UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

PAUL GRIESEDIECK, HENRY GRIESEDIECK, et al.	)	
Plaintiffs,	)	
vs.	)	**CASE NO. 12-cv-3459 RED**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.	)	
Defendants.	)	

PLAINTIFFS' SUGGESTIONS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs, Paul Griesedieck and Henry Griesedieck, seek preliminary injunctive relief so they may run their businesses, Plaintiffs American Pulverizer Co., Springfield Iron and Metal, LLC, Hustler Conveyor Co., and City Welding (hereinafter the "Griesedieck Companies"), in a manner consistent with their religious values and beliefs. Absent such relief, by January 1, 2013 at the latest, Paul and Henry Griesedieck 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.

The choice the government imposes on Plaintiffs, through regulations requiring them to provide employee insurance coverage for services 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 Griesediecks' 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, and has already led the first court to consider this issue to enjoin the same regulations challenged here. *See Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012).

There is immediacy to this matter that justifies a deviation from the ordinary time frame of litigation. The Griesediecks *have already begun planning* in order to have a new health care policy in place by the plan renewal date of January 1, 2013. Right now, *solely* because of the Mandate—which, as will be shown herein, violates Plaintiffs' rights under RFRA—Plaintiffs are faced with a few unacceptable, *and inescapable*, choices. They could drop health coverage for their 150 employees and, in so doing, incur astronomical fines, hurt their business, and hurt their

employees. Plaintiffs could go out of business entirely, again hurting both themselves and their employees, not to mention the local economy. Or, they could do something that the government has no right to require of them: abandon their religious beliefs as part of the cost of doing business. This Court should act to protect Plaintiffs from this unlawful and unprecedented government coercion, at least until the matter can be fully adjudicated, by granting the requested Preliminary Injunction. Three courts have already granted preliminary injunctions to plaintiffs challenging the very same Mandate that Plaintiffs challenge here. *See Tyndale House Publrs. v. Sebelius,* 2012 U.S. Dist. LEXIS 163873 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Nov. 1, 2012); *Newland*, 2012 U.S. Dist. LEXIS 104835.[1]/ Plaintiffs respectfully ask this Court to do the same.

FACTUAL BACKGROUND

Plaintiffs and brothers Paul and Henry Griesedieck own and control the Griesedieck Companies, businesses involved in wholesale scrap metal recycling and the manufacturing of related machines. (Exs. A and B, ¶ 2.)[2]/ They are Evangelical Christians (*Id.* at 5.), and pursuant to their understanding of the Christian faith, they believe that actions intended to terminate an innocent human life are immoral. (*Id.* at ¶ 4.) They further believe that subsidizing or paying for any drugs or services that they believe might result in the termination of innocent human life is also immoral. (*Id.* at ¶ 7.) Paul and Henry Griesedieck seek to manage and operate the Griesedieck Companies in a way that reflects their Christian faith. (*Id.* at ¶ 4.)

The Griesedieck Companies currently employ 150 employees. (*Id.* at ¶ 5.) These employees are covered by a health insurance plan paid for by the Griesedieck Companies. (*Id.*)

[1]/ *But see, Hobby Lobby Stores, Inc. v. Sebelius*, 2012 U.S. Dist. LEXIS 164843 (W.D. Okl. Nov. 19, 2012) (denying motion for preliminary injunction against the Mandate).

[2]/ Exhibits A and B are the declarations of Paul and Henry Griesedieck, respectively. The declarations are substantially similar and citations to paragraph numbers refer to paragraph numbers of both exhibits.

As explained further below, Defendants' Mandate requires group health plans, such as the plan the Griesedieck Companies provide for their employees, to include coverage, without cost sharing, for contraceptives (including abortion-inducing drugs), sterilization, and related patient education and counseling. Pursuant to their religious beliefs, Paul and Henry Griesedieck do not want to pay for, provide, or subsidize emergency contraception in any health plan for the Griesedieck Companies. (*Id.* at ¶¶ 7, 13.) They have made it a policy of the Griesedieck Companies not to provide coverage for emergency contraception[3]/ in employee health plans based on these same religious beliefs. (*Id.* at ¶ 8.) The health plans covering employees of the Griesedieck Companies are due to be renewed on January 1, 2013. (*Id.* at ¶ 5.) The Griesedieck Companies are not exempt from the dictates of the Mandate. (*Id*. at ¶¶ 9-11.)

It was discovered earlier this year that the Griesedieck Companies' current group health plan includes coverage for emergency contraception.[4]/ (*Id.* at ¶ 6.) This is an error that the Griesediecks wish to correct. Plaintiffs are in need of immediate relief from the Mandate to allow time to obtain insurance coverage that complies with the Griesediecks' religious beliefs and the policy of the Griesedieck Companies by not causing them to arrange for, pay for, or otherwise support employee health plan coverage for emergency contraception, or related education and

[3]/ Plaintiffs draw a distinction between ordinary contraceptives, *i.e.*, those primarily intended to prevent ovulation, and so-called "emergency contraceptives" ("morning after pills"), *i.e.*, those primarily intended to and likely to act post-fertilization. Plaintiffs do not object to paying for coverage of ordinary contraceptives but do object to covering emergency contraceptives because they often destroy already conceived embryos. Keith L. Moore & T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology* 58 (6th ed. 1998) ("The administration of relatively large doses of estrogens ('morning after' pills) for several days, beginning shortly after unprotected sexual intercourse, usually does not prevent fertilization, but often prevents implantation of the blastocyst.").

[4]/ 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.").

counseling. (*Id.* at ¶ 12.) If Plaintiffs fail to comply with the Mandate or drop employee group health coverage altogether, the companies will likely face substantial penalties.

In sum, the Mandate requires Plaintiffs to choose between (a) complying with the Mandate and violating their religious beliefs and (b) not complying with the Mandate and having to pay significant fines and penalties in order to conduct business consistent with their religious beliefs. Plaintiffs seek relief from this Court so that they will not be forced to make that choice.

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.[5]/

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

[5]/ 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,[6]/ are exempt from compliance with the Mandate. *See* 75 Fed. Reg. 41726, 41731 (July 19, 2010).[7]/ Defendant HHS estimates that "98 million individuals will be enrolled in grandfathered group health plans in 2013." *Id.* at 41732. On the other hand, many provisions of the ACA do apply to grandfathered plans. 75 Fed. Reg. 34538, 34542 (June 17, 2010). Also exempt from the Mandate are non-profit "religious employers," as defined at 45 C.F.R. § 147.130(a)(iv)(B).[8]/ In addition, employers with fewer than fifty full-time employees have no obligation to provide employee health insurance under the ACA or to comply with the Mandate. 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, *see* 26 U.S.C. §§ 4980H(a), (c)(1), and those that fail to provide certain required coverage may be subject to an assessment of $100 a day per employee. *See* 26 U.S.C. § 4980D(b)(1); *see also* STAMAN & SHIMABUKURO, CONG. RESEARCH SERV., RL 7-5700, ENFORCEMENT OF THE PREVENTATIVE HEALTH CARE SERVICES REQUIREMENTS OF THE PATIENT PROTECTION & AFFORDABLE CARE ACT (2012) (assessment applies for violations of the ACA's "preventive care" provision). In sum, the challenged regulations contain categorical exemptions that exclude literally tens of millions of Americans from "preventative services" coverage.

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

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

[8]/ 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).

PLAINTIFFS' SUGGESTIONS IN SUPPORT OF THEIR MOTION

I. PLAINTIFFS SATISFY THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF.

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 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). "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase Sys.*, 640 F.2d at 113. "The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case." *Id.* "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).

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

For purposes of their motion, Plaintiffs will rely on Count I (RFRA) of their complaint. (Doc. 1.) Plaintiffs preserve the other claims and issues in their complaint.[9]/

[9]/ The district court in *O'Brien v. U.S. Dep't of Health & Human Servs.,* 2012 U.S. Dist. LEXIS 140097 (E.D. Mo. Sept. 28, 2012), dismissed claims similar to those raised by Plaintiffs here. The *O'Brien* decision, which is not binding on this Court, was wrongly decided and is on appeal. Case No. 12-3357 (8th Cir.).

A. Plaintiffs Are Likely To Succeed On Their RFRA Claim.

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).

1. The Mandate Substantially Burdens Plaintiffs' Exercise Of Religion.

To trigger the protections afforded by RFRA, Plaintiffs must first show that a federal governmental 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)). Under RFRA, "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." *Id.* (citation and internal quotation marks omitted).[10]/

Several Supreme Court cases illustrate what a substantial burden involves in the freedom of religion context. 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 employee, whose religious beliefs prohibited her from working on Sunday, substantially burdened her exercise of religion. The

[10]/ The constitutional and statutory rights at issue in this case are enjoyed not only by Paul and Henry Griesedieck, but also by the Griesedieck Companies. Corporations are legal persons that enjoy First Amendment rights. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). The First Amendment rights enjoyed by corporations include the right to the free exercise of religion. *E.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009); *Primera Iglesia Bautista Hispana v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006); *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474 (2008) (illustrating that a corporate pharmacy had standing to bring, among other claims, a federal free exercise claim); *see also Monell v. N.Y. City Dep't of Social Servs.*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."); 1 U.S.C. § 1 ("In 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.").

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 compensation benefits to a Jehovah's Witness employee, 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 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 type of inescapable choice between acting contrary to their faith and incurring penalties that the religious claimants in these cases faced. In the wake of the Mandate, and beginning on January 1, 2013, Plaintiffs must either pay for a health plan that includes drugs and services to which they religiously object or suffer severe penalties. They have no other choice. Compliance with the Mandate is not an option for Plaintiffs because they would be facilitating, subsidizing, and encouraging the use of objectionable services. A key purpose of the Mandate and related ACA provisions is to shift a portion of the cost of these and other covered services *from individuals to employers* through the medium of employer-provided insurance that covers such services. In other words, the intended effect of the Mandate is that individuals who seek covered services (and happen to be employed by an employer that is subject to the Mandate) will pay less out of pocket for such services *because the Mandate forces their employer to partially subsidize the provision of such services*; the anticipated lower cost to

employees is not due to health care provider or insurance company generosity, it is expressly paid for by employers at the command of the government. It is this forced subsidization, and not the manner in which employees may spend their own money, to which Plaintiffs object.

Should, however, Plaintiffs exclude emergency contraceptive services in health plans for employees of the Griesedieck Companies, the Griesedieck Companies will face substantial penalties as set forth in 26 U.S.C. § 4980D, in addition to potential lawsuits by plan participants, plan beneficiaries, and the Secretary of Labor. *See* 29 U.S.C. § 1132(a). Should Plaintiffs drop health insurance for their employees altogether, the Griesedieck Companies could face substantial penalties as set forth in 26 U.S.C. § 4980H, in addition to losing good will with its employees and losing a competitive edge in the employment marketplace. In short, due to the Mandate, Plaintiffs cannot create a health plan for employees of the Griesedieck Companies consistent with their religious beliefs without incurring substantial penalties.

2. RFRA Imposes Strict Scrutiny.

RFRA requires application of the "strict scrutiny test." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). This test, which requires "the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993), "is 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).

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." *O Centro*, 546 U.S. at 430-31

(emphasis added). Indeed, in both *Sherbert* and *Yoder*, the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. 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 nearly tens of millions of employees.

3. Defendants Cannot Demonstrate A Compelling Governmental Interest.

Just last term, the Supreme Court described a compelling state interest as a "high degree of necessity," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011), noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *See id.* at 2738 (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980). As such, the government's invocation of the promotion of health and equality as compelling interests, without more, is insufficient to meet the demands of strict scrutiny. While recognizing "the general interest in promoting public health and safety," the Supreme Court has held that "invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. The government must demonstrate "some substantial threat to public safety, peace, or order" that would be posed by exempting the claimant. *Yoder*, 406 U.S. at 230.

Defendants have proffered two governmental interests in support of the Mandate: public health and gender equality. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012). What radically undermines the government's claim that these interests are compelling in this context is the massive number of employees, tens of millions in fact, whose employers are not subject to the Mandate and whose health and equality interests are completely unaffected by it. *See Newland*, 2012 U.S. Dist. LEXIS 104835 at *23. For example, Defendants cannot explain how these interests can be of the highest order when the Mandate does not apply to plans grandfathered under the ACA. 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) (emphasis supplied). The court in *Newland v. Sebelius* found, based on government estimates, that "***191 million*** Americans belong to plans which may be grandfathered under the ACA." 2012 U.S. Dist. LEXIS 104835 at *4 (emphasis supplied). Defendants cannot justifiably assert that the Mandate serves a compelling interest when tens of millions of individuals are unaffected by it.

Indeed, the government's alleged interests are further undermined by the fact that though grandfathered plans need not comply with the preventive services challenged here, they must comply with other provisions of the ACA.[11]/ The ***government's decision*** to impose the prohibition on excessive waiting periods on grandfathered plans, for example, but not preventive services, 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[12]/ have no obligation to

[11]/ For a summary of the applicability of ACA provisions to grandfathered health plans can, *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 Nov. 15, 2012).

[12]/ 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 Nov. 15, 2012).

provide health insurance for their employees and thus no obligation to comply with the Mandate.[13]/ With respect to Plaintiffs, 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.

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." *Lukumi*, 508 U.S. at 547 (citations and internal quotation marks omitted). It is the existence of these enormous loopholes in the Mandate that led the district court in *Newland* to find a lack of any compelling interests. *See* 2012 U.S. Dist. LEXIS 104835 at *23 (stating that the "massive" number of employees untouched by the Mandate "completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs").

Finally, the Eighth Circuit has implicitly recognized that an employer's exclusion of contraceptive coverage from its employee health plan does not jeopardize the government's interest in gender equality. 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*, 131 S. Ct. at 2738 ("The State must specifically identify an 'actual problem' in need of solving, and the curtailment . . . must be actually necessary to the solution.").

[13]/ 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).

In sum, Defendants cannot demonstrate a compelling need to require Plaintiffs to comply with a mandate for their approximately 150 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. *Yoder*, 406 U.S. at 230.

4. The Mandate Is Not The Least Restrictive Means.

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, Defendants' attempt at 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, 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; 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*, 2012 U.S. Dist. LEXIS 104835 at *23-27 (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.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

An injunction should be issued because Plaintiffs' RFRA rights are being violated by the Mandate 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."). Plaintiffs must act as soon as possible to have a new health plan in place by the plan renewal date of January 1, 2013. 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.

IV. AN INJUNCTION WOULD CAUSE NO HARM TO DEFENDANTS.

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 of over 100 million employees. An order requiring them to refrain from applying the Mandate to the Griesediecks and the Griesedieck 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.").

V. 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, that they are likely to succeed on the merits of their claims, that the balance of harms favors the Plaintiffs, and that no harm to the public interest would result from the issuance of the relief requested, this Court should grant Plaintiffs' motion for a Preliminary Injunction against Defendants' requirement that Plaintiffs include in their employee health plan coverage for emergency contraception and related patient education and counseling.

A proposed form of Order is attached.

Respectfully submitted on this 20th day of November, 2012.

/s/ Francis J. Manion
Francis J. Manion (adm. pro hac vice)
Geoffrey R. Surtees (adm. pro hac vice)
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Edward L. White III (adm. pro hac vice)
AMERICAN CENTER FOR LAW & JUSTICE

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. That on November 20, 2012 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

Timothy F. Geithner
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Kathleen Sebelius
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David M. Ketchmark
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Western District of Missouri

Hilda Solis
U.S. Department of Labor

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