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

MARY FRANCES CALLAHAN, MARY CLARE BICK, JAMES PATRICK BICK, JR., WILLIAM JOSEPH BICK, MARY PATRICIA DAVIES, JOSEPH JOHN BICK, FRANCIS XAVIER BICK, MARY MARGARET JONZ, MARY SARAH ALEXANDER, BICK HOLDINGS, INC., and BICK GROUP INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 4:13-cv-00462
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official Capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as the Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and SETH D. HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

FEDERAL STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS

INTRODUCTION

Plaintiffs, Mary Frances Callahan, Mary Clare Bick, James Patrick Bick, Jr., William Joseph Bick, Mary Patricia Davies, Joseph John Bick, Francis Xavier Bick, Mary Margaret Jonz, and Mary Sarah Alexander (hereinafter "the Bicks"), seek preliminary injunctive relief so they may run their businesses, Plaintiffs Bick Holdings, Inc., Bick Group Inc., and the subsidiaries thereof (hereinafter "the Bick Companies"), in a manner consistent with their religious values and beliefs. Absent such relief, the Bicks will face a stark and unavoidable choice: abandon their beliefs in order to stay in business, or abandon their businesses in order to stay true to their beliefs. That is a choice that the federal government, bound by the First Amendment and the Religious Freedom Restoration Act ("RFRA"), may not lawfully impose upon them without demonstrating a compelling interest served through the least restrictive means available. The government cannot make that showing here.

The choice the government imposes on Plaintiffs, through regulations requiring them to provide employee insurance coverage for contraceptives, abortifacients, and counseling to which they are morally opposed ("the Mandate"), is a choice the government has decided *not* to impose on thousands of other employers who share the Bicks' views, and tens of thousands more employers (of well over 100 million employees) who may or may not share their views. This massive under-inclusiveness shows that the government's purported interests are remarkably *non*-compelling.

Indeed, twice now, on facts virtually identical to those presented here, the Eighth Circuit Court of Appeals has preliminarily enjoined application of the Mandate. *See O'Brien v. U.S. Dep't of HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Annex Med. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013). Another district court within this district has done

the same, *see Sharpe Holdings, Inc. v. U.S. Dep't of HHS*, No. 2:12-CV-92, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012), as have the Seventh Circuit and several other district courts, including the U.S. District Court for the Western District of Missouri. *See Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012).

For the reasons stated herein, including the fact that the Eighth Circuit has already held that plaintiffs in the same situation as Plaintiffs herein are entitled to preliminary injunctive relief, this Court should grant Plaintiffs a preliminary injunction against the Mandate.

FACTUAL BACKGROUND

Plaintiffs, the Bicks, are nine siblings who own and control the Bick Companies, businesses involved in data center consulting, design, maintenance, service and cleaning, as well as information technology consulting for healthcare providers. Ex. A, Decl. of James P. Bick, Jr., ¶¶ 3, 5 . The Bicks are adherents of the Catholic religion. *Id.* at ¶ 8. Their religious convictions include the beliefs that human life is a sacred gift from God and that individuals are not permitted to cause, or pay for, directly or indirectly, the intentional, unjustified termination of such life. *Id.* at ¶ 9. The Bicks seek to manage and operate the Bick Companies in a manner that reflects these sincerely held religious beliefs. *Id.* at ¶ 8. In fact, the Bick Group website sets forth that the first "Core Value" of BHI and its subsidiaries is: "To Honor God. We believe in the Christian principles that form the societal mores the founders of our country believed necessary for our Democracy to work. In our dealings with customers, employees, owners, and all members of the community, we must above all strive to act in a manner which adheres to the Judeo-Christian principles of ethical behavior." *Id.* at ¶ 11; Ex. 1.

The Bick Companies currently have approximately 196 full-time employees. *Id.* at ¶ 7.

Of these employees, 143 are covered by a health insurance plan paid for by Bick Group Inc. *Id.* As explained further below, Defendants' Mandate requires group health plans, such as the plan the Bick Companies provide for their employees, to include coverage, without cost sharing, for contraceptives (including abortion-inducing drugs), sterilization, and related patient education and counseling. The Bicks hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. *Id.* at ¶ 12. They believe that actions intended to terminate an innocent human life by abortion are gravely sinful. *Id.* Further, the Bicks adhere to Catholic Church teaching regarding the immorality of contraception and sterilization. *Id.* They believe that they cannot arrange for, pay for, facilitate, or provide coverage for contraceptives, sterilization, abortion or related education and counseling without violating their religious beliefs. *Id.* at ¶ 13. In other words, direct subsidization of immoral goods or services is itself an immoral act that the Bicks' faith forbids, regardless of whether those goods or services are ever used by others. *Id.* The Bicks wish to manage and operate their businesses in a manner that reflects their religious beliefs. *Id.* at ¶¶ 8, 11.[1]/ Despite the religious beliefs of the Bicks, however, the Bick Companies are not exempt from the dictates of the Mandate. *Id.* at ¶ 19, 20.

The Bicks discovered earlier this year that the Bick Companies' current group health plan includes coverage for contraception and abortifacients.[2]/ *Id.* at ¶ 14. This is an error that the

[1]/ Plaintiff Bick Group Inc. is wholly owned by Plaintiff Bick Holdings, Inc. All other Bick Companies are wholly owned subsidiaries of either Bick Group Inc. or Bick Holdings, Inc. While the Bicks operate Bick Holdings, Inc. through a Board of Directors, the Bicks maintain ultimate responsibility and authority for setting and approving all phases and policies of the business of Bick Holdings, Inc., Bick Group Inc., and the subsidiaries thereof. (Ex. A, at ¶).

[2]/ One drug that the FDA classifies as "contraceptive," and that must be paid for by employers subject to the Mandate, is ulipristal (marketed as the emergency contraceptive "Ella"). Ulipristal (HRP 2000) acts in a similar way to RU-486, a formulation that is used for medically induced abortions. *See* A. Tarantal *et al.*, *Effects of Two Antiprogestins on Early Pregnancy in the Long-Tailed Macaque (Macaca fascicularis)*, 54 Contraception 107-115 (1996), at 114 ("[S]tudies with mifepristone and HRP 2000 have shown both antiprogestins to have roughly comparable activity in terminating pregnancy when administered during the early stages of gestation."); G. Bernagiano & H. von Hertzen, *Towards more effective emergency contraception?*, 375 The Lancet 527-28 (Feb. 13, 2010) ("Ulipristal has similar biological effects to mifepristone, the antiprogestin used in medical abortion.").

Bicks wish to correct. *Id.* at ¶¶ 8, 17. Plaintiffs are in need of immediate relief from the Mandate to allow time to obtain insurance coverage that complies with the Bicks' religious beliefs by not causing them to arrange for, pay for, or otherwise support employee health plan coverage for contraceptives, abortifacients, or related education and counseling. *Id.* at ¶ 17, 18. If Plaintiffs fail to comply with the Mandate or drop employee group health coverage altogether, the Bick Companies will likely face substantial penalties. *Id.* at ¶ 21, 22.

THE REGULATIONS BEING CHALLENGED

On March 23, 2010, the Affordable Care Act (hereafter "ACA") became law. The ACA requires group health plans to provide no-cost coverage for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration (hereafter "HRSA"). 42 U.S.C. § 300gg-13(a)(4). The HRSA guidelines include, among other things, "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." WOMEN'S PREVENTIVE SERVICES: REQUIRED HEALTH PLAN COVERAGE GUIDELINES, Health Res. & Servs. Admin., http://www.hrsa.gov/womensguidelines/ (last visited Nov. 15, 2012). FDA-approved contraceptive methods include emergency contraception (such as Plan B and Ella), diaphragms, oral contraceptive pills, and intrauterine devices.[3]/

On August 3, 2011, Defendants promulgated an interim final rule, 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 (2011). This interim rule, which, along with the

[3]/ FDA, BIRTH CONTROL GUIDE (Oct. 19, 2011), http://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/ucm282014.pdf.

religious employer exemption described below, comprises the Mandate, was adopted as final, "without change," on or about February 15, 2012. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012).

Not all employers are required to comply with the Mandate. Grandfathered health plans, that is, plans in existence on March 23, 2010, and that have not undergone any of a defined set of changes,[4]/ are exempt from compliance with the Mandate. *See* 75 Fed. Reg. 41726, 41731 (July 19, 2010).[5]/ Defendant HHS estimates that "98 million individuals will be enrolled in grandfathered group health plans in 2013." *Id.* at 41732. Also exempt from the Mandate are non-profit "religious employers," as defined at 45 C.F.R. § 147.130(a)(iv)(B).[6]/ In addition, employers with fewer than fifty full-time employees can avoid providing Mandate-required coverage by not providing an employee health plan because they have no obligation to provide health insurance under the ACA. 26 U.S.C. § 4980H(c)(2)(A). Non-exempt employers that fail to provide an employee health insurance plan will face annual fines of roughly $2,000 per full-time employee, minus the first thirty employees, *see* 26 U.S.C. §§ 4980H(a), (c)(1), and those that provide coverage that does not comply with the Mandate may be subject to penalties of $100 a day per employee. *See* 26 U.S.C. § 4980D(b)(1). In sum, the challenged regulations contain categorical exemptions that exclude the employers of literally tens of millions of Americans and their dependents from the requirement to provide "preventative services" coverage.

ARGUMENT

This Court may properly exercise its discretion and grant Plaintiffs injunctive relief under Fed. R. Civ. P. 65. In exercising that discretion, this Court considers "(1) the threat of irreparable

---

[4]/ *See* 26 C.F.R. § 54.9815-1251T (2010); 29 C.F.R. § 2590.715-1251 (2010); 45 C.F.R. § 147.140 (2010).

[5]/ *See* 42 U.S.C. § 18011 (2010); 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

[6]/ 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012). A religious employer was defined as one that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under IRC §§ 6033(a)(1) and (a)(3)(A)(i) or (iii).

harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113, 114 (8th Cir. 1981) (en banc); *accord Phelps-Roper v. City of St. Charles*, 782 F. Supp. 2d 789, 791 (E.D. Mo. 2011). "In balancing the equities no single factor is determinative," *id.*, but the movant must make a threshold showing of being likely to prevail on the merits. *Planned Parenthood of MN v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RFRA CLAIM.

For purposes of their motion, Plaintiffs rely on Count I of their Complaint (RFRA). (Doc. 1.) Plaintiffs preserve the other claims and issues in their Complaint.

The Eighth Circuit has issued injunctions pending appeal in two cases that are, in all material respects, indistinguishable from this case. *O'Brien v. U.S. Dep't of HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Annex Med. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013). Another court within this very district has granted a temporary restraining order against enforcement of the Mandate, *see Sharpe Holdings, Inc. v. U.S. Dept. of HHS*, No. 2:12-CV-92, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012) (relying in part on *O'Brien* in concluding that plaintiffs had shown a reasonable likelihood of success on the merits), and the U.S. District Court for the Western District of Missouri has granted a preliminary injunction, *see Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012). In fact, since July of 2012,

nine courts, including the Seventh Circuit, in a total of thirteen separate cases, have preliminarily enjoined application of the Mandate to for-profit employers like Plaintiffs.[7]/

A. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion.

Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The only time the federal government may substantially burden a person's exercise of religion is if "it demonstrates that application of the burden *to the person* (1) is in furtherance 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) (emphasis added).

In *Annex Medical*, the Eighth Circuit considered a motion seeking preliminary relief that was nearly identical to Plaintiffs' motion. 2013 App. LEXIS 2497. There, appellants argued that the Mandate substantially burdened their exercise of religion by requiring them to violate their Catholic faith, specifically the religious belief that paying for a group health plan that includes "coverage for abortifacient drugs, sterilization, and contraception supplies and prescription medications . . . is sinful and immoral." *Id.* at *3 (internal quotations omitted). Appellants

---

[7]/ *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Grote v. Sebelius*, No. 13-1077, 2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 23764 (7th Cir. Dec. 28, 2012); *Monaghan v. Sebelius*, 2012 U.S. Dist. LEXIS 182857 (E.D. Mich. Mar. 14, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 30265 (W.D. Pa. Mar. 6, 2013); *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 4:13-cv-00036 (W.D. Mo. Feb. 28, 2013); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs*., No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs*., No. 12-cv-3459, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publ'rs, Inc. v. Sebelius*, No. 12-1635, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

But see Conestoga Wood Specialties Corp. v. Sebelius, No. 12-6744, 2013 U.S. Dist. LEXIS 4449, at *10–14 (E.D. Pa. Jan. 11, 2013), *appeal docketed*, No. 13-1144, 2013 U.S. App. LEXIS 2706, at *6 (3d Cir. Jan. 29, 2012) (denying injunction pending appeal); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 U.S. Dist. LEXIS 184093, at *15-23 (W.D. Mich. Dec. 24, 2012), *appeal docketed*, No. 12-2673, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012) (same); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012), *appeal docketed*, No. 12-6294, 2012 U.S. App. LEXIS 26741 (10th Cir. Dec 20, 2012) (denying injunction pending appeal), *and* 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers) (same).

contended that because the Mandate does not serve any compelling governmental interest through the least restrictive means, it violated their rights under RFRA. In addressing these arguments, the Eighth Circuit looked to the earlier decision in *O'Brien*, 2012 U.S. App. LEXIS 26633, in which the panel issued a stay pending appeal, and clarified that the decision was a grant of "the only motion that was pending before the court: a motion for an injunction pending appeal." *Id.* at *8. Clearing up the apparent confusion among the district courts within the circuit, the *Annex Medical* court explained that "[t]o grant the pending motion, the *O'Brien* panel necessarily concluded that the appellants satisfied the prerequisites for an injunction pending appeal, including a sufficient likelihood of success on the merits and irreparable harm." *Id.* at *8-9. Recognizing the substantial similarities between the case before it and the *O'Brien* case, and the "significant interest in uniform treatment of comparable requests for interim relief within th[e] circuit," the *Annex Medical* court likewise granted appellants' motion for preliminary injunction pending appeal.

The facts of the present case are not meaningfully distinguishable from those in *O'Brien* and *Annex Medical*. Like Mr. O'Brien, Mr. Lind, and their respective businesses, Plaintiffs here have a sincere religious objection to including coverage for contraceptives, abortifacients, and related counseling in the group health plan for employees of the Bick Companies. Like O'Brien and Lind, the Bicks wish to provide health coverage for their employees in a manner that is consistent with their religious beliefs without the imposition of potentially ruinous penalties for doing so. Like O'Brien and Lind, Plaintiffs are being directly pressured by the government, through application of the Mandate, to violate their beliefs as a prerequisite to staying in business. By coercing the Bicks and their businesses into choosing between violating their religious beliefs or paying substantial penalties for adherence to those beliefs, the government

has placed a substantial burden on their right to freely exercise their religion, as protected by the Religious Freedom Restoration Act.

B. Defendants Cannot Demonstrate a Compelling Governmental Interest.

As in *O'Brien*, *Annex Medical*, and all the other similar cases brought under RFRA, the government may impose this substantial burden on Plaintiffs' religious exercise only if it can demonstrate that the Mandate serves "a compelling governmental interest" *and* is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). As described above, the strict scrutiny test imposed by RFRA must be conducted "through application of the challenged law '*to the person*'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 430-31 (2006) (emphasis added). It is therefore not enough for the government to describe a compelling interest in the abstract or in a categorical fashion; the government must demonstrate that the interest "would be adversely affected by granting an exemption" *to the religious claimant*. *Id.* In other words, in this case the government must demonstrate *that exempting Plaintiffs* from the Mandate would jeopardize its asserted interests even though the government willingly exempts thousands of other employers who employ tens of millions of employees.

As courts addressing the very claim presented here have repeatedly held, however, Defendants cannot overcome this high hurdle. The Supreme Court has stated, "[i]t 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." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citations and internal quotation marks omitted). Following this teaching, courts have noted the

colossal number of employees whose employers are not subject to the Mandate and whose health and equality interests are completely unaffected by it, and have concluded that this "massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland*, 881 F. Supp. 2d at 1298; *see also id.* at 1291 (finding, based on government estimates, that "*191 million* Americans belong to plans which may be grandfathered under the ACA") (emphasis added); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *61 (holding, in light of "the myriad of exemptions to the contraceptive coverage mandate already granted by the government," that it had "not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object"); *Am. Pulverizer Co.*, 2012 U.S. Dist. LEXIS 182307, *14 ("these exemptions undermine any compelling interest in applying the preventative coverage mandate to Plaintiffs").

The alleged compelling nature of the government's asserted interests is further undermined by the fact that although grandfathered plans need not comply with the preventive services coverage provision challenged here, they must comply with other provisions of the ACA—the prohibition on excessive waiting periods and the extension of dependent coverage, for example.[8]/ The *government's decision* to impose certain provisions of the ACA on grandfathered plans—but not the preventive services coverage provision—indicates that the *government itself* does not think that the Mandate is necessary to protect an interest of the "highest order." Nor can Defendants explain how their alleged interests can be compelling when employers with fewer than fifty employees[9]/ have no obligation to provide health insurance for

[8]/ For a summary of the applicability of ACA provisions to grandfathered health plans, *see Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Mar. 20, 2013).

[9]/ More than 20 million individuals are employed by firms with fewer than twenty employees. STATISTICS ABOUT BUSINESS SIZE (INCLUDING SMALL BUSINESS) FROM THE U.S. CENSUS BUREAU, U.S. CENSUS BUREAU, http://www.census.gov/econ/smallbus.html (last visited Mar. 20, 2013).

their employees and thus no obligation to cover the goods and services that Plaintiffs object to covering.[10]/ In other words, Defendants cannot sufficiently explain how there is a compelling interest in coercing Plaintiffs into violating their religious principles when businesses with fewer than fifty employees can avoid the Mandate entirely by not providing any insurance.

Finally, with regard to the government's asserted interest in promoting gender equality in the workplace, the Eighth Circuit has implicitly recognized that an employer's exclusion of contraceptive coverage from its employee health plan does not jeopardize that interest. In *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007), the court held that where a health plan excluded contraceptive coverage for both women and men, the plan did not amount to gender-based discrimination under Title VII as amended by the Pregnancy Discrimination Act. If the failure to provide cost-free contraceptive services to women does not amount to discrimination (when men are also not covered), then the Mandate is a solution in search of a problem. *Cf. Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2727, 2738 (2011) ("The State must specifically identify an 'actual problem' in need of solving, and the curtailment . . . must be actually necessary to the solution.").

In sum, Defendants cannot demonstrate a compelling need to require Plaintiffs to comply with a mandate for their approximately 143 employees that does not apply to the employers of tens of millions of employees nationwide. Defendants cannot show a "substantial threat to public safety, peace or order" should Plaintiffs be exempted from the Mandate. *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972).

[10]/ Employers are not subject to penalties for not providing health insurance coverage if they have fewer than fifty full-time employees. 26 U.S.C. § 4980H(c)(2).

C. The Mandate Is Not The Least Restrictive Means of Achieving a Compelling Governmental 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 particularly where, as here, the regulation runs up against what Defendants themselves recognize is the exercise of a fundamental right. 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).

Assuming *arguendo* that the interests proffered by Defendants were compelling in this context, 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 contraceptive services, they could do so in a myriad of ways without coercing Plaintiffs, in violation of their religious exercise, into doing so. For example, the government could 1) provide these services to citizens itself, as it already does for numerous individuals through existing programs; 2) allow citizens who pay to use contraceptives to submit receipts to the government for reimbursement; 3) offer tax deductions or credits for the purchase of contraceptive services; or 4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products to pharmacies, doctor's offices, and health clinics free of charge.

Each of these options would further Defendants' proffered interests in a direct way that would not impose a substantial burden on persons such as Plaintiffs. *See Newland*, 881 F. Supp. 2d at 1298-99 (rejecting government's claim that the Mandate furthers a compelling governmental interest through the least restrictive means). Of the various ways the government could achieve its interests, it has chosen a path with clear and undeniable adverse consequences to employers with religious objections to 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 way 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) (emphasis added). 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). Thus, Plaintiffs are likely to succeed on their RFRA claim.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION, WHILE DEFENDANTS WILL SUFFER NO HARM.

An injunction should be issued because Plaintiffs' RFRA rights are being violated by the Mandate on a continuing basis as discussed previously. *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[A] plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA."). Each day that Plaintiffs are subject to application of the Mandate is another day that they must choose between violating their religious beliefs (by providing coverage for the objectionable drugs and services) and paying enormous penalties as the price of adhering to those beliefs. That the companies cannot purchase new coverage or amend their current coverage to exclude the objectionable services because of the Mandate is proof that the Plaintiffs are—at this moment—suffering irreparable harm.

Any argument that Defendants would be harmed by the issuance of a Preliminary Injunction in this case would be meritless. Defendants themselves have already stayed their hand for thousands upon thousands of employers such that millions of employees and their dependents are not covered by the Mandate. An order requiring Defendants to refrain from applying the

Mandate to the Bicks and the Bick Companies while this case is pending could not conceivably be said to cause harm to any of the Defendants' interests. Moreover, there is no legitimate governmental interest to be furthered by Defendants' infringement of Plaintiffs' rights. *See Legatus*, 2012 U.S. Dist. LEXIS 156144, *44 ("The harm in delaying the implementation of a statute that may later be deemed constitutional must yield to the risk presented here of substantially infringing the sincere exercise of religious beliefs.").

III. THE PUBLIC INTEREST FAVORS A PRELIMINARY INJUNCTION.

The public has no interest in having Defendants violate Plaintiffs' rights under RFRA; to the contrary, the public has a strong interest in the preservation of religious freedom (as Congress recognized in enacting RFRA). Also, Plaintiffs do not seek to enjoin the Mandate as to all employers, only as to themselves. As such, an injunction will not harm the public interest.

CONCLUSION

Because the Plaintiffs have shown that they are currently suffering irreparable harm, they are likely to succeed on the merits of their claims, the balance of harms favors the Plaintiffs, and no harm to the public interest would result from the issuance of the relief requested, and in light of the "significant interest in uniform treatment of comparable requests for interim relief" within the Eighth Circuit, this Court should grant Plaintiffs' motion for a Preliminary Injunction against Defendants' requirement that Plaintiffs, in violation of their religious beliefs, include in their employee health plan coverage for contraceptives, abortifacients, and related patient education and counseling.

A proposed form of Order is attached.

Respectfully submitted on this 25th day of March, 2013.

Carly F. Gammill*
American Center for Law & Justice
188 Front St., Suite 116-19
Franklin, TN 37064
Tel: (615) 415-4822
Fax: (615) 599-5189
cgammill@aclj-dc.org

Edward L. White III P62485
American Center for Law & Justice
5068 Plymouth Rd.
Ann Arbor, MI 48105
Tel: (734) 662-2984; Fax: (734) 302-1758
ewhite@aclj.org

/s/ Francis J. Manion
Francis J. Manion (KY Bar No. 85594)*
Geoffrey R. Surtees (KY Bar No. 89063)*
American Center for Law & Justice
PO Box 60
New Hope, KY 40052
Tel: (502) 549-7020
Fax: (502) 549-5252
fmanion@aclj.org
gsurtees@aclj.org

Erik M. Zimmerman*
American Center for Law & Justice
1000 Regent University Drive
Virginia Beach, Virginia 23464
Tel. (757) 226-2489; Fax. (757) 226-2836
ezimmerman@aclj.org

Counsel for Plaintiffs

**admitted pro hac vice*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney at law and is a person of such age and discretion as to be competent to serve process. On March 25th, 2013 he caused to be served a copy of the foregoing by placing said copy in an overnight envelope and addressed to the persons hereinafter named at the addresses stated below and by depositing said envelope and its contents with the United States Mail:

Eric H. Holder, Jr.
U.S. Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Kathleen Sebelius
U.S. Depart. of Health & Human Services
200 Independence Avenue, SW
Washington, DC 20201

Seth D. Harris
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Jacob J. Lew
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Richard Callahan
U.S. Attorney
Thomas Eagleton U.S. Courthouse
111 South 10th St., 20th Floor
St. Louis, MO 63102

/s/ Francis J. Manion
Francis J. Manion (adm. pro hac vice)