UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

TONN AND BLANK CONSTRUCTION, LLC, ***Plaintiff***, **v.** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,** ***Defendants.***	**Case No. 1:12-cv-00325-JD-RBC**

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In its brief in support of its motion for a preliminary injunction, Tonn and Blank Construction, LLC ("T&B") illustrated that an injunction should issue against Defendants' mandate requiring health plans to cover abortion-inducing drugs, contraception, sterilization, and related education and counseling (the "Mandate"), because T&B will succeed on the merits of its claims—especially its claim under the Religious Freedom Restoration Act ("RFRA")—and because T&B continues to suffer irreparable injury. (Br. in Supp. of Prelim. Inj. (Doc. No. 5) at 10-25.) As the Seventh Circuit recently found when granting similar relief pending appeal, *see Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *4-*5 (7th Cir. Dec. 28, 2012), T&B has suffered an "irreparable" harm because the Mandate forces it to provide services violating its religious beliefs. And, as the Seventh Circuit also found, *see id.* at *4, Defendants have not shown that the Mandate is the least restrictive means of achieving any compelling government interest; indeed, Defendants do not identify in the administrative record a single alternative that they considered before enacting the Mandate into law. Defendants' contrary arguments lack merit.

ARGUMENT

Defendants' opposition—while articulating the standards for a motion to dismiss—makes arguments only with regard to T&B's request for preliminary relief. Specifically, Defendants argue that T&B has established neither a likelihood of success on the merits of any of its claims (Br. in Opp. to Prelim. Inj. (Doc. No. 25) at 9-43), nor the necessary irreparable harm (*id.* at 43-44). But because Defendants do not sufficiently explain why the Complaint fails to meet relevant pleading standards, they have waived any right to a dismissal. *See, e.g.*, *Wehrs v. Wells*, 688 F.3d 886, 891 n.2 (7th Cir. 2012) (deeming argument waived when only raised in one sentence in the summary of argument and in the conclusion). And because Defendants' arguments against a preliminary injunction lack merit, the Court should grant T&B immediate relief.

Indeed, a clear majority of courts have now granted preliminary injunctions or other temporary relief to similar for-profit businesses challenging the Mandate. *See Korte*, 2012 WL 6757353, at *5; *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012) (attached as Exhibit A); *Triune Health Grp. v. U.S. Dep't of Health & Human Servs.*, No. 12 C 6756 (N.D. Ill. Jan. 1, 2013) (attached as Exhibit B); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092-DDN, 2012 WL 6738489, at *7 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476, at *8 (E.D. Mich. Dec. 30, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459-CV-S-RED (W.D. Mo. Dec. 20, 2012) (attached as Exhibit C); *Tyndale House Publishers v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323, at *20 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *15 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, No. 1:12-cv-1123-JLK, 2012 WL 3069154, at *8 (D. Colo. July 27, 2012). Because the Seventh Circuit falls within this majority rule, this case is particularly easy. As the Northern District of Illinois held, the "binding [*Korte*] precedent" requires the Court to grant a preliminary injunction. *Triune*, slip op., at 2. Even aside from *Korte*, Defendants' arguments are wholly unpersuasive.

I. T&B HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS RFRA CLAIM.

T&B's opening brief established its likelihood of success on the merits of its RFRA claim.[1] *First*, the Mandate substantially burdens T&B's religious exercise by requiring it to engage in conduct (facilitating abortion-inducing drugs, contraception, and sterilization) that conflicts with

[1] In a footnote, Defendants suggest that *Winter v. Natural Resource Defense Council, Inc.*, 555 U.S. 7 (2008), overruled the Seventh Circuit's standard that a "likelihood of success" requires only a greater than negligible chance of winning. (Br. in Opp. to Prelim. Inj. at 9 n.7.) But, after *Winter*, this Court has continued to apply that standard, illustrating that *Winter* did not overrule it. *See, e.g.*, *Miche Bag, LLC v. Marshall Grp.*, 818 F. Supp. 2d 1098, 1108 (N.D. Ind. 2010); *Fort Wayne Women's Health v. Bd. of Comm'rs, Allen Cnty.*, 735 F. Supp. 2d 1045, 1050 (N.D. Ind. 2010). Regardless, T&B also meets Defendants' allegedly more demanding standard.

its religious beliefs on threat of onerous fines. (Br. in Supp. of Prelim. Inj. at 11-13.) *Second*, Defendants have no "compelling interest" in applying the Mandate to T&B. (*Id.* at 13-17.) *Third*, Defendants have not shown that the Mandate is the least restrictive means to achieve their interests. (*Id.* at 17-19.) Defendants' response to each of these three points is meritless.

A. Defendants Wrongly Suggest That The Mandate Does Not "Substantially Burden" T&B's "Exercise Of Religion."

Defendants make three arguments why the Mandate does not substantially burden T&B's exercise of religion, claiming that: (1) a for-profit company can never "exercise religion"; (2) T&B cannot challenge the Mandate on behalf of its religious owners; and (3) the Mandate's burden on T&B is not "substantial" under RFRA. Each of these arguments is wrong as a matter of law.

1. A for-profit corporation qualifies as a "person" that can "exercise religion" within the meaning of RFRA.

Defendants initially argue that, while individuals and religious nonprofit corporations can exercise religion, "a secular, for-profit corporation does not exercise religion" under RFRA. (Br. in Opp. to Prelim. Inj. at 10.) This argument conflicts with RFRA's plain text. RFRA indicates that the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). Defendants identify no "nonprofit" limitation on this unambiguous language.

a. RFRA broadly protects the exercise of religion by any "*person*," not merely by any *individual* or by any *religious institution*. 42 U.S.C. § 2000bb-1(a) (emphasis added). It is well established that when Congress uses the word "person," it intends to include corporations. Under the Dictionary Act, "unless 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. As such, corporations "are presumptively *covered* by the term 'person.'" *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 782 (2000);

see Ruppel v. CBS Corp., 701 F.3d 1176, 1181 (7th Cir. 2012); *see also Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 125-26 (2003) (citing sources confirming that corporations have been treated as "persons" dating back to the early 1800s).

Furthermore, the "context" nowhere suggests that Congress meant for RFRA to depart from this general rule. If Congress had wanted to limit RFRA only to individuals and religious institutions (as Defendants claim), it merely needed to say so. It has, in fact, said so in many other places. In *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), for example, the Court interpreted the word "individual" to mean "human being" precisely because Congress uses the term "person" when it means to include corporations. *Id.* at 1707; *see Aziz v. Alcolac, Inc.*, 658 F.3d 388, 393 (4th Cir. 2011) (same). Equally true, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which amended RFRA in various respects, prohibits a government from "impos[ing] or implement[ing] a land use regulation in a manner that treats a *religious assembly or institution* on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1) (emphasis added). This provision shows that Congress knows how to limit protections to religious institutions when it wants to. That Congress used the term "person" in RFRA illustrates, by contrast, that it meant to include all corporations. *See Nken v. Holder*, 556 U.S. 418, 430 (2009) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (citation omitted)).

That Congress meant for corporations to be treated as "persons" under RFRA also comports with the background rule that corporations can exercise constitutional rights. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010) (citing numerous cases for proposition that "[t]he Court has recognized that First Amendment protection extends to

corporations"); *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."). Well before RFRA, for example, "[i]t [had] been settled for almost a century that corporations [were] persons within the meaning of the Fourteenth Amendment." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978).

Nor does RFRA's phrase "exercise of religion" somehow demonstrate that Congress meant to exclude for-profit corporations. That phrase is broadly defined to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). To qualify, a practice need only be "sincerely held" and "rooted in religious belief, not in purely secular philosophical concerns." *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007) (internal citation omitted); *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (noting that "exercise of religion" requires a practice to be based on religious beliefs, not "purely secular considerations") (internal quotation and citation omitted). The same exact practice cannot somehow change from being the "exercise of religion" to being something else depending on whether a nonprofit or for-profit entity engages in it. There is, for example, no dispute that an individual's refusal to work on the Sabbath qualifies as the exercise of religion. *Sherbert v. Verner*, 374 U.S. 398, 399 (1963). If a nonprofit or for-profit company closes on the Sabbath for the same reason, that too necessarily qualifies. In short, RFRA's plain language shows that for-profit companies can "exercise religion" and so are entitled to the statute's protections when they do.

b. Defendants' contrary arguments lack merit. While ignoring the Dictionary Act's definition of "person" (a term that RFRA actually uses), Defendants begin with the definition of "secular" (a term nowhere to be found in RFRA). They argue that "T&B is plainly secular"

because it is a construction company, and so is disqualified from RFRA's protections. (Br. in Opp. to Prelim. Inj. at 11.) Setting aside that T&B is anything but "plainly secular," *see infra* Part I.A.2, whether a company is "secular" or "religious" is beside the point, because RFRA's protections do not turn on the type of entity at issue. Through its use of the term "person," RFRA protects religious and secular companies alike. The religious-versus-secular dichotomy instead matters for determining whether RFRA protects a particular *activity*, not whether it protects a particular *entity*. While the activity undoubtedly has to be motivated by religious rather than secular considerations, *see Koger*, 523 F.3d at 797, if it is so motivated, RFRA applies to the activity regardless of the person who engages in it. Defendants' contrived efforts to shift the focus from the activity to the entity conflicts with RFRA's plain language.

Defendants next repeatedly make statements like "[t]he government is aware of no case in which a for-profit, secular employer like T&B prevailed on a RFRA claim." (Br. in Opp. to Prelim. Inj. at 11; *see id.* at 12, 13.) But they fail to explain why that helps them. This absence of case law simply means that, prior to the Mandate, courts had not needed to decide this issue—probably because of the political branches' tradition of protecting religious freedom, *see Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990), a tradition trampled by the Mandate. Regardless, numerous cases have adjudicated religious claims by for-profit corporations. *See, e.g.*, *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200, 206-07 (2d Cir. 2012) (adjudicating the free-exercise claims of a delicatessen and its owners); *State by McClure v. Sports & Health Club*, 370 N.W.2d 844, 850 (Minn. 1985) (rejecting government's argument that corporation had no free-exercise rights because it was "unsupported by any cited authority").

Nor do any of Defendants' cases support their strained reading of RFRA. (Br. in Opp. to Prelim. Inj. at 10-12.) Two of the cases help T&B. *Levitan v. Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002), a case about prisoner rights, confirms that religious rights are triggered by the "practice[] at issue"—not by the person who undertakes it. *Id.* at 1320. *Anselmo v. County of Shasta*, 873 F. Supp. 2d 1247 (E.D. Cal. 2012), found that a corporation did, in fact, have religious rights. While the court found the defendants immune from damages based on a lack of clearly established law, it also held that the plaintiffs—a limited liability corporation and its owner—had stated a claim that the government substantially burdened their religious exercise. *Id.* at 1258-59. Another case, *Holy Land Foundation v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003)—which addressed a statute prohibiting the funding of terrorism—expressly declined to address whether a non-religious corporation could qualify as a "person" under RFRA. *Id.* at 167.

Defendants' interpretation of their constitutional cases fares no better. Simply because the Free Exercise Clause "'gives special solicitude to the rights of *religious* organizations,'" (Br. in Opp. to Prelim. Inj. at 11 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012)), does not mean that for-profit corporations get no solicitude under RFRA. *Hosanna-Tabor*—a case about the constitutionally required ministerial exception—holds that government interference with internal church decisions triggers scrutiny under the Religion Clauses even if that interference takes the form of a neutral law of general applicability, and so it represents a *constitutional* exception to the rule that the Free Exercise Clause does not apply to such laws. *See* 132 S. Ct. at 706-07 (distinguishing *Smith*, 494 U.S. at 879). RFRA, by contrast, was designed to grant a *statutory* exception to that *Smith* rule for all persons, not simply churches. *See* 42 U.S.C. § 2000bb(b).

To be sure, Defendants cite two cases—*Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), and *Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072-MJR, 2012 WL 6553996, at *6 (S.D. Ill. Dec. 14, 2012)—that refused to grant an injunction against the Mandate to corporations. (Br. in Opp. to Prelim. Inj. at 11-12.) As noted, however, these cases depart from the majority rule. Further, *Korte* agreed that a corporation could qualify as a person under RFRA, *see* 2012 WL 6553996, at *6, and its refusal to grant an injunction on other grounds was remedied by the Seventh Circuit, *see* 2012 WL 6757353, at *3. As for *Hobby Lobby*, its refusal to treat a corporation as a "person" rested on the notion that corporations do not "pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." 870 F. Supp. 2d at 1291. This obvious fact of all artificial entities—that they do not do anything independent of their agents—in no way justifies the court's holding. Corporations also do not "speak," but the Supreme Court long ago held they have free-speech rights. *Citizens United*, 130 S. Ct. at 899.

Moving past case law, Defendants contend that interpreting RFRA to protect for-profit companies renders superfluous Title VII's exemption for "religious corporations" from its ban on religious discrimination. (Br. in Opp. to Prelim. Inj. at 12-13.) But those provisions peacefully coexist. Title VII gives religious corporations an *automatic* exemption—without scrutiny under any substantial-burden or compelling-interest tests.[2] RFRA applies to other organizations, but only grants relief if its elements are met. Thus, Defendants' parade of horribles—that RFRA permits a corporation "to impose its owner's religious beliefs on its employees in a way that denies

[2] For the reasons explained below, *see infra* Part I.A.2, T&B may in fact qualify as an exempt "religious corporation" under Title VII. *See LeBoon v. Lancaster Jewish Comm. Ctr. Ass'n,* 503 F.3d 217, 226 (3d Cir. 2007) (determining whether a corporation qualifies based on such factors as whether the corporation includes religion within its articles of incorporation; "whether [it] is owned, affiliated with or financially supported by a formally religious entity"; whether a formally religious institution participates in the entity's management, whether the entity holds itself out to the public as religious, and whether the entity regularly includes worship within its activities).

those employees the protection of general laws designed to protect their health and well-being" (*id.* at 13)—ignores that RFRA does not provide an automatic exemption. As another court held when rejecting this argument, "just because a corporation is *allowed* to assert a RFRA claim does not mean that it will *succeed* on the claim." *Tyndale*, 2012 WL 5817323, at *9 n.13. If the Government believes its interests are compelling, it need only prove that claim in a court of law.

Finally, Defendants rest on policy notions, arguing that T&B *voluntarily* opted to operate a for-profit entity and *voluntarily* opted to engage in commerce. (Br. in Opp. to Prelim. Inj. at 13.) But Defendants fail to explain why these facts matter. As for the type of business, there is no dispute that RFRA gives *unincorporated* businesses an exemption from laws that burden religious beliefs if the Government cannot meet the compelling-interest test. *Cf. United States v. Lee*, 455 U.S. 252, 254 (1982) (finding First Amendment applicable to Amish employer). Defendants offer no justification why these RFRA rights should vanish simply because the same individuals run the same business through the *corporate* form. It would be absurd to hold that a statute designed to protect religion actually discriminates against religion by requiring individuals who want to operate businesses consistent with their faith to do so via outdated, inefficient business modes.

Defendants' reliance on T&B's entry into the commercial world is no better. That argument relies on an unduly narrow view of religious exercise as limited to such things as attending worship services. But the Supreme Court long ago held that the exercise of religion can take place in commercial settings. So, for example, the plaintiff in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), did not relinquish his rights when he accepted a job with Blaw-Knox Foundry & Machinery. *Id.* at 709. When the plaintiff quit that job after being forced to perform work violating his religious beliefs, that decision was an "exercise of religion." *Id.* at 714-16. And, contrary to Defendants' claim, *Lee* does not help their argument,

because, while it found that the Government had a compelling interest in uniform social-security collection, 455 U.S. at 258-60, it did so only *after* holding that regulations of commercial activity can substantially burden religious exercise and so implicate religious rights, *id.* at 257-58.

2. In any event, T&B has standing to assert its owners' RFRA rights.

Even assuming (wrongly) that T&B is not a "person," it still has standing to present the RFRA claims of its owners. RFRA itself adopts the broadest rules of standing, noting that "[s]tanding to assert a claim or defense . . . shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c). Such standing exists here for two reasons.

a. It is well established that closely held corporations have standing to assert their owners' religious beliefs. "[W]hen the beliefs of a closely-held corporation and its owners are inseparable, the corporation should be deemed the alter-ego of its owners for religious purposes." *Tyndale*, 2012 WL 5817323, at *8; *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 & n.9 (9th Cir. 2009) (allowing for-profit pharmacy to assert free-exercise claim of owner); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (same). Here, contrary to Defendants' claim that T&B is "secular," T&B is similar to Tyndale House Publishers, Inc. ("Tyndale"), which was granted standing to assert the religious rights of its owners because "the beliefs of Tyndale and its owners [were] indistinguishable." 2012 WL 5817323, at *7.

The similarities between T&B and Tyndale are palpable. They are both for-profit entities wholly owned by non-profit entities. T&B is owned 5% by Franciscan Alliance, Inc. ("Franciscan Alliance") and 95% by Franciscan Holdings, LLC ("Franciscan Holdings"). *See* Ex. A of Operating Agreement (attached to Compl. (Doc. No. 1) as Exhibit A, and reattached here for the Court's convenience as Exhibit D). Franciscan Holdings is, in turn, 100% owned by Franciscan Alliance. Franciscan Alliance is 100% owned by the Sisters of Perpetual Adoration, a religious

order. Likewise, the profits of Tyndale and T&B are distributed to their religious owners to support their religious charity. (Compl. ¶ 23.) Franciscan Alliance runs a hospital system that provides millions in charity care. (*Id.* ("Franciscan uses those profits to help fund its medical care services to the poor and uninsured, thus, the work of T&B indirectly benefits those in need.").) T&B also donates services to the Diocese of Gary and to the Archdiocese of Indianapolis, to name a few. (Compl. ¶ 30.)

Similarly, while Tyndale was established to publish Bibles and Christian books, T&B was acquired to assist in building non-profit medical centers and hospitals. (Compl. ¶ 24.) And while Tyndale's articles of incorporation set forth its religious purposes, T&B's Operating Agreement contains "Special Limitations" that align T&B's work with Franciscan values. (Compl. ¶¶ 20-21 ("For all services to be provided by [T&B], [T&B] agrees to abide by and adhere to the Mission and Franciscan Values of Franciscan Alliance and the *Ethical and Religious Directives for Catholic Health Care Services* as promulgated by the United States Conference of Catholic Bishops ["USCCB"] of the Roman Catholic Church . . . .").) Thus, T&B declines construction projects that conflict with its faith. (Compl. ¶ 31.) Also consistent with Catholic teachings, T&B gives health benefits to its employees, but cannot pay for, facilitate, or support services such as contraceptives, abortion-inducing drugs, or sterilization in its health plans. (Compl. ¶¶ 33-34.)

Even beyond the similarities to Tyndale, T&B takes its commitment to the Catholic faith further. Immediately upon affiliation with Franciscan Alliance in 1998, T&B required all employees to attend Franciscan's new-employee orientation about Franciscan Values. (Compl. ¶ 25.) This education continues. (Compl. ¶ 27.) Six of the seven members of T&B's Board of Directors have traveled to Rome and Assisi to participate in Franciscan's Pilgrimage program. (Compl. ¶ 26; *see also infra* Picture of T&B's CEO, Jon Gilmore, on pilgrimage with Sisters of St.

Francis of Perpetual Adoration, including T&B Board Member Sister Jane Marie Klein.) Added to that is T&B's placement under the patronage of St. Joseph the Worker, who protects and watches over its business. (Compl. ¶ 29; *see also infra* Picture of statue of St. Joseph sitting in T&B's corporate office.)

Jon Gilmore, left, with Sister Jane Marie Klein, right, on pilgrimage in Assisi, Italy.

St. Joseph statue at T&B's corporate office.

As such, T&B is uniquely positioned to assert its owners' RFRA claims. *Tyndale*, 2012 WL 5817323, at *7 ("The Court has no reason to doubt, moreover, that Tyndale's religious objection to providing insurance coverage for certain contraceptives reflects the beliefs of Tyndale's owners."). And there is no question that T&B's immediate owner, Franciscan Alliance, and ultimate owner, Sisters of St. Francis of Perpetual Adoration, can "exercise religion" given their non-profit religious status. *Id.* (citing *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 381, 384 (1990); *Bob Jones Univ. v. United States*, 461 U.S. 574, 579-85, 602-04 (1983); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467-70 (D.C. Cir. 1996)).

b. Even if this Court finds that T&B does not have standing to assert its owners' rights directly, T&B has third-party standing to assert those rights. *See Tyndale*, 2012 WL 5817323, at *8-*9. The Supreme Court has "recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied": (1) "[t]he litigant must have suffered an 'injury in fact,' thus giving [the litigant] a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) "the litigant must have a close relation to the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (citations omitted). The "close relation to the third party" prong considers whether the litigant and third party have a "congruence of interests" such that the litigant is a "motivated, effective advocate for [its owners'] rights." *Id.* at 414. The "hindrance" prong considers the "likelihood and ability of the third parties . . . to assert their own rights." *Id.*

Here, T&B has an injury-in-fact because the Mandate forces it to facilitate the provision of objectionable services to its employees. Given T&B's "congruence of interests" with Franciscan Alliance and the Sisters of St. Francis of Perpetual Adoration, *see supra* at 10-12, T&B has also shown that they all "share common religious objections to the contraceptive coverage mandate," *Tyndale*, 2012 WL 5817323, at *9, and T&B can effectively advocate for its owners' rights.

Regarding the hindrance prong, Defendants take what the *Tyndale* court referred to as a "perplexing, self-defeating position on the issue." *Id.* On the one hand, Defendants claim to be baffled by the absence of T&B's owners from this suit, (Br. in Opp. to Prelim. Inj. at 15), arguing that T&B's owners are not hindered from suing on their own. But, soon thereafter, Defendants assert that T&B, not its owners, is the entity burdened by the Mandate (*id.* at 15-18), and so its owners lack standing to challenge it. If the Court were to accept Defendants' arguments, T&B would be caught in a catch-22, unable to challenge the Mandate under any circumstance. In

Defendants' world, T&B, though burdened by the Mandate, cannot exercise religion, and its owners, though capable of exercising religion, are not burdened by the Mandate. This is the precise argument that the third-party standing doctrine was designed to protect against. *See Tyndale*, 2012 WL 5817323, at *9. Finally, should the Court wish, T&B is happy to amend its complaint to add Franciscan Alliance, which is a plaintiff in the action at Civ. No. 1:12-cv-159 (N.D. Ind.). But the Court should not let Defendants' technical legal argument further delay a remedy for the Mandate's ongoing, irreparable harm to T&B and its owners' religious rights.

3. The Mandate substantially burdens the exercise of religion.

As explained in the opening brief (Br. in Supp. of Prelim. Inj. at 10-13), the Mandate substantially burdens T&B's exercise of religion because it requires T&B and ultimately its owners to pay crippling penalties if T&B refuses to provide insurance coverage for services in contravention of their religious beliefs. In response, Defendants argue that this burden is too "attenuated" because a series of independent decisions must occur before T&B's insurance plan will cover the mandated services. (Br. in Opp. to Prelim. Inj. at 20-22 (citing *O'Brien v. U.S. Dep't of Health & Human Servs.,* No. 4:12-cv-00476 (CEJ), 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012); *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *10-*11).) This argument both conflicts with circuit precedent and lacks merit in any event.

In *Korte*, the Seventh Circuit held that a for-profit employer and its owners "established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise." 2012 WL 6757353, at *4. In doing so, it noted that the "violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, not—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services." *Id.* at *3. And it disagreed with the cases on which Defendants rely because they "misunderstand[] the substance of [plaintiffs'] claim." *Id*. It is

obvious that this Court should follow the Seventh Circuit over Defendants' contrary cases. *See, e.g.*, *Triune*, slip op., at 2 (recognizing that it should following the "binding [*Korte*] precedent").

Aside from its conflict with precedent, Defendants' position is erroneous because it conflates the "substantial burden" and "religious exercise" elements. It is settled that a law substantially burdens religious exercise if it places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718; *see Koger*, 523 F.3d at 799. But, to determine if such "substantial pressure" has been applied, the beliefs must first be identified. Here, the *O'Brien* case on which Defendants rely falls short. *O'Brien* nowhere finds that paying for the objectionable insurance coverage violates Catholic beliefs. Rather, it notes that the plaintiffs "remain free to exercise their religion, *by not using contraceptives and by discouraging employees from using contraceptives*." 2012 WL 4481208, at *6 (emphasis added). Only by defining the "exercise of religion" in this way could the court hold that a requirement to offer a health plan covering those services was not a substantial burden. *Id.* But T&B's beliefs forbid it from offering *coverage* for the services; it does not simply prohibit the *use* of those services.

Defendants' efforts to transform the substantial-burden analysis from a measure of the government's coercive power into a judicial exploration of moral theology runs contrary to black-letter law. "Repeatedly and in many different contexts, [the Supreme Court has] warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. "Courts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, and "[i]t is not within the judicial function and judicial competence . . . to determine whether [a plaintiff] or the Government has the proper interpretation of the [challenger's] faith," *Lee*, 455 U.S. at 257 (internal quotation and citation omitted). In *Thomas*, for example, the Court held that the denial of unemployment benefits to a man who refused to work at

a factory that manufactured tank turrets substantially burdened his religion. 450 U.S. at 713-18. Rather than question whether working in an armaments factory was too "attenuated" a breach of Thomas's beliefs, the Court recognized "that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. Likewise, in *Lee*, the Court rejected the contention that payment of social-security taxes was too indirect a violation of the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255. Instead, it accepted the Amish's claim that "the payment of the taxes . . . violate[d their] religious beliefs." *Id.* at 257. In short, courts categorically may not assess whether a particular action is too remote a transgression of religious beliefs. That line is for the church, not the state, to draw. Here, T&B has drawn a line—it cannot offer the mandated coverage—and "it is not for [the courts] to say that the line [is] unreasonable." *Thomas*, 450 U.S. at 715.

Indeed, Defendants' argument has no logical end point. If adopted, Catholic hospitals could be compelled to allow physicians to perform surgical abortions or to commit euthanasia on their premises, without any recourse under RFRA. After all, "independent" third parties (the doctors performing the procedures and the patients requesting them) would be making those decisions. But RFRA was enacted for precisely these circumstances—to safeguard "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services." The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102d Cong., 174, 192 (1992) (Statement of Nadine Strossen, President, Am. Civ. Liberties Union).

Finally, there can be no question that Defendants have "substantially" burdened T&B's exercise of religion *once it is properly defined*. T&B and its owners believe that it is morally wrong to provide coverage for the objectionable services and so seek to exclude those services.

This action constitutes a religious exercise. And the Mandate places substantial pressure on T&B and its owners to facilitate that coverage. If T&B fails to provide the coverage, it and its owners must pay significant penalties. The Mandate thus "affirmatively compels" T&B to perform "acts undeniably at odds with fundamental tenets of [its] religious beliefs" on threat of penalties. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). A fine for exercising religion is the epitome of a substantial burden. *See, e.g.*, *Tyndale*, 2012 WL 5817323, at *13 (finding that plaintiff would likely be able to show a substantial burden); *Legatus*, 2012 WL 5359630, at *6 (same).

B. Defendants Have Failed To Prove A Compelling Interest.

The opening brief likewise showed that Defendants have no "compelling interest" in applying the Mandate to T&B because, as in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), they rest on *general* interests that allegedly justify the Mandate (rather than *specific* interests justifying a refusal to exempt T&B). (Br. in Supp. of Prelim. Inj. at 13-17.) In response, Defendants recite those very interests in "public health and gender equality." (Br. in Opp. to Prelim. Inj. at 22-24.) Setting aside the dubious claim that the Mandate serves these interests, Defendants' argument is precisely the sort that the Supreme Court has rejected. Under RFRA, Defendants must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the *particular claimant* whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31 (emphasis added). As such, they must "show with . . . particularity how [even] admittedly strong interest[s] . . . would be adversely affected by granting an exemption," *Yoder*, 406 U.S. at 236, and cannot rely on the "broadly formulated interests justifying the general applicability of [the] government mandate[]" in question, *O Centro*, 546 U.S. at 431. In *O Centro*, for example, the Court rejected the argument that public-health interests in banning "exceptionally dangerous" drugs sufficed to prohibit a religious exemption from this ban. *Id.* at 432. The same is true here.

Defendants retort that their generalized interests are "*particularly* compelling for women employed by companies not currently offering such coverage, like T&B." (Br. in Opp. to Prelim. Inj. at 25 (emphasis in original).) Such reasoning eviscerates RFRA's compelling-interest test, because the law that the government is attempting to justify will always be "particularly compelling" as applied to the RFRA plaintiff who wants the exemption. Under Defendants' reasoning, for example, the interest in education that justifies a law compelling parents to send their kids to school is "particularly" compelling as applied to the Amish who decline to send their children to school after the eighth grade—but the Supreme Court held otherwise. *See Yoder*, 406 U.S. at 207, 221. And the health interests in a law banning the use of hallucinogenic drugs is "particularly" compelling as applied to the small number of individuals who want to use those drugs—but the Supreme Court rejected the Government's efforts to rely on these general interests to justify the ban. *O Centro*, 546 U.S. at 432. If the law were as Defendants would have it, the government's burden to prove a *particularized* interest would be satisfied in every case simply by relying on the *generalized* interest *as applied* to the plaintiff who wants the exemption.

No better are Defendants' efforts to reconcile their argument that they have a compelling interest with the Mandate's many exemptions. As T&B showed (Br. in Supp. of Prelim. Inj. at 14), "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, 547 (1993) ("*Lukumi*") (plurality op.; internal citation omitted), and the Mandate has "significant exemptions for small employers and grandfathered health plans," as well as for entities deemed sufficiently "religious" by Defendants, *Newland*, 2012 WL 3069154, at *7. Defendants respond that the exemption for grandfathered plans is "not really a permanent 'exemption,'" but a "transition in the marketplace." (Br. in Opp. to Prelim. Inj. at 27.)

Their semantics aside, by declining to require grandfathered plans to provide the services, Defendants have "le[ft] appreciable damage to [their] supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Were their alleged interests truly compelling, the Mandate could have been included among the requirements—such as the requirement to offer dependent coverage to adult children—that *were* imposed on grandfathered plans. HealthCare.Gov, Grandfathered Health Plans, *available at* www.healthcare.gov/law/features/rights/grandfathered-plans/index.html (last visited Jan. 24, 2013). Defendants also note that small employers are required to provide the objectionable services if they offer a health plan. But, as *Newland* recognized, 2012 WL 3069154, at *7, small employers are exempt from the Mandate's penalties, 26 U.S.C. § 4980D(d); 26 U.S.C. § 4980H(a). And Defendants' religious-employer exemption—like the Native American exemption in *O Centro*—shows that Defendants lack any interest in uniformity. 546 U.S. at 434.

Finally, Defendants attempt to rebut the argument that their interests are not compelling because most employers *already* cover the mandated services with the claim that "[t]he challenged regulations eliminate . . . cost-sharing" arrangements for these plans. (Br. in Opp. to Prelim. Inj. at 25.) Defendants, however, have admitted not only that "85 percent of employer-sponsored health insurance plans cover[] preventive services," but also that they do so "without [beneficiaries] having to meet a deductible," 75 Fed. Reg. 41,726, 41,732 (July 19, 2010)—in other words, without significant cost sharing. Perhaps more importantly, exempting T&B would do nothing to undermine whatever alleged benefits result from eliminating cost-sharing requirements for the innumerable employers who have no objection to the Mandate. Defendants' interest as applied to T&B is simply not compelling because "the government does not have a compelling interest in

each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011).

C. Defendants Have Not Shown That The Mandate Is The Least Restrictive Means To Further Any Governmental Interest.

As the opening brief lastly illustrated, Defendants have not shown that the Mandate is the least restrictive means to achieve their interests. (Br. in Supp. of Prelim. Inj. at 17-19.) In response, Defendants assert that they are not required to adopt a new administrative scheme to meet this standard. (Br. in Opp. to Prelim. Inj. at 29-31.) But RFRA *does* require Defendants to consider "workable . . . alternatives that will achieve" their stated goals. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). They must "demonstrate[] that [they have] actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice," *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005), and cannot rely on "post-hoc rationalizations," *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 989 (8th Cir. 2004) (citation omitted); *see Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (noting that "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."). Here, Defendants have not identified in the administrative record—or their opposition—even *a* single alternative that they considered before enacting the Mandate. "Faced with such a record," this Court need not even consider whether T&B's proposed alternatives are workable, as it "cannot conclude that other alternatives could not achieve the same intended goals." *Johnson v. City of Cincinnati*, 310 F.3d 484, 504 (6th Cir. 2002). Indeed, in *Korte*, Defendants took the same position. *See* Opp. to Pls.' Emergency Mot., at *19-20, *Korte v. U.S. Dep't of Health & Human Servs.*, 2012 WL 6822215. The Seventh Circuit found it so deficient that it held that Defendants had not even "advanced an argument that the contraception mandate is the least restrictive means." *Korte*, 2012 WL 6757353, at *4.

Even if Defendants had in fact considered alternatives, moreover, their argument rests on conclusory assertions that the "alternatives would impose considerable new costs and [other] burdens on the government and [are otherwise] impractical." (Br. in Opp. to Prelim. Inj. at 30.) These "conclusory claims"—lacking any evidentiary support—cannot meet their burden of offering "*affirmative evidence* that there is no less severe alternative," *Johnson*, 310 F.3d at 505 (emphasis added). Indeed, Defendants have failed to show why T&B's proposed alternatives would interpose insurmountable administrative obstacles where, as here, "the government already provides free contraception to women." *Newland*, 2012 WL 3069154, at *7-8 (internal quotation marks omitted). Since the scheme *already* exists, T&B does not ask Defendants to adopt "an entirely new legislative . . . scheme." (Br. in Opp. to Prelim. Inj. at 30.) Further, the very fact that Defendants have proposed an "accommodation" for nonprofit religious organizations proves that even Defendants themselves believe that the Mandate is not the least restrictive means to accomplish their goals. *See* Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012). They fail to explain why this so-called "accommodation" cannot simply be expanded to include *all* religious objectors.

Defendants' cases do not support their argument. They rely primarily on *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011). That case stresses that RFRA cannot require the Government to prove "that no matter how long one were to sit and think about the question, one could never come up with an alternative regulation that adequately serves the compelling interest while imposing a lesser burden on religion." But the court goes on to note that the Government *is* responsible for "support[ing] its choice of regulation, and . . . refut[ing] the alternative schemes offered by the challenger . . . through *the evidence presented in the record*." *Id.* at 1288-89 (emphasis added). Defendants present no evidence. Similarly, *New Life Baptist Church Academy*

v. Town of East Longmeadow, 885 F.2d 940, 946 (1st Cir. 1989), is concerned with preventing an imaginative judge from dreaming up "something a little less 'drastic' or a little less 'restrictive,'" as grounds for striking down legislation. Here, T&B is not asking Defendants to disprove the feasibility of *any conceivable* alternative. T&B instead asks only that Defendants engage with, and provide reasoned analysis—based on evidence—for rejecting, T&B's many feasible alternatives.

II. T&B HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS FREE EXERCISE CLAIM.

The opening brief also showed that an injunction should issue because the Mandate is not a neutral law of general applicability, and so the Free Exercise Clause subjects it to the compelling-interest test that Defendants cannot meet. (Br. in Supp. of Prelim. Inj. at 19-21.) Defendants' response begins by claiming a consensus in the case law that the Mandate is a neutral law of general applicability. (Br. in Opp. to Prelim. Inj. at 31.) But recent decisions show that the question is far from settled. For example, a Missouri district court granted a temporary restraining order to a similar plaintiff after determining that the Mandate was not a neutral law of general applicability. *See Sharpe*, 2012 WL 6738489, at *6. To bolster this claim, moreover, Defendants rely on inapposite decisions upholding state laws that accommodated religious employers by allowing them to avoid similar mandates by dropping prescription-drug coverage. *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 76, 91 (Cal. 2004). Here, if T&B drops its health plan, it will be subject to onerous fines. *See* 26 U.S.C. § 4980H(a), (c)(1), (c)(2)(D)(i)(I).

On the merits, Defendants argue that the Mandate is "neutral and generally applicable" because it "does not target religiously-motivated conduct." (Br. in Opp. to Prelim. Inj. at 32-33.) But Defendants have conceded that most plans *already* provide cost-free coverage for the

mandated services. 75 Fed. Reg. at 41,732. This fact shows not only that Defendants lack any compelling need to enact the Mandate but also that "the burden of the [Mandate], in practical terms, falls on [religious entities] but almost no others." *Lukumi*, 508 U.S. at 536. In other words, the Mandate's effect will be felt mainly by organizations whose religious objections have prevented them from providing such coverage previously; in contrast, the "burden" will be minimal or non-existent for those entities that already offer the services. The Mandate is indistinguishable on this score from the prohibition on animal slaughter in *Lukumi*, which, although it applied to all, was deemed "motivated by religious belief" because of its particular impact on adherents to the Santeria religion. *Id.* at 545. As in *Lukumi*, religiously motivated conduct is nearly the only conduct that will be required to change to comply with the Mandate.

Defendants next argue that the existence of allegedly "objectively defined" exemptions to the Mandate has no impact on whether it is "generally applicable." (Br. in Opp. to Prelim. Inj. at 34). But, as *Sharpe* held, "the ACA mandate is not generally applicable because it does not apply to grandfathered health plans, religious employers, or employers with fewer than fifty employees," 2012 WL 6738489, at *6. And, as then-Judge Alito explained in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.), "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Id.* at 366; *see Ward v. Polite*, 667 F.3d 727, 739-40 (6th Cir. 2012) (noting that that "[a] double standard is not a neutral standard").[3]

[3] The Mandate is also subject to the compelling-interest test because it intrudes on T&B's free-speech, in addition to free-exercise, rights. *See Smith*, 494 U.S. at 881-82 (suggesting that heightened scrutiny is called for under Free Exercise Clause in "hybrid situation[s]" where law intrudes on multiple rights).

III. T&B'S COMPLAINT ADEQUATELY STATES A CLAIM FOR ITS REMAINING CAUSES OF ACTION.

Defendants next argue that T&B has not shown a likelihood of success on its remaining constitutional and administrative claims. But these claims state valid causes of action.

A. Establishment Clause.

T&B's Complaint states a cognizable claim that the Mandate and its narrow religious-employer exemption violate the Establishment Clause. The Supreme Court has repeatedly reiterated that "the clearest command of the Establishment Clause" is the principle of denominational neutrality: The Government cannot "pass laws which aid one religion" or "prefer one religion over another." *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982) (internal quotation and citation omitted).[4] Strict scrutiny applies to such laws. *See id.* at 246 & n.23, 253; *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266-67 (10th Cir. 2008). And a law qualifies as "discriminatory" when it has more than a "disparate impact" on a denomination, even if it does not *expressly* identify any religious denomination by name. *Larson*, 456 U.S. at 246 n.23; *cf. Lukumi*, 508 U.S. at 534-35 (considering practical effect of a law to evaluate targeting under the Free Exercise Clause).

In *Larson*, for example, members of the Unification Church, which emphasized door-to-door and public-place solicitation of donations, contested a Minnesota statute that imposed special requirements on religious organizations that received over half of their funding from non-members. 456 U.S. at 231-32. The Court held that the statute was discriminatory even though it did not mention any denomination and rested on secular considerations (the amount of

4 *See also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grument*, 512 U.S. 687, 707 (1994) ("It is clear that neutrality as among religions must be honored."); *Gillette v. United States*, 401 U.S. 437, 449 (1971) (a "central purpose of the Establishment Clause [is] the purpose of ensuring governmental neutrality in matters of religion"); James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785), *available at* http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html (criticizing the denominational preference for Christianity as violating the "equality [that] ought to be the basis of every law").

money that an organization receives from non-members), because it "made explicit and deliberate distinctions between different religious organizations." *Id.* at 246 n.23. Similarly, *Colorado Christian* struck down a state law that withheld scholarship funds from students attending "pervasively sectarian" religious colleges. The state had argued that its ban did not discriminate among denominations because any denomination could choose to establish a "pervasively sectarian" institution and so the ban was based on a neutral factor. The court flatly rejected this "puzzling and wholly artificial distinction." 534 F.3d at 1259. It instead found the law subject to heightened scrutiny because it "discriminate[d] between 'types of institutions' on the basis of the nature of the religious practice these institutions are moved to engage in." *Id.*

These principles apply here. The Mandate and its exemption discriminate among religions because they tie an exemption to the religious nature of the institution—asking whether its purpose is to inculcate religious values and whether it primarily employs and serves people of the same religious tenets. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B). The similarities with *Larson* are striking. The statute in *Larson* turned on whether the particular organization primarily received funding from *members or non-members*; the Mandate and its exemption turn on whether the particular organization primarily serves and employs *members or non-members*. Thus, just like in *Larson*, the Mandate "make[s] explicit and deliberate distinctions between different religious organizations," and so is "not simply a facially neutral [law], the provisions of which happen to have a disparate impact upon different religious organizations." 456 U.S. at 246 n.23. The Mandate expressly distinguishes between religious organizations that have purely insular missions and those, like many Catholic institutions, that have external missions to serve the world.

Indeed, as in *Colorado Christian*, the exemption's discrimination is more egregious than the discrimination in *Larson*, because the statute in *Larson* "was framed in terms of secular

considerations: how much money was raised internally and how much from outsiders to the institution." 534 F.3d at 1259. In contrast, the Mandate's exemption—like the Colorado law—also expressly turns on religious factors, such as whether the institution's purpose is to inculcate religious values. *See id.*; 45 C.F.R. § 147.130(a)(1)(iv)(B)(1).

In response, Defendants argue that no Establishment Clause concern exists here, because "[t]he relevant inquiry is whether the distinction drawn by the regulations between exempt and non-exempt entities is based on religious affiliation." (Br. in Opp. to Prelim. Inj. at 35). But this is the same argument made in *Larson* and again in *Colorado Christian*—namely, that the relevant law was non-discriminatory because, while its express distinctions may have had a disparate impact on certain religious denominations, the distinctions themselves were based on neutral considerations that did not single out any particular denomination. *See Larson*, 456 U.S. at 246 n.23; *Colo. Christian*, 534 F.3d at 1259. That argument should be rejected in this case, as it was in those cases, because Defendants' allegedly neutral distinctions are "expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations." *Colo. Christian*, 534 F.3d at 1259 (distinguishing *Children's Healthcare Is A Legal Duty, Inc., v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000)). It is simply not for the Government to tie an exemption to the Government's view of what a religious institution is or should be.

B. Free Speech Clause.

T&B has stated a cognizable claim that the Mandate violates the Free Speech Clause. The government may not compel speech. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977); *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943); *Enter. Software Ass'n v. Blagojevich*, 469 F.3d 641, 652-53 (7th Cir. 2006). This restriction takes at least two forms. Most obviously, it prevents the "government from compelling individuals to express certain views" with which they disagree. *United Foods*, 533 U.S. at 410.

So, for example, individuals cannot be forced to say the pledge of allegiance, *Barnette*, 319 U.S. at 634, to proclaim a state's "Live Free or Die" motto, *Wooley*, 430 U.S. at 715-16, or to place another person's views in their newspapers, *Miami Herald Pub'l Co. v. Tornillo*, 418 U.S. 241, 256 (1974). And this doctrine "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995); *see Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). In addition, the government may not "compel[] . . . individuals to pay subsidies for speech to which they object." *United Foods*, 533 U.S. at 405. This limit has led the Supreme Court to invalidate, among others, requirements that farmers pay funds for mushroom advertising, *see id.* at 415-16, that lawyers finance a bar association's politics, *Keller v. State Bar of Cal.*, 496 U.S. 1, 16-17 (1990), and that union members finance a union's ideological activities, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

The Mandate violates this law by compelling T&B to speak. To begin with, it "compel[s] . . . [T&B] to pay subsidies for speech to which [it] object[s]." *United Foods*, 533 U.S. at 405. In particular, T&B must subsidize speech by physicians ("counseling and education") about the objectionable services. Additionally, the Mandate compels T&B to include in its plan documents speech stating that the plan offers services to which T&B has a moral objection. In other words, the Mandate does not simply compel T&B to pay for others' speech; it compels T&B to speak directly about the objectionable services. *See Hurley*, 515 U.S. at 573 (compelled-speech doctrine applies "to statements of fact the speaker would rather avoid"). T&B cannot be put into a position in which it will be forced to tell its employees that its health plan provides coverage for services with which it has a moral objection. Indeed, T&B's very act of not covering the objectionable

services is expressive in that it conveys the Catholic Church's teachings on these subjects. *See id.* at 569 ("the Constitution looks beyond written or spoken words as mediums of expression.").

Defendants' responses lack merit. To begin with, Defendants mischaracterize T&B's Complaint when they say that T&B's "only" free-speech allegation is that it must pay for physician speech. (Br. in Opp. to Prelim. Inj. at 36.) As illustrated, the Mandate requires T&B to engage in objectionable speech in its plan documents (stating that its plan covers the mandated services). Regardless, Defendants' argument that the physician speech may or may not "be in favor of services to which plaintiffs object" is both factually inaccurate and legally irrelevant. (*Id.* at 36.) Factually, Defendants defend the Mandate as serving their interest of *promoting* the objectionable services. (*Id.* at 37.) By this argument, Defendants acknowledge that the "related" counseling and education is, in fact, intended to encourage use of those services; otherwise, they would allegedly have no "compelling" interest in forcing T&B to pay for that speech. Legally, the prohibition on compelling a party to subsidize another's speech is not limited to "the compelled funding" for "a particular message." (*Id.* at 37.) The bar association in *Keller*, for example, was alleged to have spoken on a variety of different topics. *See* 496 U.S. at 15; *see also Abood*, 431 U.S. at 234 (agreeing that workers who pay union dues "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative").

C. The Administrative Procedure Act.

T&B's Complaint also states valid claims under the Administrative Procedure Act ("APA") that Defendants (1) failed to follow proper notice-and-comment rulemaking; (2) enacted arbitrary-and-capricious regulations; and (3) passed regulations violating the law.

1. Defendants failed to follow mandatory notice-and-comment procedures in violation of the APA.

Under the APA, notice-and-comment rulemaking is required for all "legislative" rules (also known as "substantive" rules). 5 U.S.C. § 553(b)(A); *see Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169-70 (7th Cir. 1996). This process requires agencies to publish in the Federal Register a "[g]eneral notice of proposed rule making" that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). After publishing the notice, agencies must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c). "In addition to increasing the quality of rules, the required public participation helps 'ensure fair treatment for persons affected by' regulation." *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) (quoting *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005)); *see Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449-50 (3d Cir. 2011). Thus, only after giving the public an opportunity to participate may agencies "adopt a final rule" that includes a statement of basis and purpose. 5 U.S.C. § 553(c). Defendants flouted this process in a number of ways.

a. Defendants promulgated the HRSA Guidelines without notice and comment or even publication in the Federal Register.

It is well established that duties imposed by agencies pursuant to statutory delegations of authority are quintessential "legislative rules." "[W]hen a statute does not impose a duty on the persons subject to it but instead authorizes . . . an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency." *Hoctor*, 82 F.3d at 169; *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 620-21 (D.C. Cir. 1980). That is precisely the case with the Mandate; Congress delegated to the Health Resource Services Administration ("HRSA"), an agency within HHS, the authority to enact "comprehensive guidelines" for women's preventive health that are binding on health plans. 42 U.S.C. § 300gg-13(a)(4). By setting "standards

governing conduct," HRSA is legislating, and so its standards are "subject to notice and comment procedures." *Farmworkers*, 628 F.2d at 620-21; *see Natural Res. Def. Council v. E.P.A.*, 643 F.3d 311, 321 (D.C. Cir. 2011); *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1088 (9th Cir. 2003).

Yet Defendants purported to "adopt" the HRSA Guidelines that contain the Mandate by publishing them on a website. *See* Health Res. & Servs. Admin., Women's Preventive Servs.: Required Health Plan Coverage Guidelines, *available at* www.hrsa.gov/womensguidelines (last visited Jan. 24, 2013). Defendants thereby violated the most fundamental requirement of the APA—that rules be published in the Federal Register. *See* 5 U.S.C. § 553(b). There can be no dispute that these Guidelines are "legislative." They lay out the substantive requirements for women's preventive-care coverage. And without the guidelines, "there is no legislative basis for [an] enforcement action" for refusing to cover any listed item. *Hemp*, 333 F.3d at 1088. The guidelines thus "necessarily create[] new rights and impose[] new obligations" that must be enacted via notice-and-comment rulemaking. *Id.* In other words, it is not the statute and interim final rules that give content to the Mandate. Both merely delegate authority to HRSA to issue guidelines. *See* 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv). It is instead the guidelines themselves that create new duties. If they are exempt from the APA, the coverage requirements could change without any notice to, or recourse for, affected employers.[5] *Cf. Hoctor*, 82 F.3d at 171. The Court should not allow this "regulation by press release" to stand, especially where First Amendment freedoms are involved.

[5] Tellingly, the same statute also requires HRSA to develop "comprehensive guidelines" for *children's* preventive care. 42 U.S.C. § 300gg-13(a)(3). As with the Mandate, Defendants promulgated a rule mirroring the statutory language. *See* 45 C.F.R. § 147.130(a)(1)(iii). But, unlike with the Mandate, Defendants published the guidelines governing children's preventive services in the Federal Register. *See* 75 Fed. Reg. 41,726, 41,740 *et seq.* (July 19, 2010) ("Comprehensive guidelines for infants, children, and adolescents supported by HRSA appear in two charts that follow.").

Defendants' only response is that it is common for agencies to request assistance from private organizations in developing legal standards. (*See* Br. in Opp. to Prelim. Inj. at 38, n.27.) But while nothing prohibits Defendants from seeking scientific recommendations from private organizations, doing so does not grant them license to adopt the recommendations *without* notice-and-comment rulemaking. *Farmworkers*, for example, involved an agency's promulgation of a rule that incorporated a private organization's recommendations. 628 F.2d at 607-10. The rule involved an exemption to child-labor laws for the harvesting of short-seasoned crops. *Id.* at 607. The exemption delegated to the Department of Labor the ability to grant waivers to those laws if the pesticides used on the crops would not harm children. Under the regulations, a company needed to submit evidence that the specific pesticides it used were not harmful, unless those pesticides fell within the agency's "approved list of pesticides." *Id.* at 607-10. As with the creation of the HRSA guidelines, the agency created its "approved list" by adopting recommendations received from a third party. *Id.* at 621. The court held that adoption of the approved list violated the APA because the agency had not followed notice-and-comment rulemaking. *Id.* The list was "exactly the kind of standard which especially needs the utmost care in its development and exposure to public and expert criticism." *Id.* So, too, the Mandate's determination that T&B must cover abortion-inducing drugs, contraception, and sterilization deserves "development and exposure to public and expert criticism."

In short, the statute and regulation have no substance without the HRSA Guidelines, but they were not published in the Federal Register and did not proceed through notice and comment. The Mandate is thus an invalid legislative rule that must be vacated. *See* 5 U.S.C. § 706(2)(D).

b. Defendants failed to follow notice-and-comment rulemaking procedures in promulgating their interim final rules.

With respect to the rules that Defendants published in the Federal Register, they still failed to comply with the notice-and-comment requirements. Defendants concede as much but claim that they were not required to do so because (1) they had statutory authority to issue interim final rules and (2) they met the APA's "good cause" exception. *See* 75 Fed. Reg. at 41,730; 76 Fed. Reg. 46,621, 46,624 (Aug. 3, 2011); (Br. in Opp. to Prelim. Inj. at 38 & n.26). Both arguments are mistaken.

Statutory Authority. Defendants lacked statutory authority to avoid notice and comment. They cite 26 U.S.C. § 9833, 29 U.S.C. § 1191c, and 42 U.S.C. § 300gg-92 as authorizing their failure to do so. 76 Fed. Reg. at 46,624; 75 Fed. Reg. at 41,729-30. But those provisions merely authorize each Defendant Secretary to promulgate "any interim final rules as the Secretary determines are appropriate to carry out" certain provisions of the Affordable Care Act. Such discretionary language does not allow Defendants to avoid the APA when promulgating legislative rules. Rather, a statute can only "supersede or modify" the APA if "it does so *expressly*." 5 U.S.C. § 559 (emphasis added); *see, e.g., Lakeside Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 6 (D.C. Cir. 2011). Indeed, Congress has used such express language to alter the APA's procedure in other instances. *See, e.g., Asiana Airlines v. Fed. Aviation Admin.*, 134 F.3d 393, 395 (D.C. Cir. 1998) (directing FAA to publish "interim final rule, *pursuant to which public comment will be sought and a final rule issued*" (emphasis added; internal quotation and citation omitted)). Here, there is no express mention of the APA or its procedure. In the few instances where courts have considered similar language, they have held that such language does not alone justify sidestepping the APA. *See, e.g.*, *Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 105 (D.D.C. 2006) (applying "good cause" exception despite similar statutory

language, necessarily showing that such language did not *alone* eliminate the need for notice and comment).

Good Cause. Defendants have also failed to demonstrate "good cause" for avoiding the notice-and-comment procedure. (*See* Br. in Opp. to Prelim. Inj. at 38 n.26.); 5 U.S.C. § 553(b). "[T]he Government's burden to show that good cause exists is a heavy one—the good cause exception is 'narrowly construed and only reluctantly countenanced.'" *Cain*, 583 F.3d at 420 (quoting *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001)). "The exception is not an escape clause; its use should be limited to emergency situations." *Util. Solid Waste*, 236 F.3d at 754 (quotation and citation omitted).

This good-cause exception cannot support Defendants' defiance of the APA. For their July 19, 2010 interim final rule, Defendants claimed that notice and comment was "impracticable" because "[i]t [was] not possible to have a full notice and comment process and to publish final regulations in the brief time between enactment of the Affordable Care Act and the date regulations [were] needed." 75 Fed. Reg. at 41,730. But such time constraints do not trump the APA's requirements because, "[b]y delegating regulatory authority . . . rather than creating law itself," "Congress . . . already balanced the costs and benefits of an immediately effective rule compared to the delayed implementation of a reasoned regulation." *Cain*, 583 F.3d at 421.[6]

For similar reasons, Defendants did not have good cause to ignore the APA when issuing the final rule creating the religious-employer exemption. *See* 76 Fed. Reg. at 46,626. Any sense of urgency felt by Defendants in August 2011 was entirely self-imposed, resulting from the decision

[6] With respect to the Mandate, Defendants' claim is particularly misplaced because, when they issued this regulation, Defendants were still in the process of "developing guidelines" for women's preventive care (the HRSA Guidelines) and planned to issue those guidelines *more than one year later*. 75 Fed. Reg. at 41,731; *cf., e.g., U.S. Steel Corp. v. E.P.A.*, 595 F.2d 207, 213 (5th Cir. 1979) ("[I]t is clear that the EPA did not regard the statutory deadline as sacrosanct, since the [rule] was not published until a full month after the deadline."). And Defendants have found no impediment to taking extra time when it suits them. *See, e.g.*, 77 Fed. Reg. at 16,501 (initiating prolonged process with an ANPRM).

to dispense with notice and comment in July 2010. Had they provided notice of an exemption in 2010, a final rule easily could have been promulgated by August 2011. *Cain*, 583 F.3d at 421-22 ("[E]ven a statutory deadline may not be enough to establish good cause to disregard the APA requirements if the agency would have had time for notice and comment had it not unreasonably delayed taking action.").

Defendants'second excuse for avoiding the APA with respect to the exemption was that "the July 19, 2010 interim final rules . . . provided the public with an opportunity to comment." 76 Fed. Reg. at 46,624. But those prior rules failed to mention an exemption. To satisfy the APA, a prior notice "must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making." *Prometheus*, 652 F.3d at 450 (quotation and citation omitted). The earlier rules do not meet this notice standard.

Defendants' third "good cause" argument was that observing the notice-and-comment procedure would have delayed implementation of the HRSA Guidelines for individuals with group health plans starting in August or September 2012. 76 Fed. Reg. at 46,624. But "a largely conclusory statement that [a rule's] immediate promulgation is necessary in order to benefit the greatest number" of people is "not enough" to constitute good cause. *Zhang v. Slattery*, 55 F.3d 732, 747 (2d Cir. 1995). This argument rings especially hollow here in light of the thousands of grandfathered plans that will *not* be required to provide the mandated services for many years.

Finally, that Defendants accepted *post-publication* comments does not ameliorate these deficiencies. (Br. in Opp. to Prelim. Inj. at 38.) *See, e.g., Nw. Tissue Center v. Shalala*, 1 F.3d 522, 531 (7th Cir. 1993) ("If the statute authorizing agency action requires the agency to solicit data and comments from interested parties, the parties ought to have a meaningful opportunity to present

these materials to the agency *before* it embarks upon a course of action, particularly if the agency can impose . . . civil sanctions for violations of its regulations." (emphasis added)); *Sharon Steel Corp. v. E.P.A.*, 597 F.2d 377, 381 (3d Cir. 1979) ("If a period for comments after issuance of a rule could cure a violation of the APA's requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation."). By contrast, an "agency is more likely to give real consideration to alternative ideas" if it accepts comments *before* issuing rules. *U.S. Steel Corp. v. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979); *Prometheus*, 652 F.3d at 449; *Cain*, 583 F.3d at 420.

Defendants' failure to observe the process Congress mandated has prejudiced T&B. The notice-and-comment requirements exist to "ensure that [the] agency regulations are tested via exposure to diverse public comment," *Prometheus*, 652 F.3d at 449, before they are finalized. In stark contrast to regulation by fiat, the APA's formal process leads to "better-informed agency decision-making." *Id.* at 450 (noting that another purpose is to develop a record for judicial review of regulations); *Cain*, 583 F.3d at 420. Here, T&B and similarly situated organizations did not have the opportunity to participate in the legislative process that resulted in the Mandate. And T&B has been forced, as a result, to provide insurance coverage for services that violate its sincerely held beliefs. It is incumbent on this Court to uproot the Mandate and force Defendants to start over using the appropriate procedure *before* a rule is finalized. 5 U.S.C. § 706(2)(D).

2. The Mandate and its exemption are arbitrary and capricious.

Defendants' regulations violate the APA because they are arbitrary and capricious. A rule is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,

43 (1983); *accord St. James Hosp. v. Heckler*, 760 F.2d 1460, 1469 (7th Cir. 1985). The Mandate and religious-employer exemption violate both prongs of this test.

First, Defendants failed to consider an issue raised by several commentators: that the mandated services should not be considered "preventive" services at all because they do not prevent illness or disease. *See* U.S. Conf. of Catholic Bishops, Comments on Interim Final Rules on Preventive Services (Aug. 31, 2011) (attached as Exhibit E) (noting the FDA's own admission that the use of contraceptives to prevent pregnancy does not control disease); Family Research Council, Comments on Interim Final Rules on Preventive Services (Sept. 30, 2011) (attached as Exhibit F) (noting that "the mandate to include the full range of FDA-approved contraceptives as necessary preventive medicine defies common sense because pregnancy is not a disease").

Second, Defendants failed to consider the risks associated with the services that they mandated. As the *amicus* brief of the Breast Cancer Prevention Institute and similar organizations shows (*Amici Curiae* Br. (Doc. No. 32) at 4-18), numerous studies illustrate that many of the mandated services have a variety of health risks. In fact, Defendants' record is noticeably devoid of *any* discussion regarding the services that should be covered because, as discussed, Defendants failed to subject the HRSA Guidelines to any public comment at all.

Third, Defendants failed to consider using established religious exemptions in other federal and state laws. Defendants were plainly aware of these provisions. The Interim Final Rules repeatedly reference ERISA and the Tax Code, two federal regimes with broader exceptions for religious entities. *See, e.g.*, 76 Fed. Reg. at 46,622. Many commentators also asked Defendants to incorporate these and other even broader state-law exceptions. *See, e.g.*, Alliance of Catholic Health Care, Comments on Interim Final Rule on Preventive Services (Sept. 23, 2011) (attached as Exhibit G). Yet Defendants described their religious-employer exemption as

"[c]onsistent with most States that have such exemptions," and as "based on existing definitions used by most States." 76 Fed. Reg. at 46,623. That was untrue. A study conducted not long after the Defendants published their exemption found that of the twenty states that offered an exemption to similar coverage, only four limit[ed] the availability of the exemption to churches and church associations. *See* Guttmacher Inst., *State Policies in Brief: Insurance Coverage of Contraceptives*, July 1, 2012. That number has since dropped to three, as Arizona has recently expanded its exemption. *See State Policies in Brief: Insurance Coverage of Contraceptives* (Dec. 1, 2012).

In short, when enacting the Mandate and exemption, Defendants ignored key aspects of the problem before them and relied on misinterpretations of facts and laws. Defendants thus acted arbitrarily and capriciously in violation of the APA. *See St. James Hosp.*, 760 F.2d at 1468-69; *Motor Vehicle*, 463 U.S. at 43.

3. The Mandate is "not in accordance with law."

The Mandate should be set aside because it is "not in accordance with law," 5 U.S.C. § 706(2)(A), specifically the Weldon Amendment. The Weldon Amendment, which the House of was originally considered in 2002, has since been included in every major appropriations bill since 2005. *See, e.g.,* Consolidation Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). The amendment provides that federal funds may not be "made available to a Federal agency or program . . . if such agency[] [or] program . . . subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." *Id.* The term "health care entity" is defined to include health insurance plans and "any other kind of health care facility, organization, or plan." *Id.* Thus, the Weldon Amendment prohibits federal agencies or programs from discriminating against health plans and the organizations that provide them on the basis that they do not "provide, pay for, [or] provide coverage for" abortion services. *See id.*

While the Weldon Amendment did not define abortion, its medical meaning includes actions taken after conception that terminate an embryo. *See F.A.A. v. Cooper*, 132 S. Ct. 1441, 1449 (2012) ("[I]t is a 'cardinal rule of statutory construction' that, when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'" (citation omitted)); *see also Gonzales v. Carhart*, 550 U.S. 124, 152 (2007) (looking to medical dictionaries when interpreting abortion statute). Stedman's Medical Dictionary, for example, defines "abortion" as the "[e]xpulsion from the uterus of *an embryo* or fetus [before] viability . . . ." STEDMAN'S MEDICAL DICTIONARY 4 (28th ed. 2006) (emphasis added); *see also id.* at 1438 (defining "pregnancy" as "[t]he state of a female *after conception* and until the termination of the gestation") (emphasis added); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1500 (30th ed. 2003) (defining pregnancy as "the condition of having *a developing embryo* or fetus in the body, after union of an oocyte and spermatozoon"). Some of the Mandate's covered services—which Defendants admit prevents an embryo from implanting in the womb (*see* Br. in Opp. to Prelim. Inj. at 41)—thus qualify as an "abortion."

At the least, the definition of "abortion" should be determined by the plan provider (rather than the Government). That interpretation comports with other federal laws protecting conscientious objectors. The Affordable Care Act, for example, itself contains a provision preventing any interpretation that would require "qualified health plans" to provide coverage for abortion services, and provides that "the *issuer* of a qualified health plan"—not the *Government*—"shall determine" whether or not a plan provides that objectionable coverage. *See* 42 U.S.C. § 18023(b)(1)(A)-(B) (emphasis added).

The history of the Weldon Amendment also supports this interpretation. It was passed in a legal environment that increasingly forced institutions to provide abortion services over religious

objections. *See* Judith C. Gallagher, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 AVE MARIA L. REV. 527, 528-30 (2007) (citing *Valley Hospital Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997)); *see generally* 148 Cong. Rec. H6566 et seq., 2002 WL 31119206 (daily ed. Sept. 25, 2002). The Amendment was meant to restore rights to conscientiously object to providing, paying for, or facilitating what a particular person viewed as an abortion. For example, during the debate on the original version in 2002, Representative Bilirakis, a sponsor of the bill, was asked "to define what constitutes an abortion" and, specifically, "[i]s emergency contraception abortion?" 148 Cong. Rec. H6566-01, at H6577-78, (Rep. Capps). He responded: "[T]his is not about abortion. This is about freedom. . . . basically giving people the moral rights to make their decisions. That is what it is all about." *Id.* at H6578 (Rep. Bilirakis); *see also id.* at H6566 (Rep. Myrick) ("[T]oday a growing number of health care practices, procedures and *medications* present serious moral concerns for many health care providers. . . . Increasingly, there is pressure upon health care providers . . . to put aside personal moral beliefs in order to facilitate convenient access to *new drugs*, procedures and technologies. . . . [The Bill would give health care providers] a right to choose not to be involved in destroying life." (emphasis added)). This Court should interpret the Weldon Amendment to actually fulfill the goal it was meant to accomplish: protecting conscientious objectors.

Defendants, by contrast, would have this Court believe that there is a "decade of regulatory policy and practice" interpreting "abortion" to exclude all of the mandated services. (Br. in Opp. to Prelim. Inj. at 41-42.) But Defendants' discussion relies only on the FDA's definition of "emergency contraception." Defendants cite no statutory definition of "abortion," no medical definition of it, and no case in which a court interpreted "abortion" in the context of the Weldon Amendment. That Amendment should not be interpreted in a manner that would utterly defeat its

fundamental purpose of protecting religious conscience. Defendants also suggest in passing that this Court should defer to their interpretation of the term "abortion." (Br. in Opp. to Prelim. Inj. at 42.) But "reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer." *Prof'l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991). Defendants are not specially charged with enforcing appropriations bills, and their interpretation of the Weldon Amendment is thus entitled to no deference. Lastly, Defendants cite the floor statements of one representative that were made years before the law ever was enacted into an appropriations bill. (Br. in Opp. to Prelim. Inj. at 42-43.) But "[w]hat motivate[d] one legislator to make a speech about a statute [in 2002] is not necessarily what motivate[d] scores of others to enact it" in 2012, as illustrated by statements from other representatives like the ones referenced above. *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *see also Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 457 n.15 (2002) (rejecting reliance on floor statements).

IV. T&B CONTINUES TO SUFFER IRREPARABLE HARM AND GRANTING THE INJUNCTION SERVES THE PUBLIC INTEREST

Lastly, as T&B has explained, the Mandate irreparably harms it and an injunction serves the public interest. (Br. in Supp. of Prelim. Inj. at 22-25.) Defendants dismiss T&B's irreparable harm by pointing to the time between the Mandate's passage and T&B's suit. (Br. in Opp. to Prelim. Inj. at 43-44.) But T&B has already explained that it was unknowingly providing the objectionable services, and, less than three weeks after it became aware that it could not get those services removed, it filed suit. (Compl. ¶ 39.) This passage of time does nothing to undermine the fact that T&B's religious rights continue to be violated, a violation that *automatically* qualifies as irreparable. *See Am. Civil Liberties Union v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012).

Indeed, T&B filed suit on September 20, 2012, weeks *before* the plaintiffs in *Korte* filed their suit. *See* 2012 WL 6757353, at *2. Yet the Seventh Circuit found that the *Korte* plaintiffs showed irreparable harm. *Id.* at *4; *see also Sharpe*, 2012 WL 6738489, at *7 (finding unpersuasive "the government's arguments that plaintiffs' delay in bringing these proceedings for 16 months should work against their entitlement to short term injunctive relief"). Moreover, Defendants have not even attempted to explain how this alleged "delay" prejudiced them. In these circumstances, the alleged "delay alone, without any explanation on [Defendants'] part of why such a delay negatively affected them, would not lessen [T&B's] claim of irreparable injury." *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001); *Fairbanks Cap. Corp. v. Kenney*, 303 F. Supp. 2d 583, 590 (D. Md. 2003) (rejecting delay argument for lack of prejudice); *Rubbermaid Comm. Prods., Inc. v. Contico Int'l, Inc.*, 836 F. Supp. 1247, 1257 (W.D. Va. 1993) (same).

Frankly, Defendants' argument is astonishing. In July 2012, they argued that a for-profit corporation had not shown irreparable harm from the Mandate (which would apply to it in November 2012), because "this harm, three months in the future, is not sufficiently imminent to justify injunctive relief." *Newland*, 2012 WL 3069154, at *4. And, in a related action (Civ. A. No. 1:12-cv-159 (N.D. Ind.)), Defendants argue that Franciscan Alliance (among other nonprofit institutions) is not entitled to relief because the Mandate does not yet apply to it, despite the impacts that the Mandate has had on its operations. Here, however, Defendants take an about-face and argue that T&B waited too long. Apparently, for Defendants, it is never the right time to challenge their illegal Mandate. The Government should not be able to eviscerate the First Amendment through such smoke and mirrors. *See Tyndale*, 2012 WL 5817323, at *18 n.18 (finding Defendants' argument to be "disingenuous" for precisely these reasons).

Defendants next seize on T&B's unwitting provision of the objectionable services in support of its argument that no irreparable harm exists. (Br. in Opp. to Prelim. Inj. at 44-45.) The Seventh Circuit has already rejected this argument as well. In *Korte*, "the government emphasize[d] the fact that [the plaintiff's] current employee health plan covers contraception" as a basis for denying the injunction, but the Court disagreed based on the "well-established" ground "that a religious believer does not, by inadvertent nonobservance, forfeit or diminish his free-exercise rights." 2012 WL 6757353, at *4. And again, the violation of the First Amendment or RFRA, without more, qualifies as irreparable injury. *See Alvarez*, 679 F.3d at 589-90.

Finally, turning to the balance of harms, Defendants argue that the Government and the public at large would be harmed if an injunction issued. (Br. in Opp. to Prelim. Inj. at 45.) These interests, however, are "outweighed by the harm to the substantial religious-liberty interests on the other side." *Korte*, 2012 WL 6757353, at *4. Indeed, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm and its remedy certainly would serve the public interest."). The Government's alleged injuries, by contrast, are insubstantial, since the Mandate already "include[s] exemptions and other provisions excluding a large number of people from [its] scope." *Tyndale*, 2012 WL 5817323, at *19; *see Monaghan*, 2012 WL 6738476, at *8 (finding alleged harm to Government "comparatively minimal"). With many grandfathered plans presently excluded from the Mandate, Defendants cannot seriously contend a significant public harm from temporarily excluding T&B's plan as well.

CONCLUSION

The Court should grant T&B a preliminary injunction barring Defendants from enforcing the Mandate against it and should deny Defendants' motion to dismiss in its entirety.

Respectfully submitted, this the 25th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013, I electronically filed the foregoing document with the Clerk of the United States District Court for the Northern District of Indiana, using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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