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 Oral Argument Requested

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. TYNDALE IS LIKELY TO SUCCEED ON THE MERITS.

A. Tyndale the Bible Publisher Can Exercise Religion.

There are four elements to a RFRA claim: Is the plaintiff exercising religion? Is the law a substantial burden on that exercise? Then, under strict scrutiny, can the government show a compelling interest regarding that specific burden? And, can the government prove its approach is the least restrictive means of achieving its interest? 42 U.S.C. § 2000bb-1. In this case the government knows it will fail the strict scrutiny test, just as it did in *Newland v. Sebelius*, 2012 WL 3069154 at *1 (D. Colo. July 27, 2012). Thus the government's only path to sustain the Mandate is to propose the unprecedented view that Tyndale, a thoroughly religious Bible publisher, cannot even exercise religion and faces no substantial burden thereon. This argument failed to prevent a preliminary injunction in *Newland*. It fails here even moreso.

The government incorrectly informs this Court that somehow *Newland*, which granted the same preliminary injunction that Tyndale is requesting here, did not even decide whether the Mandate substantially burdens the free exercise of religion of a company and its owners. But Judge Kane not only ruled on that question, he rejected "out of hand" the government's position:

> [T]he government argues that because Plaintiffs routinely contribute to other schemes that violate the religious beliefs alleged here, the preventive care coverage mandate does not substantially burden Plaintiffs' free exercise of religion. This argument requires impermissible line drawing, and I reject it out of hand. *See Thomas v. Review Bd. of Ind. Emp't Sec.*, 450 U.S. 707, 715, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)."

Newland, 2012 WL 3069154, at *9. Thus the government is wrong when it says "the first court to decide the merits" of these questions was the contrary decision in *O'Brien v. U.S. Dep't of Health & Human Srvs.*, 2012 WL 4481208 (E.D. Mo. 2012). Gov. Br. at 3.

The government has no basis for asserting that Tyndale "is not . . . a 'religious organization,' . . . under RFRA." Gov. Br. at 8. RFRA contains no category of "religious organizations" to which it applies. RFRA instead protects "any" "exercise of religion." 42 U.S.C. § 2000bb-1, *as amended by* 42 U.S.C. § 2000cc-5(7)(A). Counsel for the government

have created a fictitious category for RFRA contrary to the language Congress adopted. No law or case supports the government's novel proposition that "Tyndale is a for-profit employer that cannot 'exercise religion' under RFRA and the Free Exercise Clause." Gov. Br. at 2. There is no business or corporation "exception" in RFRA or the in Free Exercise Clause. The government cites cases finding that some companies, though they do exercise religion, will still be subject to certain laws if the government carries its legal showing. None of those cases say that "free exercise of religion" under RFRA and the First Amendment are incapable of being exercised just because company is organized as a for-profit. Not even *O'Brien* adopted the government's unprecedented view. 2012 WL 4481208 at *4 (declining to reach the question).

Tyndale cites multiple cases showing exactly the opposite: a for-profit company can exercise religion and bring free exercise claims on behalf of itself or its owners. In this respect the government's claim is false that "none of" the cases cited by Tyndale "held that a for-profit corporation may exercise religion." Gov. Br. at 11. Multiple cases did so. The Minnesota Supreme Court called the government's position "conclusory" and "unsupported" and ruled that a health club and its owners could assert free exercise of religion claims. *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985). The Ninth Circuit allowed two for-profit corporations to assert free exercise claims on behalf of their owners. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009) (pharmacy and its religious owners); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (manufacturer on behalf of its religious owners). In *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), the Court allowed a kosher deli and butcher ("Inc."), and its owners, officers, and shareholders, *id.* at 200, to bring Free Exercise and Establishment Clause claims, and the Court subjected each claim to the applicable level of scrutiny rather than declaring that the for-profit business and its owners were not capable of exercising religion. The government's position here would ban Jewish people from exercising religion through preparing kosher foods for profit. *See also* Tyndale Br. at 11 (citing multiple cases recognizing and sometimes vindicating free exercise of religion claims brought by for-profit companies and their owners).

The United States Supreme Court has repeatedly recognized that free exercise of religion claims can be brought to protect money-making and employment activities. *Sherbert v. Verner*, 374 U.S. 398, 399 (1963) (an employee's religious beliefs were burdened by the government's refusal to give her unemployment benefits); *Thomas*, 450 U.S. at 709 (same); *United States v. Lee*, 455 U.S. 252, 257 (1982) (an employer exercised religious beliefs and was sufficiently burdened by having to pay taxes for objectionable items). The Court has emphasized that "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010); *see also Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"); Tyndale Br. at 13 (citing multiple cases recognizing the ability of corporations to bring free exercise claims). Justice Brennan's concurrence in *Amos* observes it possible "that some for-profit activities could have a religious character." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 345 n.6 (1987).

The government's error is that it takes non-RFRA rulings—which recognize that companies can exercise religion, but then hold that some government requirements (unlike this Mandate) are justified anyway—and uses these statements to contradict those same courts by saying the companies and their owners are incapable of exercising religion in the first place. The government does this because it knows that the Mandate here cannot pass RFRA's strict scrutiny. But none of the cases the government cites for this novel idea say that commercial employers cannot exercise religion. In this regard the government directly mischaracterizes *Lee*, Gov. Br. at 1, where the Supreme Court decided that an Amish employer *does* exercise religion and a tax *does* sufficiently burden that religion. 455 U.S. at 257. Only thereafter did the Court apply a balancing test (not RFRA's standard) to uphold the universal tax (not the much more burdensome, more arbitrary Mandate at issue here). *Id.* at 261. But *Lee* is clear that the Court

must apply the applicable scrutiny level. It cannot refuse to do so on the theory that the employer is not capable of exercising religion in the first place.[1]

The government further contradicts caselaw when it contends Tyndale's owners have no free exercise interest that Tyndale can assert here. *Stormans*, *Townley*, *McClure* and the other cases referenced above all recognize that when the government burdens a business in violation of the religious owners' beliefs, that in itself is a burden on the religious beliefs of the owners. Those cases ruled that because the owners exercise their religion through the company, a government burden impacts the owners' religious exercise to the same extent. The government simply disagrees with *Stormans*, *Townley*, *McClure* and these other cases. But it does not even cite a case holding the opposite. The government is left to merely recite corporate law distinctions between a company and is owners. This is irrelevant, because in free exercise of religion contexts the question is not whether the company and its owners are identical, the question is whether for *moral and religious* purposes a government coercion on an owner's personal business is a violation of his own beliefs. Every case to discuss this question answers it affirmatively. The government claims that following these cases "would expand RFRA's scope in an extraordinary way," Gov. Br. at 16, but *Stormans*, *McClure* and the other cases represent settled free exercise law.[2] It is the government's view that would radically alter free exercise.

The government's novel argument is even less applicable here, because Tyndale is not just a company with religious owners, it is a thoroughly religious company. The government does not and cannot rebut any of Tyndale's factual allegations in that regard. See Verified Complaint ("VC") ¶¶ 21–69. To this extent the government concedes the "sincerity" of

[1] The government similarly misrepresents *McClure*, Gov. Br. at 12 n.7. That court called it "unsupported" to say a sports club and its owners cannot exercise religion. 370 N.W.2d at 850. The court then *applied* its scrutiny level.

[2] The government's melodramatic warnings about authorizing "millions of shareholders of publicly traded companies [to] assert RFRA claims" are entirely unfounded. Gov. Br. at 16. Tyndale is not publicly traded and has four shareholders. It is nearly entirely owned by one religious non-profit entity that its founder created to funnel Tyndale's funds to charity; and by one entity he created to maintain its religious identity; and a small faction is owned by two small trusts benefitting the founder's widow and children. VC ¶¶ 41–62. *Stormans*', *McClure*'s and other cases' recognition that a company can assert its religious owners' free exercise claims have opened the door to exactly zero claims by "millions of shareholders," and the government cites no case showing otherwise.

plaintiffs' beliefs. Gov. Br. at 2, 14. But to concede the sincerity of Plaintiffs' beliefs *is to concede that they actually possess religious beliefs.* This is incompatible with the government's position that Tyndale and its owners do not exercise religion through their company.

The government cannot claim that Tyndale's owner, Tyndale House Foundation, is not religious, because it is in fact a religious non-profit. The government has already recognized as much through its "religious employer" exception and its non-enforcement safe harbor. Since companies can bring religious exercise claims on behalf of their religious owners, that fact alone precludes the government's argument that Tyndale cannot bring its free exercise claims. *See, e.g., Stormans*, 586 F.3d at 1119–20. There is no way to distinguish between this case, where Tyndale asserts that the burden on it violates the beliefs of itself and its owner Tyndale House Foundation, and *Stormans*, *Townley*, and *McClure*, where the courts recognized that government burdens on those incorporated businesses constituted *to the same extent* a sufficient burden on the beliefs of their religious owners. The government even proposes the breathtaking view that because the Foundation is not an "individual," the burden on its religious beliefs is "further attenuate[ed]" in a way that negates its free exercise claim. Gov. Br. at 16. Adopting this approach would let the government force even non-profit entities to violate their beliefs just because they are not individuals. This flies in the face of Free Exercise Clause caselaw.

The government incorrectly contends that a wholly immaterial statute to this case governs RFRA's protection of religious exercise, namely Title VII employment discrimination's narrow category of "religious corporations." This view is doubly wrong. First, by their plain texts, RFRA and the First Amendment do not limit their protections to "religious corporations" as does Title VII. They protect "any" free exercise of religion. 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A). The fact that Congress created an entirely different category in Title VII in no way means that RFRA is limited to that category. Quite the opposite: Congress could have, but did not, adopt the narrower category it previously used in Title VII. Congress instead chose to protect "any" free exercise in RFRA. Congress also said in RFRA that it applies to other statutes even if there is a conflict. 42 U.S.C.A. § 2000bb-3. But Title VII is irrelevant.

See also Townley, 859 F.2d at 619–20 (after deciding company was not "religious corporation" under Title VII, it could still bring free exercise claims on behalf of its owners).

Second, Tyndale is a "religious corporation" under Title VII. No case says that being for-profit *alone* disqualifies a company from being a religious corporation under Title VII. On the contrary, multiple circuits use a non-exclusive, multi-factor test in which for-profit status is only one factor, "not all factors will be relevant in all cases, and the weight given each factor may vary from case to case." *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226–27 (3d Cir. 2007). The government failed to cite this test in its brief. Instead it cites only two cases, one of which is not even a Title VII case.[3] The Ninth Circuit did *not* exclude for-profits from Title VII's exemption in its three-way split-decision *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011). Judge O'Scannlain followed the Supreme Court in leaving the for-profit status question open, while Judge Kleinfeld declared that the relevant inquiry is how an entity spends its money—not its non-profit or for-profit status. *Id* at 734 n.4, 746.[4] Here, Tyndale directs a tithe of its pre-tax profits, nearly all of its dividends, and millions in other payments to religious charities. VC ¶¶ 35–36, 45–50. The company is entirely structured so that its money either furthers evangelization through its publishing, or funds religious charity with the remainder.

[3] The government's citation to *University of Great Falls v. N.L.R.B.*, 278 F.3d 1335 (D.C. Cir. 2002) is not relevant. That case considered only the meaning of a "substantially religious" exception to the National Labor Relations Act, not Title VII. *Id.* at 1340–41. And it explicitly exercised "constitutional avoidance" so as not to redefine the free exercise of religion. *Id.*

[4] The government is incorrect that "the Ninth Circuit has explicitly held that a for-profit entity can never qualify for the Title VII exemption. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 734, 748 (9th Cir. 2011)." Gov. Br. at 10. *World Vision* said no such thing. The panel was split three ways. Of the two judges agreeing on the holding—finding that World Vision was in fact religious—Judge Kleinfeld explained that non-profit or for-profit status has almost nothing to do with the question, and instead this factor asks whether the thrust of the organization's goals and activities are financial gain or religious: "For profit' and 'nonprofit' have nothing to do with making money. As the CEO of National Geographic said, '[n]onprofit means non-taxable—it doesn't mean you don't make a profit.'" 633 F.3d at 746 (Kleinfeld, J., concurring). Judge Kleinfeld also proposed that it would be a "narrowness problem" if "[a]bsence of . . . nonprofit status would defeat the exemption." *Id.* at 745. His focus was on how money and profit are used, not on corporate status. *Id.* at 746. Judge O'Scannlain's opinion similarly declared that non-profit status was significant but not dispositive (noting that the Supreme Court left the question open), and found it significant specifically regarding where the organization *directs* its profits. *Id* at 734 & n.4. Under both Judge Kleinfeld's and Judge O'Scannlain's view, it is highly relevant here that Tyndale's proceeds and even a substantial portion of its pre-tax income are directed to religious charity. This is consistent with other cases' flexible approach.

Tyndale's structure is thoroughly religious, and no case has ruled that such a company is not religious. Nearly all the flexible factors used interpret Title VII counsel in Tyndale's favor: its religious purpose in its founding documents; its religious goal since its inception to the present; its thoroughly religious policies; its statement of faith requirement for board members; its ownership by a religious non-profit entity; its massive institutional charitable giving; its direction of nearly all its proceeds to its non-profit religious owner. *Cf. LeBoon*, 503 F.3d at 226.

Whether Tyndale is a religious corporation under Title VII is ultimately irrelevant here, because the plain language of RFRA and the First Amendment protect all free exercise of religion, not only for "religious organizations" or "religious corporations." But if the Court considers the question germane, Tyndale passes the Title VII test.

The government wrongly contends that under *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), "a company must be a 'religious organization' to assert free exercise rights." Gov. Br. at 16. This principle does not exist in *Hosanna-Tabor* or in any other case. There is no limit in the First Amendment or RFRA that restricts exercise of religion to only the government's arbitrarily-defined category of religious organizations (which, under its "religious employer" test, encompasses only churches). Free exercise claims have been allowed to proceed many times in the Supreme Court and other cases cited above on behalf of a company or its owners, employers, employees, and other business interests. The fact that *Hosanna-Tabor* says that religious organizations *are* protected does not suggest or imply the negative view that if one is *not* a church the Free Exercise Clause doesn't apply. *Hosanna-Tabor*'s discussion related to a context not relevant to this case: the fact that certain kinds of organizations receive special protection in "freedom of association" to protect state interference in their internal governance. 123 S. Ct. at 706. It did not even imply that only "religious organizations" have free exercise rights generally, and no case says so. Moreover, Tyndale is unquestionably a religious organization under any rational definition. Tyndale is and has always been an evangelism-focused Bible publisher that directs is proceeds to religious charity. All the cases that Defendants cite saying that the First Amendment protects religious

groups would cover Tyndale, and those cases imply that to have and exert religious beliefs *itself* makes an organization religious for free exercise purposes. The government is attempting to impose a "religious organization" category, and a narrow definition thereof, where it does not exist in RFRA or the First Amendment. No case has said free exercise of religion does not apply to a "for-profit" entity. Plenty have said otherwise.

The government finally resorts to the scare tactic of claiming that if for-profit companies can exercise religion, this would let a company "impose its owner's religious beliefs on its employees in a way that denies those employees the protection of general laws," and "would permit for-profit companies and their shareholders and officers to become laws unto themselves, claiming countless exemptions from an untold number of general commercial laws . . . ." Gov. Br. at 2, 10. This is the slippery slope argument that the Supreme Court has rejected under RFRA as the "classic rejoinder of bureaucrats throughout history" that should not be heeded. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). The above-cited cases have allowed businesses and their owners to assert free exercise claims without any danger ensuing to society or civil rights. On the contrary, the only civil rights protections in danger in this case are the ones protected by the First Amendment, if this Court adopts the government's unprecedented view that religion cannot be exercised in business. This case has nothing to do with "imposing" Tyndale's beliefs on anyone—Tyndale is not asking for the ability to force anyone to do anything. It is the government that is imposing its views to force Tyndale to violate the very Bible that it publishes. Title VII is in no danger by this Court following the view that corporations can bring free exercise claims. Ruling that a Bible publisher can exercise religion in this case does not strike down any laws, and the federal government is still able to try to justify its law under the strict scrutiny test. The government knows that while Title VII has survived, this Mandate will not.

B. The Mandate is a Substantial Burden on Tyndale and Its Owners.

Not only does the Mandate burden Tyndale's and its owners exercise of religious beliefs, but the burden is "substantial." The government argues that if a burden is morally "indirect," as

it defines that concept, then the burden is not "substantial." Gov. Br. at 17. This is false on many levels. First, there is nothing indirect about the Mandate. It orders Tyndale to provide coverage that Tyndale says violates its religious beliefs. Then it subjects Tyndale to monetary fines and lawsuits by the Department of Labor forcing it to violate its beliefs. 26 U.S.C. § 980D(a), (b); 26 U.S.C. § 4980H; 29 U.S.C. § 1132(a). That is not even arguably indirect. When Defendants Solis and her Department sues Tyndale to coerce compliance with the Mandate, it will sue Tyndale directly, not "indirectly."

The only way the government can claim this Mandate is "indirect" is by inviting the Court to engage in improper moral theologizing, and rejecting the specifically pleaded allegations that Tyndale does in fact object to coverage of these items. The government argues that the moral burden is indirect because Tyndale won't use abortifacients, it will only cover other people's use. This contradicts the complaint in violation of Fed. R. Civ. P. 12(b)(6), because Tyndale pled that the coverage, not merely its use, violates its beliefs. VC ¶¶ 39, 51, 59, 62, 75. The government invites this Court to engage in moral theology line drawing that the Supreme Court has explicitly rejected. In *Thomas*, where the government deemed the armament manufacturing activity to which the plaintiff objected "sufficiently insulated" from his objection to war. 450 U.S. at 715. "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Id.* In *Lee*, likewise, the Court rejected the government's attempt to insist that despite the plaintiff's sincerity of beliefs, there was no substantial burden on "the integrity of the Amish religious belief or observance." 455 U.S. at 257. *Lee* rejected the same proposal the government offers here, because it would be an interpretation of faith that is "not within 'the judicial function and judicial competence'" *Id.* (quoting *Thomas*, 450 U. S. at 716). As a result of this clear Supreme Court caselaw, *Newland* rejected the government's view "out of hand." 2012 WL 3069154, at *9. In contrast, the District Court in *O'Brien* violated *Thomas* and *Lee*.

The Supreme Court and the D.C. Circuit declare that even where a burden is "indirect" it is still substantial, if the law merely imposes "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*, 450 U.S. at 718). As explained above, the Mandate here is as direct as a requirement can be. But in *Lee*, the Supreme Court found a sufficient burden in a less direct circumstance. Tyndale is being forced to buy objectionable coverage directly, whereas in *Lee* the plaintiff paid taxes that the government spent objectionably. In *Sherbert*, there was no "direct" order to work on the Sabbath, but the burden was substantial merely because the plaintiff was denied unemployment benefits for refusing such work. 374 U.S. at 404 (reasoning that the law "force[d] [plaintiff] to choose between following the precepts of her religion and forfeiting benefits"). In *Thomas*, 450 U.S. at 717–18, likewise, there was no "direct" government order to manufacture armaments, instead the plaintiff was denied unemployment benefits. 450 U.S. at 718 ("the compulsion may be indirect [but] the infringement upon free exercise is nonetheless substantial"). Here "the compulsion" is direct. Even mild forms of "direct" pressure constitute a substantial burden where, as here, the "law affirmatively compels." *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (parents were "fined the sum of $5 each"); *see also Lee*, 455 U.S. at 254 ($27,000 penalty).

The government makes a false statement of fact when it insists that Tyndale "'routinely contribute[s] to other' schemes that present the same conflict with their religious beliefs alleged here present the same conflict with their religious beliefs alleged here," relying on *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), and *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011). This "routinely contribute to other schemes" rationale constitutes impermissible line drawing under *Thomas*, 450 U.S. at 715 (as cited in *Newland*, 2012 WL 3069154, at *9). This is also factually false because the burden from the "individual mandate" in *Mead* and *Seven-Sky* was merely a tax, and was *not* a command to do something unlawful. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595–97 (2012) ("individual mandate" is simply a tax, is mild in cost, is not punitive, involves no other penalties, and non-compliance is not "illegal"). Here the government directly makes it unlawful for Tyndale to not provide abortifacient coverage, and it imposes massive rather than mild financial penalties for not doing so, along with direct lawsuits

compelling Tyndale to comply. Tyndale is not participating in any "similar" scheme. Taxes spent on abortifacients involve none of the directness of this Mandate's buy-coverage-for-private-citizens legal requirement, or its rendering of Tyndale's activity unlawful, or the kinds of penalties in this Mandate. Tyndale "drew a line" between paying mere taxes, and being forced to buy abortifacient coverage directly for other citizens, "and it is not for us to say that the line [they] drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Thomas*, 450 U.S. at 715. The burden is substantial.

C. The Mandate Is Not Supported by Even Remotely Compelling Evidence.

The government's interests do not remotely satisfy the compelling interest test, because: (1) the government cannot claim that the Mandate's specific goals are "compelling" when it freely lets 191 million Americans, and most large employers like Tyndale, out of the Mandate; (2) none of the evidence even purports to show an urgent need for merely morning after pills, "ella" and IUDs (the only things Tyndale objects to covering), rather than contraception as a whole; (3) none of the evidence shows that the generic benefits of contraception for health and equality will actually be achieved by the Mandate itself; and (4) none of the evidence shows that if Tyndale is exempted, a causal connection exists showing grave harm as a result.

First, the government does not really believe that women's health and equality are "compelling interests" in this case, because through PPACA and Defendants' own regulations the government is content to omit two-thirds of the nation—191 million Americans—from the health and equality it claims flow from this exact Mandate. *See Newland*, 2012 WL 3069154 at *1. Moreover, the government has allowed thousands of religious entities one year of non-enforcement from this very Mandate. It cannot claim that it has a compelling interest to refuse a preliminary injunction to Tyndale. The government decided that some interests are compelling enough to impose on grandfathered health plans encompassing 191 million Americans, and

encompassing "most" large employers such as Tyndale, but this Mandate is not one of them.[5] Counsel for Defendants are actually contradicting this decision by Congress when they tell this Court that the Mandate is compelling. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 520 (1993). The government in this case has left far more than "appreciable" damage to its "supposedly vital" interest. It has no basis to claim Tyndale's 260 employees represent a "paramount" need to impose the Mandate, while 191 million other Americans present no such need. Tyndale's employees represent a mere fraction of a "marginal percentage point" of persons supposedly within the government's interest—this cannot raise a compelling interest. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (June 27, 2011).

The government's attempt to distinguish *Lukumi* by claiming that the grandfathering exception "is not limited to the preventive services coverage regulations" is irrelevant. Gov. Br. at 25. It doesn't matter how the government characterizes its non-application of the Mandate to two-thirds of the nation, because the question is not how the exclusion is labeled, the question is whether the rule "leaves appreciable damage to that supposedly vital interest." In fact, the government admits that the interest behind the Mandate can be and has been trumped ("balanced") by "other significant interests supporting the complex administrative scheme created by the ACA." *Id.* The government therefore admits that if another compelling interest exists, the Mandate should give way. *RFRA requires that Tyndale's religious exercise be considered no less compelling an interest*. The government cannot, under RFRA, deem "complex administrative" interests sufficient to trump the Mandate, but religious exercise insufficient. By deeming administrative interests sufficient to relieve 191 million Americans from the Mandate and to give employers a "right" to maintain plans outside the Mandate (75

[5] HHS, HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," *available at* http://www healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered html (last visited October 5, 2012).

Fed. Reg. 34,538, at 34,540, 34,558, 34,562, & 34,566), the government has conceded that the Mandate is not a compelling interest "of the highest order," *Lukumi*, 508 U.S. at 520, so as to deny Tyndale's "unalienable right" to a RFRA exemption, 42 U.S.C. § 2000bb. Other "orders" of interests are higher than the Mandate, by the government's own admission. Thus the Mandate does not implicate "the gravest abuses, endangering paramount interests," so as to satisfy RFRA's exemption requirement. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Second, the government's "evidence is not compelling" because it does not even address Tyndale's situation. *Id.* at 2739. Tyndale provides its employees with all contraception except the morning after pill (e.g., "Plan B"), "ella," and IUDs. VC ¶¶ 89, 136. Every piece of the government's evidence, however, purports only to say that contraception *in its entirety* may cause health benefits for women. But Tyndale is not refusing to cover contraception *writ large*. Tyndale is providing its employees nearly all contraception. The government does not even point to evidence saying that the failure to provide these few items causes compelling harm. Therefore the government's alleged interest has no nexus to this case—it has failed to demonstrate an interest tailored to "the particular claimant." *O Centro Espirita*, 546 U.S. at 430–31. The government also does not show scientific evidence showing a "caus[al]" nexus between their Mandate and the grave interest it supposedly serves. *Brown*, 131 S. Ct. at 2739. It cannot meet this burden against Tyndale showing merely a correlation between good effects and contraception (not even correlating to the Mandate itself). *Id.* The government does not even purport to show health effects with respect to morning after pills, "ella," and IUDs alone, which are the only items at issue in this case. The government is not permitted to claim "a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741. The government claims that women suffer inequality in preventive services costs generally, but Tyndale provides all mandated preventive services and even all mandated contraception and sterilization, with the exception of morning after pills, "ella" and IUDs. The government cites *zero* studies showing that women receiving 99.9% of preventive services, as Tyndale's plan beneficiaries do, still suffer inequality to a compelling extent justified by this Mandate.

Third, the government admits that 28 states have already imposed some form of a mandate of contraceptive coverage, but it provides this Court with *zero* studies showing that even one of those mandates has actually led to a reduction in unintended pregnancy among employees. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 821 (2000) ("Without some sort of field survey, it is impossible to know how widespread the problem in fact is"). The government cannot claim that women's health and equality are advanced by the availability of contraception to reduce unintended pregnancy, but fail to produce any studies showing that a mandate on employer insurance actually achieves these goals. The government likewise admits that a vast majority of employers already offer contraceptive coverage. Thus the Mandate is not yielding all the benefits of contraception, since it is already 90% or more accessible. The government therefore does not show that this particular Mandate coercing Tyndale is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2738.

Nor does the government "specifically identify an 'actual problem' in need of solving" by the Mandate. *Id.* No studies show an "actual problem" of women being less healthy and less equal at workplaces where abortifacients that Tyndale objects to are not covered. But RFRA imposes a burden on the government to satisfy strict scrutiny, including at the preliminary injunction stage, *O Centro Espirita*, 546 U.S. at 428–30, and it must present compelling evidence to do so, *Brown*, 131 S. Ct. at 2739. It has not done so. Instead the government's alleged interests reside in the generic categories of women's health and equality. Defendants cannot propose such a generalized interest "in the abstract," *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000). RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant," not through "broadly formulated interests." *O Centro Espirita*, 546 U.S. at 430–32; *see also Lukumi*, 508 U.S. at 546. The government argues against this clear directive from *O Centro* to tailor its interest to the plaintiff, but this Court should decline to follow the government's invitation to ignore Supreme Court precedent.

Fourth, the government's evidence nowhere shows that absent this Mandate on Tyndale, grave health consequences will result. The government does not connect health effects of

contraception generally (much less regarding abortifacients alone) with any studies showing that the Mandate yields those effects on Tyndale's beneficiaries. In other words, even if contraception did generally provide health to women, the government hasn't shown that the lack of *this Mandate* of abortifacients is yielding an "actual problem" at Tyndale. *Brown*, 131 S. Ct. at 2738. To cite one of a multitude of examples, recited more fully in Tyndale's initial brief: the government incorrectly asserts that "many women forgo recommended preventive services, including contraceptive services, because of cost-sharing imposed by their health plans," citing the Institute of Medicine Report[6] at 19–20 and 109. Gov. Br. at 23. This is simply unsupported with respect to contraception (to say nothing of abortifaiceints). The IOM report at pages 19–20 and 109 do not even claim that any of its studies show women forgo *contraceptive services* specifically because of cost; the report only references "mammograms and Pap smears," and says that women *already using contraception* might use something more permanent. This is a failure to provide compelling evidence that the Mandate will yield any result at all. It might be that if women want these products they are obtaining them on their own, or are able to amply afford it, and that Tyndale's beneficiaries are amply protected through Tyndale's offering of all preventive services and all contraception besides abortifacients. The government presents no studies even purporting to prove a "causal" connection to the contrary. *Brown*, 131 S. Ct. at 2739. There is no reason to think women at employers with religious objections experience health or equality consequences absent the Mandate. If they did, there would be no justification for the government to voluntarily subject 191 million Americans to such "grave" harm. The government "bears the risk" of this "uncertainty" and "ambiguous proof will not suffice," *id.*, nor will its generic assertions of health and equality.

The government falsely declares that even though its evidence in the IOM report doesn't show a causal connection either between abortifacients and grave health consequences, or this Mandate and the prevention of grave health consequences, the "scientific recommendations are

[6] 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 October 5, 2012).

entitled to deference" under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) and *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376-77 (1989). Gov. Br. at 23 n.16. The government relegated this point to a footnote because it is plainly false. *Chevron* and *Marsh* on their face only apply deference to an agency's interpretation of an ambiguous law. But Tyndale doesn't challenge the *interpretation* that "preventive services" include abortifacients. They challenge the subsequent *imposition* of that interpretation against Tyndale's religious beliefs, and whether it passes RFRA's strict scrutiny. This is not a matter for *Chevron*. No case declares that under *Chevron* and *Marsh*, whatever an agency *says* is "compelling" *is* compelling under strict scrutiny. That would negate RFRA's strict scrutiny test. Instead RFRA declares that it applies to all subsequent laws, which includes PPACA. 42 U.S.C.A. § 2000bb-3. As a result, even if *Chevron* and *Marsh* applied, they would yield no deference to Defendants because the clear language of RFRA trumps PPACA and requires the government to show compelling evidence to coerce Tyndale, not affording agency "deference" for insufficient evidence. *See, e.g., Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 116 (D.C. Cir. 2012) ("if the intent of Congress is clear, that is the end of the matter" under *Chevron*). The Supreme Court insists that the government has the burden to establish compelling "evidence", and the Court scrutinizes and rejects non-compelling scientific evidence even when the government relies on it in passing a law. *Brown*, 131 S. Ct. at 2739. The government cannot negate its burdens under RFRA by derisively calling strict scrutiny "flyspecking." Gov. Br. at 23 n.16. Its evidence is generic, remote and inapplicable.

D. The Government Rebuts None of Its Less Restrictive Alternatives.

The government fails to show that it could not fully achieve women's health and equality from free abortifacients by the government giving women those things itself instead of forcing Tyndale to violate its religious beliefs to do the same. The government already gives these items away on a massive scale. See Tyndale Br. at 33. If abortifacients advance women's health and equality by enabling them to avoid unintended pregnancy, such a result can be fully achieved by abortifacients provided by the government. No study says that Tyndale must be the conduit.

The government seeks to redefine the least restrictive means test to be something entirely different: merely asking whether an exemption would undermine the government's interest, and saying that the government needs only to consider its chosen means rather than alternatives. Gov. Brief at 28–29. The government's test therefore would not consider either restrictiveness or means. RFRA, in contrast, requires the Mandate to be "the least restrictive means," not the least restrictive means the government chooses. And it imposes its burden on the government, not the Plaintiffs. 42 U.S.C. § 2000bb-1. In the D.C. Circuit, the least restrictive means test does not mean that the government need only show its chosen alternative is the best or most efficient one: it means that "no alternative forms of regulation" can exist that accomplishes the proffered interest. *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert*, 374 U.S. at 407). Here, the option of women getting abortifacients from the government *fully* achieves the health and equality interests that the government asserts. Not an iota of those interests would be left unaccomplished.

The government's view is inconsistent with *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), where the Court insisted that several alternatives caused the government to fail its test even though they were costly, less directly effective, and a restructuring of the governmental scheme. *Id.* at 799–800. Here RFRA similarly requires full consideration of other ways the government can and does provide women free contraception. "The lesson" of RFRA's pedigree of caselaw "is that the government must show something more compelling than saving money."[7]

The government also misinterprets cases such as *United States v. Wilgus*, 638 F.3d 1274, 1284–95 (10th Cir. 2011). Gov. Br. at 28–29. The government contends that under *Wilgus*, least restrictive means need only consider the government's chosen means. But according to *Wilgus*, a less restrictive means does not have to work within the existing governmental scheme or be equal or less in cost than the challenged policy. *See* 638 F.3d. at 1289. Instead, *Wilgus* requires

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

the government to "support its choice of regulation" and "refute the alternative schemes offered by the challenger," not to assume its choice and refuse to contemplate alternates.

The government fails this standard, for at least two reasons. First, exemptions would not undermine the government's interest if it adopted other means. The government already provides free contraception to women, and provides health insurance including contraception outside the "employer-based" system (such as by Title X funding and Medicaid). There is no compelling reason that the government cannot do so for women working at exempt entities, without coercing religiously objecting employers. *O Centro* shows that the least restrictive means test means what it says when it distinguishes cases such as *Lee* and *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion). 546 U.S. at 435–37. The present case is not like *Lee*, wherein *taxes* cannot be raised if people opt out of paying them; here, the interest of *providing* abortifacient contraception can easily be done and is done by the government directly without any need to coerce Tyndale. Nor is it like *Braunfeld*, wherein the interest of closing all businesses on Sunday cannot be pursued if some businesses are open; here the interest is merely that women get abortifacients, not how they get them. The government could achieve its interest of providing women free contraception in many ways, even when Plaintiffs are exempt.

The government falsely claims that honoring Tyndale's rights under RFRA would involve the government in "subsidizing private religious practices." This is a seriously flawed view. Tyndale is not asking the government to subsidize it or any religious group or practice. It is not even asking the government to buy abortifacients. It is simply asserting the self-evident fact that if the government wants to give private citizens abortifacient contraception, it can do so itself instead of forcing Tyndale to do it, and such an alternative renders the Mandate a violation of RFRA. To call Tyndale's *freedom from coercion* "subsidizing private religious practices" is an Orwellian attempt to characterize coercion as the default in America. This would render the First Amendment itself a government "subsidy." The Declaration of Independence instead emphatically declares that the right to Liberty belongs to citizens as "endowed by their Creator," not "subsidized by their government." ¶ 2.

The government's assertion that it has an interest not merely in women getting abortifacients but making sure they come from Tyndale actually redefines the government's interest. But this new interest has no evidence to support it. Health and equality from abortifacients do not depend on where the abortifacients come from. The government has presented zero evidence saying that even if women have full access to as many free abortifacients as they want, they still suffer health or equality harms. No such study even attempts to establish that impossible proposition. The government has not even "offered evidence demonstrating" harm from alternatives. *O Centro*, 546 U.S. at 435–37.

E. The Mandate Fails Under Tyndale's Other Claims.

Tyndale's primary brief explains the errors in the government's views regarding its claims under the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, Due Process, and the Administrative Procedure Act. Several points are worth noting in reply.

1. The Mandate Violates the Free Exercise Clause.

The government's own analysis shows that the Mandate's Swiss-cheese array of exceptions is not "generally applicable" under the Free Exercise Clause. The government summarizes *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.), as "finding that a medical exemption to a police department's no-beard policy indicated that the department accepted secular motivations but *rejected* religious ones." Gov. Br. at 33. This is exactly what the government admits here: it accepted secular "administrative" motivations for non-application of the Mandate to 191 million Americans, Gov. Br. at 25, while rejecting the religious motivation of Tyndale and similar objectors under RFRA. The government has explicitly deemed secular motivations "balance" (trump) the Mandate, but religious motivations such asserted by Tyndale and its owners do not. *Id.*

Similarly, the government concedes that a regulatory scheme is not "neutral" under the Free Exercise Clause where it "enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct." Gov. Br. at 34 (citing *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)). This is exactly what 42 U.S.C. § 300gg-13 enables, and what

the Defendants in this case have done. They have made subjective, case-by-case decisions determining what factors count for a "religious exemption," what factors count for entities to receive "accommodations" under forthcoming regulatory changes, what factors count for the "safe harbor" of non-enforcement, and what factors count for repeated reinterpretations or amendments to the safe-harbor, all as to exclude Tyndale and others. These subjective and constantly changing determinations are driven by no restriction on the discretion of Defendants in 42 U.S.C. § 300gg-13. The government is picking and choosing what religion is, who exercises it, and in what context it can be exercised. The scheme is not religiously neutral.

2. The Mandate Violates the Establishment Clause.

The government's argument against Tyndale's Establishment Clause claim is incorrect when it calls *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) "inapposite." Gov. Br. at 35. *Weaver* is directly applicable, since it deemed a law invalid when the law did *not* discriminate against "denominations," which the government incorrectly says the Establishment Clause is only concerned about. *Weaver*'s statement that laws must abide by the Establishment Clause if they "facially regulate religious issues" is directly relevant to the Mandate and its regulations in this case, which on their face pick and choose what a "religious employer" is according to various factors, and further subjectively select who will be recipients of the non-enforcement safe harbor and additional regulatory accommodations. This is exactly the kind of situation that existed in *Weaver*, wherein the non-"religious issue" of school funding was deemed to "facially regulate religious issues" when it deigned to decide that some religious entities qualified and others did not. Like in *Weaver*, the government's decision that some kinds of religion are favored over others (the ones that consider business non-religious, or that only inculcate values") constitutes discrimination "*among* religions," and because of different types of religious practice, itself violates the constitution. 534 F.3d at 1256, 1259.

3. The Mandate Violates the Free Speech Clause.

The government is incorrect in its view on Tyndale's Free Speech Clause claim when it declares that "Plaintiffs appear to concede that they are not required to speak." Gov. Br. at 37.

Tyndale makes no such concession; on the contrary, the Mandate requires it *as an insurer* to cover and fund speech contrary to its beliefs. The government's contention that the Mandate does not involve coverage of speech by a doctor *in favor* of abortifacients is implausible. If that were true, Tyndale could put an exclusion in its insurance plan that said the required "education and counseling" could be *against*, but not *for*, abortifacients. Of course Defendants would permit no such exclusion. The Mandate requires coverage of speech in favor of abortifacients even though Tyndale exists to evangelize a Gospel that rejects the destruction of nascent life.

4. The Mandate Violates the Due Process Clause.

The government misstates Tyndale's Due Process Clause argument when it declares that Tyndale does not "primarily" challenge PPACA statutory section in question, 42 U.S.C. § 300gg-13. Gov. Br. at 39. This is false. Tyndale's complaint explicitly challenges "the Mandate" including § 300gg-13 as its statutory authority, VC ¶ 4 n.1, and Tyndale's Due Process Claim explicitly declares that "PPACA and" the Mandate

> vest Defendants with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations, in crafting "religious employer" exemptions and changing the same, in crafting and modifying further "accommodations" and additional definitions of entities that qualify for the same, and in enforcing the Mandate and crafting rules regarding the same such as through its repeatedly issued enforcement "Guidances."

VC ¶ 191. Tyndale has squarely raised a Due Process claim against § 300gg-13.

That section literally contains no limits on Defendants' unbridled discretion to discriminate against the religion and speech. Defendants have done so in their own words: in the Mandate, the ANPRM, the safe harbor, and interpretations thereof. The government cites cases generally saying that Congress can delegate authority to agencies. But not one of those cases, nor any other case cited by the government, declares that if the delegated authority is unbridled, *and* if it impacts First Amendment rights and religious freedom, it need not satisfy the Due Process Clause. Contrary to the government's assertion, Tyndale cites multiple cases that in no uncertain terms restrict the government's grant of discretion when it impacts fundamental rights. "[L]aws that might infringe constitutional rights" are subject "to the strictest of all" level of

scrutiny under the Due Process Clause. *Commack*, 680 F.3d at 213; *see also Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 341 (6th Cir. 2007) ("Due process provides heightened protection against vague statutes 'where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.'" (quoting *Colautti v. Franklin*, 439 U.S. 379, 390 (1979))).

Thus the government's string of case citations recognizing the legitimacy of agency discretion are inapposite, because none of those cases involved First or Fifth Amendment rights. Gov. Br. at 39–40, citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (no First Amendment or religious rights implicated); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (same); *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir. 1988) (same).

In other words, Tyndale's claim is not a non-delegation doctrine claim. It is a Due Process Clause unbridled discretion claim impacting First Amendment and RFRA free exercise protections, owing to 42 U.S.C. § 300gg-13's vagueness over the scope of religious accommodations. Even if Congress's delegation of discretion satisfies the constitutional separation of powers doctrine, it must also satisfy the Fifth Amendment with respect to freedoms protected in the First and in RFRA. Otherwise, any duly enacted law would be immune from First and Fifth Amendment scrutiny solely because it was passed by a constitutional process. But the First and Fifth Amendments still apply to those laws, and the government does not offer a single defense of the unbridled discretion harming religious exercise that is inherent in § 300gg-13. The Supreme Court just declared that "[o]ther provisions of the Constitution also check congressional overreaching" in PPACA specifically, such that "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2624 (Ginsburg, Sotomayor, Breyer, Kagan, JJ., concurring). Constitutional provisions are cumulative—the government cannot ignore the Due Process Clause.

Section 300gg-13 is quintessentially vague because it says nothing about the scope of religious accommodations, but inherently grants unlimited discretion on enforcement officials. The fact that Defendants enforce the Mandate as agencies, instead of as "policemen, judges and juries," Gov. Br. at 40, is irrelevant. Agency bureaucrats are not superior to police officers nor to the First or Fifth Amendments. *Cf. Gjyzi v. Ashcroft*, 386 F.3d 710, 714 (6th Cir. 2004) ("as a matter of due process, assigning complete discretion to an agency to apply the law does not allow that decisionmaker to ignore the law," citing *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991)). In this case Defendants have assumed the role of judge, jury and executioner.

5. The Mandate Violates the Administrative Procedure Act.

The government mischaracterizes Tyndale's claim when it asserts that "[t]he mere fact that the regulations were not altered in the manner plaintiffs seek does not undermine the thoughtfulness of defendants' consideration." Gov. Br. at 41. Tyndale's claim is not premised on this "mere fact": it is premised on the government's own admitted public activity, wherein it (1) declared in August 2011 that it could not change its rule after comments because otherwise college women would not get free contraception by August 2012; (2) confirmed that illegal close-mindedness when it adopted its rule in February 2012 "without change," (3) essentially admitted in March 2012 that it should not have finalized its rule without change but really ought to have had an open mind to the 200,000 comments, and therefore intended to start new rulemaking, but (4) still insists that its rule was final as of August 2011, when it really is still not final at all and still should not apply to Tyndale until more than a year after it is eventually finalized. The government offers no rebuttal to these government admissions. Nor does it reconcile its view that the Mandate cannot legally apply to Tyndale until a year after it is finalized, with its claim that the rule will not be finalized until August 2013 but the government insists on applying it now. The preliminary injunction that Tyndale seeks would likely not even last long enough to give Tyndale the full year of post-finalization time to which it is entitled under PPACA. Yet the government opposes granting even a preliminary injunction. Its opposition is unjustified.

II. TYNDALE WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.

The government's position against "delay" is wrong for two reasons. First, Tyndale's actual injury did not begin when the Mandate was finalized in August 2011; by its own terms the Mandate did not apply to Tyndale until October 1, 2012. So Tyndale did not delay at all during the injury it seeks the injunction to prevent, because it filed suit promptly on October 2 and immediately moved for relief. Not only was there no delay, there is no "two month rule" against "delay" as the government contends. None of the cases the government cites complaining of delay are applicable, because all of the delays those plaintiffs permitted were delays *during which the injury was occurring*.[8] Gov. Br. at 42–43. But in this case Tyndale has not permitted the injury it seeks an injunction against—the Mandate as it applied to Tyndale—any delay. Tyndale filed this case on October 2 and filed its injunction request on October 8. The government cites zero cases saying that if you sue *the day after* a regulation applies to you, and seek a preliminary injunction a week after, you have subjected yourself to impermissible delay. Moreover, since October 1 Tyndale is not providing abortifacient items to its employees, so it has succumbed to no violation *of its conscience*. But Tyndale does face irreparable injury—that did not start until October 1, 2012, that Defendants have authorized themselves to *presently and fully* enforce the Mandate against Tyndale. That is irreparable harm without any delay. The

[8] The delay undermined the harm in *Fund for Animals v. Frizzell*, 530 F.2d 982, 984 (D.C. Cir. 1975), because the challenged regulations only authorized a couple months of hunting certain animals, so much of the opportunity for relief had passed by the delay, and on appeal the hunting seasons were "pretty well over." Here, in contrast, the Mandate is perpetual, and Tyndale sought an injunction right when it was subject to it. Tyndale's harm is in the future, not the past. Delay similarly eviscerates the harm in trademark and intellectual property cases when, *during the delay*, the injury is ongoing. In *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 42 (D.D.C. 2000), the plaintiff only sought relief to protect its market share for a single month—January 10–February 9, 2000—but the delay took away months of market share *during* the same injury. Here Tyndale did not delay at all in suing and seeking an injunction once the Mandate *applied*, and the injunction will avert injury perpetually. *See also Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (trade dress infringement had been occurring for over a year); *Citibank, N.A. v. Citytrust*, 756 F.2d 273 (2d Cir. 1985) (trademark infringement occurring during the delay); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1375 (9th Cir. 1985) (challenged newspaper feature exclusivity contracts had been occurring "for many years"); *Gidatex, S.R.L. v. Campaniello Imps., Ltd.*, 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998) (trademark infringement occurred for two years *during* delay). The delay itself also harmed plaintiffs in *Quince Orchard Valley Citizens' Ass'n v. Hodel*, 872 F.2d 75, 75, 80 (4th Cir. 1989), because the road project they challenged began many months before they sought relief, during which time Defendants spent money on the project. Here the defendants have no sunk costs with respect to Tyndale or their October 1 plan.

government cannot date "delay" back to August 2011, because the Mandate did not apply to Tyndale until October 1, 2012.

Second, the government's assertion of delay is duplicitous. In other pending cases against this Mandate, the government has asserted that no irreparable harm exists until the date the Mandate is applicable *to the plaintiff*. The Mandate here was not applicable to Tyndale until October 1, 2012, upon which Tyndale expeditiously sued and sought an injunction. But in *Newland*, Defendants' attorneys here contended that asking for an injunction before the Mandate went into effect *was too early*, stating :

> Here, plaintiffs have failed to establish any actual or imminent statutory or constitutional injury resulting from the preventive services coverage regulations. Plaintiffs do not dispute that the challenged regulations will not apply to Hercules Industries until November 2012. . . . Plaintiffs therefore have not met their burden to establish imminent irreparable harm.

Defendants' Amended Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 57, *Newland*, No. 1:12-cv-01123-JLK, Doc. # 26 (D. Colo. filed July 13, 2012).

Tyndale relied on this representation; indeed counsel for Tyndale is the same firm as counsel for the plaintiffs in *Newland*. Because a preliminary injunction is an equitable remedy, the government is estopped in this case from asserting that filing suit right when the Mandate is applicable to a plaintiff is too late, when in July it took the position in federal district court that no irreparable harm exists until the date the Mandate is effective on a plaintiff. This Mandate has been publicly debated incessantly since January, with continual statements about ongoing negotiations and potential compromises, and a U.S. Supreme Court case that came one vote away from invalidating PPACA entirely. It was reasonable to believe that a Bible publisher might be included in accommodations. It was not reasonable to believe the federal government would stubbornly assert that Bible publishers cannot even exercise religion.

CONCLUSION

Tyndale therefore respectfully asks the Court to enter a preliminary injunction.

Respectfully submitted this 25th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Court's ECF system on October 25, 2012, and was thereby electronically served on counsel for Defendants and others who have appeared in the case.

s/ Matthew S. Bowman
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