FREQUENTLY ASKED QUESTIONS

UPDATED February 15, 2012

EWTN v. Sebelius
Belmont Abbey College v. Sebelius
Colorado Christian University v. Sebelius

FAQs:
Becket Fund's Lawsuits Against HHS

(1) How did the government mandate arise?

As part of universal health insurance reform passed in 2010, all group health plans must now provide—at no cost to the recipient—certain "preventive services." In September 2010, the government announced a general list of "preventive services," but asked the Institute of Medicine (IOM) to recommend a list of "preventive services for women." Religious groups urged the IOM to not include sterilization and contraceptive services in the mandate. Undeterred, the IOM made recommendations that included the two services, and the government adopted them in the summer of 2011.

(2) What does the government mandate require?

The government mandate requires group health plans to pay for several preventive services for women: annual well-woman visits; *screening* for gestational diabetes, HPV, HIV, and domestic violence; and *counseling* for sexually transmitted infections, HIV and domestic violence, as well as breastfeeding support and supplies. None of these nine services are morally troublesome for our clients—Belmont Abbey College, Colorado Christian University, or EWTN.

It is the tenth government-mandated service that puts them in a moral bind. It requires: "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."

(3) What's so troubling about FDA-approved contraceptives?

Most serious is the fact that at least one of the approved contraceptives can cause an abortion. Abortions are a serious violation of Belmont Abbey's, CCU's, and EWTN's faiths. Although the government has publicly stated that the mandate does

"not include abortifacient drugs," the text of the regulation itself contains no such guarantee. The "FDA-approved contraceptives" covered by the mandate include "emergency contraception" drugs. One of them is "*ella*" (ulipristal)—which is a close analogue to the abortion drug RU-486 (mifepristone)—and can cause an abortion when taken to avoid pregnancy. Thus, Belmont Abbey, CCU, and EWTN believe that providing coverage for *ella* would be a serious violation of their faiths. The government should not trample on sincere religious convictions, even if—especially if—they are unpopular.

(4) How is the Becket Fund fighting this mandate?

The Becket Fund for Religious Liberty has brought three legal challenges to this mandate. The Becket Fund currently represents Belmont Abbey College, a small Catholic liberal arts college located in Belmont, North Carolina; Colorado Christian University, an interdenominational Christian liberal arts university located near Denver, Colorado; and EWTN, a global Catholic media network headquartered in Irondale, Alabama. The Becket Fund is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious faiths. What is at issue in these cases is the protection of the right of conscience.

(5) What is the right of conscience?

James Madison famously said that conscience is "the most sacred of all property." Conscience—particularly in the religious sense—is the right all of us have not to be forced by the government to violate our religion. It is a right that we have always recognized in this country—from religious exemptions for Quakers who could not fight in the military, to religious exemptions for those who could not work on certain days of the week, to religious exemptions for those who could not pledge allegiance to the flag, to religious exemptions for corrections workers who could not be involved in capital punishment, to religious exemptions for health-care personnel who could not be involved in abortions. It is a bedrock principle of our Constitution, our history, and our basic liberty.

(6) Isn't this just a Catholic issue?

No. Many religious organizations are opposed to the government-mandated drugs, devices, and procedures aimed at forcing them to provide sterilization,

contraception, abortion and related education and counseling to their employees and/or students. Although Belmont Abbey and EWTN are Catholic institutions, Colorado Christian is an evangelical university, which shows that this is not just a Catholic issue. And the mandate has been sharply criticized from across the political spectrum, and from religious leaders of a variety of faiths.

(7) Is there precedent for the government requiring a broad mandate for contraception and sterilization?

No. The government mandate is unprecedented in federal law, and broader than any state contraception mandate to date. Never has federal law required private health plans to cover sterilization or contraception. And as compared to State mandates, the government mandate is the most expansive ever enacted. At least 22 States have no contraception mandate at all. Of the 28 States that have some mandate, none require contraception coverage in self-insured and ERISA plans, only two States include contraception in plans that have no prescription drug coverage, and only one State specifies sterilization.

(8) Is there a religious exemption from the mandate, and who qualifies under the exemption?

There is a "religious employer" exemption from the mandate, but it is extremely narrow and will, in practice, cover very few religious employers. The exemption may cover certain churches and religious orders (that are tax-exempt and not required to file a tax return under certain IRS provisions) that inculcate religious values "as [their] purpose" and which *primarily employ and serve* those who share their faith. Many religious organizations—including hospitals, charitable service organizations, and schools—cannot meet this definition. They would be forced to choose between covering drugs and services contrary to their religious beliefs or cease to offer health plans to their employees and incur substantial fines.

(9) What are the penalties if religious employers don't fall within the exemption and don't comply with the mandate?

If Belmont Abbey, CCU, and EWTN do not violate their consciences and refuse to furnish sterilization, contraception, abortion drugs, and related education and counseling against their teachings, they will be forced to stop providing health

insurance altogether and will be issued a penalty. Without a change in the rules, Belmont Abbey could be forced to pay more than $300,000; CCU more than $500,000; and EWTN more than $600,000 (with penalties increasing in future years) for the "privilege" of not underwriting services they believe are immoral.

And the burden does not end there. Without employer health plans, many religious institutions would find themselves at a serious competitive disadvantage vis-à-vis other employers. Some religious institutions could find that without a group health plan, they could not attract sufficient staff and would be forced to close their operations altogether.

(10) Is there precedent for such a narrow exemption?

Again, the answer is no. Until now, federal policy has generally protected the conscience rights of religious institutions and individuals in the health care sector. For example, for 25 years, Congress has protected religious institutions from discrimination (based on their adherence to natural family planning) in foreign aid grant applications. For 12 years, Congress has both exempted religious health plans from the contraception mandate in the Federal Employees' Health Benefit Program and protected individuals covered under other health plans from discrimination based on their refusal to dispense contraception due to religious belief.

On the State level, the federal mandate is unquestionably broader in scope and narrower in its exemption than *all* of the 28 State's comparable laws. Almost half the States do not have a state contraception mandate at all, so there is no need for an exemption. Of the States that have some sort of state contraception mandate (all less sweeping than the federal one here), 19 provide an exemption. Of those 19 States with an exemption, only three (California, New York, and Oregon) define the exemption nearly as narrowly as the federal one, although the federal exemption is still worse because of the regulation's discretionary language that the government "may" grant an exemption. Moreover, religious organizations in States with a mandate—even those where there is no express exemption—may opt out by simply self-insuring, dropping prescription drug coverage, or offering ERISA plans. The federal mandate permits none of these alternatives, and therefore is less protective of religious liberty than any of the States' policies.

(11) Why is this particular exemption so troubling?

Not even Jesus' ministry would qualify for this exemption, because He fed, healed, served, and taught non-Christians. The government should not punish religious organizations today that likewise serve the general public. Churches and other religious organizations have a long history of feeding the hungry, educating children, and providing much-needed social services to those who need them most. Under the government's mandate, religious organizations can follow their beliefs as long as they only serve their own members. But when they start to do the good work of serving the community, the government can restrict them. This is extremely troubling, for without these religious organizations, many of the poor and needy would go without services altogether.

(12) Why won't any exemption from the mandate harm women and women's health?

Including a robust exemption protecting the deeply held religious beliefs of Belmont Abbey, CCU, EWTN and others like them would not harm women or women's health. The evidence is clear. Nine out of ten employer-based insurance plans in the United States already cover contraception. The government admits these services are widely available in "community health centers, public clinics, and hospitals with income-based support." In fact, the federal government already spends hundreds of millions of dollars a year funding free or nearly free family planning services under its Title X program.

Therefore, the issue is not really about access to contraception but rather about who pays for it. The government's answer is to force religious organizations to pay for services against their deeply held religious beliefs. Of course, if the government really believed free provision of these drugs and services were crucially important for women's health, there are many other alternatives it could pursue to accomplish that goal. Instead, it is trying to force a small group of religious objectors into submission with huge fines and penalties to make them pay for these drugs and services.

(13) If the exemption covers only religious *employers*, then are religious colleges and universities required to provide free contraception to their students?

Yes. Student health plans are indeed included within the government mandate (with some narrow exceptions that don't apply to Belmont Abbey or CCU). And there is no exemption from the mandate for religious colleges and universities that offer health care plans to their students. Even if Belmont Abbey and CCU were to qualify for the "religious employer" exemption, they would still be required by law to pay for sterilization, contraception, and abortion drugs for students through their student health care plans.

There is something quite unsettling about the government mandating that—while a university pastor may preach to his student congregants on Sunday that pre-marital sexual intercourse, contraception, and abortion are all immoral—on Monday, the university has to pay for those students to be educated, counseled, and provided with drugs, devices and procedures in direct violation of those teachings.

(14) Are the legal claims different between the three parties?

The three lawsuits challenge the government mandate as a violation of the First Amendment of the U.S. Constitution, the Religious Freedom Restoration Act (RFRA), and the Administrative Procedures Act (APA).

Under the First Amendment, we argue that the mandate (1) is neither neutral nor generally applicable and imposes a substantial burden in violation of the Free Exercise Clause, (2) intentionally discriminates against religious beliefs in violation of the Free Exercise Clause, (3) imposes its requirements on some religions but not on others in violation of the Free Exercise Clause, (4) prefers some denominations over others and places a selective burden on our clients in violation of the Establishment Clause, (5) compels our clients to provide counseling and education on subjects that violate their religious beliefs in violation of the Free Speech Clause, (6) unconstitutionally forces our clients to associate with actions and beliefs that are against their religious convictions, and (7) gives a government agency the "unbridled discretion" to decide which organizations can be exempted from the mandate and thus have their First Amendment rights accommodated.

We also argue that the mandate violates RFRA—a federal civil rights statute sponsored by Ted Kennedy and signed into law by President Clinton—because the mandate places a substantial burden on our clients' religious exercise without a compelling government interest that is narrowly tailored to meet that interest.

The lawsuits seek declaratory judgments which are statements from the court that the mandate and the enforcement of it against our clients violate the First Amendment, RFRA, or the APA, and an order prohibiting the government from enforcing the mandate against our clients and any other religious group that cannot pay for these drugs and services because of their religious convictions.

(15) What happened on January 20, 2012?

The Obama Administration announced in a statement on January 20, 2012, that they were taking religious principles very seriously—by giving religious institutions an extra year to get over them. The Administration announced that it would not expand the exemption from its abortion-drug mandate to include religious schools, colleges, hospitals, and charitable service organizations. Instead, the Administration merely extended the deadline for religious groups who do not already fall within the existing narrow exemption so that they will have one more year to comply or drop health care insurance coverage for their employees altogether and incur a hefty fine.

(16) What was the so-called "compromise" announced by the President on February 10, 2012?

After a firestorm of opposition from across the political and religious spectrum arose following the Administration's January announcement, the President held a press conference on February 10, 2012, to announce his so-called "compromise." In fact, all the Administration did was finalize the August 2011 mandate—leaving intact all of its provisions and making no changes to the exemption, the narrowest protection for conscience known in federal or state law.

For non-exempt religious organizations, the president made two promises. First, enforcement of the mandate would be delayed by a year so that they could get their houses in order to comply with the mandate. And second, the president promised that in a rule yet to be developed, insurance companies—not the religious

employers themselves—would be forced to pay for the abortion-inducing drugs, sterilization, and contraception.

The problems with this so-called "compromise" are many. First, anyone who understands economics knows that insurance companies will not offer these services for free. Religious employers would still ultimately be paying for these services against their conscience, with the costs spread through higher insurance premiums for their employees. Some argue that insurance companies would cover these services for free because it helps their bottom line, but if that were the case, why haven't insurance companies already done it?

Second, hundreds if not thousands of religious organizations have self-insured plans, where the religious organization is the "insurance company." The new "compromise" offers them nothing. Ironically, many religious organizations chose self-insurance to avoid state contraception mandates.

Third, it's still unclear whether, even under the new proposal, non-exempt religious organizations (for-profit organizations, individuals, or non-denominational organizations) will have their religious liberty protected at all. The president's plan only reinforces how the government's policy intends to treat different religious groups and individuals differently which is unconstitutional.

(17) Does the President's announcement change your lawsuits?

No. We are full steam ahead.

(18) Don't religious employers have to comply with this mandate if they receive federal funds?

Proponents of the mandate argue that religious groups must provide these services—whatever their religious convictions—because they receive federal funding. Not so. It would be one thing if the mandate required religious organizations to choose between their convictions and federal funding. But this mandate is much worse: It applies with full force to every religious school, hospital, and soup kitchen, even if every single dollar of funding comes from private donations. It is simply a red herring to say that the mandate is somehow tied to the receipt of federal funding.

(19) Doesn't the Equal Employment Opportunity Commission's opinion in 2000—stating that denying women contraception is illegal—govern this issue?

No. The only federal court of appeals to rule on the issue has held that the 2000 EEOC opinion was unpersuasive and lacked the force of law. The U.S. Court of Appeals for the Eighth Circuit held that Title VII, as amended by the Pregnancy Discrimination Act (PDA), did *not* require employers to provide contraception to female employees. It rejected the reasoning of the 2000 EEOC opinion that interpreted the PDA as requiring employers to cover prescription contraception for women if they cover other prescription drugs and devices.

Indeed, if the federal government thought that the EEOC opinion already required employers to provide contraception, why would it have pushed the mandate through as part of the universal health reform law? The fact of the matter is that the EEOC opinion requires nothing.

(20) What is the relationship between these lawsuits challenging the contraception mandate and the Supreme Court case involving the individual healthcare mandate?

The Supreme Court agreed to review a challenge to the individual mandate, a separate provision of the universal health insurance reform law that requires individuals to obtain healthcare by 2014. The Becket Fund lawsuits involve another mandate under that law that requires all group health plans to provide contraception, sterilization, abortion-inducing drugs.

Even though these lawsuits involve two different mandates, they stem from a similar problem with the healthcare reform law—Congress over-reaching to impose a conformist one-size-fits-all solution to a perceived societal problem. It should come as no surprise that when Congress imposes mandates like these, it threatens individual liberty, generally, and religious liberty, specifically. The Founders knew this and structured our nation's government such that Congress would have limited powers for this reason, so that Congress could not restrict liberty in these ways.

(21) What happens to the rest of the healthcare law (including the contraception mandate) if the Supreme Court strikes down the individual mandate as unconstitutional?

It depends. If the Supreme Court strikes down the individual mandate as unconstitutional, the Court would still need to decide a second question: whether the rest of the healthcare reform law is sufficiently separate from the individual mandate that it can remain good law. The Court could decide that the rest of the healthcare reform law can remain in effect because it can function without the individual mandate. Or the Court could decide that the rest of the law must also be struck down because it is so closely tied to the individual mandate that the rest of the law cannot work absent the unconstitutional individual mandate.