IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR.; PHILIP M. GILARDI; FRESH UNLIMITED, INC., d/b/a Freshway Foods; and FRESHWAY LOGISTICS, INC.,
Plaintiffs,

v. Civil Action No. 1:13-cv-104-EGS

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; NEAL WOLIN, in his official capacity as Acting 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' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION (DOC. 21)

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* indicates the cases and authorities on which counsel chiefly relies. LCvR 7(a).

ARGUMENT

I. Initial Matters

Despite Defendants' allegation that "plaintiffs dramatically overstate the extent to which their arguments are supported by other decisions in cases similar to this one," (Doc. 28 at 6), Defendants do not dispute the fact, stated by Plaintiffs, that "[a]t present, for-profit plaintiffs are protected by injunctions preventing application of the Mandate to them in eleven cases, including in *Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012), *appeal docketed*, No. 13-5018 (D.C. Cir. Jan. 18, 2013), while injunctive relief has been denied in three cases." (Doc. 21 at 2.)

Defendants present many of the same arguments in opposition to the present motion that they presented in opposition to the motions for a preliminary injunction in the other Mandate cases. This Court should reject those arguments as courts have in the vast majority of Mandate cases. In particular, as discussed herein and in Plaintiffs' statement of points of law and authority, (Doc. 21), numerous arguments presented in Defendants' brief were considered and rejected by Judge Walton in *Tyndale House Publishers*.

Defendants' argument that Plaintiffs improperly delayed the filing of the present lawsuit and motion—implying that the motion should have been filed as early as August 2011, more than a year and a half in advance of when the Mandate will apply to Plaintiffs—is without merit. In July 2012, the government argued in another Mandate case that a motion for preliminary injunction *was premature* because the Mandate would not apply to the Plaintiffs until November 2012. Defs.' Amended Memo. in Opposition to Pls' Motion for Preliminary Injunction at 56-57, *Newland v. Sebelius*, No. 1:12-cv-01123-JLK, Doc. 26 (D. Colo. filed July 13, 2012). After this argument was rejected, however, the government made the opposite argument in *Tyndale House*

Publishers, stating that the motion for a preliminary injunction should have been filed months in advance of when the Mandate would apply to the plaintiffs to be timely. Judge Walton rejected this argument, explaining:

> The defendants' argument that the plaintiffs have not suffered irreparable harm due to their "delay" in filing this lawsuit is disingenuous. The contraceptive coverage mandate did not apply to the plaintiffs until October 1, 2012, and they filed this lawsuit on October 2, 2012. The plaintiffs state that they filed this case when they did on the basis of the defendants' representations "[i]n other pending cases against this [contraceptive coverage mandate] . . . that no irreparable harm exists until the date the [m]andate is applicable to the plaintiff." In any event, to the extent that the plaintiffs here delayed in filing this case, they did not wait so long as to undermine their showing of irreparable harm; the cases cited by the defendants involved delay much more substantial than the delay here. The plaintiffs here waited only one day after the contraceptive coverage mandate applied to them before filing this action.

Tyndale House Publ'rs, 2012 U.S. Dist. LEXIS 163965, at *62-63, n.18 (citations omitted).

The delay argument is even more "disingenuous" in this case because Plaintiffs filed the instant action sixty-seven days *before* the Mandate takes effect against them, while the plaintiffs in *Tyndale House Publishers* filed their lawsuit one day *after* the Mandate took effect against them. *See id.* Additionally, as Defendants' brief acknowledges, it was not until this month, February 2013, that the government announced that for-profit companies would not be afforded any form of accommodation under the proposed rule revisions, (Doc. 28 at 10), which remained a distinct possibility until that announcement was made.

Additionally, Defendants mischaracterize Plaintiffs' claim as seeking a right to control the choices of employees and a right to have the government subsidize their religious practices, stating that RFRA is a shield, not a sword. (*See, e.g.,* Doc. 28 at 23, 25, 35). Under the Mandate, however, it is neither employees nor the government that is required to pay for coverage of the mandated goods and services but employers such as Plaintiffs; RFRA is asserted here not as a

sword to dictate what others must do but rather as a shield to protect Plaintiffs against being forced to either act contrary to their faith or incur massive penalties for non-compliance.

In essence, Defendants challenge the nature of religious freedom itself, as virtually every religious exemption from any law could be characterized as shifting some form of cost or burden to others or as providing a special benefit or subsidy to the claimant. This characterization by Defendants stands in sharp contrast to the robust view of religious exercise held by the Congress that enacted RFRA or, for that matter, the Continental Congress which exempted individuals with pacifist religious convictions from military conscription,[1]/ and Thomas Jefferson who once wrote that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[2]/

II. The Mandate Substantially Burdens the Religious Exercise of Both the Companies and the Gilardis.

A. Defendants make improper policy arguments in their substantial burden discussion.

Defendants' argument that the Mandate does not substantially burden Plaintiffs' religious exercise is notable for a glaring omission: Defendants never once cite or apply the legal test for determining when a substantial burden is present—namely, whether the government has put "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008); *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *36; (Doc. 21 at 11-13).[3]/

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[1]/ Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1469 (1990).

[2]/ Writings of Thomas Jefferson: Replies to Public Addresses: To the Society of the Methodist Episcopal Church at New London, Conn., on Feb. 4, 1809 (Monticello ed. 1904) vol. XVI, pp. 331-32.

[3]/ Cases like *Sherbert v. Verner*, 374 U.S. 398 (1962), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Thomas* are instructive concerning what constitutes a substantial burden, *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *36-38; they cannot be dismissed out of hand,

Rather than applying applicable law, Defendants set forth a parade of horribles and a flood of hypothetical RFRA claims brought by business owners that would purportedly ensue should this Court conclude that the Mandate substantially burdens Plaintiffs' religious exercise. (Doc. 28 at 2, 13, 15, 16, 21, 25.) This type of policy argument for narrowly interpreting RFRA is flawed for four distinct reasons.

First, Defendants' policy arguments contradict RFRA's plain language. Defendants would effectively rewrite RFRA to add an additional requirement: strict scrutiny should only be applied where (1) a law substantially burdens religious exercise *and* (2) various policy concerns raised by the government during litigation are assuaged. RFRA's protections are triggered, however, whenever the government has put "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717-18. To the extent that policy concerns and the fear of hypothetical claims in future cases have any bearing in a RFRA case, it would be during the application of strict scrutiny, *not* in the consideration of whether the claimant's religious exercise has been substantially burdened. *Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *44-45 (noting that a policy concern raised in *O'Brien v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. Dist. LEXIS 140097 (E.D. Mo. Sept. 28, 2012), "is not relevant to whether a plaintiff's religious exercise is substantially burdened, but rather applies to the issue of whether the government's interest is sufficiently compelling to justify the substantial burdening of a plaintiff's religious exercise").

Second, RFRA has existed for two decades and there has not been a flood of claims brought by for-profit employers. As noted in Plaintiffs' statement of points of law and authority, (Doc. 21 at 8, n.6), courts have previously recognized that corporations may assert their own free exercise

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as Defendants' suggest, simply because the laws did not target for-profit corporations. (Doc. 28 at 16.)

rights and/or the free exercise rights of their owners or employees. *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474 (2008); *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 846 (Minn. 1985). There is no reason to believe that rulings in the Mandate cases will radically alter the course charted by two decades of actual practice. Judge Walton rejected a similar "floodgates" argument in *Tyndale House Publishers*:

> The defendants caution that accepting the *Townley-Stormans* theory of standing "would expand [the] RFRA's scope in an extraordinary way" by allowing "owner[s'] religious beliefs [to be] automatically imputed to [their] compan[ies]." This, in the defendants' estimation, would allow "millions of shareholders of publicly traded companies [to] assert RFRA claims on behalf of those companies." But *Townley* and *Stormans* . . . only permit a corporation to assert the free exercise rights of its owners when it is closely-held and the beliefs of the corporation are an extension of the owners' beliefs. Furthermore, *Townley* has been the law of the Ninth Circuit since 1988, yet nothing has been presented to show that courts in that Circuit have been flooded with free exercise and RFRA claims by for-profit corporations.

2012 U.S. Dist. LEXIS 163965, at *25-26, n.11 (citations omitted); *see also id.* at *17-23 (applying the reasoning of *Townley* and *Stormans* in concluding that "the beliefs of Tyndale and its owners are indistinguishable"). The lack of any flood of RFRA claims brought by businesses is unsurprising, as the vast majority of the legal requirements imposed upon businesses pose no conflict of any kind with anyone's religious exercise.

Third, a finding that a claimant's religious exercise has been substantially burdened does not guarantee entitlement to an exemption under RFRA; it simply triggers the application of strict scrutiny. *Id.* at *31-33, n.13 ("[J]ust because a corporation is allowed to assert a RFRA claim does not mean that it will succeed on the claim."). Defendants assert that holding that the Mandate substantially burdens Plaintiffs' religious exercise "would permit for-profit, secular corporations and their owners to become laws unto themselves" and would allow businesses to ignore anti-discrimination laws, (Doc. 28 at 2), but in the relatively rare instances in which

employers actually allege that such provisions substantially burden their religious exercise, the requirement will often be the least restrictive means of achieving a compelling governmental interest (such as, for example, provisions eliminating racial discrimination).

In the relatively rare instance where, as here, there is both a substantial burden and the existence of a viable less burdensome alternative, RFRA's plain language forecloses any policy argument that a claimant should still lose. Declaring that a business owner consents to some level of broader regulation by entering the marketplace merely begs the question. Under RFRA's plain language, he does *not* consent to be subject to laws that substantially burden his religious exercise and that cannot survive strict scrutiny. Concerning this point, Defendants rely upon *United States v. Lee*, 455 U.S. 252 (1982), to suggest that commercial actors can never be substantially burdened by market regulations, (Doc. 28 at 1-2, 17), but in *Lee*, the Court concluded that the employer's religious exercise *was substantially burdened* before determining that the burden was sufficiently justified in that instance. 455 U.S. at 257. As the Fourth Circuit has observed in a different context: "Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC v. Sunbelt Rentals, Inc*., 521 F.3d 306, 319 (4th Cir. 2008).

Fourth, and finally, any policy concerns over the potential breadth of the protection that RFRA provides for religious freedom would be properly addressed to Congress, which has the prerogative to revisit and narrow the scope of RFRA's plain language in the unlikely event that it determines that too many religious claimants have successfully invoked RFRA's protection.

B. Companies and their owners, such as Plaintiffs, can exercise religion.

Defendants' theory that free exercise rights extend only to entities that exist for the purpose of exercising religion (churches, some non-profit organizations, etc.) is quite similar to an

argument concerning corporate free speech rights that the Supreme Court rejected in *First National Bank v. Bellotti*, 435 U.S. 765 (1978). The Court stated:

> The proper question . . . is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does. . . .
>
> The court below . . . held that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests. In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not . . . address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment. . . .
>
> [A]ppellee suggests that First Amendment rights generally have been afforded only to corporations engaged in the communications business or through which individuals express themselves . . . . The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. . . . But the press does not have a monopoly on either the First Amendment or the ability to enlighten. . . .
>
> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. . . .
>
> If a legislature may direct business corporations to "stick to business," it also may limit other corporations -- religious, charitable, or civic -- to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.

Id. at 775-77, 781-85.

Defendants' assertion that *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), announced a "rule that a company must be a 'religious organization' to assert free exercise rights," (Doc. 28 at 21), is incorrect. Although it is true, as Defendants note, that the Free Exercise Clause "gives special solicitude to the rights of religious organizations," *Hosanna-Tabor*, 132 S. Ct. at 706, that does not mean the Free Exercise Clause (or RFRA, for

that matter) *only* protects religious organizations. For example, although "speech on public issues . . . is entitled to special protection" under the First Amendment, *Connick v. Myers*, 461 U.S. 138, 145 (1983), this does not mean the First Amendment *only* protects speech on public issues. And just as a for-profit corporation need not be organized, operated, and maintained for the primary purpose of engaging in free speech activity to invoke First Amendment free speech protections, *Bellotti*, 435 U.S. at 784-85, a for-profit corporation need not be organized, operated, and maintained for the primary purpose of religious activity to invoke First Amendment religious protections. *See generally Stormans*, 586 F.3d at 1120, n.9 ("[A]n organization that asserts the free exercise rights of its owners need not be primarily religious."). Furthermore, the Fourteenth Amendment was adopted "with *special solicitude* for the equal protection" rights of African-Americans, *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (emphasis added), but this hardly means that the Fourteenth Amendment is limited to the equal protection rights of African-Americans *alone*.

RFRA broadly protects the religious exercise of a "person," 42 U.S.C. § 2000bb-1(a), and corporations are generally considered to be persons, 1 U.S.C. § 1; (Doc. 21 at 11). RFRA's scope is not, as Defendants' arguments imply, limited to the protection of "religious persons." Whether RFRA applies to a situation is not dependent upon how religious the claimant is, *but rather is dependent on the degree of pressure* that the government has applied to the claimant to violate his faith. It is indisputable that corporations, whether non-profit or for-profit, can and often do engage in various religious activities, such as contributing money to further religious causes. As Justice Brennan once observed, it is possible "that some for-profit activities could have a religious character." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring).

Where, as here, a company is owned and controlled by a couple of like-minded individuals who share the same religious values and run the company in accordance with those values, the company itself holds and/or asserts the values of its owners. *See, e.g., Tyndale House Publ'rs*, 2012 U.S. Dist. LEXIS 163965, at *23-25; *Townley*, 859 F.2d at 620 n.15; *Stormans*, 586 F.3d at 1120. Defendants' suggestion that neither businesses nor their owners can have their religious exercise substantially burdened by laws regulating employers or the commercial marketplace is rebutted by the fact that courts have addressed the merits of religion-based claims brought by a business and/or its owners in numerous cases.[4]/ As Judge Noonan of the Ninth Circuit observed:

> The First Amendment does not say that only one kind of corporation enjoys this [free exercise] right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons—are free.

Townley, 859 F.2d at 623 (Noonan, J., dissenting).

Similarly, Defendants' suggestion that certain businesses (such as Tyndale House Publishers) may be religious *enough* to be capable of exercising religion, while other businesses (such as the companies here) are *not* religious enough to be capable of exercising religion—even though both types of businesses are indisputably "persons" for purposes of RFRA and various constitutional rights—is flawed. (*See* Doc. 28 at 5-6, 13-14.) This is simply a repackaging of Defendants' policy concerns over a hypothetical flood of future RFRA claims. A "religious enough" standard

[4]/ *See, e.g., Lee*, 455 U.S. at 258-61; *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210-12 (2d Cir. 2012) (addressing the merits of a free exercise claim brought by a kosher deli and butcher shop and its owners); *Stormans*, 586 F.3d at 1127-38; *Townley*, 859 F.2d at 620-21; *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (holding that a law prohibiting discrimination on the basis of marital status in housing substantially burdened the free exercise of a landlord who objected to facilitating the cohabitation of unmarried couples); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same); *McClure*, 370 N.W.2d 844 (addressing the merits of a free exercise challenge brought by a for-profit health club and its owners).

is inescapably vague and finds no basis in RFRA or Free Exercise Clause case law. It would make no sense, for example, to hold that closely-held Company X engages in religious exercise when it donates money to religiously-affiliated groups to help them further their religious mission, or advocates in favor of causes that it believes are morally justified, but closely-held Company Y does not engage in religious exercise when it does the same things for the same religious reasons, because Company X is more religious (under some undefined standard) than Company Y.

As explained in the State of Ohio's amicus curiae brief, Ohio for-profit corporations such as the companies here can pursue any lawful purpose and engage in any lawful activity:

> The Ohio law under which the family-owned Freshway companies are organized recites that . . . "A corporation may be formed . . . for any purpose or combination of purposes for which individuals lawfully may associate themselves." . . . [T]he approved Articles of Incorporation of Fresh Unlimited, Inc. . . . set forth that the purpose for which the company is formed is "[t]o engage in any lawful act or activity for which corporations may be formed under Sections 1701.01 to 1701.98 inclusive, of the Ohio Revised Code." Absolutely nothing in those or other Code sections restricts, requires (or guarantees) Freshway "to make money!" Under Ohio law, the pursuit of profit need not be the exclusive or even the primary reason for the corporate existence. Just as "profit" is not a dirty word that should discredit the values by which an enterprise is operated, neither is it necessarily the animating or exclusive reason for corporate existence of closely held enterprises organized as the Freshway companies are. Family-owned companies that provide needed products and create good jobs with significant benefits surely can be operated according to agreed guiding religious principles of their owners regardless of whether they are organized under the general or the non-profit sections of Title 17 of the Ohio Revised Code (Ohio's corporations chapter).

(Doc. 27 at 23-24.)

As in *Tyndale House Publishers* and various other cases in which companies have received injunctions preventing enforcement of the Mandate against them, the companies here have adopted, and operate in accordance with, the religious beliefs and values of their owners as documented previously by Plaintiffs. (Doc. 21 at 2-7 and declarations cited therein.) Compliance

with the Mandate would require the companies (and the Gilardis) to take actions contrary to their belief system. That is enough to establish a substantial burden under RFRA.

Defendants' extensive reliance upon the law governing corporate structure and finances is misplaced. The Gilardis do not dispute that the companies are distinct legal entities that are directly subject to the Mandate, nor do they suggest that the companies' assets are, in fact, their own assets. Under the substantial burden test that Defendants largely ignore, however, courts examine the substantiality of "the coercive impact" on the claimant, *Thomas*, 450 U.S. at 717, *not* how direct or indirect *the source* of that coercive impact is. *Id.* at 718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.")[5]/ Defendants do not contest the fact that the imposition of millions of dollars of penalties *upon the companies* for non-compliance with the Mandate would significantly harm *both the Gilardis and the companies.* Indeed, the specter of this significant harm *substantially pressures the Gilardis* to take actions that violate their religious beliefs and those of the companies (by complying with the Mandate).

In other words, although the companies are distinct entities for purposes of corporate law, they are also valuable assets that belong to the Gilardis such that the threatened imposition of massive penalties against the companies has an undeniable "coercive impact" upon the Gilardis for purposes of RFRA. *See Thomas*, 450 U.S. at 717. Similarly, corporations do not run themselves or comply with legal mandates except through human agency. The Gilardis would themselves have to operate the companies in a manner that they believe to be immoral in order for the companies to provide a Mandate-compliant health plan. *See Korte v. U.S. Dep't of Health*

[5]/ *Potter v. District of Columbia*, 558 F.3d 542 (D.C. Cir. 2009), cited by Defendants, (Doc. 28 at 19), imposes no directness requirement to establish a substantial burden; in fact, the government conceded the existence of a substantial burden on appeal.

& Human Servs., 2012 U.S. App. LEXIS 26734, at *9 (7th Cir. Dec. 28, 2012) ("The contraception mandate applies to K & L Contractors as an employer of more than 50 employees, and *the Kortes would have to violate their religious beliefs to operate their company in compliance with it*.") (emphasis added).

The Gilardis' implementation of their religious beliefs into their companies is in keeping with their Catholic faith. For example, the Catholic Church's Pontifical Council for Justice and Peace recently stated that, for Catholics, "[t]he vocation of the businessperson is a genuine human and Christian calling."[6]/ According to the Council,

> [one of biggest obstacles to fulfilling this Christian calling] at a personal level is a *divided life*, or what Vatican II described as "the *split between the faith which many profess and their daily lives*." . . . Dividing the demands of one's faith from one's work in business is a *fundamental error* which contributes to much of the damage done by businesses in our world today. . . . The divided life is not unified or integrated; it is fundamentally disordered, and thus *fails to live up to God's call*.[7]/

The Gilardis seek to live out their religious calling in and through their businesses. As Frank Gilardi testified:

> I manage and operate [the companies] in a way that reflects the teachings, mission, and values of my Catholic faith, and I desire to continue to do so. . . . My sincerely-held religious beliefs and moral values do not allow me to direct, or allow, [the companies] to arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating my sincerely-held religious beliefs and moral values. . . . In my view, the Mandate prevents me from following the dictates of my Catholic faith in the operation and management of [the companies], violates the religious-based principles by which [the companies] are run, and will continue to violate my rights and those of my corporations unless we obtain relief from this court by April 1, 2013.

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[6]/ *Vocation of the Business Leader: A Reflection* at ¶ 6 (Nov. 2012), http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf (last visited Feb. 27, 2013).

[7]/ *Id.* at ¶ 10 (first emphasis in original; subsequent emphases added).

(Doc. 21-2, Ex. A, F. Gilardi Decl. at ¶¶ 6, 11, 19); *accord* (Doc. 21-3, Ex. B, P. Gilardi Decl. at ¶¶ 6, 11, 19) (same).[8]/ In sum, it would exalt form over substance to suggest that the Gilardis are not directly and substantially affected by a threat to effectively destroy their companies.

Moreover, Defendants extensively rely upon Title VII, but while Title VII expressly differentiates between certain religious non-profit entities and other employers, RFRA does not. Congress, well aware of Title VII's provisions, declined to include language in RFRA limiting it to religious or non-profit entities alone. Defendants' attempt to effectively import language into RFRA from other statutory schemes runs counter to the maxim that a legislature's exclusion of language in a statute or statutory section is presumed to be intentional. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"). RFRA itself provides that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3; *see United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (RFRA "amended all federal laws to include a statutory exemption" where RFRA's two-part test is satisfied). In short, Title VII must be read through the prism of RFRA, not the other way around. *See Tyndale House Publr's*, 2012 U.S. Dist. LEXIS 163965, at *31-33, n.13 (rejecting the government's argument that holding that

[8]/ This position is shared by the United States Conference of Catholic Bishops, which views the Mandate as "unjust and illegal" because it violates the civil rights of those striving in their daily lives to act in accordance with their faith and moral values. According to the Bishops, people such as the Gilardis "face a government mandate to aid in providing 'services' contrary to those values—whether in their sponsoring of, and payment for, insurance as employers . . . or as insurers themselves—without even the semblance of an exemption [something] unprecedented in federal law, which has long been generous in protecting the rights of individuals not to act against their religious beliefs or moral convictions." United States Conference of Catholic Bishops, *United for Religious Freedom: A Statement of the Administrative Committee of the United States Conference of Catholic Bishops*, at 1, 4 (Mar. 14, 2012), http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm (last visited Feb. 27, 2013).

a for-profit corporation can be substantially burdened for purposes of RFRA would undermine the enforcement of Title VII).

C. The burden that the Mandate imposes upon Plaintiffs is substantial.

The coercive impact that the Mandate will have upon both the companies and the Gilardis is clear: absent injunctive relief, Plaintiffs must either act contrary to the teachings of their faith by directly subsidizing the provision of products and services that they believe are immoral or incur over $14 million in penalties on an annual basis that would significantly harm all of them. (Doc. 21 at 9-10, 14 & n.8.) This coercive impact is identical in relevant respects to the coercive impact that the Mandate had upon the plaintiffs in *Tyndale House Publishers* (as well as the plaintiffs currently protected by injunctions in ten other cases):

> The contraceptive coverage mandate . . . places the plaintiffs in the untenable position of choosing either to violate their religious beliefs by providing coverage of the contraceptives at issue or to subject their business to the continual risk of the imposition of enormous penalties for its noncompliance. Such a threat to the very continued existence of the plaintiffs' business necessarily places substantial pressure on the plaintiffs to violate their beliefs. Government action that creates such a Hobson's choice for the plaintiffs amply shows that the contraceptive coverage mandate substantially burdens the plaintiffs' religious exercise.

2012 U.S. Dist. LEXIS 163965, at *39-40.

Moreover, Plaintiffs object to being forced to directly facilitate, subsidize, and encourage the use of goods and services that they believe are immoral. They raise no objection to how employees may choose to utilize their own money. (Doc. 21 at 9-10.) As Judge Walton explained in distinguishing the district court's decision in *O'Brien*:

> If *O'Brien* is intended to stand for the proposition that a plaintiff can never demonstrate that its religious exercise is substantially burdened by a law that forces it to pay for services to which it objects that are ultimately chosen and used by third parties, this Court must respectfully disagree. . . . The plaintiffs' specific objection is not simply to the use of the contraceptives at issue, but to "providing coverage for abortifacients and related education and counseling in Tyndale's health insurance plan." . . . [T]he contraceptive coverage mandate puts substantial pressure on the plaintiffs to violate their religious

> beliefs against the provision of coverage for the three contraceptives at issue. Therefore, the requirement to provide such coverage directly burdens the plaintiffs' religious objection to providing such coverage. Because it is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties. And even if this burden could be characterized as "indirect," the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden. *Thomas*, 450 U.S. at 718.

Tyndale House Publ'rs, 2012 U.S. Dist. LEXIS 163965, at *43-44.[9]/

Although Plaintiffs' religious beliefs concerning the immorality of directly facilitating or subsidizing the use of the goods and services covered by the Mandate need not be logical to receive the protection of RFRA, see *Thomas*, 450 U.S. at 714, the government's own established practice concerning its funding programs and related case law recognizes that *the government facilitates activities that it funds*, even through neutral programs that involve some level of independent private choice. The government routinely excludes particular activities or entities from otherwise neutral funding programs because the government does not want to facilitate, directly or indirectly, certain activities. The existence of some element of third-party choice may have a bearing upon whether the government's facilitation of private conduct *is lawful*, but third-party choice does not negate the fact that any funding provided does, in fact, facilitate that conduct. Plaintiffs' religious objection to facilitating certain conduct here is of a similar nature.

Of particular relevance here, the federal government often excludes the funding of most elective abortions from otherwise neutral programs, *including through the provision of health insurance coverage*, to avoid facilitating such procedures and to promote the government's interest in encouraging childbirth. *See, e.g.,* 42 U.S.C. § 1397ee(c) (prohibiting the use of certain

[9]/ While the *O'Brien* district court decision upon which Defendants rely declared that the Mandate does not prevent anyone from doing anything that their faith *requires*, such as keeping the Sabbath or taking communion, *O'Brien*, 2012 U.S. Dist. LEXIS 140097, at *18-19, the fundamental objection of the plaintiffs seeking injunctive relief from the Mandate (including Plaintiffs here) is that the Mandate substantially pressures them to do something that their faith *forbids*. Both types of claims are protected by RFRA.

federal funds to subsidize State-provided health insurance coverage for low-income children if that coverage includes abortion other than for instances in which the mother's life is endangered or the pregnancy resulted from rape or incest).

Various Supreme Court cases have recognized that the government's refusal to subsidize medical expenses associated with most abortions is a proper means of encouraging childbirth and declining to facilitate abortion, and requiring individuals to pay for abortions themselves does not violate their rights or improperly interfere with the doctor-patient relationship. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 200, 203 (1991) (upholding regulations that required Title X funding recipients to ensure that any counseling in favor of abortion was conducted outside the funded program and concluding that the regulations did not improperly interfere with the doctor-patient relationship); *Harris v. McRae*, 448 U.S. 297, 325 (1980) (upholding the Hyde Amendment's exclusion of funding for most abortions and noting that, by subsidizing medical expenses of childbirth while not subsidizing medical expenses of most abortions, "Congress has established incentives that make childbirth a more attractive alternative than abortion"). In like manner, the federal government has taken numerous steps to ensure that federal funds are not used to directly or indirectly subsidize the provision of obscenity, whether through funding of the arts,[10]/ money

[10]/ 20 U.S.C. §§ 954(d)(2) & (l)(1) (the National Endowment for the Arts considers standards of decency in its funding decisions and is prohibited from providing funds for obscene projects, productions, or programs; if it determines that funds were used to support such projects, it is entitled to a full repayment); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding this statute); 20 U.S.C. § 9103(i)(3)(B) (stating that projects funded by the Institute of Museum and Library Services may not be obscene).

provided to small businesses,[11]/ or the subsidization of computers or Internet services for schools and libraries.[12]/

All of these examples defeat Defendants' argument that a funding provider does not facilitate funded conduct where there is some layer of "separation," such as the independent choices of private parties. (Doc. 28 at 27.) Just as the government has declined to facilitate conduct that it does not want to encourage, Plaintiffs' faith requires them to refrain from facilitating conduct that Plaintiffs believe to be immoral through the provision of health insurance. Plaintiffs' religious objection to the Mandate is no more "attenuated" than the government's objection to subsidizing abortion through its funding programs. In any event, in *Thomas*, the existence of several layers of separation between the production of a weapon and, after various decisions of independent third parties, its possible use to take actions potentially inconsistent with the claimant's faith did not render the burden upon the claimant's religious exercise insubstantial. *Thomas* recognized that compelling even indirect facilitation of conduct to which one morally objects may substantially burden one's religious exercise.

Furthermore, Defendants attempt to redefine Plaintiffs' religious beliefs and/or demonstrate a perceived inconsistency by asserting that there is no difference between an objection to providing Mandate-compliant insurance coverage (which is at issue here) and hypothetical objections to the decision of an employee or the government to pay for the goods and services to

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[11]/ 15 U.S.C. § 633(e) (prohibiting the Small Business Administration from providing funds to a business that produces or distributes obscene products or services).

[12]/ 20 U.S.C. §§ 6777, 9134(f) & 47 U.S.C. § 254(h)(6) (stating that educational agencies, school boards, and libraries that receive federal funds in order to buy computers used to access the Internet or to pay for Internet service must implement Internet filters that protect against accessing obscenity and child pornography); *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (plurality opinion) (upholding provisions); *cf.* 20 U.S.C. § 7906(a)(1) (stating that certain federal funds may not be used to support literature or programs that encourage sexual activity among minors); 42 U.S.C. §§ 300dd-32(e)(3), 300ee(c) (same).

which Plaintiffs object with their own money (which is not at issue here). (Doc. 28 at 4, 26, 27, n.18.) This is strikingly similar to an argument that the Supreme Court rejected in *Thomas*. The claimant in *Thomas* did not object to producing the raw materials necessary to make tanks and war materials, regardless of how those raw materials were eventually used. 450 U.S. at 715. The Court stated:

> The [state] court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. *We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one*. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.
>
> . . . Courts are not arbiters of scriptural interpretation.

Id. at 715-16 (emphasis added).

Judge Walton rejected a similar argument:

> [T]he Supreme Court has cautioned courts to avoid parsing a plaintiff's religious beliefs for inconsistency, and this Court will heed that warning. . . . To hold that the plaintiffs' belief regarding direct coverage of the contraceptives at issue requires the plaintiffs to also object to contributing to federal programs that provide the same contraceptives is to engage in exactly the kind of impermissible interrogation of religious beliefs that the Supreme Court warned against.

Tyndale House Publ'rs, 2012 U.S. Dist. LEXIS 163965, at *47-48 (citing *Thomas*, 450 U.S. at 715-16).[13]/

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[13]/ For similar reasons, Defendants' reliance upon *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C.), *aff'd sub nom. Seven Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), is misplaced.

> The circumstances of this case are considerably different. Unlike the plaintiffs in *Mead*, the only alternative offered to the plaintiffs here is noncompliance with the contraceptive coverage mandate and its attendant risk of suit and enormous financial penalties. The availability of a reasonable alternative for the plaintiffs in *Mead* eliminated the pressure on them to violate their religious beliefs; the plaintiffs here have no such alternative, and therefore, the pressure to violate their religious beliefs remains undiminished. . . . [T]he

III. Defendants Have Not Demonstrated that Applying the Mandate to Plaintiffs Satisfies Strict Scrutiny.

RFRA's strict scrutiny test is 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). Plaintiffs do *not* suggest that "the government must separately analyze the impact of and need for the regulations as to each and every employer and employee in America." (Doc. 28 at 31, n.19.) Rather, as Judge Walton explained,

> [w]hile the defendants have broad, compelling interests in both promoting public health and ensuring that women have equal access to health care, the question that this Court must answer under the RFRA here is whether the government has shown that the application of the contraceptive coverage mandate to the plaintiffs furthers those compelling interests. . . . That is, the defendants must show that requiring the plaintiffs to provide the contraceptives to which they object . . . will further the government's compelling interests in promoting public health and in providing women equal access to health care.
>
> The defendants object to the Court limiting its focus to "the specific characteristics of Tyndale's work force and health plan." . . . However, it is upon exactly those specific characteristics that the Court's RFRA analysis must turn. . . .
>
> The defendants try to minimize the RFRA's demanding requirements by contending that "[i]n practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have expanded the inquiry to all similarly situated individuals or organizations." . . . They then go on to cite several cases pre-dating the Supreme Court's decision in *O Centro*. . . . Regardless of what those courts held, *O Centro* made clear that, under the RFRA, "courts should strike sensible balances[] pursuant to a compelling interest test that requires the Government to address the particular practice at issue."

Tyndale House Publ'rs, 2012 U.S. Dist. LEXIS 163965, at *50-53 & n.16 (citations omitted).

> objection raised here to directly providing coverage of the contraceptives at issue is easily distinguished from generally contributing to federal programs that provide the contraceptives at issue.

Tyndale House Publ'rs, 2012 U.S. Dist. LEXIS 163965, at *46-47.

The government bears the "burdens of going forward with the evidence and of persuasion" concerning whether the Mandate is the least restrictive means of furthering a compelling governmental interest. *See Potter*, 558 F.3d at 546 (quoting 42 U.S.C. § 2000bb-2(3)).

A. The government's asserted interests are not compelling with respect to the Mandate.

In various respects, Defendants' own arguments undercut their assertion that there is a truly *compelling* need for the Mandate. Defendants suggest that the interests offered in support of the Mandate are *not* compelling enough to (1) outweigh other interests that underlie the decision to indefinitely allow grandfathered plans and small employers to not cover the services that Plaintiffs are required to cover, (Doc. 28 at 31-34), or (2) justify the modification of existing programs through which the government already pays for contraceptives for many individuals, (Doc. 28 at 35-37). In other words, increasing the availability of contraceptives for the small percentage of women who (1) want to utilize them, (2) are employed by, or are a dependent of an employee of, a non-exempt employer that does not already provide coverage for them, (3) are unable to afford them, and (4) are currently ineligible to receive them through existing government programs, is less important to the government than other "competing" interests, such as maintaining administrative efficiency and minimizing costs. (*See* Doc. 28 at 31-37.) This relatively low level of importance that the government has placed upon achieving the Mandate's stated goals stands in stark contrast to the high level of importance that Plaintiffs place upon continuing to act in accordance with their religious principles, as they have consistently done for many years.

In addition, the exemption for grandfathered health plans undercuts the assertion that the Mandate is justified by a compelling interest, as explained previously by Plaintiffs. (Doc. 21 at 16-17.) Regardless of whether this exemption is characterized as a statutory or a regulatory

exemption, (Doc. 28 at 31), the fact remains that employers offering grandfathered plans are not required to cover the goods and services that Plaintiffs are required to cover despite their religious objection. Moreover, Defendants characterize the exemption as transitional and incremental in nature, (Doc. 28 at 32-33), but that is only partially correct. Although Defendants expect that a percentage of existing grandfathered plans will lose their status over time through specific changes that those plans make, a plan is *entitled* to maintain its grandfathered status *indefinitely* if it so chooses. Under 42 U.S.C. § 18011, which is entitled, "Preservation of right to maintain existing coverage," individuals can indefinitely renew the coverage that they had as of the date the Affordable Care Act was enacted without change, except that certain requirements (not including the Mandate) apply even to those grandfathered plans. *Id.*

Even using the estimates that Defendants rely upon in their brief, (Doc. 28 at 32-33, n.20) (citing 75 Fed. Reg. 34553)), there is a mid-range estimate (relying upon data from 2008 and 2009) that 49% of grandfathered plans will still maintain their grandfathered status at the end of this year, and "to the extent that the 2008-2009 data reflect plans that are more likely to make frequent changes in cost sharing, *this assumption will overestimate the number of plans relinquishing grandfather status in 2012 and 2013*." 75 Fed. Reg. 34552-53 (emphasis added). And, small employers are not subject to penalties if they decline to provide an employee health plan. (Doc. 21 at 2, 17.) Thus, millions of employees and their dependents are not covered by the Mandate.

In *O Centro*, the Court found it significant that "hundreds of thousands" of Native Americans were exempted, 546 U.S. at 433, while here there are millions of individuals who are employed by, or are a dependent of an individual employed by, entities that are not required to provide a health plan that includes coverage of the goods and services that Plaintiffs would be required to

cover, absent an injunction by April 1, 2013. A selectively applied legal requirement, such as the Mandate, "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) (internal quotation marks omitted).

B. The government has failed to prove that the Mandate is the least restrictive means of furthering the government's asserted interests.

Rather than addressing the specifics of the less restrictive alternatives offered by Plaintiffs, Defendants categorically dismiss them out of hand as improperly requiring new statutory schemes. A less restrictive means offered by a RFRA claimant does not, as Defendants suggest, have to operate within an existing governmental scheme to be valid, (Doc. 28 at 35-37); "the government's burden is two-fold: it must support its choice of regulation, and it must refute *the alternative schemes* offered by the challenger." *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (emphasis added); *see also id.* ("[W]e have an obligation to ensure that the record supports the conclusion that the government's chosen method of regulation is least restrictive and that none of the proffered alternative schemes would be less restrictive while still satisfactorily advancing the compelling governmental interests."). Although Defendants cite *Wilgus* in support of its position, (Doc. 28 at 35), the court in *Wilgus* considered two alternative schemes that were not presently authorized by existing law and concluded that, although they would lessen the burden imposed upon the claimant's religious exercise, they would fail to advance one of the government's compelling interests. *Id.* at 1292-95.[14]/

[14]/ Nor do the other cases that Defendants rely upon support this argument. *See, e.g., United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (holding that the claimed alternative in that case would jeopardize the government's compelling interest and create "significant" administrative problems); *S. Ridge Baptist Church v. Industrial Comm'n*, 911 F.2d 1203, 1206-08 (6th Cir. 1990) (noting that the government must show that a law substantially burdening religious exercise "is essential to accomplish an overriding governmental interest" and

Even if less restrictive alternatives could only be considered if they can be part of existing regulatory schemes, Plaintiffs' proposed alternatives meet this criterion. For example, Plaintiffs have suggested that the government could further both of its stated interests by providing or paying for contraceptives itself, and the government already has existing schemes and programs in place that subsidize the provision of contraceptives. (Doc. 21 at 18.) Defendants offer no explanation, let alone actual proof as is their obligation, that the modification of existing schemes to broaden eligibility for contraceptives would not further the government's objectives or is impractical. The mere fact that the government would end up paying additional money does not eliminate this as a plausible alternative. Notably, the decisions in *Sherbert* and *Thomas* in favor of religious claimants resulted in the government paying additional money. *See also Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835, at *26-27 (D. Colo. July 27, 2012).

Similarly, Plaintiffs have suggested that the government could further both of its stated interests by offering tax deductions or credits to individuals who purchase contraceptives, (Doc. 21 at 18), which would not require the creation of any new schemes, programs, or bureaucracies. Again, Defendants do not address the merits of this proposed alternative or argue that it would not further the government's stated interests.[15]/ Defendants' vague, general assertions that Plaintiffs' proposed alternatives would be impractical, implausible, or inconvenient fall far short of meeting the government's burden of proving that the Mandate is, in fact, the least restrictive means of furthering compelling governmental interests. *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 824 (2000) (emphasis added) ("[A] court should not *assume* a plausible, less

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concluding that the claim at issue was "substantially identical" in relevant respects to the claim in *Lee*).

[15]/ That the less restrictive alternatives offered by Plaintiffs may require new statutory and/or regulatory authority to *actually implement* is irrelevant, (Doc. 28 at 36-37); the question under RFRA is whether there are less burdensome alternative means of furthering the government's interests that the government *could* choose to implement.

restrictive alternative would be ineffective."). General concerns about efficiency or uniformity are not sufficient to defeat a RFRA claim:

> Here the Government's argument for uniformity . . . rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." 42 U.S.C. § 2000bb-1(a).

O Centro, 546 U.S. at 435-36.

In sum, even if one assumed that there is a tangible lack of access to contraceptives for those who desire them, and further assumed that such a lack of access implicated compelling governmental interests, the alternatives offered by Plaintiffs would directly further those interests without substantially burdening Plaintiffs' religious exercise. As such, Plaintiffs are likely to succeed on their RFRA claim.

IV. The Remaining Injunction Factors Favor Plaintiffs.

Without an injunction issued by this Court before April 1, 2013, Plaintiffs will suffer irreparable harm to their religious freedoms because on that date the Mandate will compel them to violate their faith or incur ruinous fines. A preliminary injunction in Plaintiffs' favor will preserve the status quo. Plaintiffs will be able to continue to provide their employees with the same self-insured health plan they have been offering for the last ten years, a plan that, based on Plaintiffs' religious beliefs, excludes coverage for contraceptives, abortion-inducing drugs, sterilization, and related education and counseling, all of which would be required by the Mandate. As Plaintiffs have explained, a preliminary injunction will not harm the interests of Defendants or of the public. (Doc. 21 at 23-24.) Rather, it will allow the parties to proceed with

this litigation to a final resolution of the important legal issues at hand in a way that protects Plaintiffs' rights in the process.[16]/

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' statement of points of law and authority, (Doc. 21), this Court should grant Plaintiffs' motion for a preliminary injunction before April 1, 2013.

Respectfully submitted on this 28th day of February, 2013,

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[16]/ Defendants do not contest Plaintiffs' position that no bond should be imposed.

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2013, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record for Defendants, Benjamin Berwick, who is a CM/ECF participant and who can obtain a copy of the filing through the CM/ECF system.

/s/ Edward L. White III
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