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

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

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

There is no business exception in the Religious Freedom Restoration Act ("RFRA") or the Free Exercise Clause. Nothing in the Constitution, the Supreme Court's decisions, or federal law requires—or even suggests—that citizens forfeit religious liberty protection when they try to earn a living, such as by operating a corporate business. The idea that "a corporation has no constitutional right to free exercise of religion" is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.,* 370 N.W.2d 844, 850 (Minn. 1985). Instead of adopting the government's proposed prohibition on free exercise of religion in business, RFRA requires strict scrutiny whenever government action substantially burdens religion. The Mandate here forces Charles Sharpe and the entity through which he acts, Sharpe Holdings, Inc. ("Sharpe Holdings"), to choose between violating religious beliefs, paying outlandish fines, or abandoning business altogether. This pressure constitutes a substantial burden on religious exercise.

The strict scrutiny required by RFRA is true strict scrutiny as applied under First Amendment doctrines like free speech. *Gonzales v. O Centro Espirita Beneficente Uniao do*

Vegetal, 546 U.S. 418, 430 (2006). The Court has confirmed that strict scrutiny cannot be satisfied where, as here, the government exempts others selectively. *Id.* at 433. In *O Centro* the government's exemption of merely "hundreds of thousands" required a RFRA exemption for a few hundred more. *Id.* Here the government has excluded 100 million employees from the Mandate under its politically-motivated grandfathering clause. It cannot claim that "paramount" interests will suffer from an injunction protecting the Plaintiffs. The government incorrectly labels its grandfathering exclusion as a "phase-in," but the Patient Protection and Affordable Care Act ("Act"), its website, and the government's own data indicate that the exclusion will encompass tens of millions indefinitely. The government provides no evidence that religious businesses constitute more than a microscopic fraction of others the government has exempted.

The government could fully accomplish its identified interests in giving women free contraception to achieve health and equality by providing such items itself instead of by applying the Mandate against Plaintiffs' beliefs. The government seeks to neuter the least restrictive means test by not actually considering alternative options. This is flatly inconsistent with RFRA's text and with relevant case law.

ARGUMENTS IN REPLY

I. The Mandate violates RFRA.

The government's argument is an attempt to amend RFRA and the Free Exercise Clause. It tries to exclude categories from "free exercise" that Congress and the Constitution did not exclude: profit vs. non-profit activity, corporate vs. individual activity, and direct vs. indirect activity. RFRA asks a much simpler question: whether the government is imposing a substantial burden on the exercise of religion. 42 U.S.C. § 2000bb-1. RFRA requires strict scrutiny, which the government has not satisfied.

RFRA does not define "person" within the statute and therefore does not exclude a for-profit corporation like Sharpe Holdings from being a "person" under the statute. According to 1 U.S.C. § 1, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *See also Mohamad v. Palestinian Auth.,* 132 S. Ct. 1702, 1707 (2012) (explaining the word "person" often includes corporations, and Congress and the Supreme Court often use the word "individual" "to distinguish between a natural person and a corporation"); *Monell v. New York City Dept. of Social Sers.,* 436 U.S. 658, 687 (1978) ("by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis").

A. Mr. Sharpe and Sharpe Holdings exercise religious beliefs through the operation of Sharpe Holdings.

The government argues that Mr. Sharpe forfeits his rights to religious liberty to the extent he endeavors to operate a business by running a corporation. Yet case law is to the contrary. For example, in both *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.,* 859 F.2d 610, 620 n.15 (9th Cir. 1988), the Ninth Circuit recognized that individual owners of a for-profit and even "secular" corporation had their religious beliefs burdened by regulation of that corporation. Moreover, each corporation could sue to protect those beliefs.[1] *Id.*

The government's premise seems to be that one cannot exercise religion while engaging in business. But free exercise of religion is an expansive term indicating the practice of religious beliefs in any context. Judicially, that context has often involved the pursuit of financial gain in employment and commerce. In *Sherbert v. Verner,* 374 U.S. 398, 399 (1963), an employee's

[1] In the case at bar, both the corporation and its owner are plaintiffs.

religious beliefs were burdened by not receiving unemployment benefits; likewise in *Thomas v. Review Board,* 450 U.S. 707, 709 (1981). In *United States v. Lee,* 455 U.S. 252, 257 (1982), the Court ruled an employer's religious beliefs were burdened (the threshold inquiry here) by paying taxes for workers. In *Fraternal Order of Police v. City of Newark,* 170 F.3d 359, 360 (3d Cir. 1999), an employee's bid to continue his employment was burdened by discriminatory grooming rules.

Congress also has rejected the government's view. The Act itself lets employees and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions, without requiring them to be non-profits. 42 U.S.C. § 18023. These and similar protections[2] cannot be reconciled with the government's view that commerce excludes religion. A Mandate on an individual's business burdens the individual's religious beliefs. Many of the government's case citations interpret not "free exercise," but other terms such as "religious employer" in Title VII.

The government argues that because its Mandate applies to Sharpe Holdings, Mr. Sharpe is isolated from its effect. *Stormans* and *Townley* instead recognize the common sense view that an imposition on a family business corporation is no less an imposition on the family owners. The Mandate can only possibly be implemented by Mr. Sharpe. The corporate papers of Sharpe Holdings cannot implement the Mandate, nor can its brick-and-mortar buildings. The government's emphasis on a corporation's limited liability is a *non sequitur.* Limited liability is only one corporate characteristic, and not the relevant one here.

Second, Mr. Sharpe is the sole owner of Sharpe Holdings. The Mandate coerces him to use his property in a way that violates his religious beliefs, and penalizes his property if he does

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[2] *See, e.g.,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *id.* at Title VIII, Div. C, § 808; *see also* 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); and Pub. L. 112-74, Title V, § 507(d). See also 48 C.F.R. § 1609.7001(c)(7).

not comply. This is an intense burden. The government could not claim that when it fines a person it is not burdening him, but merely burdening his bank account and assets. The Supreme Court has stated that coercion against an individual's financial interests is a substantial burden on religion. *Sherbert,* 374 U.S. at 403–04.

The government's exclusionary attitude would push religion out of every sphere of life except the four walls of church, but this is not the law: "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United v. Federal Election Com'n,* 130 S. Ct. 876, 899 (2010). If for-profit corporations can have no First Amendment "purpose," newspapers and other media would have no rights. Instead of imposing categorical exclusions, the Court asks "whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978).

The government incorrectly asserts that no case recognizes the free exercise of religion through a business or corporation. The Ninth Circuit considered this point specifically in *Stormans,* affirming not only that a for-profit corporation's owners could assert free exercise claims, but that Stormans, Inc. itself could present those claims on the owners' behalf. 586 F.3d at 1119–20.

The government relies heavily on *United States v. Lee* for its claim that religion is incompatible with earning a living. But *Lee* made no such finding. It resolved the case only *after* recognizing the religious liberty interest of the employer, at which point it then it engaged in its scrutiny analysis. The government's oft-repeated quote from *Lee* about plaintiffs who "enter into commercial activity" is lifted out of context to suggest that people in businesses can assert no free exercise burdens. The Court found that "compulsory participation in the social security

system interferes with [Amish] free exercise rights" but that this limitation on religious liberty was justified because it was essential "to accomplish an overriding governmental interest." 455 U.S. at 257. *Lee* was decided under the First Amendment years before RFRA became law.

The government further argues that "[i]t is clear that Sharpe Holdings does not qualify as a 'religious corporation'; it is for-profit, it is not affiliated with a formally religious entity such as a church or synagogue, and it makes secular products." Memorandum, p. 12. According to the government, "Sharpe Holdings is distinguishable from the corporate plaintiff in *Tyndale House*" because the corporate plaintiff in that case gave a proportion of profits to charity, published religious materials, and its Articles of Incorporation mentioned religious purposes. Memorandum, p. 12, n. 4.

The Plaintiffs had not anticipated having to defend their "Christian-ness," but will do so. In the 1990s, Plaintiff Charles N. Sharpe founded a community in Northeast Missouri referred to collectively as the "Heartland Community" that centered around a drug and alcohol recovery program, at first for men, then women and finally for troubled youths. Second Declaration of Charles N. Sharpe, ¶ 1, attached hereto as Exhibit 1. From the beginning, the recovery program has aspired to be a Christ-centered environment to help people become productive citizens. *Id.* at ¶ 2. Part of this Christ-centered environment is Heartland Academy Community Church, where Mr. Sharpe is the pastor. *Id.* at ¶ 3.

The men and women in the recovery program often have families and monetary needs, so Mr. Sharpe sought to find a way for them to make a living while they were in the recovery program. *Id.* at ¶ 4. One of his first steps was to sell his herd of beef cattle and replace it with a much more labor-intensive dairy operation. *Id.* at ¶ 5. Beyond attempting to satisfy the program participants' purely economic needs, Mr. Sharpe believes that one of the means of recovery is

the development of a strong work ethic such as the Bible describes: "Whatever you do, work at it with all your heart, as work for the Lord, not for men, since you know that you will receive an inheritance from the Lord as a reward." Colossians 3:23-24. *Id.* at ¶ 6.

Capitalizing on the vast, undeveloped land in Northeast Missouri, Mr. Sharpe founded Sharpe Land & Cattle, which is now a division of Sharpe Holdings. *Id.* at ¶ 7. Sharpe Land & Cattle is a dairy farming and row-crop operation. *Id.* Sharpe Holdings operates an associated creamery and cheese-making operation. *Id.* at ¶ 8. There are non-farm related Sharpe Holdings enterprises as well, such as the "Solid Rock Café," a restaurant at Heartland, and "Cleansing Waters," a dry-cleaner. *Id*. The adults in the recovery program, along with some youths who are old enough to be legally employed, work at and earn paychecks from Sharpe Holdings. *Id.* at ¶ 9.

Whereas the for-profit plaintiff in *Tyndale House* donates much of its profits to charity, Sharpe Holdings has never made any profits. *Id.* at ¶ 10. It is a for-profit corporation in name only. *Id*. In essence, Mr. Sharpe pays for Sharpe Holdings to operate the farm and other enterprises at a loss so that the hundreds of men and women he strives to help, as well as parents of children who go to school at Heartland, and others in the community, can have a place to work. *Id.* at ¶ 11. This is, as with the rest of Heartland, all part of Mr. Sharpe's and Sharpe Holdings' Christian service and mission. *Id.* at ¶ 12.

B. The Mandate substantially burdens Plaintiffs' religious exercise.

The government argues that the Mandate presents no substantial burden on Plaintiffs' religion, relying to a great degree on two district court cases from the Seventh Circuit. But on Friday evening, December 28, the Seventh Circuit reversed one of those decisions. *Korte v. Sebelius,* No. 12-3841 (7th Cir. Dec. 28, 2012), attached hereto as Exhibit 2. It held as follows:

> In short, the Kortes have established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise. As such, the

> burden will be on the government to demonstrate that the contraception mandate is the least restrictive means of furthering a compelling governmental interest. Given this high bar, we think the Kortes have established a reasonable likelihood of success on their RFRA claim.

Id. at 5-6 (citations omitted). In granting an injunction pending appeal, the Seventh Circuit noted that the Eighth Circuit "apparently disagrees with our colleagues in the Tenth [referring to *Hobby Lobby*]. In a similar lawsuit, the Eighth Circuit granted a motion for an injunction pending appeal [citing *O'Brien*], albeit without discussion." *Id.* at 5. *See also Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744 (W.D. Pa. Dec. 28, 2012) (granting for-profit company and its owners temporary restraining order against enforcement of contraceptive mandate because "within a matter of days, Plaintiffs will have to decide between paying substantial fines or committing an act which they have shown to have a likelihood of violating their rights to religious freedom"), attached hereto as Exhibit 3.

In its memorandum (p. 17), the government argues that the burden on Plaintiffs is too attenuated to be substantial. The Seventh Circuit responded to this same argument:

> [W]e think this misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.

Id. It is worth noting that the case at bar involves a self-insured plan, not an insurance policy, as is the case in *O'Brien,* in which Judge Jackson considered O'Brien's claim to be too attenuated, based in part on the purchase of an insurance policy.

C. No compelling interest exists to burden the Plaintiffs' beliefs.

1. By excluding 100 million employees and others for various reasons, the government shows that it does not believe its interest is compelling.

The government's self-defined interest is to provide women free contraception and sterilization to promote their health and equality. It argues that its voluntary exclusion of 100

million employees from its Mandate somehow does not "leave[] appreciable damage to [its] supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547 (1993). But if the government really had an interest "of the highest order" to justify coercing Plaintiffs, *id.,* the government could not use grandfathering to omit 100 million employees from exactly the same Mandate. The government is content to leave tens of millions of women at the same "competitive disadvantage" it insists must be prevented at Sharpe Holdings.

The government argues that the grandfathering exclusion is transitory. Memorandum, pp. 22-23. This contradicts the text of the Act, the government's website, and its own data. HealthReform.gov continues to trumpet the fact that to garner votes for the Act, "President Obama made clear to Americans that 'if you like your health plan, you can keep it.'"[3] The grandfathering regulation "makes good on that promise by [p]rotecting the ability of individuals and businesses to keep their current plan." *Id*. The government insists it "preserves the ability of the American people to keep their current plan if they like it." *Id*. "Most of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." *Id*.

2. The government misinterprets the compelling interest test.

The government relies extensively on pre-RFRA *United States v. Lee* to characterize RFRA's scrutiny as not being very strict in commercial contexts, but the government gives short shrift to *O Centro Espirita, supra,* which was decided under RFRA. That case does not allow the Court to apply a "strict scrutiny lite" for any RFRA claim. "[T]he compelling interest test" of "RFRA challenges should be adjudicated in the same manner as constitutionally mandated

[3] HealthReform.gov, "Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered' Health Plans," *available at* http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_ have.html (last visited Dec. 30, 2012).

applications of the test," such as in speech cases. *O Centro,* 546 U.S. at 430. As scholars note:

> The standard thus incorporated [by RFRA] is a highly protective one. . . . The cases incorporated by Congress explain "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served," if "no alternative forms of regulation would combat such abuses". . . .

Douglas Laycock and Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," 73 TEX. L. REV. 209, 224 (1994).

The government insists from *U.S. v. Lee* that conscience should not be applied "on the statutory schemes which are binding on others in that activity." 455 U.S. at 261. But *Lee's* uniform tax is not comparable to the Mandate and its exceptions. The Mandate is many things, but "uniform" is not one of them.

O Centro was impatient with uniformity arguments such as are asserted here:

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."

546 U.S. at 436.

The law upheld in *U.S. v. Lee* was a tax to raise government funding. Governments cannot function without taxes. *Lee* ruled that if exemptions were allowed "[t]he tax system could not function." 455 U.S. at 260. But the nation has functioned for over 200 years without a federal mandate of employer contraception coverage in insurance.

D. Other means could fully achieve the government's interests.

The fact that the government could subsidize contraception itself for employees at exempt entities, and already does so on a wide scale, shows the government fails RFRA's least restrictive means requirement. Realizing this, the government seeks to redefine the least restrictive means test to be something entirely different: merely asking whether an exemption

would undermine the government's interest, and saying that the government needs only to consider its chosen means rather than alternatives. The government's test therefore would not consider either restrictiveness or means.

RFRA, in contrast, requires the Mandate to be "the least restrictive means," not the least restrictive means the government chooses. And it imposes its burden on the government, not the Plaintiffs. 42 U.S.C. § 2000bb-1. The government's view is inconsistent with *Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988). There, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be viewed as acceptable alternatives. *Id.* Here RFRA similarly requires full consideration of other ways the government can and does provide women free contraception. "The lesson" of RFRA's pedigree of caselaw "is that the government must show something more compelling than saving money." Laycock & Thomas, *supra*, at 224.

II. The government's complaints regarding delay are without merit.

The government cites a minute order in *Triune Health Grp. v. U.S. Dep't of Health & Human Servs.,* No. 1:12-cv-06756 (N.D. Ill. Dec. 26, 2012), ECF No. 45, which in turn cites *Ty, Inc. v. Jones Group Inc.,* 237 F.3d 891, 903 (7th Cir. 2001), for the proposition that a delay in filing a motion for a temporary restraining order "undermines [the Plaintiffs'] argument that they will suffer irreparable harm if the Court does not issue a TRO immediately." *Triune*, at 1.

In *Jones Group*, the plaintiff waited more than two years, *while damages were allegedly accruing*,[4] to apply for a preliminary injunction to stop trademark infringement. *Jones Group*, at 902-03. The district court nonetheless ruled that the delay was immaterial, and would only have been relevant to the extent the defendant was "lulled into a false sense of security or had acted in reliance on the plaintiff's delay." *Id.* at 903. The defendant in *Jones Group* presented no such evidence, and the Seventh Circuit ruled that "[t]he magistrate judge therefore properly decided that the evidence of mere delay alone, without any explanation on Jones' part of why such a delay negatively affected them, would not lessen Ty's claim of irreparable injury." *Id*.[5]

Like the defendants in *Jones Group* and *Ideal Industries*, the government makes no showing or even an allegation of the necessary prejudice. The case at bar is one of more than 40 challenging the contraceptive mandate, and the government has briefed the legal arguments at issue here repeatedly over the last few months. The Plaintiffs' claims show up in most if not all of the cases. And just as in those cases, the government has been able to file—in 33 pages—a memorandum in opposition to the Plaintiffs motion.

Jones Group and *Ideal Industries* are Seventh Circuit decisions. The only Eighth Circuit case the government cites in claiming that the Plaintiffs' "inexplicable and egregious delay further cuts against a finding of irreparable harm" is *Hubbard Feeds, Inc. v. Animal Feed S., Inc.*,

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[4] Both *Jones Group* and *Ideal Industries*, *infra*, unlike the case at bar, involved plaintiffs that had been subjected to alleged harm for some time but waited in applying for injunctive relief. The *Jones Group* plaintiff waited the aforementioned two years, *id*. at 895, and the *Ideal Industries* plaintiff filed a motion for a preliminary injunction but did not ask for a hearing until more than two years later. *Ideal Industries*, at 1021. Despite these delays, injunctions in both cases were upheld. *Id*. at 1028; *Jones Group* at 895.

[5] The case cited in *Jones Group* on the delay subject, *Ideal Industries, Inc. v. Gardner Bender, Inc.,* 612 F.2d 1018, 1025 (7th Cir. 1979) (citations omitted), held similarly:

> Gardner is correct in arguing that the plaintiff's delay in moving for a preliminary injunction has been considered by some courts in assessing the probability of irreparable injury. However, delay is only one among several factors to be considered; these cases do not support a general rule that irreparable injury cannot exist if the plaintiff delays in filing its motion for a preliminary injunction. On the contrary, this court has stated that mere passage of time cannot constitute laches. In evaluating the defense of laches, the *Helene Curtis* court looked to whether the defendant had been lulled into a false sense of security or had acted in reliance on the plaintiff's delay.

182 F.3d 598 (8th Cir. 1999), which involved a plaintiff that failed to assert his rights despite allegedly being damaged for *nine* years. *Id*. at 602. The government presents no case wherein a plaintiff was barred from obtaining injunctive relief *before* any alleged damage had even occurred, as is the case here.

The government also completely ignores the liquid nature of the issues in this case. The court cases and interrelated precedent, which changes almost by the day, are one issue; but events outside of challenges to the contraceptive mandate have been important in forming the Plaintiffs' decision to bring suit. First, there was a lawsuit challenging the Act as a whole, which was resolved by the Supreme Court in June. *Natl. Fedn. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Had the Supreme Court decided that case differently, the contraceptive mandate would not exist today. Then there was the presidential election, wherein Mitt Romney promised to repeal the Mandate if he was elected. That was resolved, obviously, just last month.

The rolling precedential landscape, too, has been important. The Plaintiffs were hopeful that the dust would settle and there would be guidance as to Plaintiffs' rights. In Missouri and in the Eighth Circuit, this has begun (very recently) to happen—favorably to the Plaintiffs. The Supreme Court, however, has not spoken, outside of Justice Sotomayor's refusal to grant an extraordinary writ under a "demanding standard" that required both that the writ be in aid of the Court's jurisdiction and a showing of "indisputably clear" entitlement to relief. *Hobby Lobby Stores, Inc. v. Sebelius,* No. 12A644, 568 U.S. ___ (Dec. 26, 2012) (Sotomayor, J., in chambers).

The Plaintiffs have not been eager to sue the federal government and expend the resources necessary to prosecute this suit. A delay in bringing suit, if one exists, should not be held against them due to this reluctance, and the cited cases say that a delay may be relevant only to the extent the government demonstrates that it was "lulled into a false sense of security or had

acted in reliance on the plaintiff's delay." *Jones Group*, at 903. There has been no such showing, and instead the government has been and is actively defending this case and other almost identical cases around the nation.

The Plaintiffs have demonstrated an irreparable injury, and the Western District of Missouri and the Eighth Circuit, along with the Seventh Circuit in *Korte* and several other jurisdictions have recognized that Plaintiffs' claim for injunctive relief is sufficient. On December 28, 2012, the District Court for the Eastern District of Pennsylvania granted a motion for a temporary restraining order, on almost identical facts, in a case that was, like the case at bar, filed just this month. *Conestoga, supra,* Exhibit 3.

III. A temporary restraining order preserves the status quo and does not harm the public interest.

The government argues that a temporary restraining order would harm the public interest. The government argues as if this motion requests a ban on contraception. But Defendant Sebelius admits that contraception is widely available for sale as well as in "community health centers, public clinics, and hospitals with income-based support."[6]

Further, the government cannot claim that a preliminary injunction here will devastate the public interest when it excludes tens of millions by grandfathering and it is giving many religious groups a remedy that it contends has the same effect as the injunction Plaintiffs request.[7]

The public has lived without this federal Mandate for all of history. But failure to issue an injunction will cause the Plaintiffs to face crippling penalties or add religiously objectionable coverage into their plan for the 2013 year, changing the status quo.

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[6] "A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius," (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Dec. 30, 2012).

[7] In litigation brought by such groups, the government claims its "temporary safe harbor" fully removes any of the Mandate's burdens. *See, e.g.,* Gov. Mot. to Dismiss at 14–16, *Belmont Abbey College v. Sebelius,* No. 1:11-cv-01989-JEB (D.D.C. doc.# 23-1, Apr. 5, 2012).

IV. That Sharpe Holdings is not eligible for the grandfathering exemption is properly pled.

The government claims that Plaintiffs do not have standing in this matter because Plaintiffs only asserted that "[n]one of the several exemptions from the law applies to any of the plaintiffs," and thus Plaintiffs have not specifically stated why the grandfathering exemption does not apply. This is incorrect. The government fails to mention paragraph 45 of the Plaintiffs' Complaint, which states as follows: "Given plan changes since March 23, 2010, the Plaintiffs' health insurance plan does not qualify as a grandfathered health plan." Charles N. Sharpe's first declaration, filed as an exhibit to Plaintiffs' Memorandum in Support, also contains the statement and therefore verifies same.

CONCLUSION

For these reasons and the reasons offered in their opening brief, the Plaintiffs respectfully request that this Court grant their motion for a temporary restraining order.

Respectfully submitted this 30th day of December, 2012.

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Certificate of Service

I hereby certify that on December 30, 2012, the foregoing was filed electronically with the Clerk of the Court for the United States District Court for the Eastern District of Missouri to be served by operation of the Court's electronic filing system upon the following registered CM/ECF participants:

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