IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TYNDALE HOUSE PUBLISHERS, INC., a Delaware Corporation; MARK D. TAYLOR; Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY; Defendants.	Civil Action No. 1:12-CV-1635-RBW

PLAINTIFFS' RESPONSE/REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Court got it right in November—so right that the government surrendered on appeal. For 50 years Tyndale House Publishers has been evangelizing. It prints Bibles and Christian publications, and directs its proceeds to religious charity through its institutional structure and charitable giving. Tyndale has embedded its faith commitment throughout its leadership chain. So when the government claims Tyndale and its owners do not exercise religion, it is denying reality. A government Mandate that forces a company to violate its beliefs or face fines and lawsuits is imposing the very definition of a "substantial burden." It far exceeds the mere "pressure" on beliefs that courts require. This Court rightly declined the government's invitation to become a theological tribunal by inquiring into the "attenuation" of religious beliefs.

The government has again failed to lift its heavy burden under strict scrutiny. The government voluntarily excludes tens of millions of women from its Mandate, but refuses to tolerate an exception here. The government relies on scientific generalities, but fails to show that a RFRA exemption will cause actual harm or that a grave nexus exists between the Mandate and its goals. And the government could achieve free abortifacients in a number of ways less restrictive of religious freedom—ways that it already pursues to the tune of millions of dollars.

These are the same four issues at stake now, during summary judgment, and the factual record has not changed. The government simply asks the Court to reverse its view. But most other cases have agreed with this Court's analysis, from the implied but necessary finding of the motions panel of the D.C. Circuit in *Gilardi*, through written panel orders by the Seventh and Eighth Circuits, all the way to the decisive en banc decision by the Tenth Circuit in *Hobby Lobby*. A minority of cases have disagreed. Respectfully, this Court has the better view.

Therefore the Court should grant Plaintiffs' motion for summary judgment and deny the government's cross-motion on the RFRA claim. It should enter declaratory and permanent injunctive relief for Plaintiffs. And it should continue to avoid constitutional and other questions by denying without prejudice the government's cross-motion for summary judgment on Plaintiffs' other claims. Those claims need not be considered if Plaintiffs prevail under RFRA.

FACTS

This Court set forth a thorough and accurate representation of the facts of Tyndale House Publishers in its November order granting a preliminary injunction. The record that the Court cited for those facts has not changed. It is the same record supporting the Statement of Material Facts by Plaintiffs ("Tydnale"), which the government does not substantively rebut. Tyndale's Responsive Statement of Facts clarifies caveats that the government made about Tyndale's Facts. The facts prove Tyndale's thoroughly religious character, activities and beliefs.

The parties' main fact-based disagreement relates to the government's alleged scientific support for its Mandate. Tyndale believes this is not a factual dispute *per se*. The Court need not resolve scientific questions. Tyndale gladly agrees that the government does rely on the "Institute of Medicine" Report as grounds for its Mandate. Both sides point to the IOM Report, its studies and its logic (or lack thereof). The dispute is instead a legal one. Do the government's citations actually show what the government says they show? Has the government met its burden to provide compelling evidence and to show the necessity of its means under the strict scrutiny test? *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011) (holding the government's scientific evidence "is not compelling"). Below and in its Responsive Statement of Facts, Tyndale calls attention to unwarranted conclusions that the government draws from its sources. Tyndale called attention to most of these same flaws in its briefing in support of preliminary injunction (Doc. ## 6, 19). Tyndale's Responsive Statement of Facts also attaches further admissions made by Defendants' representative in a recent deposition.

ARGUMENT

Tyndale is entitled to summary judgment because it has satisfied all the elements of its RFRA claim. "[S]ummary judgment is appropriate where 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *AstraZeneca Pharm. LP v. Food & Drug Admin.*, 713 F.3d 1134, 1138 (D.C. Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). Under RFRA, "Government shall not substantially burden a person's exercise of religion . . .

[unless] 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. When a plaintiff shows the first two elements of RFRA, free exercise and substantial burden, the government must demonstrate the two strict scrutiny elements. *See Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428–29 (2006).[1]

I. Tyndale and Its Owners Exercise Religion under RFRA When They Refrain from Providing Abortifacient Items in Tyndale's Health Insurance Plan.

The government is wrong that Tyndale cannot exercise religion. Tyndale publishes Bibles. It is a devout family company that was founded to evangelize, and that directs nearly all its proceeds to religious charity. This Court has already rejected the government's view. *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 114–19 (D.D.C. 2012). And it has done so consistent with the vast majority of cases challenging this Mandate.[2]

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[1] The Court framed the issue of religious exercise as one of standing, possibly as distinct from being an element of RFRA. Plaintiffs respectfully suggest that the analysis here ends up in the same place, since the question is whether religious exercise by a party exists, or is present, so as to face a threat by the government burden.

[2] Of 29 cases by businesses challenging this Mandate, 22 have obtained preliminary injunctive relief (see citations at the end of this footnote). Somehow the government conjures this consensus into a "majority" *against* plaintiffs. Gov. Summ. J. Br. (Gov. Br.) at 5. It does so by counting district court rulings where the circuit disagreed and granted plaintiffs an injunction pending appeal (e.g., *O'Brien* and *Grote*), and by *not* counting cases in which the government was so confident it would lose that it didn't even fight the injunction request (just as it abandoned its *Tyndale* appeal). But even by this reckoning, the government's math is fuzzy. The government has since lost *Hobby Lobby* both on appeal and in a TRO before the district court (by extension this calls *Armstrong* and *Briscoe* into question). Many more than seven cases have issued written orders, over the government's objection, agreeing with the plaintiffs: *Hobby Lobby* (10th Cir. and W.D. Okla.), *Korte* (7th Cir.), *Grote* (7th Cir.), *Annex Medical* (8th Cir., saying it includes *O'Brien*), *Newland*, *Legatus (Weingartz)*, *Tyndale*, *Monaghan*, *American Pulverizer*, *Triune Health Group*, *Geneva College (Seneca Hardwood Lumber)*, and *Beckwith*.

Overall, in addition to the present case, compare these 21 cases: *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013) (finding likelihood of success on the merits and irreparable harm); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (injunction pending appeal); *Grote Indus. LLC v. Sebelius*, No. 13-1077, 708 F.3d 850 (7th Cir. Jan. 30, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012) (injunction pending appeal); *Gilardi v. U.S. Dep't of Health*

Notably, the government does not appear to dispute that refraining from providing abortifacients in a health plan is religious exercise, if done by one who can exercise religion.

The D.C. Circuit itself granted relief to a food company claiming to exercise religion in *Gilardi*, observing that it only could do so after plaintiffs satisfied a very "stringent" threshold. *Gilardi*, No. 13-5069, orders (Mar. 21 & 29, 2013). Most recently, the *en banc* Tenth Circuit resoundingly rejected the government's argument against religious exercise in business for two sister-companies: the arts and crafts chain Hobby Lobby, and even more analogously here, the Christian bookstore company Mardel. *Hobby Lobby*, 2013 WL 3216103 at *1.

At least one prominent judge sympathetic to the government's position concedes that a "for-profit" corporation can exercise religion if it is devoutly religious. *See Grote*, 708 F.3d 850 at 856 (Rovner, J., dissenting). Judge Rovner cited *Tyndale*, declaring "there do exist some

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and Human Servs., No. 13-5069 (D.C. Cir. Mar. 29, 2013) (injunction pending appeal); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. July 27, 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. Oct. 31, 2012) (preliminary injunction for Weingartz plaintiffs); *Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs.*, No. 6:12-cv-03459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Monaghan v. Sebelius*, No. 2:12-cv-15488-LPZ-MJH, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 2:12–CV–92–DDN, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013); *Lindsay v. U.S. Dep't of Health and Human Servs.*, No. 13-cv-1210 (N.D. Ill. Mar. 20, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462-AGF (E.D. Mo. Apr. 1, 2013); *Tonn & Blank Constr. v. Sebelius*, No. 1:12-cv-00325-JD-RBC (N.D. Ind. Apr. 1, 2013); *Hall v. Sebelius*, No. 0:13-cv-00295-JRT-LIB (D. Minn. Apr. 2, 2013); *Hartenbower v. U.S. Dep't of Health and Human Servs.*, No. 1:13-cv-02253 (N.D. Ill. Apr. 18, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-00207-JFC, 2013 WL 1703871 (W.D. Pa. Apr. 19, 2013) (preliminary injunction for Seneca Hardwood Lumber plaintiffs); *Johnson Welded Prods., Inc. v. Sebelius*, No. 1:13-cv-00609-ESH (D.D.C. May 24, 2013); and *Beckwith Electric Co., Inc. v. Sebelius*, 2013 WL 3297498 (M.D. Fla. June 25, 2013); with these seven cases: *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 7, 2013); *Briscoe v. Sebelius*, No. 1:13-cv-00285-WYD-BNB, 2013 WL 755413 (D. Colo. Feb. 27, 2013); *Eden Foods, Inc. v. Sebelius*, No. 13-1677 (6th Cir. June 28, 2013); *MK Chambers Co. v. Dep't of Health and Human Servs.*, No. 13-cv-11379, 2013 WL 1340719 (E.D. Mich. Apr. 3, 2013); *Armstrong v. Sebelius*, No. 1:13-cv-00563-RBJ (D. Colo. May 10, 2013); and *Mersino Mgmt. Co. v. Sebelius*, No. 2:13-cv-11296-PDB-RSW (E.D. Mich. July 11, 2013).

corporate entities which are organized expressly to pursue religious ends, and I think it fair to assume that such entities may have cognizable religious liberties independent of the people who animate them, even if they are profit-seeking." *Id.* The government's contrary view is extreme.

A. Tyndale's owners exercise their beliefs through Tyndale.

This Court correctly concluded that Tyndale and its owners overlap in their religious exercise, and that Tyndale has standing to assert its owners' rights. Tyndale is owned by a non-profit religious entity (Tyndale House Foundation) that even the government admits can exercise religion. It is also thoroughly owned, directed and operated by religious people (including Plaintiff Mark Taylor) unified in running Tyndale to pursue religious goals. *See Tyndale*, 904 F. Supp. 2d at 115–16 (citing record evidence from the complaint and Taylor Affidavit). "[A] corporation has standing to assert the free exercise right of its owners." *Id.* at 114–18. Standing exists here because "Tyndale has been subject to the [Mandate] since it became effective on October 1, 2012," "based on its noncompliance with the law on religious grounds, it currently faces heavy fines and penalties that accrue daily, as well as likely governmental enforcement," and this injury would "be redressed by a court decision holding the contraceptive coverage mandate unlawful and enjoining its enforcement." *Id.* at 117–18.

1. Most courts agree with this Court's analysis.

The government does little more than disagree with this Court, and declare that its "reasoning is flawed," Gov. Br. 20. The government offers arguments mostly verbatim from last year's brief. There is no good reason for the Court to reconsider its holding.

As noted above, the vast majority of courts agree with this Court's decision, and have likewise issued preliminary injunctions against this Mandate (even, in many cases, for companies operating in fields less outwardly religious than Christian publishing). For example, Judge Elizabeth A. Kovachevich in *Beckwith Electric*, 2013 WL 3297498 at *12 (M.D. Fla. June 25, 2013), enjoined the Mandate for a company "inculcated with the beliefs of its owner and CEO." Judge Kovachevich ruled that "[p]ragmatically, as the owner and operator of the company who is charged with setting policy, the beliefs of Beckwith are, in essence, the beliefs of Beckwith

Electric." *Id.* at *13 (and at *8 discussing *Tyndale*). "This Court is persuaded by Judge Walton's well-reasoned analysis in *Tyndale House*." *Id.* at *8. Likewise in *Monaghan*, 2013 WL 1014026 at *4–*5 (E.D. Mich. Mar. 14, 2013), the court held that Domino's Farms Corp. (DF) had standing to challenge the Mandate on behalf of its Catholic owner, Thomas Monaghan. The court saw "no reason why DF cannot be secular and profit-seeking, and maintain rights, obligations, powers, and privileges distinct from those of Monaghan, while at the same time being an instrument through which Monaghan may assert a claim under the RFRA." *Id.* (also discussing *Tyndale*).

The government myopically asserts that the owners of a company have no stake, not even morally and religiously, in what the government forces their company to do. But this view denies reality. Tyndale's tightly structured group of owners have used the company to evangelize for decades. A government requirement that Tyndale do something against its and its owners' beliefs naturally presents a direct moral and religious harm to Tyndale's religiously-unified owners, directors and operators. They are *the* people and religious entities, and the necessary ones, who will suffer from having their company used to violate their own beliefs.

The government objects that its Mandate does not impose requirements on Tyndale's owners or owner/manager Mark Taylor, because it only applies to the company and the plan. This ignores the Mandate's real world impact. A requirement on Tyndale is necessarily a requirement on its owners and managers, because there is no one else who can implement it. The government is essentially declaring that Tyndale's owners and managers have a "choice": instead of violating their beliefs they could (a) abandon Tyndale and the business world altogether, (b) watch their evangelism company be devastated by penalties, or (c) violate a future court order that Defendants obtain under ERISA ordering abortifacients into Tyndale's health plan. In this sense, if someone kidnapped a child and demanded that she pay for her release, her parents would not be "required" to intervene. This strikes at the heart of what coercion means: putting someone in a situation where they must accept either harm or unwanted conduct. When a company is coerced, its close-holding owners and operators must either act or retreat.

To Tyndale's owners, this religious affront is "an 'actual or imminent' injury-in-fact that is 'concrete and particularized' and 'fairly ... traceable' to the contraceptive coverage mandate." *Tyndale*, 904 F. Supp. 2d at 117 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This is a common sense conclusion, that is "appropriate" to apply based on *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *E.E.O.C. v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). *Tyndale*, 904 F. Supp. 2d at 115. Tyndale cannot improve on this Court's analysis: "as in *Townley* and *Stormans*, the beliefs of Tyndale and its owners are indistinguishable." *Id.* at 116.

2. Religion is exercised in a variety of business models.

The government again relies heavily upon the concept of limited corporate liability. But this is a *non sequitur* when talking about religious exercise. Legal liability and religious liability are not coextensive. People are religiously and morally implicated by what they do in their business, without regard to whether they have limited legal liability for the company's financial losses. As the Tenth Circuit pointed out, "sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit." *Hobby Lobby*, 2013 WL 3216103 at *15. That Court asks rhetorically, "Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices?" *Id.* The court views entities such as Tyndale as not even a close call on this question, by contrasting the obvious religious implications of companies like kosher butchers that "directly serve a religious community—as Mardel, a Christian bookstore, does here," with the less obvious but still significant reality that one need not "orient one's business toward a religious community to preserve Free Exercise protections." *Id.* Recognizing that religion is exercised in business does not, as the government contends, disregard the corporate form. As Judge Kovachevich explained, "The First Amendment, and its statutory corollary the RFRA, endow upon the citizens of the United States the unalienable right to exercise religion, and that right is not relinquished by efforts to engage in free enterprise under the corporate form." *Beckwith Electric*, 2013 WL 3297498 at *13.

The reality of religious exercise in business highlights the ultimately discriminatory effect of the government's theory: it denies religious rights to people in business if they operate in a corporate form. The government essentially admitted, in the *Hobby Lobby* oral argument, that if a person engages in business through a sole proprietorship she can exercise religion in that capacity.[3] But if that same business owner organizes her company using a corporate form, she abandons her Free Exercise protections (according to the government). This result would itself impose a substantial burden on religious exercise. Requiring someone to abandon her religious exercise if she takes advantage of the corporate form would literally impose a choice between "forfeiting benefits, on the one hand, and abandoning one of the precepts of [her] religion in order to accept [benefits of corporate status], on the other hand." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). This is the very definition of a substantial burden.

The government's theory is also unworkable, and leads to senseless results. It fails to account for the variety of modern business forms such "as a general or limited partnership, sole professional corporation, LLC, [or] S-corp." *Hobby Lobby*, 2013 WL 3216103 at *15. Which of these forms abandon free exercise rights, and why? What if a sole-proprietor simply obtained an insurance policy to shield herself from personal liability? Can she still exercise religion? The government offers no coherent rationale, only inconsistent results. If a kosher butcher is a sole proprietorship it exercises religion; if it is a corporation it doesn't; if it is a limited liability partnership even the government isn't sure what to do. The Supreme Court rejected this kind of approach when it said First Amendment rights don't depend on the formalisms of a plaintiff's

[3] During the May 30, 2013 oral argument in *Hobby Lobby*, the following exchange occurred between a judge on the *en banc* panel and the attorney for the government:

> Judge: Yeah but you've admitted a sole proprietorship can exercise religion. You've admitted a partnership can exercise religion. You've admitted a non-profit can exercise religion. What is it inherently about a for-profit corporation that's different than all those other things?
>
> Government: Well, I want to be clear. I, when your honor says partnership I want to think more about the legal structure.

Oral argument recording, at 58:30 *et seq.*, *available at* http://www.becketfund.org/wp-content/uploads/2013/05/12-6294.mp3 (last accessed July 17, 2013).

status, but on whether the kind of activity in question is protected by the First Amendment. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Here, the Supreme Court has held that a sole proprietor's objection to a government regulation on his business is religious exercise. *See United States v. Lee* 455 U.S. 252, 256–57 (1982). Since the objection by Tyndale's owners is the same kind of activity "that the First Amendment was meant to protect," *Bellotti*, 435 U.S. at 776, Tyndale too and its owners are exercising religion.

3. The Establishment Clause does not require coercing Tyndale.

The government indirectly admits the discriminatory implications of its view when it asserts the novel concept that it would somehow *violate the Establishment Clause* to allow a religious exemption to any believer in business. Gov. Br. 19. This theory would read the abortifacient Mandate into the Constitution itself, *requiring* the government to coerce people into paying for other people's embryocidal drugs, else the government "advance" religion. This is a bizarre and radical view that the Supreme Court has never announced.

First, plainly, the First Amendment does not actually contain this Mandate requiring private citizens buy abortifacient drugs for other citizens. The First Amendment doesn't require the government to coerce anyone at all. It is *anti*-coercion, not pro-coercion. It restrains the government, not the citizenry. The idea that the U.S. Government is "establishing religion" if it does *not* coerce people to do something is breathtaking. The government is essentially proposing that when it allows freedom for religion, its lenience "advances" and therefore establishes religion. This is a deep misunderstanding of liberty itself. It presumes that freedom belongs to the government to give or withhold, so that when the state "allows" freedom, it actively causes religion to "advance." But in American political theory, fundamental freedoms are not the government's property in the first place. The Declaration of Independence insists that people do not receive their liberty as bestowed by the state, but "endowed by their Creator." Para. 2. The government's role is not to originate freedom but to "secure" it, the government itself being derivative of the governed, whose freedoms preexist the state. *Id.* Thus it is incompatible with America's founding principles to propose that *not* coercing someone counts as government

"advancement" of religion. The government does not own my freedom so as to bless me by sheathing its sword. *Cf. Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011) (when the state offers a tax credit for contributions to religious schools, the state is not spending its own or taxpayers' money, because the money never entered the state's hands).

If freedom itself "advances" religion, the Free Exercise Clause would violate the Establishment Clause. But in actual practice, this same government is offering exemptions to churches who object to the Mandate. Those church exemptions ought to engender the highest kind of Establishment Clause violation for the government, since religion is quintessentially "advanced" when churches themselves are free. The only way to fully realize the government's theory of non-establishment would be to refuse to "advance" religion at all by making it entirely illegal.

The government's supposed source for discovering a "coercion principle" hiding in the Establishment Clause is *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). But *Amos* did not require the government to coerce anyone, nor did it prohibit the government from exempting believers from coercion. *Amos* simply held that "[r]eligious accommodations . . . need not" be accompanied by secular exemptions. *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005). But *Amos* never held that letting religious people have an exemption in business or anywhere else would somehow violate the Establishment Clause.[4] As the Tenth Circuit noted, two concurrences in *Amos* explicitly declared it "conceivable that some for-profit activities could have a religious character" and that the question "remains open." *See Hobby Lobby* 2013 WL 3216103 at *11 (quoting *Amos*, 483 U.S. at 345 n.6, 349).

The Supreme Court later clarified the point the government wishes to draw from *Amos*, declaring that "legislative" exemptions and accommodations for religious exercise "[are] permitted," and are a proper product of "the political process," even when the First Amendment

[4] Nor is a religious person's exemption in business a "secular exemption"—it is a religious exemption. By characterizing all business as secular in a way that wholly excludes religion, the government begs the question. *See Hobby Lobby*, 2013 WL 3216103 at *15 ("sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit").

does not require those exemptions. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990). The Court never said that such exemptions would not be permitted if they happened in business. Then in 2005 the Court further clarified that *Amos* itself, far from standing for the principle that religious exemptions violate the Establishment Clause, instead affirms that "removal of government-imposed burdens on religious exercise is more likely to be perceived 'as an accommodation of the exercise of religion rather than as a Government endorsement of religion.'" *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (quoting *Amos*, 483 U.S. at 349 (O'Connor, J., concurring)). The idea that "removal of government-imposed burdens on religious exercise" is a violation of the Establishment Clause is an unprecedented and disturbing position for the government to take.

The Supreme Court's free exercise cases are incompatible with the idea that exemptions can never advance a religious believer in a profitable context: *Sherbert* and *Thomas* both ruled in favor of plaintiffs who *demanded and received a right to direct payments by the government* for unemployment. It is impossible to theorize a view of the Establishment Clause that considers it an "advancement" and "subsidy" of a religious believer if she is merely exempted from a burden in a financial context, and yet still rule in favor of the plaintiffs in *Sherbert* and *Thomas* when their entire request was for government money. All Tyndale and its owners want in this case is not to be coerced. They aren't asking for any government payment. And if the government is correct that religious exemptions for businesses violate the Establishment Clause, then dozens of statutes including the Affordable Care Act itself would be "unconstitutional" for allowing religious or moral objections by entities that need not operate non-profit.[5] The

[5] The federal code is bursting with conscience exemptions that allow entities to religiously object to health practices without those entities needing to operate not-for-profit. This starts with the Affordable Care Act itself: 42 U.S.C.A. § 18023(b)(1) (protecting a "health plan" and its "issuer" when it objects to covering abortions in the plan); 42 U.S.C.A. § 18113 (protecting an individual "or institutional health care entity" when it objects to participating in assisted suicide). *See also* 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b); Title III of Division I (Department of State, Foreign Operations, and Related Programs Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-2(b)(3); 42 U.S.C. § 1395w-22(j)(3)(B); 48 C.F.R. § 1609.7001(c)(7); Sec. 727 of Title VII of Division C (Financial Services

government's theory would require the Affordable Care Act to renege on the few conscience protections it contains.

4. The shareholder standing doctrine is impossible to apply here.

Finally, the government attempts to raise the prudential doctrine of shareholder standing against such a claim. Gov. Br. 21–22. But this turns the shareholder standing doctrine inside out. The government's own recitation of that doctrine states that, when applicable, it can prevent an action brought "by a stockholder *in his own name*," instead of the corporation, when "the individual *who seeks redress* for corporate injuries is the corporation's sole shareholder," allowing "a shareholder [to] sue." *Id.* (quoting various cases; emphasis added). But the exact opposite is happening here: the corporation is suing, not the shareholder himself. There is no shareholder plaintiff for the government to aim its shareholder standing argument against.

The purpose of the prudential shareholder standing doctrine is to encourage suits by the right plaintiff, the corporation. It seeks to avoid concerns raised when a shareholder sues but the corporation has declined to do so, sometimes for reasons undermining the shareholder's claims. Here the corporation did sue. If the shareholder standing doctrine is at all relevant to this case, it would reinforce Tyndale as the plaintiff, not undercut it. Ironically, while the government now asserts shareholders have no standing to sue, in October it called it "inexplicabl[e]" that the shareholders did *not* sue. Def. Opp. to Pls.' Mot. for Prelim. Inj. at 13 (Doc. # 16, Oct. 22, 2013). The government's use of this doctrine is nonsensical. The shareholder standing doctrine cannot undermine a corporate lawsuit.

The shareholder standing doctrine is not applicable for several additional reasons. First, as this Court correctly held, Tyndale and its owners share one and the same religious interest

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and General Government Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74; Sec. 808 of Title VIII of Division C (Financial Services and General Government Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74; 22 U.S.C. § 7631(d); and Sec. 507 (d) of Title V of Division F (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74.

against the mandate, the Mandate impacts Tyndale's owners religiously, and Tyndale has standing to assert rights of its owners in the free exercise of religion context. *Tyndale*, 904 F. Supp. 2d. at 114–19. Those holdings preclude any prudential standing concern from the shareholder standing doctrine. Prudential concerns relating to this doctrine imply that Article III injury exists, but raise question about who is the proper plaintiff. *But the shareholder is not the plaintiff here at all—the corporation is*. So there's no prudential shareholder standing concern in the first place, because the proper party is in fact suing. Injury exists to the owners for the reasons given by this Court, and because prudential standing is significantly lessened in a First Amendment context. "Within the context of the First Amendment . . . the Court has enunciated other concerns that justify a lessening of prudential limitations on standing." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Branch v. F.C.C.*, 824 F.2d 37, 50 (D.C. Cir. 1987) (same). The Mandate harms Tyndale's owners when they exercise religion in Tyndale.

Second, this case presents a well-established exception to the shareholder standing doctrine. Tyndale's owners and directors are not mere shareholders. They are intimate partners with Tyndale House Publisher's mission, family members to its founders, officers of the corporation, and co-religionists in Tyndale's joint efforts. As discussed above, they are personally and religiously harmed by the Mandate, because it coerces them to violate the beliefs they infused into their business. The shareholders here are part of the intimate structure by which Tyndale implements its and its founders' religious beliefs in an evangelization enterprise, and then directs the proceeds of those beliefs to charities and reinvestment that also advance its religious beliefs. This is not a case where a shareholder is asserting that his minority shares were devalued because another company broke a contract with the corporation, and the corporation chose not to sue. These personal and intertwined harms to Tyndale and its owners illustrate a "well-established exception" that allows shareholder claims if they have "a *direct, personal interest* in a cause of action." *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006) (shareholders have Article III standing when corporation "incurs significant harm, reducing the return on their investment and lowering the value of their stockholdings").

Finally, prudential standing does not apply to a RFRA claim. RFRA provides that standing "shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c). Where "Congress intended standing . . . to extend to the full limits of Art[icle] III," courts "lack the authority to create prudential barriers to standing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

This Court was correct to hold that Tyndale's owners' exercise of religion is harmed by the Mandate, that they and Tyndale share the same religious beliefs and interest, and that their rights can be asserted by Tyndale itself.

B. Tyndale House Publishers itself exercises religious beliefs.

Tyndale House Publishers, as a corporation, exercises religion. It exists for no other purpose. State law empowers it to pursue that lawful purpose, and the Constitution and RFRA encompass that pursuit. Though this Court previously declined to rule on this issue, and though it can still refrain from doing so if it sustains the owners' activities through Tyndale as it did before, recent decisions illuminate this point. In particular, the Tenth Circuit in *Hobby Lobby* ruled that Hobby Lobby and Mardel themselves exercise religion within the meaning of RFRA and the First Amendment. 2013 WL 3216103, at *9–*17. Tyndale House Publishers is likewise a "person[] exercising religion" under RFRA. The government's familiar arguments, rejected by the Tenth Circuit, carry even less weight than they did before.

There is no "business exception" to RFRA; "any" exercise of religion is protected. The text of RFRA states in part, the "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. §2000bb-1(a). RFRA does not define the term "person." *See id.* The Dictionary Act, however, declares that "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. "We could end the matter here since the plain language of the text encompasses 'corporations . . . .'" *Hobby Lobby*, 2013 WL 3216103 at *9. There is no text, context or history in RFRA exempting businesses or corporations from its protection.

In addition to the statutory text, a host of sources affirm corporations have rights under both the First Amendment and RFRA. It is highly notable that the government itself admits that corporations exercise religion. The government has conceded here and in all cases against this Mandate that non-profit corporations, including but not limited to churches, exercise religion. Necessarily, then, it is not the corporate form or separate legal status that causes the government to exclude the possibility of religious exercise. Church corporations are different than their individual members; they are not natural persons any more than business corporations are. And as discussed above, as held in this Court's previous opinion, the profitable context cannot be held as precluding the exercise of religion. Tyndale's owners and operators have always exercised their religion to evangelize through Tyndale's publication of Christian materials and funneling of its proceeds to charity, regardless of the formality of their corporate status. But if corporate form can be a forum for religious exercise (even in the government's own estimation), and business can be a forum for religious exercise (as this Court concluded), there is simply no hook left on which the government can hang its declaration that Tyndale is incapable of exercising religion.

Caselaw amply supports the existence of religious exercise through corporations. Numerous Supreme Court cases involve religious exercise by non-profit corporations. In *O Centro Espirita*, for example, the Court affirmed the plaintiff's RFRA claim. *See generally* 546 U.S. 418. The plaintiff there was a corporation, not a natural person. *See O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 973 (10th Cir. 2004) (en banc), *aff'd*, 546 U.S. 418 (2006). Similarly, in *Church of the Lukumi Babalu Aye, **Inc.** v. City of Hialeah*, the plaintiff, a church, was incorporated, yet that did not prevent the Supreme Court from affirming its Free Exercise rights under RFRA. 508 U.S. 520 (1993).

Corporate exercise of First Amendment rights is also apparent outside the non-profit context. *See, e.g., Hobby Lobby*, 2013 WL 3216103 at *13–*14 (religious exercise is not "purely personal" under *Bellotti*); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("First Amendment protection extends to corporations."). There is no legal distinction between natural persons and corporations when it comes to First Amendment rights. *See, e.g.,*

Monell v. Dep't of Social Services, 436 U.S. 658, 687 (1978) ("[I]t is well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."); *United States v. Amedy*, 24 U.S. 392 (1826) ("That corporations are in law, for civil purposes, deemed persons is unquestionable."); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006) ("[C]orporations possess Fourteenth Amendment rights . . . through the doctrine of incorporation, [of] the free exercise of religion."). This makes it "beyond question that associations—not just individuals—have Free Exercise rights." *Hobby Lobby*, 2013 WL 3216103 at *13.

This judicial interpretation likewise applies to RFRA. When Congress enacted RFRA it was aware of this centuries-old rule that corporations are "persons" with constitutional rights. *See Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation . . . ") (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975)). As the Tenth Circuit recently noted, in defining religious exercise RFRA cross-references RLUIPA, which "notes that both 'person[s]' and 'entit[ies]' can exercise the religious rights it grants." *Hobby Lobby*, 2013 WL 3216103 at *9 n.6. This cross-reference "provides further support that RFRA . . . encompasses both natural persons and anything that qualifies as an 'entity'—which of course would encompass corporations." *Id.*

There is nothing strange about concluding that a Bible publishing company can exercise religion. As a corporation, Tyndale is deeply religious. The company was founded as and remains a publisher of Bibles and other Christian media. VC ¶¶ 21-24. Its purpose is explicitly stated in its articles of incorporation to publish "Christian and faith-enhancing" media. VC ¶ 25. Tyndale was founded, moreover, not to seek a profit, but to evangelize through publishing. VC ¶ 44. The purpose of the company was to share the "gift" from God that Dr. Kenneth Taylor believed he was given to communicate the Gospel's message to the world, and to direct nearly all the profits to religious, charitable, and evangelistic non-profit endeavors. VC ¶ 44. Tyndale

continues to operate under this evangelistic motive and method by making extensive charitable contributions and fostering a Christian workplace. VC ¶¶ 26-38, 44-49.

The government argues that religion and business are incompatible. Gov. Br. 27. However, RFRA protects "any" exercise of religion. 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A); *see also United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends*, 322 F. Supp. 2d 603 (E.D. Pa. 2004) (Quaker Church's refusal to levy its employee's wages was an exercise of religion under RFRA). Furthermore, free exercise, in the judicial context, has historically been intertwined with the pursuit of financial gain. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 399 (1963); *United States v. Lee*, 455 U.S. 252, 257 (1982). For example, in *Sherbert*, an employee's religious beliefs were burdened when he was denied unemployment benefits. 374 U.S at 399; s*ee also Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 709 (1981). Similarly, in *Fraternal Order of Police v. City of Newark*, the court upheld a permanent injunction to prevent employers from taking disciplinary action against employees who, for religious purposes, failed to abide by the police station's grooming rules. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.). In *United States v. Lee*, the Court held that an Amish employer's religious beliefs were in fact burdened by paying taxes for his workers into the Social Security system and required the government to offer sufficient justification for this burden. *Lee*, 455 U.S. at 257. "[T]he Supreme Court has settled that *individuals* have Free Exercise rights with respect to their *for-profit businesses*." *Hobby Lobby Stores, Inc.*, No. 12-6294, 2013 WL 3216103, at *14.

The government asserts that "not a single case [] held that a for-profit corporation can exercise religion under RFRA and the Free Exercise Clause." Gov. Br. 18. But it could be equally said that not a single case has ever held that all for-profit corporations are categorically excluded from being able to exercise any religion. Of course, at minimum, the government's side of this "no case" dispute is falsified by *Hobby Lobby*. Strikingly, the government relies extensively on the now defunct rulings reversed in *Hobby Lobby* itself. The en banc Tenth Circuit noted that the Supreme Court has "rejected the argument that . . . corporations or other

associations should be treated differently under the First Amendment simply because such associations are not natural persons." *Hobby Lobby*, 2013 WL 3216103 at *13 (quoting *Citizens United*, 558 U.S. at 342–43). The Tenth Circuit court declined to make a distinction between the right to political expression recognized in *Citizens United* and the right to religious expression: "We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression." *Id.* at *15. Relying in part on *Citizens United*, the Tenth Circuit reasoned, "[W]e cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the exact same activities as before." *Id.* And as noted above, *Hobby Lobby* is hardly a bolt from the blue: the government has been subject to over 20 preliminary injunctions against this Mandate alone for for-profit companies. The government should cease insisting that no case supports Tyndale's religious exercise.

Even outside this Mandate dispute, nearly three decades ago the court in *McClure v. Sports and Health Club, Inc.* called it "conclusory" and "unsupported" when the state argued that a business corporation has no capability to exercise religion. 370 N.W.2d 844 (Minn. 1985). Other courts also recognized religious exercise by for-profit corporations. *See, e.g., Jasniowski v. Rushing*, 678 N.E.2d 743, 749 (Ill. App. Dist. 1, 1997) (for profit corporation may assert free exercise claim), *vacated*, 685 N.E.2d 622 (Ill. 1997). *Morr-Fitz, Inc. et al. v. Blagojevich*, No. 2005-CH-000495, slip op. at 6–7, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011) (ruling in favor of the free exercise rights of three pharmacy corporations and their owners); *Roberts v. Bradfield*, 12 App. D.C. 453, 464 (D.C. Cir. 1898) (recognizing that the right of "free exercise of religion" inheres in "an ordinary private corporation"). *See also Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011) (analyzing free exercise claims without regard to profit motive); *Maruani v. AER Services, Inc.*, 2006 WL 2666302 (D. Minn. 2006) (analyzing religious First Amendment claims by a for-profit business).

The government's response to this wave of caselaw within and outside the Mandate litigation is to insist that other statutes—not RFRA—offer a narrower scope of who can exercise

religion, and therefore that this Court should judicially amend RFRA to write those exceptions into the statute. It relies primarily on Title VII's "religious employer" exemption for employment discrimination, 42 U.S.C. § 2000e-1(a), and claims that "[u]nder RFRA, as under pre-existing federal statutes such as Title VII, an entity's for-profit status is an objective criterion that allows courts to distinguish a secular company from a potentially religious organization. . . ." Gov. Br. 19. But the statutory "evidence" for this claim leads to exactly the opposite conclusion. Those other statutes contain narrower protection; *RFRA does not*. It protects "any" religious exercise. "Where the words of a later statute differ from those of a previous one *on the same or related subject*, the Congress *must have* intended them to have a different meaning." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988) (emphasis added) (citing *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765–66 (3d Cir.1970)). Therefore Congress "must have" not limited RFRA's protections to the narrower scope found in exemptions in Title VII or other statutes. The Tenth Circuit correctly applied this principle, observing that the government's cited statutes "imply Congress is quite capable of narrowing the scope of a statutory entitlement or affording a type of statutory exemption when it wants to . . . when the exemptions are not present, it is not that they are 'carried forward' but rather that they do not apply." *Hobby Lobby*, 2013 WL 3216103 at *10. Therefore, to read a "religious employer" limit into RFRA or the First Amendment would violate the text of both.

A company's exercise of religion is no different substantively than its pursuit of any other value or belief. Many companies prioritize values other than (and sometimes higher than) profit: for Ben & Jerry's, "Progressive values lead the way"; Starbuck's supports establishing a right to same-sex marriage; Whole Foods champions sustainable agriculture.[6] It is simply false

[6] *See, e.g.*, Ben & Jerry's "Activism," *available at* http://www.benjerry.com/activism (last visited July 17, 2013) ; David Zimmerman, "Starbucks CEO to anti marriage equality investors, 'buy shares in another company," Boston.com (Mar. 22, 2013), available at http://www.boston.com/lifestyle/blogs/bostonspirit/2013/03/starbucks_ceo_to_anti_marriage.html (last visited July 17, 2013); Whole Foods "Mission and Values," available at http://www.wholefoodsmarket.com/mission-values (last visited July 17, 2013).

as a matter of law that ordinary corporations may only pursue profit to the exclusion of other values such as religion. And if the government were to concede that corporations can pursue not-profitable values *as long as they are not religious*, that position would be not only theoretically unjustified, it would impose unconstitutional viewpoint discrimination. See, e.g., *Good News Club v. Milford Central School*, 533 U.S. 98, 107–12 (2001) (finding viewpoint discrimination where certain activities are permitted but not if pursued from a religious perspective).

Tyndale's for-profit status does not divest the company of its First Amendment rights. The limited exemptions found in other statutes are simply not applicable to a court's interpretation of RFRA, and if anything those statutes suggest that RFRA is indeed as broad as its text indicates. The government's attempt to exclude the right of religious exercise from for-profit corporations is unsupported, especially now that the primary case that it rests this argument upon has been decisively reversed by the en banc court in *Hobby Lobby*.

II. The Mandate Substantially Burdens Tyndale's Religious Exercise Because It Commands Activity that Violates Tyndale's and Its Owners' Beliefs.

Tyndale and its owners exercise their religious beliefs in part by refraining from covering abortifacient items and related counseling in their employee health insurance plan. To outlaw that religious exercise and "*compel* a violation of conscience," as here, is a quintessential substantial burden. *Thomas v. Review Bd.*, 450 U.S. at 717.

A. Compelling a violation of beliefs is a substantial burden.

The Mandate is an archetypal substantial burden, because it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). This Court has correctly concluded that "the contraceptive coverage mandate substantially burdens [the plaintiffs'] religious exercise." *Tyndale*, 904 F. Supp. 2d at 125. This substantial burden is the same whether considered at the preliminary or summary judgment stage. The Court's ruling was amply supported by precedent. A plaintiff's religious exercise is substantially burdened when the government places "substantial pressure on an adherent to modify his behavior and to violate

his beliefs." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd. of Ind. Emp't. Sec. Div.*, 450 U.S. 707, 718 (1981)). In this case, "the pressure to violate their religious beliefs remains undiminished." *Tyndale*, 904 F. Supp. 2d. at 124.

The government does not contest the sincerity of Tyndale's deeply held conviction regarding abortifacients. Instead it repeats its arguments that health insurance coverage requirements generally are not substantial burdens and do not harm Tyndale's beliefs. This Court correctly rejected the government's argument because, "[a]s in *Yoder*, the contraceptive coverage mandate affirmatively compels the plaintiffs to violate their religious beliefs in order to comply with the law and avoid the sanctions that would be imposed for their noncompliance." *Tyndale*, 904 F. Supp. 2d at 121.

The government does not appear to dispute that the weightiness of the monetary and lawsuit penalties at issue in this case are, in themselves, substantial when applied to a health insurance coverage requirement.[7] The Supreme Court has acknowledged a substantial burden even when the law contained no command at all, but only resulted in the plaintiff foregoing unemployment benefits. *Sherbert*, 374 U.S. at 403–04 (1963); *Thomas*, 450 U.S. at 717–18. Even "the imposition of significant added expense to a religious practice can, under some

[7] The government itself recognizes that mandatory coverage of abortifacients, contraception and sterilization is a substantial burden on religious exercise. In a narrow effort to "take[] into account the effect on the religious beliefs of certain religious employers," the Mandate exempts certain churches and religious orders. 76 Fed. Reg. 46,621, 46,623. Defendant Sebelius explained that extending time before this Mandate goes into effect for some non-profit groups "strikes the appropriate balance between respecting religious freedom and increasing access to important preventative services." Available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited July 17, 2013). President Obama acknowledged that religious liberty is "at stake here" because some institutions "have a religious objection to directly providing insurance that covers contraceptive services." Available at http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited July 17, 2013). Likewise, Congress has elsewhere recognized the need to accommodate the same burden. *See, e.g.,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727 (protecting religious health plans in the federal employees' health benefits program from being forced to provide contraceptive coverage); *id.* at Title VIII, Div. C, § 808 (affirming that the District of Columbia must respect the religious and moral beliefs of those who object to providing contraceptive coverage in health plans).

circumstances, rise to the level of a substantial burden." *Tyndale*, 904 F. Supp. 2d at 121 (citing *Jimmy Swaggart Ministries v. Bd. Of Equalization of Cal.*, 493 U.S. 378, 392 (1990)). But this case presents a quintessential substantial burden: a command to act in violation of one's beliefs or be penalized. The situation is like *Thomas v. Anchorage Equal Rights Comm'n*, where "the effect of the law was to 'put [the plaintiffs] out of business' . . . due to their inability to comply with the law in accordance with their religious belief." *Tyndale*, 904 F. Supp. 2d at 121–22 (quoting *Thomas v. Anchorage Equal Rights Comm'm*, 165 F.3d 692, 696-97 (9th Cir. 1999), *rev'd on other grounds en banc*, 220 F.3d 1134 (9th Cir. 2000)). "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." *Tyndale*, 904 F. Supp. 2d at 122.

This Court's decision is reinforced by many similar injunctions against this Mandate. In *Hobby Lobby*, the en banc Tenth Circuit held that "the contraceptive-coverage requirement substantially burdens Hobby Lobby and Mardel's rights under RFRA." *Hobby Lobby*, 2013 WL 3216103 at *9; *see also Beckwith Electric*, 2013 WL 3297498 at *16. The D.C. Circuit motions panel in *Gilardi* necessarily found this element when it granted injunctive relief pending appeal.

B. Measuring the "attenuation" of beliefs is not what substantial burden means.

Instead of directly disputing the substantiality of its penalties, the government again attempts to redefine "substantial burden" away from what it is—a measure of the weight of government "pressure," *Kaemmerling*, 553 F.3d at 678—into instead a theological litmus test about how "attenuated" or "indirect" contraceptive coverage is in relation to contraceptive use, or in relation to Tyndale's owners' actions. But this Court correctly rebuffed that attempt, for several reasons.

First, substantial burden is not and cannot be a theological inquiry. RFRA asks for a "substantial burden," not a "substantial belief." 42 U.S.C. § 2000bb(b). The government says that an objection to insurance coverage is no different than paying a salary that could be used to buy abortifacients. Gov. Br. 31. But that is a moral test, not a legal one. "In *Thomas*, [450 U.S. at

715–16,] the Supreme Court rejected an argument that the plaintiff's claimed objection to working in a facility that produced armaments was inconsistent with his prior work in the same facility producing sheet metal that may have been ultimately used in the production of armaments." *Tyndale*, 904 F. Supp. 2d at 124. The government urges "exactly the kind of impermissible interrogation of religious beliefs that the Supreme Court warned against." *Tyndale*, 904 F. Supp. 2d at 124. Tyndale "drew a line, and it is not for [courts] to say that the line [it] drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Id.* (quoting *Thomas*, 450 U.S. at 715–16).

Second, the government fails again in its attempt to claim the Mandate is indirect by relying on *O'Brien*. *O'Brien* was wrongly decided. When the Defendants sue Tyndale to coerce compliance with the Mandate, there will be nothing "indirect" about that suit. The Eighth Circuit issued two injunctions pending appeal against this Mandate, including in *O'Brien*, suggesting findings of likelihood of success on the substantial burden element. Most cases against this Mandate, including the D.C. Circuit, have issued similar injunctions, and now the en banc Tenth Circuit has ruled in a way contradicting the rationale of *O'Brien* and similar outlying cases. *O'Brien* is not persuasive. It is also still true that "the facts of the instant case [are] sufficiently distinguishable from *O'Brien* to warrant a different result," due to Tyndale's self-insured structure. *Tyndale*, 904 F. Supp. 2d at 123. And even if the burden on Tyndale could be called in some ways "indirect," that would "not render the burden insubstantial." *Id.* at 121; *see also Thomas*, 450 U.S. at 718 (explaining "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial").

Third, the government's attempt to distinguish abortifacient use from its coverage (Tyndale. Gov. Br. 33) is inconsistent with the undisputed fact that Tyndale objects to 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." *Tyndale*, 904 F. Supp. 2d at 123.

III. The Mandate Has No Compelling Interest Because the Government Pursues It Haphazardly, and No Evidence Shows Religious Exemptions Would Cause Harm.

This Court correctly held that "the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object." *Tyndale*, 904 F. Supp. 2d at 129. The government bears the burden to demonstrate "that application of the burden to [Tyndale] is in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1). RFRA purposefully holds the government to "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534, by adopting "the strict scrutiny test," *O Centro Espirita*, 546 U.S. at 534, previously used in both *Yoder* and *Sherbert*, 42 U.S.C. § 2000bb (b)(1). This standard can only be met by an interest of "the highest order," *Lukumi*, 508 U.S. at 546, involving only "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The government's allegedly compelling interests are too generic, they are undermined by the government's own haphazard policies, and they lack the necessary evidentiary chain needed to show the Mandate fixes any actual problem.

A. The government raises generic interests that cannot satisfy strict scrutiny.

Strict scrutiny is not satisfied by "'mere invocation of the general characteristics' of contraceptives as promoting public health or . . . as equalizing access to health care . . . ." *Tyndale*, 904 F. Supp. 2d at 127. But the government nowhere goes beyond its generic assertions to show "that the application of the contraceptive coverage mandate *to the plaintiffs* furthers those compelling interests." *Id.* at 125 (discussing *O Centro Espirita*, 546 U.S. at 430). In response to *O Centro*'s requirement that it tailor its interest "to the particular claimant," the government simply repeats that it disagrees with *O Centro* and this Court. See Gov. Br. 35. This Court's reading of *O Centro* is straightforward, and other courts agree. *See, e.g., Hobby Lobby*, 2013 WL 3216103 at *23 (rejecting these interests as "broadly formulated" and citing *O Centro Espirita*, 546 U.S. at 431); *Korte*, 2012 WL 6757353 at *4 (characterizing the interests as "generalized"); *Beckwith*, 2013 WL 3297498, at *16 (same).

Among the cases that the government cites to dispute this point, see Gov. Br. 35, all but one predates *O Centro*. The exception, *U.S. v. Winddancer*, is a least restrictive means case, not a compelling interest case. 435 F. Supp. 687, 695 (M.D. Tenn. 2006) ("the defendant does not dispute the government's compelling interest . . . "). This Court has already rebuffed the government's attempt: "Regardless of what those courts held, *O Centro* made clear that, under the RFRA, 'courts should strike sensible balances[] pursuant to a compelling interest that requires the Government to *address the particular practice at issue*." *Tyndale*, 904 F. Supp. 2d at 126 n.16 (quoting *O Centro Espirita*, 546 U.S. at 439).

Whether the government must tailor its interest to a particular claimant, or to a similarly situated class of religious objectors, the government's interests are still highly generic: "health" and "equality." No one denies that "health" or "equality" are important; saying so is nearly tautological. But "broadly formulated" interests cannot, by definition, satisfy strict scrutiny, no matter how "compelling" they might be in a colloquial sense. *See O Centro Espirita*, 546 U.S. at 431; *see also Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) ("[I]t was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish); *Sherbert*, 374 U.S. at 410.

There is good reason for saying generic interests fail strict scrutiny. They present no reason "of the highest order," *Lukumi*, 508 U.S. at 546, in relation to the only issue at hand: refusing *this claimant* an exemption to *this Mandate*. The government's interests are generic in several senses. First, the Mandate is not a mandate that Tyndale provide "health" or "equality" as such. So invocation of "health" and "equality" fail to justify why this Mandate can tolerate no exceptions. Second, studies purporting to show that "contraception benefits women" are also far too generic to be relevant to this case. The Mandate is not about making contraception legal (it is already legal), and an exception to the Mandate blocks no one from using their money to buy contraception. The Mandate is about *who pays*. A government interest in the health or equality benefits of contraception is therefore too generic to the question of this case, which is whether there is a compelling interest in forcing Tyndale to pay. Third, Tyndale does not object to—and

in fact provides coverage for—nearly all contraception, with the exception of abortifacient items such as Plan B, Ella and IUDs. None of the government's alleged interests or evidence show a compelling need to force Tyndale to pay for those particular items. See *Tyndale* 904 F. Supp. 2d at 126–27 (compelling "proof" is "lacking" with respect to Plan B, ella, and intrauterine devices, or precluding an exemption for the same).

B. The government treats its interests as optional, not compelling.

The government's actions foreclose it from asserting that the Mandate serves a compelling interest. "[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 520. The government itself has chosen, in the Affordable Care Act and its regulations, not to give "health" or "equality" to tens of millions of women in "grandfathered" health plans. *See* 76 Fed. Reg. at 46,623 & n.4. It also refrains from providing such benefits to members of a "recognized religious sect or division" with an objection under 26 U.S.C §§ 5000A(d)(2)(a)(i) and (ii), and for churches or religious orders under 78 Fed. Reg. 39,870 (July 2, 2013). The government purports to refrain from imposing the mandate on some religious non-profit entities. *Id.* The government claims that those religious non-profits will receive an "accommodation" whereby they need not "contract, arrange, pay, or refer for such coverage." *Id*. at 39,871. The government also refrains from imposing part of its penalty pressuring employers to follow the Mandate, when it allows small employers to drop health insurance altogether.

This Court and most others have rightly focused on the government's massive grandfathering exclusion. By the government's own choice, these plans will withhold the Mandate from tens of millions of women as far out as the government's own data projects. 75 Fed. Reg. 34,538, 34,540–53. This Court correctly reasoned that "[t]he existence of these exemptions significantly undermines the defendants' interest in applying the contraceptive coverage mandate to the plaintiffs." *Tyndale*, 904 F. Supp. 2d at 128. No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47. There is simply no dispute in

the record that the government's alleged interests of "health" and "equality" apply identically, if they apply at all, to women in grandfathered plans or non-grandfathered plans alike. "The very purpose of a law is undermined where it is 'so woefully underinclusive as to render belief in [its] purpose a challenge to the credulous." *Tyndale*, 904 F. Supp. 2d at 128 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)). Defendants cannot claim that it is "paramount" for them to impose the Mandate on Tyndale while simultaneously allowing indistinguishable "appreciable damage" to tens of millions of women.

There are three ways in which the grandfathering exclusion blows up the government's interests. First consider the numbers. The government disputes the "191 million" figure that this and many other courts relied upon for persons in grandfathered plans.[8] But there is no dispute on this record that grandfathered plans will continue to encompass tens of millions of women. The government has the burden to show otherwise, but it has done the opposite. The government's data show that by the end of 2013—as far out as data predict—49% of all health plans will be grandfathered. 75 Fed. Reg. at 34,553 (Table 3, "Mid-Range Estimate"). But that number includes 55% of large employer plans. Therefore, even if slightly less than half of *plans* will be grandfathered, a majority of *employees* and beneficiaries will be in those plans.[9] Assuming, as the government now does, that 191 million persons are in employer plans overall, that still leaves about 100 million people in plans the government is not subjecting to the Mandate, *i.e.*, tens of millions of women. Likewise important, Tyndale itself is a large employer, having more than 50 full-time employees. But as just referenced, 55% of large employer plans are projected to maintain grandfathered status. So the government data shows that it is not applying the Mandate to *most* employers similarly situated to Tyndale.

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[8] The government claims this number came from calculating the total number of persons covered in any group health plan, as listed at 75 Fed. Reg. 34,550.

[9] The government cites a more recent survey from the Kaiser Family Foundation that places 48% of employees in grandfathered plans. See Gov. Br. 49. Even if credited against the government's own data (which amount to a party admission), this modest variation still leaves tens of millions of women in grandfathered plans. And when the government imposed the Mandate it *believed* that even more women would be grandfathered than Kaiser suggests.

These numbers require judgment for Tyndale under *O Centro Espirita*. Those claimants wanted an exception to use hallucinogenic tea. 546 U.S. at 423. The ban on that tea *had no exceptions*. But the government had made an exception for a *different* drug—peyote—for "hundreds of thousands of Native Americans." *Id.* at 433.[10] For that reason alone RFRA required "a similar exception for the 130 or so" claimants. *Id.* Here the government has excluded tens of millions of women from this very Mandate, and that's not counting exemptions besides grandfathering. The grandfathering exclusion "fatally undermines the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if Tyndale is exempted, too. *O Centro Espirita*, 546 U.S. at 434. And it is improper to insist on coercing Tyndale when most other large companies need not comply. This impermissibly asserts "a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2741. In other words, the government is straining at gnats while swallowing the camel.

Second, the grandfathering exclusion *statutorily* undermines the government's claim that its interests are "of the highest order." Grandfathered plans are, in fact, subject to a variety of other mandates under PPACA. These include: no lifetime limits on coverage, extension of dependent coverage to age 26, no exclusions for children with pre-existing conditions; and others. 75 Fed. Reg. at 34,542 (Table 1). All these provisions fall within Title I of the Act, and most of them within the same "Improving Coverage" subpart as the preventive services mandate in § 2714, flanking that section. Yet while Congress carefully decided to impose these adjacent sections to grandfathered plans, it explicitly chose not to impose the preventive services mandate. Congress deemed this Mandate not important enough to deliver to a majority of citizens along with the benefits that it considered truly important, like coverage of adult dependents. By definition this is not one of "the gravest," "paramount" interests "of the highest order." *See Collins*, 323 U.S. at 530; *Lukumi*, 508 U.S. at 546.

[10] For the same reason, it is irrelevant that the government labels grandfathering as not relating to the Mandate. Grandfathering does in fact encompass the Mandate. But the *O Centro Espirita* court required a RFRA accommodation due to an exemption that existed for an entirely different drug.

Third, the grandfathering rule is not a "transition," but that characterization itself undermines the government's interest. There is no sunset on grandfathering status—not in PPACA or its regulations. A plan can keep grandfathered status in perpetuity, even if it raises various costs to employees. *See generally* 75 Fed. Reg. 34,538. The government, furthermore, repeatedly calls it a "right" for a plan to maintain grandfathered status. *See, e.g., id.* at 34,540, 34,558, 34,562, & 34,566. But the government admits that it was willing to leave tens of millions of women without the interests advanced by this Mandate, for many known years and maybe indefinitely, because of the *more important* "interest in maintaining existing coverage and easing the transition into the new regulatory regime." Gov. Br. 37. No interest "of the highest order" could be trumped on such a massive scale merely in order to "balance" administrative and technical concerns. This Mandate is simply not a significant priority.

C. The government fails to connect necessary evidentiary dots.

The government also fails the compelling interest test because its "evidence is not compelling." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739. This is because the Mandate stands at a great distance from the government's stated interests. The government fails in trying to cross that distance. Its Mandate is like an Olympic runner who trips on the first hurdle. He can't regain his rhythm. He tries but stumbles again on the second hurdle, and again on the third. Looking up from the turf he sees the winning runner move ever farther away.

The government's evidentiary failures compound upon one another, for three overarching reasons. The government must show that the Mandate actually serves the right women, with the right problems, and solves those problems. It must "specifically identify an 'actual problem' in need of solving" and show that coercing Tyndale is "actually necessary to the solution." *Id.* at 2738. But the government fails to show that mere contraception access (the Mandate) causes more contraception use, and so results in less unintended pregnancy. The government glosses over the Mandate's failure to impact the most at-risk group of women, or to show contraception access is a problem among preventive services generally. And the government fails to show any causation between a pregnancy's intendedness and alleged health problems—the evidence fails

to even define unintended pregnancy in a reliable way. Each of these elements is even weaker in the context of an entity like Tyndale that objects to only a few items. This evidentiary failure necessitates a RFRA exemption for Tyndale.

First, the government presents no evidence that the Mandate will do what it says the Mandate will do. Recall what are the government's alleged interests: It proposes that women's health will be benefitted by a reduction in unintended pregnancy, so that alleged health consequences will decrease. And it proposes that women's equality will be benefitted by a reduction in unintended pregnancy to the extent it harms women's status in the workplace. Both interests require the Mandate to reduce unintended pregnancy.[11] But the government provides no evidence that this Mandate or any mandate actually does that: reduces unintended pregnancy. This evidentiary vacuum is all the more striking since the government concedes that 28 states have passed similar coverage mandates. Gov. Br. 8 n.8. The government does not offer one single study showing that any of those mandates reduced unintended pregnancy, or were even correlated with such a reduction.

The second problem is the generic quality of the government's evidence. Instead of showing that the Mandate will actually solve a problem, all the government does is urge a connection between contraception generally and a reduction in unintended pregnancy.[12] On its face this fails to show that a coverage mandate achieves that goal. There are many consequent steps between showing contraception reduces unintended pregnancy and showing this Mandate will do the same. Evidence doesn't show that compelling health problems exist because of the absence of this Mandate.

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[11] It is outside any government claim in this case to pursue a reduction in *intended* pregnancy. The government has no business pushing a woman to avoid pregnancy when she chooses it, and it certainly has no compelling interest in doing so by coercing religious objectors.

[12] Alvare, Helen M., No Compelling Interest: The 'Birth Control' Mandate and Religious Freedom (May 31, 2013). Villanova Law Review, Vol. 58, No. 3, pp. 379-436, 2013; George Mason Law & Economics Research Paper No. 13-35. Available at SSRN: http://ssrn.com/abstract=2272821 (last visited July 17, 2013).

Evidence doesn't show that if women aren't using contraception, cost is the problem. In the 2011 Institute of Medicine Report,[13] the government's own sources show that: 89% of women avoiding pregnancy are already practicing contraception;[14] among the other 11%, lack of access is not a statistically significant reason why they do not contracept;[15] even among the most at-risk populations, cost is not the reason those women do not contracept.[16] The IOM references some studies that show "preventive services," not contraception specifically, are avoided by some women due to cost. The actual study[17] specifies that it means only "blood pressure, cholesterol, cervical cancer, colon cancer (for ages 50 to 64) and breast cancer (for ages 50 to 64) screens." This is typical of the government's use of evidence: a failure to "specifically identify" the compelling need and how the Mandate serves that need.[18] *Brown v. Entm't Merchs.*, 131 S. Ct. at 2738.

The government again fudges the difference between contraception and preventive services generally when it claims that women pay more for preventive services. There is not a

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[13] Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited July 17, 2013) (link to Read Free OpenBook).

[14] The Guttmacher Institute, "Facts on Contraceptive Use in the United States (June 2010)," *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited July 17, 2013).

[15] Mosher WD and Jones J, "Use of contraception in the United States: 1982–2008," Vital and Health Statistics, 2010, Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf (last visited July 17, 2013).

[16] R. Jones, J. Darroch and S.K. Henshaw "Contraceptive Use Among U.S. Women Having Abortions," *Perspectives on Sexual and Reproductive Health* 34 (Nov/Dec 2002): 294–303 (*Perspectives* is a publication of the Guttmacher Institute). The Centers for Disease Control released a study this year showing that even among those most a risk for unintended pregnancy, only 13% cite cost as a reason for not using contraception. CDC, "Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS), 2004–2008," Morbidity and Mortality Weekly Report 61(02);25-29 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm?s_cid=mm6102a1_e (last visited July 17, 2013).

[17] "Robertson and Collins, 2011," at pages 8–9. see IOM at 151; available at http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/May/1502_Robertson_women_at_risk_reform_brief_v3.pdf) (last visited July 17, 2013).

[18] A study cited at 2011 IOM pp. 109 does not show that cost leads to non-use of contraception generally, but relates only to women who switch from one contraception method to another.

single study showing how much of that "gap" contraception counts for. PPACA erases most of the preventive services gap—maybe all of it—by mandating coverage of all other preventive services in 42 U.S.C. § 300gg-13. And Tyndale is not seeking an exemption for any of those things, including for most contraception. The government offers no evidence that any gap will remain at Tyndale, much less that there will be a compelling gap.

No evidence shows that if cost is a problem for some women, this Mandate serves those women. The IOM identifies the at-risk class of women who suffer "unintended pregnancy" as being primarily young, unmarried, undereducated and low income. 2011 IOM at 102. By definition this Mandate covers women who have employer-based health insurance. For at-risk women, the government, along with states, already fund a multitude of programs that already give free contraception to women even above the poverty line. See Gov. Resp. Stmt. Facts at 108–09. An at-risk class of women who already receive free contraception cannot form an evidentiary basis to coerce Tyndale.

The government's third fatal problem is that "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739 (quotation marks omitted).

The IOM admits that evidence on this issue is merely correlative, at best, and in many ways is uncertain. Which pregnancies are "unintended"? How can a scientific study identify them? Are situations like premature birth, or domestic violence, actually caused by whether the woman mentally intended to become pregnant? Or is the Mandate a hammer looking for a nail? To these questions the IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. The IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy."[19]

[19] Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), available at http://books.nap.edu/openbook.php?record_id=4903&page=64 (last visited July 17, 2013).

The 2011 IOM Report relies on several studies that admit the non-causal character of their evidence. The study by Gipson[20] (cited at 2011 IOM at 103) summarizes these flaws:

- "Assessing the relationship between pregnancy intention and its potential health consequences is fraught with a number of measurement and analytical concerns."
- "[B]oth health outcomes and pregnancy intentions may be jointly determined by a single, often unobserved factor."
- "[A]lthough longitudinal data may provide some inferences about the observed associations, causality is difficult if not impossible to show."
- "In light of the paucity of studies . . . and their limitations in terms of establishing causality, the existing research should only be considered to be suggestive of such an impact."
- "The existing evidence on the impact of unintended pregnancy on child and parental health outcomes is mixed and is limited by an insufficient number of studies for some outcomes and by the aforementioned measurement and analytical concerns."

Notably, if it is "difficult if not impossible to show" causation between unintended pregnancy and adverse health effects, it is even more impossible to show causation between those effects and a RFRA exemption here. The Mandate doesn't compel contraception use, and contraception use doesn't guarantee unintended pregnancy reduction, and Tyndale is only a small fraction of the Mandate's target, and Tyndale provides most contraception already. But the government must prove that entire causal chain in order to prevail. At each step the government's allegedly "compelling" problem reduces to a smaller and more speculative margin. But "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

The 1995 IOM likewise admits that no causal link exists for its alleged factors.

- A delay in seeking prenatal care upon unintended pregnancy is "no longer statistically significant" for women not already disposed to delay or who have a "support network"[21]—which exists in Tyndale's plan.

[20] Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 Stud. Fam. Plan. 18, 19–20, 29 (2008).
[21] *Id.* at 68.

- The alleged increase in smoking and drinking drops significantly where studies control for other causes; while data on domestic violence and depression "provide little systematic assessment" and merely "suggest" association (not causation).[22]

- The alleged reduction in low birth weight and prematurity overlooks the fact that, like other cited factors, these are merely "associated" with, not caused by, unintended pregnancy (1995 IOM at 70; 2011 IOM at 103). Several studies show no connection between it and pregnancy-spacing in the U.S.[23] And several studies show that low birth weight is associated not with contraception but with shorter pregnancy *intervals*, further distancing itself from a contraception connection. 2011 IOM at 103

- Evidence is not compelling that the Mandate against Tyndale would certainly cause pregnancy-prevention. In 48% of all unintended pregnancies, contraception was used.[24] Multiple peer-reviewed studies demonstrate that there is no scholarly consensus that increased contraception use reduces either abortion (which occurs upon pregnancy) or sexually transmitted diseases.[25]

- None of the government's evidence shows a pandemic of unwanted births or grave consequences at Tyndale or similar entities that lack mandated coverage. It could be that employees at Tyndale experience *zero* negative health or equality consequences absent the Mandate, for any number of reasons. At best, the government has no idea. But Defendants "bear the risk of uncertainty" on that question. *Id.* at 2739.

Brown v. Entertainment Merchants categorically excludes mere "associative" evidence from supporting a compelling interest. In that case California attempted to regulate violent video games, and put forth scientific studies showing a correlation between youth violence and the use of such games. 131 S. Ct. at 2739. But even that direct scientific record was "not compelling" because it lacked "a direct causal link," amounted to "ambiguous proof," and advanced its interest only "marginal[ly]" since other causes influenced youth violence. *Id.* at 2738–41.

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[22] *Id.* at 69, 73, 75.
[23] *Id.* at 70–71.
[24] Finer, L. B., and S. K. Henshaw, "Disparities in rates of unintended pregnancy in the United States, 1994 and 2001," 38(2) *Perspectives on Sexual & Reprod. Health* 90–96 (2006) *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited July 17, 2013).
[25] K. Edgardh, et al., "Adolescent Sexual Health in Sweden," Sexual Transmitted Infections 78 (2002): 352-6 (http://sti.bmjjournals.com/cgi/content/full/78/5/352) (last visited July 17, 2013); Sourafel Girma, David Paton, "The Impact of Emergency Birth Control on Teen Pregnancy and STIs," Journal of Health Economic, (March 2011): 373-380; A. Glasier, "Emergency Contraception," British Medical Journal (Sept 2006): 560-561; 37 J.L. Duenas, et al., "Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population During 1997–2007," Contraception (January 2011): 82-87

The government's evidence is far weaker here. The race to strict scrutiny is far too demanding for the government to withstand its evidentiary collapses. Intoning "health" and "equality" is no substitute for the government actually satisfying its evidentiary burden. When the government targets a problem that is inherently amorphous and loosely defined in the scientific literature, it is not the *kind* of problem the government can use as a reason to violate religious freedom. The government can address its perceived problem, to be sure. But it must use other means—here, it already does so extensively by funding contraception. The government cannot violate religious exercise when science says there is no cause and effect.

IV. The Government Could Pursue Less Restrictive Means, on Which It Is Already Spending Billions of Dollars, but It Did Not Even Consider Those Means.

Since the government showed no compelling interest, this Court correctly determined that it need not "reach the third prong of the RFRA test—whether the government has chosen the least restrictive means to further its compelling interest." *Tyndale*, 904 F. Supp. 2d at 129. But in fact the Mandate is not "the least restrictive means of furthering" the government's alleged interests. 42 U.S.C. 2000bb-1.

A. Violating fundamental freedoms must be a last resort, not the default choice.

If a less restrictive alternative would serve the government's purposes, "the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). "[A] court should not assume a plausible, less restrictive alternative would be ineffective." *Id.* at 824. 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); *see also Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) ("[I]f there are other, reasonable ways to achieve those goals . . . , [the Government] may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"; quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1971)).

In fact, "without some affirmative evidence that there is no less severe alternative," the Mandate cannot survive RFRA's requirements. *Johnson*, 310 F.3d at 505.

Although the government suggests that it can be its own judge of the viability of less restrictive means, this is incorrect. The government receives no deference on this question. The Supreme Court recently emphasized this in *Fisher v. University of Texas*, 133 S. Ct. 2411 (June 24, 2013). There the Court reversed a Fifth Circuit ruling that gave too much deference to the government under strict scrutiny. "[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, *before* turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id.* at 2420 (emphasis added). Not only did the Court confirm that the government must show it engaged in "consideration" of alternatives, but consideration alone "is not sufficient . . . . : The reviewing court must ultimately be satisfied that no workable . . . alternatives would produce the . . . benefits." *Id.* at 2414. Reiterating that the question is not merely one of government choice, the Court emphasized "it is for the courts, not for [the government], to ensure that the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Id.* at 2420 (citation and internal quotes omitted). Courts must "examine with care, and not defer to" even a "good faith consideration of workable . . .alternatives." *Id.* (citation and internal quotes omitted).

B. The government is already spending billions on contraception as an alternative.

There are numerous "plausible, less restrictive alternative" ways the government could achieve its goals. The government is actually already involved in such measures by providing contraception and contraceptive subsidies on a massive scale.[26] At the outset, in the least

[26] The government has admitted that it provides or subsidizes contraception in the following programs: Family Planning grants in 42 U.S.C. § 300, *et seq.*; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq.*; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, *et seq.*; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1). *See also*

restrictive means test the question must be asked, a means *of doing what*? As discussed above, the IOM admits that low income women are the class of women at risk of unintended pregnancy. But those women are already receiving free contraception and abortifacients from the government. So those programs are already a least restrictive means. The government's evidence does not show that more than a "marginal percentage point" fall outside the class of women who are already being served by an alternate means. *Brown*, 131 S. Ct. at 2741 n.9.

Even if evidence proved that the Mandate itself (not contraception) actually prevented demonstrable grave harm among middle or high-income women who could not afford abortifacients, there is nothing stopping the federal government from giving abortifacients to those women, instead of forcing Tyndale to do it. The same programs the government uses for low-income women could be used for other women who allegedly also need free abortifacients. Income thresholds on Medicaid provision of contraceptive coverage could be raised for people covered by exempted health plans. Note that the question is not whether the government could afford to give free contraception to everyone, just whether it could provide it for people falling under a RFRA exemption. It is not clear that many such groups exist in the grand scheme of things. The government claims that 89% of health plans already provide contraceptive coverage. The government provides no evidence to suggest that RFRA objectors to the Mandate would flood the system of a less restrictive alternative. And given that the government claims allegedly catastrophic public health consequences from RFRA exemptions, providing contraception to objecting entities' plan participants would likely be "cost-neutral."

To the extent the government asserts that HHS currently has no existing legal authority to extend free contraception among RFRA objectors, that is not the question. The question is whether the *federal government*—Congress and the President—could do so with alternate legislation or regulations. Moreover, Defendant Departments have already shown themselves to

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Facts on Publicly Funded Contraceptive Services in the United States (Guttmacher Inst. May 2012) (citations omitted), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited July 17, 2013).

be less than rigorous about following the letter of the law as they implement PPACA.[27]

C. Less restrictive means can and do require some government expense.

The Supreme Court required less restrictive alternatives even at the government expense in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). There, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. *Id.* at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be prioritized. *See id.* Here, the government cannot avoid its duty to pursue less restrictive means based on the idea that it might involve some expense or administrative burden. "The lesson" of RFRA's pedigree of caselaw "is that the government must show something more compelling than saving money."[28] RFRA requires the Mandate to be the "least restrictive means," not the least restrictive means the government chooses, nor the least expensive. 42 U.S.C. § 2000bb-1.

Several other courts have recognized the obvious option of the government providing contraception itself instead of coercing objectors. In *Newland*, 881 F. Supp. 2d at 1299, the court said, "'[T]he government already provides free contraception to women.' . . . Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no cost preventive health care coverage to women." *See also Monaghan*, 2013 WL

[27] See, e.g., Treasury Department Guidance, July 2, 2013 (delaying enforcement of requirement that large employers drop health insurance coverage altogether, despite the Affordable Care Act's command that the requirement "shall apply to months beginning after December 31, 2013"), *available at* http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx (last visited July 17, 2013).

[28] Douglas Laycock and Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," 73 TEX. L. REV. 209, 224 (1994).

1014026 at *11 (noting that applying the Mandate to plaintiffs was not the least restrictive means in light of the existing programs under which the government pays for contraceptive services). Judge Kovachevich, though not reaching a decision on this question, noted that "[c]ertainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established program [Title X] that has a reported revenue stream of $1.3 billion." *Beckwith*, 2013 WL 3297498, at *18 n.16.

Viable alternatives could take many forms. As mentioned, the government could allow people to be covered under Medicaid for abortifacients if they are in a RFRA objector's plan. The government could create its own "abortifacients insurance" plan covering the few items to which Tyndale objects, and then allow free enrollment in that plan for whomever the government seeks to cover. The government could directly compensate providers of abortifacients. Or it could offer tax credits or deductions for abortifacient purchases. The government could reimburse citizens who pay to use contraceptives. Or it might impose a mandate on the abortifacient manufacturing industry to give its items away for free. Coercing third parties to provide the items is hardly far-fetched, since the Defendants just enacted a rule doing exactly that to cover religious objectors, even when those third party administrators were not themselves insurance companies. 78 Fed. Reg 39,870. The government has failed its burden to rebut any of these alternatives other than to complain about cost or administrative burdens, which under *Riley* are not dispositive.

D. The government did not meet its duty to even *consider* other means.

Finally, in addition to failing to rebut any of these alternatives, the government also fails to meet its burden because it has not actually considered using a less restrictive means to achieve their goal. "[T]he government cannot meet its burden to prove least restrictive means unless it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 39 (D.D.C. 2002). *See also Washington v. Klem*, 497 F.3d 272, 284 (3rd Cir. 2007) ("the Supreme Court has suggested that

the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means."); *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012); *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Spratt v. Rhode Island Dep't of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007); *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004). A mere "comparison with other means" does not satisfy this requirement. *Klem*, 497 F.3d at 284.

But the government never even considered alternatives less restrictive to religious rights. Plaintiffs assume that the reason the government never considered these options is that it does not believe religion can be exercised through for-profit entities. But that legal error does not excuse the government's failure to consider alternatives. The government recently admitted, in a Rule 30(b)(6) deposition in another case challenging this Mandate, that it gave little or no consideration to basic alternatives. Defendants' representative was asked about removing Medicaid's income limits for women who needed contraception coverage, and he testified that "I'm not aware that we considered" it. Pls.' Resp. Stmt. Facts at (ll) (citing Exh. 1. Cohen Dep. Excerpts at 36). When asked if the government's interests could be satisfied if someone other than the employer provided the Mandated items, he answered "yes" because the government was proposing something similar for religious non-profits. *Id.* at (mm) & Exh. 1 at 48. And he declared that he has not seen any studies showing that "contraception or sterilization services, if provided by or subsidized by the government, is less efficient than if provided by an employer health plan." *Id.* at (nn) & Exh. 1 at 57.

Violating First Amendment rights "must be a last—not first—resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Because "there is no hint that the Government even considered these or any other alternatives," *id.*, and because those alternatives amply serve the government's interests, Tyndale is entitled to an exemption under RFRA.

V. The Government is Not Entitled to Summary Judgment on Tyndale's Other Claims.

Plaintiffs do not seek summary judgment on their other claims at this time. If Tyndale receives summary judgment on its RFRA claim, it will be unnecessary for the Court to consider Tyndale's other claims in any fashion, and constitutional avoidance and judicial economy both counsel against ruling on those claims. Therefore the Court should deny the government's motion for summary judgment with prejudice with respect to Plaintiffs' RFRA claims, and without prejudice on those other claims. To the extent the Court wishes to consider those other claims, Tyndale follows the government in simply referring to the briefing the parties submitted on those issues previously. Notably, another District Court sustained Free Exercise Clause and Administrative Procedure Act claims by a for-profit entity. *Geneva College*, 2013 WL 1703871.

CONCLUSION

Because Tyndale is religious, the Mandate coerces it to violate its' and its owners' beliefs, and the government fails to satisfy both prongs of strict scrutiny, Plaintiffs respectfully request that the Court enter summary judgment in favor of Plaintiffs on their RFRA claim and award them declaratory and permanent injunctive relief and other appropriate relief as requested in the complaint. The Court should deny the government's cross-motion for summary judgment with prejudice to Plaintiffs' RFRA claim and without prejudice to Plaintiffs' other claims.

Respectfully submitted this 17th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Court's ECF system on July 17, 2013, and was thereby electronically served on counsel for Defendants who have appeared in the case.

s/ Matthew S. Bowman
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