IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FRANK R. O'BRIEN JR., et al., APPELLANTS, vs. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, et al., APPELLEES.	)	CASE NO. 12-3357

APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION PENDING APPEAL

Pursuant to FED. R. APP. P. 8, Appellants move this Court for preliminary injunctive relief pending appeal of the district court's dismissal of their statutory and federal claims against the preventive services coverage provision of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010) ("the Mandate"). In the absence of such relief, Frank O'Brien and the business he manages will be forced to make a stark and inescapable choice on ***January 1, 2013***: either pay for contraceptive and sterilization procedures, including abortion-inducing drugs, in violation of O'Brien's religious beliefs and company policy, or face crippling penalties imposed by the federal government. Contrary to the decision of the court below, the preventive services mandate at issue in this case substantially burdens Plaintiffs' religious exercise and violates

the Religious Freedom Restoration Act ("RFRA") (42 U.S.C. § 2000bb *et seq*.), the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, and the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*).

Plaintiffs filed a motion for a preliminary injunction with the district court on their RFRA and First Amendment claims. That motion became moot, however, upon a ruling of the court granting Defendants' motion to dismiss the entirety of Plaintiffs' Amended Complaint. The district court thus "failed to afford the relief requested." FED. R. APP. P. 8(a)(2)(A)(ii). *See Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763 (8th Cir. 1998) (granting an injunction pending appeal pursuant to FED. R. APP. P. 8); *Walker v. Lockhart*, 678 F.2d 68 (8th Cir. 1982) (same).

Plaintiffs seek preliminary relief from this Court based on their RFRA claim alone. Given the current briefing schedule for the appeal and the impending January 1, 2013 date when Plaintiffs will be coerced into acting contrary to their religious principles and beliefs upon pain of financial penalties, the instant motion is necessarily of an immediate nature. Plaintiffs merely request that the status quo, *i.e.*, their freedom to choose a health plan consistent with their religious beliefs

pursuant to Missouri law,[1] remain in place until the final disposition of their appeal.

PROCEDURAL BACKGROUND

On June 11, 2012, Plaintiffs filed their Amended Complaint alleging that the preventive services mandate violated their rights under RFRA and the First Amendment and violated the Administrative Procedure Act. On July 16, Defendants filed a motion to dismiss Plaintiff's Amended Complaint and on August 23 Plaintiffs filed a motion for a preliminary injunction on their RFRA and First Amendment claims.

On September 28, the district court granted Defendants' motion to dismiss Plaintiffs' Amended Complaint in its entirety, thus rendering Plaintiffs' motion for a preliminary injunction moot. Plaintiffs filed their notice of appeal on October 1, 2012 and the case was docketed in this Court on October 4. Plaintiffs have appealed, and thus preserved, all claims dismissed by the district court.

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

FACTUAL BACKGROUND

A. The Mandate, Its Exceptions, and Penalties

The statutory and regulatory background to the preventive services mandate is set forth in the district court opinion.[2] In sum, all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage must provide coverage for certain preventive services without cost-sharing. 42 U.S.C. § 300gg-13. These services have been defined by the Health Resources and Services Administration to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Health Resources and Services Administration, WOMEN'S PREVENTIVE SERVICES: REQUIRED HEALTH PLAN COVERAGE GUIDELINES, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Oct. 22, 2012).

Not all employers are required to comply with the Mandate. Grandfathered health plans, *i.e.*, a plan in existence on March 23, 2010 that has not undergone any of a defined set of changes,[3] are exempt from compliance with the Mandate. *See* 75

[2] The decision of the court below, granting Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, is attached hereto as EXHIBIT A.

[3] *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.

Fed. Reg. 41726, 41731 (July 19, 2010).[4] Even though the Mandate does not apply to grandfathered health plans, many provisions of the ACA do. 75 Fed. Reg. 34538, 34542 (June 17, 2010).[5]

Also exempted from the Mandate are "religious employers," defined as organizations whose "purpose" is to inculcate religious values, that "primarily" employ and serve co-religionists, and that qualify as churches or religious orders under the tax code. 45 C.F.R. § 147.130(a)(iv)(B)(1)-(4). In addition, because employers with fewer than fifty full-time employees have no obligation to provide health insurance for their employees under the ACA, they have no obligation to comply with the Mandate. 26 U.S.C. § 4980H(c)(2)(A).

Non-exempt employers who fail to comply with the Mandate or fail to provide any insurance at all face severe penalties. Non-exempt employers who fail to provide an employee health insurance plan will be exposed to annual fines of roughly $2,000 per full-time employee. *See* 26 U.S.C. §§ 4980H(a), (c)(1). Non-exempt employers who fail to provide certain required services in their plans are

[4] *See also* 42 U.S.C. § 18011; 76 Fed. Reg. 46621, 46623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.").

[5] A summary of which ACA provisions apply to grandfathered health plans and which do not, can be found here: *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, *available at* http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Oct. 22, 2012).

subject to an assessment of $100 a day per employee, as well as potential private enforcement suits. *See* 26 U.S.C. § 4980D(b); 29 U.S.C. §§ 1132, 1185d(a)(1).

This case is one of thirty-five others currently pending in federal courts challenging the constitutionality of the Mandate.[6]

B. Frank O'Brien and O'Brien Industrial Holdings

Frank O'Brien is the Chairman and Managing Member of O'Brien Industrial Holdings ("OIH"). Declaration of Frank O'Brien, ¶ 4.[7] He is responsible for setting all policies governing the conduct of all phases of the business of OIH and its related companies. *Id*. OIH and its subsidiaries currently have eighty-seven employees. *Id*. at 13. O'Brien is a Catholic who has the religious duty to conduct himself and his business in a manner consistent with the Catholic faith. *Id*. at ¶ 7. Pursuant to these beliefs, O'Brien has "established as company policy that OIH cannot pay for and provide coverage for contraceptives, sterilization, abortion or related education and counseling." *Id*. at ¶ 15. To do so would violate his religious beliefs. *Id.*

When OIH switched from a self-insured plan to a fully insured plan in 2006, coverage of contraceptive services was inadvertently included in OIH's health plan

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[6] *See* The Becket Fund for Religious Liberty, HHS MANDATE INFORMATION CENTRAL, *available at* http://www.becketfund.org/hhsinformationcentral/ (last visited October 23, 2012).

[7] The Declaration of Frank O'Brien is attached hereto as EXHIBIT B. It is the same declaration filed with the court below in support of Plaintiffs' Motion for a Preliminary Injunction.

contrary to longstanding practice and O'Brien's intentions. *Id*. at ¶ 17. Since discovering this error, OIH has been investigating ways to obtain insurance coverage that would exclude coverage for contraceptive services, including abortifacient drugs, and sterilization. *Id*. at ¶ 18.

Time, however, is running short. The renewal date for OIH's employee insurance plan is January 1, 2013. *Id*. at 20. Should Plaintiffs implement a health plan that does not include those services that violate O'Brien's religious beliefs and OIH's religious based policy, it will face steep monetary penalties, up to $3,175,500 per year. Should Plaintiffs discontinue health insurance for OIH employees entirely, it will face penalties in excess of $100,000 per year. Either way, Plaintiffs will face a stiff price for following the dictates of their religious principles and beliefs.

REASONS FOR GRANTING RELIEF

I. PRELIMINARY INJUNCTION STANDARD.

To obtain injunctive relief, a movant must establish the following factors: (1) a likelihood of success on the merits; (2) irreparable harm; (3) that the balance of the harms of granting or denying the injunction are in its favor; and (4) that granting the injunction is in the public's interest. *CDI Energy Servs. v. West River Pumps, Inc*., 567 F.3d 398, 401-02 (8th Cir. 2009) (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc*., 640 F.2d 109, 114 (8th Cir. 1981) (en banc)).

II. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR RFRA CLAIM.

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

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

The federal government may only substantially burden a person's exercise of religion under RFRA if "it demonstrates that application of the burden ***to the person***[8] (1) is in furtherance of a compelling governmental interest; and (2) is the

[8] That corporations are legal "persons" that enjoy First Amendment rights worthy of protection cannot be gainsaid. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). Case law also makes clear that the First Amendment rights enjoyed by businesses include the right to the free exercise of religion. *U.S.United States v. Lee*, 455 U.S. 252 (1982) (adjudicating free exercise claim of for-profit employer); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (adjudicating, *inter alia*, free exercise claims of secular, for-profit businesses); *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (adjudicating free exercise claim of for-profit pharmacy corporation); *Primera Iglesia Bautista Hispana v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006) ("corporations possess Fourteenth Amendment rights" including, through incorporation doctrine, "the free exercise of religion"); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (for-profit corporation could assert free exercise rights of owners).

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

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

Several Supreme Court cases illustrate what constitutes a substantial burden upon religious exercise. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious beliefs prohibited her from working on Sunday, substantially burdened her exercise of religion. The regulation "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id*. at 404. In *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court held that a state's denial of unemployment benefits to a Jehovah's Witness, whose religious beliefs prohibited him from participating in the production of armaments,

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

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

Remarkably, even though it acknowledged that "[l]aws substantially burdening the exercise of religion often discourage free exercise by exacting a price for religious practice," the court below held that the Mandate does not substantially burden Plaintiffs' religious exercise. Ex. A, at 10. Despite the uncontested religious belief of Plaintiffs that paying for the services required by the Mandate directly impacts their religious exercise and principles, the court below opined that that the Mandate does "not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting

in accordance with their religious beliefs." *Id.* at 11. The court observed that the Mandate does not prohibit O'Brien from attending Mass or raising his children in the Catholic faith, and that any burden the Mandate imposes is merely a minimal one. *Id.*

The district court's ruling on this issue is fundamentally flawed for several reasons. For purposes of the instant motion, two will suffice. First, at issue in this case is not simply a general or abstract objection to abortion, contraception, and sterilization. What is at issue is Plaintiffs' religious objection to *paying for these goods and services* through OIH's group health plan — exactly what the Mandate forces Plaintiffs to do under pain of financial penalties. The Mandate does not force anyone to use contraception, but it forces Plaintiffs to subsidize it directly against their religious beliefs and principles.

What is extraordinary about the court's holding on this point is that Defendants themselves have acknowledged that the Mandate directly implicates religious belief and practice. Recognizing that paying for, providing, or subsidizing contraceptive services would conflict with "the religious beliefs of certain religious employers," Defendants have granted a wholesale exemption for a class of employers, *i.e.*, churches and their auxiliaries, from complying with the Mandate. 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012).

In addition, the government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that fails to cover some or all recommended contraceptive services and that is sponsored by a non-profit organization that meets certain criteria.[9] During the time of this temporary safe harbor, Defendants are considering ways of "accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services [while] assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012). Defendants are even considering whether "for-profit religious employers with [religious] objections should be considered as well." *Id.* at 16504. This Advance Notice of Proposed Rulemaking was issued after President Obama announced on February 10, 2012 that the administration would attempt to accommodate objecting religious organizations so that they "won't have to pay for these services, and no religious institution will have to provide these services directly."[10] As such, although the government contends in this litigation that paying for contraceptive

[9] Department of Health and Human Resources, GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR 3 (2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Oct. 22, 2012).

[10] REMARKS BY THE PRESIDENT ON PREVENTIVE CARE, February 10, 2012, *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited Oct. 18, 2012).

services through a group health plan does not substantially burden religious exercise, the authors of the Mandate have suggested otherwise.

The second flaw in the district's court's decision is that it is not within the province of courts to evaluate the religiosity of a claim of religious exercise. But that is exactly what the court below did here. Though the court said it did not question the sincerity of Plaintiffs' beliefs, it weighed O'Brien's religious-based objection to the payment for contraceptive methods and sterilization through OIH's group health plan against religious exercises such as keeping the Sabbath and receiving communion — as though the former is less a religious exercise than the latter. Case law does not allow courts to make such theological judgments. *See Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'"). Nor does RFRA itself allow it. *See* 42 U.S.C. § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4) (the term "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief").

For these reasons, the court's ruling flatly contradicts *United States v. Lee*, 455 U.S. 252 (1982). In *Lee*, a for-profit religious employer challenged on religious grounds the requirement to pay social security taxes. Similar to the rationale of the court below here, the government in *Lee* did not question the

sincerity of Lee's religious, specifically Amish, beliefs, but nonetheless "contend[ed] that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance." *Id.* at 257. The Supreme Court rejected that contention. 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*. (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.* Had the court below followed the constitutional logic of *Lee*, as it should have, it would have found that Mandate imposes a substantial burden on Plaintiffs' religious exercise.

B. RFRA Imposes Strict Scrutiny.

Because the court below held that the Mandate does not impose a substantial burden on Plaintiffs' religious exercise, it did not apply RFRA's strict scrutiny test to Plaintiffs' religious claim. 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). Moreover, in the RFRA context, the test must be conducted "through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita*, 546 U.S. at 430-31.

C. Defendants Cannot Demonstrate A Compelling Governmental Interest.

A compelling governmental interest involves "only those interests of the highest order." *Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984). In fact, in this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. The government must demonstrate "some substantial threat to public safety, peace, or order" in not exempting the religious claimant. *Yoder*, 406 U.S. at 230.

Defendants have proffered two compelling governmental interests for the Mandate: public health and gender equity goals. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012). What radically undermines the government's claims of compelling interests, however, is the massive number of employees, millions in fact, whose health and equality are completely unaffected by the Mandate. *See Newland v. Sebelius*, 1:12-cv-1123, 2012 U.S. Dist. LEXIS 104835, *23 (D. Colo. July 27, 2012) (granting preliminary injunction to for-profit business from having to comply with the

Mandate).[11] For example, Defendants cannot explain how their alleged interests can be compelling when employers with fewer than fifty employees[12] have no obligation to provide health insurance for their employees and thus no obligation to comply with the Mandate. With respect to Plaintiffs, Defendants cannot sufficiently explain how there is a compelling interest in coercing Plaintiffs, with their eighty-seven employees, into violating their religious principles when businesses with fewer than fifty employees can avoid the Mandate entirely by not providing any insurance at all.

Defendants also cannot explain how these interests can be of the highest order when the 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).[13] When this figure is added to the number of employees of businesses with fewer than fifty employees, it is fair to say that well over 100 million employees are left untouched by the government's claim of compelling interests. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as

[11] The currently unpublished *Newland* opinion is attached hereto as EXHIBIT C.

[12] More than 20 million individuals are employed by firms with fewer than twenty employees. U.S. CENSUS BUREAU, STATISTICS ABOUT BUSINESS SIZE (INCLUDING SMALL BUSINESS) FROM THE U.S. CENSUS BUREAU, http://www.census.gov/econ/smallbus.html (last visited Oct. 22, 2012).

[13] According to the district court in *Newland*, "191 million Americans belong to plans which may be grandfathered under the ACA." *Id.* at *4.

protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (citations and internal quotation marks omitted).

In sum, Defendants cannot demonstrate a compelling interest in requiring Plaintiffs to comply with a mandate for their eighty-seven employees that does not apply to the employers of over 100 million employees nationwide. Defendants cannot show a "substantial threat to public safety, peace or order" should Plaintiffs be excused from compliance with the Mandate. *Yoder*, 406 U.S. at 230.

D. The Mandate Is Not The Least Restrictive Means to Achieving any Interest.

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

Even assuming *arguendo* that the interests proffered by Defendants are compelling, the Mandate is not the least restrictive means of furthering those interests. If Defendants wish to further the interests of health and equality by means of free access to contraceptive services, Defendants could do so in a myriad of ways without coercing Plaintiffs, in violation of their religious exercise, into

doing so. For example: 1) offer tax deductions or credits for the purchase of contraceptive services; 2) reimburse citizens who pay to use contraceptives, allowing citizens to submit receipts to the government for payment; 3) provide these services to citizens itself; and 4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products through pharmacies, doctor's offices, and health clinics free of charge.

Each of these options would further Defendants' proffered compelling interests in a direct way that would not impose a substantial burden on persons such as Plaintiffs. *See Newland*, at *23-27 (rejecting government's claim that the Mandate furthers a compelling governmental interest through the least restrictive means). Indeed, of the various ways the government could achieve its interests, it has chosen a path with clear and undeniable adverse consequences to employers with religious objections to paying for contraceptive services, such as Plaintiffs.

Although Defendants may contend that any or all of these options would prove difficult to establish or operate, "least restrictive means" does not mean the most convenient 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). 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).

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

III. PLAINTIFFS SATISFY THE REMAINING PRELIMINARY INJUNCTION FACTORS.

An injunction should be issued because Plaintiffs' rights under RFRA are being violated by the Mandate as discussed previously. Moreover, and more immediately, O'Brien and OIH must act as soon as possible to have a new health plan in place by the plan renewal date of January 1, 2013. Without an injunction in place by this date, Plaintiffs will be unable to arrange for a health insurance plan consistent with their religious beliefs and principles.

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

Finally, as discussed previously, the Mandate violates Plaintiffs' statutory rights under RFRA. The public has no interest in having Defendants violate those

rights and, as such, an injunction will not negatively impact the interests of the public.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court enter a preliminary injunction against Defendants' enforcement of the Mandate against them pending their appeal of the decision of the court below.

Respectfully submitted this 23rd day of October, 2012.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1(b), the undersigned counsel for Frank O'Brien, Jr., and O'Brien Industrial Holdings, LLC, hereby certifies that neither appellant is a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

/s/ Francis J. Manion
Francis J. Manion

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Francis J. Manion
Francis J. Manion