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

JOHN J. DIERLAM,)	
)	
Plaintiff,)	NO. H-16-CV-307
)	
v.)	June 14, 2018
)	
BARACK HUSSEIN OBAMA,)	
et al.,)	
)	
Defendants.)	

HEARING
BEFORE THE HONORABLE KEITH P. ELLISON

For the Plaintiff:	John J. Dierlam*
	Pro Se
For the Defendant:	Emily S. Newton*
	U.S. Department of Justice
	20 Massachusetts Ave, NW
	Washington, DC 20530
Court Reporter:	Bruce Slavin, RPR, CMR

*Appearing via teleconference.

Proceedings reported by mechanical stenography and produced
by computer-aided transcription.

1 THE COURT: Okay. Good afternoon and welcome.
2 We're here on Dierlam v. Trump.

3 We'll take appearance of parties or counsel,
4 as the case may be, beginning with Plaintiff.

14:31 5 MR. DIERLAM: This is John Dierlam. I am the
6 Plaintiff in this case.

7 THE COURT: Thank you. Welcome.

8 MS. NEWTON: And Emily Newton from the Department
9 of Justice on behalf of the Defendants.

14:31 10 THE COURT: Thank you very much. Welcome to you.

11 Okay. First off, kudos to you, Mr. Dierlam.
12 This is the best set of papers I have ever seen from a
13 pro se litigant. Well done.

14 MR. DIERLAM: Well, thanks. I appreciate that.

14:31 15 THE COURT: I am going to give each side ample time
16 to make argument, but, first, let me just see if we're
17 singing from the same song sheet.

18 Judge Palermo based her ruling in part on the
19 interim final rules that were in place and my understanding,
14:32 20 Ms. Newton, is that Judge Beetlestone of the Eastern
21 District of Pennsylvania has enjoined those interim final
22 rules.

23 Is that your understanding?

24 MS. NEWTON: Yes, Your Honor.

14:32 25 THE COURT: Okay. Does that then vitiate the

1 mootness?

2 MS. NEWTON: No, Your Honor. We had made two
3 arguments with regard to mootness, one being made on the
4 IFRs and the other being based on the fact that Plaintiff
14:32 5 can find a plan --

6 THE COURT: Yeah. Right.

7 MS. NEWTON: -- in accordance with his religious
8 beliefs. So, we would no longer be making the argument with
9 respect to the IFRs but would maintain our jurisdiction
14:33 10 argument with regard to availability of plans in accordance
11 with his beliefs.

12 THE COURT: Well, let me ask you about another
13 intervening event.

14 The Tax Cuts and Jobs Act of 2017, Public Law
14:33 15 115-97, was adopted ten days after your response to
16 Judge Palermo and that eliminated the financial penalty for
17 violating the mandate. Would that not also serve to moot
18 the prospective aspects of Plaintiff's claim?

19 MS. NEWTON: Plaintiff's claim for, I think, a
14:33 20 refund? It would not necessarily --

21 THE COURT: No. I said "prospective".

22 MS. NEWTON: Prospectively? It could. I believe
23 it would still be that he maintains the position that he's
24 either having to purchase a plan that contains contraceptive
14:34 25 coverage or forego health insurance that could impose a

1 substantial burden on religious exercise in violation of
2 RFRA. However, prospectively, to the extent his claim is
3 based on the financial penalty, yes, Your Honor, I think
4 that would vitiate the claim.

14:34 5 THE COURT: Why did the government change its
6 position so completely on the substantial burden question in
7 between Judge Palermo's opinion and your appearance here?

8 MS. NEWTON: I think the government set forth three
9 explanation for that change in position in the IFRs and the
14:34 10 rule makings -- well, in the IFRs and for the reasons stated
11 in our brief, which, in accord with the statements made
12 there, determined that in fact it is a substantial burden to
13 have to comply with contraceptive coverage provisions, or
14 face either a lack of coverage altogether or incur a
14:35 15 financial penalty.

16 THE COURT: So, you just rethought it. There
17 wasn't a change of personnel or anything else?

18 MS. NEWTON: Well, I mean, an agency can change
19 position so long as it provides a reasoned explanation for
14:35 20 that change in position.

21 I venture Your Honor is aware there was a
22 change with regard to certain personnel between the time we
23 filed our initial papers and the time we filed later, but
24 the requirement is that the agency really provide a
14:35 25 reasonable explanation for the change in position.

1 THE COURT: Mr. Dierlam, this is your opportunity
2 to argue your case. You can assume I've read all your
3 papers. As I say, I found those very impressive. But
4 anything you would like to say about your appeal from the --
14:36 5 or your request for review from the report and
6 recommendation?

7 MR. DIERLAM: Well, there's a couple of, somewhat,
8 reasons I would like to mention that would help substantiate
9 my case.

10 One is the -- when I looked up the *Wielend*
11 case last night, that was dismissed by mutual agreement and
12 the government has agreed to pay legal fees. So, I am
13 taking it that the government is not going to pursue acting
14 on that case so that, more importantly, *Wielend* stands.

14:36 15 THE COURT: This is *Wielend v. HHS*.

16 MR. DIERLAM: I believe so.

17 THE COURT: For the court reporter it's
18 *W-i-e-l-e-n-d*, a decision of the District Court of the
19 District of Columbia -- no -- I'm sorry -- excuse me --
14:36 20 sorry -- Eastern District of Missouri.

21 MR. DIERLAM: Yes.

22 THE COURT: Okay. Go ahead, sir.

23 MR. DIERLAM: I think it was in February of this
24 year 20 states have initiated a lawsuit against the federal
14:37 25 government involving the ACA in general and it's somewhat

1 similar to some of the complaints I have. Of course, they
2 are sovereign, they have more specific complaints and harm,
3 et cetera, et cetera. But they are saying that because the
4 2017 tax law came into effect in 2019, according to the law,
14:37 5 the penalty would be reduced to zero and at that point it
6 would be unconstitutional because it would no longer -- as
7 the Supreme Court ruled in *NIFB* it provides some tax revenue
8 to the government; therefore, it was allowed under taxing
9 authority.

14:37 10 Now their position is no income for the
11 government and, therefore, it is not constitutional anymore.
12 Of course, that is ongoing, but...

13 THE COURT: Ms. Newton, let me get your response to
14 that.

14:38 15 MS. NEWTON: My response to the latter point is
16 that's simply not a claim, a claim for fraud, and it's not
17 currently at issue or in front of the court.

18 MR. DIERLAM: Well, it is one of my claims. It is
19 Claim 6 or 7.

14:38 20 MS. NEWTON: Respectfully, Your Honor, it is not
21 and couldn't conceivably be -- That was not the grounds for
22 any of the claims. And his objection is to being subjected
23 to the shared responsibility payment because, otherwise, he
24 would have to try to find a plan with the contraceptive
14:38 25 coverage provisions; and, as the magistrate judge found and

1 as we have our argued, he does not have standing to bring
2 that claim because he can, in fact, find such a plan.

3 MR. DIERLAM: Can I address that?

4 THE COURT: Yes, sir. Please go ahead.

14:39 5 MR. DIERLAM: The CMF CURO that was mentioned in
6 the --

7 THE COURT: I'm not hearing. Start that over
8 again. I didn't understand what you said.

9 MR. DIERLAM: CMF CURO was the categorization,
14:39 10 supposedly, that was mentioned by the judge. As I wrote in
11 my reply, they are not -- they do not have an exemption from
12 the ACA. They were not even in existence before 1999 and,
13 therefore, they are in partnership with a Protestant
14 organization and that Protestant organization, actually, has
14:39 15 the exemption and, therefore, there is just not enough
16 veneer running on top of that other organization.
17 Therefore, it does not -- it is not fully Catholic, is what
18 I am saying.

19 And I have other objections, as I mention in
14:40 20 the complaint, to Health Care Sharing Ministry. Therefore,
21 to me, that is not a viable option. It also does not
22 provide fully for insurance.

23 THE COURT: Are you saying that you have surveyed
24 the entire insurance industry and there's nothing that is an
14:40 25 adequate substitute or are you saying that particular

1 program was not?

2 MR. DIERLAM: Kind of both. My understanding is
3 that maybe, from when I talked to the people at CMF CURO
4 there may be one other organization that has some similar
14:40 5 arrangement with a Protestant group. But in both cases, you
6 know -- I also have -- There is more -- It's kind of
7 complicated, but I have reservations toward the health
8 sharing concept and...

9 I am trying to organize my thoughts here.
14:41 10 It is just not a viable alternative.

11 Also, the provision of the redemption that was
12 mentioned that supposedly makes the case moot, the first
13 provision -- the first prong is that I have religious
14 objection, which I meet. I have religious objection to the
14:41 15 contraceptive mandate, although "contraceptive mandate" is
16 kind of a misnomer.

17 Also, on the second prong, though, I do not
18 meet it in that I do not have an employer anymore. I quit
19 my employment in 2015 with ZXP. I have not been employed
14:42 20 since then. I've gotten -- I've started my own business to
21 some extent.

22 THE COURT: Well, congratulations.

23 MR. DIERLAM: Thanks. Just a sole proprietorship.
24 Very small.

14:42 25 THE COURT: Sorry. I didn't hear the last part.

1 MR. DIERLAM: It's a sole proprietorship and it's
2 very small.

3 THE COURT: A small sole proprietorship. Okay.

4 MR. DIERLAM: That's right.

14:42 5 And I do not have -- as they call it, the
6 contraceptive mandate, in general -- I mean, it applies to
7 everybody. So, there are no -- outside these healthcare
8 insuring ministries, there is no insurance available. And I
9 can't see that anybody would write a policy for a single
14:42 10 person to exclude the contraceptive mandate.

11 So, I don't think there is any possibility I
12 would be able to find anything that's -- and I prefer
13 insurance. These healthcare insuring ministries are not
14 insuring. I don't think they properly cover everything
14:43 15 necessary.

16 So, again, 1) I don't meet that second prong
17 because I do not have a current insurance provider and I do
18 not have an employer. So, that I do not meet; so, the
19 exemption does not -- I do not qualify for the exemption.

14:43 20 So, all the -- nothing has changed.

21 THE COURT: Okay. You say you don't have insurance
22 and you don't think there exists insurance like that which
23 you had.

24 But you don't disagree, do you, that the
14:43 25 financial penalty for violating the mandate is now gone?

1 MR. DIERLAM: No. I do disagree with that.

2 THE COURT: Why do you say that? It's been
3 repealed by Congress.

4 MR. DIERLAM: I paid this last year.

14:43 5 THE COURT: I'm sorry?

6 MR. DIERLAM: I paid \$3,000. In April I paid
7 nearly \$3,000 for the penalty and I will pay it next year.
8 It will not be gone until 2019.

9 THE COURT: You're saying the fact it's not yet
14:44 10 effective is --

11 MR. DIERLAM: That's right. According to the
12 law -- the Tax Reform Act of 2017, I think it was -- they do
13 not reduce the penalty to zero until 2019.

14 THE COURT: The one I am looking at is called the
14:44 15 Tax Cuts and Jobs Act of 2017.

16 MR. DIERLAM: Yeah. Yeah. Okay. I think it was
17 past December 22nd, something like that --

18 THE COURT: It was past --

19 MR. DIERLAM: Last year?

14:44 20 THE COURT: Yeah, it was.

21 MR. DIERLAM: Okay. That's the one. It does
22 not -- Not until 2019 does it reduce to zero.

23 THE COURT: Do you want to speak to that,
24 Ms. Newton?

14:44 25 MS. NEWTON: Yeah. I would like to speak to a

1 couple of things, if I could.

2 He mentioned both in -- Mr. Dierlam mentioned
3 in both his response and just now that he has various other
4 objections to the healthcare sharing ministries and that he
14:45 5 differs with the current practices of medicine, that he
6 doesn't believe in making payments to individuals for
7 specific needs.

8 To the extent that he has indicated that he is
9 unwilling to participate in these plans because of those
14:45 10 issues, those are caused by the government and he doesn't
11 have standing to bring a claim against the government. His
12 inability to find insurance that meets those moral
13 objections is not the result of any action by the
14 government.

14:45 15 And then with regard to the -- I'm sorry. So,
16 thus far, his claim has been based on his payments in 2015
17 and 2016, and for the reasons we stated this court doesn't
18 have jurisdiction over those claims because he is still not
19 satisfied with the jurisdictional prerequisites.

14:45 20 He has not amended his complaint to bring a
21 claim based on any payments he made last year; so, that's
22 not currently before the Court.

23 And, as the Court mentioned at the outset, any
24 claim for injunctive or declaratory relief on the basis of a
14:46 25 shared-responsibility payment that doesn't exist, obviously,

1 should be dismissed.

2 THE COURT: Mr. Dierlam, this is an issue that has
3 fascinated me since I was a teenager.

4 MR. DIERLAM: Okay.

14:46 5 THE COURT: It came up for me because a lot of my
6 friends, especially Catholic friends and Quaker friends,
7 found that their parents should withhold a portion or all of
8 their taxes to protest the government's involvement in the
9 war in Vietnam, which is something I think had the same
14:46 10 effect on their conscience that this has on your conscience.

11 MR. DIERLAM: Well, I think this is more serious
12 than even that. But go ahead.

13 THE COURT: So, I have thought about it for a long
14 time.

14:47 15 How do you feel about that? What would you
16 say about the right of a taxpayer to withhold part of his
17 taxes because he objects to a foreign policy of our
18 government?

19 MR. DIERLAM: Well, in some of the decisions I have
14:47 20 seen regarding that, that the government does have, you
21 know, financial needs. I can understand that. However, the
22 First Amendment is still there and, in this case, it does
23 conflict with some basic tenets there.

24 THE COURT: But my friends thought that the war in
14:47 25 Vietnam did, too. They thought the Quakers were, of course,

1 pacifists. The Catholics thought there was grotesquely
2 unnecessary killings. They definitely grounded their
3 opinions in the First Amendment.

4 MR. DIERLAM: Well, you know, in that case, you
14:47 5 know, were the enemy in that case -- were they totally
6 innocent? I think the answer to that would be "no". In
7 this case the unborn are totally innocent.

8 THE COURT: So, you're saying the difference is
9 some of the Vietnamese children were not totally innocent?

10 MR. DIERLAM: I am saying the Vietnamese as a
11 people and their government.

12 THE COURT: But a lot of children were killed in
13 Vietnam. Surely they weren't guilty of anything.

14 MR. DIERLAM: Children weren't being targeted,
14:48 15 though. Children were not being targeted. They were
16 incidental. They were collateral damage, as they'd say.

17 THE COURT: So, there is a First Amendment
18 difference between killing children as collateral damage and
19 what you're talking about?

14:48 20 MR. DIERLAM: Well, in this case, the children are
21 targeted. They are not collateral damage. They aren't
22 targeted. It's not incidental to the action. It "is" the
23 action. It is the main purpose of the action.

24 And, as I mentioned in my briefs there, two or
14:49 25 three of the contraceptives have an abortive patient effect.

1 So, they will kill innocents.

2 THE COURT: Well, how about should Jehovah's
3 Witnesses be able to withhold their payments because the
4 plans cover blood transfusions?

14:49 5 MR. DIERLAM: Well, in the case of -- There's also
6 another distinction here, as I mentioned in my brief.

7 In the case of the Catholic church,
8 participating in such a -- in any type of a program or plan
9 that has that effect I just mentioned is prohibited.

14:49 10 Now, in the case of Jehovah's Witnesses, that
11 may just be a self -- you know, as long as you don't do it,
12 whereas if other people do it is a different story.

13 In this case the Catholic church teaches that
14 participating willingly in such a plan or such a program,
14:50 15 you know, it helps to corrupt others; and, therefore, it
16 taints you.

17 THE COURT: But Jehovah's Witnesses feel equally
18 strongly about blood transfusions.

19 MR. DIERLAM: Well, as I mentioned, I don't know --
14:50 20 I don't know if that was just for themselves or they feel
21 that anybody getting a blood transfusion anywhere is a
22 violation of their principles. If it's just for themselves,
23 then that's a different category.

24 THE COURT: No. They're actively trying to --

14:50 25 MR. DIERLAM: Well --

1 (Simultaneous dialogue)

2 THE COURT: -- other people to their point of view.

3 MR. DIERLAM: Yeah, I'm sure they are, but I'm

4 saying -- but my point still exists, is that if they are

14:50 5 feeling that as long as they don't participate that they are

6 good. Whether other people participated in that activity is

7 a different story, you know. Then them withdrawing or not

8 using that service may be an alternative.

9 In this case, in the Catholic church, whether

14:50 10 you use that service or not -- well, use it it's worse --

11 but still participating in that program, you know, is a

12 violation.

13 THE COURT: So, what about using Muslims who are

14 offended by medications that are extracted from the poor?

14:51 15 MR. DIERLAM: Well, again, the same thing as I

16 mentioned before. If it's a personal prohibition, then just

17 avoiding the activity is fine, and whether other people do

18 it is not germane to themselves or to their religion.

19 THE COURT: So, you think that --

14:51 20 MR. DIERLAM: I'm not sure, but I am guessing that

21 that's going to be the case.

22 THE COURT: So, you think that your religion ought

23 to be accommodated but not other people's?

24 MR. DIERLAM: No. I am saying that there is a

14:51 25 different philosophy there. There is two categories,

1 basically, that -- One is that like in a -- Let me give you
2 a... Uh...

3 THE COURT: How about Christian Scientists who
4 think that vaccinations ought to be prohibited?

14:52 5 MR. DIERLAM: Well, I'm not sure that Christian
6 Science believes that vaccinations should be free for
7 everybody or that they just themselves want --

8 THE COURT: For everybody.

9 MR. DIERLAM: Well, you know, I don't know.
14:52 10 Assuming that they do, that they feel that, you know,
11 participating in any program that encourages vaccinations,
12 then they do fall in the same category and they -- you know,
13 they should not be forced to participate, I would say.

14 THE COURT: So, they can withhold part of their tax
14:52 15 money, too?

16 MR. DIERLAM: Well, you know, it's -- it's somewhat
17 complicated, but there is a potential that that might be
18 justified.

19 THE COURT: And then there are some religions that
14:52 20 don't believe in any kind of medical treatment at all.

21 Should they be allowed to withhold all their tax money?

22 MR. DIERLAM: If they're consistent. If they do
23 believe -- I mean, they already exist now, as you know.
24 There are exemptions from the Social Security tax, although
14:53 25 I don't know the degree of that, of the exemptions, but they

1 do not have to pay it. They cannot pull from Social
2 Security, from what I understand. But, to me, that's seems
3 a just solution.

14:53 4 THE COURT: So, who makes the determination as to
5 what the solution is? The individual taxpayer?

6 MR. DIERLAM: Well, that would be nice, but the
7 government usually doesn't let us get away with that.

8 THE COURT: No. And I am curious as to why you
9 think you should.

14:53 10 MR. DIERLAM: Well, you know, I think I should
11 because of the laws that exist, RFRA, et cetera.

12 THE COURT: But --

13 MR. DIERLAM: I am basing -- most of my argument
14 there is based on it and is fairly solid in that.

14:54 15 THE COURT: But there's only been one circuit court
16 to consider this and that court came down decidedly against
17 your position. So...

18 MR. DIERLAM: No. The *Wielend* case --

14:54 19 THE COURT: It wasn't a circuit court decision,
20 sir. There has only been one circuit court decision on this
21 and it definitely rejected that. It definitely rejected
22 your position.

23 MR. DIERLAM: And I think that they were wrong on
24 various grounds and for various reasons. I think their test
14:54 25 was that -- something I mentioned in my brief, that their

1 test was -- if you really applied it and thought about how
2 it worked, then it basically -- the RFRA is giving the
3 individual an entitlement to an exemption. It gives the
4 court the entitlement to the exemption. It's within the
14:54 5 court's discretion whether they -- despite any evidence,
6 that the individual gets an exemption or not.

7 THE COURT: So, I should disregard the circuit
8 court's decision?

9 MR. DIERLAM: Well, to the extent I think they were
14:55 10 wrong, yes.

11 THE COURT: Doesn't it sound a little bit
12 unmanageable? Doesn't it sound a little bit Anarcho, that
13 we're ignoring statutes and ignoring higher court decisions
14 because you believe your religion is to the contrary?

14:55 15 MR. DIERLAM: No. It would be -- like I said, if
16 we follow the Constitution. Yet, much of the Constitution
17 does not fall under or -- And that goes for the laws as
18 well. The laws are passed in violation of the Constitution,
19 as the ACA was.

14:55 20 THE COURT: But who is going to decide this?
21 You've decided they're in violation of the Constitution?

22 MR. DIERLAM: You know, it's obviously in the
23 court's...whether or not it's -- and Congress and other
24 parts of the government. I don't really get to decide. I
14:56 25 just make a complaint and that's about it.

1 THE COURT: But we have a system for correcting
2 mistakes if the laws are unconstitutional. Judges are
3 authorized to strike them down.

4 MR. DIERLAM: Yes.

14:56 5 THE COURT: But I don't know that individual
6 taxpayers can decide that they're authorized to withhold
7 money from causes they disagree with.

8 MR. DIERLAM: Well, I haven't withheld money. I
9 have paid in full, as far as I know, all the requirements
14:56 10 that --

11 THE COURT: But you're asking to withhold money.
12 Right?

13 MR. DIERLAM: Well, I am asking -- well, if the
14 stay was lifted I would be asking for an injunction to stop
14:56 15 them from forcing me to pay the money which I think is not
16 constitutionally due.

17 THE COURT: Okay. Let's talk about some of your
18 other claims.

19 You say that the Affordable Care Act violates
14:56 20 the due process clause of the Fifth Amendment because the
21 ACA was --

22 MR. DIERLAM: I think the 20 states also --

23 THE COURT: You say that the ACA, quote --

24 MR. DIERLAM: -- in violation --

14:57 25 THE COURT: -- let me finish -- the ACA, quote, was

1 created with a high degree of incompetence and negligence
2 for the welfare of the general public and that the shared
3 responsibility payments constitutes fallacious and insulting
4 propaganda.

14:57 5 MR. DIERLAM: Yes. I remember that.

6 THE COURT: I think those are policy and political
7 arguments. I don't think they're arguments for a court to
8 do anything with. I can't ignore laws that I think were
9 passed with incompetence and negligence.

14:57 10 MR. DIERLAM: Well, I think the 20 states -- in
11 their complaint I think they term it like the verbiage in
12 *Brushaber*. They're using the words "irrational" and
13 "capricious", which I do, too, I think, there, although I
14 don't -- I think I vary the "irrational" a little bit. But,
14:58 15 essentially, that there was great negligence in passing that
16 law. And I do mention in my complaint and in some of the
17 filings and the reply that I posted -- or sent in after
18 that, examples of how the law is contradictory to itself,
19 how it's contradictory to its own purpose, et cetera.

14:58 20 THE COURT: And you say in another place that the
21 Affordable Care Act discriminates in favor of those who
22 engage in, quote, drug use, illicit sex and overeating at
23 the expense of those who, quote, choose a healthier
24 lifestyle.

14:58 25 MR. DIERLAM: Yes.

1 THE COURT: Do you really want me to strike down a
2 law because it favors those who eat too much --

3 MR. DIERLAM: That's an example of, again,
4 irrational breaches of law.

14:58 5 THE COURT: Okay. But do you think because the law
6 favors overeating that I ought to strike it down?

7 MR. DIERLAM: Well, it's just one example, just one
8 example of many that I hopefully have there and there may be
9 more that I rely on.

14:59 10 THE COURT: How do I tell whether a law promotes
11 overeating?

12 MR. DIERLAM: Well -- well -- if it penalizes one
13 group of people that are law-abiding and, otherwise, try to
14 do the right things with their health, et cetera, and does
14:59 15 not penalize a group that are doing things that harm their
16 health, that they wind up in intensive care, needing more
17 healthcare, a little more expensive healthcare, et cetera,
18 et cetera -- does it do anything about that? I say, again,
19 that's irrational and capricious.

14:59 20 THE COURT: Do you know of any laws that have been
21 struck down on the basis of the promotion of overeating?

22 MR. DIERLAM: Well, I know some laws are
23 established based on overeating. I think in New York they
24 have some sort of a -- or I should say maybe it was -- the
15:00 25 mayor there promoted a law that would tax soda usage and

1 prohibits the size of the container that it could be sold
2 in.

3 THE COURT: And you say the ACA's, quote, real
4 design and impact benefits certain Democratic constituencies
15:00 5 and punishes primarily non-Democratic constituencies.

6 MR. DIERLAM: Uh-huh.

7 THE COURT: Do you know any laws that have been
8 struck down on that basis?

9 MR. DIERLAM: Offhand -- you know, I'd have to
15:00 10 really look at that, but, offhand, I am thinking there's
11 certain voting jurisdictions, you know, the boundaries that
12 have been -- higher courts and the courts have been involved
13 in that said, you know, favored Republicans too much or, you
14 know, Democrats too much or whatever -- it was gerrymandered
15:01 15 basically -- and they would not allow those boundaries.

16 THE COURT: And you say the Establishment Clause is
17 violated here because, quote, the committee only heard from
18 pro-abortion, pro-contraception groups, which further places
19 their objectivity in doubt.

15:01 20 MR. DIERLAM: Uh-huh.

21 THE COURT: Can I really strike down a law based on
22 what I think about Congress members' objectivity?

23 MR. DIERLAM: Yes.

24 THE COURT: I can?

15:01 25 MR. DIERLAM: That's part of the law itself.

1 THE COURT: I can?

2 MR. DIERLAM: Say again.

3 THE COURT: I can strike down a law because I think
4 the congress members lack objectivity?

15:01 5 MR. DIERLAM: Yes.

6 THE COURT: Okay. Do you know of any laws that
7 have been stricken on that basis?

8 MR. DIERLAM: I believe so. What I am thinking of
9 is the -- I think there is a -- I am trying to -- I haven't
10 looked at it, but there is a ruling thing that -- it's the,
11 you know, statements by the decision-making body or -- I
12 think the Supreme Court looked at this -- but I'd have to
13 really look at that -- but there's something saying that, if
14 verbiage by the decision-making body shows a favoritism or
15:02 15 lack of objectivity or something to that effect, then that
16 is a basis for reversing a decision.

17 THE COURT: Well, what if someone had a religious
18 belief that all the races should not intermingle and,
19 therefore, objected to integrated schools? Is that a
15:02 20 religious belief that should be accommodated?

21 MR. DIERLAM: I guess's it's possible. I'd have to
22 really look at the particulars more on that. You know, they
23 can -- on their own they can form their own school. I
24 mean --

15:02 25 THE COURT: But still --

1 MR. DIERLAM: School then will not be subsidized by
2 the government --

3 THE COURT: But when they pay their property taxes
4 in Texas they are subsidizing public schools.

15:03 5 MR. DIERLAM: That's right. They are.

6 THE COURT: Do you think they ought to be able to
7 withhold some of their money because they don't think
8 schools ought to involve interracial student bodies?

9 MR. DIERLAM: Well, I don't think the current law
10 will allow that, but I am thinking there is a case that they
11 can make.

12 THE COURT: Let me go back to you, Ms. Newton.
13 Anything you want to say? But, also, a particular question.

14 You make an argument on taxpayer standing and
15:03 15 you say that you didn't -- let's see -- that full payment of
16 an assessment has to be made before a tax refund suit can be
17 maintained and you cite the Supreme Court's decision in
18 *Flora v. United States*.

19 In fact, doesn't the Plaintiff need to pay all
15:04 20 of his taxes for the years he's challenging, not all of his
21 taxes forever?

22 MS. NEWTON: All of the taxes for the years that he
23 is challenging, but he has not even alleged, much less
24 shown, that he did pay the taxes in 2015 and 2016.

15:04 25 MR. DIERLAM: Can I comment on that?

1 THE COURT: Yes, you can.

2 MR. DIERLAM: In the reply to the response to the
3 R&R by the Defendant, I do say there that I did pay, as far
4 as I know, all the taxes.

15:04 5 So, I mean, these are kind of minor
6 technicalities that -- and, you know, I don't see how
7 they're significant.

8 There is only two that I know of they mention
9 in their response.

15:04 10 One was I did allege I paid all the taxes.

11 And the second one was that, basically, the
12 filing date on at least one of the exhibits there was before
13 the six-month period, saying this is a continuing
14 controversy. As long as I was on -- within -- after six
15:05 15 months from the first one, to me, it doesn't matter because
16 it's the same controversy continuing. And I mention that.
17 In each of my claims I put that's the case number in that
18 claim. So, it's not a new controversy. It's the same
19 controversy.

15:05 20 As far as the paying taxes, I used the
21 worksheet that was in the instructions provided by the IRS,
22 filled it out and I come up with a number. That's the
23 number I paid and I put on the IRS form. It's possible I
24 miscalculated. The IRS has not said anything to me. So, as
15:05 25 far as I know, I have paid all the taxes in full.

1 THE COURT: Does your complaint allege that? I
2 don't think it does. Does it?

3 MR. DIERLAM: Well, I don't think I mentioned it in
4 the complaint, that I paid taxes in full. And I know in the
15:06 5 Judge's R&R she says I paid the taxes in full in one of her
6 statements. I guess she assumed it, because I didn't
7 really -- I don't think I exactly mentioned that, but I did
8 pay the taxes in full, as far as I know.

9 THE COURT: Do you want to speak to that,
15:06 10 Ms. Newton?

11 MS. NEWTON: Yes, Your Honor.

12 I mean, he just said that he didn't allege in
13 the complaint that he paid his taxes in full, and the report
14 and recommendation does not find that. I think to the
15:06 15 extent that there may be some question about that, maybe
16 he's referring to the shared responsibility payment, but he
17 has not alleged, even in his response to our response to the
18 R&R, that he has paid his taxes in full for 2017 --

19 MR. DIERLAM: I state that categorically in my
15:06 20 response, in my reply to your response.

21 MS. NEWTON: I apologize if I have missed it, but
22 there is no other evidence and it certainly wasn't claimed
23 in the complaint.

24 MR. DIERLAM: Well, I didn't think about mentioning
15:07 25 that, you know. It's kind of a technicality. To me, it

1 seems like a minor technicality.

2 THE COURT: Well, the relevant statute is
3 28 USC 1346 and it says: "The district courts have original
4 jurisdiction over," quote, "any civil action against the
15:07 5 United States for the recovery of any Internal Revenue tax
6 alleged to have been erroneously or illegally assessed or
7 collected" and that the statute is being construed in the
8 *Flora* case as meaning "full payment of the assessment has to
9 be paid before a tax refund suit can be maintained in the
15:07 10 district court."

11 There is a lot that may be wrong with that
12 law, but I do believe it is the law.

13 MR. DIERLAM: Well, you know, the only thing -- if
14 there is anything that was left out is that I didn't say
15:07 15 "full payment" in my complaint, although that is the case.
16 I am saying that here. I said that in my reply to the
17 Defendant's response to the R&R. I don't know how much --
18 And if there's proof you need, I am willing to provide it,
19 any additional proof, as I stated in my response as well or
15:08 20 my reply as well. I think in my last sentence in my reply I
21 state that. So, I mean, I don't see a big issue or a big
22 problem here.

23 THE COURT: Anything else, Ms. Newton?

24 MS. NEWTON: No, Your Honor. We'll rest on the
15:08 25 papers.

1 THE COURT: Well, we're -- these are difficult
2 issues. Anytime religion and government collide these are
3 difficult issues.

4 Do you want to say anything more about RFRA,
15:09 5 Mr. Dierlam?

6 MR. DIERLAM: About what?

7 THE COURT: RFRA, Religious Freedom Restoration
8 Act.

9 MR. DIERLAM: Only that the *Wielend* case is, from
15:09 10 what I can tell, the most similar, and it did -- the judge
11 there seemed to have an appropriate ruling and ruled that
12 the government did violate the RFRA. It is most similar to
13 this case. They were Catholic. I am Catholic. So, to me,
14 I think that's an appropriate ruling in this case as well.

15:09 15 THE COURT: In the *Hobby Lobby* case, where the
16 court considered insurance that was required of employers,
17 they found that the obligation to cover contraception
18 required businesses and owners to engage in conduct that
19 seriously violated their religious beliefs. Their theory
15:10 20 was the business's insurance plans would have to cover birth
21 control. "Some plan beneficiaries would use birth control,"
22 and "birth control and the belief of the businessowners may
23 result in the destruction of an embryo." So, they felt that
24 was too great a burden on the employers and, therefore, it
15:10 25 should not be required.

1 It seems to me that that's much less true in
2 your situation, Mr. Dierlam. You're not out shopping for
3 contraception, insurance that covers contraception. You're
4 not providing it for people who might use contraception
15:11 5 contrary to your beliefs. It's not something you're
6 providing to anybody else. You're just a passive recipient
7 of insurance that you don't ever have to use for any
8 purposes that offend you.

9 Isn't that quite a difference?

15:11 10 MR. DIERLAM: Not exactly. There's two things
11 there that -- In my case, as I said, I am not employed, you
12 know. I have no insurance right now. But, if I were
13 looking for it, I couldn't find any. I tried to do that
14 because of the HHS mandate. I couldn't find any.

15:11 15 But if I were looking for it and if it didn't
16 exist, then I would be in the same position as these
17 employers you're talking about in the *Hobby Lobby* case. I
18 would still be looking for coverage that did not violent my
19 beliefs. And, so, I would be in the exact same position.

15:11 20 I might not be as big as the other employers
21 are, I don't have as much purchasing power, et cetera,
22 et cetera, but, you know, me and any potential family, I
23 would be looking for coverage and I would be in the exact
24 same position.

15:12 25 THE COURT: But you're looking for coverage that is

1 the converse of what was being looked for in *Hobby Lobby*.
2 You're looking for coverage that excludes birth control
3 rather than includes birth control. So, I don't know how
4 your principles are being traduced.

15:12 5 MR. DIERLAM: Not exactly, in that they were
6 looking for coverage that did not violate their beliefs,
7 also. They did not want to pay for -- They were Protestant,
8 as I remember, and they allowed some contraceptives, but
9 some contraceptives they did not allow, like these
15:12 10 abortifacients I mentioned. They had a moral objection to
11 those.

12 THE COURT: The law required them to look for
13 insurance that did cover contraception and --

14 MR. DIERLAM: Yes.

15:12 15 THE COURT: -- there is no law that requires you to
16 look for insurance that covers contraception.

17 MR. DIERLAM: I understand.

18 THE COURT: There is no law that requires --

19 (Simultaneous dialogue)

15:13 20 MR. DIERLAM: The minimum coverage does require it
21 now, not -- Again, as I mentioned before, that's kind of a
22 misnomer from what the Defendants and the magistrate judge
23 is mentioning there. The ACA does not require any
24 contraceptive coverage. It doesn't require that at all.
15:13 25 That was put in by the HHS under Obama.

1 THE COURT: Okay. I --

2 MR. DIERLAM: They put that in --

3 (Simultaneous dialogue)

4 THE COURT: I don't think that's quite the point.

15:13 5 You're not being forced to go look for insurance that covers
6 contraception.

7 MR. DIERLAM: I am in that the essential minimum
8 coverage which is required by the ACA and now contains that
9 HHS mandate, which is still there, requires all insurers to
10 provide that as part of essential minimum coverage.

11 THE COURT: And you think that gives you a private
12 right of action under the Affordable Care Act?

13 MR. DIERLAM: Well, it's a violation of the
14 Constitution. It gives me no choice but to -- any coverage
15 that I can find will have that contraceptive coverage.

16 THE COURT: Well, are Jehovah's Witnesses'
17 constitutional rights also violated by their inability to
18 find an insurance coverage that excludes blood transfusions?

19 MR. DIERLAM: Well, as long as they don't have
15:14 20 to -- I mean, in this case, when the penalty goes away, as
21 long as I'm not in that system or I am forced to support the
22 system, it's okay.

23 THE COURT: For you and Jehovah's Witnesses? For
24 both you and Jehovah's Witnesses it's okay?

15:14 25 MR. DIERLAM: For what? For --

1 THE COURT: For you to go look for insurance that
2 does not cover that which offends your religious beliefs.

3 MR. DIERLAM: Well, it's not only -- in this case
4 it's also -- as I mentioned, in the other claim there, it's
15:15 5 not just the religious beliefs here. It's also a
6 confiscation of my property. It's a violation of, I think,
7 the Fourth Amendment because the government is saying and
8 dictating that a portion of the money that I must pay or the
9 penalties I have paid, although eventually it will go to
15:15 10 zero, the individual mandate is still in place until, you
11 know, the ACA gets declared unconstitutional.

12 But the -- Where was I at? As far as....

13 Now, what was your question again?

14 THE COURT: I am just worried how far this
15:16 15 constitutional right that you believe you have identified --
16 how broadly it cuts. I mean, do we have religious beliefs
17 sufficient in Muslims and Jews to look for an insurance
18 company that excludes medicine that's derived from pork? I
19 mean, do they have a constitutional right to sue if they
15:16 20 can't find it?

21 MR. DIERLAM: Well, you know, if this was totally a
22 private transaction -- which it should be -- then no. I
23 would say no because, you know, if they can find it, that's
24 fine. If they can't find it, that's up to them.

15:16 25 THE COURT: And why are Jews and Muslims different

1 from Catholics in that regard?

2 MR. DIERLAM: They're not.

3 There are two aspects to this.

4 One is the religious aspect. If I'm not
15:16 5 forced to participate in the system, we are penalized for
6 not participating in the system and then, to me, it's fine.
7 It doesn't matter. But in this case I am forced to
8 participate and, therefore, that's a different -- that puts
9 it in a different category.

10 The second thing is that, you know, it's
11 violating my religious freedom.

12 THE COURT: That puts you in the same category as a
13 Jehovah's Witness and the Muslims and the Jews. Right?

14 MR. DIERLAM: Not necessarily. I mentioned that
15:17 15 point before. Not necessarily. However, if -- you know,
16 they may have their own objections to various aspects of the
17 law as forcing them to do or it might not be forcing,
18 whatever provisions of the essential minimum coverage. They
19 might have other objections. Other religions might have
15:17 20 different objections. I can see that. And that all should
21 be taken into account because everybody is being forced into
22 the same plan.

23 Now, if there was no force, if the ACA,
24 essentially, has no minimum essential coverage provision,
15:18 25 then it would be fine.

1 THE COURT: I am concerned about the boundaries of
2 this right you're seeking and I am just wondering how it's
3 going to apply if different individuals because of
4 conscientious and religious exception want to opt out of
15:18 5 whatever the government does.

6 MR. DIERLAM: There is a solution that came up in
7 the Supreme Court in the "compelled association" case. They
8 set up with these unions that were established that were,
9 you know, given bargaining rights with the government. They
15:18 10 made a rule that if anything is outside of that -- that if
11 you paid money or spent money on it that's outside of
12 bargaining with the government, then the individuals in that
13 union have -- or the individuals being represented by the
14 union or all of them that are in the union -- have a right
15:19 15 to take that complaint to the union and ask for a refund of
16 that money.

17 And there was a similar objection that you're
18 raising raised by -- I can't remember case -- I mention it
19 in one of my briefs -- that -- you know, saying that there
15:19 20 would be so many that they can't, you know, handle it, it's
21 just too overwhelming, et cetera, et cetera. And that was
22 dismissed by one of the Supreme Court judges, saying that --
23 it's in -- The *Abood* decision has been in place for a decade
24 or so at the time it was written, and that there have been
15:19 25 no problems, that they had figured it out and they had

1 properly adjudicated all the complaints. So, there is a
2 solution.

3 THE COURT: I am still not understanding the
4 contours of the solution. I don't understand what you think
15:19 5 people ought to be authorized to do or not do.

6 MR. DIERLAM: In that case, whatever the objection
7 was -- you know, religious, you know, whatever it was to
8 money being spent that was outside of the government-stated
9 purpose, you know, their compelling interests, then they had
15:20 10 a right to a refund of that money regardless of what it was.

11 THE COURT: I am asking you to translate that into
12 this context, where someone is offended on religious grounds
13 by what the government is spending.

14 MR. DIERLAM: Uh-huh.

15:20 15 THE COURT: Tell me how it works. What does a
16 Jehovah's Witness do?

17 MR. DIERLAM: Well, in this case what could be
18 done -- this is a possibility -- some sort of board could be
19 set up where the individual can appeal that they don't want
15:20 20 to have this particular type of coverage and they don't want
21 to pay for it for other people either; they don't want it in
22 their policy at all. Okay? Whatever money that would go to
23 that particular coverage, that you go to this board and that
24 could be excised from their payments, just like in the *Abood*
15:21 25 decision.

1 Do you follow what I am saying?

2 THE COURT: Yeah.

3 MR. DIERLAM: It would essentially be no -- very
4 little difference other than, you know, I think that the
15:21 5 government does not have a compelling interest there. I
6 don't think that they can really set up such a system
7 because they don't have a compelling interest or sufficient
8 compelling interest but -- and they haven't made a case for
9 that.

10 But that would a potential solution, and that
11 would also avoid violating all the constitutional rights
12 guaranteed by the Constitution, not just religion, because
13 in some cases -- In *Abood* they were spending money on not so
14 much religion but on supporting candidates that some of the
15:22 15 people objected to, some of the members objected to, and
16 they did not want their money spent on advancing, you know,
17 that particular candidate.

18 I am sure there's others, too, there, but
19 that's just one of the ones I can think of.

15:22 20 THE COURT: Ms. Newton, anything more?

21 MS. NEWTON: No, Your Honor.

22 THE COURT: Anything more, Mr. Dierlam?

23 MR. DIERLAM: Not that I can think of right now.

24 THE COURT: Well, let me just say, Mr. Dierlam, I
15:22 25 really applaud the sincerity and the passion of your

1 convictions. This is an age where not many people are
2 willing to adhere to a strict set of behavioral standards,
3 and you clearly are and I applaud that. I really do.

4 MR. DIERLAM: Thanks. I appreciate it.

15:23 5 THE COURT: I am always impressed with people
6 who -- and it's relative to this case -- are loyal to their
7 principles.

8 MR. DIERLAM: I appreciate it. I have always been
9 aware that my standards are somewhat higher than other
10 people, not just in religion but in other things.

11 THE COURT: I'm sorry. I didn't hear that.

12 MR. DIERLAM: I've been somewhat aware that my
13 standards are higher than other people's, not just in
14 religion but other things as well. But, you know, I try. I
15 try.

16 THE COURT: I am not going to agree that they're
17 higher than other people's, but you do adhere to a certain
18 set of beliefs and I know it's not easy. I know it's not
19 easy.

15:24 20 MR. DIERLAM: Yes.

21 THE COURT: In terms of your particular claims,
22 there are, I think, eight different claims in your
23 pleadings.

24 The first one is the failure of the government
15:24 25 to notify you of non-enrollment violated ACA. I just don't

1 think the ACA provides the proper right of action. I'm
2 sorry.

3 MR. DIERLAM: Even though the previous act of
4 Congress allowing you to protest the withholding or the
15:24 5 income tax --

6 THE COURT: There are many wrongs in our society
7 that do not -- that are not accompanied by legal claims for
8 relief, and that may be one of them, but I don't think I see
9 it in the ACA. The Fifth Circuit may see it differently.

10 The individual mandate. I think Judge Palermo
11 is correct in dividing those arguments into "retrospective"
12 and "prospective".

13 I think, prospectively, it seems to me that
14 most recent legislation does take care of the problem
15:25 15 prospectively. I think the Tax Cuts and Jobs Act of 2017
16 does take care of it prospectively.

17 Retrospectively, I'm just unable to conclude
18 that the individual mandate violates the Religious Freedom
19 Restoration Act. I agree with what the Third Circuit said
15:25 20 in that case that Judge Palermo relied on.

21 MR. DIERLAM: You said you didn't agree with what?

22 THE COURT: I agree with Judge Palermo's -- I agree
23 with the Third Circuit in the case that Judge Palermo relied
24 on so heavily; that the burden, although it's not
15:25 25 nonexistent, is not so substantial that it's a violation of

1 RFRA.

2 MR. DIERLAM: Okay.

3 THE COURT: The Preventive Services Coverage
4 Provision of the ACA I don't think violates the
15:26 5 establishment clause.

6 I don't think the contraceptive coverage with
7 the individual mandates violates the Equal Protection
8 Clause.

9 I don't think the individual mandate exceeded
15:26 10 Congress' power under the Taxing and Spending Clause.

11 I don't think the individual mandate violates
12 the due process clause.

13 And I don't think the individual mandate
14 violates your right to privacy or freedom of association.

15 I do congratulate you again on the force and
16 the conviction you have put into your arguments. And other
17 court some day may very well see things differently, but
18 that's the best I can do today.

19 Thank you both.

15:26 20 MR. DIERLAM: Question real quick.

21 THE COURT: Yes, sir.

22 MR. DIERLAM: Does that mean you're dismissing the
23 complaint in its entirety or --

24 THE COURT: Yes. Yes, it does.

15:27 25 MR. DIERLAM: Okay. I assume I will get something

1 in the mail to that effect?

2 THE COURT: We'll either enter it as a docket
3 minute order or put something in the mail -- Oh. You're not
4 on ECF, are you?

15:27 5 MR. DIERLAM: No.

6 THE COURT: Yeah, we'll send you something.

7 MR. DIERLAM: Okay.

8 THE COURT: Thank you very much.

9 MR. DIERLAM: Thank you.

15:27 10 MS. NEWTON: Thank you, Your Honor.

11

12

COURT REPORTER'S CERTIFICATE

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I, BRUCE SLAVIN, certify that the foregoing is a
correct transcript from the record of proceedings in the
above entitled matter, to the best of my ability.

16

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s/Bruce Slavin
BRUCE SLAVIN, RPR, CMR

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