UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

SHARPE HOLDINGS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 2:12-cv-00092
	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Sharp Holdings, Inc. ("Sharpe Holdings") and Charles N. Sharpe, the founder, owner, chairman of the board and chief executive officer of Sharpe Holdings, are asking this Court for a temporary restraining order and preliminary injunctive relief in order for Sharpe Holdings to be allowed to operate in a manner consistent with the religious values and beliefs that have shaped the company from its start. Plaintiffs Judi Diane Schaefer and Rita Joanne Wilson, employees of Sharpe Holdings, join in this request in order to maintain the benefits of their employment without violating their religious beliefs.

In the absence of such relief, the Plaintiffs will be forced to make stark and inescapable choices on January 1, 2013. On the one hand, they can choose to fund the use of abortion-inducing drugs and devices and related counseling in violation of their religious beliefs. On the other, they can pay crippling fines imposed by the federal government (in the case of Sharpe Holdings and Charles N. Sharpe) or lose their employer-provided health insurance (in the case of Judi Diane Schaefer and Rita Joanne Wilson). These are choices no government bound by the First Amendment and the Religious Freedom Restoration Act ("RFRA") may lawfully impose.

This is especially true because the choices the government imposes on the Plaintiffs are choices the government has decided, at least for now, *not* to impose on thousands of other employers who share Plaintiffs' views but choose to operate as non-profits. The contraceptive mandate further does not apply to tens of thousand more employers (of 100 million employees) who may or may not share Plaintiffs' views, but qualify for "grandfathering" or do not have more than 50 employees. Such massive under-inclusiveness in rules purporting to further what appears to be a remarkably *non-compelling* "compelling interest" has already led the first court

to consider this issue to enjoin the same regulations challenged here. *See Newland v. Sebelius,* 2012 WL 3069154 (D. Colo. July 27, 2012); *see also Tyndale H. Publishers, Inc. v. Sebelius*, CIV.A. 12-1635 RBW, 2012 WL 5817323 (D.D.C. Nov. 16, 2012) (granting for-profit religious corporation that objected to abortion-causing drugs and devices and related counseling—and not contraceptives in general—preliminary injunctive relief from the contraceptive mandate).

The preventive services mandate at issue in this case substantially burdens Plaintiffs' religious exercise and violates RFRA (42 U.S.C. § 2000bb *et seq.),* the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, and the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.,* 701 *et seq.)*. A recent decision in this District held differently, denying injunctive relief regarding, and dismissing entirely, a challenge made to the Mandate by a for-profit religious corporation and its religious owner on the basis that there was no substantial burden on the plaintiffs. *O'Brien v. U.S. Dept. of Health and Human Services*, – F. Supp. 2d – , 2012 WL 4481208 at *6 (E.D. Mo. 2012).[1] The court reasoned as follows:

> Under plaintiffs' interpretation of RFRA, a law substantially burdens one's religion whenever it requires an outlay of funds that might eventually be used by a third party in a manner inconsistent with one's religious values. This is at most a de minimus burden on religious practice. The challenged regulations are several degrees removed from imposing a substantial burden on OIH, and one further degree removed from imposing a substantial burden on OIH's owner and manager, Frank O'Brien. Because there is no substantial burden imposed on either plaintiff's religious exercise, plaintiffs have failed to state a claim under RFRA.

Id. at *7. This decision was appealed to the Eighth Circuit Court of Appeals, which granted the *O'Brien* plaintiffs preliminary injunctive relief similar to that sought herein by Sharpe Holdings

[1] The Plaintiffs in the case at bar actually seek narrower relief than those in the *O'Brien* case. In *O'Brien*, the plaintiffs seek to avoid the funding or provision of *any* contraceptives, including the birth control pill. The Plaintiffs in this case only seek to avoid the funding or provision of drugs or devices that cause abortion, such as the so-called "morning after pill." This distinction was noted in the *Tyndale* case, wherein the plaintiff sought the same narrow relief as Plaintiffs in the case at bar: "There is no specific finding that the government *must* ensure that Plan B, ella, and intrauterine devices, as opposed to other forms of contraception, be covered under the plaintiffs' health plan in order to further the government's compelling interests." *Tyndale*, at *16.

and Charles N. Sharpe.[2] Deducible from such relief is the Eighth Circuit's finding that the requirements for preliminary relief—the same ones the similarly situated Plaintiffs in this case face—were met, and thus the harm to the Plaintiffs was found to be substantial.

In the wake of the mandate, and beginning on January 1, 2013, Plaintiffs must either pay, in violation of their religious beliefs, for a health plan that includes abortion-inducing drugs and devices and related counseling or suffer severe financial harm. Given the impending January 1, 2013 date, the instant motion is necessarily of an immediate nature. Plaintiffs merely request that the status quo, *i.e.,* their freedom to choose and fund a health plan consistent with their religious beliefs pursuant to Missouri law,[3] remain in place.

[2] A copy of the 8th Circuit's Order is attached hereto as Exhibit 1.
[3] Missouri's own contraception mandate includes a complete exemption—not limited to religious or non-profit employers—for any employer for whom "the use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity." Mo. Rev. Stat. § 376.1199(4)(1).

FACTUAL BACKGROUND

I. The Mandate, Its Exceptions, and Penalties

On March 23, 2010, the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (hereinafter, the "Act"), became law.[4] The Act requires group health plans to provide no-cost coverage for the preventive care and screening of women in accordance with guidelines created by the Health Resources and Services Administration ("HRSA"). 42 U.S.C. § 300gg-13. These services have been defined by the HRSA to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Dec. 10, 2012).

On August 1, 2011, Defendants promulgated an interim final rule ("the Mandate"), requiring all "group health plan[s] and . . . health insurance issuer[s] offering group or individual health insurance coverage" to provide coverage for all FDA-approved contraceptive methods and sterilization procedures as well as patient education and counseling about those services. 76 Fed. Reg. 46621, 46622 (Aug. 3, 2011); 45 C.F.R. § 147.130. This interim rule, along with the religious employer exemption described below, was adopted as final, "without change," on February 15, 2012. 77 Fed. Reg. 8725, 8729.

Not all employers are required to comply with the Mandate. Grandfathered health plans, *i.e.,* a plan in existence on March 23, 2010 that has not undergone any of a defined set of

[4] In *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566 (2012), the Court upheld the so-called "individual mandate" of the Act under the Constitution's taxing power. In so doing, the Court did *not* rule on the constitutionality of the Mandate challenged herein. Indeed, as Justice Ginsburg observed, "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause." *Id.* at 2624 (Ginsburg, J., concurring in part, dissenting in part).

changes,[5] are exempt from compliance with the Mandate. *See* 75 Fed. Reg. 41726, 41731 (July 19, 2010).[6] Even though the Mandate does not apply to grandfathered health plans, many provisions of the Act do. 75 Fed. Reg. 34538, 34542 (June 17, 2010).[7]

Also exempted from the Mandate are "religious employers," as defined at 45 C.F.R. § 147.130(a)(iv)(B). To be eligible for the exemption, such employers must "meet[ ] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012).

In addition, because employers with fewer than fifty full-time employees have no obligation to provide health insurance for their employees under the Act, they have no obligation to comply with the Mandate. 26 U.S.C. § 4980H(c)(2)(A). Finally, individuals are exempt from the requirement to obtain health insurance if they are members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds or are members of a "health care sharing ministry." 26 U.S.C. §§ 5000A(d)(2)(A)(i), (ii), (B)(ii).

In total, the Defendants have written into the challenged regulations categorical exemptions that exclude upwards of 100 million Americans from "preventive services"

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[5] *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.
[6] *See also* 42 U.S.C. § 18011; 76 Fed. Reg. 46621, 46623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.").
[7] A summary of which Act provisions apply to grandfathered health plans, and which do not, can be found here: *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans, available at* http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Dec. 3, 2012).

coverage. The exemptions apply to for-profit, secular employers ("grandfathered" plans) as well as non-profit religious employers and, in addition, small employers (fewer than 50 employees) and a number of miscellaneous categories.

Non-exempt employers who fail to comply with the Mandate or fail to provide any insurance at all face severe penalties. Non-exempt employers who fail to provide an employee health insurance plan will be exposed to annual fines of roughly $2,000 per full-time employee. *See* 26 U.S.C. §§ 4980H(a), (c)(1). Non-exempt employers who fail to provide certain required services in their plans are subject to an assessment of $100 a day per employee, as well as potential private enforcement suits. *See* 26 U.S.C. § 4980D(b); 29 U.S.C. §§ 1132, 1185d(a)(1).

This case is one of more than forty cases currently pending in federal courts challenging the constitutionality of the Mandate.[8]

II. Charles N. Sharpe, Sharpe Holdings, Judi Diane Schaefer and Rita Joanne Wilson

Charles N. Sharpe is the founder, owner, chairman of the board and chief executive officer of Sharpe Holdings.[9] Declaration of Charles N. Sharpe ("Sharpe Declaration"), ¶ 4. Mr. Sharpe is responsible for setting all policies governing the conduct of all phases of the business of Sharpe Holdings, and he strives to operate Sharpe Holdings' business according to Christian principles and coinciding sincerely held religious beliefs. *Id*. at ¶¶ 4, 7. He is also a minister of the gospel. *Id*. at ¶ 6.

Sharpe Holdings, Inc. is a Missouri for-profit general business corporation that employs more than 300 full-time men and women in a variety of industries, including but not limited to farming, dairy, creamery, and cheese-making. *Id*. at ¶ 6. Sharpe Holdings promotes the Christian beliefs, practices, and aspirations espoused by its founder and owner, Charles N.

[8] *See* The Becket Fund for Religious Liberty, HHS Mandate Information Central, *available at* http://www.becketfund.org/hhsinformationcentral/ (last visited December 10, 2012).
[9] The Declaration of Charles N. Sharpe is attached hereto as Exhibit 2.

Sharpe. *Id*. at ¶ 8. Outward examples of Sharpe Holdings' Christian principles include its milk tankers, which are emblazoned with the message "Jesus is the Answer," and its milk and cheese products, marketed under the name of Heartland Creamery, which substitute the "T" in Heartland with a Christian cross. *Id*. The Sharpe Holdings website describes the corporation's various enterprises and contains several demonstrations of its faith-based mission, including, for instance, the front page of the website which is subtitled "Transforming Hearts and Lives through the Power of Jesus Christ." *Id*. at ¶ 9; *see* http://www.sharpeholdingsinc.com/.

Sharpe Land & Cattle is a division within Sharpe Holdings. The Sharpe Holdings website says the following of Sharpe Land & Cattle:

> The goal of Sharpe Land & Cattle goes far beyond the further growth of an already thriving agricultural enterprise. The heart behind the organization aspires to help people rebuild their lives through the changing power of Jesus Christ. By modeling their work ethic before the men at the Recovery Center, and by providing vocational opportunities for those in their community, the staff of Sharpe Land & Cattle strives to implement Godly principles in every aspect of their business.

Id. at 10; http://www.sharpeholdingsinc.com/slc.html.

As part of its mission, Sharpe Holdings promotes the well-being and health of its employees. *Id*. at ¶ 11. In furtherance of these commitments, Sharpe Holdings ensures that its employees have comprehensive medical coverage through a self-insured plan.[10] *Id*. at ¶ 11. Mr. Sharpe has sought to ensure that the health plan—like the rest of Sharpe Holdings' benefits package—is harmonized with Christian teachings and his Christian beliefs. *Id*. at ¶ 12.

[10] The plaintiffs in the *O'Brien* case used a third-party insurance plan, and thus the Eighth Circuit, in granting the plaintiffs a preliminary injunction, obviously did not find the self-insured/third-party plan issue to be dispositive. The distinction was, however, discussed in some detail in *Tyndale, supra*. In analyzing the district court's ruling in *O'Brien* that the *O'Brien* plaintiffs were too far removed from contraceptive usage by end users, the *Tyndale* court noted that the *Tyndale* plaintiff used a self-insured plan, "directly pay[ing] for the health care services used by its plan participants" while the *O'Brien* plaintiffs merely "contribute[] to a health insurance plan which ultimately pays for the services used by the plan participants." *Tyndale*, at *13. The *Tyndale* court ruled that the use of a self-insured plan removed "one of the 'degrees' of separation that the court deemed relevant in [*O'Brien*]." *Id*.

Consistent with Mr. Sharpe's adherence to his church's teachings on issues surrounding the beginnings of human life, Sharpe Holdings' health policies have expressly excluded coverage for abortion on demand and any related services. *Id*. at ¶¶ 13-14.

Two of Sharpe Holdings' employees are plaintiffs Judi Diane Schaefer and Rita Joanne Wilson. Thus health insurance coverage is a benefit of their employment at Sharpe Holdings. Declaration of Judi Diane Schaefer ("Schaefer Declaration"), ¶ 3; Declaration of Rita Joanne Wilson ("Wilson Declaration"), ¶ 3.[11] Schaefer and Wilson pay premiums in order to maintain this coverage. *Id*. These premiums partially fund medical services provided to other employees covered under the same plan. *Id*.; Sharpe Declaration, ¶ 11.

Sharpe Holdings, Charles N. Sharpe, Judi Diane Schaefer and Rita Joanne Wilson have sincerely held religious beliefs that human life begins at conception and that from that point forward it is sacred and worthy of protection. Sharpe Declaration, ¶ 13; Schaefer Declaration, ¶ 4; Wilson Declaration, ¶ 4. The Plaintiffs thus oppose the use, funding, provision or support of abortion on demand as a matter of sincerely held religious belief and practice. Sharpe Declaration, ¶ 14; Schaefer Declaration, ¶ 5; Wilson Declaration, ¶ 5. The Plaintiffs do not believe that abortion on demand constitutes medicine, health care, or a means of providing for the well-being of persons. Sharpe Declaration, ¶ 15; Schaefer Declaration, ¶ 8; Wilson Declaration, ¶ 8. Rather, Plaintiffs believe abortion on demand involves gravely immoral practices and the intentional destruction of innocent human life. Sharpe Declaration, ¶ 16; Schaefer Declaration, ¶ 8; Wilson Declaration, ¶ 8.

[11] The Declaration of Judi Diane Schaefer and the Declaration of Rita Joanne Wilson are attached hereto as Exhibits 3 and 4.

Sharpe Holdings intends to continue to provide health coverage for its employees. Sharpe Declaration, ¶ 23. It intends to do so in a way that will be consistent with the values and beliefs that have always guided the company. *Id*. The renewal date for Sharpe Holdings' employee insurance plan is January 1, 2013. *Id*. at ¶ 22. Should Sharpe Holdings continue to implement a health plan that does not include those services that violate Plaintiffs' religious beliefs, Sharpe Holdings will face steep monetary penalties, in excess of $10,000,000 per year. Should Sharpe Holdings discontinue health insurance for Sharpe Holdings employees entirely, it will face penalties in excess of $600,000 per year. Judi Diane Schaefer and Rita Joanne Wilson must choose between funding the use of abortifacients and surrendering their employee insurance coverage. In any case, Plaintiffs will face a stiff price for following the dictates of their religious principles and beliefs.

ARGUMENT

I. Standard for Preliminary Relief

"In determining a litigant's right to preliminary injunctive relief the Court considers four factors: (1) the threat of irreparable injury to the plaintiff; (2) the balance of harm to the plaintiff if relief is not granted and harm to the defendant if an injunction is issued; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Medtronic, Inc. v. ETEX Corp.,* No. Civ. 04-1355 ADM/AJB, 2004 WL 768945 (D. Minn. Apr. 12, 2004) (citing *Dataphase Systems. Inc. v. C.L. Systems, Inc.,* 640 F.2d 109, 113 (8th Cir. 1981)). This is the same standard that applies when a court considers whether a temporary restraining order should be issued. *True LD LLC v. S.W. Commun., Inc.*, 2005 WL 3190396 (W.D. Mo. 2005) (citing *S.B. McLaughlin & Co. Ltd. v. Tudor Oaks Condominium Project, ABIO,* 877 F.2d 707, 708 (8th Cir. 1989)).

Likelihood of success on the merits, the "major difficulty" in applying the test, *Dataphase,* 640 F.2d at 113, requires that the movant find support for its position in governing law. *Baker Elec. Co-op., Inc. v. Chaske,* 28 F.3d 1466, 1473-74 (8th Cir. 1994). At this preliminary stage, the court does not decide whether the party seeking relief will ultimately win. *PCTV Gold, Inc. v. SpeedNet, LLC,* 508 F.3d 1137, 1143 (8th Cir. 2007). Although preliminary injunctive relief cannot be issued if the movant has no chance on the merits, Plaintiffs are "not required to prove a mathematical (greater than fifty percent) probability of success on the merits." *Heartland Academy Community Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003).

II. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their RFRA Claim.

A. The Mandate Imposes a Substantial Burden on Plaintiffs' Religious Exercise.

The purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972)" and "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b); *see Harrell v. Donahue,* 638 F.3d 975, 984 (8th Cir. 2011) (explaining that RFRA restored "the pre-Smith status quo of requiring the Government to show a compelling interest for any law that substantially burdened the free exercise of religion").

The federal government may substantially burden a person's exercise of religion under RFRA only if "it demonstrates that application of the burden to the person[12] (1) is in furtherance

[12] That corporations are legal "persons" that enjoy First Amendment rights worthy of protection cannot be gainsaid. *Citizens United v. FEC,* 130 S. Ct. 876, 899 (2010). Case law also makes clear that the First Amendment rights enjoyed by businesses include the right to the free exercise of religion. *United States v. Lee,* 455 U.S. 252 (1982) (adjudicating free exercise claim of for-profit employer); *Braunfeld v. Brown,* 366 U.S. 599 (1961) (adjudicating, *inter alia,* free exercise claims of secular, for-profit businesses); *Stormans, Inc. v. Selecky,* 586 F.3d 1109 (9th Cir. 2009) (adjudicating free exercise claim of for-profit pharmacy corporation); *Primera Iglesia Bautista Hispana v. Broward Cnty.,* 450 F.3d 1295 (11th Cir. 2006) ("corporations possess Fourteenth Amendment rights" including, through incorporation doctrine, "the free exercise of religion"); *EEOC v. Townley Eng'g & Mfg. Co.,* 859 F.2d 610

of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In other words, the government must satisfy strict scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 430 (2006) (RFRA imposes the "strict scrutiny test").

To trigger RFRA's protections, Plaintiffs must show that a federal policy or action substantially burdens their sincerely held religious beliefs. *United States v. Ali,* 682 F.3d 705, 709 (8th Cir. 2012) (citing *Weir v. Nix,* 114 F.3d 817, 820 (8th Cir. 1997)). A regulation substantially burdens religious exercise "if it prohibits a practice that is both sincerely held by and rooted in [the] religious belief[s] of the party asserting the claim." *Id.* (citation and internal quotation marks omitted).

Several Supreme Court cases illustrate what constitutes a substantial burden upon religious exercise. In *Sherbert v. Verner,* 374 U.S. 398 (1963), the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious beliefs prohibited her from working on Sunday, substantially burdened her exercise of religion. The regulation "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. In *Thomas v. Review Board,* 450 U.S. 707 (1981), the Court held that a state's denial of unemployment benefits to a Jehovah's Witness, whose religious beliefs prohibited him from participating in the production of armaments, substantially burdened his religious beliefs. "[T]he employee was put to a choice between fidelity to religious belief or

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(9th Cir. 1988) (for-profit corporation could assert free exercise rights of owners). Two state Supreme Courts have also recognized that for-profit, secular corporations have free exercise rights deserving of protection. *See, e.g., Morr-Fitz, Inc. v. Blagojevich,* 231 Ill. 2d 474 (2008) (corporate pharmacy had standing to bring, *inter alia,* federal free exercise claim); and *McClure v. Sports & Health Club, Inc.,* 370 N.W.2d 844, 850 (Minn. 1985) (the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority").

cessation of work." *Id.* at 717. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Court held that a state compulsory school attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id.* at 218.

Plaintiffs face the same inescapable burden faced by the religious claimants in these cases. In the wake of the Mandate, and beginning on January 1, 2013, Plaintiffs must either pay, in violation of their religious beliefs, for a health plan that includes abortion-inducing drugs and devices and related counseling or suffer severe financial harm or the loss of employment benefits, as described above.

At issue in this case is not simply a general or abstract objection to abortion and the related counseling. What is at issue is Plaintiffs' religious objection to *paying for these goods and services* through Sharpe Holdings' group health plan—exactly what the Mandate forces Plaintiffs to do. The Mandate does not force anyone to use abortion-inducing drugs or devices, but it forces Plaintiffs to subsidize them directly against their religious beliefs and principles.

Defendants themselves have acknowledged that paying for, providing, or subsidizing contraceptive services would conflict with "the religious beliefs of certain religious employers." 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012). In response, Defendants have granted a wholesale exemption for a class of employers, *i.e.,* churches and their auxiliaries, from complying with the Mandate. *Id*.

In addition, the government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that fails to cover some or all recommended contraceptive services and that is sponsored by a non-profit organization that

meets certain criteria.[13] During the tenure of this temporary safe harbor, Defendants are considering ways of "accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services [while] assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012). Defendants are even considering whether "for-profit religious employers with [religious] objections should be considered as well." *Id.* at 16504. This Advance Notice of Proposed Rulemaking was issued after President Obama announced on February 10, 2012 that the administration would attempt to accommodate objecting religious organizations so that they "won't have to pay for these services, and no religious institution will have to provide these services directly."[14] As such, although the government has contended in litigation similar to the case at bar that paying for contraceptive (or abortion) services through a group health plan does not substantially burden religious exercise, the authors of the Mandate have suggested otherwise.

It is not within the province of courts to evaluate the religiosity of a claim of religious exercise. *See Employment Div. v. Smith,* 494 U.S. 872, 886–87 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'"). Nor does RFRA itself allow it. *See* 42 U.S.C. § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4) (the term "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief").

In *United States v. Lee,* 455 U.S. 252 (1982), a for-profit religious employer challenged

[13] Department of Health and Human Resources, Guidance on the Temporary Enforcement Safe Harbor (2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Dec. 10, 2012).
[14] Remarks by the President on Preventive Care, February 10, 2012, *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited Dec. 10, 2012).

on religious grounds the requirement to pay social security taxes. The government in *Lee* did not question the sincerity of Lee's religious (specifically, Amish) beliefs, but nonetheless "contend[ed] that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance." *Id.* at 257. Noting that courts "are not arbiters of scriptural interpretation," the Supreme Court held that it is beyond "the judicial function and judicial competence" to determine the proper interpretation of religious faith or belief. *Id.* (quoting *Thomas,* 450 U.S. at 716). The Court therefore accepted Lee's interpretation of his own faith and held that "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.*[15]

B. RFRA Imposes Strict Scrutiny.

RFRA imposes "the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 546 (1993), and "the most demanding test known to constitutional law," *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997). The government must demonstrate that the challenged law serves "a compelling governmental interest" *and* is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Moreover, in the RFRA context, the test must be conducted "through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita,* 546 U.S. at 430-31.

C. Defendants Cannot Demonstrate A Compelling Governmental Interest.

A compelling governmental interest involves "only those interests of the highest order."

[15] Although the Court recognized an interference with Lee's religious rights, it ultimately ruled against him, finding that "the broad public interest in maintaining a sound tax system" would be compromised by accommodating Lee's rights. *Lee*, at 260.

Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984). In fact, in this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert,* 374 U.S. at 406. The government must demonstrate "some substantial threat to public safety, peace, or order" in not exempting the religious claimant. *Yoder,* 406 U.S. at 230. The Supreme Court recently described a compelling interest as a "high degree of necessity," *Brown v. Entm't Merchs. Ass'n,* 131 S.Ct. 2729, 2741 (2011), noting that the government "must specifically identify an 'actual problem' in need of solving, and the curtailment of [a fundamental constitutional right] must be actually necessary to the solution." *Id.* at 2738 (citations omitted).

Defendants have proffered two compelling governmental interests for the Mandate: public health and gender equity goals. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012). What radically undermines the government's claims of compelling interests, however, is the massive number of employees, millions in fact, whose health and equality are completely unaffected by the Mandate. *Newland*, *supra*, at *7 (granting preliminary injunction to for-profit business from having to comply with the Mandate). For example, Defendants cannot explain how their alleged interests can be compelling when employers with fewer than fifty employees[16] have no obligation to provide health insurance for their employees and thus no obligation to comply with the Mandate. With respect to Plaintiffs, Defendants cannot sufficiently explain how there is a compelling interest in coercing Sharpe Holdings and Charles N. Sharpe, with their more than 300 full-time employees, into violating their religious principles when businesses with fewer than fifty employees can avoid the Mandate entirely by not providing any insurance at all.

Defendants also cannot explain how these interests can be of the highest order when the

[16] More than 20 million individuals are employed by firms with fewer than twenty employees. U.S. Census Bureau, Statistics About Business Size (Including Small Business) From the U.S. Census Bureau, http://www.census.gov/econ/smallbus.html (last visited Dec. 10, 2012).

Mandate does not apply to plans grandfathered under the Act.[17] The government itself has estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732 (July 19, 2010).[18] When this figure is added to the number of employees of businesses with fewer than fifty employees, it is fair to say that well over 100 million employees are left untouched by the government's claim of compelling interests. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi,* 508 U.S. at 547 (citations and internal quotation marks omitted).

In sum, Defendants cannot demonstrate a compelling interest in requiring Sharpe Holdings and Charles N. Sharpe to comply with a mandate for their more than 300 full-time employees that does not apply to the employers of over 100 million employees nationwide.[19] Similarly, Defendants cannot demonstrate a compelling interest in requiring Judi Diane Schaefer and Rita Joanne Wilson to fund others' use of abortion on demand and related counseling given the massive number of exempt employees. Defendants cannot show a "substantial threat to public safety, peace or order" should Plaintiffs be excused from compliance with the Mandate. *Yoder,* 406 U.S. at 230.

[17] Given plan changes since March 23, 2010, the Sharpe Holdings health insurance plan does not qualify as a grandfathered health plan.

[18] According to the district court in *Newland,* "191 million Americans belong to plans which may be grandfathered under the [Act]." *Newland.* at *1.

[19] Looking beyond the impact of the vast exemptions, the Defendants have been unpersuasive heretofore in demonstrating the government's interest (compelling or not) in the provision of abortion-causing drugs, as opposed to true "contraceptives." "Lacking from the Institute Report and from the defendants' brief is *any* proof that mandatory insurance coverage for the specific contraceptives to which *the plaintiffs* object—Plan B, ella, and intrauterine devices—furthers the government's compelling interests." *Tyndale*, at *16 (emphasis in original). The United States Supreme Court has not spoken on the issue, but in *Maher v. Roe*, 432 U.S. 464, 471 (1977), the Court did recognize that there is no constitutional right to a government-funded abortion.

D. The Mandate Is Not The Least Restrictive Means To Achieving Any Interest.

The existence of a compelling interest in the abstract does not give Defendants *carte blanche* to promote that interest through any regulation of their choosing. If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze,* 460 U.S. 780, 806 (1983).

Even assuming *arguendo* that the interests proffered by Defendants are compelling, the Mandate is not the least restrictive means of furthering those interests. If Defendants wish to further the interests of health and equality by means of free access to abortion on demand and related counseling, they could do so in a myriad of ways without coercing Plaintiffs, in violation of their religious exercise, into doing so. For example, Defendants could: 1) offer tax deductions or credits for the purchase of drugs and devices causing abortion on demand; 2) reimburse citizens who pay to use drugs and devices causing abortion on demand, allowing citizens to submit receipts to the government for payment; 3) provide these products and services to citizens themselves; and 4) provide incentives for pharmaceutical companies that manufacture drugs or devices causing abortion on demand to provide such products through pharmacies, doctor's offices, and health clinics free of charge.

Each of these options would further Defendants' proffered compelling interests in a direct way that would not impose a substantial burden on persons such as the Plaintiffs. *See Newland,* at *7-8 (rejecting government's claim that the Mandate furthers a compelling governmental interest through the least restrictive means). Indeed, of the various ways the government could achieve its interests, it has chosen a path with clear and undeniable adverse

consequences to employers and employees with religious objections to paying for contraceptive services, such as Plaintiffs.

Although Defendants may contend that any or all of these options would prove difficult to establish or operate, "least restrictive means" does not mean the most convenient means for the government. Even if the government claims these or other options would not be as effective or efficient as the Mandate, "a court should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 824 (2000). In fact, if a less restrictive alternative would serve the government's purpose, "the legislature must use that alternative." *Id.* at 813. The asserted interests of health and equality "cannot be invoked as a talismanic incantation to support any [law]." *United States v. Robel,* 389 U.S. 258, 263 (1967).

Plaintiffs have a substantial likelihood of success on the merits of their RFRA claim.

III. Plaintiffs Are Likely to Succeed on the Merits of their Free Exercise Claim.

In addition to violating Plaintiffs' rights under RFRA, the Mandate operates to deny Plaintiffs their right to the free exercise of religion even under the analytical framework announced in *Employment Div. v. Smith,* 494 U.S. 872 (1990). "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi,* 508 U.S. at 546. "Neutrality and general applicability are interrelated" and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531-32. Here, because the Mandate is not neutral or of general application, strict scrutiny applies—a demanding standard the government cannot survive.

A. The Mandate is Not Neutral.

It goes without saying that the government may not discriminate among classes of

religious believers based on their status as institutions, organizations, or preferred denominations. *See, e.g., Lukumi,* 508 U.S. at 533; *McDaniel v. Paty,* 435 U.S. 618 (1978).

Using its "discretion," the government has exempted from the Mandate every non-profit entity that has as its purpose the "inculcation of religious values," "primarily employs persons who share its religious tenets" and "primarily serves persons who share its religious tenets." 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012). Thus, under the Mandate, some religious organizations and institutions, like churches and their "integrated auxiliaries," *Id.,* enjoy a wholesale exemption from compliance, but other entities with religious principles and beliefs, like Sharpe Holdings, for example, are subject to them. Such a discriminatory system gives obvious preference to the religious beliefs and practices of certain religious institutions over those which do not satisfy the government's definition of "religious employer"; it gives a *religious* preference; a preference for entities that practice their religion according to standards set out by the government, over those who do not. The Mandate thus fails the test of religious neutrality by granting a blanket exemption to religious institutions while leaving other religious employers unprotected—the very kind of "religious gerrymander" which demonstrates a lack of neutrality. *Lukumi,* 508 U.S. at 534 ("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders") (citations omitted).

In *Frazee v. Employment Security Dept.,* 489 U.S. 829 (1989), the Court definitively dismissed the idea (implicit in the Mandate and its narrow religious exemption) that institutionalized or organized religion is somehow entitled to greater deference than individual beliefs: "we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal [to

work on the Sabbath] was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection." *Id.* at 834.

Finally, while it is unnecessary for Plaintiffs to show that they or their religious beliefs were targeted, there can be little doubt that the Mandate targets religiously-motivated conduct. "[T]he effect of a law in its real operation is strong evidence of its object." *Lukumi,* 508 U.S. at 535. *Prior* to the Mandate, religious employers like Sharpe Holdings and Charles N. Sharpe were permitted to fashion their health insurance plans according to their religious, moral, and conscientious beliefs. Now, in the wake of the Mandate, religious employers like Sharpe Holdings and Charles N. Sharpe must either abandon these religious, moral, and conscientious beliefs or pay substantial penalties.

B. The Mandate is Not Generally Applicable.

Because the Mandate does not apply to grandfathered health plans or religious employers as defined at 45 C.F.R. § 147.130(a)(iv)(B), and because employers with fewer than 50 employees can avoid the Mandate entirely by dispensing with health insurance altogether, the Mandate is not generally applicable.[20] Unlike in *Smith,* which involved "across-the-board criminal prohibition on a particular form of conduct," 494 U.S. at 1603, the Mandate is not an "across-the-board requirement" that all employers nationwide include contraceptive services in health plans for employees. The Mandate substantially burdens the religiously motivated conduct of the Plaintiffs while, at the same time, exempting a sizable population that either has nothing to do with religion or that meets the government's definition of a "religious employer." Such a scheme can hardly be described as generally applicable.

[20] Individuals who are members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds or are members of a "health care sharing ministry" are also exempt from the Act and therefore the Mandate. *See* 26 U.S.C. §§ 5000A(d)(2)(a)(i), (ii), (b)(ii).

There can be no merit to an argument that, because these exemptions do not create a subjective, case-by-case inquiry into the reasons for an employer's objection to covering contraceptive services, strict scrutiny cannot apply. *Smith* and *Lukumi* do not support this view. As now Justice Alito wrote for the Third Circuit in *Fraternal Order of Police v. City of Newark,* 170 F.3d 359 (3d Cir. 1999), holding that a police department violated the free exercise clause when it refused religious exemptions from prohibition against officers wearing beards while allowing medical exemption from the same prohibition:

> While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi,* it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. *If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.*

Id. at 365 (emphasis supplied).

In other words, *categorical* secular exemptions make a law *even less* generally applicable than *individualized* secular exemptions. And, in this case, there is something even more egregious than a categorical preference for secular exemptions over religious ones: there is a categorical exemption for one class of religious objectors over another class of religious objectors. In addition, recognizing a categorical exemption for employers with grandfathered health plans but not employers with a religious objection to abortion on demand like Sharpe Holdings and Charles N. Sharpe belies any assertion that the Mandate is generally applicable. By exempting some religious objectors, but not others, and exempting some employers for secular reasons but not religious ones, the regulations at issue are "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi.*" *Id.; see*

also Lukumi, 508 U.S. at 542 (1992) ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause protect[s] religious observers against unequal treatment . . .") (citation and internal marks omitted).

Where the government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardships' without compelling reason." *Lukumi,* 508 U.S. at 568 (quotations and internal citations omitted). Similarly, because the government under the Act and the Mandate has in place a system of *categorical* exemptions, it may not refuse to exempt entities that demonstrate religious hardship, like Sharpe Holdings, "without compelling reason." As previously explained, the government cannot satisfy the demanding standard of strict scrutiny.

Accordingly, Plaintiffs are likely to succeed on the merits of their Free Exercise Clause claim.

IV. Plaintiffs are Likely to Succeed on the Merits of their Establishment Clause Claim.

In addition to violating RFRA and the Free Exercise Clause, the Mandate violates the Establishment Clause for two reasons. First, the Mandate is subject to strict scrutiny under *Larson v. Valente,* 456 U.S. 228 (1982)—which it cannot survive as explained previously—because it differentiates between various religious organizations based upon whether they adhere to a particular theological viewpoint. Second, the Mandate fosters excessive entanglement with religion by authorizing government officials to decide whether an objecting organization's mission, values, and activities are truly religious or secular in nature and whether an organization and the individuals that it employs and serves share the same religious tenets.

In *Larson,* the Supreme Court applied strict scrutiny to a statute that imposed requirements upon religious organizations that solicited over half of their funds from non-members. *Id.* at 246-47. Although the government argued that it was "a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations," *Id.* at 246 n.23, the Court concluded that the statute "makes explicit and deliberate distinctions between different religious organizations" and has the effect of distinguishing between established religious organizations and new ones. *Id.* This differential treatment gave rise to the application of strict scrutiny. *Id.* at 246-47.

The Mandate is similar in key respects to the law at issue in *Larson.* Both provisions "make[] explicit and deliberate distinctions between different religious organizations." *See Id.* at 246 n.23. Both provisions disproportionally burden certain religious denominations and organizations while benefiting others.[21] The government cannot expressly single out one type of religious organization for disfavored treatment when it enacts statutes or rules, as it did here and in *Larson,* and then claim that it has not done so in litigation.

In addition, while the differential treatment of religious organizations in *Larson* reflected the theological view that soliciting funds from members of one's own faith is preferable to soliciting funds from non-members, the differential treatment of religious organizations in this instance reflects the theological view that religious organizations that emphasize religious education of members of their own faith are more *truly* religious, and deserving of an exemption, than faith-based organizations that pursue any other religious mission. This government-imposed orthodoxy runs counter to the longstanding principle that "no official,

[21] For example, various religious employers who employ and serve only members of their own faith are exempt from the mandate, which will benefit employers of some faiths more (e.g., Old Order Amish and Orthodox Jewish groups), while employers who employ and serve members of the broader community are subject to the Mandate.

high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943).

The theological position reflected in the Mandate, which limits religious exemptions to certain non-profits, specifically those that "inculcate" their religious values into "persons who share the religious tenets of the organization," is troublingly limited. Many organizations fulfill their religious mission not so much by instilling faith in those already in their membership, but by reaching out to non-believers, by employing and being fair to employees, by delivering social, medical, and other services, or by doing a host of other activities that they believe further their religious tenets and duties. *See Catholic Charities of Sacramento, Inc. v. Superior Court,* 85 P.3d 67, 106 (Cal. 2004) (Brown, J., dissenting) ("[A] crabbed and constricted view of religion . . . would define the ministry of Jesus Christ as a secular activity"). In addition, some business owners, such as Charles N. Sharpe, sincerely view the operation of all aspects of their business as a divinely-inspired calling and a way to share their faith through their example. *See generally Corp. of the Presiding Bishop v. Amos,* 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) ("It is . . . conceivable that some for-profit activities could have a religious character"). The theological line drawn by the Mandate between religious organizations that primarily share their faith through *words* and "less" religious organizations that primarily share their faith through *actions* is no less suspect than the line drawn in *Larson.*

The second reason the Mandate violates the Establishment Clause arises from the Mandate's partial religious employer exemption, an exemption that requires a government review of an organization's purpose(s), values, and activities so that the government may decide whether the organization has the inculcation of religious values as its purpose and whether the individuals employed and served by the organization share its religious tenets. This review runs

afoul of two key principles set forth in cases that have examined whether the government had become excessively entangled with religion. First, the government violates the Establishment Clause (and other First Amendment provisions) when it seeks to decide which of an organization's activities are truly religious and which are secular. Second, courts have often examined whether a law fosters more or less entanglement than an alternative approach would and have favored the less problematic option.

More than seven decades ago, the Supreme Court held unconstitutional a law empowering a government official to determine whether a cause for which donations were solicited was truly a "religious" cause. *Cantwell v. Connecticut,* 310 U.S. 296, 305-07 (1940). The Court reiterated this point in *Lemon v. Kurtzman,* 403 U.S. 602 (1973), when it held that a law providing a salary supplement to private school teachers that taught only secular courses created an excessive entanglement with religion. *Id.* at 617-20. The Court explained:

> [T]he program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

Id. at 619-20; *see Hernandez v. Comm'r of Internal Revenue,* 490 U.S. 680, 694 (1989).

Both because it is clear that the Mandate deems some religious believers to be more religious than others and, thus, worthy of exemption, and because the Mandate requires those seeking exemption to pass some sort of bureaucratic "religiousness" test, all of which violates decades-old Supreme Court jurisprudence in this area, it is likely that Plaintiffs will succeed on the merits of their Establishment Clause claim.

V. Plaintiffs Are Likely to Succeed on the Merits of their Free Speech Claim.

In addition to paying for coverage of services they find religiously objectionable, the Mandate requires Plaintiffs to pay for "patient education and counseling" related to those services, constituting compelled speech. *See* 76 Fed. Reg. 46621, 46622 (Aug. 3, 2011); 45 C.F.R. § 147.130. Being compelled to refer to abortifacients as "preventive care" also constitutes compelled speech in violation of the First Amendment.

These are examples of the kind of coerced speech that the Free Speech Clause of the First Amendment forbids. The Supreme Court has long held that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard,* 430 U.S. 705, 714 (1977) (quoting *Barnette,* 319 U.S. at 637). Put more succinctly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 573 (1995). Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny," as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 624, 642 (1994). The "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the government] commands, an idea they find morally objectionable." *Wooley,* 430 U.S. at 715.

Requiring Plaintiffs to pay for "education and counseling" in favor of services they find morally objectionable, and requiring them to refer to abortifacients as "preventive care," runs afoul of core Free Speech rights. As such, Plaintiffs are likely to succeed on the merits of their Free Speech claim.

VI. Plaintiffs Satisfy the Remaining *Dataphase* Factors.

An injunction should be issued because Plaintiffs' rights under RFRA and the First Amendment are being violated by the Mandate, as discussed previously. The deprivation of First Amendment freedoms even for a short period of time constitutes irreparable harm, *Elrod v. Burns,* 427 U.S. 347, 373–74 (1976), and "a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA." *Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir. 2001).

Moreover, and more immediately, Plaintiffs must act as soon as possible to have a health plan in place, by the plan renewal date of January 1, 2013, that is compliant with the law (including the Act, RFRA and the Constitution). Without an injunction in place by this date, Plaintiffs will be unable to arrange for a health insurance plan and employment arrangements consistent with their religious beliefs and principles. Once any action is taken by Charles N. Sharpe and Sharpe Holdings, Judi Diane Schaefer and Rita Joanne Wilson will have to react accordingly and immediately.

Any argument that the Defendants would be harmed by the issuance of a Temporary Restraining Order and Preliminary Injunction in this case would be frivolous. The Defendants themselves have already stayed their hand for thousands upon thousands of employers of 100 million employees. An order requiring them to refrain from applying the Mandate to Plaintiffs while this case is pending could not conceivably be said to cause harm to any of the Defendants' interests.

Finally, as discussed previously, the Mandate violates Plaintiffs' statutory rights under RFRA. The public has no interest in having Defendants violate those rights and, as such, an injunction will not negatively impact the interests of the public.

VII. This Court Should Not Impose a Bond on Plaintiffs.

According to Fed. R. Civ. P. 65(c), this court "may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." "The amount of the bond rests within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion." *Stockslager v Carroll Elec. Coop. Corp.,* 528 F.2d 949, 951 (8th Cir. 1976).

In this case, a bond requirement would further violate Plaintiffs' constitutional and statutory rights by causing them to have to pay to assert and defend their rights. Moreover, enjoining the enforcement of the Mandate as to Plaintiffs will not impose any monetary requirements on Defendants. Consequently, Plaintiffs request that no bond be imposed should an injunction issue. *See Phelps-Roper v. City of St. Charles, Mo*., 782 F. Supp. 2d 789, 794 (E.D. Mo. 2011) (not requiring a bond).

CONCLUSION

The Eighth Circuit has already ruled in the *O'Brien* case that a for-profit religious company, similarly situated to Sharpe Holdings, and its owner, similarly situated to Charles N. Sharpe, are entitled to preliminary injunctive relief from enforcement of the contraceptive mandate. *See* Exhibit 1. Plaintiffs ask for the same relief, though their religious objections are even *narrower*—they object not to funding any contraceptives whatsoever as the plaintiffs do in *O'Brien*, but only to those "contraceptives" that cause abortion.

For these and the other reasons herein, Plaintiffs respectfully request that the Court enter a temporary restraining order and a preliminary injunction against Defendants' enforcement of the Mandate against them pending the resolution of this case.

Respectfully submitted this 20th day of December, 2012.

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