(B)(ii)(II) requires members to "...share a common set of ethical or religious beliefs..." Most if not all these health care sharing ministries are Protestant. No new ministries can be created. These ministries are inferior to insurance as they cap the lifetime and yearly amounts at a

4 *Adair v. United States, 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908).*

much lower level than insurance. Protestants may allow some forms of contraceptives. The government has formed a ghetto for religious health care where second class less favored citizens are forced. This exemption is in contradiction to *Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)* based upon religion instead of race. In contrast to *South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 585 U.S., 201 L. Ed. 2d 403 (2018)*, where certain interstate businesses were given an advantage, here the ACA and the agencies have "prevented market participants from competing on an even playing field" as some consumers are saddled with a disadvantage in commerce, which was supposedly declared interstate by Congress.

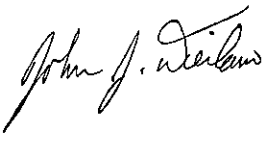
E – The panel is in conflict with the 7th circuit. *Korte v. Sebelius, 735 F.3d 654, 672 (7th Cir. 2013)* ruled RFRA entitles the victim to BOTH retrospective AND prospective relief.

The panel's decision is in conflict with the 7th circuit decision *Korte v. Sebelius, 735 F.3d 654, 672 (7th Cir. 2013)* which indicates "RFRA applies retrospectively and prospectively..." I am unaware of any decision in the 5th circuit on the issue of the legality of such a separation of an RFRA claim. As the government has admitted to a violation of RFRA and the district court has ruled in favor of a retrospective violation, no doubt should exist I have standing for this prospective claim. Just as in *Opulent Life*, the government continues to violate RFRA with the inclusion of the HHS Mandate in Part D of Medicare and PrEP

coverage for all insurance.

Conclusion

It has been shown FRAP 35(a) and (b) are met and this court should rehear this case en banc. The many conflicts with legal precedent and principle by the panel and lower court undermine the "Rule of Law." These decisions in effect indicate a judge can veto any lawsuit at whim, which embodies the "Rule of Men" NOT the "Rule of Law."[5]



5 https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/

Certificate of Service

I certify I have on April 5, 2024 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

as I do not have access to the Court's electronic filing system. I have also emailed a copy to Defendant's Counsel at: Sarah.N.Smith@usdoj.gov and Alisa.Klein@usdoj.gov

John J. Dierlam

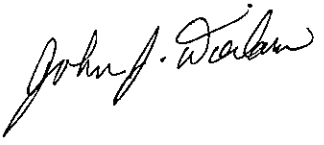
Date: 4/5/2024
John J. Dierlam
5802 Redell Road
Baytown, TX 77521
Phone: 281-424-2266

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of FED. R. APP. P. 35(b)(2)(A) because this brief contains 3886 words (according to the wordprocessor's word count tool), excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using LibreOffice 5.3.6.1 in Times New Roman 14 point typeface, footnotes are in 12 point.



Appendix: Panel Decision and the District Court's Clarifying Memorandum

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 29, 2024
Lyle W. Cayce
Clerk

No. 23-20401
Summary Calendar

JOHN J. DIERLAM,

Plaintiff—Appellant,

versus

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—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-307

Before KING, HAYNES, and GRAVES, *Circuit Judges*.

PER CURIAM:*

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Pro se Plaintiff John Dierlam brought claims challenging the Affordable Care Act (ACA) alleging a myriad of violations of the United States Constitution and The Religious Freedom Restoration Act (RFRA). Dierlam sought both retrospective and prospective relief.

This pro se case was previously before this court in 2020. *See Dierlam v. Trump*, 977 F.3d 471 (5th Cir. 2020). There, we remanded the case so the district court could conduct a full mootness analysis and so Plaintiff could seek a refund of the shared-responsibility payments he made under the ACA from 2014-2017 (a fee imposed on individuals who failed to purchase health insurance) (retrospective relief). *Id.* at 475, 478. As to prospective relief, this court concluded that changes in the law raised questions of standing and mootness which the district court was to address on remand. *Id.* at 473-74.

On remand, the district court granted Defendants' Partial Motion to Dismiss finding that Plaintiff's claims were moot and/or lacked standing because the Tax Cut and Jobs Act reduced the shared-responsibility payments to $0; the Department of Health and Human Services (HHS) created exemptions to the contraceptive-coverage requirement, which included an individual exemption for individuals like Plaintiff; and Plaintiff could not state an injury under § 1502(c) of the ACA. After permitting Plaintiff to file a Third Amended Complaint, Defendants filed another Partial Motion to Dismiss which the district court granted. Plaintiff appealed.

This court has considered this appeal on the basis of the briefs and pertinent portions of the record. Having done so, the judgment is affirmed for the reasons stated in the district court's detailed clarifying memorandum on the dismissal of Plaintiff's Second Amended Complaint. Those reasons also apply to Plaintiff's Third Amended Complaint. The district court did not err in granting Defendants' Partial Motion to Dismiss. We AFFIRM.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

CLARIFYING MEMORANDUM

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

I. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

II. DISCUSSION

A. Mootness

i. Legal Standard

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

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

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

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

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

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

ii. Analysis

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

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

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

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

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

Mr. Dierlam first argues, citing a *Fox News* article from December 2020 and his personal predictions on the "normal inclination of Democrats", that his claims are not moot because Congress will simply reinstate the shared-responsibility payment. Pl.'s Resp. 10-11, ECF 105. Such unsupported speculation is not sufficient to establish the certainty necessary to invoke the rare exception to the general rule that statutory changes discontinuing a challenged practice moot plaintiff's prospective claims—even more so when such speculation remains unsubstantiated two years into the Biden administration. *See Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 564 (5th Cir. 2006) (recognizing that "statutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'"); *see also Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996) (commenting that "[t]he exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted.")

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

Third, Mr. Dierlam argues that despite the Religious Exemption Rule, he is still injured because the previous requirement that all health plans include contraceptive coverage "so skewed the market" that "few if any insurers" will offer a policy without contraceptive coverage, and "[e]ven if a health insurance policy can be identified there is no assurance the insurer will remain in business or the policy can be maintained for other reasons." Pl.'s Resp. 12, ECF 105. However, Mr. Dierlam cannot show causation where his putative injury "results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). Here, where insurers are expressly permitted by law to give plaintiff a religious exemption, their decisions about whether to do so have very little to do with defendants. Similarly, Mr. Dierlam cannot establish redressability since he cannot show that "it is likely, as opposed to

merely speculative, that [his] injury will be redressed by a favorable decision." *Inclusive Cmtys. Project*, 946 F.3d 649, 655 (5th Cir. 2019).

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

B. Standing

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

The Court's analysis regarding standing tracks closely with its mootness analysis above because, as the Supreme Court has observed, "[m]ootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 & n.22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 387 (1980)). Therefore, this Court finds that Mr. Dierlam lacks standing for his prospective claims for the same reasons that this Court finds such claims moot.

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

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

III. CONCLUSION

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

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

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

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April 08, 2024

Mr. John J. Dierlam
5802 Redell Road
Baytown, TX 77521

No. 23-20401 Dierlam v. Biden
USDC No. 4:16-CV-307

Dear Mr. Dierlam,

The following pertains to your rehearing filed on April 8, 2024.

We have filed your Petition for Rehearing. However, it has the following deficiency. Unless the deficiency is corrected within 10 days from this date, we will forward the document to the court to be stricken.

Attachments to the rehearing are not allowed, see Fed. R. App. P. 40 and 5th Cir. R. 35 and 40.

Once you have prepared your sufficient rehearing, you must email it to: **Melissa_Mattingly@ca5.uscourts.gov** for review. If the rehearing is in compliance, you will receive a notice of docket activity advising you that the sufficient rehearing has been filed.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

cc:
Mr. Daniel David Hu
Ms. Alisa Beth Klein
Ms. Sarah Nicole Smith