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' RESPONSE TO BRIEF OF AMICI AMERICAN CIVIL LIBERTIES UNION ORGANIZATIONS

INTRODUCTION

The American Civil Liberties Union, defenders of constitutional liberties and rights of individual conscience, have filed an amicus brief not in defense of religious liberty and conscience rights, but in support of a government regulation that conscripts citizens, against their will and under pain of penalty, into facilitating actions in violation of their deeply held conscientious beliefs. Roger Baldwin, the founder of the ACLU, was jailed for eight months for his conscientious refusal to comply with the draft.[1] That kind of conscientious objection, similar to Plaintiffs' conscientious objection here, has a longstanding pedigree. As Thomas Jefferson, the author of the Declaration of Independence and Virginia's Act for Establishing Religious Freedom of 1786, noted, "[n]o provision in our Constitution ought to be dearer to man than that

[1] *See History of the ACLU – Eastern Missouri*, http://www.aclu-em.org/home/historyofaclu.htm (last visited Jan. 11, 2013).

which protects the rights of conscience against the enterprises of the civil authority."[2] This case is not about free access to emergency contraception, public health, or gender equality, but whether persons, like the Plaintiffs, can be compelled to act contrary to their conscience by a governmental edict that the government itself has chosen not to apply to hundreds of thousands of organizations and tens of millions of citizens nationwide.

SUGGESTIONS IN REPLY TO AMICI ACLU ORGANIZATIONS

To date, a majority of the for-profit companies that have sought injunctive relief regarding enforcement of the Mandate have been successful. *See O'Brien v. HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012) (order granting motion that requested a "preliminary injunction against Defendants' enforcement of the Mandate against them pending their appeal");[3] *American Pulverizing Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459-CV-S-RED (W.D. Mo. Dec. 20, 2012); *Korte v. Sebelius*, 12-3841, 2012 WL 6757353 (7th Cir. 2012); *Tyndale H. Publishers, Inc. v. Sebelius*, CIV.A. 12-163, 2012 WL 5817323 (D.D.C. 2012); *Legatus v. Sebelius,* 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 2012 WL 3069154 (D. Colo. July 27, 2012); *Monaghan v. Sebelius*, 12-15488, 2012 WL 6738476 (E.D. Mich. 2012); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs.,* No. 12 C 6756,

[2] Letter from President Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Conn. (Feb. 4, 1809). One provision of Jefferson's Bill for Establishing Religious Freedom, originally drafted in 1779, has special relevance to the instant action: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *A Bill for Establishing Religious Freedom*, in 5 THE FOUNDER'S CONSTITUTION, No. 37, p. 77 (P. Kurland & R. Lerner eds. 1987).

[3] One of Amici's counsel is reported to have observed that the Eighth Circuit's ruling was not unexpected. He opined, "These are serious, weighty questions that deserve serious attention from the court of appeals, so maintaining the status quo while they decide the case is not a huge setback." *Ruling temporarily blocks contraception mandate*, http://www.semissourian.com/story/1917939.html (last visited Jan. 11, 2013).

slip op. at 1 (N.D.Ill. Jan. 3, 2012).[4] And for good reason. The argument advanced by Amici, *i.e.*, that the Mandate does not impose a substantial burden on Plaintiffs' exercise of religion, is wholly unsupportable under relevant decisional law.

Amici are correct to cite to *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012), and *Love v. Reed*, 216 F.3d 68 (8th Cir. 2000), for establishing the parameters of what constitutes a substantial burden under Eighth Circuit precedent:

> Thus, in a RFRA analysis, a rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both "sincerely held" by and "rooted in [the] religious belief[s]" of the party asserting the claim or defense. *See United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007); *see also Love v. Reed,* 216 F.3d 682, 689 (8th Cir. 2000) (holding that a rule imposes a substantial burden on the free exercise of religion when it provides "no consistent and dependable way" to observe a religious practice).

Ali, 682 F.3d at 710. But, as shown below, these cases support Plaintiffs' claim of substantial burden. Charles N. Sharpe states in his declaration that he has a religious duty to strive to conduct the business of Sharpe Holdings in a manner consistent with the principles of his Christian faith (Dec. of Charles N. Sharpe, Doc. 4-2, ¶ 7); that Sharpe Holdings promotes his Christian beliefs, practices, and aspirations (¶ 7); that in paying for employee health insurance, he 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 (¶ 12); that he believes that actions intended to terminate an innocent human life by abortion are gravely sinful (¶ 12); and that the HHS Mandate prevents him from following the dictates of his faith in the

[4] The five contrary decisions are *Hobby Lobby Stores, Inc. v. Sebelius,* No. 12-6294 (10th Cir. Dec. 20, 2012), *Grote Indus. v. Sebelius,* No. 4:12–cv–00134, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *Autocam Corp. v. Sebelius,* No. 12–2673, slip op. (6th Cir. Dec. 28, 2012), *Annex Medical, Inc. v. Sebelius*, 2013 WL 101927 (D. Minn. 2013), and *Conestoga Wood Specialties Corp. v. Sebelius,* No. 12-6744 (W.D. Pa. Jan. 11, 2012). The court in *Conestoga* refused to enter a preliminary injunction, finding an insufficient likelihood of success on the merits, after having previously entered a temporary restraining order. Distinguishing the case at bar, the *Conestoga* court noted that while it is the rule in the Eight Circuit that "[i]n balancing the equities no single factor is determinative" (the court calling this a "sliding scale"), the Third Circuit "has no such 'sliding scale' standard, and Plaintiffs must show that all four factors favor preliminary relief." *Id*. at *9.

operation and management of Sharpe Holdings, and violates the religious-based principles and policies he has established for Sharpe Holdings (¶ 27).

Based on these undisputed statements of fact, there can be no doubt that the Mandate imposes a substantial burden on the Plaintiffs' exercise of religion. The "rule imposes a substantial burden on the free exercise of religion" because it "prohibits" Charles N. Sharpe from operating his business pursuant to his "sincerely held" religious beliefs, a practice "rooted" in his Christian faith. *Ali*, 682 F.3d at 710. Given the ruinous penalties imposed by the Mandate, Mr. Sharpe has "no consistent and dependable way of exercising" his faith in how he runs his business, as the Mandate compels him to act contrary to his faith. *Love*, 216 F.3d at 689. In short, Mr. Sharpe must choose either to follow his religious beliefs or comply with the Mandate; he cannot, under present circumstances, do both. According to well-established law, this impossible choice creates a substantial burden. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (finding substantial burden upon religious exercise where a person was forced "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"); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (burden was "not only severe, but inescapable," requiring the religious claimants "to perform acts undeniably at odds with fundamental tenets of their religious belief"); *Tyndale*, at *12 ("Government action that creates such a Hobson's choice for the plaintiffs amply shows that the contraceptive coverage mandate substantially burdens the plaintiffs' religious exercise."); *see also Legatus*, at *6 (finding that the Mandate imposes a substantial burden on the religious exercise of a Catholic business owner).

For these reasons, Amicis' assertion that "the connection between these programs and Plaintiffs' religious beliefs is too attenuated" makes no sense. Amicus, at 8. The Mandate

requires that Plaintiffs subsidize, pay for, and provide health insurance that includes abortifacients or incur enormous financial penalties. But it is Plaintiffs' belief that they cannot subsidize, pay for, or provide emergency contraception through a health plan and remain consistent with their religious beliefs and principles. There can be no more direct and immediate religious conflict than this. It is thus entirely irrelevant that Plaintiffs "remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives." Amicus, at 6-7 (quoting the district court opinion in *O'Brien*, at *6). At issue in this case is not Plaintiffs' opposition to abortifacients as such; the issue rather is being *forced to subsidize, provide, and pay for them*.

The argument that Plaintiffs' claim of substantial burden is undermined by the intervening, independent decisions of third parties, *i.e.*, employees of Sharpe Holdings, is meritless. Even if the burden is characterized as indirect, which it is not, this should not lead to a finding that Plaintiffs are not substantially burdened. The religious claimants in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Bd.*, 450 U.S. 707 (1981), were not forced by law to work on the Sabbath and produce armaments, and yet the Supreme Court found that their religious exercise was nonetheless substantially burdened through the denial of unemployment benefits, which indirectly pressured them to violate their religious beliefs. "While the compulsion may be *indirect*, the infringement upon free exercise is nonetheless *substantial*." *Thomas*, 450 U.S. at 718 (emphasis added); *see also Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (a rule may be "constitutionally invalid even though the burden may be characterized as being only *indirect*") (emphasis added). Here, however, the burden imposed by the Mandate is far heavier than in *Sherbert* or *Thomas*; it affirmatively compels Plaintiffs to undertake actions in direct violation of their religious beliefs. The Mandate is therefore akin to

laws requiring Adell Sherbert to work on her Sabbath, or Eddie Thomas to help manufacture arms, backed by the sanction of ruinous penalties for non-compliance.

Indeed, as the Seventh Circuit correctly found in *Korte*, explicitly disagreeing with the rationale of the district court in *O'Brien*:

> 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.

Korte v. Sebelius, 12-3841, 2012 WL 6757353, at *3 (7th Cir. 2012) (emphasis in original).

Under Amicis' rationale, a governmental mandate requiring a local church or parish to provide coverage for free surgical late-term abortions or the means to carry out euthanasia would not substantially burden the religious exercise of such entities, as the "circuit" would be broken by the independent decisions of the individuals seeking the abortion or euthanasia.[5] Also, the religious exercise of the claimant in *Thomas* would not have been substantially burdened because the "circuit" would have been broken by multiple independent decisions concerning where the manufactured armaments would be shipped and how they would be used at some indefinite point in the future. The absurdity of this logic is readily apparent. The Mandate requires that Plaintiffs, in violation of their sincerely held religious beliefs and exercise, pay for a health plan that makes abortifacients freely available to employees. There is nothing circuitous, attenuated, or indirect about any of this.[6] But, as previously explained, whether it is characterized as a direct or indirect burden, the Mandate nonetheless imposes a substantial burden upon Plaintiffs.

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[5] Amicis' analogy to school vouchers, citing *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), Amicus, at 7-8, is flawed; a government's *voluntary choice* to allow individuals to decide where they want funds for their children's education to be directed is entirely different than a mandate that individuals and entities must, *in violation of their freedom of conscience*, provide arrange, pay for, and facilitate ready access to goods and services that they believe to be gravely immoral.

[6] As such, the suggestion that the Mandate "will offend plaintiffs' religious beliefs only if an [] employee (or covered family member) makes the independent decision to use the plan" is not true. Amicus, at 6-7 (quoting *O'Brien*, 2012 WL 4481208, *7).

The burden is not alleviated by an employee's decision whether to make use of the abortifacients. Indeed, forcing Plaintiffs to pay for a health plan that includes these drugs and devices is the same as forcing Plaintiffs to provide employees with coupons for free abortions paid for by the Plaintiffs themselves. Under Amicis' theory, if the government required Plaintiffs to cover late-term surgical abortions, Plaintiff's religious exercise would not be substantially burdened.

Amicis' analogies to paying salaries or paying taxes are misguided. Amicus, at 4 and 7. In the case of salaries, giving someone money with no strings attached, that he may later decide to save, donate, or spend on one of a thousand different goods or services, is completely different than *being forced to purchase a specific good or service* that one morally objects to and then make that good or service freely available to others. An example analogous to the Mandate would be a mandate forcing an employer who believes that buying and consuming alcohol or pork is sinful to pay to make it freely available to any interested employee; such a mandate would clearly impose a substantial burden upon the employer's religious exercise. Plaintiffs do not place restrictions on how their employees use their salaries, whether for emergency contraception or anything else; Plaintiffs object, however, to being forced to directly facilitate and subsidize abortifacients through their health plan, and drawing that line is perfectly reasonable. *See Thomas*, 450 U.S. at 715 ("We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.").

A regulation that substantially burdens religious exercise "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008). Religious exercise becomes "effectively impracticable," when the government exerts "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Id.* (quoting *Thomas*, 450 U.S. at 718). The "substantial burden" analysis therefore focuses on the amount of governmental "pressure," not on moral attenuation, an inquiry that *Thomas* places off limits. *See Thomas*, 450 U.S. at 715.

In addition, the burden imposed by the Mandate is clearly more direct and substantial than the burden imposed by the payment of taxes into the general Treasury, which the government then allocates for thousands of different expenditures. Being forced to directly arrange for and directly subsidize a specific set of goods and services to which one morally objects is a far more concrete harm than paying taxes.[7] It should be noted, however, that in *United States v. Lee*, 455 U.S. 252 (1982), the Supreme Court held that the requirement to pay social security taxes substantially burdened a for-profit Amish employer's religious exercise. Noting that courts "are not arbiters of scriptural interpretation," the Court held that it is beyond "the judicial function and judicial competence" to determine the proper interpretation of religious faith or belief. *Id*. at 257 (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.* While the *Lee* Court ultimately held that the tax survived strict scrutiny, it did not deny — as Amici do here — the existence of a

[7] Relying on *Thomas*, the *Newland* court rejected the same tax argument Amici proffer here. *See Newland*, 2012 WL 3069154, *6, n.9 ("[T]he government argues that because Plaintiffs routinely contribute to other schemes that violate the religious beliefs alleged here, the preventive care coverage mandate does not substantially burden Plaintiffs' free exercise of religion. This argument requires impermissible line drawing, and I reject it out of hand.") (citing *Thomas,* 450 U.S. at 715).

substantial burden. *Id.* Following the logic of the Supreme Court in *Lee* leads to one conclusion: forcing Plaintiffs to subsidize coverage of emergency contraception, as required by the Mandate, imposes a substantial burden on Plaintiffs' religious exercise.[8]

Moreover, by granting a permanent exemption for objecting religious employers (and those offering grandfathered plans) as well as a temporary exemption for objecting non-profit employers, the government itself has implicitly acknowledged that the Mandate directly implicates religious belief and practice and that forcing certain employers to provide contraceptive services in their group health plans would impose more than an attenuated or minimal burden. Plaintiffs have the same religious-based objection as permanently exempt religious employers or temporarily exempt non-profit employers. The for-profit nature of Plaintiffs' businesses does not change the substantial burden imposed by the Mandate.[9]

Amicis' citation to the Fourth Circuit decision, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), actually undermines their position. Amici, at 4. Assuming the court's substantial burden analysis was correct, the court ultimately evaluated whether application of the Fair Labor Standards Act ("FLSA") requirements at issue satisfied strict scrutiny under the First Amendment. *Id.* at 1398. Thus, to the extent the case is even relevant to the one at bar, *Dole* stands for the proposition that even a limited burden on religious exercise can trigger strict scrutiny — which, as Plaintiffs have explained, the government Mandate cannot survive. *See* Pl.

[8] The decisions in *Hobby Lobby* and *Korte* (at the district court level, which was reversed) both cited *Lee* for its conclusory observation that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee,* at 261. However, this statement related to the Court's holding that the tax survived strict scrutiny, *not* to the issue of whether a substantial burden was present, as the Court concluded that the tax did, in fact, substantially burden the employer's religious exercise.

[9] Amici's argument, relying on the district court opinion in *O'Brien*, that Plaintiffs are attempting to impose their religious values on their employees is meritless, Amicus, at 7; as the *Tyndale* court correctly held, "the *O'Brien* court's statement that the RFRA 'is not a means to force one's religious practices upon others,' is not relevant to whether a plaintiff's religious exercise is substantially burdened, but rather applies to the issue of whether the government's interest is sufficiently compelling to justify the substantial burdening of a plaintiff's religious exercise." *Id.* at *12.

PI Memo., at 9-14 (Doc. 17). In *Dole*, a pre-RFRA case, the Fourth Circuit indeed found that the FLSA imposed only a "limited burden" on the defendant's exercise of religion, but for reasons that are wholly inapplicable to the case at bar. *Id*. at 1398. Although the defendant church cited a bible passage allegedly supporting its male-only, head-of-household pay supplement, the Fourth Circuit noted that the actual reason for the supplement was to attract teaching candidates. *Id*. at 1392. As to the importance of the supplement to the defendant, the court noted that the defendant had discontinued the pay supplement four years before the court's decision was handed down. *Id*. at 1397-98. Finally, members of the defendant church testified that "the Bible does not mandate a pay differential based on sex" and that "no Shenandoah doctrine prevents [its schools] from paying women as much as men or from paying the minimum wage." *Id*. at 1397.

The essential problem with the Ninth Circuit case cited by Amici, *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), Amicus, at 6, is that the Ninth Circuit's understanding of "substantial burden," at least as articulated in that case, not only conflicts with the Eighth Circuit's understanding of "substantial burden," it predates a critical amendment made to RFRA in 2000. In *Goehring*, the court stated that the plaintiff-students had to establish that the "University's subsidized health insurance program imposes a substantial burden on a *central tenet of their religion*." *Id*. at 1299 (emphasis supplied). In 2000, however, four years after the *Goehring* decision, the definition of "religious exercise" in RFRA was amended to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4). *See*, P.L. 106-274, § 7(a) (Sept. 22, 2000), 114 Stat. 806. Thus, in contrast to how RFRA stood in 1996, today "RFRA extends free exercise rights even to religious practices that are *not compelled by or central to* a particular belief system." *Ali*, 682 F.3d at 710 (emphasis added) (citing *Van Wyhe v. Reisch*, 581

F.3d 639, 656 (8th Cir. 2009)).[10] In light of these facts, the decision is *Goehring* has no persuasive value in evaluating whether Plaintiffs' religious exercise is substantially burdened by the Mandate.

Finally, Amicis' several citations to the district court opinion in *O'Brien* (Amicus, pp. 3-4, 7-8) are unpersuasive for reasons even beyond the Eighth Circuit's grant of the O'Brien plaintiffs' motion for a preliminary injunction. Unlike Sharpe Holdings, which utilizes a self-insured plan, the plaintiffs in the *O'Brien* case used a third-party insurance plan (which is also the case in *Conestoga* and *Annex Medical, 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*.

[10] In the same year as the *Goehring* decision, the Eighth Circuit held, consistent with how RFRA would be amended four years later, that "substantial burden" should be construed broadly. *See In re Young,* 82 F.3d 1407, 1419 (8th Cir. 1996) ("[D]efining substantial burden broadly to include religiously motivated as well as religiously compelled conduct is consistent with the RFRA's purpose to restore pre-*Smith* free exercise case law"), *vacated on other grounds*, 521 U.S. 1114 (1997), *remanded and reaff'd*, 141 F.3d 854 (8th Cir. 1998).

CONCLUSION

For the foregoing reasons, and for the reasons set forth previously, Plaintiffs respectfully renew their request that their Motion for a Preliminary Injunction be granted.

Respectfully submitted this 12th day of January, 2013.

Respectfully submitted,

OTTSEN, LEGGAT AND BELZ, L.C.

By: /s/ Timothy Belz
Timothy Belz #MO-31808
112 South Hanley, Second Floor
St. Louis, Missouri 63105-3418
Phone: (314) 726-2800
Facsimile: (314) 863-3821
tbelz@omlblaw.com

Attorney for Plaintiffs
Sharpe Holdings, Inc.,
Charles N. Sharpe,
Judi Diane Schaefer and
Rita Joanne Wilson

Certificate of Service

I hereby certify that on January 12, 2013, 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:

Jacek Pruski
U.S. DEPARTMENT OF JUSTICE - CIVIL DIVISION
Federal Program Branch
20 Massachusetts Avenue, NW
P.O. Box 883
Washington, DC 20530

Christina Bahr Moore
OFFICE OF U.S. ATTORNEY
111 S. Tenth Street, 20th Floor
St. Louis, MO 63102

Grant R. Doty
Anthony E. Rothert
Brigitte Amiri
American Civil Liberties Union—Eastern Missouri

/s/ Timothy Belz