Both RFRA and the First Amendment protect the right of religious organizations to follow their basic religious convictions unless the government can show a compelling interest unachievable by a less restrictive means for forcing a particular religious organization to violate its religious conscience.

Specifically, as to the "substantial burden" inquiry, the "religious employer" exemption itself demonstrates that the government recognizes that the Mandate creates a substantial burden on employers' religious liberty by forcing them to purchase coverage of drugs that violate their religious beliefs. Yet the Mandate places this identical substantial burden on many other employers with religious convictions against providing such coverage. In *Gilardi,* in ruling for the religious owners of a corporation, this Court determined that "the burden becomes substantial because the government commands compliance by giving . . .a Hobson's choice. They can either abide by the sacred tenets of their faith, [and] pay a penalty . . . or they become complicit in a grave moral wrong." *Gilardi v. HHS*, 733 F.3d 1208, 1218 (D.C. Cir. 2013), *cert. pet. filed*, Nos. 13-567 & 13-915 (U.S. 2013).

This Court then held that the government failed to demonstrate a compelling interest, unachievable by less restrictive means, that justified burdening religious conscience rights to avoid participating in, or funding, abortion-inducing drugs to which religious persons have religious objections. *Id.* at 1219-22. Even were the

government's interest compelling, which it has failed to show, *id.* at 1220, the government has not used the least restrictive means: "the mandate is unquestionably underinclusive" because "small businesses, businesses with grandfathered plans (albeit temporarily), and an array of other employers are exempt either from the mandate itself or from the entire scheme of the Affordable Care Act." *Id.* at 1222-23. *Accord Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir.)(*en banc*), *cert. granted*, 134 S. Ct. 67 (2013). Quite simply, "a law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 433(2006), *quoting Church of the Lukumi Babalu Aye, Inc. v City of Hialeah,* 508 U.S. 520, 547 (1993) (quotation marks and ellipses omitted). *See Gilardi,* 733 F.3d at 1219.

Forcing religious organizations to fund contraceptives and abortion-inducing drugs is hardly the least restrictive means of achieving the government's purported interests. This is a solution in search of a problem. No one seriously disputes that contraceptives are widely available. HHS itself has ordered religious employers to inform their employees that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based

support."[1] The government has many other policy options available to it, including expanding existing programs.

For many of these reasons, the Mandate also violates the Free Exercise and Establishment Clauses. Religious liberty requires the government to give religious organizations breathing space to define what their mission will be, whom they will employ, and whom they will serve. "[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. . . . [Believers] exercise their religion through religious organizations, and these organizations must be protected by the Free Exercise Clause." *Corporation of Presiding Bishop v. Amos,* 483 U.S. 327, 341 (1983) (Brennan, J., concurring) (quotation omitted).

[1] Statement by U.S. Dep't of Health and Human Serv's Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Sept. 16, 2013).